

## Contents

Indian Child Welfare Act (ICWA).....	2
Reason to Know Child is an “Indian Child” .....	2
Abuse, Neglect, Dependency .....	3
Adjudication .....	3
Neglect: Drug Screen as Business Record .....	3
Evidence: Expert Testimony; Hearsay in CME .....	4
Neglect: Relevancy of Other Juvenile Who Was Neglected .....	5
Neglect; Dependency: Findings.....	5
Abuse; Dependency .....	7
Initial Disposition .....	8
Reasonable Efforts; Visitation.....	8
Visitation, Case Plan, Constitutional Rights .....	9
Permanent Plan.....	11
Americans w/ Disabilities Act (ADA); Visitation .....	11
Eliminate Reunification: Findings.....	12
Eliminate Reunification; Visitation.....	13
Appeal .....	14
De Novo Review .....	14
Termination of Parental Rights .....	15
Subject Matter Jurisdiction .....	15
Verified Petition/Motion.....	15
Subject Matter vs. Personal Jurisdiction: Nonresident Parent .....	16
Ineffective Assistance of Counsel .....	17
Adjudicatory Hearing .....	18
Motion to Continue.....	18
Adjudication .....	18
Standard of Proof; Appellate Remedy .....	18
Neglect .....	19
Neglect; Abandonment.....	25
Failure to Make Reasonable Progress.....	26

Failure to Pay Reasonable Portion of Cost of Care .....	27
Willful Abandonment.....	28
Aiding and Abetting Murder of Child.....	31
Best Interests .....	32
G.S. 7B-1110(a) Factors.....	32
Likelihood of Adoption.....	33
Parent-Child Bond .....	33
Relative Placement .....	34
Dispositional Alternatives .....	35
Adoption .....	36
Consent: As Applied Constitutional Challenge .....	36
Civil Case Related to Child Welfare.....	37
UCCJEA .....	37
Unjustifiable Conduct.....	37

## Indian Child Welfare Act (ICWA)

### Reason to Know Child is an “Indian Child”

[In re C.C.G.](#), 2022-NCSC-3

#### **Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected. At a permanency planning hearing, the court ordered no visitation with mother and concurrent permanent plans of adoption and custody or guardianship. DSS filed a TPR petition. At the TPR hearing, mother was not present and her attorney requested a continuance, which was denied. The TPR was granted and mother appeals, challenging the denial of her motion to continue, noncompliance with the requirements of the Indian Child Welfare Act (ICWA), and the denial of visits in the permanency planning order. This summary focuses on ICWA.
- 25 CFR 23.107(c) addresses when a trial court has reason to know a child is an “Indian child,” which is defined as a child who is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. 1903(4).
- The inquiry as to whether a child is an Indian child focuses on (1) whether the child is a citizen of a tribe or (2) whether the child’s parent is a citizen of a tribe and the child is also eligible for citizenship. (*relying on* In re M.L.B., 377 N.C. 335 (2021)). Documents relied on by mother to support the argument the court had reason to know the child is an Indian child refer to a possible distant Cherokee relative on the mother’s side and mother reporting Cherokee Indian Heritage. These documents do not state the child is an Indian child and do not include

information that indicates the child or her biological parents are members/citizens of an Indian tribe. “Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political.” Sl.Op. ¶ 19. The court did not have reason to know the child was an Indian child under 25 C.F.R. 23.107(c).

- *Author’s Note:* This opinion appears to supersede by implication the court of appeals opinions that hold erring on the side of caution, ancestry with an Indian tribe is reason to know. *See, e.g., In re A.P.*, 260 N.C. App. 540 (2018); *In re K.G.*, 270 N.C. App. 423 (2020).
- The mandatory inquiry about the child’s status as an Indian child was made in the underlying neglect proceeding, where the court determined there was no reason to know the child was an Indian child. There is nothing in the record that indicates the court made the inquiry at the TPR hearing. Since the record shows there is no reason to know the child is an Indian child, the court did not commit reversible error in not making the inquiry at the TPR hearing.

## Abuse, Neglect, Dependency

### Adjudication

Neglect: Drug Screen as Business Record

In re K.H., 2022-NCCOA-3

#### **Held: Affirmed**

- Facts: A petition alleging a neglected 10-month-old juvenile was filed by DSS based on lack of proper care and supervision and an injurious environment due to substance use by the parents and overdoses in the juvenile’s home by grandmother. At the adjudicatory hearing, testimony was received from the DSS social worker, a paramedic, a police officer, and an employee of a drug screening company. Objections to the admission of the child’s and both parents’ positive drug test results were made. The court allowed the admission of the results with the testimony of the employee of the drug screening company, who the court determined was an expert about how tests were performed and in analyzing the results. Evidence showed the juvenile was crawling and pulling up and that there were drugs and drug paraphernalia in the home. The juvenile was adjudicated neglected, and the initial dispositional order continued custody of the juvenile with DSS. Parents appeal.
- Hearsay evidence is excluded unless it meets a statutory or rules of evidence exception. Rule 803(6) allows for a business records exception, which includes a report of conditions or diagnoses made at or near the time or from information transmitted by a person with knowledge if the record is kept in the course of regularly conducted business activities and it was the regular practice of that business to make the report. A business record does not need to be authenticated by the person who made it and may be authenticated by testimony from the records’ custodian or other qualified witness or by an affidavit or document under seal that is made by the records’ custodian or other qualified witness. An other qualified witness is someone who is familiar with the business entries and the system that they are made.
  - The employee of the drug screen company was a qualified witness. He was the custodian of the company’s records, which the company maintains under its policy for 12 months. He testified to the process of collecting the sample, the chain of custody of the sample when sent to an outside lab, and the receipt of the lab report. Although he

did not personally perform the drug test, which was sent to an outside lab, he was familiar with the business entries and system under which they are made. The testimony showed the records were made by someone with knowledge and were transmitted and retained in the course company's and outside lab's regularly conducted business activities. There was no error in admitting the drug test reports.

- For a juvenile to be adjudicated neglected based on an injurious environment, there must be evidence that there is harm of a substantial risk of harm to the juvenile. The positive drug test results (marijuana, meth, opiates, morphine, and heroin) for the juvenile demonstrates the juvenile suffered harm. Although a parent's substance abuse alone is not neglect, unchallenged findings show a substantial risk of harm to the juvenile resulting from the parents' substance use when he was at risk of exposure to the drugs and drug paraphernalia.
- At disposition, "[t]he district court has broad discretion to fashion a disposition from the prescribed alternatives...based upon the best interests of the child." Sl.Op. ¶128. There was no abuse of discretion when the trial court continued the juvenile's placement with relatives as findings showed the child was thriving in his placement, and mother although starting to work her case plan and making some progress, only visited the child 5 times, had 2 positive drug screens, refused drug screens, and attended less than half of her classes.

Evidence: Expert Testimony; Hearsay in CME

In re A.W., 2022-NCCOA-282

**Held: Affirmed**

- Facts: Father appeals an adjudication of his two daughters based upon sexual abuse, arguing the court erred by admitting over his objection a child medical exam (CME) that contained hearsay and allowing an expert to testify over his objection that her diagnosis was the child was a victim of sexual abuse. DSS was contacted in 2019 after the two sisters reported sexual abuse by their father to father's girlfriend. There were prior incidents of sexual abuse, with an earlier report made in 2013 which resulted in a CME. In the most recent disclosure, a second CME was conducted and consisted of forensic interviews and a physical exam. During the physical exam, the doctor found a tissue tag in one of the girl's vagina's and in determining whether it was indicative a trauma compared the physical exam to that of the 2013 CME where no tag was noted.
- Expert Opinion regarding Child Sexual Abuse: Admissibility of expert testimony is reviewed for an abuse of discretion. Although the rules of evidence apply to adjudication hearings, the impact of improper expert testimony is distinguishable from criminal trials. Rather than a jury, the court hears the evidence and is presumed to disregard incompetent evidence. A reversal based on the admission of incompetent evidence results only if there is prejudice, which the appellant must show that the trial court improperly relied on the expert's assessment of the victim's credibility. Unlike the criminal opinions relied upon by father (*State v. Stancil* and *State v. Grover*), in this case the expert relied on physical evidence as well as the child's disclosure. The physical evidence of the tissue tag was consistent with the child's statements as to what occurred. Although the expert testified on cross-examination that she would have made the same diagnosis if the tissue tag was not present, which was an inadmissible bolstering of the victim's credibility, father cannot object to testimony his own counsel elicited on cross. There was no

prejudice as father did not show the court improperly considered the expert's bolstering of credibility.

- Hearsay: The CME was admitted over father's objection after the court determined it met the hearsay exceptions for statements made for the purpose of diagnosis and treatment (Rule 803(4)) and a regularly kept business record (Rule 803(6)). Because father only challenged the admission under Rule 803(4), the unchallenged ground as a business record exception remains. The court did not err.

#### Neglect: Relevancy of Other Juvenile Who Was Neglected

In re J.C., 2022-NCCOA-377

##### **Held: Affirmed in Part, Remanded**

- Facts: After a physical altercation between the parents, DSS filed a petition alleging neglect for a juvenile. The parent's older children were already in DSS custody, which the court relied upon in part in adjudicating the juvenile neglected. After the adjudication, the court entered a dispositional order that continued the child in DSS custody, placed the child with a relative out-of-state, and ordered supervised virtual visitation only. Respondents appeal. This summary focuses on the adjudication.
- The findings of fact are not challenged and are binding on appeal. The court's conclusion is supported by the findings. Neglect allows the court to consider whether the juvenile lives in a home where another juvenile has been neglected or abused by an adult who regularly lives in the home. That fact alone is not sufficient to support an adjudication of neglect but requires other factors that suggest the abuse or neglect will be repeated. Those factors include domestic violence, substance use, refusal to engage in services or work with DSS, and failing to accept responsibility for prior adjudications. Here, the older children were in DSS custody, and the court found the parents engaged in a physical altercation, refused to allow DSS to access the juvenile as required by the case plan, did not complete DV classes as ordered in the other neglect action.

#### Neglect; Dependency: Findings

In re K.W., 2022-NCCOA-162

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

- Facts: DSS filed a petition alleging 3 children were neglected and dependent based on circumstances involving the parents' mental health, improper care and supervision, injurious environment, parenting skills, and housing instability. The children share the same mother but only 2 children share the same father. The children were adjudicated, and father appeals the adjudication of his 2 children.
- Evidence about mother's mental health and drug use was introduced and some showed her behavior adversely affected the children, but the findings did not address how these issues impacted the children. Evidence of improper care and supervision and an injurious environment relate to mother's treatment of her one child who is not subject to this appeal and did not address how the other children were affected. Unchallenged findings could be sufficient to for the court to adjudicate neglect. Father focused on favorable findings only. The trial court did not

sufficiently address in its findings the impact on father’s children but focused more on mother’s one child. The trial court must determine the credibility of witnesses and weight of the evidence. Further, housing instability without evidence that it impacts care and supervision or exposed the children to an injurious environment cannot support a conclusion of neglect.

- When questioned about her illegal drug use, mother invoked her 5<sup>th</sup> Amendment right. Because this is a civil proceeding, the court could infer her answers would be damaging. “The privilege against self-incrimination is intended to be a shield and not a sword.” Sl. Op. ¶16. Mother cannot use it as both when asserting the 5<sup>th</sup> amendment right to curtail DSS’s ability to prove she was unfit.

In re R.B., 2021-NCCOA-654

**Held: Reversed and remanded in part; reversed in part**

- Facts: Mother has a history of depression and anxiety, which she sought help for. She had difficulty caring for her son and contacted law enforcement once and friends over a period of time for assistance in caring for him. At one point when the child was with mother, mother texted a friend that she wanted to hurt her child, hated him, and that she was having great difficulty. Her friend took the juvenile for a week after receiving the text messages and then returned the child to mother. A week after the text messages were sent, DSS started an assessment. During the assessment, mother refused to allow the social worker to enter her home. However, a community behavioral health counselor was with the social worker, and mother allowed the counselor to enter her home and talked with the counselor. The counselor determined that mother was not in not of an involuntary commitment. DSS filed a petition and obtained nonsecure custody of the child that same day. The child was placed in foster care and then returned to mother’s residence while her mother (grandmother) remained in the residence to supervise. At hearing, mother and the friend testified. The text messages were introduced. The juvenile was adjudicated neglected and dependent. Mother appeals.
- An adjudication “determine[s] the existence of the juvenile’s condition as alleged in the petition.... the court’s decisions must often be ‘predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child bason on the historical facts of the case.’ ” Sl.Op. ¶18 (quoting In re E.P.-L.M., 272 N.C. 585, 593 (2020)).
- An adjudication order must contain appropriate findings of fact and conclusions of law. G.S. 7B-807(b). Findings of fact must be more than a recitation of the allegations in the petition. There must be specific ultimate facts that are sufficient for an appellate review. “Ultimate facts are the final resulting effect reached by processes of logical reasoning from evidentiary facts.” Sl.Op. ¶17. “Although it is ‘not *per se* error for a trial court’s fact findings to mirror the wording of a petition,’ the trial court is mandated to find ‘the ultimate facts necessary to dispose of the case.’ ” Sl.Op. ¶22. When the court only recites the allegations, the court fails to make its own ultimate findings.
- A neglected juvenile must have experienced or be at substantial risk of some physical, mental, or emotional impairment as a result of a parent’s lack of proper care, supervision, or discipline or the injurious environment the juvenile is residing in. “ ‘[T]he circumstances and conditions surrounding the child,’ not ‘the fault or culpability of the parent,’ are ‘what matters.’ ” Sl.Op. ¶18 (quoting In re Z.K., 375 N.C. 370, 373 (2020)).

- There are no findings of fact regarding harm or substantial risk of harm to the juvenile. If evidence supports such a finding, there is no error. Some of the findings were not supported by competent evidence. The testimony of mother and friend were that they did not take the text messages literally. There is no evidence of harm and there were no findings of a substantial risk of future harm to the juvenile. The text messages by themselves are not clear and convincing evidence of a substantial risk of harm. Although a trial court is in a better position to determine witness credibility, the ultimate findings were not made. Reversed and remanded to make additional findings that may support the conclusion.
- Concurrence in result only. The majority ignored evidence that supported a finding of substantial risk of harm to the juvenile and stepped into the shoes of the trial court to determine witness credibility and the weight to give the evidence.
- To adjudicate dependency the court must make findings on both prongs of the definition: the parent has an inability to provide care or supervision and lacks an appropriate alternative child care arrangement. There was no evidence or findings that mother lacked an appropriate alternative child care arrangement. Reversed.

## Abuse; Dependency

In re W.C.T., 2021-NCCOA-559

### **Held: Affirmed**

- Facts: This case involves 3 children, the youngest whom suffered second- and third-degree burns when he was 3 months old and was being watched by his paternal grandmother, with whom the parents and children lived. The infant's injuries were not witnessed but various inconsistent and implausible explanations were provided. DSS became involved and ultimately filed a petition alleging the infant was abused, neglected, and dependent and his 2 siblings were neglected and dependent. After hearing, the juveniles were adjudicated as alleged. At initial disposition, the children were placed in DSS custody. Both parents appeal. Mother challenges disposition as well as adjudication.
- A juvenile is abused when a parent, guardian, custodian, or caretaker inflicts, allows to be inflicted serious physical injury by nonaccidental means or creates or allows to be created a substantial risk of such injury. G.S. 7B-101(1)(a)-(b). Adjudications of abuse have been affirmed when non-accidental injuries are not explained and the "findings of fact support the inference the respondents are responsible for the unexplained injury by clear and convincing evidence...." Sl.Op. ¶130.
  - Distinguishing this case from *In re K.L.*, 272 N.C. App. 30 (2020) where the adjudication was reversed, there is no dispute that the injuries occurred when the children were in the exclusive care of their caretaker, and the unchallenged findings of fact support the inference that the injury was caused by non-accidental means. There is no requirement that witness testimony is required to support a finding that an injury was caused by non-accidental means.
  - The court's unchallenged findings included an over 1.5 hour delay in seeking medical care for the infant's burns, the initial explanation being conspired by the parents and paternal grandmother, multiple inconsistent explanations for the cause of the injury, red flags of potential domestic abuse by grandmother and grandmother's volatile

behavior, and the children having been left without supervision. The findings support the conclusion of neglect.

- A juvenile is dependent when they are in need of assistance or placement and their parent, guardian, or custodian is unable to provide care and supervision and lacks an appropriate alternative child care arrangement. G.S. 7B-101(9).
  - The findings were unchallenged and are binding on appeal. The findings support the court's conclusion of dependency. They include the respondents' lack of care and supervision which resulted in one child's severe injuries, the respondents inability to provide an alternative child care arrangement prior to DSS filing its petition, the failure to meet one child's educational needs, and failure to meet the children's medical needs.

## Initial Disposition

### Reasonable Efforts; Visitation

#### In re N.L.M., 2022-NCCOA-335

##### **Held: Affirmed**

- Facts: This case involves 4 children; one of whom was adjudicated abused and neglected, the other 3 neglected. The child who was abused was underweight and severely malnourished requiring hospitalization, had burn marks and scars on her body, and was reported to be left alone for hours on the toilet and limited to remaining in her room. The other children witnessed the mistreatment of their sibling. Domestic violence and illegal substance use occurred in the home. Pending the adjudication, the parents visitations were suspended. At the initial disposition, the court continued the children's custody with DSS, placement with a relative, and no visits. Mother appeals arguing DSS failed to provide reasonable efforts and both parents appeal the visitation order.
- Reasonable Efforts is a conclusion of law. G.S. 7B-903(a3) requires the order to specify findings about whether DSS made reasonable efforts to prevent the need for placement. Reasonable efforts is defined at G.S. 7B-101(18) as the "diligent use of preventative or reunification services by [DSS] when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." Sl.Op. ¶13. Federal regulations include a nonexhaustive list of reasonable efforts: "crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker...." *Id.*
  - The unchallenged findings are binding on appeal and support the court's conclusion that reasonable efforts were made. They include placement in a court-approved kinship placement; a transitional living plan for the 14 year old; mental health treatment for a juvenile; referrals to services for parenting, mental health assessment and services; substance use assessment and services; random drug screens; domestic violence services and follow-up and records requests from the referred to service providers. Mother refused all services.
- Mother also argues the court denied her due process by holding the hearing. However, mother never requested a motion to continue and affirmatively stated she was ready to go forward.
- Mother argues the court was biased because of its commentary such that she was denied a fundamentally fair procedure. This argument was not preserved for trial and is waived. Even if



not waived, the argument is without merit. “Trial courts have ‘broad discretionary power to supervise and control the trial’ which [the appellate court] will not disturb absent an abuse of discretion.” ¶21. The trial court’s remarks were made to all the parties and were based on the evidence it heard and were not biased against mother.

- Visitation: G.S. 7B-905.1 requires the court to address visitation when a juvenile’s placement continues. The court may order no visitation when it finds the parent has forfeited that right or it is in the child’s best interests. Both parents had pending criminal charges for the same incident resulting in the abuse adjudication. The court’s reference to the superior court criminal action was not a misapprehension of law regarding whether visits could be ordered. The court found DSS and the GAL did not recommend visits and the criminal charges were pending and being pursued. Previous opinions have affirmed a denial of visits when a parent has not complied with mental health treatment, substance use treatment, or have pending criminal charges arising from the abuse of the child. Father only complied with part of his case plan and had new drug charges. The court determined visitation was not in the children’s best interests. There was no abuse of discretion.
- Notice of right to review visitation: The court did not inform the parties of the right to review visitation but it scheduled a hearing 90 days later. This opinion recognized the General Assembly amended the statute, G.S. 7B-905.1(d), requiring notice when the court waives permanency planning hearings and retains jurisdiction (effective October 1, 2021). Although the court should have provided notice under the former statutory language, the error was harmless because of the scheduled hearing date.

## Visitation, Case Plan, Constitutional Rights

### In re W.C.T., 2021-NCCOA-559

#### **Held: Affirmed**

- Facts: This case involves 3 children, the youngest whom suffered second and third degree burns when he was 3 months old and was being watched by his paternal grandmother, with whom the parents and children lived. The infant’s injuries were not witnessed but various inconsistent and implausible explanations were provided. DSS became involved and ultimately filed a petition alleging the infant was abused, neglected, and dependent and his 2 siblings were neglected and dependent. After hearing, the juveniles were adjudicated as alleged. At initial disposition, the children were placed in DSS custody. Both parents appeal. Mother challenges disposition as well as adjudication.
- At disposition, the court has the authority to order a parent to take appropriate steps to remedy the conditions that led to the child’s adjudication or removal from the home. G.S. 7B-904(d1)(3). Mother was ordered to take steps that were reasonably related to the children’s removal. Showing proof of income is reasonably related to ensuring the children have adequate care and supervision to reduce the risk factors and ensure the children have a safe home. The provision that mother must refrain from allowing mental health to impact parenting is also reasonably related to the conditions that led to the children’s adjudication given mother conspiring to make an explanation for one child’s injury and the suspected domestic violence in the home.
- The court did not abuse its discretion when ordering 1 hour of supervised visits a week. The visitation schedule is consistent with the recommendations of DSS and the children’s guardian

ad litem. The court had a reasonable basis to limit mother's visitation and it authorized additional visitation time if agreed to by the foster family and mother.

- Neither mother nor her attorney raised her constitutional rights to parent at the dispositional hearing despite having an opportunity to do so as mother was on notice that guardianship had been recommended. Mother waived her right to raise this issue on appeal.

In re J.C., 2022-NCCOA-377

**Held: Affirmed in Part, Remanded**

- Facts: After a physical altercation between the parents, DSS filed a petition alleging neglect for a juvenile. The parents have older children that were in DSS custody, which the court relied upon in part in adjudicating the juvenile neglected. After the adjudication, the court entered a dispositional order that continued the child in DSS custody, placed the child with a relative out-of-state, and ordered supervised virtual visitation only. Respondents appeal, challenging the outline of visits, virtual visits only, and failure to notify them of the right to review. Father also challenges his case plan requirements of having to take a substance use assessment, participate in random drug screens, show proof of income, and maintain housing. This summary focuses on the case plan.
- Visitation orders are reviewed for an abuse of discretion.
- G.S. 7B-905.1(b) requires the court to establish a minimum outline of visits with duration and frequency and level of supervision. The order stated the parents shall have virtual visits very Thursday at 12 p.m. and incorporates previous orders. Although the order does not state the duration of the visit, the previous order that was explicitly incorporated sets out the frequency of one hour a week. When read together the orders comply with G.S. 7B-905.1(b).
- G.S. 7B-906.1(a) requires the court to address visitation when custody has been removed from a parent. No visits may be ordered. Visitation is based on the juvenile's best interests. Virtual visitation is not a replacement or substitute for visitation; instead, virtual visitation may be used to supplement visits. G.S. 50-13.2(e)(3); *In re T.R.T.*, 255 N.C. App.567 (2013). The findings of the court showed mother did not exercise her visits and visits would terminate if 2 visits were missed and that father missed his virtual visits. With the child's move to California, the court provided visitation that the parents would be able to reasonably comply with. By determining virtual visits were in the child's best interests, "the trial court necessarily concluded that in-person visitation would *not* be in [the juvenile's] best interests." Sl.Op. ¶ 19 (emphasis in original). The statute does not require an express finding that in-person visitation is inappropriate but instead provides that visitation be in the child's best interests, including no visitation.
- G.S. 7B-905.1(d) requires the court to inform that parties when permanency planning hearings are waived and the court retains jurisdiction that they have a right to file a motion to review the visitation order. Relying on *In re K.W.*, when the court fails to do so at an initial dispositional hearing, the remedy is remand to comply, not vacate.
  - *Author's note*: Effective October 1, 2021, the statute was amended to require the notice of a right to review only when there is a permanency planning order, further hearings are waived, and the court retains jurisdiction. *In re K.W.* was decided under prior statutory language that did not specify the circumstances under which the notice must be given.

- G.S. 7B-904.1(d1) authorizes the court to order a parent to take appropriate steps to remedy the conditions that led to or contributed to the juvenile’s adjudication or removal. There must be a nexus between the step the ordered and the condition that led to the adjudication, but the steps are not limited to only those that directly address the reason for adjudication or removal. The court “may order services which could aid in both understanding and resolving the possible underlying causes of the actions that contributed to the trial court’s removal.” Sl.Op. ¶ 33.
- The court did not abuse its discretion in order father to submit to a substance use assessment and drug screens. The adjudication was based in part on father stating the physical altercation was because mother was upset he was drinking. Substance use could have led to the domestic violence. Maintaining housing and showing proof of income were also related as the evidence of domestic violence and keeping DSS from accessing the juvenile suggest the respondents were not maintaining a safe and stable home.

## Permanent Plan

Americans w/ Disabilities Act (ADA); Visitation

In re A.P., 2022-NCCOA-29

### **Held: Affirmed in part, vacated and remanded in part (visitation)**

- Facts: The juvenile was adjudicated neglected based on circumstances involving a lack of proper care and supervision. Mother has an intellectual disability in the moderate range, is under a guardianship with her paternal aunt, and was not providing basic care for her infant (e.g., knowing how to change diapers). Mother also has depression and anxiety. Mother entered into and was working on a case plan with DSS. She completed a comprehensive psychological evaluation and was engaging in parenting classes with a parenting coach. Although arranged for by DSS, mother declined services for mental health treatment and from participating in an assisted living facility that would work with her on independent skills. Father was identified, and his paternity was established. The child was placed with him. At a permanency planning hearing, the court ordered legal and physical custody to father; 2 hours of supervised visitation every other weekend to mother, with father to determine the location and supervisor; and waived further hearings. Mother appeals. She raises the Americans with Disabilities Act (ADA) and her need for reasonable accommodations in her appeal.
- Title II of the ADA and Section 504 of the Rehabilitation Act “protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services.” Sl.Op. ¶ 17 (citation omitted). There is no dispute mother is a qualified individual with a disability for ADA and Section 504 purposes.
- DSS reasonable efforts: Relying on the holding of *In re C.M.S.*, 184 N.C. App. 488 (2007) related to a termination of parental rights, “[b]ecause the trial court in this case concluded ‘DSS has made reasonable efforts to reunify and eliminate the need for placement of the juvenile,’ it necessarily complied with the ADA’s directive that a parent not be ‘excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program.’” Sl.Op. ¶ 19.
  - The trial court’s conclusion of law re: DSS providing reasonable efforts is supported by its findings of fact, which include referrals for mother to complete her case plan, attempting to engage mother in services recommended by the psychological evaluation,

attempting to enroll mother in an assisted living facility that would provide training to mother on independent skills, monitoring mother's compliance and progress with her case plan, and assisting with supervised visits that had parenting skills teachers present. The findings were supported by competent evidence: social worker testimony, GAL and DSS reports, evaluator's assessment.

- ADA compliance and the adequacy of services. Mother waived her argument that the services offered by DSS were inadequate under the ADA because she did not timely raise the issue – either before or during the permanency planning hearing. Instead, she raised it for the first time on appeal. A claim of an ADA violation must be timely raised, meaning at the time the court adopts a service plan, so that reasonable accommodations can be made. *See In re Terry*, 240 Mich. App. 14 (2000); *see also In re S.A.*, 256 N.C. App. 398 (2017) (unpublished).
- The visitation order improperly delegates father “substantial discretion to decide the circumstances of Respondent-mother’s visits” – choosing the location and supervisor. Sl.Op. ¶ 49. Mother's argument that the order also fails to provide a reasonable accommodation is rejected as there was no support provided for that argument. The visitation order meets the minimum requirements of G.S. 7B-905.1 (frequency, length, supervision). However, father testified he didn't want to facilitate or supervise the visits and didn't want mother to be involved in their child's life. This is the scenario the court of appeals cautioned against in *In re Stancil*, 10 N.C. App. 545 (1971) – visitation should not be delegated to a custodian-parent when the parents have been unable to reach a satisfactory agreement about custody and visitation rights; granting the custodian-parent the authority to decide when, where, and under what circumstances a visit happens, could result in the other parent being completely denied their visitation rights.
- Like TPR proceedings, “abuse, neglect, and dependency proceedings are not ‘services, programs, or activities’ within the meaning of the ADA, and therefore, the ADA does not create special obligations in such child protection proceedings.” Sl.Op. ¶ 47. The trial court satisfied the statutory criteria of G.S. 7B-906.1(k) and 7B-905.1(d) when it waived further hearings and notified the parties of their right to file a motion to review the visitation plan. The ADA does not require regular hearings continue as it does not “change the obligations imposed by [these [G.S. 7B-906.1 and -905.1]] unrelated statutes.’ ” Sl.Op. ¶ 48.

#### Eliminate Reunification: Findings

In re A.W., 2021-NCCOA-586

##### **Held: Vacated and Remanded**

- Facts: In 2018, the juvenile was adjudicated neglected and dependent due to circumstances created by domestic violence between the parents. In 2019, there was a new incident of domestic violence requiring law enforcement involvement. Since that incident, no other reports of domestic violence occurred. During the pendency of this case, the parents had another child who remained in their home (a petition was filed but was subsequently dismissed). At a 2020 permanency planning hearing, the court ordered guardianship, which achieved a permanent plan for the child, and eliminated reunification. Both parents appeal.
- Standard of review for whether a parent’s conduct is inconsistent with their constitutional rights to care, custody, and control of their child is de novo. The court's determination that a parent is

unfit or has acted inconsistently with their constitutional rights must be supported by clear and convincing evidence. There is no bright line rule when making this determination but instead a case-by-case fact specific inquiry must be made. The “findings must reflect how the parents were unfit or acted inconsistently vis-à-vis the child.” Sl.Op. ¶122 (quoting *In re N.Z.B.*, \_\_\_ N.C. \_\_\_ ¶120). The finding must be made even when a juvenile has been previously adjudicated neglected and dependent.

- The court did not make the required findings, and conclusions to cease reunification efforts does not address whether a parent is unfit or acted inconsistently with their constitutional rights.
  - There are few findings of fact, and they primarily focus on the parents’ history of domestic violence and the general characteristics of domestic violence. There are no findings of how the either parent acted inconsistently with their constitutional rights. Evidence showed the visits were positive and appropriate. The social workers’ concerns about potential for ongoing domestic violence are lay opinion and not expert testimony and are not clear, cogent, and convincing evidence of unfitness or conduct inconsistent with parental rights. The baby who was born during the pending of this action was never removed from the parents, and there is no explanation for how the parents can be fit and proper for one child but not for another.
- Standard of review for eliminating reunification as a permanent plan and ceasing reunification efforts is an abuse of discretion. The court must make findings under G.S. 7B-906.2(b) and all four factors under G.S. 7B-906.2(d).
- The findings do not support the conclusion to eliminate reunification and cease reunification efforts.
  - The findings focus on the underlying domestic violence issues. Evidence shows the parents participated in the services that addressed domestic violence, attended visits that were going well, had another child who lived with the parents, and that there were no new reports of domestic violence within the last 12 months. “It is wholly inconsistent and inexplicable for an infant to be left in the care of Respondents, but for [this juvenile] to remain in a placement....” Sl.Op. ¶41.
  - The court did not make findings under G.S. 7B-906.2(d)(2) regarding the parent’s lack of cooperation with the plan, DSS, or the child’s GAL. Evidence showed respondents were reaching out to DSS. Regarding G.S. 7B-906.2(d)(3), evidence showed the respondents made themselves available by attending court session, visitations, and allowing home visits.

#### Eliminate Reunification; Visitation

In re C.C.G., 2022-NCSC-3

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected. At a permanency planning hearing, the court ordered no visitation for mother and concurrent permanent plans of adoption and custody or guardianship. DSS filed a TPR petition. At the TPR hearing, mother was not present and her attorney requested a continuance, which was denied. The TPR was granted and mother appeals, challenging the denial of her motion to continue, noncompliance with the requirements of the

Indian Child Welfare Act, and the denial of visits in the permanency planning order. This summary focuses on the denial of visitation and elimination of reunification.

- G.S. 7B-906.1(d)(2) requires the court to consider at review and permanency planning hearings whether there is a need to create, modify, or enforce the visitation plan. G.S. 7B-905.1 authorizes the court to order visitation that is in the child's best interests, including an order of no visitation. The court did not abuse its discretion in ceasing visitation between mother and child based on findings that showed the child's improved behaviors when not having contact with her mother; the child's regressed behaviors when having contact with her mother; mother's inappropriate behaviors at visits; and mother's failure to comply with the case plan. The findings were supported by the social worker's testimony, which is reliable evidence.
- Respondent's challenge to the court's finding that DSS made reasonable efforts for reunification when visitations did not occur is overruled. DSS repeatedly contacted and attempted to contact mother, including when she was in jail and mother refused to meet; maintained contact with the child and her placement providers; obtained an updated psychological evaluation for the child; coordinated a supervised visit for mother that mother cancelled; offered transportation assistance mother rejected; and conducted child and family team meetings. Court did not abuse its discretion in eliminating reunification as a permanent plan.

## Appeal

### De Novo Review

#### In re K.S., 2022-NCSC-7

##### **Held: Vacate and remand to court of appeals**

- Facts: In 2019, the juvenile was adjudicated dependent based on a stipulation agreement where the parties agreed to certain facts, including the allegations that led to the child's removal and prior adjudications of abuse, neglect, and dependency of the juvenile's older siblings, father's conviction of felony child abuse, and a recent verbal and physical altercation between mother and father with a sibling present. Mother reserved her right to argue the stipulated facts were not sufficient to support an adjudication of neglect. The social worker also testified at the hearing. The court adjudicated the juvenile dependent and dismissed the allegation of neglect. Mother appealed. DSS cross-appealed on the dismissal of the neglect claim. The court of appeals determined the trial court did not err in dismissing the neglect claim. The supreme court granted discretionary review of the dismissal of the neglect claim.
- A trial court's conclusions of law are reviewed de novo by the appellate court. A de novo review is when "the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." Sl.Op. ¶ 8 (citation omitted). The appellate court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Id.*
- The findings are based largely on agreed upon facts and are supported by sufficient evidence. Unchallenged findings are binding on appeal and are presumed to be supported by competent evidence. There is no reweighing of the evidence, and no deference is given to the trial court on a de novo review. The court of appeals was required to determine whether the facts support the conclusion that the juvenile was neglected as defined by G.S. 7B-101(15). The court of appeals

failed to conduct a proper de novo review, instead it gave improper deference to the trial court's conclusion of law.

## Termination of Parental Rights

### Subject Matter Jurisdiction

Verified Petition/Motion

[In re O.E.M.](#), 2021-NCSC-120

**Held: Vacated**

**Dissent, Barringer, J. joined by Newby, J. and Berger, J.**

- **Facts:** In 2018, DSS filed a properly verified neglect and dependency petition. The juvenile was adjudicated dependent and neglected. In 2020, DSS filed a TPR motion in the underlying neglect and dependency action. The motion was not verified. The TPR was granted, and respondent father appeals, challenging subject matter jurisdiction.
- **G.S. 7B-1104 states a TPR petition or motion "shall be verified."** This opinion relies on *In re T.R.P.*, 360 N.C. 588 (2006), which decided verification of an A/N/D petition was jurisdictional as it was a matter of substance and not form given the resulting interference by DSS with a parent's constitutional rights to parent. The verification requirement of G.S. 7B-1104 is also jurisdictional for a TPR petition or motion. The language "shall be verified" is plain and unambiguous and applies to both a TPR petition and motion. The difference between a TPR petition or motion regarding the verification requirement is not legally significant. It is not redundant to require a verification to a TPR motion since new allegations regarding the parent's conduct are required and are not included in the initial A/N/D petition. The Juvenile Code balances the best interests of the child as paramount with parent's constitutional due process rights, and the verification requirement satisfies that balance. Jurisdiction in an A/N/D case does not, standing alone, give the court jurisdiction over a subsequent TPR proceeding. Failure to verify a TPR motion is a fatal jurisdictional defect.
- **Dissent:** *In re T.R.P.* recognized an A/N/D action was "one continuous juvenile case with several interrelated stages, not a series of discrete proceedings." Sl.Op. ¶137. The court's subject matter jurisdiction was established when the neglect and dependency action was commenced with a properly verified petition. Verification of a motion in the A/N/D action as a jurisdictional requirement is not justified. Jurisdictional requirements for a TPR are set forth in G.S. 7B-1101, which does not address the need to verify a TPR motion, and G.S. 7B-1104 does not mention jurisdiction. Verification of a TPR motion in the underlying cause is a procedural requirement and is not jurisdictional.

[In re C.N.R.](#), 2021-NCSC-150

**Held: Affirmed**

- **Facts:** A neglect petition was filed, and the juveniles were adjudicated neglected. After adoption was identified as the primary permanent plan, DSS filed a motion to TPR in the neglect proceeding, on July 2, 2020. The TPR granted, and respondent parents appeal, challenging subject matter jurisdiction. The DSS director and notary public the petition was verified before

did not include the date of the verification. The petition stated “sworn to and subscribed before this \_\_\_ day of May, 2020”. Sl. Op. ¶ 11. Further, the petition was signed by the DSS attorney on June 30, 2020 and filed on July 2, 2020.

- Subject matter jurisdiction is a question of law that is reviewed de novo and may be raised at any time in the proceeding, including on appeal. The appellate court presumes a trial court properly exercises jurisdiction unless the party who challenges jurisdiction meets their burden of proof that the court did not have jurisdiction.
- G.S. 7B-1102 authorizes a TPR to be filed as a motion in an underlying abuse, neglect, or dependency proceeding, and G.S. 7B-1104 required the motion be verified. Citing *In re O.E.M.*, 2021-NCSC-120, the motion must be properly verified for the court to have subject matter jurisdiction over the TPR.
- The Juvenile Code does not specify the method of verification that is required by either G.S. 7B-403 (abuse, neglect, dependency petition) or 7B-1104 (TPR). The supreme court relies on Rue 11 of the NC Rules of Civil Procedure, which requires an affidavit that is “confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.” Sl. Op. ¶ 16 (citation omitted). A notary public is authorized to take an affidavit to verify a pleading. G.S. 1-148. There is nothing in Rule 11 or G.S. 1-148 that requires the date the verification was made or that the verified pleading be notarized. G.S. 1-148 does not require that the affidavit for verification be certified by a notary pursuant to the more formal provisions of G.S. 10B-1 through -146 that applies to a notarial certificate.
- The director signed the verification form as did the notary public, and the form included the notarial stamp and date upon which the notary’s commission expired. G.S. 10B-40(d) requires substantial compliance with the form under G.S. 10B-43, and one provision includes the date of the oath or affirmation, which was not done here. Further, G.S. 10B-99 “contains a savings clause that accords a ‘presumption of regularity’ to notarized documents despite the existence of minor technical defects in the notarial certificate” as opposed to fraud or a deliberate violation of the Notary Public Act. ¶ 19. There is no evidence in the record of fraud or a deliberate violation of the Act. There was substantial compliance.
- Although the date the attorney signed the motion was after the verification date of \_\_\_ May, 2020, the appellate court does not assume the parents’ argument that the verification occurred before the motion was finalized is accurate. The dates may have been a clerical oversight. For a TPR, the significant date is the date the motion is filed not the date the petition is signed or verified. As such, neither Rule 11 nor G.S. 1-148 requires the verification occur at the same time as or after the pleading is signed.

#### Subject Matter vs. Personal Jurisdiction: Nonresident Parent

##### In re A.L.I., 2022-NCSC-31

###### **Held: Affirmed**

- Facts: Mother filed a TPR petition against respondent father. Father is and has been incarcerated in New York since 2017. Father wrote letters to the court, was represented by court appointed counsel, and participated in the TPR remotely. The TPR was granted, and father appeals. The sole issue is whether the trial court had subject matter jurisdiction under G.S. 7B-1101 based on the service language that applies to nonresident parents. Father argues the



record does not show he was served with a summons. The Supreme Court, for purposes of this appeal, assumed he was not properly served.

- G.S. 7B-1101 states “before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find ... that process was served on the nonresident parent.” This language relates to personal jurisdiction and not subject matter jurisdiction. “A parent’s status as a nonresident does not alter the fact that arguments of insufficient service of a summons pertain to personal jurisdiction rather than subject matter jurisdiction.” Sl.Op. ¶ 9.
- Citing two prior opinions – *In re K.J.L.*, 363 N.C. 343 (2009) and *In re J.T.*, 363 N.C. 1 (2009) – personal jurisdiction, not subject matter jurisdiction, is impacted by deficiencies in the issuance or service of a summons. A summons does not impact subject matter jurisdiction. Unlike subject matter jurisdiction, the defenses related to personal jurisdiction (e.g. insufficient service of process) can be waived. Father waived this defense when he made a general appearance through his letters to the court, remote participation, and representation by counsel, without objection.

### Ineffective Assistance of Counsel

In re Z.M.T., 2021-NCSC-121

**Held: Affirmed**

**Dissent, Earls, J.**

- Facts: The juvenile was adjudicated neglected and ultimately, DSS filed a TPR motion. Notice was sent to mother’s attorney, who represented her in the underlying neglect action. The TPR motion was scheduled for the same day as a previously scheduled permanency planning hearing. Mother did not appear for the hearing, and her attorney requested a continuance, which was denied. At hearing, two witnesses were presented, neither of which were cross-examined by mother’s attorney. Mother did not present witnesses or make a closing argument. The TPR was granted, and mother appeals raising ineffective assistance of counsel.
- In a TPR, parent’s have a statutory right to counsel, which must be effective assistance of counsel. See G.S. 7B-1101.1. Ineffective assistance of counsel (IAC) requires a two-part test: (1) the counsel’s performance must be deficient and (2) that deficiency must be severe enough to deprive the respondent of a fair hearing (would there be a different result).
- Mother does not argue and cannot show that she was prejudiced by her attorney’s performance.
- Dissent: The case should be remanded for further factfinding to ensure that there is an adequately developed record. Counsel’s performance appears to have deprived the mother of a record for the appellate court to review whether the performance was deficient or that mother was prejudiced by it. A TPR is different from a criminal proceeding where a defendant can challenge the fairness of a proceeding through a motion for appropriate relief and so the parent does not have the same opportunity to develop a factual record to support their IAC claim.

## Adjudicatory Hearing

### Motion to Continue

#### In re C.C.G., 2022-NCSC-3

##### **Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected. At a permanency planning hearing, the court ordered no visitation for mother and concurrent permanent plans of adoption and custody or guardianship. DSS filed a TPR petition. At the TPR hearing, mother was not present and her attorney requested a continuance, which was denied. The TPR was granted and mother appeals, challenging the denial of her motion to continue, noncompliance with the requirements of the Indian Child Welfare Act (ACT), and the denial of visits in the permanency planning order. This summary focuses on the motion to continue.
- A motion to continue is reviewed for an abuse of discretion, unless a constitutional issue is raised (which was not the case here). The respondent must show the denial was erroneous and she was prejudiced as a result of the denial. The respondent also has the burden of showing the grounds for a continuance existed, which for a TPR requires “extraordinary circumstances when necessary for the proper administration of justice.” G.S. 7B-1109(d).
- Mother asserts she did not receive notice of the hearing. Mother was represented by an attorney and had a Rule 17 GAL appointed to her. Notice was sent to both her attorney and GAL, both of whom were present for the TPR hearing. Mother did not meet her burden, when offering to the trial court only unsworn statements and argument from her attorney and GAL that a continuance was needed since mother was not present. Mother did not show prejudice, as no assertion that mother intended to testify and no offer of proof of her potential testimony was made. There is nothing to show the testimony would have impacted the outcome.

## Adjudication

### Standard of Proof; Appellate Remedy

#### In re J.C., 2022-NCSC-37

##### **Held: Reversed and Remanded**

- **Facts:** As part of an underlying neglect action, DSS filed a TPR petition naming both parents as respondents. At the TPR hearing, DSS asked the court to find the alleged grounds existed “beyond a reasonable doubt.” After hearing, the court announced it was finding two of the three alleged grounds and directed DSS to make findings of fact “based on the evidence presented.” The court did not announce the standard of proof it was applying. The TPR order stated the findings of fact were made “by a preponderance of the evidence.” Both parents appealed, challenging the standard of proof and arguing what the remedy should be.
- G.S. 7B-1109(f) requires that adjudicatory findings in a TPR be made by clear, cogent, and convincing evidence. The U.S. Supreme Court determined this standard protects a parents’ constitutional due process in a TPR proceeding. *Santosky v. Kramer*, 455 U.S. 745 (1982). However, there is no reversible error when the TPR order fails to state the standard of proof if it explicitly announced the standard of proof at the TPR hearing; the court must *either* announce the standard in open court or state the standard in its written order. *In re B.L.H.*, 376 N.C. 118 (2020).

- Here, the order “overtly states the wrong standard of proof – a standard which is not only less than that required by statute but one which has also been held to be constitutionally insufficient to support the permanent severance of the parent-child relationship.” Sl.Op. ¶ 9. That distinguishes this case from *In re M.R.F.*, 378 N.C. 638 (2021), where the order was silent as to the standard of proof applied. The application of the wrong standard is statutory error.
- In determining the appropriate corrective measure, the supreme court considered (1) respondents’ argument that under *Santosky*, the TPR should be vacated, ending the case and (2) DSS’s and the GAL’s argument that the case should be remanded for the court to enter findings of fact under the correct standard.
  - *Santosky* is not controlling because the U.S. Supreme Court did not discuss the evidence before the N.Y. trial court, and this case falls under N.C. precedent addressing G.S. 7B-1109(f) “regarding the pivotal impact that the record evidence under appellate review has in the resolution of an appeal where a trial court has committed error regarding a standard of proof.” Sl.Op. ¶ 14. Remand is appropriate unless “the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.” Sl.Op. ¶ 16 (emphasis in original) quoting *In re M.R.F.*, 378 N.C. 638, ¶ 26. The supreme court cannot conclude the record meets the exception for remand; therefore, the case is reversed and remanded for “consideration of the record before it in order to determine whether DSS has demonstrated by clear, cogent, and convincing evidence that one or more statutory grounds exit to permit termination of parental rights.” Sl.Op. ¶ 16.

## Neglect

### In re G.D.C.C., 2022-NCSC-4

#### **Held: Affirmed**

- Facts: In 2016, the juvenile was adjudicated neglected and dependent. In 2019, DSS filed a TPR petition, which was granted by the district court. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(1) authorizes a termination of parental rights on the grounds of neglect, which involves a parent not providing proper care, supervision, or discipline to their child or creating a injurious living environment for the child’s welfare. When there is a long period of separation between the child and parent, the court must look to past neglect (which may be an adjudication of neglect) and the likelihood of future neglect, which is based on evidence of changed conditions regarding the parent’s fitness to care for the child and the child’s best interests at the time of the TPR hearing.
- The unchallenged findings support the court’s conclusion of a likelihood of future neglect. Mother refused to believe a sibling’s claims of sexual abuse by the father and caused emotional harm to that child as a result. Mother stopped attending therapy, did not know whether this juvenile should be around her father, did not acknowledge the children’s special needs, and lacked insight into the issues the resulted in DSS’s involvement and her responsibility in contributing to that involvement.
- “Respondent’s completion of her case plan does not preclude a determination that neglect is likely to recur.” Sl.Op. ¶ 15. The issues causing the child’s removal remained as mother had not

gained knowledge from her case plan to resolve the issues and still could not protect her children and provide a safe environment for them.

[In re J.R.F.](#), 2022-NCSC-5

**Held: Affirmed**

- **Facts:** In 2018, the juvenile was adjudicated neglected based on circumstances involving parent’s substance use, domestic violence, mental health issues, parenting deficits, and housing instability. In 2020, DSS filed a TPR petition, which was granted. Father appeals, challenging the grounds and best interests determination.
- G.S. 7B-1111(a)(1) authorizes a termination of parental rights on the grounds of neglect, which involves a parent not providing proper care, supervision, or discipline to their child or creating a injurious living environment for the child’s welfare. When there is a long period of separation between the child and parent, the court must look to past neglect (which may be an adjudication of neglect) and the likelihood of future neglect, which is based on evidence of changed conditions regarding the parent’s fitness to care for the child and the child’s best interests at the time of the TPR hearing.
- The findings support the likelihood of future neglect. Any progress father made did not begin until 1–2 months before the TPR hearing when his child was in DSS custody for almost 2 years. His progress had not been maintained for a sufficient period of time to show the conditions that led to the child’s adjudication were ameliorated.
  - Although father had stable employment, which was a case plan goal, he did not obtain stable housing that was suitable for his child, which was another component of his case plan. He lived in 4 residences in the last 12 months and the current residence was in need of repairs.
  - Father did have some progress addressing his substance use as of the month before the TPR hearing, but father ignores the numerous findings addressing his substance use history throughout the case – multiple positive drug screens for buprenorphine, methamphetamines, amphetamines, and cocaine; his refusal to take other drug screens knowing they would be positive; failing to complete therapy; underreporting his substance use history at intake; and declining intensive outpatient therapy.
  - Domestic violence continued to be an issue throughout the case. Father did not complete a domestic violence offender program, having been discharged the first time for missing sessions. Although he started attending for a second time and was insightful and sincere, his progress didn’t begin until 2 months before the TPR hearing, which was an insufficient period of time to compel the court to find he had made adequate progress such that there was not a likelihood of future neglect based on domestic violence.

[In re R.G.L.](#), 2021-NCSC-155

**Held: Affirmed**

- **Facts:** In 2018, the juvenile was adjudicated neglected due to circumstances of a lack of proper care and supervision because of parents’ substance use and housing concerns. DSS filed a TPR motion in 2020 after the primary permanent plan of adoption was identified. The TPR was granted, and father appeals. Father challenges the findings of fact as being verbatim recitations

of the allegations in the TPR motion and as conclusory and as unsupported by the evidence. Father challenges the grounds and best interests determination. This summary focuses on the grounds.

- Rule 52 does not require a recitation of the evidentiary and subsidiary facts to prove the ultimate facts but does require specific findings of the ultimate facts that are established by the evidence (including admissions and stipulations) that are determinative of the questions involved in the action and are essential to support the conclusion of law.
- There are differences between the court's findings and the allegations in the TPR motion, showing the court independently reviewed and judged the evidence. The findings show the court's reasoning for its conclusion regarding the grounds of neglect and failure to make reasonable progress to correct the conditions that led to the child's adjudication as father failed to engage in services and continued to use substances.
- In challenging specific findings as unsupported by the evidence, other unchallenged findings are binding on appeal. Evidence also supported the challenged findings regarding DSS efforts for reunification including referrals to substance abuse treatment and parenting skills, requests for random drug screens, supervision for the visits with the child, providing a housing list to assist in finding housing, quarterly meetings with the parents to review the case plan, and contact by the DSS social worker to father's doctor. Although the evidence does not support the finding that father did not avail himself of services, evidence does support other findings that father initially made progress but then faltered and did not fully utilize the services DSS did offer and was unwilling to work with DSS. Similarly, evidence does not support the findings that father did not create a bond with his child. Unsupported findings are disregarded.
- Under G.S. 7B-1111(a)(1), neglect is a ground for TPR. When a parent has been separated from their child for a long period of time, there must be evidence of past neglect and a likelihood of a future neglect based on evidence of changed circumstances between the past neglect and time of the TPR hearing.
- A parent's failure to make progress on a case plan is indicative of a likelihood of future neglect. The evidence shows the child's prior neglect was based on circumstances created by both parents failure to provide proper care and supervision because of their substance use. Father only partially engaged with the case plan to address these issues. There was a likelihood of future neglect.

In re A.L.A., 2021-NCSC-148

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent due to circumstances involving conflict between mother and grandmother, who were living together, substance use, and lack of appropriate care and supervision. After the court determined mother made minimal progress on her case plan, adoption was identified as the primary permanent plan. DSS filed a TPR petition, which was granted. Mother appeals the grounds.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, and a juvenile is neglected when they do not receive proper care, supervision, or discipline from a parent or live in an injurious environment. When a parent has been separated from their child for a long period of time, there must be evidence of past neglect and a likelihood of a future neglect based on evidence of changed circumstances between the past neglect and time of the TPR hearing.

- The challenged findings are supported by the evidence – the DSS social worker’s testimony. The findings support the determination there is a likelihood of future neglect as mother continued to reside with grandmother, did not submit to 18 drug screens, tested positive on two, and only attended 28 of 77 visits. Regarding her being overwhelmed in managing multiple children, she signed relinquishments for 2 of her other children the day before the TPR hearing, but she could still revoke those relinquishments at the time of the TPR hearing.

In re L.G.G., 2021-NCSC-139

**Held: Affirmed**

- Facts: The children were adjudicated neglected. The circumstances involved domestic violence, substance use, lack of appropriate care and supervision including a failure to provide necessary medical and dental care, and unsafe and unclean housing conditions. The parents were ordered to comply with a case plan and eventually started making progress. However, their compliance with the case plan was inconsistent. Once in care, the children started showing sexualized behaviors and made disclosures, which the parents did not believe. The children’s behaviors started regressing after visits. Reunification efforts and reunification were eliminated, and adoption was identified as the primary plan. DSS filed a TPR motion. The TPR was granted, and respondents’ appeal the adjudication; father also appeals the best interests determination regarding the oldest child.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent who does not provide proper care, supervision, or discipline, has not provided necessary medical care, or when the juvenile lives in an injurious environment. When the child has been separated from the parent for a period of time, there must be a showing of past neglect and a likelihood of future neglect, based on evidence of changed conditions between the time of the past neglect and TPR hearing.
- In reviewing the challenged findings that support the adjudication of neglect, they were supported by clear and convincing evidence. The social worker testified that the parents waited more than a year to engage in the case plans, never fully acknowledged responsibility and denied behaviors, and continued some of the concerns that led to the children’s removal. The therapist testified to the parents’ denial and failure to accept responsibility. These findings support the likelihood of future neglect, especially given the children’s significant behavioral issues.
- Although mother complied with her case plan, a parent’s compliance with a case plan does not preclude a finding of neglect. The court found the parents did who insight into why their children came into care even though they participated in services; this finding is unchallenged and the evidence supports the finding. The findings support the conclusion of neglect and a likelihood of repetition of neglect.

In re J.B., 2021-NCSC-135

**Held: Affirmed**

- Facts: Mother filed TPR petition against father. Father was incarcerated in Georgia after entering an Alford plea. The facts involved father molesting a child who was visiting his home, where he lived with mother and their child. The conditions of his criminal judgment included his not

having contact with his child until the child turned 18. The TPR was granted, and father appeals challenging the grounds and best interests determination.

- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent who does not provide proper care, supervision, or discipline or when the juvenile lives in an injurious environment. When the child has been separated from the parent for a period of time, there must be a showing of past neglect and a likelihood of future neglect, based on evidence of changed conditions between the time of the past neglect and TPR hearing
- Although father cannot have contact with his child until the child is 18, there is a likelihood of repetition of neglect as he cannot provide proper care, supervision, or discipline and is highly relevant. A lengthy incarceration sentence or probation cannot be the sole basis for determining a likelihood of future neglect but other factors, including father's inability to contact his child for the rest of the child's minority and his never inquiring about the child's health or well-being during the 4 years from his arrest to the TPR hearing supports the court's determination of neglect. Father was not prohibited from seeking information about the child through family or other means.

In re W.K., 2021-NCSC-146

**Held: Affirmed**

- Facts: Paternal grandmother and step-grandfather, who filed a petition to adopt the child, filed a TPR petition against father. In 2017, petitioners were granted custody of the child through a Virginia child protective action; father was incarcerated at the time. The child protective action involved the parents' drug use, father's criminal history, and a failure to obtain appropriate medical services for the child, who has cerebral palsy. The court granted petitioner's TPR, and father appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent who does not provide proper care, supervision, or discipline or has abandoned the child or when the juvenile lives in an injurious environment. When the child has been separated from the parent for a period of time, there must be a showing of past neglect and a likelihood of future neglect, based on evidence of changed conditions between the time of the past neglect and TPR hearing.
- Although the order did not state the ground in the "conclusions of law" section but instead included it in finding of fact 88, it was not prejudicial error. The court's classification of findings or conclusions "does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings. Sl.Op. ¶18. The findings include the prior neglect and likelihood of future neglect based on father's untreated substance use and lack of and inconsistent contact with the child both before and during his incarceration.
- The findings of fact are supported by clear, cogent, and convincing evidence. The court made reasonable inferences that father had not made any substantial changes in 3 years to show there would not be an injurious environment for the child and that there was a likelihood of future neglect.
- Incarceration, standing alone, is neither a sword nor a shield in a TPR. Although incarceration may limit a parent's ability to show affection, it is not an excuse to do so by whatever means available. Father was able to send money for his daughter, communicate with and inquire about

her, and visit with her but failed to do so for his son, who is the subject of this TPR. Father did not participate in the 12-month treatment program at the prison despite being incarcerated there for 4 years. Father communicated with his mother but never inquired about his son or his son's health. Father removed petitioner's email from his contact list.

In re A.E., 2021-NCSC-130

**Held: Affirmed**

- **Facts:** In 2018, the juveniles were adjudicated neglected via stipulations due to circumstances involving lack of proper care, supervision, or discipline and an injurious environment. The children were living in unsanitary housing conditions and lacked appropriate medical care and hygiene. Mother and father were ordered to comply with case plans, involving working with an exterminator and improving conditions in the home, taking parenting classes, completing psychological and parental evaluations, attending the children's medical appointments and learning about their special needs, and visiting with the children. The parents were making progress on their case plans until 2019. After the primary permanent plan was identified as adoption, DSS filed TPR motions. After a TPR hearing where neither parent attended, the court granted the TPR. Each respondent appeals, challenging the grounds.
- Clear, cogent, and convincing evidence must support the findings of fact, and the findings of fact must support the court's conclusion of law that a ground to TPR exists. Findings supported by the evidence are conclusive even if there is other evidence that would support a contrary finding.
- Findings: Recitations of witness testimony are not findings of fact unless the trial court determines the relevant portions of the testimony are credible. Here, the court described the testimony; "there is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." Sl.Op. ¶18. Some of the challenged findings were recitations of evidence only when those findings referred to the witness "testified" or "stated" and are disregarded. Other findings of fact resolved the material disputes in the evidence and are considered on appeal. The trial court took judicial notice of prior orders and reports in the neglect action when making some challenged findings of fact and was based in part on testimony provided at the hearing – the social workers' and others' testimony. As held previously, reliance on prior orders alone without any oral testimony is error. Here, there was testimony at the TPR hearing and the court did not rely solely on the prior orders. Father stipulated to findings in the neglect adjudication and did not appeal that order such that he is bound by the doctrine of collateral estoppel regarding those findings. The evidence from prior reports and orders the court took judicial notice do not support some of the court's findings and are disregarded (e.g., father (not) attending the children's medical appointments).
- Father's challenge to findings about mother do not have a bearing on father's challenge to his TPR order and are not considered since they are not necessary to support the TPR as to father.
- Regarding a challenge to the evaluator's report, the evaluator testified to the opposite of one sentence in his report. The trial court was not precluded from relying on other portions of the evaluator's report when that report included a single erroneous phrase. The challenged findings about the evaluator's testimony, which included the unlikelihood that mother or father could develop the ability to parent the children, are supported by the evidence.



- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent who does not provide proper care, supervision, or when the juvenile lives in an injurious environment. When the child has been separated from the parent for a period of time, there must be a showing of past neglect and a likelihood of future neglect, based on evidence of changed conditions between the time of the past neglect and TPR hearing. An adjudication of neglect is admissible as evidence of prior neglect.
- The prior adjudication, via stipulations, is evidence of prior neglect. The court did consider evidence of changed circumstances at the time of the TPR hearing regarding a likelihood of future neglect. This included photos of improved conditions in the home and the efforts each parent made toward reunification as well as each parent's failure to make necessary changes (e.g., both parents not believing there were problems needing to be addressed; father denying the children had special needs; and mother lacking sufficient caregiving skills). The findings support the conclusion of neglect.

## Neglect; Abandonment

### In re B.R.L., 2021-NCSC-119

#### **Held: Reversed and remanded**

#### **Dissent by Berger, J., joined by Newby, J. and Barringer, J.**

- Facts: In 2017, an underlying neglect action that was based on an injurious environment created by domestic violence, substance use, criminal activity, and improper supervision was commenced. A permanent plan of legal custody to a relative was achieved and further hearings were waived. Respondent mother had a couple visits with her child when she was not incarcerated and filed for a motion to review/increase visitation, which was not heard prior to the TPR hearing. The custodians filed a TPR petition. The TPR was granted on the grounds of neglect and willful abandonment. Mother appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR when a parent has willfully abandoned the juvenile for at least 6 consecutive months immediately preceding the filing of the TPR. Abandonment involves a willful determination of a parent to forego all parental duties and relinquish all parental claims. Willfulness is a question of fact. The determinative period is the 6 months immediately preceding the filing of the TPR petition.
  - The evidence does not support the findings, and the findings do not support the conclusion. The determinative six month period is January 11 – July 11. The unchallenged findings show mother was incarcerated for the first half of this time period, but after her release she requested visits 3 times during the determinative time period and visited with her child once. She also filed a pro se motion to review visitation one month before the TPR was filed. Mother's actions do not show she intended to forego all parental duties and relinquish all parental claims.
  - A motion to increase visitation is evidence the court must consider when determining willful abandonment but the motion, standing alone, does not necessarily defeat this ground.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which is demonstrated by current neglect of prior neglect and a likelihood of future neglect. The court must consider evidence of changed circumstances between the prior neglect and the time of the TPR hearing.

- The court's order does not address the likelihood of future neglect. There were few findings that related to mother's ability to care for her child at the time of the TPR hearing. There may be evidence in the record where those findings could have been made, reversed and remanded.
- Dissent: The findings and conclusions support the ground of willful abandonment. The majority went beyond a review of the findings and conclusions and created new facts, which is the duty of the trial court. Mother took no action regarding her child during the time she was incarcerated. Sporadic visits should not foreclose an abandonment finding. No holdings have established filing a motion will negate an abandonment finding.

### Failure to Make Reasonable Progress

#### In re T.T., 2021-NCSC-145

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected in 2014 due to circumstances involving inappropriate supervision, domestic violence, and an injurious environment. Ultimately reunification efforts with mother were ceased and guardianship and custody were ordered as the permanent plans. The case continued with regular permanency planning hearings. The court repeatedly found mother had not consistently engaged in her services, which included parenting classes and domestic violence, substance use, and mental health treatment. In 2018, the primary permanent plan was changed to adoption, when the juvenile expressed a desire to be adopted by her foster parents who were willing to adopt her. DSS filed a TPR petition, which was granted. Mother appealed, challenging the grounds.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent has (1) willfully left the juvenile in foster care placement for more than 12 months and (2) has failed to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. The trial court must apply a 2-step analysis to address each prong.
- Mother does not challenge the findings but instead argues they do not support the conclusion that mother failed to make reasonable progress to correct the conditions. A parent's compliance with a case plan is relevant when determining whether a parent made reasonable progress. Although all elements of the case plan do not need to be satisfied, the court has authority to determine extremely limited progress supports the TPR. Here, the court found mother did not complete any of the programs required by her case plan and did not make significant progress. The argument that the court of appeals in two prior opinions held lack of compliance with a case plan should be overlooked is misplaced (examining *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) and *In re D.A.H.-C.*, 227 N.C. App. 489 (2013) both of which affirmed the TPR on the ground of neglect). Mother did not comply with any aspect of her case plan.

#### In re I.E.M., 2021-NCSC-133

**Held: Affirmed**

- Facts: Due to circumstances resulting from mother's mental illness, the juvenile was adjudicated dependent (this author is unsure if the adjudication was neglect or dependency as the petition appears to have alleged neglect, not dependency). DSS initiated a TPR, which was granted. Mother appeals arguing the court misapprehended the law regarding the time period for when the court looks at a parent's reasonable progress.

- G.S. 7B-1111(a)(2) authorizes a TPR when a parent has (1) willfully left the juvenile in foster care placement for more than 12 months and (2) has failed to make reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. In addressing the parent’s reasonable progress, the court looks at the parent’s progress up to the date of the TPR hearing.
- Although DSS objected to evidence of mother’s progress after the TPR petition was filed, the court overruled that objection after making an inquiry to mother’s counsel. DSS, not the court, misstated the law. That misstatement by DSS when coupled with an inquiry by the trial court to another party’s attorney is not the adoption of the inaccurate statement, especially when the court overruled the objection based on the misstatement. Documentary evidence and other witness testimony addressed post-petition evidence, showing the trial court considered evidence of mother’s progress up to the time of the TPR hearing.
- Although there was evidence of mother’s progress post-petition, the court is not required to make findings on all the evidence presented or state every option it considered. The lack of findings on that evidence does not establish the trial court failed to consider that evidence.
- The court admitted and considered a 100-page exhibit prepared by DSS that was a timeline addressing the period from the juvenile petition until just before the TPR hearing. Although mother objects to the consideration of this evidence due to hearsay, this general objection is insufficient to show the court erred. A judge who is the fact-finder is presumed to have disregarded any incompetent evidence and to have relied on competent evidence. Mother did not identify inadmissible hearsay evidence the court relied upon in its findings of fact.

#### Failure to Pay Reasonable Portion of Cost of Care

In re S.C.C., 2021-NCSC-144

**Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected and was placed in DSS custody. In two separate 2019 permanency planning orders, the court found the parents were subject to child support orders and at most the parents made a single payment. When the primary permanent plan was identified as adoption, DSS filed a TPR motion. The TPR was granted, and both parents appeal the grounds and disposition. The summary focuses on the ground under G.S. 7B-1111(a)(3).
- G.S. 7B-1111(a)(3) authorizes a TPR when a juvenile has been placed in DSS custody or foster home and the parent has willfully failed to pay a reasonable portion of the cost of care for the six months immediately preceding the filing of the TPR despite having a physical and financial ability to do so. The cost of care is the amount it costs DSS to care for the child – foster care. A parent pays that portion that is fair, just, and equitable based on the parent’s ability/means.
- There must be a finding that a parent has an ability to pay support. Based on precedent, a child support order is based on the amount of support necessary to meet the child’s reasonable needs and the parent’s relative ability to provide that amount. When a parent is subject to a valid child support order, “there is no requirement that petitioner independently prove or that the termination order find as fact respondent’s ability to pay support during the relevant time period.” Sl.Op. ¶19. As held in *In re J.M.*, 373 N.C. 352 (2020), the court is not required to make

findings about a parent's income, assets, and reasonable needs and expenses when there is a child support order, and employing the doctrine of stare decisis, this holding is not overruled.

- The findings show the parent's were employed, had income, and were not disabled, father did not make one payment as required, and mother did not make one voluntary payment as ordered. The court did not err in concluding the ground existed.

In re J.K.F., 2021-NCSC-137

**Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected and placed in DSS custody. Mother signed a voluntary support agreement (VSA). After adoption was identified as the primary permanent plan, DSS filed a TPR motion. At the time of the TPR hearing, mother was homeless, unemployed, and not receiving treatment for her mental health and substance use issues. The court granted the TPR, and mother appeals.
- G.S. 7B-1111(a)(3) authorizes a TPR when a juvenile has been placed in DSS custody or foster home and the parent has willfully failed to pay a reasonable portion of the cost of care for the six months immediately preceding the filing of the TPR despite having a physical and financial ability to do so. A parent pays that portion that is fair, just, and equitable based on the parent's ability/means. A valid child support order or voluntary support agreement is evidence of the parent's ability to pay.
- The determinative time period is March 13, 2019 to September 13, 2019. Mother entered into the VSA during this time period, which is evidence of her ability to pay. A court is not required to make findings that address a parent's income, employment, or capacity for income/employment when there is a valid child support order or VSA. There is no evidence mother was incarcerated during part of the time period. There is evidence that shows mother was employed during part of the time period – the GAL report from a prior review hearing the court took judicial notice of and mother's testimony at the TPR hearing.
- The location of the court's willfulness finding in the conclusion of law, rather than the findings section "has no bearing on its efficacy." Sl.Op. ¶24.

Willful Abandonment

In re L.M.M., 2021-NCSC-153

**Held: Affirmed**

- Facts: Petitioners (aunt and uncle) obtained an emergency Chapter 50 custody order for the child after mother died, and father was arrested and later convicted of involuntary manslaughter. Father was prohibited from having visitation. After his release from prison, father sent \$800, cards, and gifts to the child. Father testified his probation officer told him to not contact the victim's family (in this case, the victim's sister).
- G.S. 7B-1111(a)(7) authorizes a TPR when a parent has willfully abandoned their child for the 6 months immediately preceding the filing of the TPR petition. Abandonment is conduct on the parent's part that manifests a willful determination to forego all parental duties and relinquish all parental claims. A parent relinquishes his parental claims when they withhold their presence, love, care, opportunity to display filial affection and willfully fails to provide support and maintenance. Willfulness is a question of fact. The determinative time period is the 6 months immediately preceding the filing of the TPR.

- The court determines the credibility of witnesses, the weight to give their testimony, and the reasonable inferences to be drawn from that testimony. The trial court determined respondent's testimony was not credible in making its findings of fact and his testimony did not rebut petitioner's evidence that he stopped providing money, cards, and gifts for his daughter. There was no evidence other than his testimony, which the court found not credible, that respondent was prohibited from having contact with the maternal relatives (the victim's family). The custody order prohibited visitation only.
- During the determinative time period, father sent one card and gif, which the court determined was not a sincere effort, and did not send money or support or attempt to attempt to reestablish a relationship with his daughter or inquire as to her well-being. Letters father sent after the TPR was filed is outside the determinative six-month period. Father's minimal participation in the Ch. 50 custody action was outside the determinative time period. The findings support the conclusion of willful abandonment.

[In re C.K.I.](#), 2021-NCSC-131

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and ultimately custody was ordered to the grandfather and step-grandmother via a transfer of the 7B action to a Chapter 50 action under G.S. 7B-911. Later, mother was ordered sole legal and physical custody of the child via a modification order. At some points, mother asked father to agree to the child's name change, which father refused to agree to. Father was incarcerated for parts of the child's life. Mother filed to terminate father's parental rights, alleging father had not pursued a relationship with the child since 2014. The TPR was granted, and father appeals arguing the findings of fact do not support the grounds.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment for the 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment involves the willful or intentional conduct by the parent that evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Willfulness is a question of fact. The determinative time period is the 6 months immediately preceding the filing of the TPR petition, but a court may consider the parent's conduct outside of that period when determining the parent's credibility and intentions.
- The findings show the father did not provide support, attend medical appointments, see the child, or provide letters, cards or gifts since the child was months old. Although father was aware he could file for custody after stating he would do so, he failed to. Father's grandmother (paternal great-grandmother) did see the child and sent cards and gifts and he did not seek information about his child through her. It was not until after father was served with the TPR that he began to contact mother.

[In re M.E.S.](#), 2021-NCSC-140

**Held: Affirmed**

- Facts: In 2015, a Chapter 50 permanent custody order awarded physical and legal custody of the minor child to mother and determined father could not have visitation until he satisfied certain conditions related to anger management, substance abuse, and treatment. Father was ordered to pay child support. In 2019, mother filed a TPR petition based on willful abandonment and

willful failure to pay child support. The TPR was granted, and father appeals, challenging the grounds.

- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment for the 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment involves a parent withholding his presence, love, care and opportunity to display filial affection and willfully failing to support the child such that the parent relinquishes all parental claims to the child. Willfulness is an integral part of abandonment. The determinative time period is the 6 months immediately preceding the filing of the TPR petition, but a court may consider the parent's conduct outside of that period when determining the parent's credibility and intentions.
- The findings are supported by clear and convincing evidence and support the conclusion of abandonment. The court determined the credibility of the witnesses and made findings regarding father not providing gifts to the child. Father did not seek to modify the custody order for visitation. Father was not prohibited from having contact with his child and father was aware of mother's contact information and her family members' contact information, yet he did not attempt to communicate with or about his daughter. Father never paid more than 1/3 of his child support obligation.

In re A.A.M., 2021-NCSC-129

**Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected and dependent due to circumstances involving mother's substance use. The juvenile was placed in DSS custody. Later, respondent was judicially determined to be the juvenile's father and was added as a party to the action. Due to father's criminal behavior and being in custody, he was ordered to enter into a case plan and be released from custody before he could have supervised visitation with the juvenile. Father did not enter into a case plan and remained in custody. The court ordered father complete certain actions. Father made himself only minimally available to the court, DSS, and GAL. DSS filed a TPR motion, which was granted. Father appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment for the 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment involves the willful or intentional conduct by the parent that evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Willfulness is a question of fact and is an integral part of abandonment. Abandonment involves a parent withholding his presence, love, care and opportunity to display filial affection and willfully failing to support the child such that the parent relinquishes all parental claims to the child. The determinative time period is the 6 months immediately preceding the filing of the TPR petition.
- A trial judge determines what inference to draw from the evidence and what inferences to reject when different inferences may be made from the evidence. The court determines witness credibility, which often occurs when there is inconsistent or contradictory evidence. The appellate court does not reweigh the evidence. Although a contrary finding could have been made, evidence supports the trial court's finding.
- Findings are supported by the evidence. Testimony showed the foster parents provided father with their address and contact information and father had the ability to communicate by phone but failed to do so. Father did not send letters, cards, or gifts, and gifts sent by father's fiancé

were done so voluntarily on her part and not at father's request. Father did not pay any support. The findings support the conclusion.

### Aiding and Abetting Murder of Child

[In re C.B.C.B.](#), 2021-NCSC-149

**Held: Affirmed**

**Dissent: Ervin, J. joined by Earls, J.**

- **Facts:** In 2013, one of mother's two children died and the other child was adjudicated abused as a result of actions resulting in mother's conviction of intentional and negligent child abuse and her boyfriend's (caretaker's) second degree murder conviction. The children were severely scalded, beaten with objects, and left alone while restrained, for long periods of time. Mother made efforts to hide the children's injuries. In 2019, after mother gave birth to another child, DSS became involved and filed a neglect petition. Shortly thereafter, the GAL filed to TPR under G.S. 7B-1111(a)(8). The trial court consolidated the two actions, adjudicated the juvenile neglected, relieved DSS of reunification efforts at the initial dispositional hearing, and granted the TPR. Mother appeals both orders. The supreme Court on its own motion consolidated appeal of neglect proceeding before court of appeals with direct appeal of TPR in supreme court.
- 7B-1111(a)(8) authorizes a TPR when a parent has aided or abetted in the murder of their child. The supreme court reviewed the elements of aiding and abetting: "(1) 'the crime was committed by some other person;' (2) 'the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime[,] ' [which may be inferred from actions and the relationship to the actual perpetrator as express words are not required;] and (3) 'the defendant's actions or statements cause or contributed to the commission of the crime by that other person.' " ¶ 11 (citation omitted). Although generally, a failure to intervene is not aiding and abetting, "parents... 'have an affirmative duty to protect and provide for their minor children' ", and "must 'take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.' " ¶ 12. A parent knowingly aids the perpetrator when the parent has actual knowledge of the harm and reasonably fails to protect their child from harm. The court must determine the reasonableness of the parent's response on a case-by-case basis.
- All three elements of the crime were satisfied: (1) mother's child was murdered by her boyfriend, who was convicted of second degree murder; (2) although mother was not present when her child died, she knew of the harm posed by her boyfriend to her children based on the severe abuse of her children by her boyfriend that she witnessed and intentionally tried to hide, thus failing to protect her children; and (3) her conduct in frequently leaving the children in her boyfriend's exclusive care, intentionally concealing her children's injuries, and participating in some of the abuse of her children created the opportunity for her boyfriend to murder her child and was tantamount to her consent of that act. Mother did not reasonably protect her children, one of whom was murdered.
- Trial court did not err in ceasing reunification efforts at initial disposition.

## Best Interests

### G.S. 7B-1110(a) Factors

#### In re N.B., 2021-NCSC-154

##### **Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent due to circumstances involving mother's substance use, violence by mother's boyfriend, and the juvenile's self-harm. Although mother requested visitation during the underlying juvenile action, the court denied her request due to her positive drug screens and recommendations from the child's therapist that the child had to first work through her extensive trauma history. DSS filed a TPR petition, which was granted. Mother appeals, challenging the best interests determination.
- At disposition, the court considers the factors in G.S. 7B-1110(a). The findings that there was not a strong bond between mother and child were supported by the evidence, including the child's therapist's testimony. The court had the discretion to determine the weight to give the factors.
- The court complied with the Juvenile Code when "fast-track[ing]" the case as it relieved DSS of reunification efforts at initial disposition under G.S. 7B-901(c)(1)(b) and (e). Although mother argues the parent-child bond was impacted by the juvenile dispositional orders limiting mother's ability to see her child and the TPR dispositional hearing was required to be delayed, the cases mother cites to regarding insufficient time to meet the burden to TPR apply to the grounds which address parental fault and not the best interests determination after a ground has been proved. The dispositional stage focuses on the child's best interests. Any delay in holding the dispositional hearing was not supported by evidence and relates only to one of the dispositional factors, the parent-child bond. The trial court properly made its findings based on the evidence, which included evidence of the parent-child bond at the time of the TPR hearing. There was no error in holding the dispositional hearing after grounds were adjudicated, and the Juvenile Code does not require such a delay.
- The consideration of non-TPR-related dispositional alternatives at the TPR dispositional hearing is not required.

#### In re S.C.C., 2021-NCSC-144

##### **Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected and was placed in DSS custody. In two separate 2019 permanency planning orders, the court found the parents were subject to child support orders and at most the parents made a single payment. When the primary permanent plan was identified as adoption, DSS filed a TPR motion. The TPR was granted, and both parents appeal the grounds and disposition. The summary focuses on the disposition.
- At disposition, the court considers the factors at G.S. 7B-1110(a). The standard of review is whether there is evidence to support the findings and whether the court committed an abuse of discretion. Unchallenged findings are binding.
- The unchallenged findings show the juvenile was in foster care for 28 months, the parents did not exercise their visitation rights and failed to complete their case plans, and support the finding that there was no reasonable probability of reunification within a reasonable period of time. These findings are not based on the parents' poverty. Other challenged findings regarding



the lack of bond between the parents and child are supported by competent evidence: social worker testimony and the GAL report. There is no abuse of discretion.

### Likelihood of Adoption

#### [In re L.G.G.](#), 2021-NCSC-139

**Held: Affirmed**

- **Facts:** The children were adjudicated neglected. Once in care, the children started showing sexualized behaviors and made disclosures, which the parents did not believe. The children's behaviors started regressing after visits. Reunification efforts and reunification were eliminated, and adoption was identified as the primary plan. DSS filed a TPR motion. The TPR was granted, and respondents' appeal the adjudication; father also appeals the best interests determination regarding the oldest child.
- G.S. 7B-1110(a) requires the court to consider the enumerated facts and make written findings on only those factors that are relevant.
- Although the older child had significant behavior issues and he was not in a position to be adopted at the time of the TPR hearing, testimony of his progress in treatment and possibility of finding a long-term adoptive or foster home supports the court's conclusion that adoption was a realistic possibility as he continues to improve in the next year or two. The lack of an adoptive placement at the time of at the TPR hearing is not a bar to TPR.
- The trial court weighed the dispositional factors and did not abuse its discretion.

#### [In re J.B.](#), 2021-NCSC-135

**Held: Affirmed**

- **Facts:** Mother filed TPR petition against father. Father was incarcerated in Georgia after entering an Alford plea. The facts involved father molesting a child who was visiting his home, where he lived with mother and their child. The conditions of his criminal judgment included his not having contact with his child until the child turned 18. The TPR was granted, and father appeals challenging the grounds and best interests determination.
- A TPR may be granted without a finding of a likelihood of adoption. In this case, it is irrelevant that there is a lack of a potential adoptive second parent for the juvenile. The court considered the relevant factors and did not abuse its discretion in determining TPR was in the child's best interests.

### Parent-Child Bond

#### [In re J.R.F.](#), 2022-NCSC-5

**Held: Affirmed**

- **Facts:** In 2018, the juvenile was adjudicated neglected based on circumstances involving parent's substance use, domestic violence, mental health issues, parenting deficits, and housing instability. In 2020, DSS filed a TPR petition, which was granted. Father appeals, challenging the grounds and best interests determination.
- The best interests determination is reviewed for an abuse of discretion. The court considers the factors at G.S. 7B-1110(a) and makes written findings of those that are relevant. There was no abuse of discretion.

- The court acted within its authority, when assessing all the evidence it inferred that the child’s bond with his father had diminished during the 2 years the child was in DSS custody. The court recognized the parent-child bond, but that bond is just one factor the court considers. The court may give greater weight to other factors. The evidence also supports the court’s finding of the child’s likelihood of adoption.

## Relative Placement

### In re N.C.E., 20210-NCSC-141

#### **Held: Affirmed**

- Facts: The juveniles were adjudicated neglected and dependent. After the primary permanent plan was identified as adoption, DSS filed a TPR petition, which was granted. At disposition, the maternal grandmother testified that she was willing to be a permanent placement for the children. Mother appeals, challenging the best interests determination.
- The court considers the factors set forth at G.S. 7B-1110(a) when making a best interests determination in a TPR. Written findings are only required for factors that have conflicting evidence such that it is placed at issue before the trial court and are relevant. The appellate court reviews the findings under a competent evidence standard. The review is an abuse of discretion standard.
- G.S. 7B-1110(a)(5) addressed the quality of the relationship between the child and the proposed adoptive parent or other permanent placement. The court found there was no information about the relationship because neither child was in a pre-adoptive placement. Although mother proposed her mother as a placement, the record shows no conflicting evidence about the quality of grandmother’s relationship with the children such that the court was not required to make a finding on this issue.
- Under G.S. 7B-1110(a)(6), “any relevant consideration,” the availability of a relative placement may be considered. “The extent to which it is appropriate to do so in any particular proceeding [is] dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available.” Sl.Op. ¶19. Mother’s proposed placement with the maternal great-grandmother was unavailable as the court had previously chosen not to place the children with her at prior hearings in the underlying action and there was no evidence that great-grandmother was willing and able to provide a permanent home for the children. Further, the great-grandmother was not proposed as a placement at the TPR dispositional hearing. Regarding placement with the grandmother, the court’s findings that grandmother believed mother was a good mother and blamed everyone other than mother is supported by grandmother’s testimony at the dispositional hearing. The court has authority to determine the credibility of witnesses, the weight to give their testimony, and the reasonable inferences to draw.
- Although placement with relatives is preferred, that is at disposition in the underlying A/N/D action; a TPR is a separate and distinct proceeding. TPRs are governed by Article 11 of the Juvenile Code (not Article 9 – dispositions in A/N/D) and there is no priority for relative placements. The focus is on the best interests of the child. The trial court has discretion to determine the weight to give competing factors in G.S. 7B-1110(a), including the “any relevant consideration” factor, when determining the child’s best interests. The court did not abuse its discretion in determining the TPR was in the children’s best interests.

[In re K.A.M.A.](#), 2021-NCSC-152

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and at one point was placed with maternal grandmother. Ultimately, the trial court determined maternal grandmother was not an appropriate placement because of conflict between grandmother and the parents, and there were no other relatives willing and appropriate to care for the juvenile. DSS filed a TPR, which the court granted. Father appeals, challenging the best interests determination. Maternal grandmother had written a letter to the court stating she wanted to be considered.
- When determining best interests, the court considers the factors in G.S. 7B-1110(a). Relative placement is not explicitly addressed by G.S. 7B-1110(a) but may be considered as a relevant consideration when there is evidence introduced at the dispositional stage showing a relative placement is available. Without such evidence, the court is not required to consider a relative placement. There was no conflicting evidence about the availability of a relative placement, such that it was not a relevant factor and a finding about the placement was not required. Grandmother's letter was not addressed at the hearing, and grandmother did not attend or testify at the hearing. The evidence showed the court had previously considered placement with grandmother and determined it was not appropriate.

Dispositional Alternatives

[In re R.G.L.](#), 2021-NCSC-155

**Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected due to circumstances of a lack of proper care and supervision because of parents' substance use and housing concerns. DSS filed a TPR motion in 2020 after the primary permanent plan of adoption was identified. The TPR was granted, and father appeals. Father challenges the grounds and best interests determination. This summary focuses on the best interests determination.
- A best interests determination is reviewed for an abuse of discretion. The appellate court will not second-guess the trial court's determination of the child's best interests.
- At disposition, the court considers the factors in G.S. 7B-1110(a) and makes findings of those factors that are relevant. The court made the relevant findings. Although the court stated that the TPR is in the child's best interests and that the child would be able to keep contact with his biological parents, that was not a finding in the TPR order. Further, it was not a misapprehension of law about the effect of a TPR legally and permanently severing the parents' rights but was instead a recognition of the unique circumstances in this case where the foster parents, who wished to adopt, testified they were willing to allow for continued contact unless it was unsafe, and recognized the foster family's values of not foreclosing the possibility of ongoing contact.
- Father challenges a prior permanency planning order that was not subject to appeal under G.S. 7B-1001 as an intermediate order that could be appealed pursuant to G.S. 1-278 because it was necessary to be considered in the TPR since it identified adoption as the primary permanent plan, and at the TPR disposition, the court addresses whether the TPR would aid in achieving the permanent plan. Father challenges the order based on a misapprehension of law as the prior permanency planning order contained a finding that guardianship would be appropriate but there was no available relative. Father argued a relative is not required for guardianship. Under

G.S. 1-278, there must be a timely objection when a review of an intermediate order is made. No objection was made and other permanency planning orders were entered afterwards that had similar findings. The collateral attack on this prior permanency planning order will not be considered.

- The consideration of dispositional alternatives at the TPR dispositional hearing is not required.

## Adoption

### Consent: As Applied Constitutional Challenge

#### In re Adoption of C.H.M., 2022-NCCOA-126

**Held: Affirmed**

**Dissent in part**

- **Facts:** There are 3 prior appellate opinions in this case, which has lasted over 8 years. The issue involves father's right to consent to the adoption and motion to dismiss the adoption petition. This opinion addresses a remand from the NC Supreme Court to address father's due process arguments that his consent is required under G.S. 48-3-601(2)(b)(4)(II), which requires father to have provided consistent support to the mother and/or child. The trial court denied father's motion to dismiss. This is an interlocutory appeal that impacts a substantial right – father's parental rights since an adoption would sever those rights – and is immediately appealable. Father challenges the constitutionality of G.S. 48-3-601 as it applies to him, arguing that he grasped the opportunity to establish a relationship with his child, as required by the *Lehr v. Robertson* standard of the U.S. Supreme Court, such that his consent is required.
- Like *In re Adoption of B.J.R.*, 238 N.C. App. 308 (2014), father remained passive in establishing a relationship with his child once he learned (after the mother's deceit) that the child was his. Respondent was aware of the adoption petitioners' and the adoption agency's contact information yet sent no cards or gifts. There was no evidence that the petitioners or agency prevented father from doing so. Father delayed sending support payments from cash he had saved in a lockbox or from contacting petitioners until after a TPR was filed. "Respondent's later conduct, while laudable, does not remove or excuse his non-actions for nine months in 2014, where 'for all intents and purposes [he]...walked away from his responsibilities,' after visiting his child in Petitioners' home." Sl.Op. ¶ 34. Father's later conduct "failed to preserve his entitlement to the constitutional 'protection of the family unit' guaranteed by the Due Process Clause." and has no right to give or withhold his consent to the adoption. *Id.*
- **Dissent:** Father attempted to assert his rights before child was born but was hindered by mother's blatant deceit. Petitioners for a period of time preventing father from interacting with the child and during that time, father took steps to who he was wanting to grasp the opportunity to parent his child.

## Civil Case Related to Child Welfare

### UCCJEA

#### Unjustifiable Conduct

[Malone-Pass v. Schultz](#), 2021-NCCOA-656

#### **Held: Affirmed**

- **Facts:** This opinion involves an appeal of a Chapter 50 custody order. This summary focuses only on the UCCJEA issues that are raised on appeal. In 2017, the parties obtained a permanent custody order from a New York court that explicitly stated it was relinquishing jurisdiction and the parties were to register the NY order in NC. Father and children resided in NC as of March 2017. Later in 2017, mother registered the NY order in NC and filed a motion in the NC court, which father responded to and countermotioned. During the pendency of the NC custody proceeding, in June 2018, father and children moved to South Carolina. In 2019, before the final hearing, mother filed a motion to dismiss for lack of subject matter jurisdiction, which the trial court denied. The court entered a final custody order. Mother appeals, arguing the court should not have exercised subject matter jurisdiction because it was obtained by fraud by father who had asserted to the NY court that he would remain in NC until the children graduated high school.
- **Subject matter is a question of law** that is reviewed de novo. A party cannot give a court subject matter jurisdiction by requesting relief in it.
- The trial court had **jurisdiction to modify the NY child custody order under G.S. 50A-203**. The first part of modification jurisdiction requires that NC have initial custody jurisdiction under either **home state** or **significant connection/substantial evidence jurisdiction**. Here, NC was the home state when the NC custody proceeding was commenced as the children had been living in NC with their father for more than 6 months preceding the filing of the motion. The second part of modification jurisdiction requires that a court of the other state determines it no longer has exclusive continuing jurisdiction or a NC court would be a more convenient forum. **NY determined NC would be a more convenient forum** when in its order it relinquished jurisdiction and ordered the parents to register the NY order in NC within 7 days.
- **The jurisdictional bar under G.S. 50A-208, based on unjustifiable conduct by a party, does not apply.** Under G.S. 50A-208, the court declines subject matter jurisdiction resulting from a parent's unjustifiable conduct unless an exception applies.
  - **The court did not find fraud by father after considering mother's argument.** The children resided with their father in NC for over one year. "[F]raud is a misrepresentation of a past or existing fact." Sl.Op. ¶125. Father did not misrepresent his actual residence. NC was the home state. "The UCCJEA does not base jurisdiction on where a parent plans or intends to reside in the future, but on the actual residence. *Id.*"
  - **Assuming there was fraud, exceptions in G.S. 50A-208 apply.** Under -208(a)(1), the parents acquiesced to jurisdiction in NC by registering the NY order and filing motions in NC. Under -208(a)(2), the NY court determined NC was the more appropriate forum, so even if father had engaged in unjustifiable conduct, NC had jurisdiction.