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Abuse, Neglect, Dependency

Adjudication

Neglect

[In re M.C.](#), 2022-NCCOA-786, 881 S.E.2d 871

Held: Affirmed

- Facts: Infant was born prematurely and was admitted to the NICU. Parents have older children who have been adjudicated and removed from their care based in part on parenting that was impacted by parents' mental health issues. Parents were not regularly present with their child in the hospital. When they were there, hospital staff repeatedly instructed parents on formula preparation, feeding times, amount to feed infant, and diaper changing. Parents did not always perform these tasks and when they did, they were unable to do so sufficiently. When infant was medically ready for discharge, the parents had not completed discharge teaching that addressed caring for their child. DSS filed a petition. Child was adjudicated neglected, and parents appealed.
- Under G.S. 7B-101(15), neglect involves the lack of proper care, supervision, or discipline. There must be some physical, emotional, or mental impairment, or substantial risk of such impairment, to the juvenile as a result. The determinative factors are the status of the child and not the fault or culpability of a parent. It is not appropriate to enter separate adjudications of neglect based on the individual conduct of each parent.
- Prior involvement with DSS standing alone is insufficient to support an adjudication of neglect. The court must find other factors that suggest the neglect will be repeated. A newborn does not have to return home from the hospital for a neglect adjudication to occur.
- Challenged findings are supported by clear and convincing evidence: medical records and testimony. Father's failure to acknowledge the neglect adjudication of their older child shows risk of impairment to this child. Father's argument that the prior neglect adjudication is not relevant since most of the findings were about mother is rejected. A neglect adjudication is about the status of the child.
- The prior DSS case regarding the parents' older child was not the sole basis for the adjudication. Both parents had significant mental health issues that impacted their parenting of this child. The parents were unable to provide basic care (feeding, changing diapers) to their infant while he was in the NICU and the parents were receiving instructions from staff. Both parents failed to obtain the services required from the prior case (e.g., therapy). A substantial risk of harm to this juvenile existed.

[In re G.W.](#), 2022-NCCOA-784, 882 S.E.2d 81

Held: Affirmed

- Facts: DSS filed an abuse and neglect petition regarding the two older siblings involving improper care. During that case, G.W. was born. At the time of G.W.'s birth, mother tested positive for substances. Based on parents' behaviors at the hospital, the hospital refused to allow G.W. to be discharged. DSS filed a neglect petition based on an injurious environment. The neglect petition alleged parents' inappropriate behaviors in the hospital, substance use, and

noncompliance with their case plan for the older siblings to receive mental health services, complete parenting classes, and repairs holes in the floors of the home. The two older siblings were adjudicated neglected by consent. An adjudicatory and dispositional hearing was held regarding G.W., who the court concluded was a neglected juvenile based on an injurious environment due to the conditions of the home and parents' failure to address the conditions that caused the two older siblings to be removed. Mother appeals the adjudication.

- Neglect requires a showing that the injurious environment has resulted in harm or a substantial risk of harm to the juvenile. A newborn who is in the hospital is properly determined to live in the home of their parents when determining whether there is a substantial risk of harm. Cases involving newborns requires the trial court to assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case and is predictive in nature.
- G.S. 7B-802 requires the court at adjudication to determine the existence or nonexistence of any of the allegations in the petition. Post-petition evidence is considered at disposition when the court addresses the best interests of the juvenile. However, there are exceptions when the evidence pertains to a "fixed and ongoing circumstance[s]", like paternity or mental illness and is not a "discrete event or one-time occurrence." Sl.Op. ¶ 23.
 - Mother's challenged findings of fact are supported by clear and convincing evidence. The parents' completion of parenting classes occurred after the petition was filed and is post-petition evidence of a discrete event or one-time occurrence and is not considered at adjudication. Post-petition drug screens are a discrete one-time occurrence and is not admissible at adjudication. Other findings related to post-petition evidence were appropriately considered at adjudication as they relate to "ongoing circumstances" that are relevant to the existence or nonexistence of the allegations in the petition. Parents' behavior during visitation related to the allegation about parent's inability to care for G.W. Testimony of recent observations of holes in the floors, which existed prior to G.W.'s birth, related to an ongoing circumstance of home safety. The failure to receive mental health services as required by the case plan for the 2 older siblings is relevant to the ongoing circumstance of the parents' mental illness and is relevant to the existence or nonexistence of the allegations in the petition.
- A substantial risk of harm is an ultimate finding of fact as it determines a mixed question of law or fact. The findings of fact based on clear and convincing evidence and unchallenged findings of fact support the ultimate finding that G.W. was at substantial risk of future harm.
- Author's Note: This opinion does not address the NC Supreme Court opinion stating post-petition evidence is inadmissible and relies on court of appeals precedent that carves out the exception of post-petition evidence of a fixed and ongoing circumstances. That exception was not addressed by the Supreme Court in *In re L.N.H.*, 382 N.C. 536 (2022).

Neglect; Dependency

[In re D.S.](#), 2022-NCCOA-674, 879 S.E.2d 335

Held: Reversed

- Facts: Infant was born and tested positive for THC and was also placed in NICU due to low blood sugar. Report to DSS was made and based on mother's prior history with DSS involving substance use and unstable housing, agreement was made where infant was discharged from hospital to father's home. Two weeks later, DSS and law enforcement did a courtesy check,

where father was not present for approximately 5 minutes. When father arrived, social worker and law enforcement officer entered home with father and found infant sleeping in his room; no one else was present in the home. DSS filed a neglect and dependency petition. The juvenile was adjudicated neglected and dependent based on stipulations and father appealed.

- Under G.S. 7B-101(15), neglect involves the lack of proper care, supervision, or discipline and/or an environment that is injurious to the juvenile’s welfare. There must be some physical, emotional, or mental impairment, or substantial risk of such impairment, to the juvenile as a result.
- Prior involvement with DSS standing alone is insufficient to support an adjudication of neglect. The court must find other factors that suggest the neglect will be repeated. In reviewing the conclusion of law (neglect) de novo, the unchallenged findings do not support the conclusion. The stipulations do not address when and why mother had a past DSS history, other than general references to substance use and unstable housing, and do not address the presence of any factors that would suggest the neglect from mother’s prior DSS case would be repeated. There were no findings addressing the relationship between THC and the infant’s low blood sugar levels. The infant was placed with father, who had no prior DSS history. There is no findings or evidence of harm or substantial risk of harm to the juvenile.
- There were no findings that leaving the child briefly unattended caused harm or a substantial risk of harm. This case is distinguishable from *In re D.C.*, 183 N.C. App. 344 (2007), where the child was left alone in a motel room for 30 minutes and was in distress. Here, the infant was sleeping in his crib when left briefly alone and was in no apparent distress. There is no indication that the child was more at risk than what he would have been if his father were sleeping in another room.
- The argument of DSS that the court should look to criminal statutes, specifically G.S. 14-318, for neglect and adopt a per se rule that a violation of the criminal statute is neglect is rejected. Neglect is defined in the Juvenile Code, which has a purpose of preventing the unnecessary separation of juveniles from their parents. The Juvenile Code “is not intended to punish parents; it is intended to ensure the wellbeing of juveniles.” Sl. Op. ¶125. “We see no reason to link two distinct Chapters of our General Statutes when our legislature intentionally drafted § 7B-101(15) without reference to Chapter 14 when it easily could have chosen to....” Sl. Op. ¶124. There were no findings that father’s home was inappropriate.
- Dependency under G.S. 7B-101(9) requires findings that both parents lack the ability to provide care or supervision and lack an appropriate alternative child care arrangement. Although the findings show mother was incapable of providing proper care, mother had father as an appropriate alternative childcare arrangement. The minimal facts that the child was left alone for 5 minutes does not establish both parents were unable to provide proper care or supervision and lacked appropriate alternative childcare arrangements.

[In re J.N.J.](#), 2022-NCCOA-785, 881 S.E.2d 890

Held: Affirmed

Dissent, Murphy, J.

- Facts: At the time of the juvenile’s birth, mother had two children who were in DSS custody, having been adjudicated neglected and dependent. The primary permanent plan for those juveniles was adoption based on mother’s lack of compliance with her case plan. The juvenile in

this action was born prematurely and was admitted to the NICU. He is a medically fragile child, requiring a breathing tube and ventilator, 24-hour-a-day supervision (so 2 full-time caretakers), and an environment free of smoke and smoke residue (home, car, personal contact). The homes of both mother and father smelled of smoke, and both parents admitted to being smokers. Father did not complete any medical training, and mother completed only some medical training. Neither parent provided names of two appropriate caregivers to care for the juvenile. When the juvenile was 6 months old and still in the NICU, DSS filed a petition alleging neglect based on lack of proper care and supervision and an injurious environment as well as dependency. After a 2-day hearing, the juvenile was adjudicated neglected and dependent and after the initial dispositional hearing, was placed in DSS custody. Mother appeals the adjudication and disposition.

- Although the findings in the court order mirror the allegations from the petition, the findings are supported by clear and convincing evidence. It is not per se reversible error for the findings to mirror the wording of a petition or pleading. The record of the hearing must demonstrate the trial court found the ultimate facts necessary to adjudicate the juvenile based on its process of logical reasoning and the evidentiary facts before it. At the hearing, there was social worker testimony, and one of the social worker corroborated many of the allegations in the petition. Additionally, the trial court's oral rendition demonstrated the court used a process of logical reasoning based on the evidence before it to find the necessary ultimate facts to support the adjudication.
- Neglect involves a parent not providing proper care, supervision, or discipline and/or creating an environment that is injurious to the child's welfare. There must be physical, mental, or emotional impairment or substantial risk of such impairment. For newborns or a medically fragile infant, the court must assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case and is predictive in nature.
 - A prior adjudication of a sibling, standing alone, is insufficient. There must be additional factors that suggest the neglect will recur. Failing to correct the conditions resulting in the prior adjudication, including addressing domestic violence, may support a likelihood of future neglect. The court properly found the parents were unable to provide proper care and supervision. Mother appeared controlled by father. The smoking by both parents and smoke in their homes created an injurious environment that would result in a substantial risk of physical impairment to this medically fragile infant.
- Dependency requires a juvenile to be in need of assistance because the parents are unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement. The court found that each parent was unable to provide proper care and supervision. Although father proposed alternative child care arrangements, his relatives were not willing to provide care to the juvenile. Mother failed to specifically identify any alternative caregivers and suggestions of a friend or sister were rejected as proper placements for her other children who were in DSS custody. Neither her friend or sister could provide 2 full-time live-in caretakers the juvenile required for his medical needs. The adjudication of dependency was proper.
- Dissent: The court's order contained a significant portion of its findings from the allegations in the petition that were not based on evidence before the court and do not appear to reflect the

trial court's process of logical reasoning. Looking to an oral rendition is unprecedented and is a departure from the ordinary appellate review process.

Dependency: Evidence

[In re L.N.H.](#), 382 N.C. 536 (2022)

Held: Reversed and Remanded Court of Appeals Decision

- **Facts and Procedural History:** DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid on the infant, and burning her infant's feet with a lighter. The infant was left alone on the porch, and the neighbors took her to the hospital. Mother was charged with felony child abuse. DSS filed a petition alleging abuse, neglect, and dependency. The court held an adjudication, disposition, and permanency planning hearing on the same day. At the adjudication hearing, over objection, the social worker testified to the initial report, which was offered not for the truth but for why DSS became involved. The court also took judicial notice of medical records that had been admitted at a nonsecure custody hearing without objection. The juvenile was adjudicated abused, neglected, and dependent. The child was placed in DSS custody but that custody would be transferred to a willing relative once a relative complied with certain requirements. The court ordered the cessation of reunification efforts. Mother appealed. The Court of Appeals determined mother received ineffective assistance of counsel based on a lack of objection to hearsay and reversed the dependency adjudication because the trial court did not look at the circumstances that existed at the time of the adjudicatory hearing. DSS and mother both filed a petition for discretionary review, which were granted. This summary focuses on evidentiary issues.
- **Failing to object at trial to the court taking judicial notice of underlying juvenile files waives appellate review.** There was no objection made when the court took judicial notice of the medical records that had been previously admitted without objection in the hearing on continued nonsecure custody. Mother waived this review.
- **Ineffective assistance of counsel** places the burden on the party alleging it that the counsel's performance was deficient, the deficiency was so serious that the party was deprived of a fair hearing, and there is a reasonable probability that, but for the counsel's errors, there would have been a different result. This is a heavy burden as there is a strong presumption that the counsel's performance was within the range of reasonable professional assistance, and an attorney is given wide birth in strategy decisions. Mother's attorney objected to the social worker's testimony, which was overruled. Counsel gave an explanation for why he did not object to the admission of the medical records – that were already in evidence. Neither NC appellate court has directly addressed whether a trial court at adjudication can take judicial notice of evidence that was admitted at a nonsecure custody hearing. As a result, "we are unable to conduct that respondent-mother's counsel's conduct was 'unreasonable' given 'prevailing professional norms.' " Sl. Op. ¶ 22 (citation omitted). There was no ineffective assistance of counsel.
- **G.S. 7B-802 states "the adjudicatory hearing shall be a judicial process designed to adjudicate the existence of nonexistence of any of the conditions alleged in a petition."** The court's determination of abuse, neglect, or dependency is "fixed at the time of the filing of the petition.

This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party.” The court of appeals’ reversal of the dependency adjudication because father and relatives were placement alternatives does not apply the plain language of G.S. 7B-802. When the petition was filed, father’s paternity was not established and his location was unknown, and relatives were not available placements because there were no completed home studies. The trial court’s findings that when the petition was filed, mother did not provide alternative placements with family members who presented themselves to DSS and did not have information about father and how to contact him were correct. The adjudication of dependency was not error.

Initial Disposition

Constitutional Rights of Parent: Waive

[In re J.N.J.](#), 2022-NCCOA-785, 881 S.E.2d 890

Held: Affirmed

Dissent, Murphy, J.

- **Facts:** The juvenile in this action was born prematurely and was admitted to the NICU. He is a medically fragile child, requiring a breathing tube and ventilator, 24-hour-a-day supervision (so 2 full-time caretakers), and an environment free of smoke and smoke residue (home, car, personal contact). The homes of both mother and father smelled of smoke, and both parents admitted to being smokers. Father did not complete any medical training, and mother completed only some medical training. Neither parent provided names of two appropriate caregivers to care for the juvenile. When the juvenile was 6 months old and still in the NICU, DSS filed a petition alleging neglect based on lack of proper care and supervision and an injurious environment as well as dependency. After a 2-day hearing, the juvenile was adjudicated neglected and dependent and after the initial dispositional hearing, was placed in DSS custody. Mother appeals the adjudication and disposition.
- **Mother argues the court erred by applying the best interests of the child test without first addressing whether mother was unfit or acted inconsistently with her parental rights and this issues is automatically preserved as a constitutional argument under App. Rule 10(a)(1). This argument was rejected by *In re J.N.*, 381 N.C. 131.** Mother failed to raise this argument at the adjudicatory or dispositional hearing despite having an opportunity to do so. Her argument that she could provide a safe permanent home and wanted in-person visitation with her child was insufficient. She did not argue that leaving her child in DSS custody violated her constitutional rights. Mother waived this argument for appellate review.

Cease Reunification Efforts

[In re L.N.H.](#), 382 N.C. 536 (2022)

Held: Reversed and Remanded Court of Appeals decision

- **Facts and Procedural History:** DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid on the infant, and burning her infant’s feet with a lighter. The infant was left alone on the porch, and the neighbors took her to the hospital. Mother was charged with felony child abuse. DSS

filed a petition alleging abuse, neglect, and dependency. The court held an adjudication, disposition, and permanency planning hearing on the same day. The court ordered the cessation of reunification efforts. The trial court found reunification efforts with mother would be clearly unsuccessful or inconsistent with the juvenile's health and safety and aggravating circumstances exist as mother's conduct cause serious injuries to the juvenile. Mother appealed. The Court of Appeals determined mother received ineffective assistance of counsel based on a lack of objection to hearsay and reversed the dependency adjudication because the trial court did not look at the circumstances that existed at the time of the adjudicatory hearing. DSS and mother both filed a petition for discretionary review, which were granted. This summary addresses the cessation of reunification efforts.

- When a court ceases reunification efforts at initial disposition, it must make written findings under G.S. 7B-901(c). The reference to "aggravating circumstances" invokes G.S. 7B-901(c) even when the statutory citation was not specifically cited. Referring to "aggravating circumstances" without an explanation of those circumstances is insufficient for a G.S. 7B-901(c) finding.
 - DSS's argument that the findings showing severe burns requiring hospitalization for 2 days and medical treatment for several weeks satisfied G.S. 7B-901(c)(1)f that the parent engaged in "any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse of neglect" is rejected. G.S. 7B-901(c)(1)f requires "other" conduct that is more than the facts that resulted in the adjudication of abuse or neglect. Because that evidence supported the adjudication, it does not support a determination of this statutory aggravating factor.
 - There is sufficient evidence to supporting a finding under G.S. 7B-901(c)(3)(iii) when a parent has committed a felony assault resulting in serious bodily injury to the child. The court could have made this finding based on the evidence in the record. This portion of the order ceasing reunification is vacated and remanded for the trial court to enter an appropriate finding about whether reasonable efforts should be ceased under G.S. 7B-901(c).

Permanency Planning Hearing

Withdrawal of Counsel; Eliminate Reunification

[In re L.Z.S.](#), 2022-NCSC-129, 881 S.E.2d 82

Held: Reversed and Remanded

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

- **Facts:** The juvenile was adjudicated neglected. During the course of the case, father had been incarcerated and then was released. The court held multiple permanency planning hearings, where father was represented by a court-appointed attorney but did not appear. Upon release from prison, father's contact with DSS and his attorney was sporadic despite efforts by DSS to contact father. At the last permanency planning hearing where father was not present, his attorney filed a written motion to withdraw based on his lack of contact with father and father's failure to appear at hearing. The motion was granted, and the permanency planning hearing proceeded. The court ordered reunification with father was eliminated as a permanent plan. DSS later filed a TPR petition, where father was reappointed his attorney and appeared at the

TPR hearing. The TPR was granted. Father appeals the order allowing his attorney to withdraw at the permanency planning hearing, the order eliminating reunification, and the TPR order.

- A parent who is indigent has a statutory right to counsel in cases of abuse, neglect, dependency and TPRs (unless a parent waives that right). G.S. 7B-602; -1101.1. A parent may forfeit his right to counsel only when there conduct has been egregious, dilatory, or abusive.
- An attorney may withdraw from representation when there is (1) justifiable cause, (2) reasonable notice to the client, and (3) the court's permission. *In re K.M.W.*, 376 N.C. 195 (2002) referring to Rule 16 of the General Rules of Practice. “ '[T]his general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court,' so that '[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion [to allow withdrawal].' ” Sl. Op. ¶ 11 (*In re K.M.W.* 376 N.C. at 209). Before an attorney can be allowed to withdraw on the day of trial, prior notice that is specific and reasonable must be given to the client.
- The cases are fact specific but all of them show the court only has discretion to permit the withdrawal when the parent has had adequate notice of the attorneys' intent to seek permission from the court to withdraw. Relying on *In re K.M.W.*, Father's conduct of not maintaining consistent communication with his attorney and DSS does not rise to a forfeiture of counsel. Like *In re K.M.W.*, father was not noticed by his attorney that the attorney would seek to withdraw on the day of the permanency planning hearing, and the court did not make any further inquiry about the circumstances for the motion to withdraw. The withdrawal of the attorney without notice requires reversal. Distinguishing these facts from *In re T.A.M.*, 378 N.C. 64 (2021), withdrawal in that case was not error because the court on multiple occasions advised father of his responsibility to attend all court hearings and his failure to appear may result in his attorney asking for permission to withdraw and the court proceeding without father being represented. Additionally, on the day of the hearing where the attorney did withdraw, the attorney spoke with father and told him if he did not appear at the TPR hearing, she would need to withdraw and the hearing would proceed without him.
- On remand, if the court concludes reunification should be eliminated, the TPR will stand. If the court determines reunification was improperly eliminated, the TPR will be vacated without prejudice.
- Dissent: The order allowing the attorney's withdrawal and the order eliminating reunification should be affirmed. The father's failure to communicate, avoid receiving mail, and not attend numerous hearings should not be permitted to manipulate the courts to delay the hearing and is contrary to the overarching purpose of the Juvenile Code to find permanency for the juvenile at the earliest possible stage. The required findings of fact required by G.S. 7B-906.2(b) and (d) were supported by competent evidence and support the order eliminating reunification.

Eliminate Reunification

[In re T.D.N.](#), 2022-NCCOA-787, 882 S.E.2d 116

Held: Vacate and Remand

Dissent in part, concur in part; Carpenter, J.

- Facts: In 2020, the juvenile was adjudicated neglected. Part of the basis for the adjudication was mother's mental instability. In 2021, the court eliminated reunification as a permanent plan for

each parent because of their lack of progress on their case plans. The court made findings that reasonable efforts would be unsuccessful, futile, and inconsistent with the juvenile's health and safety. The court also found that legal custody of the child cannot be returned to the parents but may be possible within the next 6 months if the parents completed their case plan.

Concurrent permanent plans of custody and guardianship were ordered. Mother appealed.

- Standard of review is whether competent evidence supports the findings and whether the findings support the conclusions of law.
- The court made the required finding under G.S. 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety. However, the finding that reunification may be possible within 6 months is materially contradictory. Although an order may include both favorable and unfavorable findings where the court weighs all the findings and makes a conclusion of law based on the findings that are given the most weight, an order cannot be upheld when the findings are "antagonistic, inconsistent, or contradictory such that the reviewing court cannot 'safely and accurately decide the question.'" Sl.Op. ¶121 (citation omitted). The court also ordered mother to have a parental capacity evaluation, which is unnecessary if reunification is not a permanent plan. It is unclear if these inconsistencies were a minor mistake or inadvertence. Further, the court did not find the parental capacity evaluation was in the child's best interests.
- Dissent in part; concur in part: The two findings do not materially contradict one another and does not support vacating the order. One finding is unsupported by the evidence. The court erred in ordering mother to have a parental capacity evaluation without determining it was in the child's best interests.

[In re M.T.](#), 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- Facts: In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinol hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child

welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the grounds and the trial court's denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.

- **Eliminating Reunification:** The standard of review is whether the findings are based on credible evidence and support the conclusions and whether the court abused its discretion with the dispositional order. The court's sole consideration at disposition is the child's best interests.
 - Mother does not challenge any specific findings, so she has failed to preserve challenges to any findings. The court made the required findings to eliminate reunification under G.S. 7B-906.2(b) and (d). The court found that mother did participate in services required by her case plan, but the services did not address the reasons for the children coming into care, including the lack of an explanation for how the child was injured. The court's decision to eliminate reunification was reasoned. Although mother argues she completed her case plan, the court's findings explain why it did not give significant weight to the parental capacity evaluation; the evaluator did not address the court's concerns about an explanation for the child's injuries and failed to review the child's medical records to learn what happened to the child. Although mother attended parenting classes, those classes focused on how to childproof a home and what to do when a child is sick or injured and did not address the reasons for the children's removal. The court's reasonable view of the evidence is binding, even when the evidence may support a contrary view. Further, "compliance with a case plan alone is not always sufficient to preserve parental rights" because parents must show changed behaviors and acknowledge and understand why the juvenile came into DSS custody. Sl. Op. ¶166.
 - The court did not abuse its discretion in emphasizing the lack of an explanation for the child's injuries when determining to eliminate reunification as a permanent plan. This case is similar to *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010), in that the court found the juvenile's injuries were nonaccidental and indicated child abuse. Further, the adjudication order found the children were in the sole care of the parents during the time of the infant's nonaccidental injuries. "[T]he trial court could not 'conclusively determine' who caused all of [the juvenile's] conditions but could still permissibly determine both parents were responsible for [his] condition either directly or indirectly." *Id.*

Eliminate Reunification; Achieve Permanent Plan; Verification by Custodian
[In re K.P.](#), 2022-NCSC-128, 881 S.E.2d 250

Held: reversed in part, remanded (Court of Appeals Opinion)

- **Procedural History:** District court entered a permanency planning order that achieved a permanent plan of custody, eliminated reunification as a permanent plan, and waived further hearings. Mother appealed, and the court of appeals vacated and remanded the order for insufficient findings to eliminate reunification, verify the guardians understanding of their appointment, and waive further hearings. There was a dissent, and an appeal was made by DSS to the NC Supreme Court.
- **Facts:** The juvenile was adjudicated neglected based on an injurious environment due to domestic violence and substance use. The child was ordered in DSS custody and placed with the Phillips (step-grandparents). The Phillips are the parents of mother's spouse, who the court determined was not the child's father and determined another man was the child's father. Mother was not making adequate progress on her case plan. At a permanency planning hearing, the Phillips expressed a desire to be the child's legal custodians and Mr. Phillips testified to such as well as his income. The court found the juvenile was doing well in the Phillips' home, the Phillips had the financial ability to care for the juvenile, and determined the child's best interests would be to award permanent custody to them. Permanent custody to the court approved caretakers, was one of the concurrent plans identified at the previous permanency planning hearing, was ordered and achieved. Reunification was effectively eliminated as a permanent plan. Mother appealed.
- G.S. 7B-906.2(b) unambiguously states "[r]eunification shall be a primary or secondary plan unless the court made written findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." Sl. Op. ¶ 18. 'Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. "or"), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.' *Id.* (citations omitted). "[T]he use of the disjunctive term "or" in N.C.G.S. § 7B-906.2(b) demonstrates that the satisfaction of any one of the three delineated circumstances which are identified in the statute, even to the exclusion of the remaining two circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan." Sl. Op. ¶ 21.
- Agreeing with the dissent, the achievement of a permanent plan occurred, regardless of whether it was labeled as the primary permanent plan or a concurrent permanent plan. Also agreeing with the dissent, the findings are sufficient to support the conclusion to eliminate reunification and satisfy the statutory requirement of G.S. 7B-906.1(d)(1) and 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health or safety.
- Agreeing with the dissent, the testimony of Mr. Phillips and the DSS social worker demonstrated the Phillips understood the legal significance of their appointment as custodians. Further G.S. 7B-906.1(j) establishes that the juvenile's stable placement for 6 consecutive months is evidence

of adequate resources. Here, the juvenile resided with the Phillips for 7 consecutive months, and Mr. Phillips gave uncontroverted testimony about their ability to support the juvenile. The court made the sufficient required verifications.

- The decision of the court of appeals regarding waiving further hearings is not before the supreme court and remains undisturbed. That holding was the court did not make all 5 findings required by G.S. 7B-906.1(n).

Termination of Parental Rights

Appellate Remand

Fundamentally Fair Procedures

[In re Z.J.W.](#), ___ N.C. App. ___ (Feb. 7, 2023)

Held: Vacated and remanded

- Facts: In 2019, father’s parental rights were terminated and father appealed. On appeal, the supreme court reversed in part, vacated in part, and remanded in part the TPR for an order that contained proper findings and conclusions of laws regarding the ground of neglect and likelihood of repetition of neglect and the whether the TPR was in the child’s best interests. In 2021, on remand, the trial judge held an in-chambers meeting with the DSS attorney and the child’s GAL. Neither father nor his attorney were provided notice of the meeting or participated in the meeting. There was no record of the meeting. A new TPR order was entered, and father appealed.
- Parents must be provided with fundamentally fair procedures, consistent with the Due Process Clause, when the State moves to destroy weakened familial bonds. Judicial Canon 3(A)(4) requires a judge “accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law, and except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding.” Sl.Op. at 5.
- The trial court acted under a misapprehension of law that father was no longer a party and not entitled to due process. Father was entitled to proper service of notice, notice, and an opportunity to be heard, just like he was afforded at the initial TPR proceeding. A remand is required as father was not given an opportunity to participate or be heard before the new TPR order was entered.

Notice Pleading

[In re A.H.D.](#), ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father’s nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.

- G.S. 7B-1104(6) requires a petition state “the [f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists.” Sl. Op. at 8. Allegations need not be exhaustive but they must put a party on notice of the acts or omissions that are at issue. Father was put on notice of the ground for willful failure to pay child support for one year immediately preceding the petition. Only 1 of the 11 grounds address the willful failure to pay child support pursuant to a court order. Failing to include the citation for the statutory ground is not inadequate when the language of the allegation puts the party on notice. Failing to allege there is a judicial decree or child support order does not render the petition insufficient, although including a child support order exists is the better practice. The allegations stated father “refused” to pay child support, and refused shows an active decision to not pay, which is a willful decision to not pay.

Adjudication

Standard of Proof: Clear and Convincing Evidence

[In re A.H.D.](#), ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father’s nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1109(f) requires the adjudicatory findings be based on clear, cogent, and convincing evidence. This standard protects the parent’s constitutional due process rights in a termination of parental rights action. The court must announce the standard or include the standard in the written order. The trial court did not do either requiring reversal. Remand is appropriate only if evidence is sufficient to support the statutory ground.

Failure to Pay Child Support

[In re A.H.D.](#), ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father’s nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1111(a)(4) requires the court make two findings of fact: (1) an order or agreement requires the payment of child support and (2) the parent willfully failed to pay the child support as ordered or agreed to.

- Although a child support order was not entered in evidence, mother presented sufficient evidence of the existence of a child support order when she testified to its existence. Father also testified that there was a child support order that he was unable to pay.
- Willfulness involves doing something deliberately and purposefully. Because a child support order exists, mother was not required to prove father had an ability to pay. Father's testimony was that he was unable to pay the full amount although he had some income during the relevant time period indicating he has the ability to pay something. Mother testified father paid nothing. Mother presented sufficient evidence that the trial court could have found father willfully failed to pay. This warrants a remand.

Likelihood of Future Neglect

[In re M.T.](#), 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- Facts: In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinol hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the grounds and the trial court's denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.

- **TPR: Likelihood of Future Neglect** as well as past neglect must be shown when there has been a long period of separation between the parent and juvenile. The court looks at the circumstances at the time of the TPR hearing.
 - “Here, as in most cases involving life-threatening non-accidental injuries to a baby, there is no direct evidence of exactly what happened. A baby cannot tell anyone what happened, and no one, other than someone who hurt the baby, saw what happened. Trial courts must often make these difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence.” Sl. Op. ¶ 1. The lack of mother’s explanation for the juvenile’s injuries is not an improper shifting of the burden of proof from the petitioner (DSS); instead, “it speaks to the likelihood of future neglect or abuse.... [and] also touches Mother’s reasonable progress, or lack thereof....” Sl. Op. ¶ 82. This lack of explanation helped the court evaluate whether DSS met its burden to prove the alleged grounds. The court’s determination that mother’s testimony and father’s email was not reasonable or medically defensible to explain the infant’s injuries is a credibility determination that the trial court makes and is not disturbed on appeal. The court’s findings about the lack of explanation support its determination of a likelihood of future neglect. Regarding the sibling, “the trial court could rely on the prior abuse and neglect of [the one juvenile] plus Mother’s lack of explanation for [his] injuries and condition when he arrived at the hospital to determine [the sibling] was also a neglected juvenile because of the likelihood of future abuse or neglect.” Sl. Op. ¶ 112. There were additional findings about concerns related to the sibling (refusing immunizations and medical treatment). The findings support the conclusion of neglect.
 - The services mother completed did not address the reason for the children’s removal as the parental capacity evaluation did not look at the cause or extent of the child’s injuries and the parenting classes did not address the conditions in the home at the time of removal. Mother was on notice of that the parental capacity evaluation and parenting classes were insufficient at a prior permanency planning hearing where reunification was eliminated as a permanent plan.
 - Although the NC Coalition Against Domestic Violence argued in its amicus brief that the trial court’s focus on a lack of explanation requirement retraumatizes domestic violence survivor parents and children involved in the child welfare system, the appellate court focused on case law that “demonstrates why the lack of explanation can be so important.” Sl. Op. ¶102. The trial court drew the same inference as other cases (*In re D.W.P.*, 373 N.C. 327 (2020)) that when a parent cannot explain how the children were harmed, there is a risk of future harm being caused in the same way. The court did not infer mother participated in or condoned the abuse but instead focused on mother’s belief that father harmed the child was medically impossible to explain all the injuries. Further, the definition of neglect includes living in an injurious environment, which can include failing to protect the juvenile from harm. A TPR focuses on the safety and wellbeing of a child and is not meant to be punitive against the respondent parent. Finally, unchallenged findings of fact show that domestic violence between the parents did not occur before the abuse, neglect, and dependency petition was filed. This case differs from those where domestic violence existed before the A/N/D petition is filed and is part of the basis for the children’s removal.

- **Amicus to Grounds:**
 - The ACLU of North Carolina raised constitutional issues regarding due process on the ground of failing to make reasonable progress to correct the conditions leading to the child's removal, G.S. 7B-1111(a)(2). Constitutional issues not raised before the trial court are waived.
 - The NC Justice Center and Community Bail Fund of Durham argued "wealth-based pre-trial incarceration" related to mother's incarceration and impact it has on her ability to comply with her case plan, specifically visiting the children and demonstrating skills learned in parenting, contradicts mother's argument that she satisfied her case plan. Sl. Op. ¶ 121. Further, mother did not argue her incarceration impacted her ability to work her case plan. The court did order DSS to determine what, if any, service were available in the jail and mother was later released and visited with her son.

Disposition

Expert Testimony

[In re M.T.](#), 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- **Facts:** In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinal hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the

grounds and the trial court’s denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.

- **Disposition: Expert Testimony** by mother’s witness was excluded after the court determine at voir dire that it was irrelevant. The expert was going to address mother’s bond with the children and the importance of maintaining family relationships, especially for Black families. The standard of review of the court’s dispositional order is reviewed for an abuse of discretion, and the admissibility of evidence at disposition is also reviewed for an abuse of discretion.
 - The court made a reasoned decision after finding the expert did not believe she had all the documents to review and that the expert had insufficient information about mother and the facts of the case. The expert was also unfamiliar with NC DHHS practices and did not have research from NC. “The trial court’s responsibility was to find the facts based upon the evidence presented as to these specific child and parents and to determine the best interests of these specific children based upon those facts and the law.” Sl. Op. ¶133.
 - Amicus NC NAACP and ACLU of NC argue the expert would have provided relevant evidence of race disproportionately in child welfare via data. These point are worthy of note and are addressed by G.S. 7B-1110(a) – the bond with the parent and any other relevant consideration. The General Assembly also identifies the purposes and policies of the child welfare system in NC through G.S. 7B-100, which involves balancing family autonomy and protecting children and providing a safe permanent home to children. These laws favor family placement over any other placement when a family placement is available and safe. Parents have constitutional rights to care, custody, and control of their children when they are not unfit or have not acted inconsistently with those rights. “Statistics or studies regarding outcomes for children in non-kinship homes or disproportionate impacts on ‘marginalized racial groups’ may be of great assistance to the policy-making branches of government when establishing the laws and procedures in child welfare cases generally, but may have no direct relevance to a particular child or family.” Sl. Op. ¶ 135

Adoption

Father’s Consent

Providing Tangible Support

[In re B.M.T.](#), 2022-NCCOA-838, 882 S.E.2d 145

Held: Affirmed

- **Facts:** Petitioners for adoption appeal district court order concluding father’s consent was required for the child’s adoption based on his acknowledging paternity, communicating and visiting with mother while pregnant and child after birth, and providing tangible support to mother during pregnancy and after the child’s birth. Mother and father continued in a relationship when mother was pregnant. Father provided mother with food and baby formula, clothing for herself and baby, cash (which was sometimes accepted and sometimes refused), transportation, housing, and personal items (e.g., car seat, diapers) during her pregnancy and after the child’s birth. Without father’s knowledge, mother executed a consent for adoption and placed child with petitioners and stated father’s identity was unknown. Afterwards, mother and

father signed a voluntary acknowledgement of paternity resulting in the child's amended birth certificate. Petitioners later filed a petition for adoption. Father was served with notice of the adoption petition and objected to the adoption. A hearing on whether father's consent was required was held by the district court, which found father's consent was required.

- Standard of review is whether there is competent evidence to support the findings and whether the findings support the conclusion. The trial court determines witness credibility and the weight of the evidence.
- G.S. 48-3-601 requires a man, before the adoption petition is filed, to acknowledge his paternity, provide reasonable and consistent payment for support including tangible means of support that is within his financial means, and visited or communicated with (or attempted to) mother during or after her pregnancy and the child after their birth. Petitioners concede father acknowledge paternity and communicated with mother.
- Respondent has the burden of showing (1) he provided payments for the support of mother, minor child, or both, (2) the payments were reasonable based on his financial means, and (3) the payments were consistently made. Attempts or offers of support are insufficient. NC Supreme Court holdings note the importance of a "payment record." The findings that father provided tangible support before the filing of the adoption petition are supported by competent evidence. Father had receipts, bank and credit card statements, and a pregnancy expense report he created. Father also set up his own home with a bed, toys, and clothing so that he could care for his child.

Civil Cases Related to Child Welfare

Child Custody and Admission of DSS Child Protective Records

Kozec, Jr. v. Murphy, 2022-NCCOA-902, 882 S.E.2d 425

Held: Vacated and Remanded

- Facts: Mother filed a motion to modify a permanent custody order seeking father's prohibition from having contact with the children. DSS child protective records were obtained and placed under a protective order allowing the parties' attorneys to review them after the court determined under G.S. 7B-302(a1) that the records were relevant and necessary to the trial and were unavailable from another source. At the hearing, father sought the admission of those records, which mother objected to. The court sustained her objection after determining live witness testimony was required to authenticate the DSS records. The court modified the custody order and father appealed, challenging the exclusion of the DSS records based on the court's misapprehension of law.
- Standard of review is whether the court abused its discretion when excluding the DSS records.
- The court misapprehended the law when determining DSS records must be authenticated by a live witness testimony, rather than determine whether the records qualify as public records under Rule 902(4) of the Rules of Evidence, which allows for certified copies of public records. Despite mother's argument that there was no authenticating affidavit to the CPS records, the authenticating affidavit is part of the record on appeal. The trial court did not consider the affidavit based on its misapprehension of the law that live witness testimony to authenticate the records was required. This misapprehension of law is an abuse of discretion requiring the order

be vacated and remanded. On remand, the parties shall have an opportunity to present arguments on whether the DSS records fall under the hearsay exception from Rule 803(8) or whether they are public record that can be authenticated by affidavit under Rule 902(4).