UNC SCHOOL OF GOVERNMENT

2024 Parent Attorney Conference

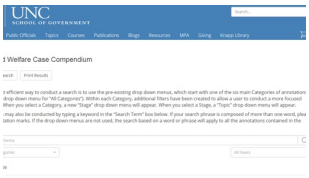
Thursday, August 29, 2024
School of Government, Room 2601

8:30 to 9:45	**Welcome & Case Law Update, Part 1** *Timothy Heinle, Teaching Assistant Professor* *Sara DePasquale, Associate Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
9:45 to 9:55	Break
9:55 to 10:55	**Parenting Evaluations: What Defenders Need to Know** *Dr. Paige Schultz, Forensic Psychologist* New Bern, NC
10:55 to 11:05	Break
11:05 to 11:50	**Your Client is More Than a Piece of Paper** **(Telling your client's story through direct examination)** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
11:50 to 12:35	Lunch
12:35 to 1:35	**Workshop: Parent Defense and Direct Examination** *Please proceed directly to assigned breakout rooms after lunch.*
1:35 to 1:45	Break
1:45 to 2:15	**Clear and Convincing Standard: What does it Mean?** *Annick Lenoir-Peek, Deputy Parent Defender* Indigent Defense Services, Durham, NC
2:15 to 2:45	**Legislative and IDS Update** *Wendy Sotolongo, Parent Defender* Indigent Defense Services, Durham, NC
2:45 to 3:00	Break
3:00 to 4:00	**Case Law Update Plus (Part 2)** *Sara DePasquale, Associate Professor of Public Law and Government* *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC

This program offers 6.0 hours of CLE credit, pending Bar approval.

Case Update I Parent Attorneys Conference (2024)

BY: SARA DEPASQUALE,
UNC SCHOOL OF GOVERNMENT



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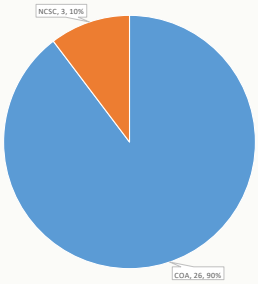
Opinions Since Last Conference



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Today's Topics

- Jurisdiction
- Parties and Representation
- Abuse and Neglect
- Dispositions
- TPR
- Appellate Issues

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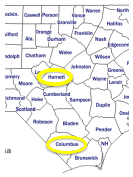
7B-1101: Jurisdiction

In re M.A.C. (p. 34)

- "Found in"
- "Resides in"



TPR Petition

Children reside in Columbus and present in Harnett County when petition filed

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Found In = Physically Present

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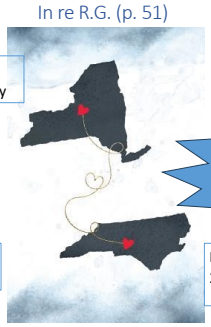
UCCJEA

In re R.G. (p. 51)

May 2019: Dad moves
Sept. 2019: Custody act, joint custody



Temporary Emergency

Nov. 2018:
Adopted by mom & dad

Dec. 2021, DSS petition/NSC
2022 mom contests SMJ

https://wellsvillesun.com/blog/2021/05/25/the-new-york-north-carolina-connection/

6

What's Required?

Is This Sufficient?

7

Modification Jurisdiction

- Order from other state preferred but not expressly required
- Docket entry ok (In re T.R.); Letter is analogous
- Letter has substantive attributes of order
  - Facts
  - Conclusion re: SMJ
  - Indicia of veracity and officiality (stationary, facts, judge's signature)

8

Terminate Jurisdiction

In re K.C. (p. 30)

Adjudication	• Dismissed with prejudice
Rule 59-60	• Granted • Transcript of forensic interview provided
Order	• Adjudicated children neglected
Appeal	• Did the court have subject matter jurisdiction to hear the Rule 59-60?

9

7B-201

- Rule 59-60 does not claw back jurisdiction
- Appeal

10

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- Jurisdiction
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- Dispositions
- TPR
- Appellate Issues

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Removal of Party

In re E.E. (p. 6)

12

7B-401.1(g)

Findings

- No legal rights affected by removal
  - DSS custody
- Continuation as party not necessary to meet juvenile's needs
  - $ support for GM
  - Sexual abuse, criminal charges, DVPO

13

What's odd about this appeal?

14

Today's Topics

- Jurisdiction
- Representation
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- Dispositions
- TPR: Abandonment
- Appellate Issues

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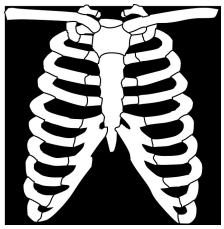

Abuse

Conflicting Expert Testimony

In re E.H. (p. 7) (Stayed 7/15/24)

16

Neglected: Sibling (p. 11)

- Sole caretakers of infant
- Nonaccidental injuries
- No explanation
- Married parents
- Pending criminal charges

17

Neglect: Single Act

- In re A.H. (p. 9)
  - Distinguish Stumbo, HP, and V.M.
  - Below normative standards of care
  - Findings are key
  - Totality of evidence

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Today's Topics

- Jurisdiction
- Parties Representation
- Abuse and Neglect
- Dispositions
- TPR
- Appellate Issues

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Initial Disposition

In re B.L.M.-S (p. 19-20)

7B-901(c) – chronic physical abuse

2 m.o.

2 rib fractures

Findings = dad's admissions

Chronic

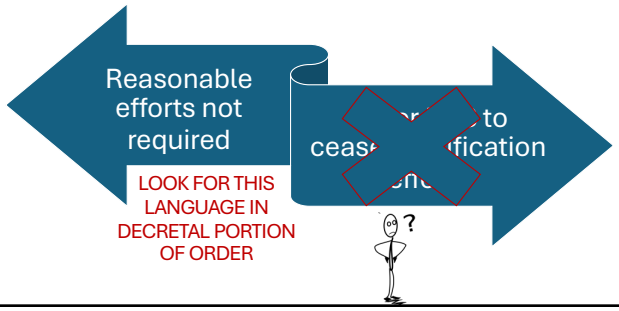
20

Discretion of trial court

Not recommended by DSS

21

Statutory authority



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Order No Contact

7B-904: steps to remedy conditions led to removal

23

Guardianship Ordered

In re J.O. (p. 26)

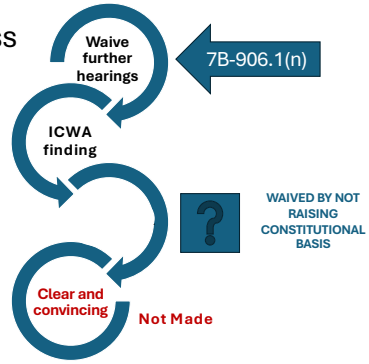
No ICWA findings clear and convincing evidence

- QEW, serious emotional or physical damage to child

25 USC 1912
25 CFR 23.121 - .122
In re E.G.M., 230 N.C. App. 196 (2013)

24

Need not address



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TPR: Abandonment

Limits on contact

27

Parole
- No contact with any children
- In re C.J.B. (p. 42)

DVPO
- No contact with mom
- In re E.Q.B. (p. 43)

Sole custody
- Mother's credibility
- In re A.N.B. (p. 45)

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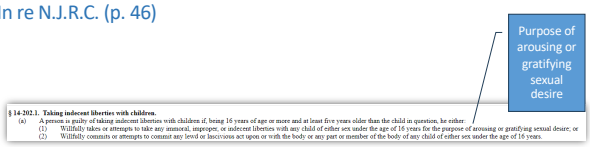
TPR: Sexually Related Criminal Offense

In re N.J.R.C. (p. 46)



§ 14-208.6(5): Definition, Sexually Violent Offense …. 14-202.1

29

Opens the Door: In re E.Q.B. (p. 50)

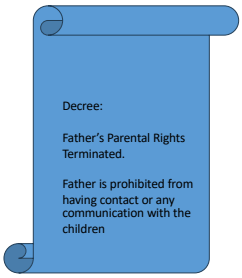
Single TPR ground jurisprudence

Reinstatement of parental rights

30

Disposition

In re E.Q.B. (p. 47)



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Today's Topics

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7B-1001: Appealable Orders

Absence of jurisdiction
In effect determinations action and prevents judgment which appeal might be taken
Adjudication and initial disposition
Change legal custody (not a NSC)
PPO eliminate reunification
TPR grant/deny

33

Which Orders Can Be Appealed
In re R.G. (p. 32)

Initial disposition order relieves DSS of reunification efforts

First PPO: concurrent plans guardianship and custody to relative

Second PPO: guardianship ordered to grandmother

34

How?

With 7B-901(c) reunification excluded so not eliminated

Initial disposition order relieves DSS of reunification efforts

First PPO: concurrent plans guardianship and custody to relative

35

7B-1002: Standing to Appeal

Juvenile

DSS

Parent, guardian, custodian who is nonprevailing party

Party seeking but denied TPR

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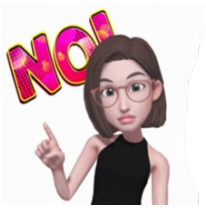
Caretaker

In re L.C. (p.33) (Stayed 5/7/24)

- "Father"
- Paternity
- Dismissed



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Inadequate Transcript

In re X.M. (p. 48)

- Burden on appellant
- Agreed narrative of TPR proceeding
- Judicial notice of prior orders and reports
- Prejudice required
- Appellate review not precluded

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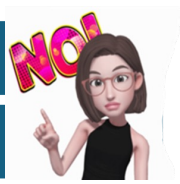
No Merit Brief

In re J.B. (p. 51)

SMJ merit



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A Respondent Parent's Right to Retain Counsel: Lessons from a New Court of Appeals Decision, In re A.K.

A recent decision by the North Carolina Court of Appeals considers the right of a respondent parent in a juvenile abuse, neglect, or dependency (AND) proceeding to hire counsel of their own choosing and what standards, if any, a retained attorney must meet to be allowed to represent a parent. *In re A.K.*, __ N.C. App. __ (August 6, 2024). The case also includes discussion of the procedures for appointing a Rule 17 guardian ad litem to a respondent parent – an issue I will explore in a later post. This post focuses on what the opinion in *A.K.* does – and does not – tell us about a parent's right to hire counsel.

A Parent's Right to Counsel, Generally

When an AND petition or a petition to terminate parental rights (TPR) is filed, the juvenile's parent has a statutory right to counsel, absent certain exceptions. *See* G.S. 7B-602(a); 7B-1101.1(a). Provisional counsel must be appointed for each parent named in the petition but must be dismissed at the first hearing if one of these statutory factors applies: the parent fails to appear at the hearing, the parent has retained private counsel, the parent is not indigent, or the parent knowingly and voluntarily waives their right to counsel. G.S. 7B-602(a)(a1); 7B-1101.1(a)(a1). If none of the statutory factors are satisfied, the court must confirm the appointed counsel. G.S. 7B-602(a); 7B-1101.1(a).

The remainder of this post will consider the right to retained counsel in the AND context. My colleague, Sara DePasquale, and I have each previously published posts related to provisional counsel at a TPR proceeding. One post, which can be found here, considered how to determine whether a parent attorney was provisional or confirmed, and what it means for withdrawal by the attorney. The other post explored issues related to waiver and forfeiture of counsel by parents at TPR, and can be found here.

A New Court of Appeals Decision: *In re A.K.*

Background. Recently, the Court of Appeals published its decision in *In re A.K.*, __ N.C. App__ (August 6, 2024). The case involves a neglect petition that was filed by Guilford County DSS and alleged domestic discord, mental health issues, and concerns over the children's welfare and lack of access to education and medical services. When the petition was filed, the court appointed provisional counsel to the respondent mother pursuant to G.S. 7B-602(a). While initially represented by provisionally appointed counsel at the continued nonsecure custody hearing, two days prior to the first setting for pre-adjudication, adjudication, and disposition, a private attorney retained by the respondent mother filed a notice of appearance and served the notice on opposing counsel and the child's GAL.

After discussing mother's representation, the court continued the hearing and sua sponte appointed a Rule 17 GAL for mother. No decision on mother's counsel was made. At the next scheduled hearing, the trial court addressed the mother's request to be represented by her retained attorney. The trial court noted that not everyone is qualified to work in an AND proceeding "because of its specialized nature," making it "extremely different" from other courts. Sl. Op. at 17. After conducting an inquiry, the court determined that the attorney did not meet the requirements set forth by the judicial district's local rules for court-appointed attorneys and was unqualified to appear in AND court. The trial court stated that the retained counsel's lack of qualifications was severe enough that the court was concerned it "most likely would end up terminating [mother's] parental rights," despite DSS having expressed that reunification was the goal. Sl. Op. at 18.

In its adjudication order, the court found that (1) mother's retained attorney lacked sufficient knowledge of the juvenile laws and lacked the experience and competence necessary to represent parents in AND matters, and (2) representation by her retained counsel was not in the mother's best interests. The order explained the court's concerns that the mother would "suffer irreparable harm to her parental rights," and thus found that "despite the fact that [this attorney] is retained…his representation would be detrimental." Sl. Op. at 16. The court released the retained attorney and ordered that appointed counsel remain in the case.

The juveniles were adjudicated neglected, and a disposition order was later entered. The respondent mother timely appealed both orders.

The appeal. Among other issues raised on appeal, the mother argued that parents have a right to hire an attorney of their choosing, and that by denying her that right, the court failed to comply with G.S. 7B-602(a) and violated her due process and constitutional rights.

Standard of review. Addressing the applicable standard of review, the Court of Appeals noted that it was unable to find prior cases dealing with a trial court's refusal to allow a respondent parent to be represented by a retained attorney who had filed notice of his appearance and attended the hearing. Looking to *In re K.M.W*., 376 N.C. 195 (2020), the Court applied a *de novo* standard of review since the issue involved a conclusion of law addressing the parent's right to counsel based on statutory criteria. A de novo standard of review is also applied "where constitutional rights are implicated." Sl. Op. at 12. The Court distinguished the present case from cases that applied an abuse of discretion standard when a parent sought a continuance to allow time to hire private counsel, or where a respondent seeks to replace a court-appointed attorney with another appointed counsel. *Id*.

Qualifications of retained counsel. In response to concerns raised about his qualifications to represent the mother in an AND matter, mother's retained counsel argued that there were no special standards he needed to meet because he was retained and not court appointed. The Court of Appeals agreed. The Court pointed to the local rules of the judicial district which set the requirements, experience, and training necessary for an attorney to be considered for appointment

to a parent in an AND matter. Those rules do not apply to privately retained counsel, however. Addressing the required qualifications for a privately retained attorney, the Court stated, "[t]he only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina." Sl. Op. At 19. DSS argued that trial courts have inherent authority over the attorneys appearing before, but the Court explained that inherent authority applies to unethical or potentially unethical behavior by an attorney. In this case, the mother's retained counsel had acted appropriately and there were no concerns about unethical behavior.

Similarly, the Court rejected an argument by DSS that allowing an inexperienced attorney to represent a parent may violate the Rules of Professional Conduct, specifically Rule 1.1, Competence. The Court reasoned that a lack of experience by an attorney who is otherwise licensed to practice law in North Carolina is not a sufficient basis to deny a motion to substitute counsel. Every attorney is new to a specific area of law at first, the Court said. While agreeing that AND proceedings are specialized in nature, the Court held that a trial court's inherent authority over the attorneys who appear before it does not go so far as to give courts the unrestrained authority to deny retained counsel based only on that attorney's lack of particular experience.

Holding. Whether the trial court "simply failed to comply" with the statutory requirement that trial courts "shall dismiss" provisional counsel under certain conditions, or whether the court misapprehended the law as it relates to qualifications necessary to serve as a parent attorney, the Court of Appeals held that the trial court erred in denying the respondent mother representation by retained counsel. Sl. Op. at 22.

Takeaways, limits, and open questions

Through *In re A.K.*, the Court of Appeals has reaffirmed the right of parents in AND proceedings to retain an attorney of their choosing. When a parent exercises that right, trial courts must dismiss provisionally appointed counsel for the parent, without considering the possible lack of AND experience on the part of the privately retained counsel. Local rules that govern court appointed counsel in AND proceedings do not apply to privately retained counsel and do not limit a parent's right to hire counsel.

Note that the Court of Appeals' ruling in *In re A.K.* does not change the Rules of Professional Conduct, including Rule 1.1 on competence. Attorneys must be competent, meaning they must have "the legal knowledge, skill, thoroughness, and preparation reasonably necessary" to represent a client. N.C. R. of Prof'l Cond., R. 1.1. But there is no requirement that a lawyer have "special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar," and in fact a new lawyer may be as competent as a seasoned one. *Id*. at Cmt. [2]. Additionally, a lawyer may act to represent a client where competence is achievable through preparation. *Id*. at Cmt. [4]. If the lawyer is not competent, they may associate with a lawyer who is. *Id*.

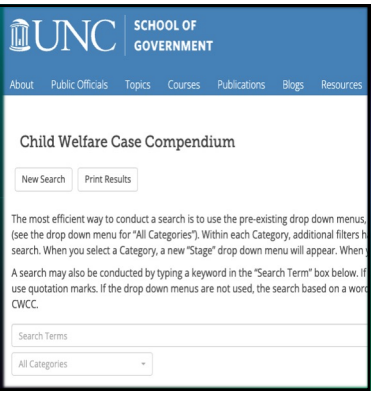
Remember too, the holding in *In re A.K.* does not necessarily apply to situations where a parent is requesting additional time to hire an attorney, or to a parent who wants the court to substitute one appointed attorney with a different appointed attorney. Other situations or questions that were not necessarily addressed by *In re A.K.* include:

- If a judicial district has local rules that establish minimum qualifications for *retained* attorneys to represent clients in AND proceedings, what effect would those rules have, if any, on a parent's right to retain counsel? Could a court prevent a licensed attorney who is retained but is otherwise "unqualified" under the local rules to appear on behalf of a parent?
- *In re A.K.* dealt with the appointment of provisional counsel under G.S. 7B-602(a) and the release of said counsel if a parent hires an attorney prior to the first hearing. What if a parent hires private counsel later in the proceeding, after provisional counsel had been confirmed? Or what if the parent has been determined to have forfeited counsel and later tries to hire their own attorney? Does the timing relative to the proceeding affect the parent's right to be represented by privately retained counsel of the parent's choosing?
- The question of a party's mental capacity to hire counsel is a significant one, and is an issue faced by all courts and not just in AND proceedings. For reasons that are beyond the scope of this post, a Rule 17 GAL was appointed to the respondent mother in *In re A.K.*, and in a way that concerned the Court of Appeals but was not ultimately an issue ruled on by the Court. In a future post, I will address the Rule 17 GAL lessons to be found in *K.*, but questions remain as to whether a parent who has been appointed a Rule 17 GAL has the capacity and right to hire their own counsel (and whether the court must accept that counsel)?

Reach out to me anytime at Heinle@sog.unc.edu if you have questions or want to discuss issues related to this post or your own cases.

Case Update Part II Parent Attorneys (2024)

SARA DEPASQUALE
TIMOTHY HEINLE
UNC SCHOOL OF GOVERNMENT



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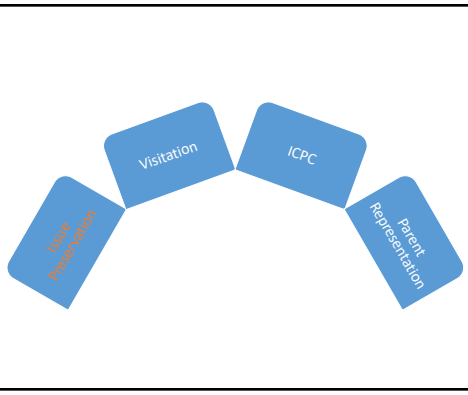

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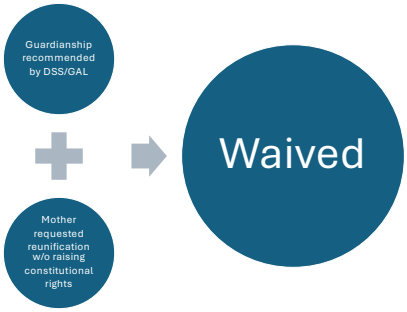
Constitutional Rights Determination

In re J.O. (p. 21)



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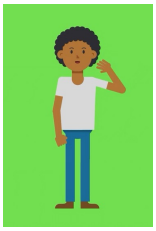
'Waiving' Goodbye to Your Argument



Notice + Opportunity =

Specific constitutional argument at trial level

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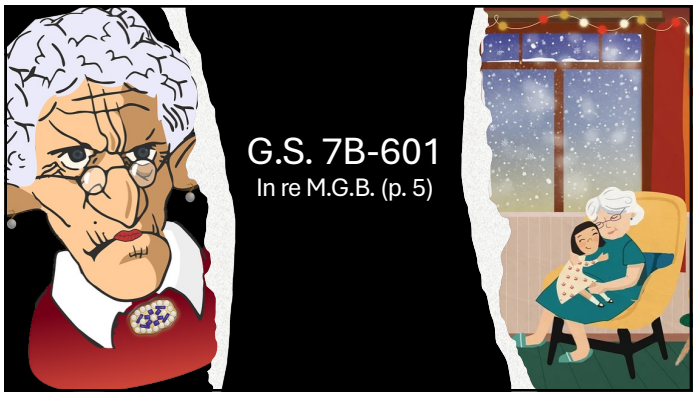

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Not a lot of guidance
7B-601

7

Performance

- Before removal, communicate with GM
- Monthly
  - Visits with children
  - Calls with foster parents
- Review DSS reports
  - Doc of grandmother's + visits
- Reports at each hearing
  - Health and well-being
  - Education
  - Relationship with placement & each other
  - Wishes

8

Preservation for appeal

- Automatic: contrary to statutory mandate that requires
  - Specific act
  - Specific courtroom proceedings judge directs
- 7B-601: GAL appointment
  - Trial court appoints
  - Duties are directed to GAL

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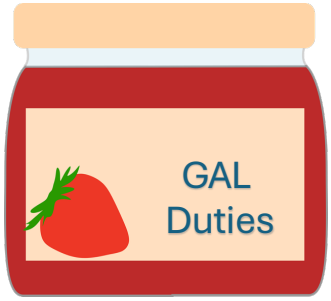
‘Preserving’ Your Argument

Raise GAL performance deficiencies at trial.



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GAL opinion ≠ Juvenile’s express wishes?

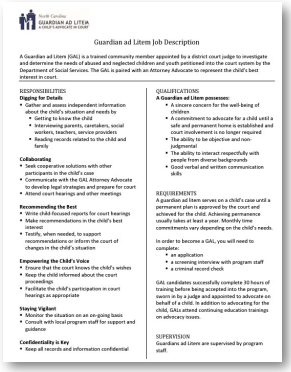
The GAL advocates their own perspective but also must “convey [the child’s] express wishes accurately and objectively to the court.”

In re J.C.-B., 276 N.C. App. 180, 192 (2021)

G.S. 7B-601(a)

- Investigate to determine the:
  - Facts
  - Juvenile’s needs
  - Available family resources to meet those needs
  - Available community resources to meet those needs
- Facilitate the settlement of disputed issues, where appropriate
- Offer evidence and examine witnesses (Adj.)
- Explore options for disposition
- Conduct follow-up investigations to ensure court orders are being properly executed*
- Report when the needs of the juvenile are not being met*
- Protect + promote the juvenile’s best interests

11



North Carolina
GUARDIAN AD LITEM
A CHILD'S ADVOCATE IN COURT

Guardian ad Litem Job Description

A Guardian ad Litem (GAL) is a trained community member appointed by a district court judge to investigate and determine the needs of abused and neglected children and youth petitioned into the court system by the Department of Social Services. The GAL is paired with an Attorney Advocate to represent the child's best interest in court.

RESPONSIBILITIES

Digging for Details
- Gather and assess independent information about the child's situation and needs by
  - Getting to know the child.
  - Interviewing parents, caretakers, social workers, teachers, service providers
  - Reading records related to the child and family

Collaborating
- Seek cooperative solutions with other participants in the child's case
- Communicate with the GAL Attorney Advocate to develop legal strategies and prepare for court
- Attend court hearings and other meetings

Recommending the Best
- Write child-focused reports for court hearings
- Make recommendations in the child's best interest
- Testify, when needed, to support recommendations or inform the court of changes in the child's situation

Empowering the Child's Voice
- Ensure that the court knows the child's wishes
- Keep the child informed about the court proceedings
- Facilitate the child's participation in court hearings as appropriate

Staying Vigilant
- Monitor the situation on an on-going basis
- Consult with local program staff for support and guidance

Confidentiality is Key
- Keep all records and information confidential

QUALIFICATIONS

A Guardian ad Litem possesses:
- A sincere concern for the well-being of children
- A commitment to advocate for a child until a safe and permanent home is established and court involvement is no longer required
- The ability to be objective and non-judgmental
- The ability to interact respectfully with people from diverse backgrounds
- Good verbal and written communication skills

REQUIREMENTS

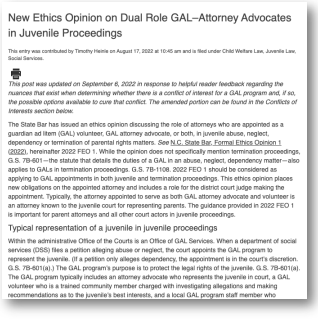
A guardian ad litem serves on a child's case until a permanent plan is approved by the court and achieved for the child. Achieving permanence usually takes at least a year. Monthly time commitments vary depending on the child's needs.

In order to become a GAL, you will need to complete:
- an application
- a screening interview with program staff
- a criminal record check

GAL candidates successfully complete 30 hours of training before being accepted into the program, sworn in by a judge and appointed to advocate on behalf of a child. In addition to advocating for the child, GALs attend continuing education trainings on advocacy issues.

SUPERVISION

Guardian ad Litem are supervised by program staff.



New Ethics Opinion on Dual Role GAL–Attorney Advocates in Juvenile Proceedings

This entry was contributed by Timothy Heinle on August 17, 2022 at 10:45 am and is filed under Child Welfare Law, Juvenile Law, Social Services.

This post was updated on September 6, 2022 in response to helpful reader feedback regarding the nuances that exist when determining whether there is a conflict of interest for a GAL program and, if so, the possible options available to cure that conflict. The amended portion can be found in the Conflicts of Interests section below.

The State Bar has issued an ethics opinion discussing the role of attorneys who are appointed as a guardian ad litem (GAL) volunteer, GAL attorney advocate, or both, in juvenile abuse, neglect, dependency or termination of parental rights matters. See N.C. State Bar, Formal Ethics Opinion 1 (2022), hereinafter 2022 FEO 1. While the opinion does not specifically mention termination proceedings, G.S. 7B-601—the statute that details the duties of a GAL in an abuse, neglect, dependency matter—also applies to GALs in termination proceedings. G.S. 7B-1108. 2022 FEO 1 should be considered as applying to GAL appointments in both juvenile and termination proceedings. This ethics opinion places new obligations on the appointed attorney and includes a role for the district court judge making the appointment. Typically, the attorney appointed to serve as both GAL attorney advocate and volunteer is an attorney known to the juvenile court for representing parents. The guidance provided in 2022 FEO 1 is important for parent attorneys and all other court actors in juvenile proceedings.

Typical representation of a juvenile in juvenile proceedings

Within the administrative Office of the Courts is an Office of GAL Services. When a department of social services (DSS) files a petition alleging abuse or neglect, the court appoints the GAL program to represent the juvenile. (If a petition only alleges dependency, the appointment is in the court's discretion. G.S. 7B-601(a).) The GAL program's purpose is to protect the legal rights of the juvenile. G.S. 7B-601(a). The GAL program typically includes an attorney advocate who represents the juvenile in court, a GAL volunteer who is a trained community member charged with investigating allegations and making recommendations as to the juvenile's best interests, and a local GAL program staff member who

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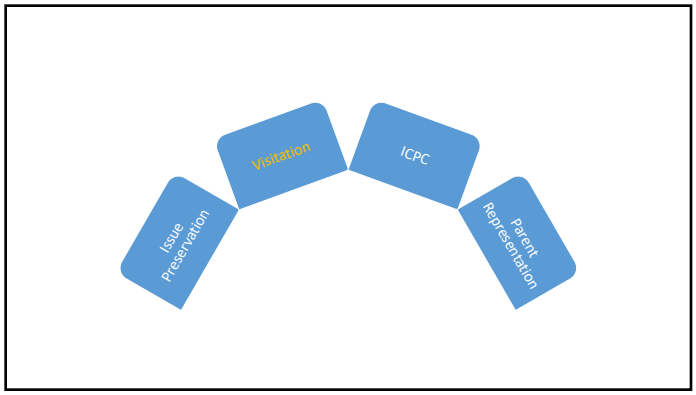


13

In re J.O. (p. 18)

14

Review of G.S. 7B-905.1

Minimum Outline

Cannot delegate

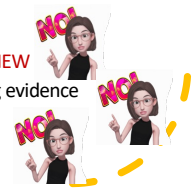
15

16

No Visitation
In re A.J.L.H. (p. 14)

COA
(on remand)
Back to NCSC

- Factors:
  - DSS history
  - Other children removed – is it related to this child's removal
  - Failed/minimally participate in case plan
  - Not consistently attend visits
  - Relinquishment
- Constitutional Rights – NEW
- Clear, cogent, convincing evidence
- Each Child and Parent



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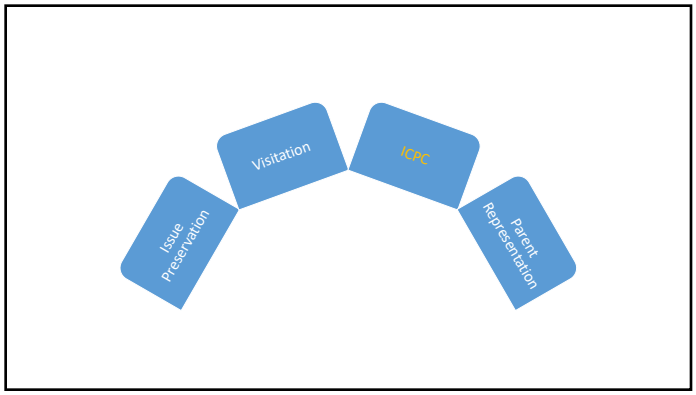
Contrary to child's best interests

FINDINGS

Forfeited their right to visitation

18



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ICPC
In re K.B.

- Home Study not required before rule out relative
- ICPC compliance when actually place
- DISSENT: 3 years

20

ICPC
In re K.B. (p. 22)

2 permanency planning hearings; same order

2019:
Placed with great aunt in NC

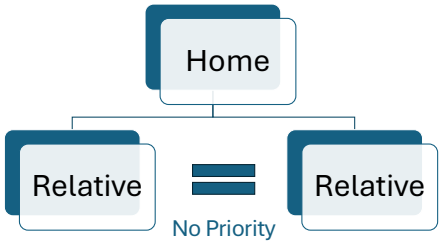
DSS ordered to assess GM in GA; starts

Nov. 2021:
Home study sent; never completed

Guardianship to Aunt

21

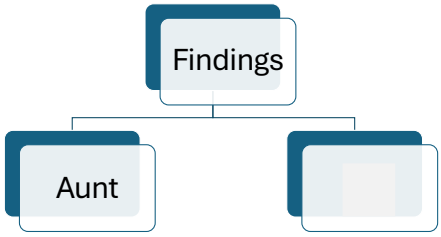
Abuse of discretion review



No Priority
(consider remaining in community)

22

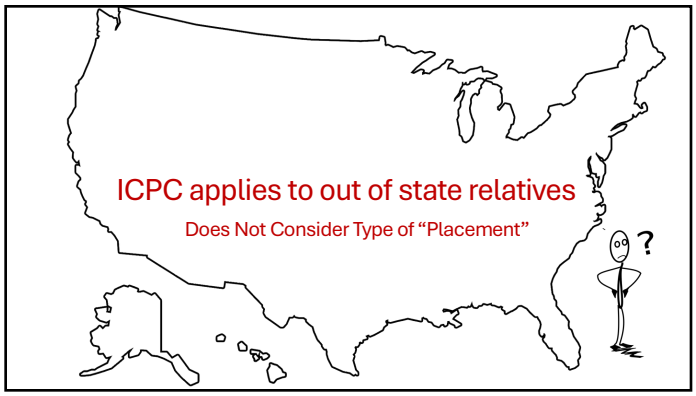
Did Not Have to Wait



Infrequent contact; Other children

Child's Best Interests Met

23



24

DSS unjustifiably delayed; show cause option

3 years

2019:

DSS ordered to assess GM in GA; starts

Nov. 2021: Home study sent

2022: Guardianship to Aunt; ICPC not completed

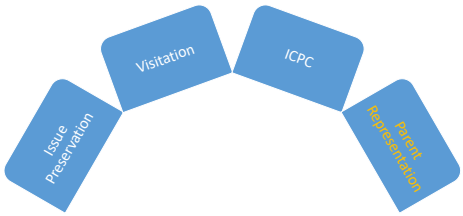
25




In re K.B., incentives, and consequences

- Don't delay. Complain loudly and often.
- Show cause
- Reasonable efforts
- Beyond ICPC

26



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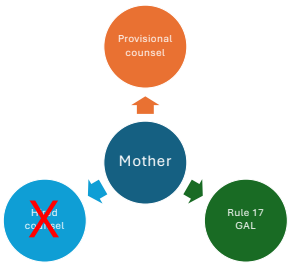
In re A.K. (p.3)



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Parent's Right to Hire Counsel

- Licensed + RPC (not local rules + experience)
- Court's inherent authority not unlimited.
- Don't just stand by – get out.

In re A.K., __ N.C. App. __ (August 6, 2024)

A Respondent Parent's Right to Retain Counsel: Lessons from a New Court of Appeals Decision, In re A.K.

This entry was contributed by Timothy Heinle on August 21, 2024 at 9:18 am and is filed under Child Welfare Law.

A recent decision by the North Carolina Court of Appeals considers the right of a respondent parent in a juvenile abuse, neglect, or dependency (AND) proceeding to hire counsel of their own choosing and what standards, if any, a retained attorney must meet to be allowed to represent a parent. *In re A.K.*, __ N.C. App. __ (August 6, 2024). The case also includes discussion of the procedures for appointing a Rule 17 guardian ad litem to a respondent parent – an issue I will explore in a later post. This post focuses on what the opinion in *A.K.* does – and does not – tell us about a parent's right to hire counsel.

A Parent's Right to Counsel, Generally

When an AND petition or a petition to terminate parental rights (TPR) is filed, the juvenile's parent has a statutory right to counsel, absent certain exceptions. *See* G.S. 7B-602(a); 7B-1101.1(a). Provisional counsel must be appointed for each parent named in the petition but must be dismissed at the first hearing if one of these statutory factors applies: the parent fails to appear at the hearing, the parent has retained private counsel, the parent is not indigent, or the parent knowingly and voluntarily waives their right to counsel. G.S. 7B-602(a)(a1); 7B-1101.1(a)(a1). If none of the statutory factors are satisfied, the court must confirm the appointed counsel. G.S. 7B-602(a); 7B-1101.1(a).

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Forfeiture of Counsel

In re D.T.P. (p. 36)

Parents Forfeited Their Right to Court-Appointed Counsel in TPR: What Is the Law for Attorney Representation of Parents in A/N/D and TPR Actions?

This entry was contributed by Sara DePasquale on December 6, 2023 at 5:55 pm and is filed under Child Welfare Law.

North Carolina law requires that parents in abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) cases receive court-appointed counsel if they are indigent. G.S. 7B-602; 7B-1101.1. Parents also have a right to knowingly and voluntarily waive their statutory right to counsel. *Id.* The question of whether a parent may forfeit their right to counsel in a juvenile proceeding based on their behaviors had not been answered until recently. Three appellate opinions address the issue and answer that question. Parents can and have forfeited their statutory right to court-appointed counsel. To get to forfeiture, you first need to understand the rules related to a parent's statutory right to court-appointed counsel.

30


The End

North Carolina
GUARDIAN AD LITEM
A CHILD'S ADVOCATE IN COURT

Guardian ad Litem Job Description

A Guardian ad Litem (GAL) is a trained community member appointed by a district court judge to investigate and determine the needs of abused and neglected children and youth petitioned into the court system by the Department of Social Services. The GAL is paired with an Attorney Advocate to represent the child's best interest in court.

RESPONSIBILITIES

Digging for Details

- Gather and assess independent information about the child's situation and needs by
  - Getting to know the child
  - Interviewing parents, caretakers, social workers, teachers, service providers
  - Reading records related to the child and family

Collaborating

- Seek cooperative solutions with other participants in the child's case
- Communicate with the GAL Attorney Advocate to develop legal strategies and prepare for court
- Attend court hearings and other meetings

Recommending the Best

- Write child-focused reports for court hearings
- Make recommendations in the child's best interest
- Testify, when needed, to support recommendations or inform the court of changes in the child's situation

Empowering the Child's Voice

- Ensure that the court knows the child's wishes
- Keep the child informed about the court proceedings
- Facilitate the child's participation in court hearings as appropriate

Staying Vigilant

- Monitor the situation on an on-going basis
- Consult with local program staff for support and guidance

Confidentiality is Key

- Keep all records and information confidential

QUALIFICATIONS

A Guardian ad Litem possesses:

- A sincere concern for the well-being of children
- A commitment to advocate for a child until a safe and permanent home is established and court involvement is no longer required
- The ability to be objective and non-judgmental
- The ability to interact respectfully with people from diverse backgrounds
- Good verbal and written communication skills

REQUIREMENTS

A guardian ad litem serves on a child's case until a permanent plan is approved by the court and achieved for the child. Achieving permanence usually takes at least a year. Monthly time commitments vary depending on the child's needs.

In order to become a GAL, you will need to complete:

- an application
- a screening interview with program staff
- a criminal record check

GAL candidates successfully complete 30 hours of training before being accepted into the program, sworn in by a judge and appointed to advocate on behalf of a child. In addition to advocating for the child, GALs attend continuing education trainings on advocacy issues.

SUPERVISION

Guardians ad Litem are supervised by program staff.

New Ethics Opinion on Dual Role GAL–Attorney Advocates in Juvenile Proceedings

This post was updated on September 6, 2022 in response to helpful reader feedback regarding the nuances that exist when determining whether there is a conflict of interest for a GAL program and, if so, the possible options available to cure that conflict. The amended portion can be found in the Conflicts of Interests section below.

The State Bar has issued an ethics opinion discussing the role of attorneys who are appointed as a guardian ad litem (GAL) volunteer, GAL attorney advocate, or both, in juvenile abuse, neglect, dependency or termination of parental rights matters. *See* N.C. State Bar, Formal Ethics Opinion 1 (2022), hereinafter 2022 FEO 1. While the opinion does not specifically mention termination proceedings, G.S. 7B-601—the statute that details the duties of a GAL in an abuse, neglect, dependency matter—also applies to GALs in termination proceedings. G.S. 7B-1108. 2022 FEO 1 should be considered as applying to GAL appointments in both juvenile and termination proceedings. This ethics opinion places new obligations on the appointed attorney and includes a role for the district court judge making the appointment. Typically, the attorney appointed to serve as both GAL attorney advocate and volunteer is an attorney known to the juvenile court for representing parents. The guidance provided in 2022 FEO 1 is important for parent attorneys and all other court actors in juvenile proceedings.

Typical representation of a juvenile in juvenile proceedings

Within the administrative Office of the Courts is an Office of GAL Services. When a department of social services (DSS) files a petition alleging abuse or neglect, the court appoints the GAL program to represent the juvenile. (If a petition only alleges dependency, the appointment is in the court's discretion. G.S. 7B-601(a).) The GAL program's purpose is to protect the legal rights of the juvenile. G.S. 7B-601(a). The GAL program typically includes an attorney advocate who represents the juvenile in court, a GAL volunteer who is a trained community member charged with investigating allegations and making recommendations as to the juvenile's best interests, and a local GAL program staff member who oversees the program's operation, including the training, retention, and management of GAL volunteers. G.S. 7B-1200. Collectively this group of individuals is referred to in practice as the GAL program. The GAL program can be thought of as team approach to the representation of a juvenile, a concept that has been acknowledged by the N.C. Supreme Court as being the intent of the legislature. *See In re J.H.K.*, 365 N.C. 171, 175 (2011).

The most common representation of juveniles in North Carolina involves Person A serving as attorney advocate and Person B serving as GAL volunteer. The attorney advocate performs traditional attorney tasks, such as calling and cross-examining witnesses, filing motions, and making arguments, and is subject to the usual Rules of Professional Conduct. The GAL volunteer performs various tasks such as investigating allegations, learning the juvenile's needs, and

identifying resources to help meet those needs. G.S. 7B-601(a). The GAL volunteer may observe hearings, confer with the attorney advocate, prepare written reports to be submitted into evidence, and testify.

Note: If Person A is serving as the attorney advocate and Person B as the GAL volunteer, but Person B happens to be an attorney, Person B's professional status as an attorney is irrelevant according to the State Bar. Person B's work as GAL volunteer is not subject to the Rules of Professional Conduct as no attorney-client relationship is formed between a juvenile and someone serving strictly as GAL volunteer. N.C. State Bar, Formal Ethics Opinion 11 (2005).

Conflicts of interest

[The following section was amended on September 6, 2022 to more clearly identify the nature of conflicts of interest relating to juvenile representation and the steps that may be taken to cure a conflict.] Sometimes, conflicts of interest arise that may prevent the GAL program, or a particular member of the program, from representing a juvenile. An attorney advocate, for example, likely cannot represent a juvenile if the advocate previously represented or currently represents another person whose interests differ from those of the juvenile. *See* N.C. Rules of Prof'l Conduct R. 1.7. (Unlike an adult, the juvenile cannot waive the conflict of interest by consenting to the representation. *Id*.) Consider a situation where a parent was once the juvenile at the center of a proceeding and was represented by the GAL program. The same attorney advocate who represented the parent as a minor should not later represent that parent's child in a new proceeding, as the parent is a former client. Whether the entire GAL program or just the attorney advocate is conflicted out from representing the juvenile depends in part on whether program staff and volunteers are the same individuals who were involved in the prior matter. A district court judge who is considering the appointment of a conflict attorney and who is in the process of defining that attorney's role or roles may consider the nature and extent of the GAL program's conflict as well as the availability of additional staff or volunteers to serve in the present matter.

Another common example of a situation where a conflict arises occurs when DSS files a petition on a juvenile whose parent is also a minor in the custody of DSS. The GAL attorney advocate--and, depending on the circumstances, possibly the entire GAL program--cannot simultaneously represent both the minor parent and the juvenile, as their interests may differ. Similarly, a conflict of interest also exists in cases involving allegations of abuse by one sibling against another sibling. Alleged perpetrators and victims require separate representation.

In these situations, a local attorney who is not affiliated with the GAL program and does not have a conflict of interest in the matter will be appointed to represent the juvenile. G.S. 7B-1202. If the attorney is appointed to serve as both attorney advocate and GAL volunteer, the requirements of 2022 FEO 1 come into play.

One person with two roles

Where there is a conflict of interest for the GAL attorney advocate or program (or a lack of GAL volunteers, a common issue in rural areas), an attorney may be appointed to serve in both the GAL volunteer and attorney advocate roles. These dual-role attorneys act as both fact witnesses and attorneys. A recent N.C. Supreme Court opinion, *In re R.D.*, 376 N.C. 344 (2020), discussed the potential ethical barriers to the appointment of attorneys in both roles. The opinion generated questions about what the representation should look like, which have now been answered by 2022 FEO 1. I break down the opinion and its impact in the questions and answers below.

Do the Rules of Professional Conduct apply to an attorney serving as both GAL volunteer and attorney advocate? Yes. The Rules of Professional Conduct apply to anyone who is acting as an attorney in North Carolina. Here, the individual is practicing law as an attorney advocate and is not serving only as GAL volunteer. 2022 FEO 1.

What is Rule of Professional Conduct 3.7, and why is it relevant to an attorney serving as both GAL volunteer and attorney advocate? Lawyers are generally prohibited from serving in an advocacy role in a trial in which the lawyer is likely to be a necessary witness. N.C. Rules of Prof'l Conduct R. 3.7. One reason is that combining the attorney and witness roles risks confusing or misleading the court. *Id.* 2022 FEO 1 emphasized this concern:

> "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."

2022 FEO 1, *quoting* Rule 3.7, cmt 1.

If someone other than the attorney advocate is appointed as the GAL volunteer, the GAL volunteer may be called by a party or by the court sua sponte to testify about their investigation, observations of people and places, and other potentially valuable information. If the GAL volunteer and attorney advocate roles are both performed by the same lawyer, however, that lawyer risks violating Rule 3.7's prohibition against a lawyer advocating in a trial in which they also may be a necessary witness.

Given the ethical considerations, what should an attorney who is appointed as both GAL volunteer and attorney advocate do in response to the appointment? 2022 FEO 1 requires the attorney to inform the court that the appointment creates a conflict and that they are unable to serve in the dual role given the likelihood they will need to testify. The attorney must ask the court to limit the appointment to either GAL volunteer or attorney advocate, not both. *Id*. If the attorney is going to serve as the attorney advocate, the attorney must request that someone else be appointed as the GAL volunteer. Conversely, if the attorney is appointed as GAL volunteer, the attorney must request that a different attorney be appointed to serve as attorney advocate. *Id*.; s*ee*

also N.C. State Bar, Formal Ethics Opinion 9 (2013) (holding that an attorney appointed to represent a child in a custody or visitation action who may be called to testify must remind the court of the relevant professional conduct limitations and should decline the appointment if the court does not clarify the attorney's responsibilities).

Despite these ethical considerations, can a court still appoint one attorney to serve in both roles? Whether to appoint one attorney as both the GAL volunteer and attorney advocate is in the court's discretion, given the court's inherent power over attorneys and proceedings and concurrent jurisdiction on matters of ethics. 2022 FEO 1 (recognizing a court's innate authority over officers of the court and matters being presided over); *see also* G.S. 84-36 (acknowledging a court's "inherent powers…to deal with its attorneys.").

If, after being informed of the potential ethical concerns of serving as both GAL volunteer and attorney advocate, the court proceeds to appoint one attorney to both roles, what are that attorney's responsibilities? 2022 FEO 1 warns of the difficult ethical tensions that exist for an attorney appointed in such a dual role. The opinion recognizes the reality that attorneys may still find themselves being dually appointed, and it directs the attorney to follow the guidance provided in the opinion, discussed above. As for what the responsibilities are for an attorney if required by the court to serve in both roles, the opinion states: "The appointed attorney is required to fulfill the statutory obligations of the GAL Program and the GAL volunteer as well as the legal and ethical duties of the GAL attorney advocate." In other words, the attorney must perform the duties that would normally be carried out by the entire GAL program to ensure adequate representation of the juvenile.

An attorney appointed solely as GAL volunteer can prepare a written report to be filed and submitted into evidence. 2022 FEO 1; *see also* G.S. 7B-601. Can an attorney appointed as both GAL volunteer and attorney advocate do the same? Yes, with a caveat. "An attorney may only prepare the GAL report and testify if the court is informed by the attorney of the conflict created by the dual roles (e.g., that an attorney cannot serve as a necessary witness and simultaneously serve as the advocate) and the court permits the attorney to serve dual roles in the proceeding." 2022 FEO 1. This caveat is further evidence of the need for attorneys to follow the opinion's guidance on how to respond to a dual-role appointment. The attorney needs to take the steps outlined in the opinion and this post to ensure that they can fully perform the duties of their appointment (e.g., to prepare a written report as a GAL volunteer).

Can an attorney serving as both GAL volunteer and attorney advocate testify and be subject to cross-examination? Generally, an attorney cannot advocate in a trial in which they are likely to be a necessary witness. N.C. Rules of Prof'l Conduct R. 3.7. But the recent ethics opinion, in discussing Rule 3.7's purpose of preventing confusion for the trier of fact, notes that juvenile matters are heard by judges—not juries—which reduces the risk of confusion. Therefore, if a judge decides that an attorney will serve dual roles, the attorney may testify and be subject to cross-examination. 2022 FEO 1.

Ethically, the opinion makes clear that a dually appointed attorney can testify if the requirements provided in 2022 FEO 1 are satisfied. An open question remains as to whether a judge can appoint an attorney to a dual role but then prohibit the attorney from testifying. A GAL volunteer is ordinarily a fact witness. Appointing an attorney to serve as both attorney advocate and GAL volunteer, but then prohibiting someone who is normally a fact witness from testifying, seems problematic. The prohibition against someone serving as a GAL volunteer from testifying may deny the court access to valuable information. The prohibition may also give rise to due process concerns for parties who want to present evidence obtained by a person serving as a GAL volunteer. A party who is denied the ability to call a dually appointed attorney to testify or to cross-examine such a person should consider objecting on the record on the basis that the decision amounts to a constitutional violation of due process. *In re R.D.*, 376 N.C. at 253. This complicated situation is an example of the challenges posed by dual-role appointments and why appointing separate individuals whenever possible is the cleanest approach.

Conclusion

Whether the appointment occurs because of a conflict of interest, a shortage of available GAL volunteers, or some other reason, an attorney who is appointed to serve as both a juvenile's GAL volunteer and attorney advocate should take the steps discussed in this post to comply with the Rules of Professional Conduct as explained in 2022 FE0 1. The State Bar opinion suggests that dual-role appointments should be avoided when possible. Separating the appointments allows an attorney advocate to perform familiar lawyerly tasks, comfortably sure that they are acting within the Rules of Professional Conduct. Separate appointments also allows the GAL volunteer to perform their statutorily required duties without blurring the lines with the roles and restrictions of attorneys. The GAL volunteer can investigate and make recommendations regarding the juvenile, the parties can argue about the value of the GAL volunteer's positions, and the court can hear the evidence and render a judgment.

Those attorneys who find themselves between a rock and a hard place, serving as both GAL volunteer and attorney advocate, should pay attention to the responsibilities of both roles. It is a tricky path to navigate, but 2022 FEO 1 sheds some light on the course to take. Feel free to reach out to me if you would like to chat about your role and responsibilities.

Parenting Evaluations:

What Defenders Need to Know

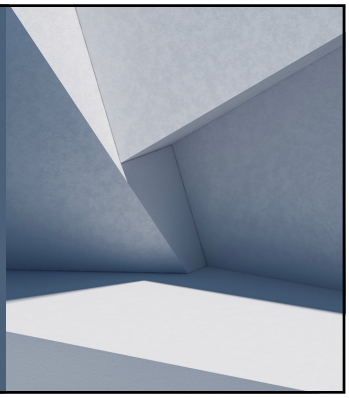
2024 Parent Attorney Conference
UNC School of Government

Paige Schultz, PsyD

1

Agenda

- PCEs vs. other evaluations
- Evaluation process
- What they do tell us
- What they do *not* tell us
- Best practices and standards
- What to do when you receive a poorly done evaluation



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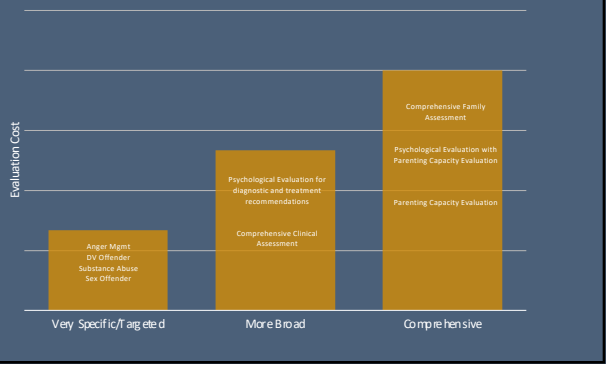


3

Very Specific/Targeted Evaluations

- Anger Management Assessment
- DV Offender Assessment
- Substance Abuse Assessment
- Sex Offender Recidivism Assessment*

** Must be criminally charged OR substantiated by DSS*

Billable through insurance and offered by local mental health agencies

4

Broad Evalutions

- Comprehensive Clinical Assessment
- Psychological Evaluation for diagnosis and treatment recommendations

Billable through insurance

Offered by local mental health agencies and private practices

5

So…what *is* a parental capacity evaluation??

6

Evaluation of risk and protective factors specific to the caregiver and the child

- Risk Factors:
  - Factors that are known to be associated with, or predictive of, negative outcomes
  - Factors that are likely to lead to the needs of the child not being met
- Protective Factors:
  - Factors that protect or buffer a child against negative developmental outcomes
  - Factors that are likely to lead to the needs of the child being met
    - Or, characteristics that decrease the impact of abuse or neglect

7

Comprehensive Clinical Assessment	Parenting Capacity Evaluation
• Self Report	• Multiple data points, including the parent's interview
• Very little record review is done	• Full record review should be done including child and parent records
• Highly unlikely that any testing will be done	• Various tests are used depending on the allegations and raised concerns
• Typically completed by a bachelor's or master's level clinician who has limited training on the nuances of diagnosis and parental fitness	• Completed by master's or doctoral level clinicians who have training in nuanced diagnostic presentations and parental fitness

8

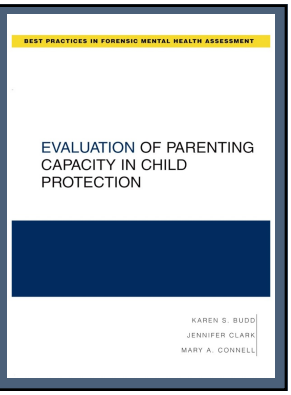
PCE Process

- Review of records
- Interviewing examinees/parents
- Intervewing collaterals or third party sources, if applicable
- Observing parents with their children, if applicable
- Conducting testing
- Intervewing the child, if applicable
- Data analysis
- Report writing + editing

9

Guiding Literature

- Evaluation of Parenting Capacity in Child Protection
- Specialty Guidelines for Forensic Psychology
- Guidelines for Psychological Evaluations in Child Protection Matters
- American Psychological Association Ethical Principles and Code of Conduct



10

What training is needed?

- Can be completed by a licensed mental health professional
- The evaluator should have experience and training in forensic psychology
- They need to be able to maintain a level of objectivity needed for legal contexts
- They also need to be knowledgeable child development, family relationships and dynamics, and parenting
- Understand thier role, the differences between clinical work and forensic work, and what is within one's scope

11

So, what does a PCE tell us?

12

What it DOES tell us	What it does NOT tell us
• The **fit** between the parent and child • Risk and protective factors related to future abuse and/or neglect • Likelihood/probability the parent can sole caregive	• Custody arrangements, parenting time, etc • Whether the child should be in a placement or in the parental home • Whether or not abuse occurred

13

IMPORTANT!!

A mental health diagnosis or IDD should NEVER be used as a reason for lack of fitness

It is the presentation of symptoms that is considered for the parent's ability to meet their child's needs

There is NO diagnosis that automatically renders a parent incapable of parenting

14

How to recognize a  evaluation

- The evaluator does not have the requisite education, training, and/or experience
- The evaluation does not address BOTH child and caregiver risk *and* protective factors
- The evaluator does not address the lack of fit between the child's needs and the parent's ability to meet them
- The evaluator determines the parent's diagnosis is the sole reason for inability to sole caregive
- Did not read DSS records, relevant medical/mental health/etc records
- The evaluator made opinions outside of their scope (parenting time, placement recommendations, determination of whether abuse occurred)

15

What do you do, as an attorney, when you get a 💩 evaluation?

16

If….	Then…
The clinician provided recommendations outside their scope	You can call them to testify Ask them how that is within the scope of the referral If they remain adamant that it is, have them identify (or you identify and question them) the standards, ethical principles, etc which allows them to make recommendations outside their scope Request a new evaluation

17

If….	Then…
The clinician did not review relevant records	You can call them to testify Point to the ethical code which indicates there must be adequate foundations for opinions Request a new evaluation

18

I know when you represent a parent, they can be a little difficult or problematic.

If they are required to have a PCE, as someone who has completed nearly 200, I view it way more favorable when a parent participates because they're making the effort.

Even if they give us the worst thing, it can be useful for things to work on.

19

Questions?

20

Parent Attorneys Conference: Child Welfare Case Update August 2023 – August 6, 2024
UNC School of Government

Abuse, Neglect, Dependency

Subject Matter Jurisdiction

Sufficient Notice

In re M.M., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: DSS filed a petition alleging five children were abused and neglected based on circumstances that were created in part by the parents' high conflict separation. DSS filed a supplemental petition in August 2021 alleging Father sexually abused four of the five children. All five children were adjudicated abused and neglected. Father appeals, challenging the court's subject matter jurisdiction to find any of the children abused based on emotional abuse, arguing DSS had not alleged emotional abuse in either of the petitions.
- "Whether a trial court possesses subject matter jurisdiction is a question of law" and reviewed de novo. Sl. Op. at 4 (citation omitted).
- The petition is the pleading in an abuse, neglect, or dependency case. G.S. 7B-401. "The petition must contain 'allegations of facts sufficient to invoke jurisdiction over the juvenile.' " Sl. Op. at 4 (citation omitted). "[I]f the specific factual allegations of the petition are sufficient

to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." Sl. Op. at 4 (citation omitted).

- G.S. 7B-101(1)(e) defines an abused juvenile to include any juvenile whose parent, guardian, custodian, or caretaker "creates or allows to be created serious emotional damage to the juvenile."
- The trial court did not lack subject matter jurisdiction to adjudicate emotional abuse. Although DSS did not check the box under abused juvenile that stated that the parent "has created or allowed to be created serious emotional damage to the juvenile," DSS checked the box on both petitions to indicate it was alleging that the children were abused and attached additional pages to the juvenile petitions detailing the facts supporting the allegations. These facts included concerns about the children's emotional well-being because of the custody fight and dad's coaching the children and making false reports about mother as well as stating the children seemed withdrawn, sad, depressed, and without affect. These allegations were "sufficient to put the respondent on notice as to each alleged ground for adjudication." Sl. Op. at 7 (citation omitted).

Parent Representation

Ineffective Assistance of Counsel

In re M.M., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Father appeals the adjudication of his five children as abused and neglected. This summary focuses on Father's argument that he received ineffective assistance of counsel due to his court-appointed attorney's failure to object to DSS's testimonial evidence of his daughters' sexual abuse.
- "A party alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was so serious so as to deprive the party of a fair hearing." Sl. Op. at 8 (citation omitted).
- Challenged testimony was not improper, therefore Father's counsel was not deficient by failing to object to the evidence and Father did not receive ineffective assistance of counsel. Neither the forensic interviewer nor the nurse practitioner testified that sexual abuse had occurred, only that they had conducted forensic interviews and child medical evaluations, respectively, with determinations that it was highly concerning the children interviewed and examined had been sexually abused.

Retained counsel; Rule 17 Guardian ad litem

In re A.K., ___ N.C. App. ___ (August 6, 2024)

Held: Vacated

- Facts: DSS filed a neglect petition and obtained nonsecure custody of two children. Mother was appointed provisional counsel. After the hearing on the need for continued nonsecure custody and before the scheduled pre-adjudication, adjudication, and disposition hearing, Mother retained counsel. Mother's retained counsel filed a notice of appearance and served the notice on opposing counsel and the children's GAL prior to the scheduled hearing. Both

appointed and retained counsel appeared at the scheduled hearing. The court ordered the hearing to be continued and *sua sponte* appointed a Rule 17 GAL for Mother. The Rule 17 GAL appointment occurred without an evidentiary hearing and was based upon a review of the court file and attorney arguments. In the continuance order, a Rule 17 GAL was appointed to Mother because of allegations in the petition, Mother's inability to understand the proceedings, and cultural barriers. Mother speaks Albanian, is Muslim, and the petition alleged in part that Mother suffered from mental health issues. The GAL Order (AOC-J-206) concluded mother is incompetent but did not include any findings of fact. At the later held pre-adjudication hearing, Mother and retained counsel requested that retained counsel, rather than appointed counsel, represent Mother. The trial court and counsel put on the record the court's previous discussions regarding Mother's representation. The trial court denied the request after determining retained counsel was not qualified under the local rules for appointed counsel to represent Mother. As a result, Mother was represented by her appointed counsel. The children were adjudicated neglected. Mother appeals, challenging the denial of her right to be represented by retained counsel on constitutional due process and statutory grounds, the Rule 17 GAL appointment, and the adjudication and disposition orders. The merits of the adjudication and disposition appeals were not addressed because this opinion vacates those orders as a result of mother's inability to proceed with her retained counsel at hearing.

- G.S. 7B-1001(a)(3) allows for direct appeal of any initial order of disposition and the adjudication order upon which it is based. The ruling about Mother's retained counsel is addressed in the pre-adjudication/adjudication order (a single order) and was properly noticed for appeal.
- Standard of review: Under In re K.M.W., 376 N.C. 195 (2020) (concerning a parent's waiver of their right to counsel), the appellate court applies a de novo review to conclusions of law addressing a parent's right to counsel based on statutory criteria. Additionally, "de novo review is appropriate in cases where constitutional rights are implicated[.]" Sl. Op. at 12 (citation omitted). The issue in this case does not involve a substitution of *appointed counsel* or a motion to continue made by respondent so that retained counsel can be obtained in lieu of appointed counsel, both of which apply an abuse of discretion review.
- The parent of a child alleged in a juvenile petition to be abused, neglected, or dependent has a right to counsel, and to appointed counsel in cases of indigency. G.S. 7B-602(a). Under G.S. 7B-602(a)(3), the trial court "shall" dismiss provisional counsel at the first hearing if the respondent parent has retained counsel. This statutory language means that a parent has the right to be represented by retained counsel of the parent's choosing. "The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and failure to comply with this mandate constitutes reversible error." Sl. Op. at 15 (citation omitted).
- The court erred in not allowing mother to be represented by her retained counsel. Although the court relied on the local rules governing abuse, neglect, and dependency cases that establish standards for court appointed attorneys who represent indigent parents, those standards do not apply to privately retained attorneys. For a retained attorney, "[t]he only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina[.]" Sl. Op. at 19. The argument by DSS that trial courts have "the inherent authority or power to regulate the attorneys appearing before

them" does not apply in this case as that inherent authority is when an attorney is "engaged in unethical or potentially unethical conduct", neither of which is at issue in this case. Sl. Op. at 19.

- The record shows that retained counsel held a license to practice law in the State, filed and served a notice of appearance before the scheduled hearing, and appeared at both the scheduled hearing and the pre-adjudication hearing requesting to represent Mother. Findings at the pre-adjudication hearing include that the trial court made an inquiry into counsel's experience representing parents in abuse, neglect, and dependency cases and found counsel did not have any requisite experience or knowledge in the subject area. After determining counsel's representation would be detrimental to Mother, given the primary plan of reunification, the trial court erroneously found counsel was unqualified to represent Mother and released retained counsel without addressing the statutory mandate of G.S. 7B-602. The record shows retained counsel acted appropriately and there was no indication his representation of Mother would be unethical or violate the Rules of Professional Conduct regarding competence. Additionally, assuming the GAL order was proper, there are no findings in the GAL order to support the GAL's argument that Mother lacked capacity to select counsel.
- Appointment of the Rule 17 GAL for Mother is not reviewable. While continuance orders and GAL orders are not appealable under G.S. 7B-1001(a), the court noted it would be "inclined to invoke Rule 2 [of the Rules of Appellate Procedure] to address Mother's argument that the appointment of her [Rule 17] GAL" at the scheduled hearing was improper, given the apparent lack of notice and absence of findings of fact or evidence to support the appointment. Sl. Op. at 9. However, the appellate court was unable to review the issue without a transcript of the scheduled hearing to determine whether Mother objected to the GAL's appointment. On remand the trial court is directed to hold a hearing upon request of any party to consider whether Mother is still in need of a Rule 17 GAL based on incompetence rather than mother's language barriers and culture, and if it is determined Mother is still in need, to enter an order with findings of fact to support its conclusion.

GAL for Child

Performance of Duties; Preserve Issue

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected. The circumstances were that the children were in the custody of their paternal grandmother and while living with their paternal grandmother and father, one of the children was sexually abused by their father. Grandmother appeals the permanency planning order that found she failed to make progress on her case plan within a reasonable period of time, eliminated reunification with her, and ceased reunification efforts including her visitation. Grandmother argues for the first time on appeal that the children's GAL failed to discharge their statutory duties.
- N.C. Rule of Appellate Procedure 10(a)(1) requires a party to timely request, object, or motion the trial court to preserve an issue for appellate review. However, appellate courts

have held that when a trial court acts contrary to a statutory mandate that requires the trial judge to (1) take a specific act or (2) direct a courtroom proceeding, the right to appeal is automatically preserved. G.S. 7B-601(a) lists the duties of the GAL and do not mandate the judge to take a specific act other than to appoint the GAL or to direct a courtroom proceeding, such that the issue of whether the GAL performed their duties is not automatically preserved.

- Failure by the GAL to fulfill their statutory duties may require reversal. The children's GAL adequately discharged their statutory duties. The GAL filed written reports at the adjudication hearing and each permanency planning hearing; made monthly visits with the children and monthly calls with the foster parents; and included in their reports detailed information about the children's health and well-being, educational development, relationships with their foster parents and amongst themselves, and their wishes about remaining in the foster home. The court rejects Grandmother's argument that the GAL did not maintain more communication with her once the children were removed from her home and the GAL failed to adequately investigate the children's wishes. G.S. 7B-601(a) provides little guidance as to what a sufficient investigation consists of. Here, over the course of the investigation regarding grandmother, the GAL interviewed grandmother more than once, conducted home visits at grandmother's house and reviewed DSS reports including visitation records for grandmother and the children. Grandmother was not prejudiced by a lack of additional communication between her and the GAL. Additionally, the GAL investigated the children's wishes, which includes that the two older children loved their foster home and family and the youngest child could not express her wishes. Distinguishing this case from *In re J.C.-B.*, 276 N.C. App. 180 (2021), the children were significantly younger and there were no conflicting recommendations from the children's service providers regarding their placement. Even if the children had expressed wishes to return to Grandmother, those wishes are not controlling "since the court must yield in all cases to what it considers to be the child's best interests[.]" Sl. Op. at 37.

Parties

Removal

In re E.E., ___ N.C. App. ___ (June 4, 2024)

Held: Affirmed

- Facts: In 2019, 4 siblings who were adjudicated neglected based on their parents' substance use and inability to provide proper care and supervision for the children. Ultimately, the court ordered custody to the children's Grandmother and her husband (Husband) at a permanency planning hearing. In 2021, a new petition was filed alleging Husband sexually abused two of the children. Those two children were adjudicated abused and neglected and the other two children were adjudicated neglected. The children remained with Grandmother and legal custody was ordered to DSS at disposition. Husband was no longer residing in the home. The disposition order was not appealed. Later, the children's GAL motioned to remove Husband as a party to the proceeding. The court held a hearing and ordered Husband discharged and removed as a party to the proceeding over DSS objections. Husband appeals the order of removal.

  - *Author's Note:* An order removing a party is not an appealable order under G.S. 7B-1001. This author believes a petition for writ of certiorari was filed although the opinion does not state that.
- Whether the trial court erred in removing a party from the proceeding is a conclusion of law that is reviewed de novo. The trial court's order is reviewed to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." Sl. Op. at 5 (citation omitted).
- "If a guardian, custodian, or caretaker is a party, the court may discharge that person from the proceeding, making the person no longer a party, if the court finds that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs." Sl. Op. at 4, *quoting* G.S. 7B-401.1(g). Custodian is defined as "[t]he person or agency that has been awarded legal custody of a juvenile by a court." Sl. Op. at 6, *quoting* G.S. 7B-101(8).
- The court made the two findings required under G.S. 7B-401.1(g) which are supported by the evidence. The findings support the court's conclusion to remove Husband as a party.
  - (1) The court found Husband did not have legal rights to the children that may be affected by the proceedings, rejecting Husband's argument that he had custodial rights to the children based on past legal custody. The adjudication and disposition orders are dispositive evidence that Husband was not a guardian, custodian, or caretaker at the time of his removal as a party. The disposition order concluded that legal custody with DSS was in the best interest of the children based on findings that included Husband's indictment for felony charges related to his sexual abuse of the children, Husband's sexual abuse of two of the children and their older sibling, and the court's conclusion that the conditions that led to Husband leaving the home continued to exist.
  - (2) The court found Husband's continuation as a party was not necessary to meet the juvenile's needs, based on findings of his prolonged sexual abuse of the two younger children and their older sibling; the resulting negative impacts of that abuse; his no longer living with Grandmother; his indictment for felony sexual assault charges and being in custody; domestic violence protection orders; and Grandmother's award of temporary possession of the home and vehicle. Husband's contention that Grandmother requires his financial support to maintain placement of the children is irrelevant as the children are in the legal custody of DSS, not Grandmother.

Adjudication

Abuse and Neglect; Findings

In re E.H., ___ N.C. App. ___ (June 4, 2024)

Held: Affirmed in part; Vacated in part; Remanded

Dissent in part, Stroud, J.

- Facts: Mother and Father appeal the adjudication of their two children, one of whom was adjudicated abused and neglected and the other of whom was adjudicated neglected. DSS filed a petition and obtained nonsecure custody of the juveniles following Mother taking the three-week old infant to the ER for what she described as a pop in his arm while changing his diaper. Medical screenings showed the child suffered several acute bone fractures, including

the humerus, ribs, and metaphysis. Mother and Father denied any abuse or events that would cause the infant's injuries both at the hospital and when interviewed by DSS and stated the juvenile was always under mother's supervision. During the adjudication hearing that spanned several months, DSS presented expert testimony to show the child's injuries would have required significant force to inflict and are highly indicative of child abuse in a three-week old, nonambulatory child. Mother and Father challenge the findings as unsupported by the evidence and the conclusion that the infant is an abused and neglected juvenile. The court of appeals affirmed the infant's adjudication. The older sibling was adjudicated neglected, and the parents' appealed. That adjudication was vacated and remanded and is summarized separately.

- "In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." Sl. Op. at 8 (citation omitted). "[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." Sl. Op. at 8-9 (citation omitted).
- "An '[a]bused' juvenile is one 'whose parent, guardian, or caretaker' either '[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means.' Sl. Op. at 9, *quoting* G.S. 7B-101(1)(a).
- Challenged findings regarding Mother and Father being sole caretakers of the infant since birth and the child's serious, nonaccidental injuries are supported by clear and convincing evidence, including social worker and expert testimony. The court weighed the conflicting expert testimony offered by Mother and Father regarding other possible medical explanations for the child's serious injuries. The court found the expert witness testimony provided by the parents' experts "were not based on 'sound, scientific principles and methods' and lacked 'credibility.' " Sl. Op. at 13. The court exercised its discretion and found the evidence presented by DSS expert testimony more credible. The findings support the conclusion that the parents inflicted or allowed to be inflicted serious physical injury by nonaccidental means.
- "A '[n]eglected' juvenile is one 'whose parent, guardian, custodian, or caretaker' engages in certain statutorily defined criteria, including failing to 'provide proper care, supervision, or discipline' or '[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare.' " Sl. Op. at 14-15, *quoting* G.S. 7B101(15)(a), (e).
- The court made sufficient findings to support the conclusion that the infant is a neglected juvenile. In addition to the findings of the infant's serious injuries suffered while in the sole care of Mother and Father for which neither parent has taken responsibility or given a plausible explanation, the court found that the home was an injurious environment and there are no reasonable means to protect a juvenile from similar injuries occurring until the perpetrator responsible for the injuries is established.

Neglect

In re A.H., ___ N.C. ___ (March 22, 2024)

Held: Reversed in part, and remanded, affirmed in part (per curiam)
Dissent, Earls. J.

- Facts and procedural history: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up. Father pursued the child on foot until she reached a cross road and he turned back to return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father and called the police. Following a DSS investigation spanning a couple of hours that same afternoon, DSS filed a petition alleging neglect and dependency. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child who he determined was safe upon observing her with a crowd. Within an hour of dropping the other two minors off with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appealed the adjudication and subsequent disposition order placing the child with DSS, contending that the findings were unsupported by the evidence and/or inadequate to support the adjudication. The court of appeals determined several findings were unsupported by the evidence and the remaining findings were insufficient to support a legal conclusion of neglect, ultimately reversing the trial court's neglect adjudication. Based on a dissent, the case was appealed to the supreme court.
- The supreme court reversed the court of appeals decision regarding the trial court's adjudication of the child as neglected for reasons stated in the dissenting opinion, 289 N.C. App. 501 (2023), and remanded to the court of appeals to further remand to the trial court for proceedings not inconsistent with this opinion. The dissent determined that there are sufficient challenged findings to support the conclusion of neglect. Father knew the child ran into a busy road, later left her on the side of the road, and did not attempt to check on her well-being. A child's treatment that falls below normative societal standards is considered neglectful but "not every act of negligence on the part of the parent results in a neglected juvenile." 289 N.C. App. at 519. There must be actual or substantial risk of mental, emotional, or physical harm to the juvenile. The question is not whether a single isolated incident can support a conclusion of neglect but rather whether the trial court findings support the conclusion under the totality of the evidence for this particular case. Here, the child was at substantial risk of harm and was left in a environment injurious to her welfare.
- Dissent, Earls. J.: The decision of the court of appeals should be affirmed as the trial court's findings that were supported by clear and convincing evidence do not support the adjudication of the child as neglected. "While a single act of negligence severe enough to

cause significant harm to a child and indicative of the likelihood that future harm would result can constitute neglect, it is not the case that 'treatment of a child which falls below the normative standards imposed upon parents by our society' is sufficient to justify a finding that the child is neglected." Sl. Op. at 11. "[I]solated incidents of neglect, even if the potential for serious injury is present, do not meet the statutory threshold for a finding of neglect." Sl. Op. at 12. The dissent argues that the court of appeals dissenting opinion erroneously referred to the court's review of the totality of the evidence to determine whether the trial court's findings support the court's conclusion of neglect.

In re L.C., ___ N.C. App. ___ (Apr. 16, 2024)

Held: Vacated and Remanded; Stay granted 5/7/2024

- Facts: DSS filed a petition alleging the juvenile as neglected and dependent based on a history of substance use by Mother and Mother's live-in female partner. The petition alleged there were three prior CPS reports and resulting assessments based on the juvenile testing positive for substances at birth, Mother and her partner's reported substance use, and instances of the juvenile stepping on Mother's needle and imitating using a needle on her arm with a plastic children's syringe. The most recent CPS report and assessment resulting in the petition was based on Mother giving birth to twin siblings of the juvenile who tested positive for substances; Mother's and partner's denial of substance use; Mother's refusal to permit drug testing for herself and the juvenile, and Mother's and partner's violation of the safety plan that provided for the juvenile to be placed in a temporary safety placement with the partner's mother. Note, Mother relinquished her rights to the twins; this action solely involves the older sibling. At the adjudication hearing, the DSS social worker testified Mother refused drug screening for herself and the juvenile but admitted to using substances and having a history of addiction; appeared agitated at DSS's involvement; threatened a relative; and discussed concerns regarding rats in the home. The juvenile was adjudicated neglected, and custody was ordered with DSS. Mother appeals the adjudication order, arguing eight findings are irrelevant and the court's conclusion of neglect is not supported by the findings. Mother's partner also appealed the adjudication order which the court of appeals dismissed for lack of standing under G.S. 7B-1002, finding the partner's status to be that of a caretaker under G.S. Chapter 7B.
- Adjudications are reviewed to determine whether the findings of fact are supported by clear and convincing evidence and whether the findings support the conclusion of law. The reviewing court must consider the totality of the evidence to determine whether the findings are sufficient to support the court's conclusion. "Only the trial court has the duty to evaluate the weight and credibility of the evidence and based up that evaluation, to make findings of fact." Sl. Op. at 25 (citation omitted). Conclusions of law are reviewed de novo.
- G.S. 7B-101(15) defines a neglected juvenile to include "[a]ny juvenile less than [eighteen] years of age. . . whose parent, guardian, custodian, or caretaker. . . [d]oes not provide proper care, supervision or discipline . . . [or c]reated a living environment that is injurious to the juvenile's welfare." Sl. Op. at 22, *quoting* G.S. 7B-101(15).
- For a neglect adjudication, appellate courts have required "that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a

consequence of the failure to provide proper care, supervision, or discipline" or "that the environment in which the child resided has resulted in harm to the child or substantial risk of harm to the child." Sl. Op. at 22-23 (citations omitted). The supreme court has stated there is no requirement that the trial court make a specific written finding of substantial risk but the trial court "must make written findings of fact sufficient to support its conclusion of law of neglect." Sl. Op. at 23 (citation omitted). When no ultimate finding is made to show impairment or substantial risk of impairment, appellate courts "have consistently reviewed the trial court's evidentiary findings, as opposed to reweighing the evidence, to determine whether the findings show impairment or a substantial risk of impairment." Sl. Op. at 33. "[A] parent's substance abuse problem alone [does] not support an adjudication of neglect." Sl. Op. at 28 (citation omitted).

- Five of the eight challenged findings are supported by clear and convincing evidence, including Mother's and social worker's testimonies, and determined to be relevant to the adjudication. But, some findings were recitations of evidence making it unclear on appellate review what the court determined about the evidence. Mother successfully challenged as irrelevant findings regarding post-petition evidence of Mother's mental state and substance use and Mother's refusal to provide her source for substances at the adjudication hearing. The court also disregarded the dispositional finding relating to the best interest of the juvenile in not returning home (though the court notes that including this finding and related conclusion in the adjudication order was not error since the finding supports the interim dispositional ruling). The finding that the court had no knowledge of what "spore to spore" meant regarding why the child would test positive for substances was disregarded as unsupported due to both Mother and social worker testifying to the term's meaning.
- The findings are insufficient to support the conclusion that the juvenile was neglected because there are no evidentiary findings showing the juvenile suffered any physical, mental, or emotional impairment, or that there was a substantial risk of impairment, though evidence in the record could support such findings. Findings clearly establish Mother's prior history with DSS, Mother's obstinance in working with DSS, Mother's threatening behavior, and that there was a discussion with DSS of safety concerns in the home. However, DSS found in its previous assessments that the juvenile was healthy and well cared for by partner's mother in the home. The court made no findings about whether drugs were used in the presence of the juvenile or that the juvenile was exposed to substances, the impact of Mother's violation of the safety plan on the juvenile, the risk of harm to the juvenile of Mother's threatening behavior toward the relative, or that the home was unsuitable or unsafe for the juvenile.
- Having vacated and remanded the adjudication order on which the disposition order is based, the disposition order is also vacated and remanded.

Neglect; Abuse of another child in the home

In re E.H., ___ N.C. App. ___ (June 4, 2024)

Held: Affirmed in part; Vacated in part; Remanded

Dissent in part, Stroud, J.

- Facts: Mother and Father appeal the adjudication of their two children, one of whom was adjudicated abused and neglected and the other of whom was adjudicated neglected. DSS

filed a petition and obtained nonsecure custody of the juveniles following Mother taking the three-week old infant to the ER for what she described as a pop in his arm while changing his diaper. Medical screenings showed the child suffered several acute bone fractures, including the humerus, ribs, and metaphysis. Mother and Father denied any abuse or events that would cause the infant's injuries both at the hospital and when interviewed by DSS and stated the juvenile was always under mother's supervision. During the adjudication hearing that spanned several months, DSS presented expert testimony to show the child's injuries would have required significant force to inflict and are highly indicative of child abuse in a three-week old, nonambulatory child. Mother and Father argue that the court's findings do not support the adjudication of the sibling as neglected. The court of appeals affirmed the adjudication of the infant as an abused and neglected juvenile, summarized separately.

- "In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." Sl. Op. at 8 (citation omitted).
- "A '[n]eglected' juvenile is one 'whose parent, guardian, custodian, or caretaker' engages in certain statutorily defined criteria, including failing to 'provide proper care, supervision, or discipline' or '[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare.' " Sl. Op. at 14-15, *quoting* G.S. 7B101(15)(a), (e). G.S. 7B-805 mandates that DSS carry "the burden to overcome the presumption of fitness and parental rights to the care, custody, and control of their children and to prove by clear, cogent, and convincing evidence the existence of neglect . . ." Sl. Op. at 16. "In determining whether a juvenile is a neglected juvenile, it is *relevant* whether th[e] juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." Sl. Op. at 16, *quoting* G.S. 7B-101(15) (emphasis in original). Appellate courts have generally required that other factors beyond evidence of prior abuse are needed to conclude neglect or abuse will be repeated. "While the decision of the trial court regarding whether the other children present in the home are neglected, 'must of necessity be predictive in nature, [ ] the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " Sl. Op. at 17.
- The court did not make sufficient findings to conclude that the older sibling is a neglected juvenile. The court's findings regarding Mother and Father being the sole caretakers of the infant, the nonaccidental injuries to the infant sibling while under their care, and the absence of explanation for the injuries are insufficient to support the neglect adjudication of the older sibling without any further findings regarding abuse of the older child or the probability of future neglect. "The transcripts and record appear devoid of any clear and convincing evidence of neglect of [the older child], other than the *ipso facto* application of non-confessed and unexplained injuries to [the infant child] to overcome the presumption of fitness and primary parental rights by married parents, who have no prior history of either neglect or abuse, and with one facing a felony indictment for child abuse." Sl. Op. at 18. The portion of the order adjudicating the older sibling as neglected is remanded for the court to make further findings of the probability of future neglect "in the absence of a compelled confession by either parent or violation of the marital privilege". Sl. Op. at 20.

- Dissent: The court made sufficient supported findings to conclude the older sibling is a neglected juvenile. Thought the majority of the findings focus on the infant's injuries, other findings provide for Mother and Father's behavior with medical staff and social workers, Father's absence from the ER visit, and both Mother and Father's continued denial of abuse or proffer of any reasonable explanation for the infant's injuries. Appellate courts have upheld neglect adjudications of another child in the home where parents cannot explain serious injury to an infant and there is no other person who might have caused the injuries. "[O]ther factors are not always required for a child who lives in the home with another child who has been abused and adjudicated as neglected. The trial court must evaluate the credibility and weight of all the evidence and has the discretion to make logical inferences which are reasonably based upon the facts in the case." Dissent at 6. The majority seems to be barring the court from drawing logical inferences based on Mother and Father's inability to explain the infant's serious injuries, relying on their Fifth amendment right against self-incrimination and marital privilege to require the trial court to make further findings that may not exist. The marital privilege does not apply in these cases. See G.S. 7B-310, -1109(f). In a civil action, a party's silence allows the court to draw a negative inference regarding the Fifth Amendment because the purpose of the proceeding is to protect the child's best interests. "[H]ere the trial court was '[f]aced with the gravity of the abuse and the persistent unwillingness of either parent to admit responsibility or to fault the other' and it concluded that the children could be protected only by removal from the home." Dissent at 14 (citing and quoting In re J.M., 384 N.C. 584, 604 (2023)).

Dependency

In re A.H., ___ N.C. ___ (March 22, 2024)

Held: Affirmed in part; reversed in part, remanded (per curiam)

- Facts and procedural history: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Father appealed the adjudication and subsequent disposition order placing the child with DSS. The court of appeals determined DSS failed to present evidence that Father did not have alternative child care arrangements, ultimately reversing the trial court's dependency adjudication. A summary of the court of appeals decision on the issue of dependency in this case can be found here. There was also a separate conclusion of neglect that was reversed by the court of appeals. This opinion also reverses and remands the court of appeals decision.
- The supreme court affirmed the court of appeals decision reversing the trial court's adjudication of the child as dependent, 289 N.C. App. 501 (2023), without precedential value as an equally divided court considered and decided the case with one justice abstaining.

Visitation

Appellate review; Standard of proof; No Visits Findings

In re A.J.L.H., ___ N.C. ___ (June 28, 2024)

Held: Reversed Court of Appeals (affirm trial court)

- Facts and procedural history: This action involves three children that share the same mother and separate fathers. DSS filed a petition based on mother and (step)father's repeated use of corporal punishment that caused bruising and marks on the oldest child as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents admitted to their repeated use of this punishment and did not believe their disciplinary methods were cruel or unusual. The oldest child was adjudicated abused and neglected and the two younger siblings were adjudicated neglected. At initial disposition only the biological father of one of the younger children was granted visitation. The trial court determined that visitation with Mother, (step)father, and the third biological father was not in the children's best interests while respondents were working on their case plans with DSS. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudication of neglect for the oldest juvenile, ordered the trial court to dismiss the adjudications of the siblings, and ordered on remand that if the older juvenile was adjudicated the trial court order general and increasing visitation with the mother. In re A.J.L.H., 275 N.C. App. 11 (2020). The supreme court allowed discretionary review and reversed the court of appeals decision, thereby affirming the adjudication orders as to the three juveniles, and held the court of appeals instruction to the trial court regarding disposition improper. In re A.J.L.H., 384 N.C. 45 (2023). On remand from the supreme court to address the respondents' remaining arguments regarding the disposition order, the court of appeals vacated the dispositional portions of the order and remanded to the trial court to make the "required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*." In re A.J.L.H., 289 N.C. App. 644, 652 (2023) (emphasis in original). DSS and GAL petitioned the supreme court for discretionary review, amended to seek review as to the oldest child only, arguing the court of appeals erred in its review of the dispositional order by: (1) misstating the standard of proof required for dispositional findings; (2) using the wrong standard to review dispositional evidence; (3) requiring the trial court to find that the parents acted inconsistently with their constitutionally protected status in order to deny visitation (4) abrogating G.S. 7B-905.1 and creating a new constitutional rights analysis; (5) determining there was insufficient evidence to support the trial court's findings of fact; and (6) reversing the trial court based on holding the trial court erred as to findings of fact related to non-appealing parties. Mother is the only respondent to this appeal.
- "[Appellate courts] review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." Sl. Op. at 7 (citation omitted). Appellate courts " 'defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result

of a reasoned decision[,]' " whereby "the remedy is to vacate the disposition order but to 'express no opinion as to the ultimate result . . .' " Sl. Op. at 11 (citations omitted). G.S. 7B-901(a) authorizes trial courts to consider "any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." Sl. Op. at 8-9, *quoting* G.S. 7B-901(a). "[A] trial court's 'decisions as to the weight and credibility of the evidence, and inferences drawn from the evidence, are not subject to appellate review.' " Sl. Op. at 11 (citation omitted). The court of appeals erred in stating that, "Dispositional findings must be based on properly admitted and clear cogent and convincing evidence." Sl. Op. at 8, *quoting* In re A.J.L.H., 289 N.C. App. at 650.

- An order removing custody from a parent or custodian or continuing placement outside of the home must "provide for visitation that is in the *best interests of the juvenile* consistent with the juvenile's health and safety, including *no visitation*." Sl. Op. at 10 (emphasis added in original), quoting G.S. 7B-905.1(a). The court of appeals erred in requiring the trial court to make findings of each parent's fitness or conduct inconsistent with their parental rights before making a best interests determination regarding visitation, as this "two-step analysis" is not required under G.S. 7B-905.1. Sl. Op. at 9. Further, in its first opinion affirming the adjudication orders, the supreme court directed the court of appeals not to address the constitutional status of the parents on remand as the issue was not raised to the trial court nor briefed on appeal.
- The trial court did not abuse its discretion. Unchallenged findings of fact support the trial court's dispositional order denying visitation, including that Mother has extensive CPS history involving inappropriate discipline and abuse of the children, to which she admitted, defended, and asserted plans to continue. Mother failed to understand that the discipline of the oldest child was inappropriate and subjected the child to trauma. Permissible dispositional evidence under G.S. 7B-901(a) also included a letter to the court from the older child stating her wishes to stay with her grandmother and not visit with mother due to mother and stepfather's past abuse.
- The court of appeals erred in holding that the trial court must find and make conclusions addressing the factors applicable to visitation for each child with each parent. Two of the biological fathers were not parties to the appeal and "[t]here is no precedent which allows the [c]ourt of [a]ppeals to assert an appeal on behalf of a non-appealing party." Sl. Op. at 13. The court of appeals erred in holding that the trial court must make findings differentiating visitation ordered between the parties. No statute or caselaw requires these findings.

No Visits; Electronic Visits

In re P.L.E., ___ N.C. App. ___ (August 15, 2023)

Held: Vacated and Remanded

- Facts: Juvenile was adjudicated neglected due to lack of proper care, supervision, or discipline and living in an environment injurious to her welfare where she was at risk for abuse based on non-accidental injuries sustained by her younger sibling while living in the family home. Mother was ordered to comply with her case, where she initially made progress but then failed to continue with that progress. At a permanency planning hearing, the court ordered a primary permanent plan of adoption with a secondary plan of

guardianship. The court ceased reunification efforts and denied mother visitation with both juveniles while mother's misdemeanor child abuse charges were pending. Later, when mother made some progress with her case plan and one of the juvenile's therapy was suspended when the juvenile met her treatment goals, the court restored limited telephone and video contact with the juvenile. At the next permanency planning hearing, the court found the juvenile had resumed therapy based on regressive behaviors following initial video visits with mother, mother was not in full compliance with her case plan, and DSS recommended that the primary permanent plan be changed to guardianship. After hearing testimony from one of placement providers to whom guardianship was recommended and receiving an affidavit with financial information for the proposed guardians and after determining the parents acted inconsistently with their parental rights, the court changed the primary plan to guardianship, awarded guardianship and denied mother all visitation. Mother appeals the final permanency planning order.

- Permanency planning orders disallowing visitation are reviewed for abuse of discretion.
- G.S. 7B-906.1(d) lists criteria a court must consider at review and permanency planning hearings. G.S. 7B-906.1(d)(2) requires the court to consider and make written findings of "reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with G.S. 7B-905.1," which requires an order removing custody from a parent, guardian, or custodian or that continues the juvenile's placement outside the home to "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety". Sl. Op. at 13 (quoting G.S. 7B-906.1(d)(2); G.S. 7B-905.1(a)).
- G.S. 906.1(e) lists additional criteria a court is required to consider and make written findings after any permanency planning hearing where the juvenile is not placed with the parent. These criteria center around whether or not it is possible for the juvenile to be placed with a parent within the next six months and if not, what disposition is appropriate.
- The court failed to make written findings and conclusions of law in the permanency planning order required by G.S. 7B-906.1(d) and (e). The record shows the court made a single finding relating to visitation which reflected the therapist's summary of the juvenile's behavior during and following the video visits with mother. Findings that "could support a potential conclusion it was not possible for [the juvenile] to be placed with [mother] within six months" are insufficient. The matter is remanded to make mandated written and supported findings required by G.S. 7B-905.1 and G.S. 7B-906.1(d) and (e).
    - *Author's note*: This opinion does not address the language of G.S. 7B-906.1(d) and (e) that requires the court to consider all the factors and make written findings of those that are relevant, where a factor is relevant when there is conflicting evidence about the factor.

In re K.B., 290 N.C. App. 61 (2023), *affirmed* 900 S.E.2d 759 (2024)

Held: Affirmed in Part, Vacated in Part, and Remanded

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.
- Trial courts must "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." G.S. 7B-905.1(a).
- The court of appeals has held that ordering electronic-only visitation is equivalent to granting no visitation and therefore the court must make specific findings equivalent to the findings required in granting no visitation. Sl. Op. at 8-9 (citations omitted). The court "must make 'specific findings that' a parent 'forfeited her right to visitation or that visitation would be inappropriate under the circumstances.' " Sl. Op. at 10 (citation omitted).
- The findings regarding visitation are insufficient to meet the requirements for electronic-only visitation. Limited findings include the current visitation plan of weekly virtual visits and telephone calls, initiated by mother, are inconsistent and often during school hours and dinner time, and provide the date of the last in-person visit.
- Frequent in-person visitation may not be eliminated solely due to the distance between children placed in-state and an out-of-state parent.
- G.S. 7B-905.1(c) requires an order providing for visitation to "specify the minimum frequency and length of the visits and whether the visits shall be supervised." Noncompliance with the requirements of G.S. 7B-905.1 is referred to as "leaving the terms of visitation to the discretion of the custodians." Sl. Op. at 11, FN 2.
- The order providing for electronic-only visitation twice a week only meets the requirement of specifying the minimum frequency of the visits, while not addressing the length or supervision of the visits. Therefore, the order improperly delegates authority regarding visitation.

Findings; Minimum Outline; Denial

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: An infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appeals. This summary discusses Father's argument that the court failed to address his visitation rights.
- G.S. 7B-905.1(a) requires the court to provide for visitation that is in the best interest of the child consistent with the child's health and safety in an order that continues the child's placement outside of the home. The court must outline a visitation plan that includes the time, place, and conditions under which visitation may be exercised. Visitation may be denied if the court finds that "*the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation*." Sl. Op. at 9-10 (emphasis in original) (citation omitted).
- The order includes no findings that father forfeited his visitation rights or that denying visits was in the child's best interests. As a result, the court was required to order the minimum outline of visits. The visitation portion of the order is remanded for entry of an order that clearly defines Father's visitation. Based on its holding, Father's alternative argument that the trial court effectively denied his visitation and failed to make the required findings as to forfeiture of the right or the children's best interests was not addressed.

Delegation of Authority; Minimum Outline

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under ICWA. The child was adjudicated dependent. At initial disposition, custody was ordered to DSS with Mother granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. At the last permanency planning hearing, both DSS and EBCI submitted reports that recommended changing the primary plan to guardianship. The court ordered guardianship to the child's guardians, waived further permanency planning hearings, and provided for

visitation at the discretion of the guardians. Mother appeals. This summary focuses on Mother's challenge to the visitation portion of the order.

- G.S. 7B-905.1 requires an order that continues the child's placement outside of the home to address visitation, and if visitation is ordered, to specify the minimum frequency and length of visits, and whether the visits must be supervised.
- The court improperly delegated its judicial function in determining visitation conditions by ordering that the child's visitation with Mother be at the discretion of the guardians and failing to provide the frequency, length, or supervision conditions for visitation.

Initial Disposition

Court Authority to Order Case Plan; No Contact between Parents

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: Infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appealed. This summary addresses Father's argument that the court exceeded its authority to order Father to have no contact with Mother.
- Dispositional orders are reviewed for an abuse of discretion.
- G.S. 7B-904(d1)(3) authorizes the court to order the parent of a child who has been adjudicated abused, neglected, or dependent to "[t]ake appropriate steps to remedy the conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.]" Sl. Op. at 11, *quoting* G.S. 7B-904(d1)(3). The court has the "'authority to order a parent to take any step reasonably required to alleviate any condition that *directly or indirectly* contributed to causing the juvenile's removal from the parental home,' *In re B.O.A.*, 372 N.C. 372, 381 (2019) (emphasis added), as long as there is 'a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication.' " *In re T.N.G.*, 244 N.C. App. 398, 408 (2015) (citation omitted). Sl. Op. at 11.
- The directive that Father have no contact with Mother was within the authority of the court under G.S. 7B-904(d1)(3) and was not an abuse of discretion. Several adjudicatory findings of fact describe domestic violence between Mother and Father, including initial reports to DSS about the family, a Military Protective Order that barred Father from contacting Mother or the child, and Mother's disclosures to DSS about Father's rough handling of the child and

refusal to let the Mother take the child during those times. Father and Mother's domestic violence was a condition that was found to have contributed to the child's adjudication.

- Dissent: The majority's interpretation of G.S. 7B-904(d1)(3) is too expansive to protect Father's parental and marital rights. The legislature did not intend and the plain language of G.S. 7B-904(d1)(3) does not allow the court sua sponte to enter a de facto domestic violence protective order and circumvent the statutory procedures in G.S. Chapters 50B and 50C.

Findings of Aggravating Circumstances; Reunification Efforts Not Required

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: Infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appealed. This summary addresses Father's arguments that the court's findings were insufficient to conclude that reunification efforts were not required, and that the court misapprehended the law by including in the decretal portion of the order that reunification efforts with the child are "hereby ceased."
- Dispositional orders are reviewed for an abuse of discretion. "[T]he extent to which [a] trial court exercised its discretion on the basis of an incorrect understanding of the law raises an issue of law subject to de novo review on appeal." Sl. Op. at 12 (citation omitted).
- A court may direct at initial disposition that reasonable efforts toward reunification are not required upon a " 'determination that aggravating circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of,' *inter alia*, 'chronic physical abuse.' " Sl. Op. at 5, *quoting* G.S. 7B-901(c)(1)(b). The court must make written findings that explain the aggravating circumstances, not a " 'mere declaration' that such circumstances exist[.]" Sl. Op. at 6 (citation omitted). G.S. 7B-901(c) "does *not* authorize a court to order DSS to cease reunification efforts with a respondent." Sl. Op. at 13 (referencing S.L. 2015-135, sec. 7, 9, amending G.S. 7B-901(c) to remove the phrase "or shall cease"). The court used the proper statutory language in its finding and conclusion of law to order that reunification efforts are not required. The use of "hereby ceased" in the decretal portion of the order is "merely an instance of imprecise language[.]" Sl. Op. at 13. The order is remanded to clarify the wording to conform to the statutory language and the court's proper conclusion of law as to reunification efforts with Father.
  - *Author's Note*: Although this opinion addresses amendments made to the statutory language regarding "ceasing reunification efforts", it does not address the common practice of using that term when DSS is relieved of making reunification efforts at initial disposition or the case law that holds using the exact statutory language is not required so long as the substance of the statute is addressed.

- Findings support the conclusion that Father committed, encouraged or allowed the chronic physical abuse of the child. Findings supported by Father's and social worker's testimony include (1) Father on multiple occasions held the child tightly and squeezed and shook the child with force equal to that used to operate a vice grip and (2) the child suffered two rib fractures on two different occasions. The court rejects Father's arguments that this pattern of abuse over the child's two months of life is not chronic, adding that Father's focus on the child's two rib fractures in two months misses the importance of his own admissions to the described pattern of physical abuse of the child. The court also dismisses Father's argument that DSS did not ask the court to find that reunification efforts with him were not required, as dispositional choices are left to the discretion of the trial court and the court is not required to adopt DSS's recommendations. The written findings of aggravating circumstances support the conclusion that reunification efforts with Father were not required. Father's argument is overruled.
- Dissent: The conclusion that reunification efforts with Father are not required is not supported by supported written findings.

Permanent Plan

Guardianship; Waive Constitutional Parental Rights

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under ICWA. The child was adjudicated dependent. At initial disposition, custody was ordered to DSS with Mother granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. DSS and EBCI submitted reports that recommended changing the child's primary plan to guardianship. The court ordered guardianship as the primary plan, ordered guardianship to the child's guardians, and provided for no further permanency planning hearings. Mother appealed, raising several issues. This summary focuses on Mother's arguments that the court failed to conclude she was unfit or acted inconsistently with her constitutionally protected status as a parent and that she did not have the opportunity to raise the issue at the hearing, or alternatively that her testimony and arguments requesting reunification preserved this issue.
- "Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." Sl. Op. at 11 (citation omitted). "Prior to granting guardianship of a child to a nonparent, a district court must clearly address whether the respondent is unfit as a parent or if his conduct has been inconsistent with his constitutionally protected status as a parent." Sl. Op. at 11 (citation omitted). A reviewing court must determine whether there is clear and convincing evidence to support the court's

conclusion that the natural parent acted inconsistently with their constitutionally protected rights. The conclusion of law is reviewed de novo.

- Failure to raise the constitutional argument before the trial court waives the right to raise the issue on appeal. The supreme court has recently held that "where the respondent-parent has notice prior to the hearing that the trial court will be considering a recommendation to grant guardianship of the child, the respondent-parent must make a specific constitutional argument regarding her parental rights before the trial court to preserve a constitutional argument on appeal." Sl. Op. at 15 (citing *In re J.N.*, 381 N.C. 131, 133-34 (2022); *In re J.M.*, 384 N.C. 584, 603-04 (2023)).
- Mother failed to preserve her argument as to her constitutionally protected status as a parent. Both DSS and EBCI presented summaries and reports prior to the hearing which recommended changing the child's primary plan to guardianship. At the hearing, Mother testified extensively, presented witnesses, and requested reunification. She had the opportunity to raise her constitutional argument but did not argue that guardianship would be improper on constitutional grounds or that she was fit and a proper parent, despite having notice of the recommendations DSS and EBCI submitted to the court.

ICPC; Relative Placement; Guardianship

In re K.B., ___ N.C. ___ (May 23, 2024)

Held: Affirmed

- Facts and procedural history: Mother appeals from the holding of the court of appeals affirming the trial court's order of guardianship of her three children to their great aunt prior to the completion of an ICPC home study of their grandmother, a Georgia resident. The three children were adjudicated neglected and dependent and were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Over the three years where the court held the initial disposition and permanency planning hearings, the children's placement continued to be with their great aunt. During this 3-year period, the court ordered an ICPC home study for the out-of-state grandmother so she could be considered for placement. Ultimately, the court granted guardianship of the children to the great aunt with whom the children had resided for years despite the ICPC home study not being completed for the grandmother.
- When a juvenile is adjudicated abused, neglected, or dependent and removal from the custody of their parents is determined to be in the child's best interest, G.S. 7B-903(a1) requires the court place the child with a relative if the court finds the relative "is willing and able to provide proper care and supervision in a safe home" and the placement is not contrary to the best interests of the child. Sl. Op. at 8, *quoting* G.S. 7B-903(a1). There is "no statutory preference between different relatives, even out-of-state relatives." Sl. Op. at 1. However, the court is required to consider whether keeping children in their community of residence is in their best interest. G.S. 7B-903(a1) requires that placement of children with relatives outside of North Carolina comply with the requirements of the Interstate Compact on the Placement of Children (ICPC), including completion of a home study by the receiving state approving the placement before a child can be placed with an out-of-state relative. The supreme court addresses prior court of appeals opinions and "make[s] clear that the ICPC

does apply to an order granting guardianship to out-of-state grandparents." Sl. Op. at 12. *See In re J.D.M.-J.*, 260 N.C. App. 56 (2018) and cases cited therein.

- A timely evaluation of potential placements is "critical to expedite the permanency and stability for a child and to provide the court with the thorough information needed to evaluate whether the placement is in the best interest of the child." Sl. Op. at 2. DSS was ordered to complete an ICPC home study and failed to timely do so. The trial court has discretion to hold parties accountable, including "requiring DSS to show cause for repeatedly ignoring a court order." Sl. Op. at 10.
- The determination of a child's best interests and ultimate placement decision lies with the trial court, notwithstanding the recommendations of DSS. "[W]hen a trial court considers a dispositional decision between relatives, that court is not required to wait on a completed ICPC home study to rule out an out-of-state relative when the trial court determines that an in-state relative can provide proper care and supervision in a safe home and the court is able to determine it is in the best interest of the child to be placed with that in-state relative before completion of that home study." Sl. Op. at 13. "The analysis of whether the trial court erred in placing a child with an in-state relative before the completion of a home study on an alternative relative is performed under an abuse of discretion standard of review." Sl. Op. at 7.
- The trial court's discretionary decision to place the children with their great aunt prior to the completion of the ordered ICPC home study was not an abuse of discretion. The trial court's findings regarding the great aunt's ability to care for and support the children support the court's conclusion that guardianship with the great aunt is in the best interest of the children. Findings include that the children had lived with the great aunt for three years and bonded with her; great aunt provided a safe, loving and stable home for the children; great aunt supported the children's educational and developmental needs; and great aunt had supported the children during that time with the help of family. Findings also show that the grandmother had not formed a bond with the children due to infrequent contact, and grandmother already had three other minor children living in the home.

In re K.B., 290 N.C. App. 61 (2023), *affirmed* 900 S.E.2d 759 (2024)

Held: Affirmed in Part, Vacated in Part, and Remanded

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a

Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.

- Before awarding guardianship, the court must determine the proposed guardian understands the legal significance of the placement pursuant to G.S. 7B-600. Specific findings are not required, but the record must show "the trial court received and considered adequate evidence on this point." Sl. Op. at 3-4 (citation omitted).
- Evidence shows the trial court received adequate evidence of the guardian's understanding of the legal significance of the placement. The court received evidence including that the children had been living with the great aunt for three years during which time she provided care such as scheduling and taking them to medical appointments and meeting teachers, and the great aunt testified that she wanted and was willing to continue providing care, understood her obligations to comply with court orders involving the children, and acknowledged the greater control of a guardian.
- The trial court should consider the children's best interest when placing them in 'out-of-home' care, but "[p]lacement of a juvenile with a relative outside of this State *must* be in accordance with the Interstate Compact on the Placement of Children [ICPC]." G.S. 7B-903(a1).
- "Where the ICPC applies, 'a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.' " Sl. Op. at 5 (citation omitted) (emphasis in original). However, "[t]here is no obligation under the ICPC that a home study by completed *to rule out* an out-of-state relative as a placement option." Sl. Op. at 5 (emphasis in original).
- No abuse of discretion to award guardianship to the great aunt, an in-state person, without the benefit of the completed previously ordered home-study of the grandmother, an out-of-state person. The order granting guardianship to the great aunt is based on the children's best interests and supported by findings and conclusions, most notably that the juveniles had lived with the great aunt for three years and had bonded with her. "[I]t is only when a trial court judge *actually places a child with an out-of-state person* that the trial court lacks discretion to make that placement without the benefit of a home study of *that person*, because such study is required under the ICPC." Sl. Op. at 7 (emphasis in original).
- Stating in the decretal portion of the order that "the matter is closed and DSS and its counsel are released and relieved of further responsibilities regarding this matter," but noting retention of jurisdiction, is not error. The clause is not read as preventing mother from filing motions in the future concerning her children, as her parental rights have not been terminated and she was granted visitation rights by the court. Sl. Op. at 7-8.
- Dissent: The majority improperly reviewed the issue concerning the home study requirement under the ICPC for "abuse of discretion rather than de novo," as the issue addresses statutory compliance under G.S. 7B-903(a1). Dissent at 2 (citation omitted). Under the court's prior caselaw, "the ICPC definitively applies to the situation here where there is a potential placement with an out-of-state relative, [g]randmother." Dissent at 3-4. The court's

interpretation that the ICPC only applies when a child is actually placed with an out-of-state relative contradicts (1) the purpose the Juvenile Code in attaining permanency as soon as possible, and (2) the purpose of the ICPC to exchange information between states to ensure any outside placement is not contrary to the best interests of the juvenile. Whether the court must wait for a completed ICPC home study when considering a potential placement with an out-of-state relative is decided on a case-by-case basis. In this case, the court was required to wait for the home study evaluating the grandmother as a potential placement, who was identified within days of the filing of the petition as potential placement. The home study was ordered three times with only DSS at fault for not complying with the court's orders, while mother and grandmother continued to assert the need for the study throughout the proceedings. It cannot be assumed that the placement decision would be the same if the home study were received, as without the home study, "it is impossible to be certain what we, the parties, or the trial court would learn about [g]randmother's home or her capacity to care for more children." Dissent at 9.

Guardianship: Verification of Understanding the Legal Significance

In re P.L.E., ___ N.C. App. ___ (August 15, 2023)

Held: Vacated and Remanded

- Facts: Juvenile was adjudicated neglected due to lack of proper care, supervision, or discipline and living in an environment injurious to her welfare where she was at risk for abuse based on non-accidental injuries sustained by her younger sibling while living in the family home. Mother was ordered to comply with her case, where she initially made progress but then failed to continue with that progress. At a permanency planning hearing, the court ordered a primary permanent plan of adoption with a secondary plan of guardianship. The court ceased reunification efforts and denied mother visitation with both juveniles while mother's misdemeanor child abuse charges were pending. Later, when mother made some progress with her case plan and one of the juvenile's therapy was suspended when the juvenile met her treatment goals, the court restored limited telephone and video contact with the juvenile. At the next permanency planning hearing, the court found the juvenile had resumed therapy based on regressive behaviors following initial video visits with mother, mother was not in full compliance with her case plan, and DSS recommended that the primary permanent plan be changed to guardianship. After hearing testimony from one of placement providers to whom guardianship was recommended and receiving an affidavit with financial information for the proposed guardians and after determining the parents acted inconsistently with their parental rights, the court changed the primary plan to guardianship, awarded guardianship and denied mother all visitation. Mother appeals the final permanency planning order.
- Permanency planning review orders are reviewed to determine "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). Any evidence that the court finds "relevant, reliable, and necessary to determine the needs of the juvenile and the most

appropriate disposition" may be considered at a permanency planning hearing. G.S. 7B-906.1(c).

- The court is required "to determine whether the proposed guardian 'understands the legal significance of the appointment' and 'will have adequate resources to care appropriately for the juvenile." Sl. Op. at 7; G.S. 7B-600(c), G.S. 7B-906.1(j). "The record must contain competent evidence demonstrating the guardian's awareness of [their] legal obligations," which can be satisfied by testimony of a desire to take guardianship, signing a guardianship agreement acknowledging an understanding of guardianship, and social worker testimony of a guardian's willingness to assume legal guardianship. Sl. Op. at 7 (citation omitted).
- Joint guardianship requires sufficient evidence that both persons understand the legal significance of guardianship appointment.
- There was insufficient evidence that the proposed guardians jointly understood the legal significance and responsibilities of guardianship. Although the testimony of one of the proposed guardians confirmed the information in the financial portion of the affidavit was accurate, the section about the understanding of the legal significance of the appointment was not addressed by the testimony or the DSS or GAL reports. The affidavit that was entered into evidence was not signed by either proposed guardian nor notarized. No other evidence was offered to support the finding that either, let alone both, proposed guardians understood the legal significance of the guardianship appointment.

ICWA; Standard of Proof; Waive Further Hearings

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under the Indian Child Welfare Act (ICWA). The child was adjudicated dependent. At initial disposition, custody was ordered to DSS and Mother was granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. DSS and EBCI submitted reports that recommended changing the child's primary plan to guardianship. The court changed the child's primary plan to guardianship, granted guardianship to the child's guardians, and provided for no further permanency planning hearings for the child. Mother appeals the order raising several issues. This summary addresses mother's argument that the court failed to satisfy the higher standard of proof for findings required by the ICWA prior to placing an Indian child in foster care.
- A de novo standard of review applies when determining whether the court followed a statutory mandate. ICWA is a federal law that establishes minimum standards the court must follow including any higher standard of protection than that provided by state law.
- ICWA requires a determination that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before

foster placement may be ordered. The determination must be supported by clear and convincing evidence and include testimony of qualified expert witnesses. 25 U.S.C. § 1912(e).

- "The findings in a disposition order or permanency planning order may be based upon a preponderance of the evidence, *unless* the order waives additional hearings required by [G.S.] 7B-906.1 and if so, the trial court must make certain findings by 'clear, cogent, and convincing evidence.' " Sl. Op. at 8. G.S. 7B-906.1(n) allows waiver of permanency planning hearings if the court finds by clear, cogent, and convincing evidence, each of the five enumerated factors regarding the child's placement, best interests, and rights of the parties.
- The permanency planning order does not satisfy the standard of proof or written findings required by G.S. 7B-906.1(n). The order effectively waived future permanency planning hearings by stating "no further review shall be scheduled at this time[,]" thereby requiring that each of the five findings be made and supported by clear and convincing evidence pursuant to G.S. 7B-906.1(n). The court did not state the standard of proof applied by the court in its written order or in open court, other than the juvenile's best interest stated in one finding, and it is unclear if each of the five factors were addressed as required by G.S. 7B-906.1(n).The court of appeals did not review whether the ICWA standard of proof and findings were met since the order was found to not satisfy the requirements of G.S. 7B-906.1(n). The order is vacated and remanded for further proceedings, including holding a new hearing and entering a new order that satisfies both NC statutory and ICWA requirements.

Reasonable Efforts

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected, based on findings that one of the children was sexually abused by their Father while in the custody of their paternal Grandmother. The children were placed in DSS custody and Grandmother was ordered monthly visitation. Findings in permanency planning orders included Grandmother denying Father's sexual abuse of the child. Grandmother was ordered to comply with several components of her case plan, including receiving a new psychological evaluation and cooperating with the recommendations, which included Dialectical Behavioral Therapy (DBT). At the permanency planning hearing from which this appeal arises, Grandmother testified that she continued to believe her son had not harmed the child and that she was unable to pay for the ordered DBT therapy recommended by her psychological evaluation despite DSS offering payment assistance. Grandmother later attended two intake sessions with a therapist that determined further services were not needed based solely on information provided by Grandmother. The court found Grandmother had failed to make progress within a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated reunification

and visitation. Grandmother appeals. This summary discusses Grandmother's argument that DSS did not make reasonable efforts towards reunification.

- A reviewing court must determine whether findings support the conclusion that DSS has made reasonable efforts to eliminate the need for removal.
- G.S. 7B-906.2(c) requires the court to make findings and a conclusion at each permanency planning hearing as to whether DSS's reunification efforts were reasonable. Reasonable efforts is defined as the "diligent use of preventive or reunification services by a department of social services 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. at 28, *quoting* G.S. 7B-101(18). Reasonable efforts do not require exhaustive efforts.
- Findings support the conclusion that DSS made reasonable efforts toward reunification with Grandmother. Findings show DSS assessed the children's needs; counseled and supported the family; met with Grandmother to develop the case plan and visitation arrangements; provided monetary assistance for the children's care; and made referrals to service providers. Although failing to provide court-ordered visitation could impact reasonable efforts, here DSS provided the minimum visitation that was ordered even though it exercised its discretion granted by the court in declining to expand visitation due to concerns about Grandmother's behavior. The court also rejects Grandmother's argument that DSS's efforts to assist Grandmother in obtaining affordable DBT were insufficient, as findings show DSS contacted multiple DBT providers and offered to share the cost of services with Grandmother, which Grandmother rejected.

Eliminate Reunification; Findings of Fact; Burden of Proof

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected, based on findings that one of the children was sexually abused by their Father while in the custody of their paternal Grandmother. During the dispositional stage, the children were placed in DSS custody and Grandmother was ordered monthly visitation. Grandmother denied father sexually abused his daughter despite evidence of both testing positive for gonorrhea. The court ordered Grandmother to attend classes or support groups for parenting a child who was sexually abused, which is separate from the sex abuse class she completed on her own; receive a new psychological evaluation where she shares information about the court's findings of the child's sexual abuse with the evaluator, and cooperate with the recommendations of the evaluations, which included Dialectical Behavioral Therapy (DBT). At the permanency planning hearing from which this appeal arises, the court found Grandmother had failed to make progress within a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated reunification and visitation. Grandmother appeals on several issues. This summary addresses grandmother's challenge to the court's findings and the elimination of reunification and her argument that the trial court

misapprehended the law by applying the neglect TPR ground to a finding and switched the burden of proof to her.

- Permanency planning orders are reviewed to examine whether the findings are supported by competent evidence and whether the findings support the conclusions of law. "The trial court's dispositional choices – including the decision to eliminate reunification from the permanent plan – are reviewed for abuse of discretion." Sl. Op. at 10-11 (citation omitted).
- The trial court must adopt concurrent primary and secondary permanent plans determined to be in the best interest of the child at each permanency planning hearing. G.S. 7B-906.2(a). "Accordingly, neither the parent nor [DSS] bears the burden of proof . . ." Sl. Op. at 26 (citation omitted). "Reunification must be the primary or secondary plan unless the permanent plan has been achieved or the trial court . . . as is this case, (3) makes written findings in the permanency planning order that 'reunification efforts would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " Sl. Op. at 9, *quoting* G.S. 7B-906.2(b). In finding that reunification efforts would be unsuccessful or inconsistent, G.S. 7B-906.2(d) lists four required written findings that must also be included in the court's order. Appellate courts have held that these findings do not have to "track the statutory language verbatim, but they 'must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.' " Sl. Op. at 9-10 (quoting *In re J.M.*, 385 N.C. 584, 594 (2023)). "The possibility that a neglected juvenile faces a substantial risk of future neglect upon reunification is a relevant consideration in determining whether reunification is appropriate." Sl. Op. at 24.
- Each of the five categories of challenged findings are supported by the evidence, including testimony of the DSS social worker, DSS supervisor, and Grandmother. Supported findings include Grandmother's ability and failure to obtain DBT; continued relationship with and priority to Father; failure to complete further ordered sex abuse parenting classes (though the finding that she completed no sex abuse education is stricken as she completed the course ordered at initial disposition); failure to acknowledge Father sexually abused the child; and inappropriate behavior at visits in violation of court orders.
- The court properly addressed the required considerations of G.S. 7B-906.2(d) to end reunification efforts, including that Grandmother remained available to the court, was not cooperating with DSS or making progress with the case plan, and was acting inconsistently with the safety of the children. The court did not err in considering the possibility of future neglect when determining the best interests of the children, rejecting Grandmother's argument that the court applied standards relevant to the termination of parental rights. "[J]ust because the likelihood of future neglect or abuse is relevant to the termination of parental rights does not render it *irrelevant* to a permanency planning ruling, nor does the trial court's consideration of such imply that the trial court is applying an improper standard to its analysis." Sl. Op. at 24 (emphasis in original).
- The court did not impermissibly place the burden of proof on Grandmother. Findings address the history of the case and Grandmother's progress (or lack thereof) in creating a safe

environment for the children, which support the court's conclusion that Grandmother has not made sufficient progress such that reunification is in the children's best interest.

- Findings support the court's conclusion that Grandmother failed to make reasonable progress; the court did not abuse its discretion in ordering that reunification efforts be ceased. "Whatever progress Grandmother has made on her case plan has not been sufficient to allow her to provide a safe home for the children," most significantly due to her refusal to "understand or admit the danger Father represents or the harm he has already caused." Sl. Op. at 30. "This standing alone could be enough to support the trial court's order ceasing reunification." Sl. Op. at 29. Additionally, although Grandmother engaged in largely positive visits with the children, maintained her pain management therapy sessions, completed one parenting course, and completed the DBT evaluation, she failed to obtain DBT and sexual assault education as ordered and recommended by psychological evaluations.

Terminate Jurisdiction

Rules 59-60; Writ of Certiorari

In re K.C., ___ N.C. App. ___ (February 6, 2024)

Held: Vacated

- Facts: DSS filed juvenile petitions alleging neglect of two children based on reports of domestic violence and improper discipline in the home. At the adjudication hearing DSS presented evidence including testimony of the social worker and child's forensic interviewer, and an hour-long videotape of the forensic interview with the older child. In the video, the child recounted arguments between Mother and Father in the home, injuries to Mother, and Father's discipline of the younger sibling. Father's testimony denied the events described in the video, and Mother did not testify. The court found DSS failed to provide clear, cogent and convincing evidence that the children were neglected, ordered the children reunited with their parents, and filed a written order dismissing the petitions. DSS filed a Rule 59-60 motion requesting that the trial court amend or grant relief from its judgment because of the difficulty in hearing the video. At the hearing on the motion, the court stated it had difficulty hearing the video at the adjudication hearing and requested a transcript of the video over Mother and Father's objections. The court granted the Rule 59-60 motion, reversed its earlier ruling, and adjudicated the children neglected, stating that the transcript of the video was clearer and more understandable than when the video was played at the adjudicatory hearing. After the adjudication and later initial dispositional orders were entered, Mother and Father appealed both orders for lack of subject-matter jurisdiction. Mother and father filed petitions for writ of certiorari to appeal the adjudication and dispositional orders since they argued the orders are void for lack of subject matter jurisdiction.
- Whether a trial court has subject matter jurisdiction is a question of law reviewed de novo. "Challenges to subject matter jurisdiction may be raised at any stage of proceedings, including for the first time" on appeal. Sl. Op. at 14 (citation omitted).
- "A judgment is void, when there is want of jurisdiction by the court over subject matter jurisdiction of the action, and a void judgment may be disregarded and treated as a nullity

everywhere. . . . A void judgment is, in legal effect, no judgment. . . . [A]ll proceedings founded upon it are worthless." Sl. Op. at 11 (citation omitted).

- After a court obtains jurisdiction by the filing of a petition, jurisdiction continues "*until terminated by order of the court* or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-201(a)). Once jurisdiction is terminated, "*the court thereafter shall not modify or enforce any order previously entered in the case*. . . *The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed*[.]" Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-201(b)). "If the court finds that the allegations have not been proven, the court *shall dismiss the petition with prejudice*, and if the juvenile is in nonsecure custody, the juvenile *shall be released to the parent, guardian, custodian, or caretaker*." Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-807(a)).
- The use of Rules 59 and 60 are not applicable when the court terminates its jurisdiction. The court did not have subject matter jurisdiction to grant the Rule 59-60 motion. The court's jurisdiction terminated when it entered its order dismissing the juvenile petitions for failure to prove the allegations of neglect contained in the petitions; any orders entered thereafter are *void ab initio* for want of jurisdiction (citing *In re T.R.P.*, 360 N.C. 588 (2006)). The court had several opportunities to "consider the allegations, weigh the credibility, and make findings of fact" regarding the videotape evidence at the initial adjudication hearing. The court's oral ruling demonstrates it weighed the child's credibility in making its adjudicatory findings, stating that DSS could have offered Mother's medical records or Father's criminal history to support the evidence presented. After concluding DSS did not prove its case by clear, cogent and convincing evidence, the court ordered the children reunited with Mother and Father and entered its order dismissing the petitions as required by G.S. 7B-807(a), thereby terminating jurisdiction under G.S. 7B-201(a). Rule 59-60 motions "cannot operate as a method to claw back jurisdiction and reconsider the evidence" and the court "cannot swap its initial adjudication decision after dismissal of the petition." Sl. Op. at 17-18.
- The opinion notes that DSS could have appealed the initial adjudication decision pursuant to G.S. 7B-1001(a)(2) as an involuntary dismissal of a petition, and that a Rule 59-60 motion cannot "be used as a substitute for an appeal." Sl. Op. at 17 n.3 (citation omitted).
- Because the orders are void, Mother and Father's notices of appeal from either void order are ineffective.
- G.S. 7A-32 authorizes the appellate courts to issue a writ of certiorari "in aid of its own jurisdiction . . . " pursuant to practice and procedure provided by statute or rule of the Supreme Court, or common law where those are silent. Sl. Op. at 12 (quoting G.S. 7A-32(c)). Rule 21 of the Rules of Appellate Procedure addresses writs of certiorari; however, the supreme court has held that "the decision to issue a writ is governed solely by statute and by common law." Sl. Op. at 12 (citation omitted). Rule 21 does not apply in this case because Mother and Father seek to appeal void orders, which are not addressed in Rule 21; therefore, common law applies.
- Appellate courts use a "two-factor test to determine whether a writ of certiorari should issue: (1) 'if the petitioner can show merit or that error was probably committed below' and

(2) 'if there are extraordinary circumstances to justify it,' including 'a showing of substantial harm.' Sl. Op. at 12-13 (citations omitted).

- PWC granted. Mother and Father's argument that the trial court erred has merit because the trial court did not have jurisdiction to enter orders in the matter after dismissing the juvenile petitions, and the parties have shown extraordinary circumstances because of the substantial harm from separation of a family due to a void order and lack of finality in the juvenile case.

Appeal

Appealable Order

In re R.G., ___ N.C. App. ___ (March 5, 2024)

Held: Appeal Dismissed

- Facts: The juvenile was adjudicated abused and neglected based on allegations of sexual abuse by a caretaker living with Mother and the child. The court found aggravating circumstances existed at initial disposition and ordered the cessation of reunification efforts with Mother after finding Mother was aware of the allegations of sexual abuse, did not act to protect the child, and had not taken any action to change the circumstances which led to the child's removal from the home. At the first permanency planning hearing, the court ordered the child's primary permanent plan of guardianship and concurrent secondary plans of custody with a relative and reunification with Father. At the second permanency planning hearing, the court awarded guardianship to the maternal grandmother, with whom the child was placed starting at nonsecure custody. Mother appeals both permanency planning orders; the first for eliminated reunification and the second for ordering guardianship. Mother's appeals were consolidated. The GAL sought to dismiss mother's appeal of the first permanency order, arguing it is not an order that eliminates reunification because the initial dispositional order did that when it ceased reunification efforts with mother.
- G.S. 7B-1001(a)(5) allows a parent to appeal "[a]n order under G.S. 7B-906.2(b) eliminating reunification. . . as a permanent plan" for the child. Sl. Op. at 7.
- Mother has no right of appeal from the initial permanency planning order under G.S. 7B-1001(a)(5) because the order did not eliminate reunification as a permanent plan for the child. The court made findings of aggravating circumstances under G.S. 7B-901(c)(1) and ceased reunification efforts with Mother in the initial disposition order. Therefore "reunification was excluded and omitted from the permanent plans . . . beginning at disposition and was never eliminated as a permanent plan at the first permanency planning hearing." Sl. Op. at 12. Mother had a right to appeal the adjudication and initial dispositional order under G.S. 7B-1001(a)(3). Allowing mother to appeal the initial dispositional order and first permanency planning order gives mother a second chance to appeal multiple orders raising the same argument.
- Based on statutory changes to G.S. 7B-906.2(b) made in 2019 and 2021, it is clear that the Legislature has clarified "that reunification efforts and reunification as a permanent plan are

not distinct, decoupled concepts; . . . [and] that the cessation of reunification efforts also eliminates reunification as permanent plan." Sl. Op. at 11. Contrary to the holding in *In re C.P.*, 258 N.C. App. 241 (2018), these legislative changes do not require reunification be an initial permanent plan.

- G.S. 7B-906.2(b) authorizes reunification to be excluded as a permanent plan if findings were made under G.S. 7B-901(c) at initial disposition. G.S. 7B-901(c) authorizes a court to cease reunification efforts at initial disposition if the court makes written findings that aggravating circumstances exist. Reading G.S. 7B-906.2 and 7B-901(c) together, if findings are made under G.S. 7B-901(c) trial courts may "omit reunification from the permanent plans for the juvenile" which occurred at disposition. Sl. Op. at 12.

Standing; Parentage

In re L.C., ___ N.C. App. ___ (Apr. 16, 2024)

Held: Vacated and Remanded; Stay Granted 5/7/2024

- Facts: Juvenile was adjudicated neglected based on a history of substance use by Mother and Mother's live-in female partner who is a caretaker to the juvenile. The petition alleged Mother's partner ("Caretaker") was identified as the juvenile's father on the juvenile's birth certificate, though the birth certificate was not presented at the hearings or in the record on appeal. The trial court treated Caretaker as the juvenile's legal father throughout the case, even appointing Caretaker counsel as a parent. Caretaker and Mother appeal the adjudication and disposition. This summary discusses the dismissal of the partner's appeal due to lack of standing. Mother's appeal proceeded and is summarized separately.
- "Standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." Sl. Op. at 6 (citation omitted). The appealing party invoking the court's jurisdiction has the burden of establishing standing.
- G.S. 7B-1001(a)(3) provides for the direct appeal of any initial disposition order and the adjudication order on which it is based. G.S. 7B-1002 limits the right to appeal under G.S. 7B-1001 to the juvenile; the juvenile's guardian ad litem (GAL); DSS; a nonprevailing parent, guardian, or custodian; or party that sought but failed to obtain a termination of parental rights.
- "[A] 'father' is the male parent of a child, whether as a biological parent, by adoption, by legitimation, or by adjudication of paternity." Sl. Op. at 9 (quoting the court's recent opinion, *Green v. Carter*, ___ N.C. App. ___ (March 19, 2024); interpreting the meaning of the terms "father" and "parent" in the context of G.S. Chapter 50). The court notes that the terms "father" and "parent" as used in G.S. Chapter 50 are indistinguishable from the terms as used in G.S. Chapter 7B, which does not define the terms.
- G.S. 130A-101 allows a mother who is unmarried at all times from conception to the child's birth and the person believed to be the child's natural father to execute an affidavit of parentage in order to list the declaring father on the child's birth certificate, creating a rebuttable presumption of paternity. "But there can be no presumption, rebuttable or

otherwise, of paternity for a woman." Sl. Op. at 12. Paternity does not apply to a woman; maternity does.

- In this situation, Caretaker would not be able to adopt the juvenile under North Carolina law and become a parent unless Mother and any potential biological father's parental rights were terminated (citing *Boseman v. Jarrell*, 365 N.C. 537 (2010)).
- Despite treating Caretaker as the child's father (including appointing counsel which is only authorized for parents), "the trial court had no authority to create a new method of establishing paternity or Respondent-Caretaker's status as a parent, without compliance with North Carolina's statutes." Sl. Op. at 8. Mother's female partner cannot become a "father" under North Carolina law by listing her name on the juvenile's birth certificate. Even had Mother and her partner falsely declared the partner as the juvenile's natural father, Mother testified at the adjudication hearing that her partner is not the juvenile's biological father and identified a potential natural father of the juvenile.
- A caretaker is "any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting[,]" including an adult member of the juvenile's household or an adult entrusted with the juvenile's care. Sl. Op. at 8, *quoting* G.S. 7B-101(3).
- Respondent's status is that of a caretaker and not a father or parent of the juvenile. There is also no evidence in the record that Mother's partner was appointed as the juvenile's legal guardian or custodian. Therefore, Caretaker does not have standing to appeal the orders.

Termination of Parental Rights

Subject Matter Jurisdiction

G.S. 7B Jurisdiction

In re M.A.C. & S.X.C., ___ N.C. App. ___ (October 17, 2023)

Held: Affirmed

Dissent, Hampson, J.

- Facts: Mother appeals order terminating her parental rights to her two minor children on the ground that the trial court lacked subject matter jurisdiction under G.S. 7B-1101. Mother's two children resided with their paternal Grandparents and their Father pursuant to a consent order from August 2017 until their father's death in March 2019. Mother moved out of state following entry of the consent order and ceased contact with the children. Following their Father's death, the children continued to live exclusively with their Grandparents in Columbus County. The Grandparents filed verified petitions to terminate Mother's parental rights to the two children in June 2021, later amended in August 2021. The petitions alleged that the two children resided with the Grandparents in Columbus County and that each child was "present in" Harnett County (a different judicial district than Columbus County) at the time of the filing of the petitions. Mother filed unverified answers motioning to dismiss the petition for lack of personal jurisdiction, insufficiency of service of process, and failure to state a claim. At the TPR hearing, Mother's motions were denied and the court concluded

that grounds to terminate Mother's parental rights had been established and that termination was in the juvenile's best interests.

- Whether a trial court possesses subject-matter jurisdiction is reviewed de novo. "Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child." Sl. Op. at 4 (citation omitted). A court's subject-matter jurisdiction can be challenged "at any stage of the proceedings, even for the first time on appeal." Sl. Op. at 4 (citation omitted).
- "A verified pleading containing factual allegations that satisfy the statutory requirements for invoking the trial court's subject matter jurisdiction is sufficient to raise 'the prima facie presumption of rightful jurisdiction.' " Sl. Op. at 7. The party challenging the court's jurisdiction has the burden to rebut the "prima facie presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." Sl. Op. at 4 (citation omitted).
- G.S. 7B-1101 grants a trial court exclusive original jurisdiction over any petition or motion relating to termination of parental rights to any juvenile who resides in or is found in the district at the time of filing of the petition or motion. Binding precedent of the court of appeals has interpreted "found in" to mean "physically present in[.]" Sl. Op. at 10 (citation omitted).
- Grandparent-petitioners invoked the prima facie presumption of rightful jurisdiction upon filing verified TPR petitions containing factual allegations that included the children were present in Harnett County at the time the petitions were filed. The allegation of the children's presence is sufficient to satisfy the jurisdictional requirement that the children be "found in" the judicial district where the action was filed, Harnett County.
- Mother did not carry her burden to rebut the prima facie presumption of rightful jurisdiction. The only competent evidence in the record regarding the physical presence of the two children at the time of the filing of the petition is the verified TPR petitions. "The allegations of a verified juvenile petition that support the trial court's subject-matter jurisdiction, and which remain uncontested by competent evidence throughout the proceedings, may sufficiently determine the threshold issue of the court's jurisdiction." Sl. Op. at 12. Though Mother's filed answers denying that the two children were present in Harnett County at the time of the filing of the petition, Mother's answers were unverified and therefore not competent evidence and not considered by the court. It is immaterial that there is no statutory requirement that an answer be verified. Mother also failed to dispute the allegation at the TPR hearing.
- The court confines this holding "to the sole issue of the sufficiency of competent record evidence to support the trial court's conclusion that it possessed subject-matter jurisdiction." Sl. Op. at 12.
- Dissent: The presumption of rightful jurisdiction only applies when it is not inconsistent with the record. In this case, Mother's answer denied the jurisdictional allegations in the petitions that the children were present in Harnett County at the time of the filing of the petitions. Beyond the "conclusory allegations in the petitions," the Grandparent-petitioners did not present any evidence to support the court's finding that the children were found in Harnett County at the time of the filing of the petitions. The record contains no evidence to support

the finding that the children were present in Harnett County when the petition was filed such that the court lacked subject matter jurisdiction.

Appointment of Counsel

Forfeiture of Counsel

In re D.T.P., ___ N.C. App. ___ (November 7, 2023)

Held: Affirmed

- Facts: Mother and Father appeal from orders terminating their parental rights, challenging the trial court's conclusion that each parent forfeited their right to court-appointed counsel requiring the parents to appear pro se at the TPR hearing. During the period between DSS filing neglect petitions in 2017 and 2018, through to the TPR in 2022, Father had five and Mother had six different court appointed attorneys. Mother and Father filed invalid appeals to the Court of Appeals and the U.S. Supreme Court. Mother and father used the procedure of having their attorneys withdraw right before the TPR hearing in order to obtain a continuance. Together, acting pro se, mother and father filed a civil action against their appointed counsel while the TPR proceedings were pending, resulting in a motion to withdraw. In the TPR order, the trial court made the above findings and concluded the parents' conduct was egregious, dilatory, and abusive; undermined the purposes of their right to counsel by making their representation impossible; and prevented the TPR proceedings from timely occurring.
- "A trial court's conclusion that a parent waived or forfeited [their] statutory right to counsel in a termination of parental rights proceeding is a question of law … reviewed de novo." Sl. Op. at 6 (citation omitted). A court's ruling is reviewed on appeal to determine whether the trial court's findings are supported by competent evidence, and if so, whether those findings support its conclusion that 'respondent parents each separately and together forfeited their right to court appointed counsel by their deliberate acts' ". Sl Op. at 7 (citation omitted).
- G.S. 7B-1101.1 provides the parent in a termination of parental rights proceeding the right to counsel, and appointed counsel in cases of indigency, unless the parent knowingly and voluntarily waives their right. G.S. 7B-1101.1(a), (a1).
- "The right to court-appointed counsel is not absolute; a party may forfeit the right 'by engaging in 'actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all' ' ". Sl. Op. at 8 (citations omitted). A conclusion of forfeiture is limited to when the parent's conduct is "egregious dilatory or abusive." Sl. Op. at 8 (citation omitted).
- The trial court's findings are supported by competent evidence, including Mother's invalid appeal from a memo of the trial court; Father's invalid appeal to the U.S. Supreme Court, which he testified that he did not expect the Court to accept; several motions and orders allowing for withdrawal and appointment of counsel; both Parents' testimony that they understood withdrawal and appointment of counsel would lead to a continuance; and the Parents' pro se civil suit against their appointed counsel and their acknowledgement of their intent to force the attorneys' withdrawal.

- The trial court's findings are sufficient to support the conclusion that the Parents' actions were egregious, dilatory, and abusive conduct that undermined the purpose of their right to appointed counsel, making their representation impossible to prevent the TPR trial from happening.

Adjudication

Neglect; Failure to Make Reasonable Progress; Findings

In re T.R.W., ___ N.C. App. ___ (May 21, 2024)

Held: Reversed

- Facts: Three children were adjudicated neglected and placed in foster care in 2015. Mother and Father were ordered to make progress on their case plan addressing hygiene and safety concerns in the home and the parents' ability to care for the children's medical needs. Following an unsuccessful trial placement the court ordered adoption be the children's primary plan with a secondary plan of reunification. Subsequently, father had a stroke and the parents moved to South Carolina to live with a relative to assist them with father's care. By February 2018 all three children were in foster placement together. The children's primary plan was changed to guardianship, which was ordered to the foster parents in January 2020. The court waived future hearings, relieved DSS of supervisory responsibility for the family, and released the GAL and parent attorneys. Mother and Father were granted quarterly visitation and weekly telephone calls with the children. In October 2021 the Guardians filed a petition to terminate the parental rights (TPR) of Mother and Father. The TPR was granted on the grounds of neglect and willfully leaving the children in placement outside the home for more than 12 months without making reasonable progress in correcting the conditions that led to the children's removal. Father appeals the TPR.
- G.S. 7B-1109 places the burden on the petitioner to prove the existence of one or more grounds for the termination of parental rights found in G.S. 7B-1111(a) by clear, cogent, and convincing evidence. The trial court must " 'take evidence [and] find the facts' necessary to support its determination of whether the alleged grounds for termination exist." Sl. Op. at 6, *quoting* G.S. 7B-1109(e). "The trial court's findings must be more than a recitation of allegations." Sl. Op. at 16 (quoting In re H.P., 278 N.C. App. 195, 204 (2021)).
- Appellate courts review a TPR adjudication order to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. Findings of fact that are effectively conclusions of law are treated as conclusions of law reviewable upon appeal. Conclusions of law are reviewed de novo.
- Several findings of fact are unsupported by clear, cogent, and convincing evidence. Other findings of fact are recitations of allegations in the petition of which the record is silent.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or creating an injurious environment to the child's welfare. When there has been a period of separation, there must be past neglect and

likelihood of future neglect by the parent. The court looks at the likelihood of future neglect based on circumstances between the past neglect and the time of the TPR hearing.
  - The remaining, supported findings do not support a conclusion that there is a likelihood Father will neglect the children in the future. The children have been removed from Father's custody for over six years with permanency achieved under guardianship for over four years at the time of the TPR hearing. Father was compliant with his case plan prior to the children achieving permanency, is employed, is in therapy, and benefitted from services. Father consistently calls the children weekly, pays child support, and sends the children gifts. South Carolina DSS determined the parents' home was safe and that they had custody of their youngest child.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves a child in foster care for 12 months and fails to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness is when a parent has an ability to make progress but is unwilling to make the effort. The trial court can consider evidence of progress up until the date of the TPR hearing.
  - The remaining, supported findings do not support the conclusion that Father failed to make reasonable progress under the circumstances to correct the conditions which led to the children's removal. Findings do not show current concerns about the children's hygiene, home conditions, and Father's ability to meet the children's medical needs, which were the conditions that led to the children's removal. Father complied with his case plan, even upon suffering a stroke, until permanency was achieved. Father has consistently called the children weekly in compliance with his ordered visitation; maintained employment; and provided child support and gifts for the children. This is reasonable progress under the circumstances of the guardianship for the children.
- The supreme court has held that "a permanency guardianship allows parents whose children cannot be returned to them to have a meaningful opportunity to maintain a legal relationship with their children." Sl. Op. at 31 (citations omitted).

Failure to Make Reasonable Progress

In re X.M., ___ N.C. App. ___ (March 19, 2024)

Held: Affirmed

- Facts: Four children were adjudicated neglected based on Mother's substance use issues and inability to provide a safe home. The court ordered primary custody of the children with Father, and five years later, the children were adjudicated neglected and dependent based on reports of Father leaving the children for long periods (e.g. six months) with a young relative incapable of caring for the children. The children were placed in DSS custody while both parents were ordered to comply with their case plans that included conditions of completing a clinical assessment and resulting service recommendations; drug testing; maintaining appropriate housing; and consistently visiting with the children. Mother made minimal efforts to comply with her case plan; testing positive on drug screens, refusing to tell DSS where she was (she worked in traveling carnivals); and rarely visiting with the children. DSS filed a TPR motion and the court terminated Mother's parental rights based on four grounds, one of which was willfully leaving the children in foster care for more than 12

months without showing reasonable progress to correct the circumstances of their removal. Mother appeals the ground.

- A trial court's adjudication of grounds to terminate parental rights are reviewed to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). An adjudication of a single ground is sufficient to support a TPR and the court need not address remaining grounds for termination once one ground is affirmed supporting the trial court's conclusion.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate parental rights after "the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." Sl. Op. at 7, *quoting* G.S. 7B-1111(a)(2). Termination under this ground requires a "two-step analysis" to determine both whether the parent willfully left the child in foster care for more than 12 months and the parent's failure to make reasonable progress in correcting the conditions that led to their child's removal. Sl. Op. at 7 (citation omitted). A parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . and will support a finding of lack of progress . . ." Sl. Op. at 8 (citation omitted). Noncompliance with case plan conditions are "relevant, 'provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.' " Sl. Op. at 8 (citation omitted).
- Mother failed to make reasonable progress in correcting the conditions that led to the children's removal, satisfying the second prong of the two-step analysis required under G.S.7B-1111(a)(2) at issue. At the time of the TPR hearing Mother had failed to address her substance use issues with only sporadic participation in substance use treatments and consistent refusal of drug tests or positive test results throughout the life of the case; had failed to create a safe home for the children as she had been homeless for months prior to the hearing and had refused cooperating with DSS regarding the children's living situation and her own whereabouts; and had failed to regularly visit the children while they were in DSS custody. Mother's "incapability to parent" was willful and would likely continue given Mother's substance use and failure to engage in meaningful treatment. Sl. Op. at 10. These components of Mother's case plan address the issues that contributed to the circumstances of the children's removal and support termination.

In re K.N., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Mother appeals the termination of her parental rights to two children based on the grounds of abuse, neglect, and willfully leaving the children in foster care for more than 12 months and her failure to make reasonable progress to correct the conditions which led to their removal. DSS became involved in 2018 and the children were ultimately adjudicated

abused, neglected, and dependent in 2019 based on circumstances involving Mother's inappropriate discipline resulting in criminal charges and convictions, and mother's mental health and failure to comply with in-home services. Throughout disposition, Mother failed to complete many of the ordered services and activities in her case plan, including demonstrating the ability to meet the basic and therapeutic needs of her children, including creating a stable home environment and engaging and cooperating in the treatment of one of the children's therapeutic treatment; and recommendations adopted by the court relating to her mental health and irrational behavior, including consistently taking her medication and participating in cognitive therapy and substance use treatment. DSS filed the TPR motion in June 2021, which was granted and entered on December 21, 2022. In its order, the court made findings based on witness testimony and from findings and conclusions in permanency planning orders.

- A trial court's adjudication of grounds to terminate parental rights are reviewed to determine "whether the findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law." Sl. Op. at 13 (citation omitted). Conclusions of law are reviewed de novo. Sl. Op. at 13.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate parental rights after "the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." Sl. Op. at 13, *quoting* G.S. 7B-1111(a)(2). Termination under this ground requires a "two-step analysis" to determine both whether the parent willfully left the child in foster care for more than 12 months and the parent's failure to make reasonable progress in correcting the conditions that led to their child's removal. Sl. Op. at 13 (citation omitted). A parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . and will support a finding of lack of progress . . ." Sl. Op. at 14 (citation omitted). Noncompliance with the case plan can only support termination if there is "a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." Sl. Op. at 14 (citation omitted).
- Mother challenges nine findings of fact as not supported by clear and convincing evidence, and further argues that several findings are improperly based upon judicially-noticed facts from prior court orders. The challenged findings were supported by the evidence, including witness testimony. "While a trial court 'may not rely *solely*' on judicially-noticed evidence from prior hearings or rely on evidence 'from prior dispositional orders, which have a lower standard of proof[,]' a trial court may use testimony from former hearings to corroborate additional testimony received at the current adjudicatory hearing." Sl. Op. at 12 (emphasis in original) (citation omitted). There must be some oral testimony at the TPR hearing and that testimony corroborated the judicially-noticed facts from the prior permanency planning orders resulting in the court making an independent determination of the new evidence presented at the TPR hearing.
- Unchallenged findings support that the children were placed in foster care from the time of their removal in November 2018 through the life of the case, satisfying the first requirement

of G.S. 7B-1111(a)(2) that the juvenile was willfully left in placement outside of the home for more than 12 months before the TPR motion was filed.

- Mother failed to make reasonable progress in correcting the conditions that led to the children's removal. Mother admitted she did not consistently take prescribed medication to manage her bipolar disorder and had ceased taking the medication altogether since becoming pregnant. Mother failed to create and maintain a stable living environment and to actively treat and manage her behaviors resulting from her mental health condition relating to violence and aggression toward her children, evidenced by Mother terminating her treatment with her therapist and bringing another child alleged to have participated in the over-discipline of the other two children back into her home. These components of her case plan address the issues that contributed to the circumstances of the children's removal from her home and Mother's noncompliance support termination.

In re A.N.R., ___ N.C. App. ___ (November 21, 2023)

Held: Affirmed

- Facts: Juvenile was placed in DSS custody upon filing of a dependency petition in September 2021. The juvenile was adjudicated in November 2021 and ordered to remain in DSS custody while Mother completed services and activities with the goal of reunification. DSS filed a TPR motion in October 2022 after Mother failed to complete many of the ordered services and activities, including supervised visits at DSS, substance abuse assessment and treatment, stable housing, and maintaining legal, verifiable income. The TPR was granted on the grounds of neglect and willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show reasonable progress had been made in correcting the conditions which led to removal of the juvenile. Mother appeals, challenging nine findings of fact relating to her progress as unsupported.
- A trial court's adjudication of grounds for termination are reviewed to determine "whether the trial court's findings of fact 'are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law' ". Sl. Op. at 6 (citation omitted). "[I]t is the responsibility of the trial court to weigh testimony, pass upon the credibility of witnesses, and draw reasonable inferences from the evidence[.]" Sl. Op. at 11 (citation omitted). Conclusions of law are reviewed de novo. Sl. Op. at 6.
- G.S. 7B-1111(a)(2) authorizes terminating a parent's rights when the parent willfully leaves the child in placement outside of the home for more than 12 months and fails to show that reasonable progress has been made in correcting the conditions which led to removal of the juvenile. The trial court may look to evidence up until the time of the TPR adjudicatory hearing to assess the parent's reasonable progress in correcting the conditions that led to the child's removal. Sl. Op. at 6. "A parent's 'prolonged inability to improve [their] situation,'. . . will support a finding of willfulness regardless of [their] good intentions[.]' " Sl. Op. at 6 (citation omitted).
- Unchallenged findings support that the child was placed in DSS custody in September 2021 and remained in DSS custody at the time the TPR motion was filed in October 2022, satisfying the first requirement of G.S. 7B-1111(a)(2) that the juvenile was willfully left in placement outside of the home for more than 12 months before the TPR motion was filed.

- Challenged findings, except the disregarded finding relating to the description of Mother's pending charges at the time of the hearing, are supported by clear, cogent, and convincing evidence, including mother's stipulation at adjudication, her certified criminal record, her admissions and testimony and DSS social worker testimony. Record evidence supports challenged findings of Mother's sporadic and minimal visits with the child; failure to appear for DSS supervised visits; history of substance abuse issues, criminal history related to possession, and periods of incarceration; failure to show for requested drug screens or obtain a substance abuse assessment or engage in treatment; and failure to fully complete parenting classes on her own. Although mother was incarcerated, which limited her ability to complete some components of her case plan, she was released for at least five months and did not address the issues required of her, such as obtaining stable housing. Together with the unchallenged findings relating to Mother's unstable housing, frequent incarceration, and failure to provide proof of income to support the child, these findings support the conclusion that Mother failed to make reasonable progress in correcting the conditions that led to the child's removal.

Abandonment: Obstruction of Ability to Contact, Restrictive Parole Conditions

In re C.J.B., ___ N.C. App. ___ (September 5, 2023)

Held: Reversed and Remanded

- Facts: Father appeals the order terminating his parental rights on the ground of willful abandonment. Mother and Father executed a 2011 consent order shortly after the child at issue was born in which they agreed to joint custody of the child, Mother was given primary custody, and Father was ordered to pay monthly child support. Father was incarcerated in Indiana from 2014 to 2017 following two felony convictions relating to sexual misconduct against a minor. Upon release in 2017, Father was subject to restrictive parole conditions which included an absolute bar to any form of contact or communication with any minor child, including his biological child, without prior approval from the Indiana Parole Board. Father petitioned the Parole Board for modification of his parole conditions in 2017 and 2019, which were denied. Mother filed the termination petition in June 2021. Father again petitioned the Parole Board for modification of his parole conditions in 2021 after the filing of the petition, which was denied. Father appeared at the adjudication hearing while incarcerated for a sex offense charge in North Carolina. Father challenges two findings of fact as unsupported by the evidence and argues the court's conclusion of willful abandonment is unsupported by the findings.
- Standard of review: A trial court's adjudication that a ground exists to terminate parental rights is reviewed "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). Conclusions of law that a ground exists to terminate parental rights are reviewed de novo.
- An ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning. Sl. Op. at 9. Findings of ultimate fact are conclusive on appeal "if the evidentiary facts reasonably support the trial court's ultimate finding [of fact.]" Sl. Op. at 7 (citation omitted).

- G.S. 7B-1111(a)(7) authorizes the termination of parental rights on the grounds of willful abandonment if the trial court finds that that the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." Sl. Op. at 8 (citing G.S. 7B-1111(a)(7)). The determinative period for adjudicating willful abandonment is the six months preceding the filing of the petition, though the trial court can look to a parent's conduct outside of the determinative period "in evaluating a parent's credibility and intentions." Sl. Op. at 8.
- "Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." Sl. Op. at 11 (citation omitted). The trial court's "findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." Sl. Op. at 11. Willful intent is a factual determination of the trial court.
- The challenged finding that Father failed to make sufficiently reasonable efforts to request approval from the Parole Board to allow contact with his child post-release is an ultimate finding. This ultimate finding of Father's intentions is supported by the evidentiary facts regarding the frequency of Father's attempts to modify his parole conditions.
- The trial court's finding of fact that Father did not send any cards, letters, gifts, or tokens of affection to the child during the determinative period fails to address Father's restrictive parole conditions that barred contact without approval of the Parole Board. This finding is disregarded to the extent the finding implies Father "possessed the ability to contact [the child] without subjecting himself to a real and significant risk of criminal prosecution." Sl. Op. at 10.
- The findings are insufficient to sustain a conclusion of willful abandonment. Though undisputed that there was no contact during the determinative period, Father remained current on his child support obligations during the determinative period and petitioned the Parole Board for modification of his parole conditions after the TPR petition was filed. Father completed tests required for consideration of any modification of his parole conditions, and promptly petitioned the Parole Board for modification of his parole conditions in 2017 and again in 2019. These findings show Father's actions are "not consistent with a parent who has manifested a willful determination to forgo all parental duties and all parental claims to the child." Sl. Op. at 12.
- Although Father's conduct in Indiana is reprehensible, it is not willful abandonment. The court will not speculate on other grounds for termination not alleged in the petition and the holding does not prevent Mother from bringing a new TPR petition.

Abandonment; Obstruction of Ability to Contact

In re E.Q.B., ___ N.C. App. ___, 891 S.E.2d 473 (2023)

Held: Affirmed in Part, Vacated in Part

- Facts: Father challenges adjudication order terminating his parental rights of three children and dispositional order prohibiting contact with the children. Mother and father were married with two children. The couple divorced during a period of father's incarceration and

had a brief reconciliation following father's release, during which time mother became pregnant with their third child. The couple again separated during father's subsequent incarceration, during which their third child was born. After father's release, father briefly lived with mother and the children, during which time mother paid all expenses. The couple again separated in January 2020. Father began calling mother and threatening her and the children. Mother blocked father from contacting her by phone and changed her phone number. In March, April, and July 2020, father sent money and toys through a relative to send to the mother for the children, but since the couple's final separation, father did not attempt to communicate or otherwise offer support to the children. Father was again incarcerated from September through December 2020. In December, upon release, father moved to Arizona. In February 2021, mother obtained a temporary domestic violence protective order (DVPO) against father, which became a final order in April 2021. In March 2021, mother filed the petition to terminate father's parental rights. After hearing, the court issued the TPR order based on abandonment, neglect by abandonment, and neglect by failure to provide proper care. The court also ordered father to have no further communication or contact with the children. Father appeals.

- An adjudicatory order is reviewed to determine "whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to de novo review." Sl. Op. at 6 (citations omitted).
- G.S. 7B-1111(a)(7) authorizes termination of a "party's parental rights when it finds that the parent 'has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.' " Sl. Op. at 6. "To find abandonment, the trial court must find that the parent's conduct 'manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]' but the relevant inquiry is limited to the statutory period of six months." Sl. Op. at 7 (citations omitted).
- Challenged findings regarding the parties' relationship and father's failure to provide care, financial support, a safe and loving home, and emotional support to the children are supported by clear, cogent, and convincing evidence. Mother testified as to the time periods of their relationship, her provisions of total financial support for the children, her provision of a home for the children since birth, the children's injuries when left alone with father in the past, and the older children's desire to stay away from their father.
- The findings support the court's conclusion of abandonment. "The obstruction of a parent's ability to contact the children is relevant to the court's consideration; however, the trial court must consider the parent's other actions and inactions in determining the impact of the obstruction on the parent's lack of contact." Sl. Op. at 1. Although mother obtained a temporary DVPO that was in effect for one and a half months of the determinative six-month period, it did not prohibit contact with the children. Mother blocked father after repeated threatening phone calls. During the determinative statutory period from September to March, father was incarcerated from September to December, moved to another state

following release without attempting to see the children, and, while calling mother repeatedly, did not contact his children. Father did not offer any excuse for not seeking custody or signing a voluntary support agreement when the court found he had the means, opportunity, and ability to do so. Father did not provide financial or emotional support for the children.

- The DVPO did not preclude contact with his children.

In re A.N.B., ___ N.C. App. ___ (August 15, 2023)

Held: Affirmed

- Facts: This is an appeal of a private TPR that mother initiated against father. In 2015, Mother initiated a Chapter 50 custody proceeding, which resulted in a custody order that granted mother primary physical custody of the child and father visitation. Father was arrested for driving while impaired and misdemeanor child abuse two years later, in December 2017, during an incident where father and his brother were found passed out from a drug overdose in a car, stopped at a red light, with the child at issue and her half-sibling in the back seat without any child seats or restraints. Mother took custody of the child from the scene; father survived, and this was the last date father saw the child. Mother filed a motion to modify the custody order, which was granted in 2020 and awarded mother sole custody, allowed paternal grandparents to intervene and awarded them visitation, and restricted father from all visitation unless the parties agreed. Mother filed a TPR petition against father in July 2021 on the grounds of willful abandonment and willful failure to pay child support ordered by the court. Conflicting evidence was presented at the adjudication hearing concerning father's attempts to contact mother or child, mother's obstruction of father's attempts to contact mother or child, and father's contribution to gifts for the child given by the paternal grandparents. The TPR was granted on the ground of willful abandonment. Father appeals for insufficient findings.
- At adjudication in TPR cases, the standard of review is "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." Sl. Op. at 19 (citation omitted).
- G.S. 7B-1111(a)(7) allows the court to terminate parental rights upon a finding that "the parent has willfully abandoned the juvenile for at least six months immediately preceding the filing of the petition or motion." The supreme court has further stated that the ground of abandonment "implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." Sl. Op. at 20 (citation omitted). The determinative time period is the six months immediately preceding the filing of the TPR petition, but the court may look to a parent's conduct outside of that time period to assess a parent's intent and willfulness. Willfulness is a question of fact.
- Challenged findings are supported by competent evidence and other unchallenged binding findings establish abandonment. The finding addressing father's testimony that he contributed some money toward gifts provided by the grandparents to the child but no

other evidence was offered to support this testimony resolves the conflict in the evidence about father's contributions and that he did not make any.

- "[T]he trial court is not required to make findings of fact on all evidence presented, nor state every option it considered." Sl. Op. at 24 (citation omitted) "Even when there is evidence in the record to the contrary, '[i]f the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal.' " Sl. Op at 25 (citation omitted).
- Findings are sufficient and support conclusion of willful abandonment. Concerning the conflicting evidence of father's attempts to contact the child and mother's "interposed obstacles," "[t]he trial court reviewed both parties' evidence and made detailed findings resolving the factual issues presented at the termination hearing, and these findings reveal the trial court ultimately concluded that the mother's version of events [regarding father's efforts to contact the child] was more credible." Sl. Op. at 25. Regarding father's argument that mother prevented access to the child, the court held that "even if there is evidence that a petitioner has attempted to prevent the respondent from having access to the minor child, if the respondent still has some means available to contact the child or establish access, the trial court may find evidence of the respondent's willful intent to abandon the child by remaining absentee and not trying to contact the child by any means necessary." Sl. Op. at 27. Father was not prevented from contacting mother or child in the 2020 custody order, father failed to seek modification of the custody order to reinstate visitation, and findings demonstrate father did not attempt to contact mother or child by phone, text, email, or mail, or contact mother in any way to inquire as to the child's education, health, or safety during the determinative period.

Conception Resulting from Sexually Related Criminal Offense

In re N.J.R.C., ___ N.C. App. ___ (November 7, 2023)

Held: Affirmed

- Facts: This is a private TPR initiated by Mother. Mother and Father engaged in sexual relations that resulted in the conception of the child at issue while Mother was 15 and Father was 21. Father was convicted of taking indecent liberties with a child. The trial court terminated Father's parental rights on several grounds including his conviction of a sexually related offense resulting in conception of the child. Father appeals and argues that his conviction of indecent liberties with a child is not a "sexually related offense" authorizing termination.
- TPR orders are reviewed to determine "whether the findings of fact are supported by clear, cogent, and convincing evidence and whether [the] findings . . . support the conclusions of law." Sl. Op. at 3 (citation omitted). Conclusions of law are reviewed de novo.
- G.S. 7B-1111(a)(11) authorizes termination of parental rights upon finding "the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile." G.S. 7B-1111(a)(11). This ground was "intentionally drafted in a manner broad enough to encompass not only acts and offenses

which may explicitly involve sex, but also offenses associated with sex or that have some sexual component." Sl. Op. at 5.

- G.S. 14-201.1 defines the crime of taking indecent liberties with children, and while criminalizing certain actions "which are not explicitly required to be sexual acts," the crime "unequivocally contains a sexual component", which includes arousing or gratifying a sexual desire. Sl. Op. at 4, 5. Appellate precedent cites the offense as sexual in nature. The definition of "sexually violent offense" at G.S. 14-208.6(5) includes taking indecent liberties with children. As a result, the crime of taking indecent liberties with children constitutes a "sexually related offense" within the meaning of G.S. 7B-1111(a)(11). *See* Sl. Op. at 6-7.

Disposition

Court's Authority

In re E.Q.B., ___ N.C. App. ___, 891 S.E.2d 473 (2023)

Held: Affirmed in Part, Vacated in Part

- Facts: Mother initiated a TPR against father, which was granted. Father appeals by challenging the adjudication order terminating his parental rights of three children and dispositional order prohibiting contact and communication with the children. Father had a long history of repeated incarcerations, made threatening phone calls to mother, and was subject to a DVPO prohibiting contact between himself and mother. This summary focuses on the dispositional argument that the court had no authority to prohibit contact and communication between father and the children in the dispositional portion of the TPR order.
- Although father argued the court issued a no-contact order when entering the dispositional order prohibiting contact and communication between father and the children, "[t]here is no indication in the Record that the trial court attempted to issue its no-contact order under Chapter 50B." Sl.Op. at 14.
- The court abused its discretion by restricting father's ability to contact the children. No provisions of G.S. Chapter 7B authorize a trial court to issue a no-contact order in a G.S. Chapter 7B case. The trial court lacked statutory authority to include the no-contact provision in its dispositional order, therefore the court must vacate that portion of the order.

Best Interests Findings

In re K.N., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Mother appeals the termination of her parental rights to two children based on the grounds of abuse, neglect, and willfully leaving the children in foster care for more than 12 months and her failure to make reasonable progress to correct the conditions which led to their removal. The Court affirmed the trial court's adjudication of the ground for termination in G.S. 7B-1111(a)(2). Mother challenges the trial court's dispositional determination that termination of her parental rights was in the best interest of both children.

- A trial court's dispositional findings of fact are reviewed to determine "whether they are supported by the evidence received during the termination hearing." Sl. Op. at 16 (citation omitted). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for [an] abuse of discretion." Sl. Op. at 16 (citation omitted).
- In determining whether termination is in the child's best interests, G.S. 7B-1110(a) lists factors a trial court must consider and make findings regarding those relevant, including the child's age, their likelihood of adoption, whether termination will aid in accomplishing the child's permanent plan, the parent-child bond, the child's bond with any proposed adoptive parent or other placement, and any other relevant considerations.
- The trial court did not abuse its discretion in determining termination of Mother's parental rights was in the best interests of both children. Findings included the age of the children and Mother's inability to provide a safe and stable home; the children's likelihood of adoption (one very likely and a possibility for the other following continued therapeutic treatment) and that termination would aid in accomplishing their primary plans of adoption; the children's bond with their Mother (both maintaining a desire not to live with their Mother); and the children's bond with proposed placements (finding one of the children has bonded with their foster parents who expressed a commitment to adoption).

Appeal

Inadequate or Unavailable Transcript

In re X.M., ___ N.C. App. ___ (March 19, 2024)

Held: Affirmed

- Facts: The court of appeals affirmed the termination of Mother's parental rights as to her four children based on the ground of willfully leaving her children in foster care for more than 12 months without showing reasonable progress to correct the circumstances that led to the children's removal. This summary focuses on Mother's argument that the available transcript of the TPR proceeding was inadequate to provide meaningful appellate review of the trial court's best interest determination as to three of the children.
- G.S. 7B-806 requires all adjudicatory and dispositional hearings to be recorded and reduced to written transcript only when timely notice of appeal has been given. The appellant "bears the burden to 'commence settlement of the record on appeal, including providing a verbatim transcript if available.' " Sl. Op. at 10 (citation omitted). "[T]he unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." Sl. Op at 11 (citation omitted). Prejudice is required even when a statute requiring the hearing be recorded is violated. "[O]nly where a trial transcript is entirely inaccurate and inadequate, precluding formulation of an adequate record and thus preventing appropriate appellate review[,] would a new trial be required." Sl. Op. at 11 (citation omitted).
- Mother failed to demonstrate that the narrative of proceedings was entirely inaccurate or inadequate, or explain how the provided information prevented appellate review. The parties agreed on a narration of the TPR proceedings developed by Mother, DSS and the GAL

due to missing testimonial evidence and statements in the transcript. Additionally, the trial court judicially noticed all prior juvenile orders and reports from previous permanency planning hearings. Mother failed to demonstrate prejudice from the narrative provided and judicially notices orders and reports. The information that was provided did not preclude appellate review.

Writ of Certiorari

In re A.N.B., ___ N.C. App. ___ (August 15, 2023)

Held: Affirmed

- Facts: This matter involves a private TPR initiated by mother where father's parental rights were terminated on the grounds of willful abandonment. Father appealed the adjudication based on insufficient findings. Father failed to serve notice of appeal on the child's GAL. Father filed a petition for writ of certiorari (PWC) as an alternative ground for review in the event the court of appeals found the potential lack of service to the child's GAL a jurisdictional issue. This summary discusses the PWC and notice of appeal.
- Rule of Appellate Procedure 3.1 requires a party seeking appeal under G.S. 7B-1001(a) to file the notice of appeal with the clerk of superior court pursuant to G.S. 7B-1001 and serve copies of the notice of appeal on all other parties. There is no case law addressing whether this failure is a jurisdictional defect under Appellate Rule 3.1.
- Relying on previous opinions interpreting Appellate Procedure Rules 3 (civil) and 4 (criminal), a party's failure to serve their notice of appeal on all parties is a non-jurisdictional defect that must be "assessed for whether the party's noncompliance is a 'substantial or gross violation of appellate rules.' " Sl. Op. at 16 (citation omitted).
- Father acknowledged in the PWC that notice of appeal was not served on the child's GAL; however, the court found "there is no indication in the record . . . that any party would be prejudiced" if the court were to hear father's appeal. Sl. Op. at 17. The GAL appeared to have actual notice of appeal, was present at Father's hearing on his Rule 60 motion after father filed notice of appeal, and did not raise any issue with the court regarding service in an appellate brief, response to the PWC, or motion to dismiss the appeal.
- PWC denied as "superfluous" upon the court concluding "that any error in service made by [Father] is non-jurisdictional and is not a substantial or gross violation of the appellate rules." Sl. Op. at 17 (citation omitted).

Role of Child's GAL; Waive Issue

In re A.N.B., ___ N.C. App. ___ (August 15, 2023)

Held: Affirmed

- Facts: This matter involves a private TPR initiated by mother against father. Father filed an answer denying the allegations. The court appointed the public defender's office as the GAL for the juvenile. The public defender's office delegated the GAL duties to a licensed attorney, per local rules. The GAL completed an investigation and prepared a GAL court report in which termination of father's parental rights was recommended. The GAL testified at the dispositional hearing. Father did not raise objections or concerns about the GAL's role and

need for the juvenile to have separate legal representation. The TPR was granted on the grounds of willful abandonment. Father appeals, asserting the trial court erred by failing to appoint an attorney for the minor child and failing to make sufficient findings of fact to support its conclusions. Father also filed a Rule 60 motion raising the failure to appoint separate legal representation for the child. This summary focuses on father's challenge regarding the role of the child's GAL.

- Rule of Appellate Procedure 10(a)(1) states that"[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, or motion, stating the specific grounds for the ruling the party desired to make if the specific grounds were not apparent from the context." Sl. Op. at 17-18.
- G.S. 7B-1108 determines when a GAL is appointed for a child in a TPR proceeding. The court of appeals has held that violations of G.S. 7B-1108 are not automatically preserved for appellate review. Sl. Op. at 18 (citation omitted).
- Father did not preserve the issue of the attorney's role as the child's GAL for appellate review. Father failed to object at trial regarding the attorney's role as the child's GAL or the need for separate legal representation for the child.
- Appellate Rule 2, which allows the appellate court to suspend or vary the requirements of any appellate rule of procedure, is used cautiously and in exceptional circumstances, which do no not exist here.

Appellate Review: Single Ground

In re E.Q.B., ___ N.C. App. ___, 891 S.E.2d 473 (2023)

Held: Affirmed in Part, Vacated in Part

- Facts: This is an appeal of a private TPR, where father's rights were terminated on the grounds of abandonment, neglect by abandonment, and neglect. The court of appeals affirmed the ground of abandonment and discussed the jurisprudence regarding the affirmation of one ground is sufficient to support a TPR order.
- "An adjudication of any single ground for terminating a parent's rights under G.S. 7B-1111(a) will suffice to support a termination order," and the court need not review any of the remaining grounds challenged on appeal once the court has affirmed one particular ground for termination exists. Sl. Op. at 12 (citation omitted).
- "This opinion recognizes that the validity of additional grounds for termination may be relevant and impact a parent's ability to regain their parental rights in a reinstatement of parental rights action pursuant to G.S. 7B-1114 (effective October 1, 2011). In that action, the court must consider whether the parent seeking reinstatement has "remedied the conditions which led to the juvenile's removal and termination of the parent's rights." G.S. 7B-1114(g)(2).
- "As we affirm the trial court's finding of abandonment in accordance with G.S. 7B-1111(a)(7), we need not review either of the remaining grounds for the purposes of the termination of parental rights," "as resolving these issues would have no practical effect on the case." Sl Op.

at 12, 13. Further, father has not argued for reconsideration of the court's "single ground" jurisprudence.

No Merit Brief

In re J.B., ___ N.C. App. ___ (June 18, 2024)

Held: Affirmed in part, Dismissed in part

- Facts: Mother's parental rights were terminated following the adjudication of her six children as abused, neglected, and/or dependent. Mother's counsel (counsel) filed a no-merit brief identifying two issues that arguably support the appeal; Mother did not file a pro se brief. Counsel also argues in the no-merit brief that the trial court prejudicially erred in terminating Mother's rights to one of the children due to lack of subject matter jurisdiction.
- Rule 3.1(e) of the Rules of Appellate Procedure allows for counsel for an appellant to file a no-merit brief identifying "any issues in the record that arguably support the appeal and . . . why those issues lack merit or would not alter the ultimate result." Sl. Op. at 3, *citing* N.C. R. App. P. 3.1(e). The appellate court must conduct an independent review of the issues identified in the brief to determine if any issue has potential merit. "[W]hile Rule 3.1(e) 'requires that parents be advised by counsel of their opportunity to file a pro se brief, Rule 3.1[(e)] neither states nor implies that appellate review of the issues set out in the no-merit brief hinges on whether a pro se brief is actually filed by a parent.' " Sl. Op. at 5, *citing* In re L.E.M., 372 N.C. 396, 402 (2019). If the issues identified in the no-merit brief lack merit, the proper disposition is for the appellate court to affirm the order.
- In affirming the TPR order, the court of appeals conducted an independent review of the record and found no merit in either of counsel's claims regarding the trial court's determination of the existence of grounds to terminate Mother's rights and that termination was in the children's best interest.
- The court dismissed counsel's argument that the trial court lacked subject matter jurisdiction to enter the TPR order with respect to one of Mother's children. Since counsel argues the jurisdictional issue has merit, the court found the issue was improperly included in counsel's Rule 3.1(e) no-merit brief and is outside the scope of the appeal and appellate review. Mother was not denied meaningful appellate review of the jurisdictional issue as Mother was properly informed of her right to file a pro se brief to supplement counsel's no-merit brief, evidenced by the communication attached to counsel's no-merit brief as required by Rule 3.1. Mother did not file a pro se brief, and no such right exists as to a meritorious brief under Rule 28.

UCCJEA

Subject Matter Jurisdiction

Modification Jurisdiction

In re R.G., ___ N.C. App. ___ (March 5, 2024)

Held: Affirmed

- Facts: This case involves an abuse and neglect adjudication based on allegations of sexual abuse by a caretaker living with Mother and the child. The child lived with Mother in NC from the time of the child's adoption in November 2018 until DSS filed a petition and obtained nonsecure custody of the child in December 2021. DSS placed the child with her maternal grandmother in NC. However, in 2019, a custody order for the child was entered in NY, where father resided. Prior to the adjudicatory hearing, Mother filed petitions to register and enforce the NY custody order and requested that the juvenile action be dismissed for lack of subject matter jurisdiction. The NC court asserted temporary emergency jurisdiction and requested a UCCJEA conference with the NY court. After the courts communicated, the NY court concluded NC was the most convenient forum for the proceedings and relinquished jurisdiction by written letter, signed by the NY judge, and filed in the NC juvenile proceeding. The NC court determined it had modification jurisdiction and adjudicated the juvenile abused and neglected. Ultimately, the court ceased reunification efforts with mother, eliminated reunification with mother as a permanent plan, and ordered guardianship to maternal grandmother. Mother appeals, arguing the court lacked subject matter jurisdiction and otherwise did not comply with the UCCJEA.
- Whether a trial court has subject matter jurisdiction under the UCCJEA is reviewed de novo.
- To obtain modification jurisdiction under G.S. 50A-203, a court must have " 'jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state] or G.S. 50A-201(a)(2) [significant connection and substantial evidence]' and the other state's court must 'determine[] it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207[.]' " Sl. Op. at 15 (quoting G.S. 50A-203). There is no dispute that NC was this child's home state since the child lived with Mother in NC since her adoption in 2018, satisfying G.S. 50A-201(a)(1).
- G.S. 50A-203 requires the foreign state to make a jurisdictional "determination" before a NC court can modify that state's child custody determination. There is no express requirement under G.S. 50A-203 or NC appellate opinions that the foreign state must relinquish jurisdiction by a court order. Although a court order is contemplated by the official comment to the UCCJEA and by our appellate opinions, a court order is not the only method a foreign state can reqlinquish its jurisdiction. Appellate courts have "accepted a sufficiently trustworthy proxy for a court order relinquishing jurisdiction[,]" such as a docket entry that "possesse[d] all of the substantive attributes of a court order." Sl. Op. at 20 (citing and quoting *In re T.R.*, 250 N.C. App 386, 391 (2016)). NC cannot dictate how another state relinquishes its jurisdiction.
- The NY court's letter in this case was sufficient to relinquish jurisdiction over the child custody determination and allow the NC court to obtain modification jurisdiction under G.S. 50A-203. The letter contained the substantive attributes of a court order including concluding that NC is the more convenient forum for the proceedings along with supporting rationale based on facts that the child and Mother have lived in NC from the time the NY custody order was entered and there are no known connections between the allegations and the previous NY custody proceedings. The letter was signed by the trial judge, written on court letterhead and in response to the NC court's UCCJEA requested conference, and filed

by the NC court upon receipt after the NC court concluded the letter was sufficiently trustworthy.

- The NC court had modification jurisdiction under the UCCJEA to enter the adjudication and disposition order and subsequent permanency planning orders.
- The opinion disregards Mother's remaining arguments regarding the trial court's compliance with the UCCJEA, noting that: (1) temporary emergency jurisdiction allows a court in this State to exercise jurisdiction pursuant to G.S. 50A-204 while another state has continuing exclusive jurisdiction when necessary to protect a child from mistreatment or abuse, and therefore the court was not required to stay its simultaneous proceeding due to the existence of the prior NY custody order; (2) Mother was given the opportunity to be heard on the question of jurisdiction at the pre-adjudication hearing and did not present arguments or evidence to contest jurisdiction, therefore the court did not violate G.S. 50A-110(b) regarding communication between the courts; and (3) Mother improperly challenges the NY court's application of the convenient forum factors, as the UCCJEA places the jurisdiction determination with the original decree state and does not require NC to review another state's jurisdiction determination; mother's remedy is in NY, not NC.

Delinquency

DSS Custody

Appeal Moot

In re J.M., ___ N.C. App. ___ (October 3, 2023) *(Summary written by Jacqui Greene)*

Held: Dismissed

- Facts: The court entered a Level 2 disposition after adjudicating the juvenile delinquent. The dispositional order included placement of the juvenile into the temporary custody of the Cumberland County Department of Social Services (CCDS). CCDS timely appealed the part of the dispositional order that placed the juvenile into its custody. Two months after entering the order of disposition, the court entered a permanency planning order that removed CCDS as the custodian for the juvenile. The juvenile was placed in the temporary custody of her grandmother pending disposition of the appeal. The grandmother's custody would become permanent after the resolution of the appeal. The State moved to dismiss the appeal as moot.
- Opinion: The only issue on appeal was the part of the dispositional order that granted custody of the juvenile to CCDS. Because custody had already been removed from CCDS, the relief sought was already obtained. Therefore, the case is moot. The two raised exceptions to the mootness doctrine did not apply.
- First, the public-interest exception does not apply because the interests at issue are confined to CCDS, the juvenile, and the juvenile's grandmother and not the public. In addition, resolution of this case would not clarify the law as the legal standards for dispositional orders are clear.
- Second, the issue is not capable of repetition yet evading review. This is true because juvenile custody cases are not necessarily too fleeting to be litigated before the controversy ends. Courts often review juvenile custody matters. Because the issue is not too fleeting to

be litigated before the controversy ends, the court does not need to determine if there is a reasonable expectation that the complaining party will be affected by the same conduct again.

- The court lacks jurisdiction because the issue is moot and there is no applicable exception to the mootness doctrine. The case is dismissed.

Adoption

Adoption Assistance

Judicial Review

White v. N.C. DHHS, ___ N.C. App. ___ (May 7, 2024)

Held: Reversed

Dissent: Tyson, J.

- Facts and procedural history: This case involves a child who was adopted at seven months of age in 2014. The child was placed with his adoptive parents through the Children's Home Society (CHS; a private adoption agency) after mother executed a relinquishment to CHS three days after the child's birth. The child was exposed to multiple substances while in utero and was born prematurely. In the years since the adoption, the child was diagnosed with ADHD and various ocular conditions and evaluated for possible autism spectrum disorder. In March 2021, the adoptive parents first discussed with CHS the possibility of receiving Title IV-E adoption assistance benefits for the child and applied for adoption assistance that May. DSS determined the child did not meet the Title IV-E eligibility criteria because the adoption was finalized before the adoption assistance agreement was executed. The adoptive parents appealed the decision through the various appellate stages including an appeal to superior court. The administrative agency decisions affirmed the denial of adoption assistance; however, the superior court reversed the decision, concluding that the denial of the request for adoption assistance was arbitrary, capricious, and an abuse of discretion based on the superior court's determination the child qualified for assistance in 2014 and thereafter. The superior court ordered that the adoptive parents receive adoption assistance retroactively to the date the adoption was finalized in 2014, in addition to awarding attorney's fees. DHHS, DSS, and CHS appeal the superior court order, pursuant to the procedure specified in G.S. 150B-52, arguing the court exceeded the authority granted for judicial review of administrative decisions.
- Appellate review of an order of the superior court reversing an administrative decision is "twofold and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." Sl. Op. at 11 (citation omitted).
- In reviewing a final agency decision, the superior court's scope of review is limited by the nature of the asserted error and the corresponding standard of review (either de novo or whole record) provided in G.S. 150B-51(b) and (c). Asserted errors of law are questions of law reviewed de novo, while assertions that an agency decision is arbitrary, capricious, or an abuse of discretion are reviewed using the whole record test. "Using the whole record standard of review, [a reviewing court] examine[s] the entire record to determine whether

the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." Sl. Op. at 10 (citation omitted).

- In order to qualify for adoption assistance benefits under Title IV-E of the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670 *et seq*., a child must (1) meet eligibility criteria and (2) the State agency and prospective adoptive parents must enter into an adoption assistance agreement prior to the adoption being finalized. Eligibility criteria includes the child meeting the federal definition of "a child with special needs" whereby the State must determine "that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section[.]" 42 U.S.C. § 673(c)(1)(B). The State must also determine that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" 42 U.S.C. § 673(c)(1)(B).
- G.S. 108A-25(a) grants DHHS and DSS authority to administer the adoption assistance program pursuant to federal law and Social Services Commission rules. At the time of the child's adoption in 2014, administrative rules enumerated eligibility requirements to include "[t]he child is, or was, the placement responsibility of a North Carolina agency authorized to place children for adoption at the time of adoptive placement"; that "[t]he child has special needs that create a financial barrier to adoption" (mirroring the statutory requirement in G.S. 108A-49(b), cited at Sl. Op. at 5); and that "[r]easonable but unsuccessful efforts have been made to place the child for adoption without the benefits of adoption assistance[.]" 10A N.C.A.C. 70M.0402(a)(2)–(4) (2014). Administrative rules at the time also included the requirement that "the adoptive parents must have entered into an agreement with the child's agency prior to entry of the Decree of Adoption." 10A N.C.A.C. 70M.0402(b)(4) (2014).
- Federal policy places an affirmative duty on adoption agencies to notify prospective adoptive parents of the availability of adoption assistance and deems any failure of the agency to do so an extenuating circumstance justifying a fair hearing and grant of assistance if the child is eligible for assistance. However, the policy provides that *"[i]t is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of [T]itle IV-E assistance for special needs children who are also unknown to the agency*." Sl. Op. at 17-18 (quoting U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYFCB-PA-01-01, at 12–13 (Jan. 23, 2001)) (emphasis in original). In those cases, the adoptive family must request adoption assistance.
- The superior court exceeded its limited judicial review authority and erred in determining DHHS's decision was without substantial justification, not supported by the whole record, and arbitrary, capricious, and an abuse of discretion. The court improperly weighed the evidence presented to DHHS and substituted its evaluation of the evidence for that of DHHS in concluding that the child met federal and State eligibility criteria for adoption assistance at the times of adoption and application, and also erred in concluding that the child's ineligibility was solely the result of the respondent agencies' failure to advise the adoptive parents about the adoption benefits program. The court of appeals found it "unreasonable

to conclude that [the child] could not be placed with adoptive parents without adoption assistance when he *was*, in fact, placed with Petitioners without adoption assistance." Sl. Op. at 15 (emphasis in original). "North Carolina's appellate courts have never adopted or applied the 'extenuating circumstances' doctrine when interpreting Title IV-E[.]" Sl. Op. at 16. The superior court misapplied the policy. CHS was relieved of its duty to advise the adoptive parents of assistance requirements since the child did not meet eligibility requirements in 2014, despite the child's Medicaid coverage since birth. DHHS and DSS were relieved of the duty to advise due to being unaware of the private adoption.

- Dissent: The superior court's findings are supported by the whole record and support the order determining the adoptive parents are entitled to retroactive adoption assistance benefits. The extenuating circumstances doctrine applies. CHS and DSS had custody and control over the child until he was adopted and had information about the child, his mother, his birth, and his medical history. They owed the duty to disclose potential available State and federal adoption assistance benefits to the prospective adoptive parents and failed to do so.

Father's Consent

In re B.M.T., ___ N.C. App. ___ (January 2, 2024)

Held: Affirmed

- Procedural history: This is an appeal of a district court order concluding Father's consent was required for adoption of the child. The court of appeals previously found no error in the district court's determination, concluding that the criteria of G.S. 48-3-601(2)b.4.II. had been met to require Father's consent. Father had provided reasonable and consistent payments for the support of the child and Mother in accordance with his financial means and had communicated with and visited with Mother while pregnant and the child after birth. The supreme court granted a PDR and issued an order that reversed and remanded to the court of appeals for "consideration of any outstanding issues on appeal." In this opinion, the court of appeals affirmed the district court's conclusion that father's consent was required on a different basis.
- Facts: Mother directly placed the child with the prospective adoptive parents without Father's knowledge or consent. Prior to the prospective adoptive parents filing a petition for adoption of the child in North Carolina, Father and Mother executed a Voluntary Acknowledgement of Paternity (VAP) with the State of Tennessee, which was the child's home state. In his Appellee's Brief, Father argues that the VAP executed prior to the filing of the adoption served as legitimation under TN law, requiring his consent to adoption of the child under G.S. 48-3-601(2)b.3.
- Under G.S. 48-3-601(2)b.3., "[i]n a direct placement, consent is required of a man who may or may not be the biological father but who '[b]efore the filing of the [adoption] petition, has legitimated the minor under the law of any state[.]' " Sl. Op. at 3. Tennessee law provides that (1) a legally executed VAP constitutes a legal finding of paternity on the individual named, and (2) that establishing paternity equates to establishing legitimation (unlike in NC).
- Unchallenged findings include that before the adoption petition was filed in NC, Father filed a VAP in Tennessee, which included notarized signatures of both Mother and Father; a

certified copy of the VAP was an exhibit in the adoption proceeding; and that Tennessee was the home state of the child and under TN law a VAP requires a father's consent to adoption.

- Father's consent was required under G.S. 48-3-601(2)b.3. The VAP filed in TN constitutes legitimation under TN law, and this legitimation occurred prior to the filing of the adoption petition.