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## A/N/D

### Permanency Planning

#### Parent's Constitutional Rights: Waive Issue

[In re J.N.](#), 2022-NCSC-52

**Held: Affirmed**

**Concurrence, Earls, J.**

- **Facts:** Two juveniles were adjudicated neglected and one was also adjudicated abused. At a permanency planning hearing, DSS recommended guardianship be ordered, while the father argued reunification should be the primary plan. The court ordered guardianship to maternal grandparents and father appealed, arguing there were no findings about him acting inconsistently with his constitutional rights to care, custody, and control or that he was unfit. At the hearing father did not raise his constitutional rights to parent. The court of appeals determined that the father waived his right to argue the court erred by not addressing his constitutional rights. The supreme court granted discretionary review.
- The constitutional protection afforded parents under *Petersen v. Rogers*, 337 N.C. 397 (1994) to care, custody, and control of their child(ren) “does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review.” Sl.Op. ¶ 7. A parent waives the issue regarding their paramount constitutional rights for review if they do not first raise the issue in the trial court.
- Respondent waived this issue by not raising it in the trial court. Respondent had notice that guardianship was being recommended by DSS and the GAL through their court reports and the GAL attorney explicitly requested guardianship be ordered in closing arguments. Father focused his arguments on why reunification was more appropriate but did not assert ordering guardianship would be inappropriate on constitutional grounds.
- **Concurrence:** When child already not in parent's custody through a court order as in an A/N/D action, a parent is on notice that the court may order permanent guardianship and must raise the objection regarding their constitutional rights. The parent waives the issue if they have an opportunity to make the argument in the trial court. There are no magic words to use. The parent must raise the issue even if DSS does not offer evidence that the parent is unfit or acted inconsistently with their constitutional rights.

#### Acting Inconsistently with Protected Status as Parent

[In re B.R.W.](#), 2022-NCSC-50

**Held: Affirm court of appeals decision**

**Dissent, Earls, J.**

- **Facts:** At a permanency planning hearing, the court ordered guardianship to the paternal grandmother after determining mother was unfit and that she acted inconsistently with her parental rights. Mother appealed. In a divided opinion, the court of appeals affirmed in part (acting inconsistently with parental rights; mother had left children in care of paternal grandmother for 3 years before DSS involvement and delayed seeking appropriate housing for the children during DSS case) and reversed in part (mother successfully completed her case plan,

including exercising unsupervised overnight visits, and was not unfit). See summary [here](#).

Mother appealed by right to the supreme court.

- The standard of review of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusion. A determination that a parent has acted inconsistently with their constitutionally protected rights is a conclusion of law and is reviewed de novo. The conclusion must be supported by clear and convincing evidence.
- There is no bright-line rule for determining whether a parent has acted inconsistently with their protected status. The conduct must be reviewed on a case-by-case basis, and the parent's conduct should be cumulatively viewed. As previously held, "a period of voluntary nonparent custody[] may constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child test.'" Sl.Op. ¶ 40 (quoting *Price v. Howard*, 346 N.C. 68, 79 (1997)). Similarly, "a parent's 'failure to maintain personal contact with the child or failure to resume custody when able' could amount to conduct inconsistent with their protected parental interests[.]" *Id.* (quoting *Owenby v. Young*, 357 N.C. 142, 146 (2003)). An important factor is whether the parent intended the nonparent custodial arrangement to be temporary or indefinite (no notice of it being temporary). "[P]ast circumstances or conduct which could impact either the present or future of the child is relevant, notwithstanding that such circumstances or conduct did not exist or was not being engaged in at the time of the custody proceeding." Sl. Op. ¶ 41 (quoting *Speagle v. Seitz*, 354 N.C. 525, 531 (2001)).
- The court's findings show that before DSS involvement, mother left the children with grandmother for 3 years and made no efforts to reunify with the children until DSS became involved. During the 3 years, mother visited the children on birthdays and holidays only. During the DSS case where the children were in care for 19 months, mother had a more active role, including regular visitation and paying child support, but she did not obtain suitable housing until right before the permanency planning hearing. Although mother completed her case plan, the children's strongest bond was with their grandmother, which was the existing family unit created by mother leaving children in grandmother's care. These finding supports the conclusion that mother acted inconsistently with her protected status by voluntarily giving the grandmother custody and care of the children for 3 years. Mother's minimal contact during the 3-year period show that she intended the custodial arrangement to be for an indefinite period.
- Mother's progress on her case plan is relevant to parental fitness; however, her compliance with her case plan "does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother...." Sl. Op. ¶ 48. This opinion should not be understood "to preclude any possibility that a parent who has taken affirmative steps, including compliance with the directives of a district court or social services agency, would be able to overcome the effects of past behavior that would be otherwise be inconsistent with his or her constitutionally protected right to parent his or her child...." *Id.*
- There was no error in applying the best interests of the child standard when awarding guardianship to the grandmother.
- Dissent: Not every parent who places their child with a nonparent acts inconsistently with their protected status. Without findings as to whether the custodial arrangement with grandmother was intended to be temporary, the case should be remanded. The message of the majority opinion is unfortunate for parents who are working toward reunification as their progress on

their case plan should be a factor when the court is considering whether the parent can exercise their parental rights.

## TPR

### Jurisdiction

G.S. 7B-1101; Findings

[In re M.S.L.](#), 2022-NCSC-41

#### **Held: Affirmed**

- **Facts:** Father challenges the termination of his parental rights, arguing the court lacked subject matter jurisdiction because G.S. 7B-1101 requires the court make specific findings that it has jurisdiction. Father concedes that the record supports a conclusion that the district court has subject matter jurisdiction, and the TPR order states “[t]he Court has jurisdiction over the parties and subject matter of this action.” Sl.Op. ¶ 14.
- Although [G.S. 7B-1101 states](#) “the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204[,]” the finding does not need to explicitly mirror the statutory language. The general statement the court had personal and subject matter jurisdiction and the records supports that statement is sufficient.

### Motion to Continue

Due Process; COVID-19; Prison

[In re C.A.B.](#), 2022-NCSC-51

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

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

- **Facts:** Father was incarcerated during juvenile proceedings, where his son was adjudicated neglected and dependent. The primary permanent plan was identified as adoption, and DSS filed a TPR motion regarding father’s parental rights in August 2020. The TPR hearing had been continued twice, first because father’s counsel was not available and second because of the Emergency Directive from the Chief Justice responding to COVID-19. Father’s counsel requested a third continuance of the January 2021 hearing for more than 5 days later as the case manager notified him that the federal prison was under lockdown until January 25, with no movement allowed, including no ability for father to call in, for the January 20 TPR hearing. The court heard the motion to continue and denied the motion after recognizing the statutory 90-day period to hold the hearing was exceeded, the prior continuances, the unpredictability of the COVID-19 pandemic and continuing restrictions, the ability of father’s attorney to present evidence and cross-examine witnesses, and the agreement that father’s report would be admitted into evidence such that due process would be satisfied. The hearing was held, and the TPR was granted. Father appeals.
- A motion to continue based on a constitutional right that is asserted before the trial court presents a question of law and is reviewed de novo. In his motion to continue, father raised his due process rights to be heard in a case that would impact his constitutionally protected parental rights. Father must show the court’s denial of the motion to continue was made in error and that he was prejudiced as a result of the error.

- Parents have a fundamental liberty interest in raising their children, and the state must provide fundamentally fair procedures when seeking to destroy weakened familial bonds. The denial of the motion to continue undermined the fairness of the hearing as father was denied the opportunity to testify and to work with his counsel to develop a strategy to oppose the TPR, and the substantive findings in the TPR order related to father’s conduct in prison, which his testimony could have assisted the court in assessing.
- G.S. 7B-1109 allows for a continuance of a TPR beyond 90 days when there are “extraordinary circumstances.” “ ‘Extraordinary circumstances’ may occur both within and beyond ninety days after the filing of a termination motion or petition.” Sl.Op. ¶ 19. The court determined the COVID-19 restrictions were an extraordinary circumstance when granting the second continuance, so logically, another disruption caused by COVID-19 was also an extraordinary circumstance. The existence of an “ ‘extraordinary circumstance’ does not *require* a trial court to continue the hearing under N.C.G.S. 7B-1109(d).” Sl. Op. ¶ 21 (emphasis in original).
- In assessing due process, courts consider “the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.” Sl. Op. ¶22 (citation omitted). “Procedural due process ‘is a flexible, not fixed, concept governed by the unique circumstances and characteristics of the interest sought to be protected.’ ” Sl. Op. ¶ 32 (citation omitted).
  - Regarding the first prong, father has a “commanding” interest in the proceeding. DSS also has an interest but that interest was not to quickly terminate father’s rights so the child could be adopted but “was in protecting [the juvenile’s] welfare through a proceeding that reaches ‘a correct decision’ regarding whether respondent-father’s parental right rights could and should be terminated.” Sl.Op. ¶24.
  - Regarding the second prong, although a parent who is incarcerated does not have an absolute right to be present at the hearing, the father’s absence here “created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing.” Sl. Op. ¶ 25. The factual basis for the TPR adjudication was father’s conduct while he was incarcerated, yet father was denied the opportunity to address his first-hand knowledge of the limitations while in prison and with the COVID-19 restrictions on his ability to access services and comply with his case plan. The denial of the motion to continue “deprived the court of a crucial source of information about a topic central to the court’s resolution of the termination motion.” Sl. Op. ¶ 26. The presence of father’s attorney did not extinguish the risk of error as counsel was not able to effectively communicate with father because of the COVID-19 restrictions. The father’s report was made to address the father’s wishes not to provide factual information about the grounds alleged. There was not another witness who could make up the informational deficiency created by father’s absence. The denial of the request for a brief continuance undermined the fairness of the hearing and was error.
- Father was prejudiced by the denial of his motion to continue. When a parent’s due process rights are violated by a motion to continue, “the challenged order must be overturned unless ‘the error was harmless beyond a reasonable doubt.’ ” Sl.Op. ¶133 (citation omitted). DSS must prove the error was harmless. Regarding a parent’s testimony at a TPR hearing, although it is not an absolute right, it is a “vital source of information” and “is especially vital when it addresses facts that are central to the trial court’s adjudication of asserted grounds for termination and

when no other witness is available who can accurately convey to the court the information the parent possesses.” Sl. Op. ¶135. DSS and the GAL failed to meet the burden of proof that the violation of father’s due process rights was harmless beyond a reasonable doubt.

- Dissent: Respondent father has not shown that but for his absence at the TPR hearing, the court would not have terminated his parental rights under any of the grounds alleged, specifically the ground that he willfully failed to pay the reasonable cost of the child’s care for the 6 months immediately preceding the TPR motion. Respondent paid zero despite being employed in the prison dining room and receiving money from his family. Respondent’s presence would not have changed the result of that ground. This ground does not require an examination of the father’s current conduct as it is focused on the six months immediately before the TPR motion is filed. There was no prejudice.

#### [In re L.A.J.](#), 2022-NCSC-54

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

- Facts: This a private TPR brought in May 2020 by custodians who resided with the child in North Carolina. Respondents reside out of state. Mother was served in Ohio and did not file an answer. Mother was appointed counsel. The TPR hearing was continued 3 times: July, October, and December. At the last continuance, the parties were notified the hearing would be in February and notice of a February 2021 hearing was served in late January. At the hearing, mother was not present, and her attorney moved for a continuance, which was denied. The TPR was granted and mother appeals, arguing the court abused its discretion in denying the motion to continue.
- The motion to continue is reviewed for an abuse of discretion as a constitutional basis for the continuance was not raised. The burden of showing extraordinary circumstances exist to continue a TPR hearing beyond 90 days is on the party seeking the continuance. Continuances are disfavored.
- Mother did not meet her burden. There was no specific explanation for why mother was not present. She had notice in December that a hearing would be the week of February 8<sup>th</sup> and she received a copy of the notice of hearing from her attorney days before the hearing. No abuse of discretion.

## Adjudication

### Circumstances at Time of Hearing

#### [In re S.O.C.](#), 2022-NCCOA-378

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

- Facts: In 2018, the juvenile was adjudicated neglected. Part of the adjudication involved the family’s long history of DSS involvement. Mother has an Intellectual Disability, and one of the previous orders (in a prior case) required that her care of her children be supervised. After 3 years, DSS filed a TPR petition, which was granted on all 3 grounds alleged: neglect, failure to make reasonable progress, and dependency. Mother appeals.
- The TPR grounds for neglect (G.S. 7B-1111(a)(1)), failure to make reasonable progress (G.S. 7B-1111(a)(2)) and dependency (G.S. 7B-1111(a)(6)) all require the court to look at the circumstances for the parent at the time of the TPR hearing.

- The findings do not evaluate the mother’s current circumstances at the time of the TPR hearing but focus on the years prior to the TPR hearing – the child’s neglect adjudication (2018), the 2018 evaluations of mother, and the prior history with DSS (2008-2017). Extensively *quoting In re Z.G.J.*, 378 N.C. 500 (2021), the findings are insufficient to support the conclusion when those findings are based solely on evidence of circumstances that were months before the TPR hearing. There were no findings addressing a likelihood of repetition of neglect, mother’s progress to correct the conditions resulting in the juvenile’s removal, or mother’s ability to care for and supervise her child at the time of the TPR hearing.

#### Neglect: Likelihood of Future Neglect

##### In re D.I.L., 2022-NCSC-35

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

- Facts: In 2016, the juvenile was adjudicated neglected based on circumstances created by parent’s illegal drug activity. Also in 2016, petitioners obtained a Chapter 50 custody order awarding the primary legal and physical custody of the juvenile. Father had monthly supervised visits. Father’s last visit was in 2017 and he has not contacted petitioners since 2017 or sent card or letters to the juvenile since 2015. In 2018, father filed a motion to modify the custody order, and petitioners filed a TPR. The TPR was granted and father appeals, arguing the court cannot find a likelihood of future neglect because of the Chapter 50 custody order and a need for him to show a substantial change in circumstances to regain custody.
- Father’s argument is without merit. A parent’s fitness to regain custody of the child at the time of the TPR hearing is not required under G.S. 7B-1111(a)(1). Instead, the determinative factors are the best interests of the child and fitness of the parent to care for their child at the time of the TPR hearing.

##### In re T.B., 2022-NCSC-43

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

- Facts: The juvenile was adjudicated neglected and dependent based on circumstances involving her parents’ domestic violence and substance use. The parents did not make progress on their case plans, which resulted in DSS filing a TPR motion. The TPR was granted, and mother appeals (father files a no-merit appeal which is not summarized).
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent’s failure to make progress on a case plan. The court looks at the best interests of the child and the parent’s fitness to care for the child at the time of the TPR hearing.
- Findings support the conclusion of neglect – mother continued in relationship with father where there was ongoing domestic violence and lacked insight to end the relationship even after attending a program addressing domestic violence; mother did not request visits she was ordered to have or send cards or gifts to her daughter or contact the foster parents to check on her daughter; mother resided in an overcrowded apartment she acknowledged was not suitable for her daughter but had no plans to relocate. An indication of a likelihood of future neglect is “a parent’s ‘pattern of inconsistent contact and lack of interest’ in a child[.]” Sl.Op. ¶ 27.

- The findings are supported by clear and convincing evidence. Although mother denied her ongoing relationship with father, the social worker's and father's testimony supported the finding that the relationship continued. The trial court determines the credibility and weight of the evidence and inferences to draw therefrom. Mother's denial of domestic violence incidence is relevant to a finding of likelihood of future neglect.
- The presence of favorable findings re: mother's progress with substance use services does not undermine the neglect adjudication based on other findings regarding a likelihood of future neglect due to domestic violence.

[In re V.S.](#), 2022-NCSC-44

**Held: Affirmed**

- Facts: The children had been adjudicated neglected due to circumstances created by mother, including exposure to pornography, domestic violence, unstable housing, unsafe housing, and poor hygiene. Mother has cognitive delays and was determined to be incompetent and appointed a Rule 17 GAL. Ultimately, DSS filed a TPR motion, which was granted. Mother appeals arguing the court did not address whether mother could be assisted by family members when determining the likelihood of future neglect.
- Although the findings that are challenged address the suitability of family members as caregivers, the unchallenged findings, which are binding on appeal, give the court overwhelming support for its determination of a likelihood of future neglect. The findings include mother's inability to function independently or parent the children or to understand basic information, the children's diagnoses and needs, and the reasons why the children came into care. "Certainly, there may be situations where a parent's reliance in part on others to assist her in caring for her children supports a determination that there is not a likelihood of repetition of neglect if the children are returned to her care." Sl.Op. ¶ 12. But the trial court assesses the best interests of the child and fitness of the parent, not others, to care for the child at the time of the TPR hearing since the parent has ultimately authority over their child. "Accordingly, a parent must be able to understand the past neglect her children suffered while in her care; comprehend how to keep them safe from harm through proper care, supervision, discipline, and provision of a living environment not injurious to their welfare; and demonstrate an ability to do so." *Id.*

[In re A.E.S.H.](#), 2022-NCSC-30

**Held: Affirmed**

- Facts: In 2019, the juvenile was adjudicated neglected based on circumstances involving unsanitary living conditions and father's substance use and parenting skills. Father was convicted of felony cruelty to animals (the family dog), felony domestic neglect of a disabled or elder person (his wife who ultimately died), and misdemeanor child abuse (the juvenile). Father did not make progress on his case plan, and DSS filed a TPR motion, which was granted. Father appeals.
- The findings are supported by clear and convincing evidence and support the conclusion of neglect, which includes past neglect and a likelihood of repetition of neglect. A parent's lack of progress in completing a case plan is an indication of a likelihood of future neglect. Evidence showed the father did not avail himself of parenting classes while he was incarcerated and did

not attend parenting classes he was referred to after his incarceration. Father did not follow up with the DSS social worker regarding his parenting classes or a setting up a home visit.

[In re B.R.L., 2022-NCSC-49](#)

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected. During the first year of the neglect case, mother did not work on her case plan. DSS filed a TPR petition, which was granted. Mother appeals the grounds, arguing the findings do not support the conclusion of neglect based on a likelihood of future neglect.
- The challenged findings were supported by clear and convincing evidence: therapist testimony. The unchallenged findings support the determination that a likelihood of future neglect existed. Mother was not capable of parenting the child at the time of the TPR hearing and that shows there is a substantial likelihood of future neglect. A parent's lack of progress on her case plan is indicative of the likelihood of future neglect. Mother did not complete many aspects of her case plan addressing DV, substance use, mental health, parenting, and safe housing such that the reasons for the juvenile's removal remained.

[In re K.Q., 2022-NCSC-53](#)

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent due to circumstances related to domestic violence between his parents. While the underlying action was pending, father participated in services under his case plan but was arrested for another domestic violence incident involving mother. When the primary permanent plan was identified as adoption, DSS filed a TPR motion, which was granted. Father appeals, challenging the grounds and arguing the court erred in determining there was a likelihood of future neglect.
- Although father challenges some findings, those findings were not reviewed because the unchallenged findings were sufficient to support the court's determination that there was a likelihood of future neglect. Those findings describe chronic domestic violence between the parents; document father's violence, including at visitation resulting in a suspension of his visitation; address the incident that resulted in the new criminal charges against father; and mother's most recent DVPO filing. The findings also show father engaged in his case plan requirements but that he did not show he could apply what he learned. Father also denied the domestic violence and any impact it had on the juvenile and blamed mother for the domestic violence. Compliance with a case plan does not preclude a conclusion of neglect. The court did not error in determining there was a likelihood of future neglect.

Past Neglect as Factor in Neglect

[In re M.S.L., 2022-NCSC-41](#)

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected based on circumstances related to mother's substance use. Respondent father contacted DSS because he believed he was the juvenile's father, which he was later determined to be. Ultimately, DSS sought to terminate father's rights. Father admitted to the allegations in the petition, which the court accepted as stipulations, but asked to be heard on the child's best interests. After hearing, the TPR was granted. Father

appeals arguing the findings of fact do not support the conclusion of neglect as the ground to TPR because father was not responsible for the initial neglect adjudication.

- Relying on prior opinions that rejected similar arguments, a neglect adjudication is about the circumstances and conditions surrounding the child and not the fault or culpability of the parent. Failure to make progress on a case plan is indicative of a likelihood of future neglect. Father admitted to the allegations in the TPR petition, and the court made findings and conclusions from those stipulations, which included father's substance use, failure to comply with his case plan regarding substance use treatment and a parenting capacity evaluation, and delayed taking a paternity test. Although the findings were limited to father's factual stipulations, there are sufficient to conclude neglect existed. Father stipulated the juvenile was previously adjudicated neglected based on the juvenile testing positive for substances at birth. Father used controlled substances.

#### In re C.S., 2022-NCSC-33

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

- Facts: A neglect and dependency petition was filed by DSS based on circumstances created by the mother. Mother identified father, and paternity was determined. The juvenile was adjudicated neglected and dependent based on a consent order, which father agreed to. After the primary permanent plan was identified as adoption, DSS filed a TPR motion. The TPR was granted and father appeals, challenging the ground of neglect and the best interests determination.
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent's failure to make progress on a case plan.
- Although there was no evidence father had custody of his child in the past or had caused the child to be neglected, "[i]t is ...not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect." Sl.Op. ¶ 16 (citation omitted). An adjudication of neglect is admissible, and here, father did not object to the original adjudication nor its admission into evidence at the TPR.

#### Failure to Make Reasonable Progress

#### In re D.D.M., 2022-NCSC-34

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

- Facts: The juvenile, who is medically fragile, was adjudicated neglected in 2018, based on circumstances created by mother's lack of proper care and untreated mental health issues that impacted her parenting. Undisputed findings are that mother did not obtain treatment for her mental health issues which negatively impacted her ability to parent. Mother appeals TPR arguing the court did not consider the impact of mother's poverty on her ability to care for the child.
- G.S. 7B-1111(a)(2) prohibits the termination of parental rights on the sole reason that the parents cannot care for their child because of their poverty. Here, the court did not terminate mother's rights because of poverty but rather because she failed to make reasonable efforts to

complete her case plan. Mother refused DSS's offers to assist with transportation to her son's medical appointments and visits and to participate in virtual visits if in-person became infeasible. Mother quit one job and left another. "On balance, the trial court's findings demonstrate that respondent-mother could have sought to comply with the requirements of her case plan even while experiencing otherwise insufficient monetary transactions." Sl. Op. ¶ 14.

### Findings Supported by Evidence

[In re L.D.](#), 2022-NCSC-40

#### **Held: Affirmed**

- This opinion affirms the TPR. It discusses how the challenged findings were supported by the evidence and how the findings support the conclusion that the children were in care for 12 or more months before the TPR petition was filed by DSS and that mother failed to make reasonable progress to correct the conditions that led to the children's removal. Mother's issues included substance use, lack of employment and housing, failure to remain in contact with DSS, and attendance at only a few parenting classes.

### Neglect; Failure to Make Reasonable Progress

[In re A.N.H.](#), 2022-NCSC-47

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

- Facts: The juvenile was adjudicated neglected based on circumstances related to mother's substance use, mental health, and lack of income. Father's paternity was established prior to the adjudication and concerns regarding his domestic violence and substance use were raised in an amended neglect petition. Father entered into a case plan with DSS and was participating in the services. Father did test positive on some drug screens. DSS filed a TPR motion, alleging neglect and failure to make reasonable progress to correct the conditions. The court granted the TPR on both grounds. Father appeals, arguing the findings are not supported by clear and convincing evidence and that the findings do not support the conclusions for the grounds.
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing of a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent's failure to make progress on a case plan. The court looks at the best interests of the child and the parent's fitness to care for the child at the time of the TPR hearing.
- Failure to make reasonable progress does not require a complete remediation of all the conditions that led to the child's removal. There does have to be a nexus between the components of the case plan and the reasons for the child's removal.
- The findings show that father completed the CCA and substance use assessment; completed a substance use program, a domestic violence program, and a parenting program. Father tested positive for cocaine and other illegal substances and denied illegal drug use. Father admitted to drug use in the adjudication order of a neglected juvenile. Ten of father's drug screens showed negative results. Father paid child support and attended 78 of 80 visits with his mother always in attendance such that he is unable to care for the child on his own. Father has sporadic

employment but was employed at the time of the TPR hearing. Father resides with his aunt, which is an appropriate and safe home. Father did not participate in intensive outpatient substance use treatment as recommended. Father did not complete individual therapy.

- There was no evidence to support some of the findings including the father's denial of drug use. The GAL report that was admitted at the dispositional stage cannot be considered at adjudication. Although father had unsupervised visits at one point does not preclude the court from finding he has not demonstrated an ability to provide appropriate care to his child. However, the evidence does not support the court's determination that he lacks the ability to provide appropriate care. The finding that father did not complete individual therapy is not supported by the evidence.
- Respondent complied with most of his case plan requirements and at the time of the TPR had regularly visited with the child, paid child support, and an appropriate and stable home, completed substance use, domestic violence, and parenting programs, and addressed the conditions that led to the child's placement in DSS custody. Although substance use was a concern and father tested positive on drug screens, he completed substance abuse treatment. There are no findings about whether his drug use creates or substantial risk of harm to the child. Similarly, given the completion of most of his case plan, the findings do not support a conclusion that he failed to make reasonable progress.
- Remand is appropriate because the court must address whether the erroneous factual findings were central or incidental to the conclusions of neglect and failure to make reasonable progress.

## Dependency

### [In re J.I.G.](#), 2022-NCSC-38

#### **Held: Affirmed**

- Facts: The juveniles were adjudicated neglected and dependent, and the youngest juvenile was also adjudicated abused. Father made progress on his case plan but was later arrested and charged with 4 counts of felony child abuse related to the youngest juvenile. Father was incarcerated and awaiting trial. DSS filed a TPR motion, which was granted. Father appeals, challenging the grounds by arguing the evidence does not support the findings and the findings do not support the conclusion about his incapability to parent.
- G.S. 7B-1111(a)(6) authorizes a TPR when (1) a parent lacks the capacity to provide proper care and supervision such that the juvenile is a dependent juvenile (G.S. 7B-101(9)), (2) there is a reasonable probability the parent's incapacity will continue for the foreseeable future, and (3) the parent lacks an appropriate child care arrangement.
- Father challenges the court's assessment of the social worker and GAL's testimony, but it is the trial court's responsibility to assign the proper weight and credibility of the evidence. The findings are supported by clear and convincing evidence even though there is evidence to the contrary. Adjudicatory findings based on mother's testimony are disregarded as mother left the hearing before cross-examination by father's attorney. Unchallenged findings support the dependency ground: father has an intellectual disability that negatively affects his ability to reason, plan, exercise judgment, and problem solve such that he was incapable of providing proper care and supervision to the juveniles, that he lacked an alternative appropriate child care arrangement, and his incapability was expected to continue.

## Willful Abandonment

[In re B.E.V.B.](#), 2022-NCSC-48

### **Held: Affirmed**

- Facts: This is a private TPR initiated by mother against father for willful abandonment. The relevant 6-month period is November 7, 2019 – May 7, 2020. The parties lived together with their child until 2017. Mother obtained a DVPO in 2017 that expired in 2018. Mother married her current husband in 2017. There has been no contact between father and child or mother since 2017. In 2017, when mother asked father for child support, he responded he would not pay. The TPR was granted, and father appeals the ground.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment for the six months immediately preceding the filing of the TPR. Willfulness is a question of fact. Abandonment involves the parent's withholding of love, care, presence, the opportunity to display filial affection and willfully neglecting to provide support and maintenance. The determinative time period is the 6 months immediately preceding the filing of the TPR petition, but the court may consider events that occurred outside that time period when determining the parent's credibility and intentions.
- Although father argues he had no way to contact mother, he had access to her and her husband's Facebook accounts and knew the mother's family. Respondent did not reach out to mother, her husband, or her family. He did not file a Chapter 50 custody action. He did not look at public records for her address. He did not attempt to reach her via Snapchat, which is how they had communicated in 2017. These findings support the court's determination that he acted willfully, and the ground existed.

## Denial of TPR

[In re S.R.](#), 2022-NCCOA-285

### **Held: Affirmed**

- Facts: This is a private TPR where mother petitioned to terminate father's parental rights on the grounds of neglect, failure to pay child support, and willful abandonment. Findings addressed mother's agenda of setting father up to not pay child support so that the ground to TPR was available. The TPR was denied and petitioner appeals arguing that some findings were not supported by clear and convincing evidence and the conclusion that no grounds existed was not supported by the findings.
- A finding that is supported by clear and convincing evidence is conclusive even if there is other evidence in the record that would support a contrary finding. The trial court considers the evidence and determines its credibility and weight. When there is conflicting evidence, the appellate court will not assign weight or credibility to that evidence. Findings that are not supported by clear and convincing evidence are disregarded.
- G.S. 7B-1111(a)(4) authorizes a TPR based on a parent's willful failure to pay child support for one year or more immediately preceding the TPR petition when a parent has been awarded custody of the child and a support order is in place. The TPR order does not include findings that there was a child support order requiring father to pay child support but instead finds father paid child support until mother elected to no longer have an income garnishment for father's

wages to pay child support. There was evidence to show there was a child support order, but “the trial court acted within its discretion in electing to not terminate [father’s] parental rights” such that any error of not including a finding about the child support order was harmless. There was no error in concluding the grounds of neglect and abandonment were not proved.

## Best Interests

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

[In re S.M.](#), 2022-NCSC-42

Held: Affirmed

- Facts: The juvenile was adjudicated neglected and dependent. Respondent parents did not engage in services resulting in a primary permanent plan of adoption. DSS filed a TPR motion, which was granted. Respondent parents appeal, challenging the best interests determination of the TPR order. They argue the facts are not supported by the evidence and the court abused its discretion when making the best interests of the child determination.
- The standard of review of a dispositional order is an abuse of discretion. The findings must be supported by competent evidence, which under G.S. 7B-1110 includes any evidence, including hearsay evidence, that is relevant, reliable and necessary to determine the most appropriate disposition. The court must consider factors in G.S. 7B-1110(a) and make written findings of those that are relevant. Relevant factors are those where there is conflicting evidence making the factor an issue for the district court.
- The majority of the challenged findings are supported by the evidence, including social worker testimony, a letter from the juvenile’s physician’s assistant, and DSS and GAL reports. Mother’s argument that the DSS report is incompetent evidence because its sources were not identified is without merit. There was no objection to the report and there was the opportunity to cross-examine the social worker. The court did not abuse its discretion in relying on the reports since hearsay evidence is admissible at disposition.
- In reviewing each factor of G.S. 7B-1110(a), the findings were supported by the evidence. The child’s age of 11 and her potential need to consent to adoption can be waived and would not preclude the adoption. A TPR was necessary to achieve the permanent plan of adoption; the trial court is not required to address the secondary plan (in this case guardianship). Although the juvenile has significant behavioral issues and experienced multiple placements, the evidence supported the court’s finding that she was likely to be adopted given her recent attachment to her foster parent and reduction in behaviors and the ability to provide more resources for an adoption once she was free to be adopted. Regarding the parent-child bond, the evidence supported the finding that the relationship hindered the juvenile’s emotional development and well-being.
- There was no abuse of discretion in determining TPR was in the child’s best interests when there was no adoptive placement for the child. This case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004). Here, the juvenile showed improvement and respondents made no progress in correcting the conditions that led to the juvenile’s removal. The appellate court will not reweigh the evidence. The trial court considered the relevant statutory criteria and made a reasoned decision.

### Parent-Child Bond

#### [In re C.S.](#), 2022-NCSC-33

**Held: Affirmed**

- **Facts:** Father appeals TPR, arguing in part that the court erred in determining it was in the child's best interests by not making findings about the parent-child bond as required by G.S. 7B-1110(a)(4).
- The court explicitly found that the father loves his child, which demonstrates the court considered the parent-child bond. The court further found that father is not in a position to provide his child with a stable, safe, and nurturing environment and the child has a strong bond with his foster parents. As previously held, the parent-child bond factor is properly addressed by findings "that any previous bond or relationship with the [respondent parent i]s outweighed by [the child's] need for permanence." Sl. Op. ¶ 21 (citation omitted). There as no abuse of discretion.

### Relative Consideration

#### [In re H.R.S.](#), 2022-NCSC-36

**Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected and had some short-term placements with relatives. Eventually, the juvenile was placed with her foster mother. Ultimately, DSS sought the termination of father's parental rights, which was granted. Father appeals, challenging the court's determination that the child's best interests supported the TPR. Father argues the court should have instead prioritized placement with available relatives.
- **There was no abuse of discretion** in determining the TPR was in the child's best interests. The court considered the factors in G.S. 7B-1110(a), including a high likelihood of adoption based on the very strong and high-quality bond between the child and foster parent, and the foster parent's desire to adopt. The court also considered as a relevant factor the availability of relatives who lived outside of North Carolina and were determined to be suitable as a placement. Those relatives never met with or requested to visit with the juvenile, and father delayed communicating the relatives' interest in being a placement option. Unlike an A/N/D case where the court is required to consider relative placement, there is no such requirement in a TPR. Instead, relative placement may be a relevant consideration under G.S. 7B-1110(a)(6). An available relative placement is not determinative on the court in a TPR. The court properly balanced the competing interests of preserving the child's ties with her biological family and achieving permanency for the child that is offered by her prospective adoptive family.

### Any Other Relevant Factor

#### [In re A.N.D.](#), 2022-NCSC-32

**Held: Affirmed**

- **Facts:** Father appeals the termination of his parental rights, challenging the best interests determination only.
- The court did not abuse its discretion when it properly considered the factors in G.S. 7B-1110(a) and determined the TPR was in the children's best interests. Although father argued the court should have considered the impact of COVID-19 restrictions on his housing and employment as

a relevant factor, father did not have suitable housing before or after the 2019 motion for TPR was filed. For his employment, although he was laid off, father had more income after his lay off and chose not to work.

- The challenged finding of fact regarding father’s criminal history has a portion that is unsupported by competent evidence and is disregarded and a larger portion that is supported by competent evidence that is considered.

In re S.D.C., 2022-NCSC-55

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected in 2019 due to circumstances related to mother’s substance use. After mother missed several visits and was arrested for alcohol-related charges, the primary permanent plan was changed to adoption. DSS filed a TPR motion, which was granted. Mother appeals, challenging the findings of fact and the court abused its discretion in determining TPR was in the child’s best interests.
- Under Rule 58 of the Rules of Civil Procedure, an order is entered when it is reduced to writing, signed by the judge, and filed by the clerk. A court may change the finding in its written order from what was orally rendered. There is no error when there is a difference between the findings rendered and those entered in the written order.
- The finding is supported by the DSS social workers’ testimony and the DSS court report. The one challenged finding of fact that is not supported by evidence is disregarded.
- The trial court properly considered the G.S. 7B-1110(a) factors and did not abuse its discretion. Although mother argues the court should have considered guardianship as an alternative since it orally praised mother for her case plan efforts, the court considers the child’s best interests as paramount over the interests of the parent. The court’s statement acknowledging mother’s efforts does not preclude the court from determining TPR is in the child’s best interests.

Challenged Findings

In re K.N.L.P., 2022-NCSC-39

**Held: Affirmed**

- Facts: Father appeals the termination of his parental rights, challenging the best interests determination. He argues several findings of fact are not supported by the evidence.
- Noting because competent evidence is admissible evidence from the Rules of Evidence and because the Rules of Evidence do not apply to the dispositional stage of a TPR but instead relevant, reliable, and necessary evidence is considered by the court, for clarity the term “competent evidence” is being avoided when addressing the best interests of TPR orders for the language of the statute, “evidence.”
- The challenged findings are supported by the evidence, including the social worker’s testimony. Findings that are supported by the evidence are binding. The trial court determines the weight, credibility, and inferences to draw from the evidence. When some evidence supports the finding, the finding is binding even when a finding to the contrary could be supported.
- A sub silentio finding is an unexpressed finding. Two of those challenged findings are not dispositional findings for the appellate court to review.
- The court did not abuse its discretion in determining TPR was in the best interests of the child.