

# Child Welfare Case Update

October 2, 2019 – May 15, 2020  
District Court Judges’ Virtual Conference (Summer 2020)

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## Abuse, Neglect, Dependency

### Indian Child Welfare Act: Notice Requirements

In re K.G., \_\_\_ N.C. App. \_\_\_ (March 17, 2020)

**Held: remand**

- **Facts:** Respondent mother appeals a permanency planning order where the court determined ICWA did not apply.
- **Reason to know child is an Indian child:** ICWA establishes federal standards that govern applicable child custody proceedings when the court knows or has reason to know the child is an Indian child. Erring on the side of caution because an order could be invalidated for not complying with applicable notice provisions, the court had reason to know an Indian child may be involved when mother indicated she has Cherokee ancestry.
- **Notice:** An abuse, neglect, or dependency proceeding is an involuntary child custody proceeding requiring notice to the tribes and regional BIA office when the court knows or has reason to know an Indian child is involved. Proof of that notice must be included in the court record. 25 U.S.C. 1912; 25 CFR 23.111. Although the record shows DSS sent notice to the EBCI and Cherokee Nation, there was no indication in the record that the tribes and regional BIA office received the notice through return receipts of certified or registered mail or other proof of service. The question of the trial court's jurisdiction under ICWA cannot be resolved from the evidence in the record. Remanded to confirm notice is provided to the appropriate tribes and regional BIA office.

### Neglect Adjudication: Findings & Judicial Notice

In re J.C.M.J.C., 834 S.E.2d 670 (N.C. Ct. App. 2019)

**Held: Reversed**

- **Facts:** DSS filed a petition alleging neglect after (1) receiving reports of children being unattended outside, father smoking marijuana, suspected domestic violence, and an unclean home and (2) needing to file an interference petition due to parents refusal to cooperate with the DSS assessment. At the adjudicatory hearing, one witness was called – the DSS social worker. The children were adjudicated neglected based on the brief social worker testimony and judicial notice of the findings in the nonsecure custody order. Respondents appeal, challenging the findings of fact and conclusion of law.
- **Standard of review:** Are the findings of fact based on clear and convincing competent evidence, and do the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- **Judicial Notice:** Although a trial court may take judicial notice of its own proceedings, “it is problematic to allow the trial court’s findings of fact in the [nonsecure custody order] to serve as the sole evidentiary support for the great majority of the adjudicatory findings....” Sl. Op. at 13. Although the same standard of proof applies to a hearing on the need for continued nonsecure custody and the adjudicatory hearing – clear, cogent, and convincing evidence – the rules of evidence do not apply to a nonsecure custody hearing. There is no way to know if the findings

for the nonsecure custody order were based on evidence that would be admissible at an adjudicatory hearing where the rules of evidence apply.

- Findings: Many of the findings are recitations of allegations or reports and are not really findings of fact. They are not affirmative findings that would support a conclusion of neglect. Other findings are not supported by clear and convincing evidence. The affirmative findings that were made focus mostly on the respondents' obstruction with the DSS assessment and do not support a conclusion of neglect based on a lack of proper care, supervision, or discipline or that the children lived in an injurious environment.
- The smell of marijuana alone does not support an adjudication of neglect as there is no evidence of harm or substantial risk of harm to the juveniles (see Sl. Op. FN 5)
- Multiple absences from school without findings contextualizing those absences – the reason, whether they were unexcused, the degree to which the children were academically behind – are insufficient to show the children were denied an education such that they were neglected. See *In re McMillan*, 30 N.C. App. 235 (1976); *In re R.L.G.*, 816 S.E.2d 914 (2018).

### Adjudication: Neglect, Dependency, Residual Hearsay Exception, Collateral Estoppel, Substance Abuse

*In re F.S.*, 835 S.E. 2d 465 (N.C. Ct. App. 2019)

#### **Held: Reversed**

- Facts and Procedural History: DSS filed its first petition alleging neglect and dependency in 2016. In 2017, the child was adjudicated neglected and dependent based mother's on substance use. Respondent mother appealed, and in 2018 the court of appeals unanimously reversed the adjudication (unpublished opinion) because the facts did not establish harm or risk of harm to the juvenile. During the pendency of the appeal, mother entered into a case plan with DSS. During that period, mother was hospitalized at least 8 times for alcohol addiction and symptoms of withdrawal. On the date of the COA mandate, DSS filed a second petition alleging (1) neglect based on a lack of proper care, supervision, and discipline by a parent and living in an injurious environment and (2) dependency. At hearing, residual hearsay involving the child's statements about mother's drinking was admitted over objection. The DSS social worker (who was the second social worker assigned to the case) testified to statements the child purportedly made to other individuals (including the prior DSS social worker and child's therapist). There was also testimony from the DSS supervisor about mother's need for hospitalizations prior to the filing of the second petition due to mother's use of impairing substances and her current participation in and compliance with the case plan. Respondent mother offered no evidence at the hearing. The child was adjudicated neglected and dependent and placed in DSS custody. Respondent mother appealed.
- Residual Hearsay Exception: The child's hearsay statements were admitted under Rule of Evidence 803(24) – the residual hearsay exception. For admission, the proponent must give written notice of its intention to offer the statement and the particulars of the statement. The court must find all three factors of Rule 803(24): the statement (1) is offered as evidence of a material fact; (2) is more probative on the point than any other evidence the proponent can procure through reasonable efforts, and (3) admission of the statement serves the general purposes of the rules of evidence and interests of justice.

- The standard of review is an abuse of discretion; respondent mother must show she was prejudiced and a different result would likely have occurred had the statement not been admitted.
- There was no testimony, arguments, or findings required by Rule 803(24).
  - The former social worker, the therapist, and the child were not called to testify and there were no findings by the court about their unavailability. The argument that availability of the child should consider mother's failure to subpoena the child is rejected since DSS and not respondent mother has the burden of proof in an adjudicatory hearing.
  - There were no findings of the circumstantial guarantee of trustworthiness of the child's statements. The statements testified to by the current social worker were double hearsay as there were a summary of meeting notes taken by the former social worker and the therapist and were not heard by the social worker who was testifying. There were no findings of the conditions, situation, and motivation to be truthful under which the purported statements were made.
- Without the child's hearsay statements, the record does not support the court's conclusion. Respondent mother was prejudiced by the admission.
- Collateral estoppel precludes DSS from retrying the fully litigated issues that were decided in the first adjudication but does not preclude an adjudication based on new allegations and events which occurred after the first adjudication.
- Neglect requires that there be some physical, mental, or emotional harm or substantial risk of such harm as a result of the failure to provide proper care, supervision, or discipline. At the time of the second adjudication, the juvenile was not in mother's care such that the court must assess whether there is a likelihood of future neglect. The court considers "the risk for a particular kind of harm given [the juvenile's] age and the environment in which they reside." Sl.Op. at 14 (citation omitted). The appellate court looks to the totality of the evidence to determine whether the findings support the conclusion of neglect. Although mother had 8 hospitalizations between the first and second adjudication, "the trial court must consider 'the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to the parent.' " Sl. Op. at 16 (citing *In re B.P.*, 809 S.E.2d 914, 920 (2018)). A parent's substance abuse in and of itself is not clear and convincing evidence of a substantial risk of harm to the child. The child was not in mother's care during the period of her hospitalizations and DSS supervisor testimony showed that since the petition was filed, mother was meeting with DSS regularly, participating in and compliant with her treatment services (including therapy, NA, and AA), and had several negative drug screens. There is no evidence that current circumstances of a likelihood of neglect exists.
- Dependency requires that the court makes findings of both the parent (1) is unable to provide for the child's care or supervision and (2) lacks and an appropriate alternative child care arrangement. Mother challenges the first prong. Although chronic alcoholism may impair a parent's ability to parent, the order did not include findings of mother's present inability to supervise her child. The evidence shows mother had been in treatment since the petition was filed and her previous relapses were prior to the filing of the petition. The evidence of mother's

present compliance with her treatment “tends to show an ability or capability of Respondent-mother to parent” her child. Sl.Op at 19.

### Adjudication: Neglect, Abuse

In re S.G., 835 S.E.2d 479 (N.C. Ct. App. 2019)

**Held: Affirm adjudication order**

**Affirmed in part and vacate in part disposition/permanency planning order,  
Remand for new visitation order**

- **Facts:** DSS responded to a report of a 3 year old with a black eye. The 3-year-old child has two older siblings. All three children have the same mother, and the older children have the same respondent father. Initially, the parents evaded the DSS social worker and ultimately explained the youngest child’s bruise as him falling when running and hitting his head on the table. DSS sought mother’s agreement to keep the children from respondent father while an assessment was being completed, but respondent mother would not agree. DSS filed a petition and obtained adjudications that the 3-year-old child was abused, neglected, and dependent and the two older siblings were neglected and dependent. At the disposition and permanency planning hearing, the court ordered respondents to complete and follow recommendations of substance abuse and mental health assessments, participate in parenting classes, obtain and maintain safe and stable housing, and submit to random drug screens. The order set forth a visitation plan of one visit per month and further designated that contact between the 3 year old and respondent father (who is not the father of the 3 year old) was to be based on the child’s therapist’s recommendation.
- **Abuse Adjudication:** An abused juvenile under G.S. 7B-101(1) includes a juvenile whose parent inflicts or allows to be inflicted serious physical injury, or substantial risk of such injury, upon the juvenile by non-accidental means. The determination of whether there is a “serious physical injury” is dependent on the facts of each case; there is no minimum threshold. The findings that the 3 year old had significant patterned bruising on his forehead and upper eyelid that was visible for at least 4 days after the incident causing the bruise is sufficient to support the conclusion that the child suffered a serious injury. Although there was no medical testimony that the injuries occurred through non-accidental means, there was medical evidence via unobjected to testimony from two medical professionals, the bruising was consistent with a being hit by a belt buckle and was not consistent with the child hitting his head on a table. This medical evidence supports the court’s determination that the injuries were non-accidental.
- **Neglect Adjudication:** The definition of neglected juvenile under G.S. 7B-101(15) includes a child who lives with a person who neglected or abused another child. The trial court has discretion to determine how much weight to give that evidence. Neglect also requires that there be some physical, mental, or emotional impairment or substantial risk of such impairment from the lack of proper care, supervision, or discipline. The court made findings of fact that (1) the mother would not agree to keep the children from their father and preferred to be with the father and have the children stay elsewhere, did not believe the child’s reports of what happened, did not believe she could protect the children from the father, and had no other placement options, and (2) both respondents denied responsibility for the youngest child’s injuries. The neglect adjudications of the two older children were supported by these findings and were not based

solely by the finding that the older children lived in the same home as their 3-year-old sibling who was abused and neglected by respondent father.

### Disposition: Case Plan and Visitation

*In re S.G.*, 835 S.E.2d 479 (N.C. Ct. App. 2019)

**Held: Affirm adjudication order**

**Affirmed in part and vacate in part disposition/permanency planning order,**

**Remand for new visitation order**

- **Facts:** DSS responded to a report of a 3 year old with a black eye. The 3-year-old child has two older siblings. All three children have the same mother, and the older children have the same respondent father. Initially, the parents evaded the DSS social worker and ultimately explained the youngest child's bruise as him falling when running and hitting his head on the table. DSS sought mother's agreement to keep the children from respondent father while an assessment was being completed, but respondent mother would not agree. DSS filed a petition and obtained adjudications that the 3-year-old child was abused, neglected, and dependent and the two older siblings were neglected and dependent. At the disposition and permanency planning hearing, the court ordered respondents to complete and follow recommendations of substance abuse and mental health assessments, participate in parenting classes, obtain and maintain safe and stable housing, and submit to random drug screens. The order set forth a visitation plan of one visit per month and further designated that contact between the 3 year old and respondent father (who is not the father of the 3 year old) was to be based on the child's therapist's recommendation.
- **Disposition and Court's Authority to Order Case Plan:** Applying the NC Supreme Court's holding in *In re B.O.A.*, 831 S.E.2d 305 (2019) (a TPR case) to an A/N/D disposition order, a trial court has authority under G.S. 7B-904 to order a parent to 'take appropriate steps' to achieve reunification but "is not limited to ordering services which directly address the reasons for the children's removal from a parent's custody." Sl.Op. at 12. The trial court may order services that aids in understanding and resolving the possible underlying causes of what contributed to the court's removal, including those conditions that directly or indirectly contributed to the juvenile's removal and allows for the court to modify and update a parent's case plan in subsequent review proceedings based on new or existing evidence. *In re B.O.A.* overruled previous holdings from the court of appeals that applied a narrow application of G.S. 7B-904 (see *In re H.H.*, 237 N.C. App. 431 (2014); *In re W.V.*, 204 N.C. App. 290 (2010)).
  - Although the removal of the children in this case was based primarily on the nonaccidental injuries to the youngest children, the court did not abuse its discretion when ordering the parents to complete substance abuse and mental health assessments and follow all recommendations and to submit to random drug screens, and obtain and maintain safe and stable housing. At a minimum these directives will assist in understanding whether substance abuse or mental health issues were the underlying causes for the abuse and neglect. Given the parents attempts to keep their residence hidden from DSS and believed housing instability (multiple moves), the court did not abuse its discretion when requiring the parents to obtain and maintain safe and stable housing.



- **Visitation:** G.S. 7B-905.1 sets forth the visitation requirements, and an order of visitation is reviewed for an abuse of discretion.
  - The portion of the order that limited contact between the three year old and respondent father, who is not that child's father (*note, this author believes he is a caretaker*) as recommended by the child's therapist is an order of no visitation. Visitation was not required as G.S. 7B-905.1 "only requires the setting of a visitation plan between a child and his or her 'parent, guardian, or custodian.'" Sl.Op. at 22. Because visitation was not required, an order of no visitation was not error.
    - **Author's Note:** The language of G.S. 7B-905.1(a) states "an order that removes custody of a juvenile from a parent, guardian, or custodian or that the continues the juvenile's placement outside of the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety."
  - An order of one visit per month between respondent mother and her children (all three children) and respondent father and his children (the older two) is not an abuse of discretion as there were findings that respondents have frequently missed visits, many of which were not cancelled beforehand.
  - The order did not specify the duration of the visits as required by G.S. 7B-905.1 and therefore this portion is remanded for a minimum duration time.

### Visitation: Cost of Supervised Visitation; Preserve Issue for Appeal

In re J.T.S., 834 S.E.2d 637 (N.C. Ct. App. 2019)

#### **Held: Affirmed in part; Vacate and remand in part**

- **Facts:** The trial court ordered weekly supervised visitation but made no findings about the costs of supervised visitation. Respondent mother appeals.
- The court erred in ordering supervised visitation without addressing costs; who would pay; and if the respondent mother, her mother's ability to pay those costs. *See In re J.C.*, 368 N.C. 89 (2015); *In re Y.I.*, 822 S.E.2d 501 (2018).
- **Appellate preservation:**
  - To preserve the issue of costs associated with supervised visitation for appellate review, the respondent is not required to object at the hearing. The costs were neither discussed or consented to at the hearing.
  - Respondent agreed to conditions that were recommended by DSS that addressed the terms of visitation (e.g., obtain assessments and treatment, submit to drug screens, not miss visits). These terms were provided in writing, read by a social worker in court, and addressed by the court with respondent's attorney. Respondent did not properly preserve the issue for appellate review.

### Permanency Planning: Waiving Further Reviews and "Period of At Least One Year"

In re J.T.S., 834 S.E.2d 637 (N.C. Ct. App. 2019)

#### **Held: Affirmed in part; Vacate and remand in part**

- **Facts:** Respondent mother appeals from an August 17, 2018 permanency planning order that awards guardianship to the maternal grandparents and waives review hearings under G.S. 7B-906.1(n), arguing the children had not resided with the grandparents for a continuous period of at least one year. The court made a finding that the children were placed with their maternal grandparents since Oct. 2017, and before that the children had previously resided with their grandparents.
- **Standard of review:** Questions of statutory interpretation are questions of law that are reviewed de novo.
- **Holding & Rationale:** G.S. 7B-906.1(n) allows the court to waive further reviews if the court finds by clear, cogent, and convincing evidence each of the 5 factors, the first of which is “the juvenile has resided in the placement for a period of at least one year.” Because “a period of at least one year” is ambiguous, the court looks to the purposes of the Juvenile Code to determine the intent of G.S. 7B-906.1(n). Given the purpose of achieving a safe permanent home within a reasonable period of time and the required findings of G.S. 7B-906.1(n) that address a stable and continuing placement with a permanent guardian or custodian, a period of at least one year means “a continuous, uninterrupted period of at least 12 months” and not an aggregation of interrupted, sporadic placements. Sl. Op. at 14. This opinion is distinguished from *In re T.P.*, 217 N.C. App. 181 (2011), which allowed for the 12-month period to span over different relatives. In *In re T.P.*, the language of G.S. 7B-906.1(n) differed and referred to a juvenile who had resided with a relative or custodian versus today’s language that the juvenile resided in the placement. Here, the findings do not support the conclusion of law; this portion of the permanency planning order is vacated.
- **Preserve for appeal:** Although respondent did not object to this issue at trial, “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved notwithstanding [the] defendant’s failure to object at trial.” Sl. Op. at 9 (citation omitted). Failure to make written findings of each of the enumerated criteria in G.S. 7B-906.1(n) is reversible error.

### Achievement of Permanent Plan: Guardianship, Findings and Evidence

*In re S.B.*, 834 S.E.2d 683 (N.C. Ct. App. 2019)

#### **Held: Affirmed**

- **Facts:** Two children were adjudicated neglected and dependent. They were placed in the care of their maternal aunt. Initial concurrent permanent plans were guardianship with the aunt and reunification with mother. At the last permanency planning hearing held, the court ordered guardianship to the aunt, removed the concurrent plan of reunification since a permanent plan had been achieved. Respondent mother appealed arguing the court did not make the required findings to eliminate reunification as a permanent plan and relied on insufficient evidence to support the findings that the aunt understood the legal significance of the guardianship and had adequate resources to care for the children.
- **Standard of review:** whether there is competent evidence to support the findings of fact and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.

- A court's determination that reunification efforts will be unsuccessful or inconsistent with children's health and safety is a conclusion of law that must be supported by findings of fact. When relevant, findings of fact that efforts to reunite the child with either parent would clearly be unsuccessful or inconsistent with the child's health and safety and need for a permanent safe home within a reasonable period of time are required under G.S. 7B-906.1(d)(3). Additionally, G.S. 7B-906.1(e) requires findings about whether it is possible for the child to be placed with the parent within the next six months. A court is not required to quote the exact language of the statute but instead must address the statute's concerns (citing *In re L.M.T.*, 367 N.C. 165 (2013)). "Pursuant to *In re L.M.T.*, we see no reason why the trial court's findings of fact, taken as a whole, cannot sufficiently address the concerns of multiple statutory criteria without more explicit reference to each." Sl.Op. at 8. The findings addressing mother continuing to struggle with substance abuse, failing to acknowledge her problem, and lack of progress such that the children's future health and safety are threatened and further efforts toward reunification would be unsuccessful fulfill the statutory requirement of G.S. 7B-906.1(d)(3).
- Reunification as a permanent plan was removed as a concurrent plan when the court ordered guardianship, which achieved the child's permanent plan. A secondary permanent plan is not required with a permanent plan has been achieved. G.S. 7B-906.2(a1). The court made all four findings required under G.S. 7B-906.2(d) and fulfilled the requirements of G.S. 7B-906.2(b) & (d).
- The court must verify that the guardian understands the legal significance of the appointment and will have adequate resources to care for the juveniles. There is sufficient evidence to support the findings of both requirements. Although the aunt did not testify, the DSS social worker did and the DSS summary was admitted. That evidence included that the aunt was informed of the legal significance of the guardianship, understands what it means and is aware that the role is permanent. The aunt's testimony was not required for the court to find she understand the legal significance of the appointment. The social worker testimony and summary are relevant and reliable evidence the court may consider under G.S. 7B-906.1(c). Additionally, the evidence that the aunt had provided for the children well over the past year and had financial support from her family (including respondent mother), worked part-time, and the children were eligible for Medicaid were sufficient to support the finding that the aunt had adequate financial resources to care for the children.

### Permanency Planning Order: Eliminate Reunification

*In re J.H.*, \_\_\_ N.C. \_\_\_ (Jan. 24, 2020)

#### **Held: Affirmed**

- Facts: Four children were adjudicated abused and neglected. The court ordered respondent mother to engage in a case plan – complete a mental health assessment and follow all recommendations, maintain employment and appropriate and safe housing for a minimum of 6 months, participate in parent coaching and implement the skills during visits, and sign necessary release forms for the court and DSS to monitor her progress. At a permanency planning hearing, the court ordered concurrent plans of adoption and reunification with the children's fathers. Respondent mother preserved the right to appeal this permanency planning order (PPO). Mother's rights were subsequently terminated, and she appealed both the PPO and TPR. The

TPR appeal is limited to the dispositional determination that TPR was in the children's best interests.

- **Standard of review:** Appellate review of an order that eliminates reunification as a permanent plan "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusion of law" and "to determine . . . whether the trial court abused its discretion with respect to disposition." Sl.Op. at 5. At disposition, the trial court considers the child's best interests.
- **Reunification** must be a primary or secondary plan unless findings are made under G.S. 7B-906.2(b) and (d). The court made findings the mother made some progress on her case plan but was not in compliance with other requirements of her case plan and was unable to safely parent her children. The evidence, including reports from the parenting coach, supported the court's finding that respondent mother only made "some progress." Based on the extensive findings and underlying evidence, there was no abuse of discretion when the trial court eliminated reunification with the mother because that was in the children's best interests.

### Permanency Planning: Guardianship Verification, Parent's Constitutional Rights, Eliminate Reunification, Waive Reviews

In re J.M., \_\_\_ N.C. App. \_\_\_ (May 5, 2020)

#### **Held: Affirmed in part; Vacated in Part and Remanded**

- **Facts:** In March 2016, four children were adjudicated neglected. Over several years, the court ordered reunification as one of the concurrent permanent plans and ordered that respondent mother comply with her case plan. In January 2019, the court entered an order of guardianship of one of the children to her foster parents and waived further review hearings. Respondent mother appeals, raising several issues.
- **Waiving further review hearings:** G.S. 7B-906.1(n) allows the trial court to waive future review hearings if it finds by clear, cogent, and convincing evidence, each of the five enumerated factors. Respondent argues there was insufficient evidence to support some of the findings. Social worker testimony of mother's inability to adequately care for the child without supervision and direction is clear, cogent, and convincing evidence for the finding that neither the juvenile's best interests nor the best interests of any party require a review hearing every 6 months (factor (3)). The hearing transcript shows that the trial court informed all parties and their attorneys who were present that the case could be brought for a review at any time through a motion by a party or by the court (factor (4)).
- **Constitutional Rights and Parent's Unfitness:** A parent may lose her paramount rights to care, custody, and control of her child if there is a finding based on a clear, cogent, and convincing evidence that the parent is unfit or has acted inconsistently with her constitutionally protected status. In awarding guardianship to the foster parents, the court found "both parents are acting inconsistently with the health and safety of the child and are unfit to have custody." Sl.Op. at 10. Specific findings included mother not being able to adequately demonstrate her ability to parent, need for significant monitoring, and need to move back to supervised visits from unsupervised visits. The findings were supported by social worker testimony. Regarding

mother's challenge to the weight given to evidence of mother's progress by the trial court, "it is not the function of [the appellate court] to reweigh evidence on appeal." Sl.Op. at 11-12.

- Verification of guardianship: Before a court may order guardianship, it must verify the person(s) being appointed understand the legal significance of the appointment. Although the court must receive evidence of these factors, there are no specific findings that are required. The testimony of both foster parents about their understanding, the social worker testimony that the foster parents understood their responsibilities, and the court's findings that the foster parents are committed to providing for the child to and past the age of majority and are willing to be parties to the action was sufficient verification by the trial court.
- Eliminating Reunification (*Author's Note: The opinion refers to ceasing reunification efforts*):
  - The standard of review is whether the court made appropriate findings, whether the findings are based on credible evidence, whether the findings support the conclusions, and whether the trial court abused its discretion in the disposition.
  - Findings under G.S. 7B-906.2(b) and (d) are required. The order had limited findings addressing only a portion of what was required. There was no finding under G.S. 7B-906.2(d)(3) as to whether the parent remains available to the court, DSS, or child's GAL. Remanded to make the required statutory findings.

## Post-Relinquishment Subject Matter Jurisdiction re: Permanency Planning Hearings

In re E.B., 824 S.E.2d 169 (N.C. Ct. App. 2019)

**Held: Affirmed, Dissent in part**

- Facts: In 2016, mother executed a relinquishment to DSS the day after the child was born. A putative father was named and paternity testing confirmed he is the child's father. Father entered into an out-of-home family services agreement with DSS. Child was placed in foster care and from 2016–Jan. 2018, the court held 6 permanency planning and review hearings resulting in 6 orders placing requirements on father. In April 2018, DSS filed a TPR petition, which was granted. Father timely appealed. Father also filed a petition for writ of certiorari, which was granted, for a review of the 6 permanency planning orders arguing lack of subject matter jurisdiction.
- Subject matter jurisdiction and permanency planning orders: Father argues and DSS concedes the trial court lacked subject matter jurisdiction to conduct review and permanency planning hearings because a petition alleging abuse, neglect, or dependency pursuant to G.S. 7B-402 and -403 was never filed with the court. Without the filing of an abuse, neglect, or dependency petition, no action was commenced and therefore the court lacked subject matter jurisdiction. As a result, each of the 6 permanency planning orders is void, and the requirements that those orders placed on the father must be disregarded.
  - Author's note: This opinion does not address G.S. 7B-909 hearings, "review of agency's plan for placement," when there has been a relinquishment and a child has not been adopted within 6 months. That statute does require a petition be filed but it is not a petition alleging abuse, neglect, or dependency.

## Appeal: Insufficient Record on Appeal

In re J.C.M.J.C., 834 S.E.2d 670 (N.C. Ct. App. 2019)

### **Held: Dismissed**

- A trial court has subject matter jurisdiction in an abuse, neglect, or dependency action when a properly verified petition is filed with the district court. Because the record on appeal did not include copies of the petition for each child filed by DSS that alleged each juvenile was neglected, the record failed to show the trial court had subject matter jurisdiction over the matter. Because the appellate court cannot determine whether the trial court had jurisdiction, the appeal is dismissed. See *State v. Petersilie*, 334 N.C. 169 (1993). However, the court granted an appeal by writ of certiorari.

## Appeal: Moot

In re A.K.G., \_\_\_ N.C. App. \_\_\_ (March 17, 2020)

### **Held: dismissed**

- Facts: Respondent father appeals a permanency planning order that eliminated reunification as a permanent plan. During the pendency of the appeal the juvenile turned 18.
- Moot:
  - Under G.S. 7B-201(a), the trial court's subject matter jurisdiction over the juvenile proceeding terminates when the juvenile reaches the age of majority. The permanent plan is no longer in effect. Any order by the court of appeals would have no practical effect as the trial court has no jurisdiction.
  - None of the exceptions to the mootness doctrine apply in this case. Unlike an adjudication order or a termination of parental rights order, there are no collateral consequences from a permanency planning order that has unfavorable findings of fact. Contrary to respondent's assertion, "[f]indings of fact in a court order from an unrelated legal proceeding are not proper subjects of judicial notice" in a civil custody proceeding for another child. Sl.Op. at 5. The limited exception based on clear and significant public interest issues is not triggered by a fact-bound order involving a permanent plan for a specific juvenile. The capable of repetition yet evading review exception does not apply to this case, where the challenge is to findings of fact and legal conclusions that are specific to the case.
  - Noting that the "State's appellate system goes to rather extraordinary lengths to expedite these juvenile cases, and it is, and should be, rare for a juvenile case to be rendered moot in this way." Sl.Op. at 2.

## Termination of Parental Rights

### UCCJEA: Subject Matter Jurisdiction

In re S.E., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

**Held: Affirmed**

- **Relevant Facts:** In an appeal of a TPR, respondent mother argues the court lacked subject matter jurisdiction over one of the four children, Sara, because the initial A/N/D petition, which was the underlying action before this TPR, stated that the children had been placed out of the home by child protective services in Oklahoma. Mother argues this statement put the NC district court on notice that there was a prior custody determination made in another state.
- **Burden on respondent mother:** “Where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . [and] the burden is on the party asserting want of jurisdiction to show such want.” Sl. Op. at 6-7 (citations omitted). Respondent mother did not meet her burden when (1) relying on allegations and inferences and (2) failing to mention that the district court found as fact a child other than Sara was removed from mother’s custody in Oklahoma. Additionally, mother stipulated to the district court that the child protective matter in Oklahoma was closed, as was her duty under G.S. 50A-209(a). Given the record, it was reasonable for the district court to infer that Oklahoma did not have continuing jurisdiction. NC had initial custody determination jurisdiction based on NC being Sara’s home state.

### Child’s GAL: Attorney Advocate in GAL Role

In re C.J.C., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- **Facts:** Mother filed a TPR to terminate father’s parental rights and father filed an answer denying that ground existed. An attorney was appointed as the attorney advocate and GAL for the child. The TPR was granted on the ground of abandonment. Respondent father appeals raising as one issue, that the attorney advocate was not appointed as the GAL such that there was prejudicial error.
- **G.S. 7B-1108(b)** requires that a GAL be appointed for the juvenile when a parent filed an answer denying material allegations in the TPR petition and state “[a] licensed attorney shall be appointed to assist those guardians ad litem *who are not attorneys licensed to practice in North Carolina.*” Sl.Op. at 4 (emphasis supplied in opinion).
- **The form AOC-J-207** was used to appoint an Attorney Advocate and GAL for the child. The form has a checkbox for when an attorney advocate is also acting as the GAL, but in this case the box was not checked. A review of the documents and transcripts in the record show that the failure to check the box was a clerical error as the appointed attorney was identified as the GAL. There was not a prejudicial substantive or procedural error. The GAL met his duties as an attorney and GAL when (1) investigating the case through contact with the parties, visiting with the child, and visiting the petitioner’s workplace and (2) reporting his observations to the trial court. His role was unquestioned and unchallenged.

## GAL for Parent: Hearing re: Incompetency

In re Z.V.A., 835 S.E.2d 425 (N.C. S.Ct. 2019)

### **Held: Affirmed**

- **Facts:** There is an underlying neglect action with a permanency planning order (PPO) of adoption and reunification. The PPO ordered DSS to proceed with a termination of parental rights for the parents. A week after the TPR was filed by DSS, the child was placed with the maternal aunt in New Jersey. After a TPR hearing, the court concluded neglect existed as to each parent and the TPR was in the child's best interests. Both parents appealed the TPR order.
- **GAL appointment for mother:** G.S. 7B-1101.1(c) authorizes the court to appoint a GAL for a respondent parent who is incompetent upon the court's own motion or the motion of a party. G.S. 7B-1101.1(c). Failure to appoint a GAL is reviewed for an abuse of discretion, which is when a court's ruling is so arbitrary or manifestly unsupported by reason. Substantial deference is given to the district court regarding decisions involving a party's competence (defined at G.S. 35A-1101(7)) because it interacts with the litigant and is able to form a better assessment of the litigant's mental condition than an appellate court that is limited to reviewing the cold, written record. "When the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [district] court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence." Sl.Op. at 5 quoting *In re T.L.H.*, 368 N.C. 101, 456 (2015) (emphasis in Sl.Op.). There is no extreme instance in this case, and the court did not abuse its discretion in not conducting an inquiry to mother's competency when despite an indication that mother has a mental disability based upon an IQ of 64, findings showed mother was able to work, attend school, and complete domestic violence classes that were part of her case plan.

## Neglect; Recusal

In re Z.V.A., 835 S.E.2d 425 (N.C. S.Ct. 2019)

### **Held: Affirmed**

- **Facts:** There is an underlying neglect action with a permanency planning order (PPO) of adoption and reunification. The PPO ordered DSS to proceed with a termination of parental rights for the parents. A week after the TPR was filed by DSS, the child was placed with the maternal aunt in New Jersey. After a TPR hearing, the court concluded neglect existed as to each parent and the TPR was in the child's best interests. Both parents appealed the TPR order.
- **Neglect:** When a child and parent have been separated for a long period of time, neglect under G.S. 7B-1111(a)(1) requires a showing of past neglect and the likelihood of future neglect. To determine the likelihood of future neglect, the court must consider evidence of changed circumstances between the period of past neglect and the time of the TPR hearing. Clear, cogent, and convincing evidence supports the district court's findings that father was willing to leave the child alone with mother despite her not being fit to care for the child, that respondents displayed constant marital discord during supervised visits with the child, and respondents intended to remain together. These findings support the conclusion of neglect based on prior neglect and the likelihood of future neglect.



- **Recusal:** “A court is not required to recuse itself absent a motion from a party, and when no such motion is made, the issue is not preserved for appellate review.” Sl.Op. at 11. Applying Rule of Appellate Procedure 2, the supreme court exercised its discretion to address parent’s argument for recusal, which was based on a statement made by the trial judge that at the previous permanency planning hearing he was willing to send the child to the care of the maternal aunt in New Jersey as he did not think the child could be with her parents and as such it was in the child’s best interests to TPR. This statement by the district court judge was merely an explanation that the court had taken that earlier step when determining the child’s best interests at the time that decision was made and was not a reflection that the court had reached a conclusion to terminate the parents’ rights prior to the TPR hearing. A determination that this statement was judicial bias would have the illogical consequence of a district court judge never being able to preside over a TPR after ordering a permanent plan that is compatible with the need for a TPR.

### Neglect: Insufficient Findings; Incarceration, Domestic Violence, Substance Use, DV

In re K.N., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

#### **Held: Vacated and remanded for further proceedings**

- **Facts:** Child was adjudicated neglected and dependent in an underlying juvenile action. Respondent father’s case plan included complete anger management and substance abuse evaluations and follow all recommendations, successfully complete parenting education, participate in a domestic violence intervention program, secure and maintain appropriate housing, comply with probation, and do not incur any new criminal charges. The trial court ultimately ordered concurrent permanent plans of adoption (primary) and reunification (secondary). DSS was ordered to initiate a TPR. The TPR was granted on the ground of neglect. Respondent father appeals, arguing the findings were not supported by the evidence, and the findings do not support the conclusion of neglect.
- **Neglect Standard:** When a child has been separated from a parent for a long period of time, the neglect ground requires a showing of both past neglect and a likelihood of future neglect by that parent. In determining the likelihood of future neglect, “the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect,” and “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 termination proceeding.*” Sl.Op. at 11 (emphasis in original; citations omitted).
- **Findings:** The trial court’s findings were insufficient to support the conclusion of neglect. There were very few findings that directly related to the respondent’s ability to care for his child or the extent to which his behavior affected his child’s welfare. The court could have made additional findings based on evidence in the record that may have been sufficient, such as respondent’s long history of drug abuse and extensive criminal record, the effect of the current criminal charges and the impact those charges would have on respondent’s ability to care for his child, respondent’s slow pace in completing his case plan and hostility towards people managing some of those services in which he refused to participate, and an additional domestic violence incident.

- Although one finding that did address the respondent's ability to care for his child is that respondent was currently incarcerated and awaiting trial on a number of criminal charges, incarceration in and of itself is not a sword or a shield in a TPR. The findings should include an analysis of the relevant facts and circumstances, including the length, of the parent's incarceration. Other findings do not establish that respondent failed to comply with the portions of his case plan that address domestic violence or substance abuse components of his case plan. There was no explanation about the finding that respondent provided diluted drug screens, how the court viewed those diluted screens, or the nature or extent of any earlier substance abuse issues of the respondent.

### Neglect: Sufficiency of Evidence and Findings

In re S.D., \_\_\_ N.C. \_\_\_ (April 3, 2020)

#### **Held: Affirmed**

- **Facts:** The child was adjudicated neglected and dependent in part based on father not having established paternity and never having seen or provided any financial or emotional support for the child. In a review order, father's paternity was established and he was permitted to send mail or gifts to the child through DSS and could call about her well-being. He was also required to contact DSS once he was released from prison so he could begin working a case plan. After he was released from prison, father did not make significant progress on his case plan, and DSS was ordered to initiate a TPR. After the TPR motion was filed, father was arrested on drug charges and violating parole and remained incarcerated until he pled guilty 4 months later. The TPR hearing was held after father's incarceration ended. The TPR was granted on the ground of neglect and failure to make reasonable progress. Father appeals. This opinion focuses on neglect.
- **Neglect:** G.S. 7B-1111(a)(1) authorizes a TPR when the parent has neglected the juvenile, which includes when a parent does not provide proper care, supervision, or discipline. When a parent and child have been separated for a long period, the petitioner/movant must show past neglect and a likelihood of future neglect by the parent. Factors include the best interests of the child and the fitness of the parent at the time of the TPR hearing. A TPR on the ground of neglect does not require that the respondent parent in the TPR be responsible for the child's prior neglect adjudication. An adjudication that a juvenile is neglected is based on "...the circumstances and conditions surrounding the child, not the fault or culpability of the parent." Sl.Op. at 13-14 quoting In re M.A.W., 370 N.C. 149, 154 (2017).
- **Incarceration:** Father was incarcerated for 14 months of the 2-year period that the juvenile was in DSS custody. As previously held, "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." Sl.Op. at 14-15. Although incarceration limits a parent's ability to show affection, incarceration is not an excuse for a parent to fail to use whatever means are available to show an interest in his child. Father made minimal efforts to show an interest in his child – he sent a single birthday card. His minimal progress on his case plan was a result of his own conduct, including his later incarceration for his continued criminal activity, his missing or cancelling several meetings with DSS, and his not engaging in recommended services. All of these actions limited DSS's ability to assist him and are not because of DSS's failure to make reasonable efforts to assist him as he proposes.

- Evidence and Findings: The evidence at the TPR hearing including social worker testimony, the father’s testimony, and underlying review orders from the neglect and dependency action. In considering the father’s testimony, the trial court determined it was not credible, and a trial court is entitled to make a witness credibility determination “without fear of appellate reversal in light of the applicable standard of review.” Sl.Op. at 30. The evidence supports the court’s findings that father did not make adequate progress on his case plan or toward reunification, and the findings support the court’s conclusion of neglect.

In re N.P., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, the child was adjudicated neglected and dependent. In 2019, the court entered an order terminating respondents’ parental rights on all the grounds alleged and concluding it was in the child’s best interests. Respondent father appeals, challenging the grounds. This opinion addresses neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when the parent has neglected the juvenile, which includes a parent who does not provide proper care, supervision, or discipline, or an injurious environment. When there is a long period of separation between the child and parent, the petitioner must show past neglect and a likelihood of future neglect by the parent. When looking at future neglect, the court looks to evidence of changed circumstances between the period of past neglect and the time of the TPR hearing.
- The more than 90 findings were sufficient to support the conclusion of neglect. Those findings included father never acknowledging his responsibility for his convictions on multiple sex offenses against a child; not timely completing a court-ordered sex offender assessment and not completing recommended treatment; paranoid behaviors; a lack of stable housing and proper vetting of roommates; and history of poor decision-making and noncompliance with court orders.
- Broad based exceptions to findings of fact that ineffectual as findings that are not sufficiently challenged are presumed to be supported by competent evidence and are binding on appeal. Of the specifically challenged findings, “the district court has the responsibility of making all reasonable inferences from the evidence presented” and here “the district court could reasonably infer from the evidence that respondent could not maintain safe housing... and lacked the ability to do so in the future.” Sl.Op. at 7.
- The role of an appellate court is not to substitute its judgment for the trier of fact. The district court had repeated opportunities to observe respondent when determining whether his behaviors (addressed in the findings) impacted his ability to parent such that the child would be placed in an injurious environment.

In re D.W.P., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

**Held: Affirmed (Earls, J. dissent)**

- Facts: In an underlying abuse and neglect action, D.W.P. was adjudicated abused and neglected based on multiple serious injuries (bone fractures) that were in various stages of healing and were caused by nonaccidental means. His sister was adjudicated neglected. No plausible explanation for the injuries was provided by respondent mother or her fiancé at the time.

Respondent mother entered an Alford plea to misdemeanor child abuse, which arose from the injuries to D.W.P. At a permanency planning hearing, the court eliminated reunification and directed DSS to file a TPR petition, which DSS did. The TPR was granted based on neglect and failure to make reasonable progress. Respondent mother appeals on the basis that the findings are not supported by clear, cogent, and convincing evidence. The opinion focuses on neglect.

- Standard of review is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusion of law.
- Findings and Role of Trial Judge: A trial judge's duty is to determine a witness's credibility and how much weight to give that testimony and to draw reasonable inferences from that testimony. These determinations are not subject to appellate review. Findings of fact must be "sufficiently specific" to allow for appellate review of the judgment and are made through processes of logical reasoning based on the evidence presented. Sl.Op. at 6. (citations omitted).
- Findings were supported by clear, cogent, and convincing evidence despite mother's challenge to findings involving (1) her credibility based on the various explanations she provided for how the child may have been injured and her lack of insight about the injuries and failure to make reasonable progress; (2) her probation violation for not obtaining a psychiatric evaluation; (3) her working on reestablishing her relationship, which involved domestic violence, with her now ex-fiance; and (4) her getting married to a different man and withholding that information from the DSS social worker which resulted in a background check on him not being conducted.
- Likelihood of neglect: Because of the period of separation between mother and her child, the court must determine whether there was prior neglect and a likelihood of future neglect, with the determinative factors being the child's best interests and the parent's fitness to care for the child at the time of the TPR hearing. Although respondent mother has made some progress, including completing parenting classes, attending therapy, and regularly visiting with the children, she continued to fail to acknowledge the likely cause of her child's injuries. In a TPR, the child's best interests are paramount and are meant to ensure the child's safety and well-being and to not be punitive against the parent. The findings that mother did not try to understand how her child was injured or how her relationships affect the children's wellbeing support the conclusion that neglect is likely to reoccur.
- Dissent (Earls, J): The findings are not supported by the evidence. Mother was compliant with her case plan. Further, the evidence shows mother (1) was consistent throughout the case that she did not injure her child and did not know how he was injured and (2) acknowledged her responsibility to protect her children as their primary caregiver. Regarding the injured child's sister, the findings of fact relate to her living in the home where another child was abused. That alone is insufficient when there is no evidence that current circumstances present a risk of harm or neglect to her.

### Neglect & Failure to Make Reasonable Progress: Findings

In re Z.A.M., \_\_\_ N.C. \_\_\_ (April 3, 2020)

#### **Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected and dependent. In 2018, the permanency planning order identified adoption and guardianship as the concurrent permanent

plans. DSS filed a motion to terminate the parents' rights on the grounds of neglect and failure to make reasonable progress to correct the conditions. After finding both grounds existed, the court determined it was in the children's best interests to terminate parental rights to allow the grandparents, who were the children's placement provider, to adopt the children. Respondent father appeals the grounds challenging the sufficiency of the findings. Both respondents challenged the best interests determination.

- Standard of review of an adjudication order is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed do novo. The appellate court will review the findings and conclusions in the order regardless of how they are classified (e.g., a conclusion is labelled as a finding).
- G.S. 7B-1111(a)(1) authorizes the trial court to terminate a parent's rights based on neglect. When a parent and child have been separated for a long period, there must be both past neglect and a likelihood of future neglect. A likelihood of future neglect is determined by considering evidence of changed circumstances between the period of past neglect and the time of the TPR hearing.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate a parent's rights based on their (1) willfully leaving their child in foster care or other out-of-home placement for more than 12 months (2) without showing reasonable progress under the circumstances has been made to correct the conditions that led to the child's removal.
- Although respondent father argues the trial court did not consider current circumstances, the findings about respondent father's more recent 3-month period of sobriety was evaluated over the entire 22-month period when the children were out of the home, which showed that he has multiple relapses and that his alcohol abuse preceded the TPR hearing. The trial court appropriately weighed the evidence to conclude there was a likelihood of neglect and failure to make reasonable progress.

In re C.N., \_\_\_ N.C. App. \_\_\_ (April 21, 2020)

**Held: Reversed and Remanded**

- Facts and Procedural History: In an underlying action, the children were adjudicated neglected based on lack of proper care and supervision and an injurious environment. Mother's rights were terminated on the grounds of neglect and willful failure to make reasonable progress with findings that mother was not consistent with her treatment or compliant with her case plan and although appropriate at visits, was not consistent in attending those visits. On appeal of that order, the court of appeals held the findings were insufficient to support neglect and the evidence was insufficient to support failure to make reasonable progress. The NC Supreme Court remanded this case to the COA to reconsider its holding in 831 S.E.2d 878 (2019) given the supreme court's decisions in In re B.O.A and In re D.L.W.
- In re B.O.A. held the court of appeals had applied a restrictive interpretation of the conditions that led to a trial court's removal of the children thus limiting a trial court's authority to order certain requirements in a case plan and instead provided a more expansive interpretation. In this opinion, there was not a restricted interpretation of those conditions. Distinguishing the case from In re B.O.A., here mother made reasonable progress on her case plan.

- In re D.W.P. is distinguishable from the present case as respondent-mother here has not continued to place her children at risk or fail acknowledge neglect as she stipulated to the allegations in the neglect petition.

### Failure to Make Reasonable Progress

In re C.J., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

Held: Affirmed

- Facts: Child was adjudicated dependent. Respondent mother was ordered to complete a diagnostic therapeutic assessment and substance abuse assessment and follow all recommendations; complete drug screens; obtain and maintain verifiable employment and stable housing suitable for the child; and communicate with DSS. After failing to make progress on her case plan, the court ordered a primary permanent plan of adoption. DSS filed a TPR, which was granted in part on the ground of failing to make reasonable progress to correct the conditions that led to the child's removal (G.S. 7B-1111(a)(2)). Respondent mother appeals.
- Review of challenged findings: Findings of fact that respondent mother challenged as unsupported by clear, cogent, and convincing evidence were not necessary to support the court's conclusion of a TPR ground and were not addressed on appeal. The appellate court reviews only those findings that are necessary to support a determination that TPR grounds existed.
- Case Plan Nexus to Conditions Leading to Removal: Quoting *In re B.O.A.*, 831 S.E.2d 305, 314 (N.C. S.Ct. 2019), "a trial court's conclusion on this ground [G.S. 7B-1111(a)(2)] is supported when there exists 'a nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [the juvenile's] removal from the parental home.' " Sl.Op at 5. The adjudication and dispositional orders found the child's removal was based on mother leaving the child with her (mother's) boyfriend after she was arrested and extradited to Mississippi because of drug-trafficking and stolen weapons charges. Mother had an extensive history with the Mississippi child protective agency, which had an open case because of allegations mother used the child to obtain drugs. Mother's demeanor at the hearing raised concerns by the court that she was under the influence or suffering from a mental health condition. These findings established the required nexus. The findings that mother did not address any part of her case plan or visit with her child was supported by clear, cogent, and convincing evidence and support the court's conclusion that G.S. 7B-1111(a)(2) existed for TPR.

In re I.G.C., 835 S.E.2d 432 (2019)

Held: Affirmed

- Facts: The children were adjudicated dependent juveniles due to drug use and domestic violence involving both parents. Case plans were ordered to address parenting, substance abuse, mental health, domestic violence, stable housing, employment, no further criminal charges, visitation, and attendance at team meetings with DSS. DSS filed a motion to terminate parental rights after concurrent permanent plans of adoption and guardianship were ordered. The parents' rights were terminated on the grounds of neglect and failure to make reasonable

progress to correct the conditions that led to the children's removal. Respondent parents' appeal. Respondent father's appeal was by a no merit brief and is affirmed after an appellate court review.

- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The mother's limited progress is well documented in the findings of fact as she never completed the substance abuse treatment or domestic violence program, missed multiple drug screens and tested positive on two, and had two DWI offenses after agreeing to the case plan. Although mother completed parenting courses and participated in some substance abuse and domestic violence treatment and had three negative drug screens, these services were of a lesser duration and intensity than recommended and were not approved by the court. The evidence supports the findings that mother did not maintain stable employment for at least six months, had not resided in the same residence for at least six months, and had frequent moves constituting housing instability. Although she was making some progress on her case plan, mother waited too long before working on her case plan to make reasonable progress to correct the conditions leading to the children's removal by the time of the TPR hearing.

In re A.R.A., 835 S.E.2d 417 (N.C. S.Ct. 2019)

**Held: Affirmed**

- Facts: The family has an extensive history with DSS based on substance abuse and domestic violence by father against the children and respondent mother. The children initially came into care through a voluntary placement by mother so that she and father could live together. DSS filed a petition and the children were adjudicated neglected. Throughout the 2-year action, mother and father continued to reside together and denied the impact that the domestic violence and substance abuse history had on the children. After making limited progress, the court ordered a primary permanent plan of adoption, and DSS filed a TPR petition which was granted on the grounds of neglect and willful failure to make reasonable progress. Respondent mother appeals the TPR order, challenging the grounds and best interests determination.
- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Unchallenged findings are deemed to be supported by competent evidence and are binding on appeal.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The findings that respondent mother lacked an understanding or did not accept responsibility for the circumstances leading to the children's removal is supported by clear, cogent, and convincing evidence as she continued to live with father who did not comply with his case plan, blamed the children and other people for his return home, and defended father throughout the TPR hearing. Mother did

not make reasonable progress in her case plan that included providing a safe and stable home environment for the children.

- The trial court determines the credibility of witnesses, the weight to give the testimony, and the reasonable inferences made from that testimony. It was reasonable for the court to infer that the social worker was prevented from having access to the home when respondent parents repeatedly cancelled home visits. Evidence, through social worker testimony, supported the finding that mother either refused or failed to provide a new address (after being evicted) to DSS and made it difficult for the social worker to conduct home visits to assess whether there was safe and stable housing for the children. Respondent mother did not rebut the clear, cogent, and convincing evidence by DSS, and her failure to do so is not a shifting of the burden of proof on to respondent mother. The court reasonably inferred mother placed her relationship with the father over the children’s safety even though there was no evidence of domestic violence occurring after the children’s removal.
- The standard of review of a best interests determination at disposition is an abuse of discretion. Agreeing with the court of appeals, G.S. 7B-1110(a) requires the court to consider all the factors designated therein but is only required to make written findings of relevant facts. When there is conflicting evidence of a factor, placing it at issue before the district court, that factor is relevant. Here, the hearing transcript shows the court considered all the factors and made the necessary findings, which addressed the child’s age (9 years old), likelihood of adoption (via social worker testimony), that any bond between the child and parent was outweighed by the need for the child’s permanence, and “other” factors addressing the child’s attachment and success in the foster home as well as his therapy. The quality of the relationship between the child and prospective adoptive parent or other permanent placement was not relevant as there was not a potential adoptive placement at the time of the TPR hearing.

## Abandonment and Neglect: Insufficient Findings, Willfulness, Court Questioning of Witnesses

In re N.D.A., 833 S.E.2d 768 (N.C. S.Ct. 2019)

### **Held: Vacated and remanded**

- Facts: This is a private TPR that was granted based on willful abandonment and neglect from which respondent father appeals, challenging the sufficiency of the facts to support the conclusions of law.
- Standard of Review for TPR adjudication is based on whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Findings of fact
  - Recitation of a witness’s testimony is not a finding of fact. The “finding” in the TPR order that father “testified that he attempted to set up visits with the child but could not get any assistance in doing so” without a determination of his credibility is not a finding of fact and must be disregarded. Sl.Op. at 6.
  - The finding that father “had significant problems with substance abuse for many years” was supported by the evidence, specifically father’s testimony. Sl.Op. at 6.



- An ultimate finding of fact “ ‘ is a conclusion of law or at least a determination of a mixed question of law and fact’ and should be ‘distinguished from the findings of primary, evidentiary, or circumstantial facts.’ “ Sl.Op. at 8-9 (citation omitted). The findings that (1) the child has been neglected by the father and (2) the father has willfully abandoned the child do not involve the exercise of judgment and are not findings. Their classification as such do not alter the need for the trial court to make factual findings sufficient to support a TPR ground.
- Abandonment implies conduct on the part of a parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child and is demonstrated by a parent withholding his presence, love, care, opportunity to display filial affection, and willful neglect to provide support and maintenance to the child. Willful intent is a question of fact.
  - Under G.S. 7B-1111(a)(7) the determinative time period is the immediate six months preceding the filing of the petition although a court may consider a parent’s conduct outside that time period to evaluate a parent’s credibility and intentions. The court findings did not adequately address the willfulness of the father’s actions. The father’s unchallenged testimony showed he unsuccessfully attempted to make arrangements to visit the child and there was no determination regarding father’s credibility or findings about whether father, who was incarcerated, had the ability to contact the child or petitioner or pay financial support during the relevant period. The lack of findings addressing father’s ability, which goes to intent/willfulness, do not support the ultimate determination that father willfully abandoned the child.
  - Under G.S. 7B-1111(a)(1), abandonment is included in the definition of neglect. Here, the TPR was based on current neglect (vs. past neglect and a likelihood of future neglect). The time period is not limited to the six months immediately preceding the filing of the petition, allowing the court to look at a more extended period of time. Abandonment based on neglect involves a parent’s conduct that demonstrates “willful neglect and refusal to perform the natural and legal obligations of parental care and support.” Sl.Op. at 16. The findings do not adequately address father’s willfulness. There were no findings that addressed whether father, who was incarcerated, had the ability to contact the child or petitioner, exercise visitation, or pay support.
- Burden and court questioning of witnesses: At the adjudicatory stage of a TPR, the petitioner bears the burden of proof by clear, cogent, and convincing evidence that one or more alleged grounds exists. Under N.C.R. Evid. 614(b), the court “may interrogate witnesses, whether called by itself or by a party.” Sl.Op. at 20. “It is proper for the judge to propound competent questions to a witness [during a trial] in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked.” (citation omitted). Sl.Op. at 20. There was no bias against respondent or in favor of petitioner from the trial court’s questioning of witnesses regarding work schedules, reason for method of contacting respondent, nature and extent of contact between petitioner and respondent, dates and length of incarceration, and the number of attempted contacts with petitioner. Each question was relevant to the issue to be determined.

## Abandonment: Sufficiency of Notice; Findings

In re B.C.B., \_\_\_ N.C. \_\_\_ (April 3, 2020)

### **Held: Affirmed**

- **Facts:** Mother petitioned to terminate father’s parental rights on the grounds of abandonment and failure to pay child support. Father’s attorney filed a motion to dismiss alleging insufficient notice of facts. The motion was denied. After hearing, the TPR was granted on the ground of abandonment. Respondent father appeals.
- **Notice:** G.S. 7B-1104 requires a TPR petition “state ‘[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists.’ ” Sl.Op. at 4. Quoting the court of appeals, “[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions, or conditions are at issue.” Id. Here, the petition included more than a mere recitation of the statutory grounds to TPR; it alleged both grounds, that both actions were willful, and addressed at length respondent father’s violation of the child custody orders in support of the allegation of willful abandonment.
- **Abandonment under G.S. 7B-1111(a)(7)** looks to a determinative 6 consecutive month period immediately before the TPR petition or motion is filed. Abandonment involves a parent’s conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willfulness is a question of fact.
- **Findings of Fact:** Findings of fact that are not challenged on appeal are deemed supported by competent evidence and are binding. The appellate court reviews only those findings that are necessary to support the court’s conclusion that a ground exists. Here, the findings of fact about willfulness are supported by clear, cogent, and convincing evidence. Although petitioner had a DVPO against respondent, the respondent was not precluded from contacting the child or petitioner’s parents. Despite having petitioner’s parents’ address, respondent did not contact them or send any cards or gifts to the child. Respondent also failed to exercise his visitation rights. The findings support the court’s conclusion of abandonment.

## Abandonment

In re A.G.D., \_\_\_ N.C. \_\_\_ (May 1, 2020)

### **Held: Affirmed; there is a dissent (Earls, J.)**

- **Facts:** In 2014, mother obtain a child custody order granting her sole legal and physical custody of the children and no contact between the children and the father without a further order of the court. Father was incarcerated on pending charges for child related sex offenses. In 2018, mother filed a TPR petition on the grounds of failing to pay child support and abandonment. The TPR was granted on the ground of willful abandonment, and respondent father appeals arguing he was prohibited from having contact with the children.
- **Under G.S. 7B-1111(a)(7)**, a trial court looks to the six consecutive months immediately preceding the filing of the TPR petition and must make facts that the parent had a “purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child].” Sl.Op. at 4-5.
- **“Incarceration**, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. at 5. When parents are incarcerated, the court must recognize the limitations

on that parent for showing love, affection, and parental concern. The trial court found that with one exception the father did nothing to maintain contact with the children's mother to learn how the children were doing. There was nothing in the custody order that prohibited father from contacting the mother or other persons for him to indirectly communicate his love, affection, and parental concern for his children. Father's failure to do "anything whatsoever to express love, affection, and parental concern for the children during the relevant six-month period" supports the TPR. Although his options were limited, it was not impossible for him to show such concern. Precluding a TPR against a parent who has been accused of sexually abusing one of his children solely because the other parent and State took action to protect the family would cause harm to the family members and is inconsistent with the intent of the General Assembly and appellate court precedent.

In re K.N.K., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, mother filed a petition to terminate father's parental rights on the ground of willful abandonment. Prior to the TPR petition, in 2015, a child custody order awarded mother sole care, custody, and control of the child and twice monthly supervised visitation with father. Mother had a DVPO against father from 2014 – 2018. From 2015- 2018, the DVPO included the child but allowed for supervised visitation. The court ordered the TPR and father appealed both the ground and best interests determinations.
- Abandonment under G.S. 7B-111(a)(7) looks to a determinative 6 consecutive month period immediately before the TPR petition or motion is filed. Abandonment involves a parent's conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.
- Willfulness is a question of fact. Because it is an emotion, it is typically proved by circumstances that may be inferred. The court may look outside the determinative 6-month period when evaluating a parent's credibility and intentions.
- The findings show that from 2014 to the date the TPR was filed, respondent father had no contact or communication with the child even after he was awarded visitation twice a month in the 2016 custody order, did not provide financial support for the child, did not attempt to attend any medical appointments or school/extracurricular activities for the child, and did not seek a modification of the child custody order. These findings support the ultimate findings that respondent acted willfully, with the intent of foregoing his parental responsibilities.
- At disposition, the court applies the best interests of the child standard, "without regard to any competing interests of respondent. "An adjudication of grounds for terminating parental rights under N.C.G.S. 7B-111(a) constitutes a determination by the trial court that the respondent-parent is unfit or has acted inconsistently with his constitutionally protected status with regard to the subject juvenile." Sl.Op. at 15.
- A best interests determination is reviewed for an abuse of discretion. Dispositional findings are reviewed on a competent evidence standard. There were detailed findings for each of the factors set forth in G.S. 7B-1110 based on the evidence. In one challenged finding that there was no bond between the child and respondent, the evidence supports there is no child-parent

bond. Regarding the father's testimony about his prior conduct to his child, the court determined the father's testimony was not credible. There is no abuse of discretion.

In re E.B., 824 S.E.2d 169 (N.C. Ct. App. 2019)

**Held: Affirmed, Dissent in part**

- **Facts:** In 2016, mother executed a relinquishment to DSS the day after the child was born. A putative father was named and paternity testing confirmed he is the child's father. Father entered into an out-of-home family services agreement with DSS. Child was placed in foster care and from 2016–Jan. 2018, the court held 6 permanency planning and review hearings resulting in 6 orders placing requirements on father. In April 2018, DSS filed a TPR petition, which was granted. Father timely appealed. Father also filed a petition for writ of certiorari, which was granted, for a review of the 6 permanency planning orders arguing lack of subject matter jurisdiction.
- **Subject matter jurisdiction and permanency planning orders:** Father argues and DSS concedes the trial court lacked subject matter jurisdiction to conduct review and permanency planning hearings because a petition alleging abuse, neglect, or dependency pursuant to G.S. 7B-402 and -403 was never filed with the court. Without the filing of an abuse, neglect, or dependency petition, no action was commenced and therefore the court lacked subject matter jurisdiction. As a result, each of the 6 permanency planning orders is void, and the requirements that those orders placed on the father must be disregarded.
  - **Author's note:** This opinion does not address G.S. 7B-909 hearings, "review of agency's plan for placement," when there has been a relinquishment and a child has not been adopted within 6 months. That statute does require a petition be filed but it is not a petition alleging abuse, neglect, or dependency.
- **TPR - Abandonment:** G.S. 7B-1111(a)(7) consists of a ground to TPR based on willful abandonment. Willfulness is a question of fact that must be supported by clear, cogent, and convincing evidence that shows "conduct on the part of the parent which manifests a willful determination to [forego] all parental duties and relinquish all parental claims to the child." Sl.Op. at 9. Relevant factors include financial support and emotional contributions displaying love, care, and affection. The determinative period is the 6 months preceding the filing of the petition, which in this case was Oct. 10, 2017 – April 10, 2018. The unchallenged findings support the trial court's conclusion of abandonment. Father allowed his sister to handle the child's care and placement, moved out of state without telling DSS, failed to attend the permanency planning hearings and a child support hearing, did not request visits despite being authorized to do so, and did not make any Skype calls to the child despite having that opportunity.
- **Dissent:** "because the ground for termination alleged by DSS and adjudged by the trial court are inextricably intertwined with the invalid review hearing process, I would conclude the trial court erred in adjudicating grounds upon which to terminate Respondent-Father's parental rights." Sl.Op. at 1 (dissent)

## Dependency: Alternative Child Care Arrangement; Child's Mental Health Needs in PRTF

In re N.N.B., \_\_\_ N.C. App. \_\_\_ (May 5, 2020)

### **Held: Affirmed**

- Facts: In 2017, the juvenile was adjudicated neglected and dependent in part due to his significant mental health issues. Respondent father had not seen the child since 2012 and has been incarcerated since 2014. Father's rights were terminated on several grounds and he appeals. This opinion addresses the ground of dependency, where father challenges the lack of an alternative appropriate child care placement based on his proposal of either his mother or sister being available.
- Dependency under G.S. 7B-1111(a)(6) requires petitioner prove by clear and convincing evidence that the parent is incapable of providing proper care and supervision such that the juvenile is dependent and that there is a reasonable probability that the incapability will continue into the foreseeable future.
- Here, there was not an appropriate alternative child care arrangement. Respondent's mother was not available due to her failing health and inability to have the child reside with her in her retirement community. Respondent's sister was not a viable placement due to the child's need level of treatment needs. Respondent's sister resides in Georgia requiring compliance with the ICPC. Because the juvenile was in a level IV PRTF with a discharge recommendation to a level III PRTF and not relative, the plan to submit the ICPC request was deemed inappropriate. Although respondent argues his sister is appropriate, available, willing, and has a close relationship with the juvenile, she is not appropriate because of the child's significant psychiatric needs.

## Failure to Pay Portion of Care

In re J.M., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

### **Held: Affirmed**

- Facts: In 2016, respondent mother stipulated to facts that established the children were neglected based on a lack of proper care and supervision and an injurious environment. In 2017, a permanency planning order identified adoption as the primary plan and custody as a secondary plan. The trial court ordered that DSS not pursue a TPR so a home study for a possible kinship placement could be pursued. In 2018, after the possible placement was not approved, DSS filed a TPR petition, and the TPR was granted on four different grounds. Respondent mother appeals. This opinion focuses on the ground of failure to pay a reasonable portion of the cost of care while the children were in DSS custody. The children were in foster care from January 8, 2016 through the relevant 6-month period ending on July 10, 2018. The cost of care for each child was more than \$400,000. In 2016, mother was ordered to pay \$50/month in child support.
- G.S. 1111(a)(3) authorizes a TPR when a parent has willfully failed for a continuous period of 6 months preceding the filing of a TPR to pay a reasonable portion of the care of their child's care when the child has been placed in DSS custody and the parent has a physical and financial ability to pay. Cost of care is the amount it costs DSS to pay for the child's care (e.g. foster care), and the parent pays the portion that is "fair, just and equitable based upon the parent's ability or means to pay." Sl.Op. at 8 (Citation omitted).

- Findings support conclusion: During the determinative 6-month period, respondent mother paid nothing toward the children’s cost of care although she had an ability to pay more than zero as she was capable of working. Respondent mother was working at the start of the determinative time period prior to quitting her job, and although the person responsible for managing her Rx to address her mental health issues was unavailable during this period, there is nothing that indicates she could not have found an alternative provider. Her lapse in Rx is based on her own conduct. Mother was also subject to a valid court order for child support and made no efforts to modify or set aside that order.

In re S.E., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

**Held: Affirmed**

- Facts: Four children were adjudicated abused, neglected, and dependent based on physical abuse, sexual abuse of one child, and domestic violence in the home. A permanency planning order identified adoption as the primary permanent plan for each of the children. DSS filed a petition to terminate respondent mother’s parental rights, which was granted on multiple grounds, including willfully failing to pay a reasonable portion of the cost of care for the children while they were placed in DSS custody. Respondent mother appealed.
- Failing to Pay Reasonable Portion of Cost of Care: G.S. 7B-1111(a)(3) involves the juvenile’s placement in DSS custody and the parent’s willful failure to pay a reasonable portion of the cost of care for a continuous period of six months immediately preceding the filing of the TPR petition when the parent is physically and financially able to do so. The cost of care is the amount it costs DSS to care for the child, and the portion of the cost of care for a parent is that which “is fair, just and equitable based upon that parent’s ability or means to pay.” Sl. Op. at 10.
- Mother paid nothing toward the cost of care despite being employed and having an ability to do so. Her argument that her failure to pay was not willful because she did not know she had to pay or how to pay is without merit. “The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent’s obligation to pay reasonable costs, because parents have an inherent duty to support their children.” *Id.* Additionally, mother was on notice given the findings in each permanency planning order that respondent-parents were not paying child support.

**Best Interests: Standard of Review**

In re Z.A.M., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected and dependent. In 2018, the permanency planning order identified adoption and guardianship as the concurrent permanent plans. DSS filed a motion to terminate the parents’ rights on the grounds of neglect and failure to make reasonable progress to correct the conditions. After finding both grounds existed, the court determined it was in the children’s best interests to terminate parental rights to allow the grandparents, who were the children’s placement provider, to adopt the children. Respondents appeal. Mother argues the standard of review should be de novo.

- The standard of review of a best interests determination is an abuse of discretion. In response to mother's argument that the review should be de novo, the supreme court reaffirmed the abuse of discretion standard. The appellate court looks to whether the trial court's decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." Sl.Op. at 17. The trial court, which hears the evidence, is in the best position to assess and weigh that evidence, make findings, and reach conclusions based on that evidence.
- There was no abuse of discretion. The trial court considered the dispositional factors in G.S. 7B-1110 and performed a reasoned analysis in weighing those factors. Although finding there was a strong bond between the children and respondent parents, that factor was outweighed by the findings addressing the primary plan of adoption, the children's relationship with their grandmother, and likelihood of adoption by the grandmother.

### Best Interests: Factors

In re C.J.C., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: Mother filed a TPR to terminate father's parental rights. After finding grounds, the court determined TPR was in the child's best interests. Father appealed raising as one of his arguments that the court abused its discretion when not making sufficient findings and properly balancing the relevant factors.
- Standard of Review is whether the court abused its discretion, which results in a ruling that is manifestly unsupported by reason or is so arbitrary that is could not have been a result of a reasoned decision.
- G.S. 7B-1110 identified best interests factors for the court to consider at the dispositional stage of a TPR hearing. Although all the factors must be considered, written findings are required for only those that are relevant. "[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [district] court." Sl.Op. at 10 (citation omitted).
- Relevant factors in this private TPR do not include the relationship between the child and mother/petitioner's long-term boyfriend when there was not a permanent plan of adoption. In this private TPR, there is no permanent plan as the term is used in G.S. 7B-1110(a)(3). The factor regarding likelihood of adoption at G.S. 7B-1110(a)(2) "becomes more relevant in a TPR case in which a child is in the custody of a Department of Social Services agency and termination of the parent's rights leaves the child as a ward of the State." Sl.Op. at 12. Because the child was in the full custody of the mother/petitioner at the time of the TPR, the likelihood of the child's potential adoption is not a sufficiently relevant factor.

In re J.H., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

**Held: Affirmed**

- Facts: Four children were adjudicated abused and neglected. The court ordered respondent mother to engage in a case plan – complete a mental health assessment and follow all recommendations, maintain employment and appropriate and safe housing for a minimum of 6

months, participate in parent coaching and implement the skills during visits, and sign necessary release forms for the court and DSS to monitor her progress. At a permanency planning hearing, the court ordered concurrent plans of adoption and reunification with the children's fathers. Respondent mother preserved the right to appeal this permanency planning order (PPO). Mother's rights were subsequently terminated, and she appealed both the PPO and TPR. The TPR appeal is limited to the dispositional determination that TPR was in the children's best interests.

- **Likelihood of Adoption:** The trial court did not abuse its discretion when determining the TPR was in each of the 4 children's best interests. The trial court made findings of each factor in G.S. 7B-1110(a) and specifically addressed the likelihood of each child's adoption. Each child has significant development delays, but "general truths" about the difficulty of placing children with behavior challenges and/or developmental delays and children in foster care with adoptive families "cannot overcome the particularized evidence ... supporting the trial court's factual findings that each of these children had a high probability of being adopted." Sl.Op. at 14-15. The court found that one child was placed with his biological father and there was a strong likelihood of a stepparent adoption by the father's wife. One child was placed in a specialized facility and the grandmother had expressed an interest in adopting him. One child was placed in his prospective adoptive home and has a good relationship with the prospective adoptive parent. One child had multiple families who were interested in adopting her. All of the children were thriving in their placements and were benefitting from not being in their mother's custody.

In re S.D.C., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

**Held: Affirmed**

- **Facts:** This TPR results from an underlying neglect and dependency action. In that action, the child's paternal grandmother had been identified as a potential relative placement, was not recommended by DSS, and was not ordered as a placement. The child remained in DSS custody. After a year, the concurrent permanent plans were changed to a primary plan of adoption and secondary plan of reunification with respondent father, and DSS was ordered to initiate a TPR. After a hearing, respondent father's parental rights were terminated. He appeals, raising as the sole issue that the trial court abused its discretion when concluding the TPR was in the child's best interests arguing that the trial court did not adequately consider whether the child could be placed with a relative.
- **Standard of review:** At the dispositional stage of a TPR, the court determines whether the TPR is in the child's best interests and looks to G.S. 7B-1110(a). The standard of review is abuse of discretion, which is when the trial "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 8.
- **Availability of Relative Placement:** Unlike an abuse, neglect, or dependency action where the trial court is required to consider the availability of a relative placement, the trial court is not expressly directed to consider the availability of a relative placement in a TPR. The trial court may treat that issue as a "relevant consideration" when determining best interests, which will depend on the particular proceeding and the extent to which the record contains evidence that tends to show whether a relative placement is, in fact, available. See G.S. 7B-1110(a)(6).



- Evidence and Relevant Factor: If at the TPR hearing, conflicting evidence about the availability of a potential relative placement is presented, “the trial court should make findings of fact addressing ‘the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanency for the children as offered by their prospective adoptive family.’ ” Sl.Op. at 9. If “the record does not contain any evidence tending to show the availability of a potential relative placement, the trial court need not consider or make findings of fact considering that issue.” *Id.*
- Evidence and Findings: The record of the TPR did not contain evidence tending to show that a potential relative placement was available for the child. Although the underlying neglect and dependency adjudication order and initial dispositional order that identified the grandmother as a potential relative placement option was admitted, that dispositional order and subsequent permanency planning orders had determined that the child’s best interests were served by remaining in DSS custody versus being placed with the relative. “Thus, we have no hesitation in concluding that [the child’s] potential placement with a relative was not a fact that the trial court was required to consider or make findings about during the dispositional phase of this termination of parental rights proceeding.” Sl.Op. at 10.

Note: Opinions affirming TPR orders based on a no-merit brief are not summarized.