UNC SCHOOL OF GOVERNMENT

2018 Parent Attorney Conference

August 16, 2018 / Chapel Hill, NC

Sponsored by the

The University of North Carolina School of Government and

Office of Indigent Defense Services

ELECTRONIC COURSE MATERIALS

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AGENDA

8:00 to 8:30	Check-in
8:30 to 8:45	**Welcome** *Austine Long, Program Attorney* UNC School of Government, Chapel Hill, NC
8:45 to 10:15	**Case Law and Legislative Update [90 min]** *Sara DePasquale, Assistant Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
10:15 to 10:30	Break
10:30 to 11:30	**DSS Policy Updates/Changes [60 min]** *Wendy Sotolongo, Parent Representation Coordinator* Office of Indigent Defense Services, Durham, NC
11:30 to 12:30	**Navigating the DSS Policy Manual [60 min]** *Workshop Groups*
12:30 to 1:15	Lunch *(provided in building)* *
1:15 to 2:45	**Using Data and DSS Policy to Advocate for Parents [90 min]** *Sydney Batch, Attorney* Batch, Poore & Williams, PC, Raleigh, NC *Shannon Poore, Attorney* Batch, Poore & Williams, PC, Raleigh, NC *Christopher Rumfelt, Attorney* Law Office of Christopher Houston Rumfelt, PLLC, Marion, NC
2:45 to 3:00	Break *(light snack provided)*
3:00 to 4:00	**Mental Health Awareness for Defenders (Mental Health) [60 min]** *Emily Mistr, Assistant Public Defender* Wake County Public Defender's Office, Raleigh, NC

CLE HOURS: 6.00
(Includes 1 hour of SA/MH)

* IDS employees may not claim reimbursement for lunch

2018 N.C. Legislative Changes Impacting Child Welfare

Author : Sara DePasquale

Categories : Child Welfare Law

Tagged as : abuse neglect and dependency, adoption, Children's Council, human trafficking, ICWA, Juvenile Code, new legislationspecial education

Date : July 9, 2018

The 2018 Legislative Session created and amended various North Carolina statutes affecting child welfare. Some of those changes are effective now and others at later dates. Here are the highlights.

Changes to the Juvenile Code

An Act to…Clarify Findings of Fact Requirements Made in Dispositional Orders Where Reasonable Efforts for Reunification Are Not Required, S.L. 2018-86.

Section 2 amends G.S. 7B-901(c) by adding the present tense verb "determines." This amendment allows the court, at the initial dispositional hearing, to take evidence and determine the existence of any of the enumerated factors listed in G.S. 7B-901(c) that supports an order relieving DSS of providing reasonable efforts for reunification. The amendment applies to initial dispositional orders that are effective on or after June 25, 2018. This new language supersedes the holding of *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d 274 (2016), affirmed per curiam, 370 N.C. 387 (2017), which required that the determination must have been made in an earlier court order and could not be made at the initial dispositional hearing because the statute used the present perfect verb tense "has determined." Now, G.S. 7B-901(c) uses "determines or has determined."

An Act to Amend Various Provisions under the Laws Governing Adoptions and Juveniles, S.L. 2018-68.

Section 8.1 amends the definitions of "abused juvenile" at G.S. 7B-101(1)* and "neglected juvenile" at G.S. 7B-101(15). Both definitions add minor victims of human trafficking, without any reference to the role of a parent, guardian, custodian, or caretaker. "Minor victims" of human trafficking are specifically addressed in a new criminal statute, G.S. 14-43.15, which refers to abuse, neglect, and the provision of Subchapter I of the Juvenile Code. These amendments are effective October 1, 2018 and comply with the federal Justice for Victims of Trafficking Act of 2015.

Section 5.1 creates G.S. 7B-1105(g), effective October 1, 2018. A summons is not required for an unknown parent in a termination of parental rights action who is served by publication pursuant to the procedures of G.S. 7B-1105.

An Act to Provide Restorative Justice to Victims of Human Trafficking, S.L. 2018-75.

*Section 5 amends the definition of "abused juvenile" at G.S. 7B-101(1) effective December 1, 2018. It repeals G.S. 7B-101(1)g. and replaces it with language that clarifies that any juvenile who is or is alleged to be a victim of human trafficking, sexual servitude, or involuntary servitude is an abused juvenile regardless of the relationship of the victim and the perpetrator. Note that this amendment differs from the amendment to the definition of "abused juvenile" made by S.L. 2018-68. Although the language is different, both amendments make it clear that a minor victim of human trafficking is an abused juvenile even when the juvenile's circumstances are not created or allowed by a parent, guardian, custodian, or caretaker.

Note that Section 3 creates G.S. 14-43.16, effective December 1, 2018. The name, address, and other information that

could reasonably be expected to lead to the identity of the victim or alleged victim of human trafficking and his/her immediate family member (as defined in that statute) is confidential**.** There are four enumerated exceptions, one of which includes disclosure to ensure the provision of family services or benefits to the victim, alleged victim, or his/her immediate family member. A knowing violation is a Class 3 misdemeanor.

An Act to Update the General Statutes of N.C. with People First Language…, S.L. 2018-47.

This session law amends various North Carolina statutes by making technical corrections to refer to the individual first before their condition (e.g., person with mental illness rather than mentally ill person), replace the term "mental retardation" with "intellectual disability," and improve readability and consistency with formatting. Section 2 amends G.S. 7B-1111(a), which enumerates the grounds to terminate parental rights and is effective for proceedings commenced on or after October 1, 2018.

Changes to the Adoptions Statutes

AOC Omnibus Changes, S.L. 2018-40.

Section 12 amends G.S. 48-9-102 regarding records**,** effective June 22, 2018. The Special Proceedings Index is excluded from adoption records that must be sealed. The time period for the clerk of superior court to send designated records to the NC DHHS Division of Social Services is extended to within 10 days after the appeal period has expired (instead of within 10 days of the entry of the final adoption decree). Orders of dismissal are explicitly included in records that must be sent to the Division of Social Services.

An Act to Amend Various Provisions under the Laws Governing Adoptions and Juveniles, S.L. 2018-68

This session law makes various changes to the adoption statutes and is effective October 1, 2018.

Consents and Relinquishments. Section 1.1 amends G.S. 48-3-603 regarding consents executed by a minor parent or minor adoptee. A new subsection (h) specifically addresses how the minor may be identified to an individual authorized to administer oaths or take acknowledgements. Section 2 amends G.S. 48-3-606(3) and 48-3-703(a)(3) to address how a newborn who is the subject of the consent or relinquishment may be referred to in that consent or relinquishment.

Order to Confirm Custody Transfer to Obtain Documentation and Benefits. Section 3 adds G.S. 48-3-607(d) regarding prospective adoptive parents with whom the child was placed in an independent adoption and who have filed an adoption petition and G.S. 48-3-705(e) regarding an agency to whom the child was relinquished. After the expiration of the revocation period for a consent or relinquishment, the prospective adoptive parents or the agency may apply to the clerk of superior court for an ex parte order confirming the transfer of the child's custody that resulted from the consent or relinquishment. The purpose of the order is to allow the prospective adoptive parents or agency to obtain a certified copy of the child's birth certificate, the child's social security number, or federal or state benefits for the child.

Service in Pre-birth Determination. Section 4.1 amends G.S. 48-2-206(e) to address service by publication on a biological father and allows the father 40 days from the date of the first publication to respond.

Preplacement Assessment. Section 5.1 adds G.S. 48-3-303(c)(13) addressing updated or amended preplacement assessments and requirements for the delivery of a copy of the assessment to the court or placing parent, guardian, or agency.

Other Changes

Appropriations Act of 2018, S.L. 2018-5.

Part XXIV, Section 24 repeals and replaces the North Carolina Child Well-Being Transformation Council (Children's Council) that was originally created by S.L. 2017-41 (Rylan's Law/Family and Child Protection and Accountability Act). Effective June 30, 2018, the state is required to establish a 25-member Children's Council that must focus on improving coordination, collaboration, and communication among agencies and organizations that provide public services to children. There are six identified tasks that include

- identifying
    - child-serving agencies in the state;
    - problems with collaboration, coordination, and communication in child welfare; and
    - gaps in coordination of publicly funded child-serving programs;
- researching the work of other states' equivalents to the Children's Council;
- monitoring child welfare and social services reform in North Carolina; and
- recommending changes in law, policy, or practice to improve coordination, collaboration, and communication between publicly funded child-serving agencies.

The legislation designates the membership representation and requires appointments be made on or after September 1, 2018. There will be two co-chairs. The Children's Council will be located administratively in the General Assembly, and the Legislative Services Commission is responsible for staffing. Meetings will be held quarterly and are subject to the Open Meetings Law. The UNC School of Government is required to convene the first meeting before October 31, 2018, host and facilitate the first four meetings, and provide administrative support and technical assistance for those meetings.

The Children's Council is required to prepare two reports that summarizes the work for the previous year and any findings and recommendations for change. The first report is due June 30, 2019 and must also include a work plan for the upcoming year. The second (and final) report is due June 30, 2020, which is when the Children's Council terminates.

Part X, Subpart X-A, Section 10.A.1 amends two education statutes that address special education scholarships for attendance at a nonpublic school or public school that charges tuition. Beginning with scholarship applications for the 2019-2020 school year, the amendments add G.S. 115C-112.5(2)f.7. and 8. to the definition of an "eligible student" to include

- a child in foster care or
- a child whose adoption decree was entered not more than one year before the scholarship application is submitted.

The priority given to these children when scholarships are awarded are addressed in amendments to G.S. 115C-112.6(a2)(2).

An Act to Authorize the DMV to Produce an Eastern Band of Cherokee Indians, A Federally Recognized Tribe, Special Registration Plate…, S.L. 2018-7.

Effective June 13, 2018, Section 1 authorizes a special registration plate, for no additional fee, to a member of the Eastern Band of Cherokee Indians (EBCI) who presents the DMV with a tribal identification card. Note that such a license plate may indicate that the child is an "Indian child" for purposes of the Indian Child Welfare Act (ICWA) An inquiry should be made as to (1) whether the child is a member of the EBCI or (2) whether one of the child's biological parents is a member and whether the child is eligible for membership in the EBCI or another federally recognized tribe. For more information about ICWA, see Chapter 13.2 in *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* (the A/N/D Manual), here.

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Abuse, Neglect, Dependency

Subject Matter Jurisdiction: Standing

In re A.P., ___ N.C. ___, 812 S.E.2d 840 (May 11, 2018)

Held: reversed decision of Court of Appeals; remanded to Court of Appeals for mother's remaining arguments (challenging adjudication and factual inquiry regarding the applicability of the Indian Child Welfare Act)

- Facts: This case involves three counties. Mother and child, A.P., (at time of A.P.'s birth) resided in Cabarrus County. Cabarrus County DSS opened a child protective case, and mother agreed to a safety plan. Under the safety plan, A.P. lived with a safety placement resource in Rowan County while mother received residential mental health treatment. Upon discharge from her treatment, mother and A.P moved in with mother's grandfather in Mecklenburg County. The case was transferred from Cabarrus County DSS to Mecklenburg County DSS. Later, a new report was made to Mecklenburg County DSS and mother's sister (A.P.'s aunt) brought A.P. back to the placement in Rowan County. Mother agreed A.P. would temporarily remain in the placement in Rowan County while she went to South Carolina, was back in Mecklenburg County when she was in jail and later inpatient treatment, and finally informed Mecklenburg County DSS that she was living in Cabarrus County. The placement resource in Rowan County notified Mecklenburg County DSS that she could no longer care for A.P. Mecklenburg County DSS requested Cabarrus County DSS accept a transfer of the case back, but Cabarrus County DSS declined the transfer. Mecklenburg County DSS filed a neglect and dependency petition. The district court in Mecklenburg County denied mother's motion to dismiss for lack of subject matter jurisdiction due to Mecklenburg County DSS not having standing to file the petition. A.P. was adjudicated neglected and dependent. Mother appealed.
- Court of Appeals Opinion: Mecklenburg County DSS lacked standing under G.S. 7B-401.1(a) as G.S. 7B-101(10) defines director as the director of the DSS in the county where the juvenile resides or is found.
- "Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly before it…. [without which] a court has no power to act…. " Sl. Op. at 5 quoting *In re T.R.P.*, 360 N.C. 588, 590 (2006). The Juvenile Code (G.S. Chapter 7B) governs subject matter jurisdiction over abuse, neglect, or dependency (A/N/D) actions. Jurisdiction over all stages of an A/N/D action is established by the filing of a properly verified petition. *In re T.R.P.* Here, the neglect and dependency petition was properly verified and filed by an authorized representative of "a county director of social services." G.S. 7B-401.1(a).
- Judicial interpretation must consider the entire statutory text, read holistically, with consideration of the logical relation of its many parts rather than by a rigid interpretation of isolated provisions in the Juvenile Code. The rigid interpretation of the statutory text creates

jurisdictional requirements that exceed legislative intent. Dismissal of the juvenile petition is not mandated by G.S. 7B-401.1 (parties) and 7B-400 (venue) when the Juvenile Code is read holistically.

- There is no requirement in G.S. 7B-401.1(a) that only one county DSS director has standing since (1) the statute uses "*a* county director," which is an indefinite article, and (2) the introductory clause to the definitions statute, G.S. 7B-101, states "unless the context clearly requires otherwise." The context does require otherwise. This opinion compares different statutes in the Juvenile Code that show how "the legislature intentionally differentiates between references to *a* director of a department of social services [generally] and *a particular director* of a department of social services." Sl. Op. at 8. There is no reference in the party statute, G.S. 7B-401.1(a), to "the" DSS director, which would single out a particular director, but instead uses "a" director.
- "Other provisions in the Juvenile Code [G.S. 7B-400(b), 7B-302(a2), 7B-402(d)] suggest that there may be instances when the party filing the juvenile petition is the director of a department of social services for a county that is not the juvenile's county of residence." Sl. Op. at 10.

- A fundamental principle in cases involving child abuse, neglect, or dependency is that the best interests of the child is the polar star. *See* G.S. 7B-100(5); *In re M.A.W.*, 370 N.C. 149 (2017) quoting *In re Montgomery*, 311 N.C. 101, 109 (1984). Respondent's interpretation of G.S. 7B-101(10) and 7B-401.1(a) that ties subject matter jurisdiction with the child's residence or physical location at the time the petition is filed would (1) prevent a district court from exercising subject matter jurisdiction by allowing a parent or caretaker to move between counties with the child and/or (2) " 'subject countless judgments [in juvenile cases] across North Carolina to attack for want of subject matter jurisdiction,' … and needlessly delay permanency for juveniles alleged to be abused, neglected, or dependent." Sl. Op. at 12 quoting *In re T.R.P.* at 595.

Adjudication: Consent v. Stipulations, Findings, Neglect, Invited Error

In re R.L.G., ___ N.C. App. ___ (June 19, 2018)

Held: vacate and remand for further proceedings

- Facts: At the adjudication hearing, DSS read respondent mother's (RM) admission into the record, and mother agreed to the truth of the admission under oath. RM admitted that the juvenile is neglected in that she did not provide proper care and supervision, ensure regular school attendance, the child had 25 absences and 37 tardies in one school year and did not pass 3 core classes, and RM did not take her child to medical well child visits. The court accepted the admission, adjudicated neglect based solely on the admission, and moved on to the disposition hearing. Separate adjudication and initial disposition orders were entered, which RM appealed.
- Procedurally, an adjudication occurs through a hearing or a consent. A consent "is an agreement of the parties, their decree, entered upon the record with the sanction of the court", and requires the 3 elements of G.S. 7B-801(b1) be satisfied, one of which is that the court makes sufficient findings of fact. Sl. Op. at 4 (citation omitted). There is separate statute, G.S. 7B-807, that addresses procedures for factual stipulations, one of which allows for the facts to be read into the record, followed by an oral statement of agreement from each party stipulating to the facts. The procedure used here was a stipulation to certain facts by RM under G.S. 7B-807 and

not a valid consent order under G.S. 7B-801(b1). *See In re L.G.I.*, 227 N.C. App. 512 (2013); *In re K.P.*, 790 S.E.2d 744 (2016) (both holding there was no consent order).

- The findings of fact do not support the conclusion that the juvenile is neglected. RM's admission that the child is "neglected" is a conclusion of law, and "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." Sl. Op. at 9-10 (citation omitted). No findings were made as to the reasons for the child's poor attendance, whether the absences were excused, or whether the failure to pass 3 classes was a result of poor attendance or lack of proper care, supervision, or discipline. The finding that well child checks were missed do not support an adjudication of neglect based on not receiving necessary medical care. The findings do not address the frequency or reasons for the missed visits, the medical conditions requiring the visits, or the adverse effect of missing the visits on the child's health. A finding incorporating by reference the findings of the pre-adjudication order in full does not support an adjudication of neglect. The adjudication order did not indicate it was relying on any finding in the pre-adjudication order when making the neglect determination; the pre-adjudication order is described as addressing jurisdictional issues; and the finding referenced on appeal by DSS is not a finding as it states "DSS made the finding" and "the trial court may not delegate its fact finding duty by relying wholly on DSS reports and prior court orders." Sl. Op. at 15-16.
- The doctrine of invited error, which "applies to 'a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining' " does not apply to RM. Sl. Op. at 12 (citation omitted). RM stipulated to facts about the child's school attendance, grades, and missed medical visits and did not request the trial court adjudicate neglect or remove her child from her care.

Adjudication: Evidence and Findings

In re J.M., ___ N.C. App. ___ (Sept. 19, 2017)

Held: Affirmed in part

- The findings supporting the court's adjudication of abuse were supported by competent evidence.
- The grandmother's testimony about a phone call and text from respondent mother that disclosed respondent father's physical abuse of her (respondent mother) when the children were present and physical discipline of the child were properly admitted as an admission by a party opponent exception to hearsay. G.S. 8C-801. Although the statements made to the grandmother were not the respondent father's, the respondent mother is also a party to the abuse and neglect action. Relying on *In re Hayden*, 96 N.C. App. 77 (1989), a respondent mother's statements about the respondent father's conduct is an admission by respondent mother that the child was subjected to conduct in her presence, which relates to the court's determination of the child's abuse or neglect. The adjudication is about the child's circumstances and conditions not the parent's culpability.
- The physicians' testimony of respondent mother's statements made during the child's well-child visit and emergency room visit were properly admitted as statements made for the purpose of medical diagnosis and treatment exception to hearsay. G.S. 8C-803(4). The statements satisfied both parts of the *Hinnant* requirements: (1) they were made for the purposes of medical diagnosis and treatment and (2) they were reasonably pertinent to diagnosis or treatment. *State*

v. Hinnant, 351 N.C. 277 (2000). The statements made by the respondent mother of the respondent father's actions toward the child were made at the medical settings and were part of the providers' attempt to diagnosis the child's injuries. The mother made the statements when discussing her concerns about the child and when the pediatrician observed marks on the child's body and bloodshot eyes, which resulted in the pediatrician sending the child to the ER. This hearsay exception does not require that the declarant be the patient and applies to statements made by the parent of a child patient when the parent is giving information to assist in the diagnosis and treatment of the child.

Neglect Adjudication

In re C.C., ___ N.C. App. ___ (July 3, 2018)

Held: Affirmed

- Facts: The respondent father (who is the appellant) was incarcerated at all relevant times in the case. This appeal focuses on the circumstances of neglect created by mother. DSS became involved because of reports related to the mother's substance abuse, mental health issues, unstable housing, prostitution, and inappropriate supervision of the child. At the time of the report to DSS, the child had been living with mother's former foster mother for a significant period of time. About one month after the DSS report, the child moved to maternal grandmother's (GM) home. Mother agreed to enter a residential drug treatment program with her infant (not subject of this appeal) while her other daughter (who is the subject of this appeal) remained with GM. Mother was discharged from the program due to her continued use of illegal drugs and breaking the program's curfew. DSS informed mother it intended to file a petition seeking custody of the children. Mother requested that her children be placed with her for former foster mother, which occurred after DSS approved this kinship placement. DSS filed the petition alleging neglect. Subsequently, mother contacted the DSS social worker to inquire about moving to New Jersey and having the children placed with a relative there. DSS filed a supplemental neglect petition and sought a nonsecure custody order based on mother's intent to move with the children to New Jersey. After a hearing, the child was adjudicated neglected, and a subsequent dispositional order was entered. Respondent father appeals, arguing there was no finding or evidence supporting a finding of a substantial risk of harm to the child and that the child was not a neglected juvenile because her needs were being met in the voluntary kinship placement.
- Neglect: G.S. 7B-101(15) defines neglected juvenile as "a juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker." Case law has established that as a result of that improper care, supervision, or discipline, there must be some physical, mental, or emotional impairment or substantial risk of such impairment to the child. Where there is no such finding, there is no error if the evidence supports such a finding.
- When a child has been voluntarily removed from the parent's home before a neglect petition is filed, the court should consider evidence of changed conditions in light of the evidence of prior neglect and the probability of repetition of neglect and consider the best interests of the child and fitness of the parent to care for the child at the time of the adjudication hearing. *Quoting In re H.L*, 807 S.E.2d 685 (2017).
- This case is similar to *In re H.L.* and *In re K.J.D.*, 203 N.C. App. 653 (2010), which affirmed the

neglect adjudications when the parents failed to remedy the conditions that required the voluntary safety placement, and differs from *In re B.P.*, 809 S.E.2d 914 (2018), which reversed the neglect adjudication when mother, by the time of the adjudication hearing, had made significant improvements to correct the conditions that led to the safety placement. Here, the child was in a kinship placement because of father's inability to provide care due to his incarceration and mother's inability to care for the child because of issues related to substance abuse, mental health, unstable housing, prostitution, and inappropriate supervision. Although the ultimate finding of a substantial risk of harm to the child was not made, the evidence supports that finding: "[t]he trial court's findings make it abundantly clear that conditions leading to the placement of [the child] outside of the home had not been corrected. At the time of the adjudication hearing, [father] was still incarcerated, and [mother] had not (1) successfully engaged in substance abuse treatment; (2) enrolled in mental health treatment or parenting classes; or (3) obtained employment."

In re J.A.M., ___ N.C. ___, 809 S.E.2d 579 (March 2, 2018)

Held: Reverse and remand to court of appeals for reconsideration and proper application of standard of review regarding findings

- Procedural History: The court of appeals reversed a neglect adjudication, after holding the findings of fact did not support the conclusion of law that the child was a neglected juvenile. In reviewing one challenged finding of fact -- that the mother did not acknowledge her role in the termination of her parental rights to her other children -- the court of appeals held that the finding was unsupported by clear and convincing evidence after it looked to the mother's testimony and determined that her testimony contradicted the trial court's finding.
- In an appeal of an abuse, neglect, or dependency adjudication, the standard of review requires the appellate court to "deem conclusive" a trial court's findings of fact that are supported by clear and convincing competent evidence even when some evidence supports a contrary finding. Although respondent mother's testimony "vaguely acknowledged 'making bad decisions' and 'bad choices' in the past," she also testified that she did not have a role in another one of her children's injuries and that she felt that her rights to her other children were unjustly terminated. The trial court's finding that respondent mother failed to acknowledge her role in her other children's placement in DSS custody and subsequent termination of her parental rights to those children was supported by clear and convincing evidence.

In re J.A.M., ___ N.C. App. ___ (June 5, 2018)

Held: Affirmed. There is a dissent.

- Procedural History: The trial court adjudicated J.A.M. neglected based upon an injurious environment. The circumstances of neglect related to the parents' lack of progress to remedy conditions arising from each parent's history of domestic violence with other partners that resulted in the prior involvement of DSS with their other children, including respondent mother's rights being terminated to six of her other children. Respondent mother appealed. The court of appeals reversed the neglect adjudication holding that the findings (1) were not supported by clear, cogent, and convincing evidence and (2) did not support the conclusion of neglect. *See In re J.A.M.*, 795 S.E.2d 262 (2016). The N.C. Supreme Court granted discretionary review, determined the court of appeals misapplied the standard of review, and reversed and

remanded the appeal back to the court of appeals for reconsideration with the proper standard of review applied. *See In re J.A.M.*, 809 S.E.2d 579 (2018).

- Standard of Review: "In a non-jury neglect adjudication, the 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 6 quoting *In re J.A.M.*, 809 S.E.2d at 580. Conclusions of law are reviewable de novo.
- Under G.S. 7B-101(15), evidence of the abuse of another child in the home is relevant in a neglect adjudication. The trial judge has discretion to determine the weight to give that evidence. The trial court's decision is "predictive in nature, as 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 7 quoting *In re McLean*, 135 N.C. App. 387, 396 (1999). In a case involving a newborn, the court may consider the parents' failure to correct conditions resulting in their other children's neglect or abuse as evidence of future neglect.
- The trial court found, based on the evidence admitted (including the prior adjudications for the other children and a DSS supervisor's and respondent mother's testimony), that the respondent-mother failed to acknowledge her role in the termination of parental rights to her other six children, refused to work with DSS and engage in services in the current case, and became involved with J.A.M.'s father who had been convicted of domestic violence even though domestic violence was one of the reasons her other children had been removed. The evidence supporting these findings "is consistent with a substantial risk of future injury in the home." Sl. Op. at 11. The weight of the trial court's findings support the neglect adjudication, and the court of appeals may not reweigh the underlying evidence.

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Facts: DSS was involved with the family on multiple occasions because of domestic violence and substance abuse issues that impacted the child. The parents voluntarily entered into a safety plan where they agreed the child would stay with her adult half-sister as a safety resource placement and the parents would engage in clinical assessments, follow recommendations, and submit to random drug screens. Both parents tested positive for methamphetamines. DSS filed a petition. The trial court held a combined adjudication, initial disposition, and permanency planning hearing. The child was adjudicated neglected and dependent. DSS was relieved from providing reunification efforts, and guardianship was awarded to the child's adult half-sister. Respondent father appeals the adjudication, award of guardianship at initial disposition, holding a concurrent review and permanency planning hearing, and visitation order.
- Neglect Adjudication (affirmed). Citing *In re K.J.D.*, 203 N.C. App. 653, 660 (2010), when a child has been voluntarily removed from the home before a petition is filed, the court considers "the conditions and fitness of the parent to care [for the child] at the time of the adjudication." Although portions of some of the court's findings were not supported by competent evidence and were disregarded on appellate review, the findings that were supported by the evidence support the trial court's conclusion that the juvenile was neglected. The supported findings showed respondent-father and mother had a tug of war with the child while they were having an altercation, they both failed multiple drug tests, the child was placed with a safety resource (her half-sister) because neither parent was able to provide proper care due to their drug use, and respondent father failed to address his substance abuse issues, such that the conditions

requiring the child be placed with a safety resource were not remedied.

In re J.M., ___ N.C. App. ___ (Sept. 19, 2017)

Held: reverse and remand in part

- A juvenile may be adjudicated as "neglected", as defined by G.S. 7B-101(15). "Serious neglect" is defined at G.S. 7B-101(19a) and "pertains solely to placement of an individual of the responsible individuals' list and is not included as an option for adjudication in an abuse, neglect, or dependency action." A child's adjudication of "serious neglect" is a misapprehension of the law.

Adjudication: Neglect; Dependency – Findings; Alternative Placement of Child before Petition Filed

In re B.P., ___ N.C. App. ___, 809 S.E.2d 914 (Jan. 16, 2018)

Held: vacated and remanded

- Standard of review of an adjudication: Whether the findings of fact are supported by clear and convincing evidence and whether the legal conclusions are supported by the findings of fact. Findings are binding if unchallenged or if evidence exists to support the finding, even if there is evidence to support a contrary finding. Conclusions of law are reviewed de novo.
- Findings of fact were unsupported by evidence, such as
    - the finding related to a domestic violence incident involving the child's stroller being knocked over was not supported by clear and convincing evidence when examining the responding officer's testimony that the stroller did not appear to be turned over and other testimony that mother admitted to lying about the stroller being knocked over;
    - the finding that respondent mother was charged with a criminal offense was misleading as it did not include the material fact that the charges were dismissed;
    - the findings that the caretaker had no document or authority to seek medical or other care for the child was unsupported by evidence showing the caregiver was able to obtain medical treatment and vaccinations for the child.
- It was proper for the court to consider prior orders in related proceedings involving respondent's other children when determining whether this child is neglected. In a neglect adjudication, it is relevant whether the juvenile lives in a home where another juvenile has been abused or neglected by an adult who regularly lives in the home. When making findings of prior court orders involving respondent's other children (a TPR and placement in foster care), the court did not merely incorporate those orders but rather employed a process of logical reasoning, which was evidenced by its having made several independent findings of fact.
- The sustained findings of fact do not support an adjudication of neglect – Risk of Harm.
    - An adjudication of neglect requires conditions that cause in juvenile to have some physical, mental, or emotional impairment or substantial risk of such impairment. The evidence and findings related to respondent's mental health, removal of her other children, and homelessness, and no finding of impairment or risk of impairment to the child do not support the determination of neglect.
- Findings related to alternative placement of child made by mother do not support adjudication of neglect or dependency.
    - Evidence and findings show that before DSS was involved, respondent mother placed the child with caretakers, and the child remained in their care at the time the petition was filed. The caretakers were found by both DSS and the trial court to be appropriate.

- This case is distinguishing from *In re K.J.D.*, 203 N.C. App. 653, 660 (2010), where child was adjudicated neglected although being placed in a voluntary kinship placement, as "the determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the [adjudication] proceedings"* (emphasis in original). In this case, respondent placed child on her own, without DSS input. Unlike *In re K.J.D.*, the findings in this case did not address mother's continuing inability to care for the child or an ultimate finding that the child would be at substantial risk of harm if removed from the placement and returned to the mother's care.
- Dependency requires findings of both prongs of G.S. 7B-101(9): (1)the parent's inability to provide care or supervision and (2) the availability to the parent of alternative child care arrangements. The second prong was not satisfied. A parent has an alternative caregiver arrangement when the parent takes some action to identify the arrangements; "it is not enough that the parent merely goes along with a plan created by DSS". *In re L.H.,* 210 N.H. App. 355, 366 (2011). Here, it is undisputed respondent made the placement and did not merely acquiesce to DSS's plan.

Adjudication: Dependency

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Dependency Adjudication (reversed). The court must make findings addressing both prongs of the dependency definition at G.S. 7B-101(9): the parent's ability to provide proper care or supervision and the availability of an alternative child care arrangement. The court's order did not contain findings about either prong. Regarding the first prong, the findings supporting the court's adjudication of neglect was based on the creation of an injurious environment to the juvenile and did not include findings that the parent's "behaviors rendered them wholly unable to parent" to satisfy the dependency prong.

Adjudication/Disposition/Permanency Planning: Reunification & Reunification Efforts

In re C.P., ___ N.C. App. ___, 812 S.E.2d 188 (March 6, 2018)

Held: reverse in part, affirm in part, vacate in part, and remanded

- Procedural History: This case originally involved two children who were adjudicated neglected and dependent and that adjudication and following disposition were appealed. The adjudication was reversed and remanded in the published opinion In re K.P., 790 S.E.2d 744 (2016). Since that first appeal, one child (K.P.) reached the age of majority, and the case proceeded for C.P., a juvenile. On remand, the trial court held an "adjudication/disposition and permanency planning hearing" where the child was adjudicated neglected and dependent and guardianship was awarded to the child's adult sibling. The adjudication, dispositional, and permanency planning order was appealed. That appeal was heard and decided in an unpublished opinion dated January 2, 2018. This published opinion results from a petition for rehearing pursuant to Rule 31 of the N.C. Appellate Rules and replaces the unpublished January 2, 2018 opinion.
- An adjudication of dependency under G.S. 7B-101(9) requires the trial court to address both prongs of the definition regarding (1) the parent's ability to provide proper care or supervision and (2) the availability to the parent of alternative child care arrangements. DSS concedes the second prong was not satisfied. Adjudication of dependency reversed.

- The trial court did not err in holding the adjudication, initial dispositional, and permanency planning hearings on the same day as it is not forbidden by the Juvenile Code.
- The court of appeals distinguished reunification as a permanent plan from reunification efforts. In interpreting the language of G.S. 7B-906.2(b) that "reunification shall remain" a primary or secondary plan absent certain findings, the *initial permanency planning order* must include reunification as one of the concurrent permanent plans. Although the trial court found that "reunification efforts… would be futile" and that the mother "presents a risk to the health and safety of the juvenile," which are findings under G.S. 7B-906.2(b) that authorize the elimination of reunification as a concurrent plan, the statutory language "shall remain" requires the trial court include reunification as part of the *initial* permanent plan. Vacate portion of order that fails to include reunification as a permanent plan. However, recognizing that it is bound by a prior published opinion of the court of appeals, *In re H.L.*, 807 S.E.2d 685 (2017), reunification efforts may be ceased at the first permanency planning hearing if certain findings are made. The findings in this case support the trial court's conclusion that reunification efforts may be ceased. Affirm portion of order ceasing reunification efforts.
    - Author's Note: This opinion does not discuss how to apply the language in G.S. 7B-906.2(b) that requires the trial court to order DSS to make efforts toward finalizing the primary and secondary permanent plans when reunification efforts have been ceased but reunification must be a permanent plan at the initial permanency planning hearing.
- In awarding a permanent plan of guardianship, the GAL and DSS concede the order did not contain a relevant finding under G.S. 7B-906.1(e)(1) of whether it is possible for the child to be returned to the mother within 6 months and if not why placement with the mother is not in the child's best interests. Vacate guardianship order.
- The mother waived her right to appellate review of the guardianship order that did not include findings that she was unfit or acted inconsistently with her constitutionally protected parental rights by failing to raise it when she had the opportunity to do so at the hearing.

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Initial dispositional order – guardianship (affirmed). At disposition, the court has discretion to order a disposition utilizing the prescribed alternatives in G.S. 7B-903(a) based on the child's best interests, and the order is reviewed for an abuse of discretion. A guardian may be appointed at disposition, including initial disposition. G.S. 7B-903(a)(5). Guardianship may be granted without the court making a written finding of a G.S. 7B-901(c) factor regarding reunification efforts because the requirements of G.S. 7B-901(c) only apply when a child is placed in the custody of a county DSS (which is not the case when guardianship is ordered). The court verified the guardian (1) understood the legal significance of the appointment based on the social worker's and proposed guardian's testimony of the duties and responsibilities of a guardian and (2) had adequate resources based on the affidavit by the proposed guardian of her finances and her, along with the DSS social worker's testimony, that she was employed, made child care arrangements while she worked, and was able to financially care for the child.
- Review/Permanency Planning Hearing (affirmed). Respondent father challenges the court's authority to conduct a combined initial disposition, review, and permanency planning hearing as an attempt by DSS to circumvent providing reunification efforts. Respondent father waived

appellate review of this issue as he received multiple notices that the hearing would be a combined hearing and did not object when the hearing proceeded. At permanency planning, G.S. 7B-906.2(b) requires the court to make reunification a primary or secondary permanent plan and require reunification efforts until it makes a finding that efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety, and this finding may be made at the first permanency planning hearing. The court's findings that since the child has been in her safety resource placement the parents tested positive for methamphetamine and failed to complete services or make progress on their case plan support its conclusion that reunification efforts would be unsuccessful. Distinguishing the case from *In re A.G.M,* 241 N.C. App. 426 (2015), the court may consider the respondent's failure to comply with a case plan that he voluntarily entered into before the petition was filed, even though there was no court order for him to participate in that plan, when considering whether reunification efforts would be (un)successful.

In re J.M., ___ N.C. App. ___ (Sept. 19, 2017)

Held: Vacate in part

- Procedural Facts: The adjudicatory hearing and a combined initial disposition under G.S. 7B-901 and a permanency planning hearing under G.S. 7B-906.1 were held on the same day. Following the hearing, the court entered a combined adjudication, initial disposition, and permanency planning order. The disposition placed the children in DSS custody. Reasonable efforts for reunification were determined not to be required under the findings of G.S. 7B-906.2(b) (permanency planning). Concurrent permanent plans of guardianship and adoption were ordered.
- G.S. 7B-901(c) applies to initial dispositions and authorizes the trial court to eliminate reunification efforts when it finds a court of competent jurisdiction has previously determined that a parent committed or allowed one of the enumerated statutory aggravating factors. *See In re G.T.*, 791 S.E.2d 274 (2016) (currently pending before the NC Supreme Court based on a dissent). An order that follows an initial disposition hearing implicates G.S. 7B-901(c) and requires the court to make one of those findings before ordering reunification efforts are not required. Findings from the permanency planning statute, G.S. 7B-906.2(b), are insufficient to cease reunification efforts at an initial dispositional hearing, and G.S. 7B-901(c) factors cannot be "eluded in favor of the more lenient requirements of G.S. 7B-906.2(b) simply by combining dispositional and permanency planning matters in a single order." The G.S. 7B-901(c) requirements were not met in the combined initial disposition and permanency planning order.

Initial Disposition: Reasonable Efforts

In re G.T., 791 N.C. App. 274 (2016), aff'd per curiam, 370 N.C. 387 (2017)

Held: Reversed in part

SINCE THIS OPINION WAS PUBLISHED, G.S. 7B-901(c) has been amended to include the present tense verb "determines," which has the effect of superseding this holding.

- GS 7B-901(c)(1)e. authorizes a court to cease reunification efforts with a parent "if the trial court **makes** a finding that: a court of competent jurisdiction **has determined** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile: … chronic or toxic

exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile."

- Statutory interpretation requires a plain and unambiguous reading of the statute to determine legislative intent. Based on the different verb tenses used in the statute, the present perfect tense of "has determined" requires that the court reference a prior order from a previously held hearing rather than make a determination in the current disposition hearing. This previously held hearing could be an adjudicatory or other prior hearing in the same juvenile case or in a collateral proceeding held in a trial court. The prior adjudication order did not contain the ultimate finding of fact that the respondent mother allowed the continuation of chronic or toxic exposure to controlled substances that caused impairment of or addition in the newborn. The findings that toxicology results for the newborn were pending and that the newborn's withdrawal and impairment at birth supported the neglect adjudication but not the ultimate finding of fact needed to cease reasonable efforts with the respondent mother.

Dispositional Order: Parent's Constitutional Rights

In re S.J.T.H., ___ N.C. App. ___, 811 S.E.2d 723 (March 6, 2018)

Held: reversed and remanded as to actions involving respondent father and custody to DSS

- Facts: Child born Feb. 2017 and mother identifies one man as the father. DSS becomes involved because of mother's prior child protective history and drug abuse and putative father's failure to appear at child's discharge from the hospital. In March, a second putative father, Sam, contacts DSS and offers to care for the child. In April, DSS files a petition alleging neglect and dependency and names both putative fathers. In June 2017, Sam is adjudicated the child's father, the child is adjudicated neglected based on circumstances created by mother, and the dispositional order places the child in DSS custody and orders Sam to comply with the same 11 requirements as mother. Evidence regarding Sam is limited to his identity and paternity. Sam appeals, challenging the dispositional order as it applies to him.
- There is no evidence or findings of fact about respondent father other than establishing his paternity. A best interests determination requires evidence about the named respondent father, such as evidence about his ability to parent or provide for the child, his home life, or why the parent cannot care for his child, so that a court may consider whether a respondent parent is unfit or has acted inconsistently with his parental rights when determining custody. Citing In re D.M., 157 N.C. App. 382 (2011), which applied to a permanency planning order awarding permanent custody to a non-parent, there must be clear, cogent, and convincing evidence to demonstrate a parent is unfit or has acted inconsistently with his parental rights to support a disposition that does not grant a parent custody.

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for a new hearing

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. Criminal charges against respondent father are dismissed. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent father appeals, challenging findings and conclusion that he acted inconsistently with his

constitutionally protected status as a parent.

- Before ordering custody to a non-parent, there must be clear and convincing evidence and a finding that a parent is unfit or has acted inconsistently with his or constitutionally protected status as a parent. This finding applies to a permanent custody order, even when custody is transferred from a non-parent (in this case DSS) to a different non-parent (in this case the foster parents).
- The appellate court reviews de novo whether conduct is inconsistent with the parent's constitutionally protected status. The trial court's findings were insufficient to support the conclusion that respondent father acted inconsistently with his protected status as a parent as the findings do not address how the father is unfit or acted inconsistently with his parental rights. Distinguishing the case from *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010), there were no findings that the child's injuries were non-accidental or that the mother and father were the sole caregivers when the non-accidental injuries were sustained and were jointly and individually responsible. The findings suggest the trial court intended to hold both parents responsible or that mother caused the injuries and do not explain how father was culpable for the injuries, unfit, or acted inconsistently with his constitutionally protected status.

Permanent Plan: Guardianship/Custody; Relative Preference; ICPC

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.
- G.S. 7B-903(a1) addresses the out-of-home placement of a juvenile. This statute mandates (through the use of the word "shall") that the court (1) first consider whether a relative is willing and able to provide proper care and supervision to the child in a safe home, and (2) if so, place the child with that relative unless there is a finding that the placement is not in the child's best interests. "Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." Sl. Op. at 4 (citation omitted). There have never been the required findings or conclusions of law resolving the issue of relative placement and the child's best interests.

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- Facts: Respondent mother appeals from a permanency planning order that awarded custody of her two children, who had been previously adjudicated neglected, to relatives who reside in Arizona. An ICPC home study was requested but not completed. Mother also appeals the termination of the juvenile court's jurisdiction and entry of a Chapter 50 custody order pursuant to G.S. 7B-911.
- ICPC: Regarding out-of-home care, G.S. 7B-903(a1) requires that a child's placement with a relative comply with the Interstate Compact on the Placement of Children (ICPC). One requirement of the ICPC is that the receiving state (where the child is going to) notify in writing the sending agency that the proposed out-of-state placement does not appear to be contrary to the child's best interests. The ICPC applies to a placement in foster care or as a preliminary to a possible adoption. G.S. 7B-3800. Looking at (1) the definition of "foster care" under AAICPC Regulation 3(4)(26), which includes the home of a relative, and (2) the holding in *In re V.A.,* 221 N.C. App. 637 (2012) , which looked to *In re L.L.*, 172 N.C. App. 689 (2005), that determined the ICPC applied to the out-of-state placement with a relative, placement with an out-of-state relative is a foster care placement requiring compliance with the ICPC. To the extent there is a later opinion, *In re J.E.*, 182 N.C. App. 612 (2007), that held placement with the out-of-state relative is not a foster care placement or preliminary placement to adoption triggering the ICPC and conflicts with the *In re V.A.* (2012)/*In re L.L.* (2005) holdings, the court is bound by the older cases. Because there was no written notification from the receiving state, the trial court "was not authorized to award custody" to the out-of-state relatives.
- Verification: Before ordering custody (or guardianship) to someone other than a parent, the court must verify the person (1) understands the legal significance of the placement and (2) will have adequate resources to appropriately care for the child. G.S. 7B-906.1(j). Although there are no specific findings that must be made, the record must show the court received and considered reliable evidence of those two factors. The evidence, which was a DSS report and social worker testimony about the source but not amount of income and that there were no concerns about the financial affidavit the proposed custodians completed, lacked specificity and was insufficient to support the findings that the resources were adequate. There was no evidence, such as testimony from the prospective custodians or social worker or a signed statement by the prospective custodians, showing the custodians' understanding of the legal relationship.

Guardianship: Adequate Resources Verification

In re N.H., ___ N.C. App. ___ (Sept. 19, 2017)

Held: Affirmed (there is a dissent and a concurring opinion)

- G.S. 7B-600(c) and -906.1(j) require that before the court appoints a guardian to the juvenile, it must verify that the person being appointed as the guardian understands the legal significance of the appointment and will have adequate resources to appropriately care for the juvenile. The court is not required to make detailed findings of evidentiary facts, but there must be some evidence of the guardian's resources for the court to make its determination of adequacy. The court may consider any evidence that it finds to be relevant, reliable, and necessary to determine the juvenile's needs and the most appropriate disposition. G.S. 7B-906.1(c).
- In its opinion, the court of appeals "acknowledge that our case law addresses this situation from numerous angles, none of them directly on point" and cites to several different cases with

different holdings."

- Evidence of Resources: There were 2 GAL reports that stated the proposed guardian was employed with the school district, and one report specified her job as a bus driver and stated she was without income during the summer. There was 1 DSS report that stated respondent mother provided $30 to the proposed guardian and DSS provided gift cards of $30 per month to assist with purchasing food and gas when the proposed guardian was experiencing financial difficulties. The proposed guardian provided sworn testimony that she was employed at the school district, that she had money to cover her household bills, that she had been unable to work the past summer because of the child's intensive in-home therapy but that she was able to get through almost all of the summer because she had saved money, and that her plan for next summer was to save money and she had family and was aware of community resources she could to turn to for financial help if needed. There was no evidence of the proposed guardian's actual income.
- Opinion: The sworn testimony from the proposed guardian that she was willing to care for the child and has the financial resources to do so was competent evidence that supported the court's determination that the proposed guardian has adequate resources to appropriately care for the juvenile. The opinion distinguishes the sworn testimony from *In re P.A.,* 241 N.C. App. 53 (2015), which involved unsworn testimony from the proposed guardian, and *In re J.H.*, 780 S.E. 2d 228 (2015) in which there was no testimony from the proposed guardians.
- Concurrence: G.S. 7B-906.1(j) requires the court to find the proposed guardian *will have* adequate resources to appropriately care for the juvenile. The issue is whether there is sufficient evidence before the trial court to determine if the proposed guardian *will have* adequate resources to care for the child *in the future*. Although the sufficiency of the evidence in this case is a "close question", there was evidence that the proposed guardian's current income was adequate to care for the child moving forward. The proposed guardian testified that she was employed, that her income was sufficient to cover her expenses in caring for the child, and there was some money left for savings. Similar to *In re J.E.,* 182 N.C. App. 612 (2007), the testimony about her job and income (although there were no specifics about the income) were more than the proposed guardian's conclusory statement about whether her resources were adequate. Distinguishing the 3 cases cited by the dissent that involved evidence about the past without any evidence of current resources to care for the child and a conclusory statement about the proposed guardian's financial ability to care for the child.
- Dissent: The GAL and DSS reports and testimony from the proposed guardian support the conclusion that she lacked the financial resources to care for the child, which is the opposite conclusion reached by the trial court. The evidence unambiguously showed she struggled financially while caring for the child. The proposed guardian's own opinion without more was insufficient to support the court's conclusion. *See In re P.A.*, 241 N.C. App. 53 (2015).

Visitation

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- The visitation order between respondent mother and the child who is placed in Arizona that establishes a weekly visit for a minimum of two hours if the mother moves to Arizona does not

comply with G.S. 7B-905.1(c). The court must specify the minimum frequency and length of visits and whether the visits shall be supervised. The order does not address the frequency or length of visits if the mother does not move to Arizona, and it does not address supervision at all.

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- If on remand, the custodians remain parties, the court must consider appropriate visitation as may be in the children's best interests pursuant to G.S. 7B-905.1 (which applies when an order removes custody of a child from a parent, guardian, or custodian, or continues the child's placement outside the home).

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Visitation (remanded). Inconsistent findings that visitation should be ceased and visitation should be for a minimum of one hour a week supervised must be remanded to reconcile the discrepancy.

Reunification w/Custodian: Findings

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- There were no findings to support the conclusion that it was not in the children's best interests to be returned to the grandparent custodians. The one applicable finding adopted and incorporated the DSS and GAL reports and is insufficient. "The trial court 'should not broadly

incorporate written reports from outside sources as its findings of fact' [and] … delegate its fact-finding duty" (*quoting In re J.S.*, 165 N.C. App. 509, 511 (2004)).

Cease Reunification Efforts: G.S. 7B-906.2(b) and (d) Findings

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for further proceedings

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent mother appeals, challenging that the findings to cease reunification efforts were not support by clear, cogent, and convincing evidence.
- Standard of review of an order ceasing reunification efforts is whether the trial court made appropriate findings, whether the findings are based on credible evidence and support the conclusions of law, and whether the trial court abused its discretion when ordering the disposition.
- An order effectively ceases reunification efforts when it awards permanent custody to a non-parent (in this case foster parent), eliminates reunification as a permanent plan, waives further review hearings, and releases the attorneys for the parties and the child's GAL.
- The court may cease reunification efforts at permanency planning after making findings under
    - G.S. 7B-906.2(b) that those efforts clearly would be unsuccessful or inconsistent with the child's health and safety and
    - G.S. 7B-906.2(d)(1)–(4), which demonstrate lack of success.
- Here the court failed to make the G.S. 7B-906.2(d)(4) and G.S. 7B-906.2(b) findings. A finding that "the home remains an injurious environment" and "a return home would be contrary to the best interests of the juvenile" are not a finding that reunification efforts would be unsuccessful or inconsistent with the child's health and safety.
- "All findings must be supported by clear, cogent, and convincing evidence."
    - Author's Note: It is unclear to this author whether this statement applies to the findings required under G.S. 7B-906.2(b) and (d) as no statutory or case citation was referenced and *In re L.M.T.,* 367 N.C. 165, 180 (2013) states there is no burden of proof in a permanency planning hearing and "the trial court's findings of fact need only be supported by sufficient competent evidence." This appeal does involve a separate challenge by respondent father on the issue of whether he was unfit or acted inconsistently with his constitutionally protected parental rights such that custody could be awarded to a non-parent. Father's appeal was remanded for findings on that issue, and case law has established clear and convincing evidence as the standard when determining whether a parent's conduct is inconsistent with his/her constitutionally protected status.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- In an appeal of a permanency planning order that eliminated reunification as a permanent plan, the transcript was not included in the appellate record. It is the appellant's burden to settle the

record on appeal by providing a transcript if available or a narrative of the hearing. Without a transcript or narrative, findings of fact are deemed conclusive on appeal, and the review is limited to whether the findings support the decision to cease reunification with the father.

  - Procedural Note: Respondent was ordered to provide the transcript by August 2017 but failed to do so or request an extension. A late transcript was provided in November 2017, and a motion to amend the record was filed in December 2017. That motion was denied, and there is a dissent on the denial of that motion. In a footnote, the court of appeals stated this dissent may provide an appeal of right to the N.C. Supreme Court from the decision to deny that motion. The dissent is included in this published opinion.

- The ultimate finding under G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety were supported by findings that respondent father had not progressed on his case plan regarding visitation and appropriate housing, which had been concerns for more than a year; missed a CFT meeting; and did not cooperate with DSS.

Removal as Party: Custodian

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- G.S. 7B-401.1 sets forth who must be parties to an abuse, neglect, or dependency proceeding, which includes parents, guardians, custodians, and caretakers. Pursuant to G.S. 7B-401.1(d) regarding custodians, the grandparents were named as respondent parties. Before removing the custodians [guardian or caretaker] as parties, the trial court must comply with G.S. 7B-401.1(g), which requires "the court finds (1) that the person does not have legal rights that may be affected by the action and (2) that the person's continuation as a party is not necessary to meet the juvenile's needs." Neither finding was made. The opinion comments that on remand, the trial court may be prevented from making the first finding given the chapter 50 custody order.

Terminate Jurisdiction: 7B-911

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- G.S. 7B-911: The trial court must make the findings required by G.S. 7B-911(c) before terminating its jurisdiction in the juvenile proceeding. Here, it is undisputed that the order contained no findings that addressed either section of G.S. 7B-911(c)(2): there was no need for continued state intervention on behalf of the child through a juvenile court proceeding, and at

least 6 months have passed since the court determined placement with the relatives who are being awarded custody is the permanent plan. The findings in the permanency planning order are internally inconsistent as they require DSS to remain involved with reunification efforts, placement, and care of the child while also "closing" and releasing DSS from the matter.

Appeal: Order Eliminating Reunification

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1001(a) sets forth which final orders may be appealed in an abuse, neglect, or dependency action. A G.S. 7B-906.2 permanency planning order that includes adoption and reunification as the concurrent permanent plans is not an appealable order under G.S. 7B-1001(a)(5), even when a TPR has been commenced by DSS, as reunification has not been eliminated as a permanent plan.
- "G.S. 7B-906.2(b) clearly contemplates the use of multiple, concurrent plans including reunification and adoption. During concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan" as the trial court is required to order DSS to make efforts toward finalizing the primary and secondary plans. The permanency planning order that identified adoption and reunification as the concurrent plans and required DSS to file a TPR petition did not implicitly or explicitly cease reunification. This opinion distinguishes appellate opinions decided before G.S. 7B-906.2 (e.g, *In re A.E.C.*, 239 N.C. App. 36 (2015)), which held a trial court's order that DSS file a TPR petition implicitly ceased reunification efforts.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part; dismiss in part

- Facts: Respondent father appeals a TPR order, the prior April 2016 permanency planning order (PPO) that ceased reunification efforts with father and eliminated reunification as a concurrent permanent plan, and the October 2016 PPO that continued the April 2016 PPO.
- G.S. 7B-1001(a) allows for appeal of a TPR order and any prior order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) if all of the criteria under G.S. 7B-1001(a)(5)(a) apply. Written notice preserving the right to appeal the G.S. 7B-906.2(b) order is not required (as it was under the former G.S. 7B-507(c)). The language in G.S. 7B-1001(b) requiring notice to preserve the right to appeal be in writing is surplusage because G.S. 7B-906.2(b) does not require a notice to preserve the appeal (distinguishing it from the former G.S. 7B-507(c) which did require such notice).
    - Legislative Note: Effective January 1, 2019, G.S. 7B-1001(a)(5)a. and 7B-1001(a1)(2) are amended and require that the right to appeal be preserved in writing within 30 days after entry and service of the G.S. 7B-906.2(b) order.
- G.S. 7B-1001 does not authorize an appeal of an order that continues the permanent plan. Respondent has no statutory right to appeal the October PPO; appeal of that order dismissed.

Appellate Issues (Standing, Vacated Order, Mootness)

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.
- Respondent father has standing to appeal. He is not asserting the interests of the relative but is asserting his own interest to have the court consider a potentially viable relative placement. Because the relative was not a party in this action with a right to appeal, this case is distinguished from *In re C.A.D.*, 786 S.E.2d 745 (2016), which held the respondent mother was not aggrieved by the permanency planning order and lacked standing to present an argument that affected the grandparents when the grandparents were parties to the proceeding (as former custodians) and could have but did not appeal the order.
- "When an order of a lower court is vacated, those portions that are vacated become void and of no effect." Sl. Op. at 7 (citation omitted). The previous permanency planning order was vacated in its entirety and the case was remanded for further proceedings. The case returned to the prior review and permanency planning orders, which was custody to DSS. After remand, the new order from the trial court, which re-incorporated findings and conclusions from the voided order, is a new single order from which respondents could raise any argument on appeal.
- A 2017 guardianship review order that ceased all contact between the child and grandmother does not moot this appeal. The trial court has not addressed the question of whether the relative should have been given priority placement as required by G.S. 7B-903(a1).

Termination of Parental Rights

Notice Pleading

In re J.S.K., ___ N.C. App. ___, 807 S.E.2d 188 (Dec. 5, 2017)

Held: reversed

- A motion to dismiss under Rule 12(b)(b) of the N.C. Rules of Civil Procedure is reviewed de novo as to whether, as a matter of law, the allegations of the complaint (in this case motion to terminate parental rights (TPR)) is sufficient to state a claim upon which relief may be granted. On review, the allegations in the complaint are considered true and are construed liberally. A denial of a motion to dismiss will only be reversed if the plaintiff is entitled to no relief under any set of facts which could be proven to support the claim.
- Although a denial of a motion to dismiss is not reviewable on appeal when there is a final

judgment on the merits, the court of appeals has previously deviated from this rule in TPR proceedings. Here respondent mother made an oral motion to dismiss the TPR motion at the beginning of the adjudicatory hearing such that the final TPR order is the only written order denying the motion to dismiss from which the respondent mother could appeal.

- G.S. 7B-1104(6) requires that a TPR motion or petition allege facts that are sufficient to warrant a determination that one or more of the G.S. 7B-1111(a) grounds to TPR exist. There is no distinction between the facts that must be alleged in a TPR petition as opposed to a TPR motion. The alleged facts must "put a party on notice as to what acts, omissions or conditions are at issue" and a "bare recitation . . . of alleged statutory grounds for termination" is insufficient. *See In re Hardesty*, 150 N.C. App. 380, 384 (2002); *In re Quevedo*, 106 N.C. App. 574, 579 (1992). Here, the TPR motion alleged four grounds: neglect, willfully leaving the child in foster care for more than 12 months without showing reasonable progress, willfully failing to pay a reasonable portion of the cost of care, and dependency. G.S. 7B-1111(a)(1), (2), (3), (6). The allegations consisted of bare recitations of the statutory grounds to TPR. Distinguishing the case from *In re Quevedo*, the TPR motion did not incorporate any prior orders, and the attached custody order did not contain additional facts that support a TPR ground. The TPR motion was insufficient to put respondent mother on notice as to what acts, omissions, or conditions were at issue.

Law of the Case Doctrine

In re K.C., ___ N.C. App. ___, 812 S.E.2d 873 (March 6, 2018)

Held: Affirm

- Procedural History: In 2014, father petitioned to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The 2014 petition was granted in a 2015 TPR order. Respondent appealed, and the TPR was reversed (*In re K.C.*, 805 S.E.2d 299 (2016)). Later in 2016, approximately 6 months after the appellate decision, father filed a new petition seeking to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The TPR was granted in July 2017. Respondent mother appeals, arguing the law of the case prevented the trial court from concluding respondent abandoned the child.
- "The law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal," which in this case is the six months next preceding the filing of the second (2016) petition. (*Quoting Bank of America, N.A., v. Rice*, 780 S.E.2d 873, 880 (2015)). "The prior opinion … does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority even if [respondent] never seeks to see [the child] or communicate with him again."
- Although some findings related to events that took place prior to the first petition in 2014, the order on appeal included several unchallenged findings of fact about events occurring after the filing of the 2014 petition and made its decision based on the period of at least six consecutive months immediately preceding the filing of the 2016 petition. The unchallenged findings are that respondent did not have even minimal contact with the child after the 2015 TPR order was reversed even though she had a way to contact petitioner and his family, and she failed to appear at the hearing resulting in the 2017 TPR order on appeal.

Due Process; Motions to Continue and Re-open Evidence

In re S.G.V.S. ___ N.C. App. ___, 811 S.E.2d 718 (Feb. 20, 2018)

Held: reversed and remanded

- Facts: DSS filed petitions to terminate respondent mother's parental rights to her two children, who had been adjudicated neglected and dependent. The TPR hearing started on December 13, 2016 and was continued to January 18 and 19, 2017. Respondent mother was previously scheduled to be in a different court in a different county for a pending criminal charge on January 18, 2017. At the start of the January 18, 2017 TPR hearing, counsel for respondent mother requested a continuance to January 19 as respondent was present in the other county court for her criminal matter. The court denied the motion to continue. At the conclusion of the TPR hearing, respondent's counsel requested that matter be left open to allow her client to appear and testify. The court denied the motion. Before a written order was entered, respondent's attorney filed a Rule 59 motion to re-open the evidence, which was denied after finding that respondent had been advised to continue her criminal matter and that she chose to attend the criminal action rather than the TPR hearing. Respondent mother's rights were terminated.
- Due process applies to a parent's liberty interest to care, custody and control of their child. Due process insures fundamental fairness in a judicial proceeding that may adversely affect the individual's protected rights. Although "due process does not provide a parent with an absolute right to be present at a termination hearing… the magnitude of 'the private interests affected by the proceeding, clearly weighs in favor of a parent's presence at the hearing.' " (*citing In re Murphy*, 105 N.C. App. 651, 654 (1992); *In re Quevedo*, 106 N.C. App. 574, 580 (1992)).
- Rule 59 of the N.C. Rules of Civil Procedure allows for a new trial due to "any irregularity by which any party was prevented from having a fair trial," and a trial court has discretion to re-open a case to admit additional testimony after the conclusion of the hearing. An appellant court may disturb an order made under the discretionary power of Rule 59 when the appellate court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487 (1982). No evidence supports the finding that respondent chose to attend her previously scheduled criminal matter instead of the TPR hearing. In North Carolina, the district attorney controls the calendaring of cases in criminal court, and there was no showing that a motion to continue would have been permitted. Respondent's choice was to attend her previously scheduled criminal matter or attend the TPR hearing and face a new criminal charge of failing to appear at the criminal hearing.
- Based on the record and magnitude of the interests at stake in a TPR, the denial of the motion to continue the hearing and to re-open the evidence to allow respondent mother to participate "results from a misapprehension of the law and is an unreasonable and substantial miscarriage of justice."

Indian Child Welfare Act (ICWA)

In re L.W.S., ___ N.C. App. ___ (Sept. 5, 2017)

Held: Affirmed

- **Issue:** Respondent father appeals an order terminating his parental rights that was entered on November 28, 2016, arguing the trial court failed to address whether the child was an "Indian

child" and whether the Indian Child Welfare Act (ICWA) applied.

- ICWA applies when the proceeding is a "child custody proceeding" and the child is an "Indian child" as both terms are defined under ICWA. A termination of parental rights is an involuntary child custody proceeding. An "Indian child" is defined as any unmarried person under 18-years-old who is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. 1903(4).
- Citing a previous case, *In re C.P.,* 181 N.C. App. 698 (2007), the burden to show ICWA applies is on the party seeking to invoke it. Respondent did not raise ICWA before the trial court, and he failed to meet his burden to show that ICWA applied. Although the TPR does not refer to ICWA, the underlying abuse, neglect, and dependency case found in its orders that ICWA does not apply.
- **Legislative Note:** 25 C.F.R. Part 23 are new Department of Interior federal regulations implementing ICWA, effective December 12, 2016. The new regulations are inapplicable to this case as the TPR order was entered before the effective date of the regulations. In footnote 4, the court refers to the new federal regulations effective after the TPR order was entered in this case, 25 C.F.R. 23.107, and notes "it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child, and if so, the state court must confirm that the agency used due diligence to identify and work with the Tribe and treat the child as an Indian child unless and until it is determined otherwise."

Adjudication: Findings

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1111(a)(2) authorizes the termination of parental rights when (1) a child has been willfully left by the parent in foster care or placement outside of the home for more than 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- Willfulness requires that the parent had the ability to show reasonable progress but was unwilling to make the effort and is not precluded when a parent has made some efforts to regain custody of his or her child. It does not require a showing of fault.
- Although respondent mother made "sporadic efforts," the findings of fact regarding her failed and diluted drug screens, inability to engage in safe and appropriate visits, and lack of progress supported the court's determination that the mother willfully left the children in foster care for more than 12 months and failed to make reasonable progress regarding two of her children.
- Regarding her third child, the findings are supported by clear, cogent, and convincing evidence that there was prior neglect (the child was adjudicated neglected) and a likelihood of repetition of neglect. G.S. 7B-1111(a)(1). Specifically, the court found the mother needed an additional support person to assist her in safely parenting but was unable to identify any such support person, she repeatedly failed drug screens, DSS had to intervene during supervised visitations because of her inappropriate behavior, and she had not complied with her case plan.
- Findings about whether DSS made reasonable efforts toward reunification are required at permanency planning hearings and are not required at a TPR. Even though they are not required, DSS provided reasonable efforts for reunification through the creation and implementation of a case plan, the provision of bus passes, supervising visitation, and arranging

for drug screens. Such efforts are not required to be exhaustive.

In re Z.D., ___ N.C. App. ___, 812 S.E.2d 668 (March 20, 2018)

Held: reversed

- Facts: In 2011, the child was adjudicated dependent based on circumstances related to respondent mother's mental health issues, drug use, unsafe home, and choice of unsafe childcare arrangements. Child was placed petitioners in the TPR, as a kinship placement in the underlying dependency action in 2011, and custody was ordered to the petitioners in 2012. Respondent mother has court ordered visitation. Respondent mother is diagnosed with bipolar disorder and has had multiple psychiatric hospitalizations and involuntary commitments from 2010 – 2015. Respondent mother engages in outpatient treatment. Petitioners filed the TPR in June 2016, and the TPR was granted in May 2017 on the grounds of neglect, failure to make reasonable progress to correct the conditions that led to the child's removal, and dependency. G.S. 7B-1111(a)(1), (2), and (6). Respondent mother appeals.
- Standard of Review is whether the clear, cogent, and convincing evidence supports the findings of fact and whether the findings of fact support the conclusion that a ground exists to terminate parental rights. The appellate court reviews the de novo whether the findings support the conclusions.
- Quoting *Quick v. Quick*, 305 N.C. 446, 452 (1982), "the trial court must make '*specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached" (emphasis in original). There must be adequate evidentiary findings to support the ultimate finding.
- The evidentiary findings of fact are insufficient to support the ultimate finding required for each ground alleged and the conclusion that any of the alleged grounds under G.S. 7B-1111(a)(1), (2), and (6) existed. The evidentiary findings lacked specificity.
    - G.S. 7B-1111(a)(2) requires a 2-part analysis: (1) the child has been willfully left in foster care placement or placement outside the home for over 12 months and (2) at the time of the TPR hearing, the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. There were no findings regarding mother's conduct or circumstances over the 15 months prior to the TPR hearing regarding her mental health, and no findings at all regarding her progress (or lack thereof) in correcting her drug use or the condition of her home at the time of the TPR hearing. Regarding her mental health, the findings of fact lack detail is describing what an "episode" is, how frequently respondent had such episodes, and how the episodes "left her incapable of properly caring for her son." The finding of fact describing respondent's behavior during visits as "consistently concerning" and "disturbing" lacked any particularity in what behavior it was referring to and how that behavior impacted respondent's ability to care for her son. The findings do not address respondent's progress or lack of progress to correct the conditions the resulted in her son's removal. Evidence, through her psychiatrist's testimony, tended to show she made significant progress in addressing her mental health issues, and other evidence showed she had stable housing and income and was not using drugs.
    - A TPR on the ground of neglect under G.S. 7B-1111(a)(1) requires the court to consider

evidence of past neglect, changed conditions related to the past neglect, and the probability of the repetition of neglect in those cases where the child has not been in the parent's custody for a significant period of time before the TPR hearing. The findings addressing the likelihood of repetition of neglect that used the terms "concerning" and "disturbing" are subjective and ambiguous and are not sufficiently specific to determine the behaviors exhibited by respondent and how those behaviors negatively impacted her son or her ability to provide proper care and supervision to her son. The likelihood of repetition of neglect is also not shown by clear, cogent, and convincing evidence and lacked temporal proximity to the TPR hearing as it focused on conduct that occurred at least 6 months before the hearing.

- Dependency under G.S. 7B-1111(a)(6) requires the court to address (1) the parent's ability to provide care or supervision and (2) the availability to the parent of an alternative child care arrangement. The evidentiary findings are insufficient to support the ultimate finding that respondent was incapable of providing care or supervision and that such incapability would continue for the foreseeable future. The findings relate to respondent's history rather than her progress (or lack thereof) for the 15 months before and up to the TPR hearing and fail to address her mental health and alleged incapability at the time of the hearing. Petitioners failed to present clear, cogent, and convincing evidence of respondent's current incapability and that it would continue for the foreseeable future.

In re E.B., ___ N.C. App. ___, 805 S.E.2d 390 (Oct. 17, 2017)

Held: reverse and remand for additional findings

- Facts: In 2014, DSS filed a petition and obtained nonsecure custody of three children who were removed from their parents' home because of severe and ongoing domestic violence. In 2015, the children were adjudicated neglected and dependent. Respondent father was ordered to comply with a case plan that included domestic violence offender treatment and counseling; a mental health assessment; an approved parenting class; and obtaining and maintaining suitable housing, employment, and transportation to provide for the children's needs. In 2016, the primary permanent plan was changed to adoption because of continued domestic violence between the parents, and DSS filed a TPR petition alleging neglect and failure to make reasonable progress on the plan as a result. Both parent' rights were terminated, and respondent father appeals the termination of his rights on both grounds.
- The dispositive question regarding the neglect ground [G.S. 7B-1111(a)(1)] at the TPR is the fitness of the parent to care of the child at the time of the TPR hearing. There's a two-part analysis for the ground under G.S. 7B-1111(a)(2): (1) the child has been willfully left by the parent in foster care or placement outside the home for over twelve months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- The findings are vague and insufficient to support the court's conclusions of neglect and failure to make reasonable progress and lack the "specificity necessary 'to enable an appellate court to review the decision and test the correctness of the judgment.'" (*citing Quick v. Quick*, 305 NC 446, 451 (1982)). The court made three findings regarding the domestic violence. The children were removed from the home and adjudicated neglected and dependent due to domestic

violence. After a January 2016 incident of domestic violence, the parents entered counseling. Another incident of domestic violence occurred in July 2016. Based on these three findings, the court concluded neglect existed and was likely to be repeated given the continued domestic violence between the parents, and that the father had not made reasonable progress to correct the conditions that resulted in the children's removal in December 2014, as the domestic violence between the parents continued. The two findings of the 2016 domestic violence incidents do not address the circumstances of the domestic violence, its severity, the impact on the children, or that respondent father was engaged in the domestic violence. The evidence showed mother was the aggressor and only one involved in domestic violence.

- Concurrence: The findings do not support the conclusions as the record does not indicate what role if any the father had in the domestic violence incidents. The mother was the one charged. Additionally, evidence in the record tends to show the father made progress on his case plan when he completed a parenting class; submitted to the mental health assessment; obtained employment, transportation, and stable housing; interacts appropriately with the children; and attends domestic violence counseling services. On remand the court needs to address whether this evidence (or additional evidence) supports a finding that father did or did not make progress on his plan.

Adjudication: Neglect

In re M.AW., ___ N.C. ___ (Sept. 29, 2017)

Held: Reverse court of appeals decision (In re M.A.W., ___ N.C. App. ___ 787 S.E.2d 461 (2016)) and reinstating trial court order to TPR

- The findings were sufficient to support a TPR on the ground of neglect. Neglect is based on the definition at G.S. 7B-101(15), and "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by a parent" (citations omitted). When there is past neglect, the court must also consider evidence of changed circumstances.
- In the underlying neglect case, the child was adjudicated neglected based on the mother's actions, which were a result of her substance abuse and mental health issues. The adjudication occurred while the respondent father was incarcerated. Incarceration, standing alone, is not sword or a shield in a TPR decision. The court considers evidence of relevant circumstances which exists before or after the prior adjudication of neglect. The prior adjudication of neglect is relevant evidence at the TPR hearing. The court found past neglect based on the respondent's long history of criminal activity, substance abuse, and awareness of mother's substance abuse such that he knew DSS would try to take the child. The court further found respondent father initially indicated a desire to be involved in the child's life and during his incarceration accessed services available to him, including parenting courses, substance abuse treatment, and a GED program. But, the court found a likelihood of repetition of neglect based on father's actions after he was released from incarceration, where he failed to regularly visit with the child as ordered, denied DSS requests to access his mother's home where he purported to live, and failed to complete an ordered clinical assessment.

In re M.J.S.M., ___ N.C. App. ___, 810 S.E.2d 370 (Feb. 6, 2018)

Held: Affirmed

- The standard of review for a TPR adjudication is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether these findings support the conclusions of law.
- Parental rights may be terminated on the ground of neglect pursuant to G.S. 7B-1111(a)(1), and neglect is defined at G.S. 7B-101(15). This ground must be based on evidence showing neglect at the time of the TPR hearing. When a child has been removed from his or her parent's custody, a prior adjudication of neglect may be considered, but "the trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of repetition of neglect" (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).
- Failure to make progress in completing a case plan is indicative of a likelihood of future neglect. Although respondent mother did not completely fail to work her case plan when she obtained appropriate housing, engaged in some domestic violence counseling, and took prescribed medication for her mental health disorders, the evidence, including social worker testimony, showed respondent's work on the case plan was sporadic and inadequate. Findings that showed mother's progress was limited and that some progress did not occur until after the TPR petition was filed was sufficient to determine the likelihood of future neglect.

In re R.D.H., III, ___ N.C. App. ___, 806 S.E. 706 (2017) (Westlaw still indicates the case is unpublished)

Held: reverse and remand

- The standard of review of a TPR ground is whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether the findings support the conclusions of law.
- When the child has been adjudicated neglected and is not in the parent's care, a legal conclusion of neglect for a TPR requires that the trial court determine neglect (as defined by G.S. 7B-101(15)) exists at the time of the TPR proceeding. The trial court must consider evidence of changed conditions and determine there is a likelihood of future neglect.
- Despite several unchallenged findings of fact that are binding on appeal, a challenged finding of fact related to the father's knowledge that the child was exposed to substance abuse and violence in her mother's care, was explicitly relied upon by the court in making its conclusion of neglect. That material finding is unsupported by the evidence. Related to that finding, the circumstances in this case do not present a situation where the man should know he is likely the father of the child. The man and child's mother had no relationship other than "casual meetings" that were sexual in nature, and the child is named after another man whom the mother identified as the possible father. It seems reasonable in these circumstances that the respondent waited until paternity testing result before beginning to take steps to gain custody of the child.
- The trial court is not required to make a finding of fact on every piece of evidence, but it must address the likelihood of repetition of neglect based on evidence of the respondent's current circumstances. In this case, there was evidence that at the time of the hearing the respondent desired that the child live with him and that he had a safe and stable home for the child to live in. There were no findings (positive or negative) about respondent's home or ability to care for the child at the time of the TPR hearing

Adjudication: Willfully leaving in foster care without making reasonable progress

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- G.S. 7B-1111(a)(2) authorizes a termination of parental rights when the parent willfully leaves the child in foster care for over 12 months and has not made reasonable progress to correct the conditions that led to the child's removal from home.
- The relevant 12 month period starts when the trial court enters a court order requiring that the child be removed from the home, which in this case was the nonsecure custody order, and ends when the TPR petition or motion is filed. This 12-month time period applies even when a respondent in the TPR was the "non-removal parent" and did not appear in the underlying abuse, neglect, or dependency action until after the child's adjudication and almost one year after the nonsecure custody order was issued.
- Willfulness exists when the respondent has an ability to show reasonable progress but was unwilling to make the effort; it does not require a showing of fault. Willfulness may be found even when the respondent has made some efforts to regain custody of his child as limited progress is not reasonable progress.
- The trial court determines the weight to give to evidence and the reasonable inferences to draw and reject from the evidence. The findings made by the trial court are supported by the evidence and are sufficient to support the TPR based on G.S. 7B-1111(a)(2). The findings show the father made limited progress by completing parenting classes but failed to make progress on a major component of his case plan, which was to obtain independent and appropriate housing.

Adjudication: Abandonment, Findings

In re D.E.M., ___ N.C. App. ___, 810 S.E.2d 375 (Feb. 6, 2018)

Held: Vacate and remand

- G.S. 7B-1111(a)(7) authorizes the termination of parental rights when a parent has willfully abandoned the juvenile for at least six months immediately preceding the filing of the TPR petition or motion. Abandonment implies conduct on the part of the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims and requires purpose and deliberation.
- The determinative period for a TPR based on G.S. 7B-1111(a)(7) is the six consecutive months immediately before the filing of the TPR petition or motion, although an earlier time period may be considered by the court in evaluating a parent's credibility and intention. Findings of fact that do not address the relevant time period are inadequate to support the conclusion of law that the ground exists. Here, the findings do not include any dates or refer to whether the action by the parent occurred prior to or during the relevant time period.
- Willfulness is not proved by incarceration alone, and an incarcerated parent is not excused from showing an interest in his or her child's welfare by whatever limited means are available. The court's findings must indicate it considered the limitations placed on the parent when determining whether the parent's actions are willful (e.g., what efforts could have been made; was the parent able but failed to provide contact, love, or affection to the child while incarcerated). Findings that the father was incarcerated during the relevant six-month period and had no contact with and provided no support to the juvenile were insufficient as they did not address what efforts he could have been expected to make.

- Rule 52 of the Rules of Civil Procedure apply to TPR orders. Upon remand, the trial court "must avoid the use of mixed findings of fact [with conclusions of law] and instead, separate the findings of fact from the conclusion of law."
    - *Author's note:* This opinion does not address prior appellate opinions that have held that mischaracterized findings of fact or conclusions of law are not a fatal error and are treated on appellate review as what they are, rather than what they are labelled.

Adjudication: Abandonment and Best Interests Disposition

In re D.E.M., ___N.C. App. ___, 802 S.E.2d 766 (2017), *aff'd per curiam,* ___N.C. ___, 809 N.C. 567 (March, 2, 2018)

Summary of Court of Appeals decision

Held: Affirmed

- Procedural History and Facts: In 2013, the paternal grandparents (petitioners in the TPR) were awarded primary legal and physical custody of the child through a Chapter 50 civil custody order. Respondent mother was awarded visitation in that custody order. In 2014, petitioners filed and obtained a TPR, which was vacated in 2016 by a court of appeals decision that held the petitioners lacked standing. During the pendency of that appeal, the TPR order was not stayed, and respondent mother did not visit with the child. In 2016, a new TPR petition was filed as the child had continuously resided with the petitioners for two years preceding this TPR petition. The TPR was granted, and respondent mother appeals.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights on the ground that the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition or motion. The relevant six month time period is September 2015 to March 2016. Abandonment implies conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child, and a parent's willful intent is a question of fact.
- Although there was a termination of mother's parental rights on appeal during the relevant time period, that order did not prohibit respondent from contacting the child. The order limited her options but did not prevent her from taking whatever measures possible to show an interest in her child. Respondent mother did not seek a stay of the TPR order that was on appeal, seek visitation with the child, send gifts or letters, or pay support. Similar to an incarcerated parent with limited options, mother's failure to attempt to show affection to her child is evidence of abandonment.
- The court may consider respondent mother's conduct outside the relevant 6 month time period when evaluating the respondent's credibility and intentions. Mother demonstrated almost no interest in the child since she lost custody of him in 2013. She did not contact the petitioners to schedule visitation after her single visit in December 2013 or send any gifts or support for the child despite being employed. Considering this history, the evidence of respondent's ongoing failure to visit, contact, or provide for the child during the relevant time period allows the court to reasonably infer that she acted willfully.
- G.S. 7B-1110(a) requires the court to consider and making findings of relevant best interests of the child factors when determining whether to TPR after a ground has been proved by clear and convincing evidence. One factor is the likelihood of the child's adoption. The child is placed with

petitioners as a result of a Chapter 50 civil custody order and not a pre-adoptive placement pursuant to G.S. Chapter 48. However, G.S. 48-2-301(a) allows for the placement requirement set forth in G.S. Chapter 48 to be waived for cause, such that the petitioners would have standing to file a petition to adopt the child. Additionally, they are the child's legal custodians and wish to adopt him. The court did not err in determining it was likely that petitioners will adopt the child.

Appeal: No Merit Brief; Rule 3.1

In re L.V., ___ N.C. App. ___ (July 3, 2018)

Held: Dismissed

Stay of mandate granted 7/17/18 (motion for en banc rehearing filed)

- Pursuant to N.C. App. Rule 3.1(d), a no-merit brief was filed by respondent mother's attorney. Although advised by her attorney that she has a right to file a pro se brief, respondent mother failed to do so. No issues were argued or preserved for review.
- In a footnote, the opinion quotes *State v. Velesquez-Cardenas*, ___ N.C. App. ___ (sl. op. concurrence at 3 filed 4/18/2018), "Rule 3.1(d) does *not* grant indigent parents the right to receive an *Anders*-type review of the record by our Court, to consider issues not properly raised."

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- Pursuant to Appellate Rule 3.1(d), respondent father's counsel filed a no-merit brief, notified his client of the right to file a pro se brief within 30 days, and requested that the court of appeals perform an independent review of the record for possible error. Counsel identified two issues: (1) whether the trial court erred in concluding a ground existed to terminate father's rights, and (2) whether the trial court abused its discretion in determining TPR was in the children's best interests.
- The TPR order includes (1) sufficient findings of fact that are supported by clear, cogent, and convincing evidence to conclude at least one ground, specifically G.S. 7B-1111(a)(1) neglect, existed, and (2) appropriate findings on each of the relevant G.S. 7B-1110(a) dispositional factors regarding bests interests.

In re M.J.S.M., ___ N.C. App. ___, 810 S.E.2d 370 (Feb. 6, 2018)

Held: Affirmed

- The standard of review for a TPR adjudication is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether these findings support the conclusions of law.
- Respondent father's counsel filed a no-merit brief pursuant to Appellate Rule 3.1(d) and asked the court to conduct an independent review of the record for possible error. The court of appeals was unable to find possible prejudicial error with the trial court's TPR order that included sufficient findings of fact supported by clear, cogent, and convincing evidence; a conclusion of at least one ground to TPR existed; and appropriate findings on each relevant dispositional factor in G.S. 7B-1110(a) in exercising discretion when assessing the child's best

interests.

Adoption

Consent: Unwed Father

In re Adoption of C.H.M., ___ N.C. ___, 812 S.E.2d 804 (May 11, 2018)

Held: reversed court of appeals decision that affirmed trial court's order requiring father's consent

- Facts: Respondent and child's biological mother were in a relationship that ended in November 2012. In January, 2013, mother marries another man. In February she notifies respondent that she is pregnant with his child but wants it kept a secret. Respondent states he intends to set aside money for the child but doesn't provide any support or details of his savings plan. Respondent and mother communicate for several months by Facebook message. Mother refuses respondent's offers of support. In one communication, mother tells respondent that she was sexually assaulted and the child may not be his even though mother was never sexually assaulted. In June, mother stops communicating with respondent and gives birth to the child. Mother and her husband execute relinquishments for the child's adoption, where mother fails to provide information about respondent and states her pregnancy resulted from a sexual assault. Child is placed with prospective adoptive parents who file the adoption petition on July 9, 2013. Respondent contacts mother at the end of July and learns mother gave birth to the child but is not told the child is an adoptive placement until November. The adoption agency is also informed in November of respondent's existence. Paternity testing indicates respondent is the father, and he files an objection to the adoption in December, 2013. At a hearing determining whether respondent's consent is required under G.S. 48-3-601(a)(2)(b)(4)(II), respondent testified he set aside money from ATM withdrawals and cashback purchases from WalMart, which he kept in a lockbox in his room. The lockbox was produced at the 2014 hearing, and it had $3,260. In his testimony, respondent estimated he placed $100-$140/month in the lockbox although he had no receipts or records indicating when or what amounts were placed in the lockbox. The trial court found respondent credible and that his payments were regular and consistent and a reasonable method of providing support for the minor child and mother, based on his $32,000/year income. The trial court ordered his consent was required, and the Court of Appeals affirmed that order. The Supreme Court granted discretionary review.
- Standard of Review: Conclusions of law, which involve a determination that requires the exercise of judgment or application of legal principles, are reviewable de novo on appeal. "[D]etermining whether sufficient evidence supports a judgment is a conclusion of law and will be reviewed as such." Sl. Op. at 10.
- "To protect the significant interests of the child, biological parents, and adoption parents, Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, establishes clear, objective tests to determine whose consent is required before a court may grant an adoption petition." Sl. Op. at 1. G.S. 48-3-601 enables a putative father to unilaterally protect his parental rights if he complies with the requirements of that statute. One of those requirements is that the putative father has provided, within his financial means, reasonable and consistent payments for the support of the mother and/or child before the adoption

petition is filed. G.S. 48-3-601(2)(b)(4)(II).

- At issue in this case is whether respondent (1) provided payments that are real and tangible for the support of the mother and/or child, (2) whether the payments were reasonable in light of respondent's financial means, and (3) whether the payments were made consistently *as shown by an objectively verifiable record*. His consent will not be required if he fails to prove all of the statutory requirements. The relevant time period is before the adoption petition was filed. Any evidence of actions taken after the filing of the petition is irrelevant, and consideration of such evidence is an error of law.
- Respondent has the burden to prove through competent evidence that he complied with each statutory requirement. Looking to *In re Anderson*, 360 N.C. 271 (2006), the Court "emphasized the importance of a *verifiable payment record* to establish that a putative father made reasonable and consistent payments." Sl. Op. at 15 (emphasis added). As a matter of law, respondent's evidence was insufficient to show he made payments during the relevant time period (before the petition was filed) or that each payment was reasonable and consistent with his financial means during the relevant statutory time period. Respondent's testimony was uncorroborated. He conceded that he did not keep records and did not really know how much money was placed in the lockbox during the relevant time period. General bank statements and the lump sum amount presented at the trial in 2014 do not provide an objectively verifiable record showing consistently reasonable payments made during the relevant time period (before the petition was filed). Because respondent failed to prove he complied with the objective statutory requirements, his consent is not required.
- Dissent: Disagreeing with the standard of review employed by the majority, the Court should have deferred to the trial court's findings of fact when those findings of fact are supported by competent evidence. The evidence was sufficient to support the extensive trial court findings, which supported the conclusion of law that the respondent's consent was required. The majority's decision to require record-keeping or a formal accounting of payments is not supported by statute or case law.
- Note: This opinion does not address whether the method of placing money in a special location in respondent's home is a "payment" under the statute. It also does not address the additional statutory requirements of acknowledging paternity and visiting or communicating (or attempting to) with the mother and/or child.

Consent: Revocation Period

In re Ivey, ___ N.C. App. ___, 810 S.E.2d 740 (Feb. 6, 2018)

Held: Affirm

- Relevant Timeline and Facts:
  - 8/31/2016: infant born
  - 9/1/2016: mother signs Consent to Adoption, which includes language regarding 7-day time period to revoke and to whom the revocation must be sent, and is notarized with the certification "to the best of [the notary's] knowledge and belief…"
  - 9/14/2016: mother's attorney delivers letter to prospective adoptive parents revoking consent and stating she never received a copy of the consent document
  - 9/29/2016: mother received copy of the consent document from her medical file at the

hospital
  - 10/3/2016: adoption petition filed
  - 10/4/2016: mother files revocation with the person designated in the consent - the clerk of superior court
  - 11/15/2016: district court enters order in a consolidated declaratory judgment action seeking declaration that the consent is invalid and the adoption proceeding; the order dismisses the adoption proceeding after finding (based on evidence presented) that the mother did not receive a copy of the consent document until 9/29/2016 and concluding the consent statute requires a copy of the document be left with the person consenting and that mother's revocation was timely when she filed it with the designated person within 7 days of receiving her copy of the consent document
- Holding in case of first impression: G.S. 48-3-605 requires that an original or copy of a signed consent to adoption be provided to the parent who has signed the document, and the 7-day time period to revoke the consent under G.S. 48-3-608 does not begin to run until the parent who signed the consent is provided with an original or copy of the written consent.
- In reaching this holding, the court of appeals looked to various statutes governing adoptions and cited various cases to discuss its standard of review. Issues of statutory construction are reviewed de novo. A statute that is clear on its fact must be enforced as written. The plain and definite meaning of clear and unambiguous text must be given, especially in the context of an adoption, which is purely a statutory creation. Every word of a statute is given effect as it is presumed the legislature carefully chose each word used. A fundamental rule of statutory construction requires that statutes in pari materia are construed together and compared with each other.
- The court of appeals looked to four statutes when determining the consent is effectuated when the consenting parent receives an original or copy of the signed consent, which provides the parent with the necessary information to revoke her or her consent:
  - The procedures for consent under G.S. 48-3-605, which requires the consent be signed under oath and includes a certification by a notary with a statement that to the best of the notary's knowledge of belief, the parent executing the consent has been given an original or copy of the fully executed consent.
  - G.S. 48-3-606 requires the consent contain the name of the person and address where the notice of revocation may be sent.
  - G.S. 48-3-608 allows for the revocation of the consent within 7 days of its execution and requires the written revocation be delivered "to the person specified in the consent."
  - The statutory purposes at G.S. 48-1-100 are to protect minors from unnecessary separation from their original parents and to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption.
- The finding by the trial court that mother did not receive an original or copy of the consent at the time it was signed does not contradict the certification by the notary, which was based on the notary's "knowledge and belief." It is possible that the notary believed or to the best of his knowledge thought the consent was left with the mother without any actual knowledge of that fact and that no document had in fact been delivered to mother.

Civil Case Related to Child Welfare

Entry of Order

McKinney v. Duncan, ___ N.C. App. ___, 808 S.E.2d 509 (Dec. 5, 2017)

Held: Dismissal of appeal

- Facts: On July 5, 2016, the court entered two no contact orders (one for each plaintiff), neither of which were appealed. In October 2016, a consent order on a motion to show cause was entered. A second show cause proceeding was initiated and a hearing occurred on December 12, 2016. The trial judge signed orders for each plaintiff, finding the defendant was in civil contempt of the July 2016 and October 2016 orders and ordering the means by which he could purge himself of the contempt. Defendant appealed.
- Rule 58 states a "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." Although the trial judge rendered her judgment and subsequently reduced it to writing and signed it, "these orders do not bear a file stamp or other indication that they were ever filed with the clerk of court." Citing *In re Thompson*, 232 N.C. App. 224 (2014), the record fails to establish the orders were entered under Rule 58. Relying on *In re Estate of Walker*, 113 N.C. 419 (1994), "a properly entered ordered is essential to vest the Court [of Appeals] with subject matter jurisdiction over an appeal." The orders were not entered and the court of appeals has no jurisdiction to review them.

Time to Appeal

Brown v. Swarn, ___ N.C. App. ___, 810 S.E.2d 237 (Jan. 16, 2018)

- Facts: Court orally rendered its order on August 2, 2016 and entered the order on August 26, 2016. Appellant filed written notice of appeal on March 13, 2017. Respondent argued the appeal should be dismissed as untimely. The record does not contain a certificate of service of the order on appellant or other evidence of when the appellant received actual notice that the order was entered.
- Holding: When there is no certificate in the record showing the appellant was served with the judgment, the appellee (and not the appellant) has the burden of showing the appellant received actual notice more than thirty days before filing notice of appeal to warrant a dismissal of the appeal as untimely.
- Note, there is a line of cases that hold that an appeal is untimely where the evidence in the record shows the appellant received actual notice of the judgment more than thirty days before noticing the appeal.

Chapter 50 Custody: Standing, Acting Inconsistently with Parental Rights

Moriggia v. Castelo, ___ N.C. App. ___, 805 S.E.2d 378 (October 17, 2017)

Held: Vacate and remand for further proceedings

- Facts: Appeal of order granting defendant's motion to dismiss custody action based on plaintiff's lack of standing (Rule 12(b)(1)). The parties were in a committed same-sex relationship and decided to have a child. The couple signed a contract, as the "recipient couple", with Carolina Conceptions acknowledging that any child resulting from artificial insemination will be their legitimate child in all aspects. They each contributed a portion toward the cost of the procedure.

The defendant became pregnant via in vitro fertilization by anonymous donor egg and donor sperm. Plaintiff attended the prenatal appointments and parenting classes with defendant, helped prepare the home for the baby, and was present at the birth. Plaintiff's biological daughter (born before the parties were involved) was recognized by both parties as the child's big sister. The child was born in 2013, and defendant changed her mind as to plaintiff's role as a parent insisting that only defendant be treated as the child's mother. The relationship between the parties ended in 2014, and in 2015 plaintiff commenced the custody action. The trial court made numerous findings about the intentions and actions of the parties regarding the child, both before and after the birth, including that after the birth, defendant changed her mind regarding co-parenting and did not voluntarily create a family unit or cede her parental authority to plaintiff. The trial court concluded the plaintiff lacked standing because although she was a loving caretaker for the child with a substantial relationship, defendant did not act inconsistently with her parental rights giving plaintiff a right to claim third party custody.

- Sua sponte, the court of appeals held that the trial court in making its determination about whether a parent's conduct is inconsistent with his or her constitutionally protected status must make findings applying the clear, cogent, and convincing evidence standard. That standard "is integral to the jurisdictional determination".
- "Standing *is* an issue of subject matter jurisdiction... subject matter jurisdiction is *the* basis for motions under Rule 12(b)(1)". (emphasis in original) (citations omitted). Reviews of a standing is de novo. G.S. 50-13.1(a) authorizes "any parent, relative, or the person, agency, organization, or institution claiming the right to custody of a minor child" to initiate a custody proceeding. Federal and state constitutions place limitations on the application of G.S. 50-13.1 when a third party (a non-parent) is in a custody dispute with a parent. The third party must allege facts demonstrating a sufficient relationship with the child and that the legal parent acted inconsistently with his or her constitutionally protected status as a parent.
- There is no bright-line test when determining if a parent acted inconsistently with his or her constitutionally protected status; instead, the decision is made on a case-by-case basis. The acts by the parent need not be "bad acts that would endanger the children". (*citing Heatzig v. MacLean*, 191 N.C. App. 451, 455 (2008). The trial court may consider defendant's actions prior to the child's birth as they are relevant to determining her intention. Those actions alone are not controlling but must be considered with defendant's actions taken after the child's birth. The issue is whether the parent intended for the non-parent partner to have a parental role prior to when they become estranged. Whether the parties marry is not determinative. The facts in this case tend to show defendant's intent to form a family unit with the parties as co-parents even though defendant's intentions changed later.
- Plaintiff also appealed the trial court's limitation plaintiff's presentation of her case to one hour. Plaintiff waived that argument by not requesting additional time (as permitted by the local rule) or objecting. There was no abuse of discretion.

Involuntary Admission of a Minor: Procedural Issues, Subject Matter Jurisdiction

**There are four separate appeals that have been consolidated.*

In re P.S., ___ N.C. App. ___, 807 S.E.2d 631 (Nov. 7, 2017)
In re L.T., ___ N.C. App. ___ (Nov. 7, 2017)
In re N.J., ___ N.C. App. ___ (Nov. 7, 2017)

In re R.J., ___ N.C. App. ___ (Nov. 7, 2017)

Held: Vacated in part (subject matter jurisdiction for one appeal); affirmed in part (three of the appeals)

- This opinion involves four consolidated appeals regarding procedural issues, some of which implicate subject matter jurisdiction, for the readmission of minors who are voluntarily admitted to an inpatient mental health facility.
- **Violation of statutory right to timely judicial review of admission.** In all four cases, the minors were admitted to and denied their right to a judicial review within 15 days of their respective initial admissions as provided for by G.S. 122C-224. The minor respondents filed motions to dismiss based on the failure to comply with the statutory time requirement to hold a judicial review. The motions were denied. Minors who are voluntary committed to an inpatient treatment facility by his or her parent's or guardian's affirmations are entitled to due process protections. *See In re A.N.B.*, 232 N.C. App. 406 (2014). The statutory scheme in G.S. Chapter 122C that governs these admissions attempts to balance the needs of the minor who is mentally ill and in need of treatment with the rights of the parent or guardian and with the minor's rights to due process. *See In re Lynette H.,* 323 N.C. 598 (1988). Although the minors' statutory rights to a timely judicial review were denied, the trial court did not err in denying the motions to dismiss. The review hearings did take place, and the law does not require a dismissal as that result would deny treatment to the minors for an indeterminate period of time regardless of whether they were in need of treatment.
    - *Note***:** Any potential civil remedies for the violation were not an issue in the appeal.
- **Subject matter jurisdiction.** Subject matter jurisdiction is conferred by statute or the North Carolina Constitution and cannot be conferred by consent or waiver. When subject matter jurisdiction is conferred by statute, the Court must follow the manner, procedure, or limitations required by the statute and not act beyond the statutory limits in excess of its jurisdiction. G.S. 122C-221(a) applies to the admissions of minors and states "a written application for evaluation or admission, signed by the individual seeking admission, is required." Additionally, for minors, "the legally responsible person" acts for the minor. The court's subject matter jurisdiction to concur in the minor's admission, therefore, requires the filing of an admission authorization form for a minor in need of treatment that is signed by the minor's legally responsible person.
    - The statute does not require the trial court to make an independent determination that the signatures on the admission authorization forms were from a legally responsible person with authority to admit the minor. When an admission authorization form, on its face, appears to comply with the statute, the court may presume the form was signed by a legally responsible person; however, this presumption may be rebutted by evidence to the contrary. In three of the appeals, the form contained a signature in the appropriate place on the form that indicated it was signed by a parent or guardian.
    - In the case of *In re N.J.*, the form was not signed by a legally responsible person. Instead, the form unambiguously stated it was signed by a representative of the mental health facility based on the verbal authorization of the minor's parent. Verbal consent is not sufficient under the statute; the court lacked subject matter jurisdiction as a result of the absence of the legally responsible person's signature on the admission authorization form.
- **Consent to Admission by Minor.** In *In re L.T.*, the minor consented to his readmission after a

brief colloquy with the court. The applicable statutes do not require that a specific procedure, such as a written waiver, be followed for the court to accept the minor's consent. Although a more detailed colloquy with the minor to ensure his consent was voluntary and fully informed would have been a better practice, the minor's due process rights were not violated when the court accepted his consent.

Criminal Case with Application to Child Welfare

Appellate Mandate and Trial Court Jurisdiction

State v. Singletary, ___ N.C. App. ___, 810 S.E.2d 775 (Feb. 6, 2018)

Held: Affirmed

- "The mandate from the appellate division issues on the day that the appellate court *transmits* the mandate to the lower court, not the day when the lower court actually *receives* it." (Emphasis in original). *See* Appellate Rule 32. In this case, the court of appeals opinion was filed on May 3, 2016, and the mandate issued 20 days later, May 23, 2016. The trial court had jurisdiction to act on the same day the mandate issued, May 23, 2016, even though the clerk did not receive the judgment and mandate until May 25, 2016.

Felony Obstruction of Justice by Parent; Accessory After the Fact; Failing to Report

State v. Ditenhafer, ___ N.C. App. ___, 812 S.E.2d 896 (March 20, 2018)

Held: No Error in part and reversed in part

There is a dissent re: accessory after the fact

- "The elements of felony obstruction of justice are (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud." A person obstructs justice when he or she "deliberately acts to subvert an adverse party's investigation of wrongdoing."
- The court's denial of defendant's motion to dismiss the obstruction of justice charge related to pressuring her daughter to recant was proper. When viewing the evidence in the light most favorable to the state, there was sufficient evidence, including her daughter's testimony, of the defendant's actions that pressured her daughter to recant the daughter's allegation of repeated sexual abuse by her adoptive father/defendant's husband with the willful intent to hinder the investigation of the abuse. Defendant directed her daughter to state she was not sexually abused and coached her daughter as to what to say. When her daughter did not recant, Defendant punished her, verbally abused her, and turned her family against her.
- On the second charge of obstruction of justice alleging defendant denied DSS (child protection) and law enforcement access to her daughter, the state presented no evidence that defendant denied a request by either agency to interview her daughter. Several interviews with the daughter occurred, and although Defendant was present during many of those interviews, there was no request for Defendant to leave. If defendant would have refused any such request, DSS or law enforcement could have sought a court order to compel defendant's nonattendance at the daughter's interview. *See* G.S. 7B-303 regarding DSS petition for obstruction/interference. As a parent, she had the right to attend the interviews and unilaterally end the one interview

she did end. The court erred in denying the motion to dismiss for insufficient evidence; conviction on this charge vacated.

- The elements of accessory after the fact are "(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." The Defendant's failure to report the crime, which is a mere act of omission and not an affirmative act, does not render her an accessory after the fact under G.S. 14-7. There were no allegations in the indictment about defendant's affirmative acts, which would support an accessory charge, that involved defendant's destruction of physical evidence and telling the investigators her daughter was lying. The opinion recognizes that defendant could have been but was not charged with a misdemeanor for failing to report suspected abuse as provided for in G.S. 7B-301.

Hearsay Exceptions – Child's Statements

State v. Blankenship, ___ N.C. App. ___ (April 17, 2018)

Held: No reversible error in admitting hearsay statements
temporary stay allowed May 3, 2018; PDR filed

- Facts: Defendant was convicted of rape of a child by an adult offender, taking indecent liberties with a child, and sexual offense with a child by an adult offender. He appealed on various issues, one of which challenges the admission of the child victim's hearsay statements.
- The Child's Hearsay Statements: The state filed an opposed motion to admit the child victim's hearsay statements through the other exceptions clauses of Rules of Evidence 803 and 804. The parties stipulated to the child's unavailability due to lack of memory for the purposes of the hearsay exceptions. The child was picked up from defendant's home by her grandparents. As she was being placed in her car seat, she stated to her grandparents "Daddy put his weiner on my coochie," and when asked what a coochie was, she pointed to her vagina. The child was acting normally when she made the statement, and her grandmother was not concerned about the child's mental or physical condition when she picked her up from the home. The court determined the statements were admissible as a present sense impression, excited utterance, and a residential exception. Rules 803(1), (2) and 804(b)(5). The child was taken to the emergency department, where she made a similar statement to the nurse and added "nothing hurt." Those statements were admitted as statements made for the purpose of medical diagnosis or treatment. Rule 803(4). The child again made a similar statement and stated "I bleed. I have blood" to a victim advocate/forensic interviewer who interviewed her 12 days later. That statement was admitted under the residual exception in Rule 804(b)(5). Approximately one month later, the child made similar statements to a relative whenever the relative changed her diaper. These statement were admitted as a present sense impression and statement of then existing mental, emotional, or physical condition and the residual exception. Rules 803(1), (3) and 804(b)(5).
- Standard of Review: The appellate court reviews de novo the trial court's determination as to whether an out-of-court statement constitutes hearsay. The statement's admission under any hearsay exception other than the residual exception is reviewed for plain error if no objection was made at trial and for prejudicial error if an objection was made at trial. Admission under the residual exception is reviewed for an abuse of discretion.

- Exited Utterance (Rule 803(2)) are statements related to a startling event or condition made when the declarant was under the stress of the excitement caused by the event or condition and must be spontaneous. Although the statement was spontaneous, there was no evidence that showed the declarant child was under stress when she made the statement. Instead, she was described as "normal" and "happy" when she made the statements. The court erred in admitting the statements.
- Present Sense Impression (Rule 803(1)) is a statement describing an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Immediately thereafter is not defined by a rigid rule regarding the amount of time that has passed. There was no evidence of exactly when the sexual misconduct occurred but instead the state alleged the acts occurred during the month (versus day the child was picked up and made the statement). Without evidence of the time of the event, the court erred in admitting the statement as a present sense impression.
- Statement of Purpose of Medical Diagnosis or Treatment (Rule 803(4)) involves a two-part inquiry: (1) were the statements made for the purpose of medical diagnosis and treatment and (2) were they reasonably pertinent to diagnosis or treatment. When determining the declarant's intent in making the statements, the trial court must consider all the objective circumstances surrounding those statements *State v. Hinnant*, 351 N.C. 277 (2000). Given the child's young age, it is a close call as to her intent. Rather than address whether there was error in admitting the statement, the defendant did not show prejudicial, reversible error given the proper admission of substantially identical statements under the residual hearsay exception.
- Residual Exception (Rule 804(b)(5)) allows for hearsay and requires a six-part test: "(1) has proper notice been given; (2) is the hearsay covered by any of the exceptions listed in Rule 804(b)(1)-(4); (3) is the hearsay statement trustworthy; (4)is the statement material; (5) is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) will the interests of justice be best served by admission." *State v. Triplett*, 316 N.C. 1, 9 (1986). The trial court erred in failing to include the factors (2) (whether the statement was admissible under another exception). When determining trustworthiness (the 3rd factor), the court should consider four factors: "(1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Nichols*, 321 N.C. 616, 624 (1988). Although the court concluded that statement possessed an equivalent circumstantial guarantee of trustworthiness, it failed to include any of the four findings. When the trial court fails to make the proper findings regarding the statement's trustworthiness, the appellate court "can 'review the record and make our own determination.' " State v. Valentine, 357 N.C. 512, 518 (2003). After considering the four factors, the appellate court concluded the statements do have a sufficient guarantee of trustworthiness. There was no abuse of discretion in admitting the statements.

Rule of Evidence 412; STDs

State v. Jacobs,___ N.C. ___, 811 S.E.2d 579 (April 6, 2018)

Held: reverse decision of court of appeals and remand for new trial (there is a dissent)

- Facts: Defendant appeals conviction for first-degree sex offense with a child (Defendant is the father of the 13-year-old victim). The state filed motions in limine under G.S. 8C-1, Rule 412 to

prohibit the defense from referencing two STDs that were diagnosed in the victim but were not diagnosed in the defendant. The evidence was ruled inadmissible. During his case-in-chief, Defendant submitted an offer of proof pursuant to Rule 412, which was a medical expert report that previewed potential expert testimony of the implications of the STD evidence. After considering the offer of proof, the trial court reaffirmed its earlier decision to exclude the evidence.

- Rule 412 of the NC Rules of Evidence, referred to as the Rape Shield Statute, makes the complainant's sexual behavior irrelevant because of its low probative value and high prejudicial effect except in four narrow situations, one of which is "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." Rule 412(b)(2).
- The excluded STD evidence addressed in Defendant's offer of proof fell within the Rule 412(b)(2) exception. The results and report by a proposed expert who is a certified specialist in infectious diseases "affirmatively permit an inference that defendant did not commit the charged crime [and]… diminishes the likelihood of a three-year period of sexual relations between defendant and [the child]." The state's argument that the defendant offered the evidence that inferred sexual activity by the victim so as to unnecessarily embarrass and humiliate her was rejected by the supreme court, which found the purpose of the evidence appears to be what the defendant purports it to be: support for his claim that he did not commit the crime.

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In re A.P.: A County DSS Director's Standing to File an A/N/D Petition Is Not as Limited as Previously Held by the Court of Appeals

Author : Sara DePasquale

Categories : Child Welfare Law

Tagged as : abuse neglect and dependency, best interests of the child, department of social services, Director, Juvenile Code, standingstatutory interpretation

Date : June 14, 2018

Last year, the Court of Appeals held that *only* a director (or authorized representative) of a county department of social services (DSS) *where the child resided or was found* at the time a petition alleging abuse, neglect, or dependency (A/N/D) was filed in court had standing to do so. In re A.P., 800 S.E.2d 77 (2017). Because standing is jurisdictional, when a county DSS without standing commences an A/N/D action, the district court lacks subject matter jurisdiction to act. *Id.*; see my earlier blog post discussing this holding here. This holding had an immediate impact on A/N/D cases throughout the state. Because subject matter jurisdiction can be raised at any time, both new and old cases were dismissed either through a voluntary dismissal by DSS or a motion to dismiss filed by another party in the action. After dismissal, new petitions for these same children were filed, sometimes after a child was transported to a county for the purpose of giving the county DSS director standing to commence the action. The North Carolina Department of Health and Human Services (DHHS) notified county DSS's that the holding in *In re A.P.* superseded DHHS policy on conflict of interest cases, recognizing that contrary to the policy, a county DSS with a conflict may be the only county DSS with standing to file an A/N/D action after a partner DSS determines there is a need to file a petition because of abuse, neglect, or dependency. *See* CWS-28-2017.

Last month, the North Carolina Supreme Court reversed the Court of Appeals holding, stating the statutory interpretation was too restrictive and contrary to children's best interests. In re A.P., 812 S.E.2d 840 (2018).

Refresher on the Facts

Three counties were involved in this case: Cabarrus, Rowan, and Mecklenburg. At the time of A.P.'s birth, she lived with her mother in Cabarrus County. When A.P. was 2-months-old, a report was received by the Cabarrus County DSS. A.P.'s mother agreed to a safety plan that allowed A.P. to live with a safety resource in Rowan County while she (mother) received mental health treatment in a residential setting in Mecklenburg County. Upon discharge, A.P. and her mother lived together in Mecklenburg County, and Cabarrus County DSS transferred the case to Mecklenburg County DSS. A new report was received by Mecklenburg County DSS, and A.P. returned to the home of the safety resource in Rowan County. While A.P. was in Rowan County, her mother temporarily resided in South Carolina and Mecklenburg County and eventually, she reported that she was living in Cabarrus County. Mecklenburg County DSS was contacted by the safety provider in Rowan County because she was no longer able to care for A.P. Mecklenburg County DSS requested that Cabarrus County DSS accept a case transfer, but the request was declined. Mecklenburg County DSS filed the petition alleging neglect and dependency. After the adjudication and disposition orders were entered, A.P.'s mother appealed. She argued Mecklenburg County DSS lacked standing to commence the action because at the time the petition was filed, A.P. did not reside in and was not found in Mecklenburg County. The Court of Appeals agreed and vacated the trial court's order. The NC Supreme Court reversed the Court of Appeals decision.

A Holistic Statutory Interpretation Is Required

In its opinion, the NC Supreme Court discussed how to interpret statutory text after stating that the "rigid interpretation of isolated provisions in the Juvenile Code is unsupported by the whole of the statutory text and creates jurisdictional

requirements beyond those which the legislature intended to impose." *Id.* at 843. A court should "…follow the whole-text cannon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.* at 843 (quoting *N.C. Dep't of Transp. V. Mission Battleground Park, DST*, 810 S.E.2d 217, 222 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012))).

The Court of Appeals' application of the definition of director found at G.S. 7B-101(10), which refers to "the county in which the juvenile resides or is found," to the statute that states "only *a* county director…. may file a petition…." (G.S. 7B-401.1(a); emphasis in opinion) restricts who may file a petition to specific county DSS directors. In looking at the Juvenile Code as a whole, the NC Supreme Court concluded that "…the legislature did not intend to constrain departments of social services this way." *In re A.P.*, 812 S.E.2d at 841.

In its opinion, the NC Supreme Court looked to the introductory language of the definitions statute, G.S. 7B-101, which states the words have the following meaning "*unless the context clearly requires otherwise*" and concluded the context requires otherwise. (emphasis supplied in opinion). In making its conclusion, the NC Supreme Court looked to

- various provisions in the Juvenile Code that distinguished between "*a* county director," which refers to directors generally, and "*the* county director," which refers to a specific county director and cited the language of G.S. 7B-401.1(a), which states "*a* county director of social services" may file a petition, and
- provisions in the Juvenile Code that suggest a county DSS director may file a petition even though the child is not a resident of that county (*see* G.S. 7B-302(a2), -400(b), -402(d)).

In looking at a holistic reading of the applicable statutes, I wonder if the NC Supreme Court could have also examined the issue in the context of the structure of North Carolina's child welfare system by also looking at G.S. Chapter 108A. North Carolina's child welfare system is state-supervised and county administered. *See* G.S. 108A-14(a), -74. The system consists of 100 counties and DHHS, with DHHS designated as the single state agency responsible for administering or supervising the administration of social services programs, including child welfare services. G.S. 108A-71, -74. The same applicable laws (e.g., the Juvenile Code and the NC Administrative Code) apply to each county and DHHS. North Carolina appellate courts have recognized in several child welfare contexts that the county DSS operates as an agent of the state. *See,* e.g., *Gammons v. N.C. Dep't of Human Res.*, 344 N.C. 51 (1996) (child protective services); *Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683 (1979) (foster care); *In re N.X.A.*, 803 S.E.2d 244 (2017) (verification requirements for an A/N/D petition); *In re Z.D.H.*, 184 N.C. App. 183 (2007) (appeal in a juvenile case); *Parham v. Iredell County Dep't of Soc. Servs.*, 127 N.C. App. 144 (1997) (adoption). In interpreting the provisions of the Juvenile Code, would the analysis have been different, supported, or weakened by also addressing the structure of the system as set forth in G.S. 108A when multiple counties are involved with one family?

The Child's Best Interests Is the Polar Star

The NC Supreme Court's interpretation was also guided by its "… oft-recited recognition that 'the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star.' " *In re A.P.,* 812 S.E.2d at 845 (quoting *In re M.A.W.*, 370 N.C. 149, 152 (2017)). In response to the argument that a county DSS director would have standing by simply requesting the child be transported to that county so that the child is "found" there, the NC Supreme Court concluded this interpretation is contrary to a child's best interest. The court pointed out that

- subject matter jurisdiction could be defeated by a parent or caretaker moving the child between counties, and
- because subject matter jurisdiction could be raised at any time, countless juvenile orders across the state could be attacked and needlessly delay permanency for children who are alleged to be abused, neglected, or dependent.

Don't Forget the G.S. 7B-302 Criteria

Although *In re A.P.* makes it clear that a county DSS director's standing is not limited to the child's residence or location at the time the A/N/D petition is filed, there are certain conditions a county department must satisfy before the district court has subject matter jurisdiction to proceed in an A/N/D action. Specifically, the procedures of G.S. 7B-302(c) or (d) must be followed, which require

- an assessment (sometimes referred to as an investigation) and
- a finding (or substantiation) that abuse, neglect, or dependency has occurred.

In re S.D.A., 170 N.C. App. 354, 361 (2005) (vacating adjudication and disposition orders and remanding for dismissal due to lack of subject matter jurisdiction after determining that in a conflict of interest case where one county DSS referred the assessment to a second county DSS, and there was no finding of abuse or neglect by either county DSS, the first county DSS "lacked the power to invoke the jurisdiction of the court").

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Show Me the Money: Verification of Adequate Resources Required when Ordering Custody or Guardianship to a Non-Parent in an A/N/D Action

Author : Sara DePasquale

Categories : Child Welfare Law

Tagged as : abuse neglect and dependency, adequate resources, competent evidence, custody, dispositional alternatives, guardianship, Juvenile Codeverification

Date : October 25, 2017

If you're a sports fan like me, you probably like sports movies. And if you like sports movies, you know the famous line from Jerry Maguire, "show me the money!" That line has some application to abuse, neglect, or dependency cases – specifically when a court is going to order custody or guardianship of a child who has been adjudicated abused, neglected, or dependent to a person who is not the child's parent. The Juvenile Code requires that the court first verify that the proposed custodian or guardian "will have adequate resources to care appropriately for the juvenile." G.S. 7B-903(a)(4), -906.1(j), -600(c).*

The Dispositional Alternatives of Custody or Guardianship

A child's disposition is based on the child's best interests and involves services to meet the child's needs and to strengthen the family so that the child may return home when it is safe to do so. *See* G.S. 7B-100, -900. Until and unless it is safe for the child to return home, the court considers various "dispositional alternatives", which address custody and placement options outside of the parents' home(s), as the case proceeds through the dispositional stage. *See* G.S. 7B-903. Two of the enumerated dispositional alternatives are (1) custody to a relative or other suitable person who is not the child's parent and (2) guardianship of the person. G.S. 7B-903(a)(4) & (5); *see* G.S. 7B-600.

In an abuse, neglect, or dependency case, there are different dispositional phases: initial disposition, review, and permanency planning. See G.S. 7B-901, -906.1. The various dispositional alternatives are available at any dispositional hearing. G.S. 7B-903(a), -906.1(i). This means custody or guardianship may be ordered as a temporary measure in the initial or review phase or as the child's permanent plan.

Verification of Adequate Resources

Before the court orders custody to an individual who is not the child's parent or appoints a guardian of the person to the child, the Juvenile Code requires the court to verify that the person receiving custody of or being appointed as guardian for the child will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4), -906.1(j), -600(c).

Findings and Evidence

Specific findings for the verification are not required, and the court does not have to make detailed and extensive findings of the proposed guardian's or custodian's resources. *In re P.A.*, 241 N.C. App. 53 (2015); *see* In re T.W., 796 S.E.2d 792 (2016). However, there must be sufficient competent evidence in the record to support the court's determination that a proposed custodian or guardian will have adequate resources to appropriately care for the child. *In re T.W.; In re P.A.*

Dispositional hearings may be informal, and the rules of evidence are relaxed. The court may hear and consider any evidence, including hearsay and written reports, that the court finds to be reliable, relevant, and necessary to determine the child's needs and the most appropriate disposition. The court considers information from the parents, the child and child's GAL, the guardian or custodian, the person providing care for the child, and any other person that will aid in the court's review. *See* G.S. 7B-901(a), -906.1(c). Evidence the court may consider when determining if the proposed guardian or custodian has adequate resources includes reports and home studies conducted by DSS and/or the child's GAL. *See* In re J.E., 182 N.C. App. 612 (2007).

Sufficiency of the Evidence

The trial court must make an independent determination based on the evidence presented that the resources available to the potential guardian or custodian are adequate. *In re P.A.*

Last month, the court of appeals recognized that the case law examining a trial court's determination of adequate resources was made "from numerous angles, none of them precisely on point". In re N.H., ___ N.C. App. ___, ____ (Sept. 19, 2017). Even in that opinion, consensus was lacking as there was a concurrence and a dissent.

Given the lack of clarity or a bright-line rule on what is required to prove adequate resources, the parties and the trial court must figure out what is sufficient. It is difficult to know. Recent cases provide some guidance for the courts and parties to follow.

1. **Evidence of income and expenses preferred (not required)**. Evidence that shows whether the monthly income meets the monthly household expenses allows the court to make a determination of whether the proposed guardian or custodian will have adequate resources. *See* In re K.B., 791 S.E.2d 669 (2016) (originally unpublished) (vacating order as there was no evidence regarding amount of income or expenses); *In re N.H.* (affirming order based on evidence that the proposed guardian's income (without addressing the specific amount) covers her bills if she plans to save, which she intended to do; note the dissent, which stated the evidence of inadequate funds and a vague assurance she could make ends meet was insufficient). *See also In re T.W.* (reversing order; evidence showed aunt was unemployed and needed more financial support but was looking for work and provided a vague assurance of finding employment).
2. **Testimony from proposed guardian or custodian helpful**. Sworn testimony by the proposed guardian or custodian constitutes competent evidence in the record that may support the court's determination. *Compare In re N.H.* (sworn testimony taken) to *In re P.A.* (unsworn testimony by proposed guardian) and *In re J.H.*, 780 SE 2d 228 (2015) (no testimony by proposed guardian). Note that testimony from the proposed guardian or custodian is not required as other evidence may be admitted, such as a DSS social worker testimony or report.
3. **Subjective opinion insufficient.** A proposed guardian's or custodian's subjective conclusory opinion that he or she has adequate resources without any evidence of resources is insufficient. *In re P.A.*
4. **Past care alone insufficient.** Evidence that solely consists of the child having been successfully maintained in the proposed guardian's or custodian's home in the past is insufficient. The statutory language contemplates the proposed guardian's or custodian's ability to care for the child in the future, as it requires verification that the person "will have adequate resources." *In re N.H.*, (Dillon, J. concurring). *See In re T.W.* (reversing order awarding custody to aunt who had maintained child successfully in her home but was currently struggling financially); *In re J.H.* (reversing guardianship order; evidence through DSS and GAL reports that child had been in a successful kinship placement for 10 months, his needs had been met and there were no current financial or material needs was insufficient to support independent determination by court).
5. **Financial difficulties not a bar**. During a kinship placement, the proposed guardian experienced a short-term layoff; however, the court found he had adequate resources based on the evidence before it and further noted his seeking Temporary Assistance for Needy Families (TANF) benefits during that time demonstrated his preparation for the financial burden of caring for the child. *In re C.P.*, 801 S.E.2d 647 (2017). In another case, the determination of adequate resources was affirmed even with evidence of the proposed guardian's past financial difficulties that caused her to use her savings and gift cards from DSS. *In re N.H.*

These decisions are hard as oftentimes resources are limited for the proposed guardian or custodian, who is oftentimes a child's relative. If a determination is appealed, the reviewing court will not weigh and compare the evidence (even if it is a close call) but will instead look to see if there was competent evidence as permitted under the Juvenile Code to support the trial court's findings. *See In re N.H.* Make sure the evidence is admitted so that the court can make a determination.

* *The Juvenile Code also requires the court verify the proposed guardian or custodian understands the legal significance of the appointment or placement. This second requirement is beyond the scope of this post.*

And Now a Two-Step: Eliminating Reunification as a Permanent Plan in an A/N/D Proceeding

Author : Sara DePasquale

Categories : Child Welfare Law

Tagged as : abuse neglect and dependency, department of social services, Juvenile Code, permanency planning reunification efforts

Date : May 3, 2018

First came the cease reunification efforts shuffle resulting from 2015?2017 statutory changes to the NC Juvenile Code and published appellate decisions interpreting those changes (see my last blog post, here). And now, *In re C.P.*, ___ N.C. App. ___ (March 6, 2018) has created the elimination of reunification as a permanent plan two-step.

Permanency Planning and Reunification

The Juvenile Code recognizes that children who have been adjudicated abused, neglected, and/or dependent need safety, continuity, and permanence. G.S. 7B-100(3). The Juvenile Code also recognizes that children should not be unnecessarily or inappropriately separated from their parents, but when a child cannot be returned home, he or she should be placed in a safe, permanent home within a reasonable period of time. G.S. 7B-100(4), (5). When an abuse, neglect, or dependency proceeding is at the permanency planning stage, the Juvenile Code requires the trial court order concurrent permanent plans, with a primary and secondary plan identified, until a permanent plan has been achieved. G.S. 7B-906.2(a), (a1), (b). There are six possible permanent plans, one of which is reunification. G.S. 7B-906.2(a). Reunification is the child's placement in either parent's home (regardless of whether the child was removed from that home) or the home of the custodian or guardian from whom the child was removed by court order. G.S. 7B-101(18b); *see also* G.S. 7B-906.1(d)(3). Before the trial court can eliminate reunification as a primary or secondary plan, it must make statutory findings addressing reunification efforts. G.S. 7B-906.2(b); *see* G.S. 7B-901(c). Reunification is the only permanent plan that requires such findings. *See* G.S. 7B-906.2(b).

Ceasing Reunification Efforts Does Not Eliminate Reunification

In my last blog post, I introduced the "cease reunification efforts shuffle," which reviewed the timing of and some of the findings that are required for when a court may cease reunification efforts in an abuse, neglect, or dependency proceeding. An order ceasing reunification efforts does not automatically eliminate reunification as a permanent plan. For example, when the court, at initial disposition, orders that reunification efforts are not required, the court must schedule a permanency planning hearing within 30 days to address and order permanent plans. G.S. 7B-901(c), (d). Additionally, the court of appeals has recently published two opinions that distinguish the cessation of reunification efforts from the elimination of reunification as a permanent plan. *See In re C.P.,* ___ N.C. App. ___ (March 6, 2018); In re C.L.S.B., 803 S.E.2d 429 (2017) (originally unpublished but subsequently published).

The Two-Step

In *In re C.P.*, the court of appeals establishes a two-step process at permanency planning for when reunification may be eliminated: (1) the first permanency planning hearing and (2) all subsequent permanency planning hearings. The opinion raises several unanswered questions, which are posed in this post. But first, the two-step.

Step One: The First Permanency Planning Hearing – Reunification Is Required

In *In re C.P.* the court of appeals addressed the mother's challenge to an adjudication, initial disposition, and permanency planning hearing. The court of appeals rejected mother's challenge that the trial court could not hold the adjudicatory, initial dispositional, and first permanency planning hearings on the same day after concluding the Juvenile Code does not forbid this practice. But, the court of appeals agreed with the mother that the trial court erred when it failed to order reunification as a concurrent plan during that *first* permanency planning hearing. The court of appeals held that that at the *initial* permanency planning hearing, the trial court must order reunification as a primary or secondary concurrent permanent plan. The reasoning for the holding is based on language in G.S. 7B-906.2(b) that states "*reunification shall remain* a primary or secondary plan . . . . [which] presupposes the existence of a prior concurrent plan which included reunification." (emphasis in original). Slip op. at 5. The opinion does not distinguish when an initial permanency planning hearing has been accelerated as a result of an initial dispositional order that ceases reunification efforts. Therefore, it appears the holding applies even when reunification efforts have been previously ceased.

But, reunification efforts may be ceased.

Even though reunification must be one of the two concurrent permanent plans ordered at this first permanency planning hearing, reunification efforts may be ceased so long as the required findings in G.S. 7B-906.2(b) have been made. *In re C.P.* (citing In re H.L., 807 S.E.2d 685 (2017) and the requirement that it follow the precedent established by the prior published opinion but noting its disagreement with that opinion and need for resolution through an en banc hearing or a decision by the NC Supreme Court; affirming the portion of the order ceasing reunification efforts; vacating portion of the order that failed to include reunification as a concurrent permanent plan). *Cf.* In re A.A.S., ___ N.C. App. ___, slip op. at 10 (March 20, 2018) (stating "during concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan").

When ceasing reunification efforts at a permanency planning hearing, other recent appellate opinions have held that findings under G.S. 7B-906.2(d) are also required. In re D.A., ___ N.C. App. ___ (March 6, 2018) (vacating and remanding permanency planning order eliminating reunification efforts with mother for additional findings under G.S. 7B-906.2(d)); In re K.L., 802 S.E.2d 588 (2017) (vacating in part, reversing in part, and remanding permanency planning order eliminating reunification efforts for additional findings under G.S. 7B-906.2; discussing findings under G.S. 7B-906.1(d) & (e)).

Step Two: The Second or Subsequent Permanency Planning Hearing ? Reunification May Be Eliminated

The court may order the elimination of reunification as a plan at a second or subsequent permanency planning hearing. *See* G.S. 7B-906.2; *In re C.P.* If there was not a prior order ceasing reunification efforts, the court will need to make the required findings to cease reunification efforts before eliminating reunification as a permanent plan.

Unanswered Questions Arising from the Two-Step

1. When the trial court enters a permanency planning order with a primary and secondary plan identified, it must order DSS "to make efforts toward finalizing the primary and secondary permanent plans…." G.S. 7B-906.2(b). What efforts are required to achieve what is likely to be a secondary (versus primary) plan of reunification when DSS has been relieved of providing reunification efforts? For example, are efforts to arrange for visitation if visitation is ordered, maintain a case plan of conditions for the parent, and respond to a parent's communication (e.g., answer and return phone calls and/or emails) sufficient? Practically, does the burden of arranging for and obtaining services switch to the parent? *See* In re L.G.I., 227 N.C. App. 512, 516 (2013) (trial court order stated "the parents have an opportunity, without reunification efforts on the part of the Department, to work their case plan, remain drug free, comply with the terms and conditions of the Family Service Case Plan and demonstrate their ability, desire and commitment to provide proper care for their daughter").

2. When an order ceases reunification efforts (either at initial disposition or the initial permanency planning hearing) but cannot eliminate reunification as a permanent plan until the second permanency planning hearing, is the reunification plan really achievable? If not, is the purpose of concurrent planning defeated? Should that second permanency planning hearing be scheduled as soon as possible so that a different concurrent plan may be ordered? *See* G.S. 7B-906.1(b) (15 days' notice). If so, what is the impact on the juvenile court docket? If not, is there an impact on the child achieving a safe, permanent home within a reasonable period of time? *See* G.S. 7B-100(5); 7B-101(18); 7B-906.1(d)(3), (g).

3. When an order ceases reunification efforts before the second or subsequent permanency planning hearing, what findings about reunification efforts must the court make before eliminating reunification as a permanent plan? *See, e.g.*, G.S. 7B-906.1(d)(3); 7B-906.2(d). Practically, how can the court make any findings other than reunification efforts were not provided as they were previously ceased by court order?

4. Is the first permanency planning order that ceases reunification efforts but does not eliminate reunification an appealable order under G.S. 7B-1001(a)(5)? That statute identifies "an order entered under G.S. 7B-906.2(b)" but refers to a review of "the order eliminating reunification as a permanent plan" and does not reference the cessation of reasonable efforts. Does the parent have to wait to appeal the second or subsequent permanency planning order that eliminates reunification as a permanent plan? If not, does the parent have a right to appeal both the first permanency planning order that ceases reunification efforts and a subsequent permanency planning order that eliminates reunification as a permanent plan?

We will have to wait for these answers. In the meantime, what are your thoughts and questions on the eliminate reunification as a permanent plan two-step?

NC's Modified Child Welfare Policy Manual

2018 Parent Attorney Conference

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Why a Modified Manual?

- Child and Family Services Review (CFSR), 2015
- CFSR Program Improvement Plan (PIP), Effective Jan 2017 and Revised December 2017

Goal 1: Improve the outcomes of safety, permanency and well-being through the establishment of clear performance expectations for practice in CPS Assessments, In-Home Services and Foster Care Services

Strategies/Activities:

- 1. Strengthen and clarify North Carolina's child welfare policies and practices

History of the Modified Manual

➢January-June, 2017	Revise Manual
➢June-December, 2017	Pilot Testing in 10 Counties*
➢January-March, 2018	Modifications-feedback from all counties
➢April-May, 2018	Regional Trainings
➢June-August, 2018	Modifications-feedback from Trainings
➢August 7, 2018	NCACDSS Joint-State County Relations meeting
➢August 8, 2018	Children's Services Committee meeting
➢August 10, 2018	Updated Manual to each county DSS director
➢September 1, 2018	Expected Implementation Date

*Buncombe, Craven, Cumberland, Durham, Hoke, Mecklenburg, Pitt, Scotland, Wilson, Wake

Changes from the Old Manual

Changes to Format
- Clear differentiation between policy, protocol, and guidance
- Shorter sections
- Less narrative; more bullets
- Less repetition; more internal links
- Information that applies to more than one function grouped in "Cross Function Topics"

Functional Areas

CPS Intake Purpose
CPS Intake Table of Contents
CPS Family and Investigative Assessments Purpose
CPS Family and Investigative Assessments Table of Contents
In-Home Services Purpose
In-Home Services Table of Contents
Permanency Planning Purpose
Permanency Planning Table of Contents
* Adoptions and Licensing

Cross Function Topics

Intensive Family Preservation Services
Safety
Risk & Use of Assessment Tools
Diligent Efforts
Collateral Contacts
Filing a Petition – Policy & Legal Basis
Preparing for Placement (or Placement Change)
Temporary Safety Providers & Kinship Providers
Domestic Violence
Child Well-Being
Child and Family Team (CFT) Meetings
Parent Engagement
Identifying, Locating and Engaging Extended Family Members
Special Legal Considerations (MEPA, ICWA, Mexican Heritage)
Documentation

Modified Manual

https://nccwta.org/index.php?/Knowledgebase/Article/View/2/12/nc-child-welfare-manual

Workshop Instructions

The website for the manual is: https://nccwta.org/index.php?/Knowledgebase/Article/View/2/12/nc-cw-modified-manual-for-nc-cw-pilot

Take your laptop with you. There is also a laptop in each room.

There will be a set of questions to answer using the manual. Groups 1-5 start with Q1 and work to Q15. Groups 6-9 start with Q15 and work back to Q1.

This is a group effort. Therefore, each group should work together to find the answer.

Everyone in each group should have the opportunity to search through the manual. Therefore, if some participants did not bring a laptop, those people should take turns at the laptop provided in the room.

In addition to answering the questions, you should note the manual section and page number of the answer. For some questions, the answer may be in more than one place. You don't need to find all the places.

This is not a race or contest. We do not expect you to get through all the questions. If you want to detour and explore a topic of interest to your group, go ahead and do so!

Your group will have 40 minutes to answer the questions/explore the manual. We will then regroup and go through the answers.

Utilizing Adoption Data at Best Interests Phase

Sydney Batch, J.D., M.S.W.
Batch, Poore & Williams, PC

N.C.G.S. §7B-1100 Factors at Best Interests Phase

Age of the child

- **Likelihood that the child will be adopted**
- Will TPR aid in accomplishing the child's permanent plan?
- Parent-child bond
- Quality of the relationship between the child and proposed adoptive placement, guardian, custodian or other placement
- **Any relevant consideration**

National Adoption Statistics

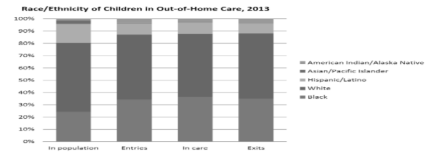
- 428,000 children are in foster care in the US
- 135,000 were adopted last year
- Males outnumber females
- African American children are disproportionally represent
- Over Half are 6 years or older
- 60% spend 2-5 years in foster care before being adopted. Some never get adopted
- Almost 60-70% of domestic adoptions are open adoptions
- Source: https://adoptionnetwork.com/adoption-statistics (appears to be based on 2013 figures)

2011 NC Adoption Statistics

- US and NC statistics are similar
- In 2011, 14,329 were in foster care
- 2234 were waiting to be adopted
- 46% over the of 5
- Males slightly outnumber females by 52%
- 36% African American, 46% were white, 10% Hispanic waiting for adoption so African American children remain disproportionately represented
- 59% of children wait between 2-5 years to be adopted with some never being adopted
- Data Count website through Annie E. Casey Foundation – great resource
- Source: https://datacenter.kidscount.org/data#NC

NC Foster Care Racial Disproportionality

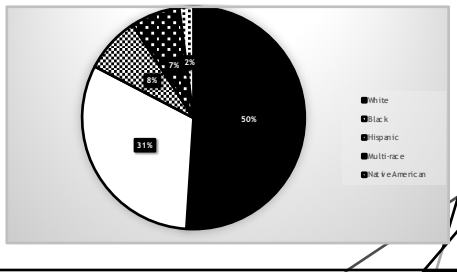
Race/Ethnicity Profile
North Carolina



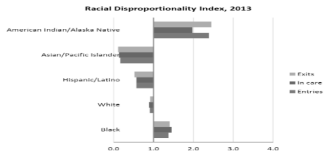
Race/ethnicity breakdowns	Population	Entries	In care	Exits
African American/Black (a)	24.3%	32.0%	33.8%	32.7%
Caucasian/White (b)	54.0%	49.1%	48.0%	49.6%
Hispanic/Latino (c)	14.8%	8.8%	8.8%	7.8%
Asian/Pacific Islander (d)	3.6%	1.3%	1.1%	1.0%
American Indian/Alaska Native (e)	1.3%	3.0%	2.5%	3.1%
More than one race	3.9%	5.9%	6.2%	5.8%
Missing	0.0%	1.0%	0.6%	0.7%
Total	100%	100%	100%	100%

NC Children in Foster Care By Race

Source: Kids Count Data for NC 2016



NC Foster Care Racial Disproportionality
(Cont.)



Racial Disproportionality Index	Entries	In care	Exits
African American/Black (a)	1.4	1.5	1.4
Caucasian/White (b)	0.6	0.6	0.6
Hispanic/Latino (c)	0.6	0.6	0.5
Asian/Pacific Islander (d)	0.2	0.1	0.1
American Indian/Alaska Native (e)	2.4	2.0	2.4

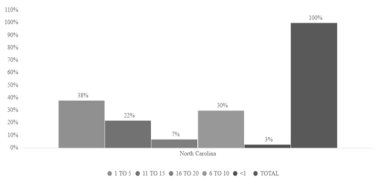
Disproportionality is the level at which groups of children are present in the child welfare system at higher or lower percentages or rates than in the general population. An index of 1.0 reflects no disproportionality. An index of greater than 1.0 reflects overrepresentation. An index of less than 1.0 reflects underrepresentation.

Kids Count Data Center

- A Project of the Annie E. Casey Foundation
- Has National and State statistics
- Can be utilized to develop graphs, pie charts
- Includes trends
- Broadly or narrowly tailor the issues to your case
- Contains useful publications, including a report about kinship families

- Find information regarding:
  - Demographics
  - Economic well-being
  - Education
  - Family and Community
  - Health
  - **Safety and Risky Behaviors***
  - Age
  - Family Nativity
  - Race and Ethnicity

Kids Count Data



Children In Foster Care Waiting For Adoption By Age Group

National KIDS COUNT
KIDS COUNT Data Center, datacenter.kidscount.org
A project of the Annie E. Casey Foundation

NC Kids
Adoption and Foster Care Network

- Website identifies legally free children in NC awaiting adoption
- Can search by:
  - Age
  - Gender
  - Race
  - Sibling groups
  - Disability
  - Currently 181 profiles (not individual children)
  - https://www.adoptuskids.org/states/nc/index.aspx
- Use this website to research to compare your client's children with similarly situated children
- Argue # of kids still waiting and why your client's child is in the same position
- Print profiles of children and admit into evidence
- Remind judge – the site is a small representation of the thousands of children waiting for adoption in NC

Practical Tips

- Uses statistics to your benefit you client's situation
- In the Discovery process request the adoption profile for your client's children
- Request the agency provide the information for all information regarding the adoption recruitment process
  - Child met prospective families?
  - Child attended adoption "fairs"?
  - Featured on any websites?
  - If so request in discovery
- Review the child's mental health, substance abuse and academic records to determine if there are any barriers that will make adoption less likely
- Compare the child's adoption file to the child's actual mental health records, etc.

Practical Tips (cont.)

- Admit into evidence NC Kids website child profiles that are similar to your client's children
- Provide alternatives to adoption – such as relative placements, guardianship, etc.
- Legal Orphan argument
- Use social science research
- Remember that at BI phase, rules of evidence are relax.
- Introduce evidence through:
  - Parent report
  - Rule 803 (8) Public Records and Reports. - Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Useful Websites

- Children's Bureau -DHHS - Administration for Children and Family Children's Division
  - Contains National and Statewide data on adoptions
  - https://www.acf.hhs.gov/cb/resource/adoption-data-2016
  - Includes statistics on race, gender, special needs, age of child at finalization of adoption
- Kids Count Data Center: Project of Annie E. Casey Foundation
  - Contains National and Statewide data on child wellbeing, foster care and adoption
  - https://datacenter.kidscount.org/data#NC

Useful Websites (cont.)

- NC Kids
  - Online Adoption warehouse for children waiting to be adopted through NC DHHS
  - https://www.adoptuskids.org/states/nc/index.aspx
- Child Welfare Information Gateway – Division of US DHHS
  - Disproportionality Data
  - https://www.childwelfare.gov/topics/systemwide/cultural/disproportionality/data/

USING DSS POLICY AND DATA TO ADVOCATE FOR PARENTS

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VISITATION

- Page 6 of the manual – 7 days after petition is filed visitation needs to occur between children and their parents as well as their siblings
- Page 6 of the manual – 14 days after petition is filed a Family Time and Contact Plan (this is a visitation plan) needs to be developed with parents to include visitation with siblings and a shared parenting meeting
- Page 192 of manual discusses this in more detail
- If there is a change in this plan it must be changed in writing within 7 days of the change and placed in the file
- If children are in separate placements then there needs to be one per child (really one per placement)
- Has to be in compliance with the current custody order
- This is a contract between your client and the Department of Social Services
- These steps are VITAL to starting the process out with parents and children
- Please make sure these are done for your client

Different levels of visitation

- Supervised, monitored, unsupervised
- Usually start out at supervised but NOT required
- Can start at monitored, or even better, unsupervised
- **Supervised**
  - Eyes on and ears on at all times.
- **Monitored**
  - Within yelling distance. Check in every 20 or so minutes.

Unsupervised

- If there are no safety concerns. Need to go back to court to get permission from the court before is allowed to happen (page 181 of manual)
- You can ask to start out at unsupervised visitation

NCGS 7B-905.1

- If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan SHALL indicate the minimum frequency and length of visits and WHETHER the visits shall be supervised.
- Don't think the legislature intended for all visits to start out supervised – it states "whether"

Family Time and Contact (Visitation) Plan

- Need to use DSS-5242
- On this form need to state (for each child) the type, level of supervision, frequency, duration, and location of visits;
- Be current at all times;
- Revised as often as necessary; and
- Signed by all parties

Additional things to consider for the Visitation plan

- The parents must sign the visitation plan
- If the parents refuse to sign then the DSS case worker just needs to document that
- Everyone gets a copy
- If there are circumstances that necessitate a visitation plan change then it must be done within 7 days
- Other things that must be addressed are as follows:
  - Who is all approved to attend these visits
  - TRANSPORTATION arrangements for the PARENTS and the child
  - Anyone else that can visit with the child (these are ppl other than the parents)
  - Whether the visits are to be supervised or monitored and by whom
  - Whether other types of contacts are appropriate such as telephone calls, emails or letters. Skype or social media and if monitoring of them is needed

Continuation of Additional

- Parents must also be informed of the following regarding visitation:
  - Anticipated changes in the visiting arrangements as the case progresses
  - Advance request for visits other than those regularly scheduled
  - Explanation of possible consequences if the parties do not carry out their responsibilities
  - Unsupervised visitation between the parents or caretaker and child must not occur without prior court approval

Visitation

- Visitation between parents and their children is a right and a responsibility retained by parents. It has been demonstrated that children who have frequent, meaningful visits with their parents are more likely to return home. Visits provide a good indicator of the possibility of reunification, and they provide the court and other agencies with documentation of the parent's progress.
- Frequent and meaningful visitation between parent/child should occur because:
  - Visits maintain and improve the parent/child relationship
  - Visits enable children to see their parents realistically and rationally and can help to calm separation fears
  - Visitation is often the only means of maintaining, improving, or developing the child's relationship with his/her parents
  - Visits provide the opportunity for parents to improve their parenting skills and to demonstrate their ability to care for their child;
  - Visits provide the county child welfare worker the opportunity to observe and to evaluate the parent-child relationship

Visits can be a motivator

- Visits can be a motivator for parents who are making progress on the objectives of their Family Services Agreement. When county child welfare workers have observed parent's progress, they can ask the Court to review the Family Time and Contact Plan and revise it to allow for more frequent visits, longer visits, or unsupervised visits, as appropriate.
- This comes from their manual and while I absolutely don't believe it's a carrot and a stick. The social workers are being taught it's a motivator for parents so use that to your advantage when arguing for more visitation or less supervision during visitation.

CHILDREN need visits to:

- Keep a connection to their family
- Mitigate their grief
- Have their worth reaffirmed
- Have the assurance that their parents "exist"; and
- Re-establish and strengthen a relationship with their parents

- This is so important to children

PARENTS need visits to:

- Remain attached to their children
- Stay motivated to work for reunification
- Practice what they have learned in treatment and improve their parenting skills (what the social workers are looking for)
- Understand the unique needs of their children
- Mitigate their own grief
- Re-establish and strengthen a relationship with their child; and
- Demonstrate their attachments and parenting abilities (also what social workers are really looking at)

Visits are mainly for

- They are mainly for parents and children, however other family members can come with DSS' or court approval
- Visits should be focused on the connection between the parents and their children (or parent and their child)

What social workers are looking for

- Per their own manual county child welfare workers should use parent/child visitation to:
  - Assess parents' ability to respond to their children's needs;
  - Prepare the child and parent for reunification;
  - Assist parents to understand the child's needs and behaviors;
  - Guide and observe parents' relationship with their child;
  - Observe changes in parents behavior over time;
  - Observe child's reactions and responses to parents; and
  - Document all the above and thus provide evidence to support the permanent plan

Physical Separation

- The physical separation that is created by foster care placements does not eliminate the attachment between the parent and the child
- Separations will have a marked effect on both the child and the parents
- The emotions created by the separation and the grieving that results may be difficult and intensified during and after visits
- Parental behavior during visits may be unpredictable and disturbed and may have damaging effects on the child
- If problems and negative reactions occur the agency needs to try to limit different aspects of the Family Time and Contact Plan before considering terminating visits completely

Visitation should occur frequently

- And in a positive, natural setting
- County child welfare workers should be creative in implementing visitation to assure frequent and positive visitation
- Limiting visits to what is convenient for the agency limits the agency's knowledge of the parent's ability and limits the parents opportunity to lean and demonstrate how to care for their children
- County child care workers need to creatively think about visitation to make visitation a real tool for assessing families and for mitigating the grief and loss experienced by children who have ben removed from their homes

Strategies for creative visitation:

- Ask the foster parents. Visits in the foster home allow the parent to observe a positive approach to child care; allow the child to see all those who care for him/her as allies; and begin the building of a potential permanent resource for the future. This promotes a sense of partnership between the foster parents and the birth parents
- School and Daycare. Most children would welcome lunch with their parents and most schools not only allow it but encourage this. Day care providers may also cooperate with encouragement. The parent can learn about this important aspect of their child's life and meet the teacher or day care provider

More strategies for visitation

- Include the parents at the doctor or dentist appointments. This provides the parent with the opportunity to take the responsibility of medical concerns when possible and keeps the parent informed. It can also reassure the child who may be fearful
- Take the visits outside the agency. Parks, playgrounds, fast-food restaurants. And other places allow for visits that more closely resemble normal parent child interaction
- Recruit volunteers and make them visitation specialists. Transportation and the need for supervision should not limit the opportunity for visits. Volunteers may also become role models and mentors

Family Time and Contact Plans are Required

And must continue until the court orders termination of visitation or termination of parental rights

Before visits can be limited or terminated, the agency MUST:

identify specific parental behaviors that are upsetting to the child

demonstrate the child's difficulties are not a child's normal anxiety response to parent-child visits and that the child's difficulties have a destructive effect

demonstrate reasonable efforts have been made to explain to parents the implications of not working to improve visits

Continued

- Support the decision through consultation with medical, psychiatric, or other appropriate professionals
- IF find visitation not in best interest for the children then petition for a court order limiting visitation, even if parents agree with this plan – they cannot unilaterally just cease visits (need to have a hearing within 30 days)
- Visitation must NOT cease or be withheld based on a parent's substance abuse or a positive drug screen ALONE. There must be other factors supporting the agency's recommendation to cease visitation.

Reasonable Efforts

- Reasonable efforts comes up at every single hearing. The statutes state they have to make reasonable efforts aimed at keeping the children in their homes and out of care and once in care sending them to safe home as soon as possible
- If you don't believe DSS has made reasonable efforts at any stage of the case, then say so
- Use this policy manual to state they are not doing what their agency requires of them and therefore they are not making reasonable efforts. Ask them specific questions from this manual.
- If there is a reasonable effort finding then they lose money so this is why they don't like it
- Use this to your client's advantage

SUBSTANCE USE & MENTAL HEALTH AMONG AMERICAN ATTORNEYS

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BY THE NUMBERS

- STUDY PUBLISHED IN FEBRUARY 2016: THE PREVALENCE OF SUBSTANCE USE AND OTHER MENTAL HEALTH CONCERNS AMONG AMERICAN ATTORNEYS
- 12,825 RESPONDENTS TO THE SURVEY
  - ONLY SIGNIFICANT PRIOR STUDY WAS IN 1990
- 20.6% OF RESPONDENTS SCREENED POSITIVE FOR HAZARDOUS, HARMFUL AND POTENTIALLY ALCOHOL-DEPENDENT DRINKING
- DEPRESSION = 28%
- ANXIETY = 19%
- STRESS = 23%

BY THE NUMBERS
ALCOHOL USE

- TOTAL SAMPLE = 20.6%
  - GENDER
    - MEN = 25.1%
    - WOMEN = 15.5%
  - AGE
    - 30 OR YOUNGER = 31.9%
    - 31-40 = 25.1%
  - YEARS IN FIELD
    - 0-10 = 28.1%
    - 11-20 = 19.2%
- 2901 SURVEY RESPONDENTS FELT ALCOHOL/SUBSTANCE USE WAS PROBLEMATIC AT SOME POINT IN LIFE
  - 27.6% PROB USE DEVELOPED PRIOR TO LAW SCHOOL
  - 14.2% DURING LAW SCHOOL
  - 43.7% W/IN 15 YEARS AFTER
  - 14.6% MORE THAN 15 YEARS

MOST AT RISK POPULATION

- MALE
- 30 YEARS OLD OR YOUNGER
- PRACTICING LAW 10 YEARS OR LESS
  - FOLLOWED CLOSELY BY THOSE 31-40YO

WHAT TO DO?

- EARLY EDUCATION AND INTERVENTION
- TALK ABOUT IT
- COMMON BARRIERS TO GETTING HELP
  - FEAR OF OTHERS FINDING OUT
  - CONCERNS ABOUT PRIVACY AND CONFIDENTIALITY

HOW CAN WE HELP?

- LAWYER ASSISTANCE PROGRAM
  - NC HAS AN OUTSTANDING LAP – CONSIDERED ONE OF THE BEST IN THE COUNTRY
  - CONFIDENTIAL!!!
  - NOT JUST FOR ALCOHOL AND SUBSTANCE ABUSE, ALSO HELPS WITH
    - ANXIETY
    - STRESS, BURNOUT & BALANCE
    - DEPRESSION & SUICIDE
    - ANGER MANAGEMENT
    - COMPASSION FATIGUE
    - GRIEF & LOSS
    - SEX, GAMBLING, FOOD ADDICTIONS

SERVICES OFFERED

- COUNSELING REFERRALS
- MENTORING BY ATTORNEY VOLUNTEERS
- MONTHLY LUNCHEONS
- WEEKLY PEER SUPPORT GROUPS

HOW CAN WE HELP?

- BARCARES
  - BARCARES IS A CONFIDENTIAL, SHORT-TERM INTERVENTION PROGRAM PROVIDED COST-FREE TO MEMBERS OF PARTICIPATING JUDICIAL DISTRICT BARS, VOLUNTARY BAR ASSOCIATIONS AND LAW SCHOOLS. IF YOU WOULD LIKE ADDITIONAL INFORMATION ABOUT THE PROGRAM AND/OR ITS AVAILABILITY IN YOUR AREA, PLEASE CONTACT THE BARCARES COORDINATOR AT 919-929-1227 OR 1-800-640-0735 OR VISIT WWW.BARCARES.ORG.
  - OFFERS 3 FREE COUNSELING SESSIONS PER YEAR IN PARTICIPATING JURISDICTIONS
  - HELPS WITH PERSONAL ISSUES (CRISIS INTERVENTION, DEPRESSION/ANXIETY, SUBSTANCE USE AND FINANCIAL CONCERNS); FAMILY ISSUES (MARRIAGE/RELATIONSHIPS, CHILDREN/ADOLESCENTS AND PARENTING/FAMILY CONFLICT); WORK ISSUES (PROFESSIONAL STRESSORS, CASE-RELATED STRESS AND CONFLICT RESOLUTION); AND STUDENT COACHING ON STRESS/TIME MANAGEMENT, ETC.
  - ONE YEAR I USED THE SESSIONS TO SEE A CAREER COUNSELOR TO DISCUSS OTHER POSSIBLE CAREER CHOICES.

DON'T BE AFRAID TO REACH OUT

LAWYERS ASSISTANCE PROGRAM

CATHY D. KILLIAN
WESTERN CLINICAL COORDINATOR
312 RENSSELAER AVE, SUITE 100
CHARLOTTE, NC 28203
704.910.2310

NICKI ELLINGTON
EASTERN CLINICAL COORDINATOR
217 E. EDENTON ST.
RALEIGH, NC 27601
919.719.9267

BARCARES

HTTPS://WWW.NCBAR.ORG/MEMBERS/BARCARES/

WWW.BARCARES.ORG

800-640-0735 919-929-1227

LASTLY, YOU ARE ALWAYS WELCOME TO REACH OUT TO ME. I AM MORE THAN HAPPY TO TALK TO OR SIT DOWN WITH SOMEONE!

EMILY MISTR, 919-619-1725, EMILY.MISTR@GMAIL.COM

OPEN

The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW

Objectives: Rates of substance use and other mental health concerns among attorneys are relatively unknown, despite the potential for harm that attorney impairment poses to the struggling individuals themselves, and to our communities, government, economy, and society. This study measured the prevalence of these concerns among licensed attorneys, their utilization of treatment services, and what barriers existed between them and the services they may need.

Methods: A sample of 12,825 licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.

Results: Substantial rates of behavioral health problems were found, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, and also younger participants and those working in the field for a shorter duration ($P < 0.001$). Age group predicted Alcohol Use Disorders Identification Test scores; respondents 30 years of age or younger were more likely to have a higher score than their older peers ($P < 0.001$). Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.

Conclusions: Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations. Mental health distress is also significant. These data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions.

Key Words: attorneys, mental health, prevalence, substance use

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Little is known about the current behavioral health climate in the legal profession. Despite a widespread belief that attorneys experience substance use disorders and other mental health concerns at a high rate, few studies have been undertaken to validate these beliefs empirically or statistically. Although previous research had indicated that those in the legal profession struggle with problematic alcohol use, depression, and anxiety more so than the general population, the issues have largely gone unexamined for decades (Benjamin et al., 1990; Eaton et al., 1990; Beck et al., 1995). The most recent and also the most widely cited research on these issues comes from a 1990 study involving approximately 1200 attorneys in Washington State (Benjamin et al., 1990). Researchers found 18% of attorneys were problem drinkers, which they stated was almost twice the 10% estimated prevalence of alcohol abuse and dependence among American adults at that time. They further found that 19% of the Washington lawyers suffered from statistically significant elevated levels of depression, which they contrasted with the then-current depression estimates of 3% to 9% of individuals in Western industrialized countries.

While the authors of the 1990 study called for additional research about the prevalence of alcoholism and depression among practicing US attorneys, a quarter century has passed with no such data emerging. In contrast, behavioral health issues have been regularly studied among physicians, providing a firmer understanding of the needs of that population (Oreskovich et al., 2012). Although physicians experience substance use disorders at a rate similar to the general population, the public health and safety issues associated with physician impairment have led to intense public and professional interest in the matter (DuPont et al., 2009).

Although the consequences of attorney impairment may seem less direct or urgent than the threat posed by impaired physicians, they are nonetheless profound and far-reaching. As a licensed profession that influences all aspects of society, economy, and government, levels of impairment among attorneys are of great importance and should therefore be closely evaluated (Rothstein, 2008). A scarcity of data on the current rates of substance use and mental health concerns among lawyers, therefore, has substantial implications and must be addressed. Although many in the profession have long understood the need for greater resources and support for attorneys struggling with addiction or other mental health concerns, the formulation of cohesive and informed strategies for addressing those issues has been handicapped by the

outdated and poorly defined scope of the problem (Association of American Law Schools, 1994).

Recognizing this need, we set out to measure the prevalence of substance use and mental health concerns among licensed attorneys, their awareness and utilization of treatment services, and what, if any, barriers exist between them and the services they may need. We report those findings here.

METHODS

Procedures

Before recruiting participants to the study, approval was granted by an institutional review board. To obtain a representative sample of attorneys within the United States, recruitment was coordinated through 19 states. Among them, 15 state bar associations and the 2 largest counties of 1 additional state e-mailed the survey to their members. Those bar associations were instructed to send 3 recruitment e-mails over a 1-month period to all members who were currently licensed attorneys. Three additional states posted the recruitment announcement to their bar association web sites. The recruitment announcements provided a brief synopsis of the study and past research in this area, described the goals of the study, and provided a URL directing people to the consent form and electronic survey. Participants completed measures assessing alcohol use, drug use, and mental health symptoms. Participants were not asked for identifying information, thus allowing them to complete the survey anonymously. Because of concerns regarding potential identification of individual bar members, IP addresses and geo-location data were not tracked.

Participants

A total of 14,895 individuals completed the survey. Participants were included in the analyses if they were currently employed, and employed in the legal profession, resulting in a final sample of 12,825. Due to the nature of recruitment (eg, e-mail blasts, web postings), and that recruitment mailing lists were controlled by the participating bar associations, it is not possible to calculate a participation rate among the entire population. Demographic characteristics are presented in Table 1. Fairly equal numbers of men (53.4%) and women (46.5%) participated in the study. Age was measured in 6 categories from 30 years or younger, and increasing in 10-year increments to 71 years or older; the most commonly reported age group was 31 to 40 years old. The majority of the participants were identified as Caucasian/White (91.3%).

As shown in Table 2, the most commonly reported legal professional career length was 10 years or less (34.8%), followed by 11 to 20 years (22.7%) and 21 to 30 years (20.5%). The most common work environment reported was in private firms (40.9%), among whom the most common positions were Senior Partner (25.0%), Junior Associate (20.5%), and Senior Associate (20.3%). Over two-thirds (67.2%) of the sample reported working 41 hours or more per week.

TABLE 1. Participant Characteristics

	n (%)
Total sample	12825 (100)
Sex	
Men	6824 (53.4)
Women	5941 (46.5)
Age category	
30 or younger	1513 (11.9)
31–40	3205 (25.2)
41–50	2674 (21.0)
51–60	2953 (23.2)
61–70	2050 (16.1)
71 or older	348 (2.7)
Race/ethnicity	
Caucasian/White	11653 (91.3)
Latino/Hispanic	330 (2.6)
Black/African American (non-Hispanic)	317 (2.5)
Multiracial	189 (1.5)
Asian or Pacific Islander	150 (1.2)
Other	84 (0.7)
Native American	35 (0.3)
Marital status	
Married	8985 (70.2)
Single, never married	1790 (14.0)
Divorced	1107 (8.7)
Cohabiting	462 (3.6)
Life partner	184 (1.4)
Widowed	144 (1.1)
Separated	123 (1.0)
Have children	
Yes	8420 (65.8)
No	4384 (34.2)
Substance use in the past 12 mos*	
Alcohol	10874 (84.1)
Tobacco	2163 (16.9)
Sedatives	2015 (15.7)
Marijuana	1307 (10.2)
Opioids	722 (5.6)
Stimulants	612 (4.8)
Cocaine	107 (0.8)

*Substance use includes both illicit and prescribed usage.

Materials

Alcohol Use Disorders Identification Test

The Alcohol Use Disorders Identification Test (AUDIT) (Babor et al., 2001) is a 10-item self-report instrument developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence. The AUDIT generates scores ranging from 0 to 40. Scores of 8 or higher indicate hazardous or harmful alcohol intake, and also possible dependence (Babor et al., 2001). Scores are categorized into zones to reflect increasing severity with zone II reflective of hazardous use, zone III indicative of harmful use, and zone IV warranting full diagnostic evaluation for alcohol use disorder. For the purposes of this study, we use the phrase "problematic use" to capture all 3 of the zones related to a positive AUDIT screen.

The AUDIT is a widely used instrument, with well established validity and reliability across a multitude of populations (Meneses-Gaya et al., 2009). To compare current rates of problem drinking with those found in other populations, AUDIT-C scores were also calculated. The AUDIT-C is a subscale comprised of the first 3 questions of the AUDIT

TABLE 2. Professional Characteristics

	n (%)
Total sample	12825 (100)
Years in field (yrs)	
0–10	4455 (34.8)
11–20	2905 (22.7)
21–30	2623 (20.5)
31–40	2204 (17.2)
41 or more	607 (4.7)
Work environment	
Private firm	5226 (40.9)
Sole practitioner, private practice	2678 (21.0)
In-house government, public, or nonprofit	2500 (19.6)
In-house: corporation or for-profit institution	937 (7.3)
Judicial chambers	750 (7.3)
Other law practice setting	289 (2.3)
College or law school	191 (1.5)
Other setting (not law practice)	144 (1.1)
Bar Administration or Lawyers Assistance Program	55 (0.4)
Firm position	
Clerk or paralegal	128 (2.5)
Junior associate	1063 (20.5)
Senior associate	1052 (20.3)
Junior partner	608 (11.7)
Managing partner	738 (14.2)
Senior partner	1294 (25.0)
Hours per wk	
Under 10 h	238 (1.9)
11–20 h	401 (3.2)
21–30 h	595 (4.7)
31–40 h	2946 (23.2)
41–50 h	5624 (44.2)
51–60 h	2310 (18.2)
61–70 h	474 (3.7)
71 h or more	136 (1.1)
Any litigation	
Yes	9611 (75.0)
No	3197 (25.0)

focused on the quantity and frequency of use, yielding a range of scores from 0 to 12. The results were analyzed using a cut-off score of 5 for men and 4 for women, which have been interpreted as a positive screen for alcohol abuse or possible alcohol dependence (Bradley et al., 1998; Bush et al., 1998). Two other subscales focus on dependence symptoms (eg, impaired control, morning drinking) and harmful use (eg, blackouts, alcohol-related injuries).

Depression Anxiety Stress Scales-21 item version

The Depression Anxiety Stress Scales-21 (DASS-21) is a self-report instrument consisting of three 7-item subscales assessing symptoms of depression, anxiety, and stress. Individual items are scored on a 4-point scale (0–3), allowing for subscale scores ranging from 0 to 21 (Lovibond and Lovibond, 1995). Past studies have shown adequate construct validity and high internal consistency reliability (Antony et al., 1998; Clara et al., 2001; Crawford and Henry, 2003; Henry and Crawford, 2005).

Drug Abuse Screening Test-10 item version

The short-form Drug Abuse Screening Test-10 (DAST) is a 10-item, self-report instrument designed to screen and quantify consequences of drug use in both a clinical and research setting. The DAST scores range from 0 to 10 and are categorized into low, intermediate, substantial, and severe-concern categories. The DAST-10 correlates highly with both 20-item and full 28-item versions, and has demonstrated reliability and validity (Yudko et al., 2007).

RESULTS

Descriptive statistics were used to outline personal and professional characteristics of the sample. Relationships between variables were measured through χ^2 tests for independence, and comparisons between groups were tested using Mann-Whitney U tests and Kruskal-Wallis tests.

Alcohol Use

Of the 12,825 participants included in the analysis, 11,278 completed all 10 questions on the AUDIT, with 20.6% of those participants scoring at a level consistent with problematic drinking. The relationships between demographic and professional characteristics and problematic drinking are summarized in Table 3. Men had a significantly higher proportion of positive screens for problematic use compared with women (χ^2 [1, N = 11,229] = 154.57, $P < 0.001$); younger participants had a significantly higher proportion compared with the older age groups (χ^2 [6, N = 11,213] = 232.15, $P < 0.001$); and those working in the field for a shorter duration had a significantly higher proportion compared with those who had worked in the field for longer (χ^2 [4, N = 11,252] = 230.01, $P < 0.001$). Relative to work environment and position, attorneys working in private firms or for the bar association had higher proportions than those in other environments (χ^2 [8, N = 11,244] = 43.75, $P < 0.001$), and higher proportions were also found for those at the junior or senior associate level compared with other positions (χ^2 [6, N = 4671] = 61.70, $P < 0.001$).

Of the 12,825 participants, 11,489 completed the first 3 AUDIT questions, allowing an AUDIT-C score to be calculated. Among these participants, 36.4% had an AUDIT-C score consistent with hazardous drinking or possible alcohol abuse or dependence. A significantly higher proportion of women (39.5%) had AUDIT-C scores consistent with problematic use compared with men (33.7%) (χ^2 [1, N = 11,440] = 41.93, $P < 0.001$).

A total of 2901 participants (22.6%) reported that they have felt their use of alcohol or other substances was problematic at some point in their lives; of those that felt their use has been a problem, 27.6% reported problematic use manifested before law school, 14.2% during law school, 43.7% within 15 years of completing law school, and 14.6% more than 15 years after completing law school.

An ordinal regression was used to determine the predictive validity of age, position, and number of years in the legal field on problematic drinking behaviors, as measured by the AUDIT. Initial analyses included all 3 factors in a model to predict whether or not respondents would have a clinically significant total AUDIT score of 8 or higher. Age group predicted clinically significant AUDIT scores; respondents 30 years of age or younger were significantly more likely to have a higher score than their older peers ($\beta = 0.52$, Wald [$df = 1$] = 4.12, $P < 0.001$). Number of years in the field

TABLE 3. Summary Statistics for Alcohol Use Disorders Identification Test (AUDIT)

	AUDIT Statistics				
	n	M	SD	Problematic %*	P**
Total sample	11,278	5.18	4.53	20.6%	
Sex					
Men	6012	5.75	4.88	25.1%	<0.001
Women	5217	4.52	4.00	15.5%	
Age category (yrs)					
30 or younger	1393	6.43	4.56	31.9%	
31–40	2877	5.84	4.86	25.1%	
41–50	2345	4.99	4.65	19.1%	<0.001
51–60	2548	4.63	4.38	16.2%	
61–70	1753	4.33	3.80	14.4%	
71 or older	297	4.22	3.28	12.1%	
Years in field (yrs)					
0–10	3995	6.08	4.78	28.1%	
11–20	2523	5.02	4.66	19.2%	
21–30	2272	4.65	4.43	15.6%	<0.001
31–40	1938	4.39	3.87	15.0%	
41 or more	524	4.18	3.29	13.2%	
Work environment					
Private firm	4712	5.57	4.59	23.4%	
Sole practitioner, private practice	2262	4.94	4.72	19.0%	
In-house: government, public, or nonprofit	2198	4.94	4.45	19.2%	
In-house: corporation or for-profit institution	828	4.91	4.15	17.8%	<0.001
Judicial chambers	653	4.46	3.83	16.1%	
College or law school	163	4.90	4.66	17.2%	
Bar Administration or Lawyers Assistance Program	50	5.32	4.62	24.0%	
Firm position					
Clerk or paralegal	115	5.05	4.13	16.5%	
Junior associate	964	6.42	4.57	31.1%	
Senior associate	938	5.89	5.05	26.1%	<0.001
Junior partner	552	5.76	4.85	23.6%	
Managing partner	671	5.22	4.53	21.0%	
Senior partner	1159	4.99	4.26	18.5%	

*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.
**Comparisons were analyzed using Mann-Whitney *U* tests and Kruskal-Wallis tests.

approached significance, with higher AUDIT scores predicted for those just starting out in the legal profession (0–10 yrs of experience) ($\beta = 0.46$, Wald $[df = 1] = 3.808$, $P = 0.051$). Model-based calculated probabilities for respondents aged 30 or younger indicated that they had a mean probability of 0.35 (standard deviation [SD] = 0.01), or a 35% chance for scoring an 8 or higher on the AUDIT; in comparison, those respondents who were 61 or older had a mean probability of 0.17 (SD = 0.01), or a 17% chance of scoring an 8 or higher.

Each of the 3 subscales of the AUDIT was also investigated. For the AUDIT-C, which measures frequency and quantity of alcohol consumed, age was a strong predictor of subscore, with younger respondents demonstrating significantly higher AUDIT-C scores. Respondents who were 30 years old or younger, 31 to 40 years old, and 41 to 50 years old all had significantly higher AUDIT-C scores than their older peers, respectively ($\beta = 1.16$, Wald $[df = 1] = 24.56$, $P < 0.001$; $\beta = 0.86$, Wald $[df = 1] = 16.08$, $P < 0.001$; and $\beta = 0.48$, Wald $[df = 1] = 6.237$, $P = 0.013$), indicating that younger age predicted higher frequencies of drinking and quantity of alcohol consumed. No other factors were significant predictors of AUDIT-C scores. Neither the predictive model for the dependence subscale nor the harmful use subscale indicated significant predictive ability for the 3 included factors.

Drug Use

Participants were questioned regarding their use of various classes of both licit and illicit substances to provide a basis for further study. Participant use of substances is displayed in Table 1. Of participants who endorsed use of a specific substance class in the past 12 months, those using stimulants had the highest rate of weekly usage (74.1%), followed by sedatives (51.3%), tobacco (46.8%), marijuana (31.0%), and opioids (21.6%). Among the entire sample, 26.7% (n = 3419) completed the DAST, with a mean score of 1.97 (SD = 1.36). Rates of low, intermediate, substantial, and severe concern were 76.0%, 20.9%, 3.0%, and 0.1%, respectively. Data collected from the DAST were found to not meet the assumptions for more advanced statistical procedures. As a result, no inferences about these data could be made.

Mental Health

Among the sample, 11,516 participants (89.8%) completed all questions on the DASS-21. Relationships between demographic and professional characteristics and depression, anxiety, and stress subscale scores are summarized in Table 4. While men had significantly higher levels of depression ($P < 0.05$) on the DASS-21, women had higher levels of anxiety ($P < 0.001$) and stress ($P < 0.001$). DASS-21 anxiety,

TABLE 4. Summary Statistics for Depression Anxiety Stress Scale (DASS-21)

	DASS Depression				DASS Anxiety				DASS Stress			
	n	M	SD	P^*	n	M	SD	P^*	n	M	SD	P^*
Total sample	12300	3.51	4.29		12277	1.96	2.82		12271	4.97	4.07	
Sex												
Men	6518	3.67	4.46	<0.05	6515	1.84	2.79	<0.001	6514	4.75	4.08	<0.001
Women	5726	3.34	4.08		5705	2.10	2.86		5705	5.22	4.03	
Age category (yrs)												
30 or younger	1476	3.71	4.15		1472	2.62	3.18		1472	5.54	4.61	
31–40	3112	3.96	4.50		3113	2.43	3.15		3107	5.99	4.31	
41–50	2572	3.83	4.54	<0.001	2565	2.03	2.92	<0.001	2559	5.36	4.12	<0.001
51–60	2808	3.41	4.27		2801	1.64	2.50		2802	4.47	3.78	
61–70	1927	2.63	3.65		1933	1.20	2.06		1929	3.46	3.27	
71 or older	326	2.03	3.16		316	0.95	1.73		325	2.72	3.21	
Years in field												
0–10 yrs	4330	3.93	4.45		4314	2.51	3.13		4322	5.82	4.24	
11–20 yrs	2800	3.81	4.48		2800	2.09	3.01		2777	5.45	4.20	
21–30 yrs	2499	3.37	4.21	<0.001	2509	1.67	2.59	<0.001	2498	4.46	3.79	<0.001
31–40 yrs	2069	2.81	3.84		2063	1.22	1.98		2084	3.74	3.43	
41 or more yrs	575	1.95	3.02		564	1.01	1.94		562	2.81	3.01	
Work environment												
Private firm	5028	3.47	4.17		5029	2.01	2.85		5027	5.11	4.06	
Sole practitioner, private practice	2568	4.27	4.84		2563	2.18	3.08		2567	5.22	4.34	
In-house: government, public, or nonprofit	2391	3.45	4.26		2378	1.91	2.69		2382	4.91	3.97	
In-house: corporation or for-profit institution	900	2.96	3.66	<0.001	901	1.84	2.80	<0.001	898	4.74	3.97	<0.001
Judicial chambers	717	2.39	3.50		710	1.31	2.19		712	3.80	3.44	
College or law school	182	2.90	3.72		188	1.43	2.09		183	4.48	3.61	
Bar Administration or Lawyers Assistance Program	55	2.96	3.65		52	1.40	1.94		53	4.74	3.55	
Firm position												
Clerk or paralegal	120	3.98	4.97		121	2.10	2.88		121	4.68	3.81	
Junior associate	1034	3.93	4.25		1031	2.73	3.31		1033	5.78	4.16	
Senior associate	1021	4.20	4.60	<0.001	1020	2.37	2.95	<0.001	1020	5.91	4.33	<0.001
Junior partner	590	3.88	4.22		592	2.16	2.78		586	5.68	4.15	
Managing partner	713	2.77	3.58		706	1.62	2.50		709	4.73	3.84	
Senior partner	1219	2.70	3.61		1230	1.37	2.43		1228	4.08	3.57	
DASS-21 category frequencies	n	%			n	%			n	%		
Normal	8816	71.7			9908	80.7			9485	77.3		
Mild	1172	9.5			1059	8.6			1081	8.8		
Moderate	1278	10.4			615	5.0			1001	8.2		
Severe	496	4.0			310	2.5			546	4.4		
Extremely severe	538	4.4			385	3.1			158	1.3		

*Comparisons were analyzed using Mann-Whitney *U* tests and Kruskal-Wallis tests.

depression, and stress scores decreased as participants' age or years worked in the field increased ($P < 0.001$). When comparing positions within private firms, more senior positions were generally associated with lower DASS-21 subscale scores ($P < 0.001$). Participants classified as nonproblematic drinkers on the AUDIT had lower levels of depression, anxiety, and stress ($P < 0.001$), as measured by the DASS-21. Comparisons of DASS-21 scores by AUDIT drinking classification are outlined in Table 5.

Participants were questioned regarding any past mental health concerns over the course of their legal career, and provided self-report endorsement of any specific mental health concerns they had experienced. The most common mental health conditions reported were anxiety (61.1%), followed by depression (45.7%), social anxiety (16.1%), attention deficit hyperactivity disorder (12.5%), panic disorder (8.0%), and bipolar disorder (2.4%). In addition, 11.5% of the participants reported suicidal thoughts at some point during their career, 2.9% reported self-injurious behaviors, and 0.7% reported at least 1 prior suicide attempt.

Treatment Utilization and Barriers to Treatment

Of the 6.8% of the participants who reported past treatment for alcohol or drug use (n = 807), 21.8% (n = 174) reported utilizing treatment programs specifically tailored to legal professionals. Participants who had reported prior treatment tailored to legal professionals had significantly lower mean AUDIT scores (M = 5.84, SD = 6.39) than participants who attended a treatment program not tailored to legal professionals (M = 7.80, SD = 7.09, $P < 0.001$).

Participants who reported prior treatment for substance use were questioned regarding barriers that impacted their ability to obtain treatment services. Those reporting no prior treatment were questioned regarding hypothetical barriers in the event they were to need future treatment or services. The 2 most common barriers were the same for both groups: not wanting others to find out they needed help (50.6% and 25.7% for the treatment and nontreatment groups, respectively), and concerns regarding privacy or confidentiality (44.2% and 23.4% for the groups, respectively).

TABLE 5. Relationship AUDIT Drinking Classification and DASS-21 Mean Scores

		Nonproblematic	Problematic*	
		M (SD)	M (SD)	P**
DASS-21 total score		9.36 (8.98)	14.77 (11.06)	<0.001
DASS-21 subscale scores	Depression	3.08 (3.93)	5.22 (4.97)	<0.001
	Anxiety	1.71 (2.59)	2.98 (3.41)	<0.001
	Stress	4.59 (3.87)	6.57 (4.38)	<0.001

AUDIT, Alcohol Use Disorders Identification Test; DASS-21, Depression Anxiety Stress Scales-21.

*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.

**Means were analyzed using Mann-Whitney U tests.

DISCUSSION

Our research reveals a concerning amount of behavioral health problems among attorneys in the United States. Our most significant findings are the rates of hazardous, harmful, and potentially alcohol dependent drinking and high rates of depression and anxiety symptoms. We found positive AUDIT screens for 20.6% of our sample; in comparison, 11.8% of a broad, highly educated workforce screened positive on the same measure (Matano et al., 2003). Among physicians and surgeons, Oreskovich et al. (2012) found that 15% screened positive on the AUDIT-C subscale focused on the quantity and frequency of use, whereas 36.4% of our sample screened positive on the same subscale. While rates of problematic drinking in our sample are generally consistent with those reported by Benjamin et al. (1990) in their study of attorneys (18%), we found considerably higher rates of mental health distress.

We also found interesting differences among attorneys at different stages of their careers. Previous research had demonstrated a positive association between the increased prevalence of problematic drinking and an increased amount of years spent in the profession (Benjamin et al., 1990). Our findings represent a direct reversal of that association, with attorneys in the first 10 years of their practice now experiencing the highest rates of problematic use (28.9%), followed by attorneys practicing for 11 to 20 years (20.6%), and continuing to decrease slightly from 21 years or more. These percentages correspond with our findings regarding position within a law firm, with junior associates having the highest rates of problematic use, followed by senior associates, junior partners, and senior partners. This trend is further reinforced by the fact that of the respondents who stated that they believe their alcohol use has been a problem (23%), the majority (44%) indicated that the problem began within the first 15 years of practice, as opposed to those who indicated the problem started before law school (26.7%) or after more than 15 years in the profession (14.5%). Taken together, it is reasonable to surmise from these findings that being in the early stages of one's legal career is strongly correlated with a high risk of developing an alcohol use disorder. Working from the assumption that a majority of new attorneys will be under the age of 40, that conclusion is further supported by the fact that the highest rates of problematic drinking were present among attorneys under the age of 30 (32.3%), followed by attorneys aged 31 to 40 (26.1%), with declining rates reported thereafter.

Levels of depression, anxiety, and stress among attorneys reported here are significant, with 28%, 19%, and 23% experiencing mild or higher levels of depression, anxiety, and stress, respectively. In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression. Mental health concerns often co-occur with alcohol use disorders (Gianoli and Petrakis, 2013), and our study reveals significantly higher levels of depression, anxiety, and stress among those screening positive for problematic alcohol use. Furthermore, these mental health concerns manifested on a similar trajectory to alcohol use disorders, in that they generally decreased as both age and years in the field increased. At the same time, those with depression, anxiety, and stress scores within the normal range endorsed significantly fewer behaviors associated with problematic alcohol use.

While some individuals may drink to cope with their psychological or emotional problems, others may experience those same problems as a result of their drinking. It is not clear which scenario is more prevalent or likely in this population, though the ubiquity of alcohol in the legal professional culture certainly demonstrates both its ready availability and social acceptability, should one choose to cope with their mental health problems in that manner. Attorneys working in private firms experience some of the highest levels of problematic alcohol use compared with other work environments, which may underscore a relationship between professional culture and drinking. Irrespective of causation, we know that co-occurring disorders are more likely to remit when addressed concurrently (Gianoli and Petrakis, 2013). Targeted interventions and strategies to simultaneously address both the alcohol use and mental health of newer attorneys warrant serious consideration and development if we hope to increase overall well being, longevity, and career satisfaction.

Encouragingly, many of the same attorneys who seem to be at risk for alcohol use disorders are also those who should theoretically have the greatest access to, and resources for, therapy, treatment, and other support. Whether through employer-provided health plans or increased personal financial means, attorneys in private firms could have more options for care at their disposal. However, in light of the pervasive fears surrounding their reputation that many identify as a barrier to treatment, it is not at all clear that these individuals would avail themselves of the resources at their disposal while working in the competitive, high-stakes environment found in many private firms.

Compared with other populations, we find the significantly higher prevalence of problematic alcohol use among attorneys to be compelling and suggestive of the need for tailored, profession-informed services. Specialized treatment services and profession-specific guidelines for recovery management have demonstrated efficacy in the physician population, amounting to a level of care that is quantitatively and qualitatively different and more effective than that available to the general public (DuPont et al., 2009).

Our study is subject to limitations. The participants represent a convenience sample recruited through e-mails and

news postings to state bar mailing lists and web sites. Because the participants were not randomly selected, there may be a voluntary response bias, over-representing individuals that have a strong opinion on the issue. Additionally, some of those that may be currently struggling with mental health or substance use issues may have not noticed or declined the invitation to participate. Because the questions in the survey asked about intimate issues, including issues that could jeopardize participants' legal careers if asked in other contexts (eg, illicit drug use), the participants may have withheld information or responded in a way that made them seem more favorable. Participating bar associations voiced a concern over individual members being identified based on responses to questions; therefore no IP addresses or geolocation data were gathered. However, this also raises the possibility that a participant took the survey more than once, although there was no evidence in the data of duplicate responses. Finally, and most importantly, it must be emphasized that estimations of problematic use are not meant to imply that all participants in this study deemed to demonstrate symptoms of alcohol use or other mental health disorders would individually meet diagnostic criteria for such disorders in the context of a structured clinical assessment.

CONCLUSIONS

Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations. These levels of problematic drinking have a strong association with both personal and professional characteristics, most notably sex, age, years in practice, position within firm, and work environment. Depression, anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics. The data reported here contribute to the fund of knowledge related to behavioral health concerns among practicing attorneys and serve to inform investments in lawyer assistance programs and an increase in the availability of attorney-specific treatment. Greater education aimed at prevention is also indicated, along with public awareness campaigns within the profession designed to overcome the pervasive stigma surrounding substance use disorders and mental health concerns. The confidential nature of lawyer-assistance programs should be more widely publicized in an effort to overcome the privacy concerns that may create barriers between struggling attorneys and the help they need.

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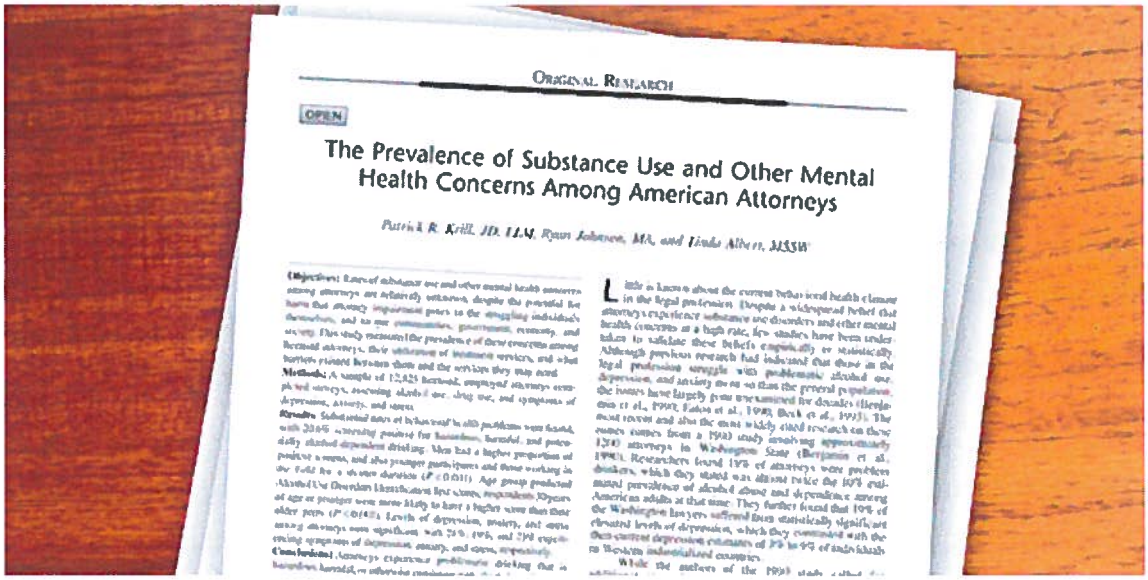
Implications, next steps discussed « ABA News Archives

In early February a landmark study conducted by the Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs revealed widespread and substantial levels of problem drinking as well as other behavioral health problems among American lawyers.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The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW

The study – the most comprehensive national research to date – reported that 21 percent of licensed, employed lawyers qualify as problem drinkers, 28 percent struggle with some level of depression and 19 percent demonstrate symptoms of anxiety. The study, published in the Journal of Addiction Medicine, found that younger attorneys in the first 10 years of practice exhibit the highest incidence of these problems.

The study compared attorneys with other professionals, including doctors, and determined that lawyers experience alcohol-use disorders at a far higher rate than other professions. The results also showed that the most common barriers for attorneys seeking help were fear of others finding out and general concerns about confidentiality.

YourABA caught up with the authors of the study, Patrick R. Krill, director of of the Legal Professionals Program at the Hazelden Betty Ford Foundation, and Linda Albert, representative of the ABA Commission on LAPs, to find out more.

How can lawyers recognize when a colleague needs help and when they do, what should they do about it?

Albert: It can be difficult to identify a person who needs help. However, here are some signs and symptoms to watch for:

- A person's behavior changes, they start coming in late to the office or leaving early.
- Their work product changes, they have decreased production or the quality of their work suffers.
- They isolate, stop attending work-related functions or communicating with colleagues.
- They have noticeable mood changes with irritability or apathy.
- In later stages of problems with alcohol they may come to work smelling of alcohol.
- When asked if there are problems, they avoid the question or insist nothing has changed.

We always encourage colleagues to "Do something." Express to the person that they don't look well or seem quite right and ask if they need any help or assistance. Call the local lawyers assistance program and they will guide you on the best way to reach out to the person for the best outcome.

Krill: When approaching a colleague about an issue like this, steps should be taken to maximize an environment of dignity, respect, confidentiality, support and empathy. Accusations, threats and public confrontations are not the appropriate starting point for such a conversation. The situation could very well escalate to the point where it is necessary for a firm or lawyer to exercise the leverage that they have to compel a colleague to seek help, but you shouldn't *begin* the dialogue with an ultimatum. If you are unsure or uncomfortable with how to approach these issues, reach out and get some advice from a professional. It will be well worth your time.

Are there any confidentiality issues involved in bringing this issue forward at a workplace?

Albert: Law offices that have concerns about their employees or colleagues can

always utilize the lawyer assistance program, which typically has confidentiality via statute or Supreme Court rule. This allows the LAP personnel and volunteers to contact the person in question and work under the rule of confidentiality. LAP personnel and volunteers are most often exempt from reporting misconduct. Since the research demonstrated that one of the biggest barriers to lawyers getting the help they need is fears about confidentiality, working with a program that has confidentiality via the court or statute may help.

Krill: Many law firms do not have adequate or thoughtfully designed policies and procedures in place for dealing with attorney impairment issues, including meaningful protection of confidentiality. All firms should examine their protocols around these issues and update them to reflect a philosophy of early detection and intervention, support, confidentiality and workplace reintegration. Ideally this should be done with the guidance and input of behavioral health experts who understand addiction, depression, treatment and recovery issues. Too often, firms fail to address these issues proactively, and find themselves cobbling together a response strategy after a crisis has either emerged or is threatening to emerge. That's not the best formula for successful outcomes.

How can law schools help address this problem?

Albert:

1. Mandated classes on alcohol/drug and mental health issues; and skills for maintaining health and wellness while working in the legal profession. Show the interface between impaired lawyers and ethical violations.
2. Improve messaging to law students regarding "getting help is the smart thing to do" and work to decrease the messaging that law students should hide their problems and avoid treatment while in law school.
3. Increase the systems approach to working with law students so lawyer assistance programs and law schools work closely together to implement programming geared at improving the health and wellness of law students.
4. Decrease the competitive atmosphere within law schools and other cultural dynamics that increase anxiety and depression among law students.

Krill: Our research indicated that roughly a quarter of attorneys who have experienced problems with substance abuse or mental health problems

indicated that the problems began prior to law school. That's a large number. The law school admissions process should better screen for these individuals, providing referrals to treatment and support resources. There should be a much greater emphasis on the importance of physical, cognitive and emotional wellness as a prerequisite to competency and law school applicants should be required to demonstrate an understanding of these issues, perhaps through some adjunct form of standardized testing or an essay submission.

Based on your study, should lawyer assistance programs change their approach to problem drinking and behavioral problems among lawyers? And, if so, in what ways?

Albert: Lawyer assistance programs have a unified approach to problem drinking and behavioral health problems among lawyers. The approach has empirical foundations based upon screenings, evaluations, referrals to quality treatment programs and peer support. The needed cultural shift is a change away from believing that health and wellness is primarily a goal of LAPs and therefore not on the scope of other legal entities. It is only through a systems approach where law schools, bar associations, admissions and regulation agencies, along with large and small firms, join together to form partnerships to implement policies and procedures along with a cultural shift giving lawyer health and wellness equal footing to the billable hour, professional responsibility, grades, etc. Then I believe we will see a decline in the distress symptoms within the profession.

Krill: In my view, the larger question is *what is the rest of the profession going to do to change their approach to these problems?* Addressing substance abuse and mental health issues cannot fall solely at the feet of lawyer assistance programs. Lawyers themselves, law firms and law schools must get on board with meaningful efforts and initiatives that match the size and scope of the problem. I don't want to see this issue shoved off onto LAPs as being solely their responsibility. We need broad-based accountability, buy-in and commitment to systemic reforms. Everyone has a part to play.

What role could bar associations play in changing the environment of alcohol overuse among lawyers?

Albert: Bar associations can join with other health and wellness groups to educate their members on the preventive strategies for abuse of alcohol and

drugs, refrain from inclusion of alcohol at their social events, promote CLE opportunities on the subjects of substance use and mental health and work to fully fund their LAP programs.

Krill: They could start by making greater and sustained efforts to decouple or deemphasize alcohol from networking and socializing, especially at bar association events. Some bar associations have attempted to do this, and found themselves struggling with poorly attended events as a result. While I understand the concerns around low attendance and sagging membership rates, it is irresponsible for bar associations to continue on with a "business as usual" approach in light of the completely unacceptable levels of problem drinking that our study confirmed. Failure to change is tantamount to enabling.

The Hazelden study's findings were surprising in that it showed lawyers in the earlier stages of their careers were at higher risk for problem drinking. How surprising was this? And what are the long-term implications for the profession?

Albert: This was an unexpected finding and the long-term implications for the profession cannot be ignored. The largest sector of lawyers – the baby boomers – are beginning to retire. This will open up the need for more lawyers in society. Our society will need lawyers to be healthy, proactive about maintaining their health and wellness and able to be involved with mentoring programs from mid-age lawyers. If the problem is not addressed now in a proactive manner the legal profession could struggle to be available to society in a way we are accustomed to. Young lawyers who are struggling may become disillusioned and leave the practice of law, further depleting the ranks of lawyers.

Krill: This was surprising, largely because it was such a direct reversal of the previous data. Long-held beliefs were turned on their heads. Interestingly though, our findings could also represent a willingness of younger attorneys to be more candid about these issues, which could ultimately be a good thing. The bottom line, however, is that we now have an entire generation of new lawyers who are likely facing shortened, less productive, less satisfying and more troubled careers as a result of their substance abuse and mental health issues. That should be deeply concerning to anyone with a vested interest in the long-term health and sustainability of our profession, and its institutions.

The New York Times | https://nyti.ms/2voimyC

The Lawyer, the Addict

A high-powered Silicon Valley attorney dies. His ex-wife investigates, and finds a web of drug abuse in his profession.

By EILENE ZIMMERMAN Photographs by DAVID BRANDON GEETING

JULY 15, 2017

In July 2015, something was very wrong with my ex-husband, Peter. His behavior over the preceding 18 months had been erratic and odd. He could be angry and threatening one minute, remorseful and generous the next. His voice mail messages and texts had become meandering soliloquies that didn't make sense, veering from his work travails, to car repairs, to his pet mouse, Snowball.

I thought maybe the stress of his job as a lawyer had finally gotten to him, or that he was bipolar. He had been working more than 60 hours a week for 20 years, ever since he started law school and worked his way into a partnership in the intellectual property practice of Wilson Sonsini Goodrich & Rosati, a prominent law firm based in Silicon Valley.

Then, for two days, Peter couldn't be reached. So I drove the 20 minutes or so to his house, to look in on him. Although we were divorced, we had known each other by then for nearly 30 years. We were family.

I parked in Peter's driveway, used my key to open the front door and walked up to the living room, a loftlike space with bamboo floors bathed in sunlight.

“Peter?” I called out.

Silence. A few candy wrappers littered a counter. Peter worked so much that he rarely cooked anymore, sustaining himself largely on fast food, snacks, coffee, ibuprofen and antacids. I headed toward the bedroom, calling his name.

The door was ajar. A few crumpled and bloodied tissues were scattered on the bedsheets. And then I turned the corner and saw him, lying on the floor between the bathroom and the bedroom. His head rested on a flattened cardboard box.

In my shock, I didn’t see the half-filled syringes on the bathroom sink, or the spoon, lighter and crushed pills. I didn’t see the bag of white powder, or the tourniquet, or the other lighter next to the bed. The police report from that day noted several safes around the bedroom, all of them open and spilling out translucent orange pill bottles.

Peter, one of the most successful people I have ever known, died a drug addict, felled by a systemic bacterial infection common to intravenous users.

Of all the heartbreaking details of his story, the one that continues to haunt me is this: The history on his cellphone shows the last call he ever made was for work. Peter, vomiting, unable to sit up, slipping in and out of consciousness, had managed, somehow, to dial into a conference call.

The Map of Peter’s Descent

None of this made sense. Not only was Peter one of the smartest people in my life, he had also been a chemist before becoming a lawyer and most likely understood how the drugs he was taking would affect his neurochemistry.

In my attempt to fathom what happened to him and how I — and everyone else in his world — missed it, I set out to create a map of Peter's life the year before he died. (To protect the privacy of our children and Peter's extended family, I'm not using his surname.)

I studied his texts to drug dealers, and I compared the timing of those with dates and times of A.T.M. withdrawals he made. I needed to see the signs I hadn't known were signs. The nonsensical conversations. The crazy hours he kept. The nights he told our children he was running out to get a soda, only to disappear.

Human beings are physically and emotionally complex, so there is no simple answer as to why Peter began abusing drugs. But as a picture of his struggle took shape before my eyes, so did another one: The further I probed, the more apparent it became that drug abuse among America's lawyers is on the rise and deeply hidden.

One of the first things I learned is that there is little research on lawyers and drug abuse. Nor is there much data on drug use among lawyers compared with the general population or white-collar workers specifically.

One of the most comprehensive studies of lawyers and substance abuse was released just seven months after Peter died. That 2016 report, from the Hazelden Betty Ford Foundation and the American Bar Association, analyzed the responses of 12,825 licensed, practicing attorneys across 19 states.

Over all, the results showed that about 21 percent of lawyers qualify as problem drinkers, while 28 percent struggle with mild or more serious depression and 19 percent struggle with anxiety. Only 3,419 lawyers answered questions about drug use, and that itself is telling, said Patrick Krill, the study's lead author and also a lawyer. "It's left to speculation what motivated 75 percent of attorneys to skip over the section on drug use as if it wasn't there."

In Mr. Krill's opinion, they were afraid to answer.

Of the lawyers that did answer those questions, 5.6 percent used cocaine, crack and stimulants; 5.6 percent used opioids; 10.2 percent used marijuana and hash; and nearly 16 percent used sedatives. Eighty-five percent of all the lawyers surveyed had used alcohol in the previous year. (For comparison sake, about 65 percent of the general population drinks alcohol.)

Nearly 21 percent of the lawyers that said they had used drugs in the previous year reported "intermediate" concern about their drug use. Three percent had "severe" concerns.

The results can be interpreted two ways, said Mr. Krill, who is also a licensed drug and alcohol counselor and whose consulting firm, Krill Strategies, works with law firms on drug abuse and mental health issues. "One is that a significantly smaller percentage of attorneys in the study are using drugs as compared to alcohol. We don't think that's true."

"Alcohol is legal," Mr. Krill said, not to mention socially acceptable. "So admitting you drink too much is not directly at odds with your role as a licensed attorney."

Illicit drug use, however, is illegal. "I think the incidence of drug use and abuse is significantly underreported," he said.

In the government's most recent National Survey on Drug Use and Health report on substance abuse by industry, professional services (which include the legal profession) ranked ninth out of 19 industries in terms of illicit drug use. The entertainment industry ranked higher on the list; finance and real estate ranked lower.

The A.B.A.'s Commission on Lawyer Assistance Programs' most recent national report identified alcohol as the No. 1 substance-abuse problem for lawyers. The second most commonly abused substance was prescription drugs.

"We see two major trends in the legal profession," said Warren Zysman, the clinical director of the EARS Recovery Program in

Smithtown, N.Y., a medically supervised chemical dependency program, and the former chief executive of Addiction Care Interventions, a rehabilitation center in Manhattan for professionals, including lawyers. “One is the opioid addiction, and the other is use of benzodiazepines like Xanax.”

In recent years, he said, “we’re seeing a significant rate of increase specifically among attorneys using prescription medications that become a gateway to street drugs.” It used to be mostly alcohol, he said, “but now almost every attorney that comes in for treatment, even if they drink, they are using drugs, too — Xanax, Adderall, opiates, cocaine and crack.”

Opioids and stimulants often go hand in hand with alcohol. In fact, drugs are sometimes used to combat the symptoms of alcohol withdrawal.

Brian Cuban, a lawyer in recovery for alcohol and drug addiction and the author of the memoir “The Addicted Lawyer: Tales of the Bar, Booze, Blow and Redemption,” would regularly show up for work drunk and do a few lines of cocaine to be able to perform. “I was doing coke in the bathroom in the morning to recover from hangovers,” he said. “Cocaine got me back on focus.”

In addition to having a private practice at the time, Mr. Cuban was working for his well-known brother, the businessman Mark Cuban, who threatened to fire Brian if he didn’t get sober. “I kept thinking: ‘I’m not going to rehab. I’m a lawyer, lawyers don’t go to rehab, they aren’t in 12-step programs,’” he said. “Of course, half the people I know in my 12-step program are lawyers.”

Lisa Smith, a lawyer and recovering alcoholic and drug addict, said the only way she was able to perform in her marketing job at the firm Pillsbury Winthrop in the early 2000s was by using cocaine to deal with alcohol withdrawal symptoms. “I was drinking during the day and at night,” said Ms. Smith, now deputy executive director of the law firm Patterson Belknap Webb & Tyler in New York and author of the

memoir "Girl Walks Out of a Bar." "I did coke because it would allow me to straighten up enough to show up to work in the afternoon."

Professional stress also plays a role, said Dr. Daniel Angres, an associate professor of psychiatry at Northwestern University Feinberg School of Medicine. "Law firms have a culture of keeping things underground, a conspiracy of silence," he said. "There is a desire not to embarrass people, and as long as they are performing, it's easier to just avoid it. And there's a lack of understanding that addiction is a disease."

That stress became particularly acute as the economy sank after the 2008 financial crisis. Jobs became more scarce. The pressure grew to not take time off from work.

At Peter's memorial service in 2015 — held in a place he loved, with sweeping views of the Pacific — a young associate from his firm stood up to speak of their friendship and of the bands they sometimes went to see together, only to break down in tears. Quite a few of the lawyers attending the service were bent over their phones, reading and tapping out emails.

Their friend and colleague was dead, and yet they couldn't stop working long enough to listen to what was being said about him.

Peter himself lived in a state of heavy stress. He obsessed about the competition, about his compensation, about the clients, their demands and his fear of losing them. He loved the intellectual challenge of his work but hated the combative nature of the profession, because it was at odds with his own nature.

Long before law school, when Peter was still in his early 20s and wearing his hair in a long ponytail, his passions were science, philosophy and music. One of his idols was the astronomer Carl Sagan. Another was Jimi Hendrix. He gave me books like "Siddhartha" and "Letters to a Young Poet" and played bass guitar in bands from college onward, even while a lawyer.

When he was a graduate student in chemistry, we spent whole weekends lying on the floor playing records for each other, talking about why we loved them and what memories a particular song snatched from the recesses of our minds.

After graduation, Peter worked for two small pharmaceutical companies but found the profession tedious and low paying. Having grown up in a low-income family, he didn't want to worry about paying the bills again. So he decided to use his chemistry background to become a patent lawyer.

When he graduated from law school, the starting salary of his first job in law was five times what he had earned as a chemist. But our lives were not suddenly easy. Although we had enough money, Peter's work schedule gave him little time to enjoy the fruits of his labor.

One Christmas Day early in his career, Peter's boss phoned from a ski lift in Aspen, Colo., to make sure Peter was going to finish a brief by that evening. He did, skipping dinner.

"I can't do this forever," Peter often told me. "I can't keep going like this for the next 20 years."

'Rewarded for Being Hostile'

According to some reports, lawyers also have the highest rate of depression of any occupational group in the country. A 1990 study of more than 100 professions indicated that lawyers are 3.6 times as likely to be depressed as people with other jobs. The Hazelden study found that 28 percent of lawyers suffer depression.

"Yes, there are other stressful professions," said Wil Miller, who practices family law in the offices of Molly B. Kenny in Bellevue, Wash. He spent 10 years as a sex crimes prosecutor, the last six months of which he was addicted to methamphetamines. "Being a surgeon is stressful, for instance — but not in the same way. It would be like

having another surgeon across the table from you trying to undo your operation. In law, you are financially rewarded for being hostile."

Peter battled his own brand of melancholy, something I found attractive in a tragically poetic, still-waters-run-deep kind of way. He used to tell me he wasn't someone who ever really felt happy. He had moments of being "not unhappy," he said, but his emotional range was narrow.

When something great happened, he didn't jump for joy. When something sad happened, he didn't break down and cry. The only times I ever saw tears in his eyes were in the hospital, right after each of our children was born.

Yet for almost a decade as an associate at various law firms, Peter displayed no photos of his children or me in his office. When I asked him why — particularly when other lawyers seemed to have photos in theirs — Peter told me he didn't want the partners to see him as "distracted by my family."

In many ways, Peter's personality and abilities read like a wish list of qualities for a lawyer. Trained as a scientist, he approached problems in a deliberative, logical way. He was intelligent, ambitious and most of all hard-working, perhaps because his decision to go to law school was such an enormous commitment — financially, logistically and emotionally — that he could justify it only by being the very best.

And he was. In law school he was editor of the law review and No. 1 in his class. He gave the speech at graduation.

He also had a single-minded focus that could border on obsessive. I remember when he became consumed with Bach's harpsichord concertos, assembling a library of every one he could find. He read about them, listened to lectures about them and even found a mathematical representation of a particular piece on YouTube, which he had us all watch. That level of focus was well suited for deep dives

into the new drug formulations, medical devices and technologies with which he had to constantly and quickly familiarize himself.

The Law School Effect

Some research shows that before they start law school, law students are actually healthier than the general population, both physically and mentally. “There’s good data showing that,” said Andy Benjamin, a psychologist and lawyer who teaches law and psychology at the University of Washington. “They drink less than other young people, use less substances, have less depression and are less hostile.”

In addition, he said, law students generally start school with their sense of self and their values intact. But, in his research, he said, he has found that the formal structure of law school starts to change that.

Rather than hew to their internal self, students begin to focus on external values, he said, like status, comparative worth and competition. “We have seven very strong studies that show this twists people’s psyches and they come out of law school significantly impaired, with depression, anxiety and hostility,” he said.

Academics often study law students because students are considered a bellwether for the profession. “They are the canaries in the coal mine,” Dr. Benjamin said.

Wil Miller, the lawyer and former methamphetamine addict, said that in his experience, law school encouraged students to take emotion out of their decisions. “When you start reinforcing that with grades and money, you aren’t just suppressing your emotions,” he said. “You’re fundamentally changing who you are.”

Research studying lawyers’ happiness supports this notion. “The psychological factors seen to erode during law school are the very factors most important for the well-being of lawyers,” Lawrence Krieger, a professor at Florida State University College of Law, and

Kennon Sheldon, a professor of psychology at the University of Missouri, wrote in their 2015 paper "What Makes Lawyers Happy?" Conversely, they wrote, "the factors most emphasized in law schools — grades, honors and potential career income — have nil to modest bearing on lawyer well-being."

After students began law school they experienced "a marked increase in depression, negative mood and physical symptoms, with corresponding decreases in positive affect and life satisfaction," the professors wrote.

Students also shed some of their idealism. Within the first year of law school, students' motivation for studying law and becoming lawyers shifted from "helping and community-oriented values to extrinsic, rewards-based values."

Young lawyers in treatment at the Center for Network Therapy, an ambulatory detox facility in Middlesex, N.J., frequently tell Dr. Indra Cidambi, the medical director, that the reality of working as a lawyer does not match what they had pictured while in law school. She has found that law students often drink and use drugs until they start their first job. After that, Dr. Cidambi said, "it's mostly alcohol, until they are established as senior associates or partners and they move back to opiates."

"These aren't the majority of lawyers," she added. "But there are quite a number abusing drugs, and once they get to heroin, it's very hard to break it."

'That's Impossible'

For the last two years of his life, every time Peter and I were together — whether it was back-to-school night, our son's cross country meets or our daughter's high school graduation — people would ask me

if he was O.K. They asked if he had cancer, an eating disorder, a metabolic disorder, AIDS. But they never asked about drugs.

Drugs didn't cross my mind, either. Not even the day I found his body, surrounded by drug paraphernalia, and called 911.

That day in Peter's house, the emergency medical workers told me right away that it was probably a drug overdose. I remember saying, "That's impossible." After all, I said, he was a partner at a law firm. He had an Ivy League education.

"How could that be?" I asked one of them. "He was so smart."

ID around her neck and clipboard on her lap, she nodded at me with a look of understanding. "We see a lot of this now," she said, meaning wealthy, accomplished men and women who start out with pain pills and graduate to amphetamines or heroin.

As I cleared out Peter's house after he died, I found receipts from medical-supply companies that had delivered things like bandages and tourniquets to his office address. Yet I don't think addiction crossed the mind of anyone he worked with, either.

Law firms are often reluctant to discuss substance abuse with their lawyers. The reason is not a malicious one, said Terry Harrell, a lawyer, substance abuse counselor and chairwoman of the A.B.A. Commission on Lawyers Assistance Programs. Law-firm leadership, she said, doesn't really know what signs to look for when it comes to addiction. And when it's happening, she said, they are so busy themselves, "they just don't see it."

When asked what the American Bar Association is doing to help combat mental health and substance abuse, Linda Klein, its president, said the A.B.A.'s requirement for continuing professional development and education "recommends that lawyers be required to take one credit of programming every three years that focuses on mental health or

substance abuse disorders." She added that "by requiring lawyers to attend such programs periodically, the hope is that these concerns will be reduced."

It's difficult, though, to imagine that one class every three years would have prevented Peter — or anyone else — from becoming an addict. Real change, experts and recovering addicts say, needs to happen at the law-firm level, but that is complicated by an entrenched culture of privacy combined with an allegiance to billable hours.

Ms. Smith, formerly of Pillsbury Winthrop, says she doesn't know what her previous firm knew or didn't know about her substance abuse. "They never said a thing to me," she said. "And during that entire time I was an addict, I didn't get a single negative performance review."

Edward Flanders, managing partner in Pillsbury's Manhattan office, said the firm was not aware of Ms. Smith's substance abuse issues when she was there. Ms. Smith spoke about her experience to the firm's New York City employees in March.

"Hearing about her experience was pretty eye-opening for the firm, and it's not something we want anyone else to have to go through alone," Mr. Flanders said.

Recalling Missed Signals

I've spent the past two years marinating in this mess, trying my best to navigate things like the byzantine probate process and my children's broken hearts. I firmly believe that law-firm culture, particularly at big firms, has to become more compassionate and more aware of the signs that one of their own is struggling.

Looking back, I can see the signs I missed.

There was the time our son broke his wrist playing soccer four years ago and was prescribed Vicodin; Peter rifled through my

medicine cabinet looking for the leftovers. “I use them for my back,” he said.

There was the holiday concert in which our son’s band was performing where Peter showed up late and jittery, looking so thin that I noticed his head seemed too big for his neck. After the show I walked with him to his car, and he complained that he was getting pushback from his firm about working from home so much.

“I’m more productive at home, but they have to see me, physically, in the office,” he said. “They don’t think I’m working if I’m not there.”

They were right.

And there was the time in early 2015 when my son told me Peter had received a shipment from Amazon that he had opened at the dining room table, pulling out boxes of syringes, bandages, cotton balls and wound cleanser. Peter explained it away as simply stocking up on medical supplies.

My son was puzzled by that. But by then his father’s behavior had become so strange, this almost seemed normal. “I just put my headphones on,” my son told me, “and said, ‘I have to do homework.’”

Years ago, when Peter was still a relatively new associate, he would joke that the perfect drug for him would be the combination of an antidepressant, a pain reliever and a stimulant. When I cleaned out his house, I found the ingredients for it: Vicodin, Tramadol, Adderall, cocaine, Xanax, crystal meth and a kaleidoscope of pills I couldn’t identify, but not for lack of trying.

Yet even as addiction was taking over his life, Peter continued working. In the notebooks he used to keep track of injection times and dosages, he also made cryptic notes about client calls and meetings, lists of things needed to prepare documents, filing deadlines.

Being a patent lawyer is intellectually grueling work, and Peter was good at it — really good at it — for a long time. Perhaps the arrogance

that grows from a profession in which your advice is worth $600 an hour is what allowed him to believe he didn't need to ask for help, that he could kick this on his own. Just another item on his lengthy to-do list.

In fact, while cleaning out his house I found a list of New Year's resolutions Peter wrote in December 2014, tucked into the bottom of a dresser drawer. "Run three races, spend more time with kids," his note to himself read.

And in red marker, the word "quit."

Correction: July 23, 2017

An article last Sunday about lawyers and drug addiction misstated the period during which Wil Miller, a former sex crimes prosecutor, was addicted to methamphetamines. It was the last six months of his tenure, not the entire 10 years he was in the job. The article also misspelled Mr. Miller's given name as Will.

Correction: July 24, 2017

An earlier version of this article referred incompletely to Lisa Smith's association with the firm Pillsbury Winthrop. While Ms. Smith was a lawyer, she was working in the firm's marketing department, not as a lawyer, during the period she said she used cocaine to deal with alcohol withdrawal symptoms.
Produced by Antonio de Luca and Whitney Richardson.

A version of this list appears in print on July 16, 2017, on Page BU1 of the New York edition with the headline: The Lawyer, the Addict.

NCLAP

An Important Free Resource for Lawyers

One of the free resources available to you as a State Bar member is the **Lawyer Assistance Program (LAP)**. From time to time, lawyers encounter a personal issue that, left unaddressed, could impair his or her ability to practice law. Accordingly, the LAP was created by lawyers for lawyers to assure that free, confidential assistance is available for any problem or issue that is impairing or might lead to impairment.

Lawyers at Particular Risk

Of all professionals, lawyers are at the greatest risk for anxiety, depression, alcoholism, drug addiction, and even suicide. As many as one in four lawyers are affected. This means it is likely that you, an associate, a partner, or one of your best lawyer friends will encounter one of these issues. Whether you need to call the LAP for yourself or to refer a colleague, all communications are completely confidential.

Anxiety and Depression

Anxiety and depression often go hand-in-hand. These conditions can be incapacitating and can develop so gradually that a lawyer is often unaware of the cumulative effect on his or her mood, habits, and lifestyle. Each condition is highly treatable, especially in the early stages. Asking for help, however, runs counter to our legal training and instincts. Most lawyers enter the profession to help others and believe they themselves should not need help. The good news is that all it takes is a phone call. The LAP works with lawyers exclusively. The LAP has been a trusted resource for thousands of lawyers in overcoming these conditions.

Alcohol and Other Substances

Often a lawyer will get depressed and self-medicate the depression with alcohol. Alcohol is a central nervous system depressant but acts like a stimulant in the first hour or two of consumption. The worse you feel, the more you drink initially to feel better, but the more you drink, the worse you feel. A vicious cycle begins. On the other hand, many alcoholic lawyers who have not had depression report that their drinking started normally at social events and increased slowly over time.

There is no perfect picture of the alcoholic or addicted lawyer. It may be surprising to learn that he or she probably graduated in the top one-third of the class. Also surprising, lawyers may find themselves in trouble with addiction due to the overuse or misuse of certain prescription medications that were originally prescribed to address a temporary condition. Use of these kinds of medications, combined with moderate amounts of alcohol, greatly increases the chances of severe impairment requiring treatment. The LAP knows the best treatment options available, guides lawyers through this entire process, and provides on-going support at every stage.

LAP recognizes alcoholism, addiction, and mental illness as diseases, not moral failures. The only stigma attached to these illnesses is the refusal to seek or accept help.

Confidentiality

All communications with the LAP are **strictly confidential** and subject to the attorney-client privilege. If you call to seek help for yourself, your inquiry is confidential. If you call as the spouse, child, law partner, or friend of a lawyer whom you suspect may need help, your communication is also treated confidentially and is never relayed without your permission to the lawyer for whom you are seeking help. The LAP has a committee of trained lawyer volunteers who have personally overcome these issues and are committed to helping other lawyers overcome them. If you call a LAP volunteer, your communication is also treated as confidential.

The LAP is completely separate from the disciplinary arm of the State Bar. If you disclose to LAP staff or to a LAP volunteer any misconduct or ethical violations, it is confidential and cannot be disclosed. *See* Rules 1.6(c) and 8.3(c) of the Rules of Professional Conduct and 2001 FEO 5. The LAP works because it provides an opportunity for a lawyer to get ***safe, free, confidential*** help before the consequences of any impairment become irreversible.

Know the signs. Make the call.
You could save a colleague's life.

Take the Test for Depression

YES NO

- ❑ ❑ 1. Do you feel a deep sense of depression, sadness, or hopelessness most of the day?
- ❑ ❑ 2. Have you experienced diminished interest in most or all activities?
- ❑ ❑ 3. Have you experienced significant appetite or weight change when not dieting?
- ❑ ❑ 4. Have you experienced a significant change in sleeping patterns?
- ❑ ❑ 5. Do you feel unusually restless...or unusually sluggish?
- ❑ ❑ 6. Do you feel unduly fatigued?
- ❑ ❑ 7. Do you experience persistent feelings of hopelessness or inappropriate feelings of guilt?
- ❑ ❑ 8. Have you experienced a diminished ability to think or concentrate?
- ❑ ❑ 9. Do you have recurrent thoughts of death or suicide?

If you answer yes to five or more of these questions (including questions #1 or #2), and if the symptoms described have been present nearly every day for two weeks or more, you should consider speaking to a health care professional about treatment options for depression.

Other explanations for these symptoms may need to be considered. Call the Lawyer Assistance Program.

Adapted from *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders*. Fourth Edition. Washington, DC. American Psychiatric Association: 1994.

Take the Test for Alcoholism

YES NO

- ❑ ❑ 1. Do you get to work late or leave early due to drinking?
- ❑ ❑ 2. Is drinking disturbing your home life?
- ❑ ❑ 3. Do you drink because you are shy with other people?
- ❑ ❑ 4. Do you wonder if drinking is affecting your reputation?
- ❑ ❑ 5. Have you gotten into financial difficulties as a result of drinking?
- ❑ ❑ 6. Does drinking make you neglect your family or family activities?
- ❑ ❑ 7. Has your ambition decreased since drinking?
- ❑ ❑ 8. Do you often drink alone?
- ❑ ❑ 9. Does drinking determine the people you tend to be with?
- ❑ ❑ 10. Do you want a drink at a certain time of day?
- ❑ ❑ 11. Do you want a drink the next morning?
- ❑ ❑ 12. Does drinking cause you to have difficulty sleeping?
- ❑ ❑ 13. Do you drink to build up your confidence?
- ❑ ❑ 14. Have you ever been to a hospital or institution because of drinking?
- ❑ ❑ 15. Do family or friends ever question the amount you drink?

If your answer is yes to two or more of these questions you may have a problem. Call the Lawyer Assistance Program.

FREE • SAFE • CONFIDENTIAL

Western Region
Cathy Killian 704.910.2310

Piedmont Region
Towanda Garner 919.719.9290

Eastern Region
Nicole Ellington 919.719.9267

FAQs

- ## Q. Who do I call with questions, to access my free BarCARES counseling sessions or with urgent concerns?

- ## Q. Can my family use my BarCARES counseling sessions?

- ## Q. Who pays for my BarCARES counseling sessions?

- ## Q. How is BarCARES different from the N.C. State Bar Lawyer Assistance Program?

  A. BarCARES is a confidential, short-term intervention program provided cost-free to members of participating judicial district bars, voluntary bar associations and law schools. All BarCARES contact is made through HRC Behavioral Health & Psychiatry, P.A., the organization that administers the BarCARES program. The three annual BarCARES counseling sessions are free.

  The Lawyer Assistance Program (LAP) is a separate free and confidential program offered by the N.C. State Bar. LAP has therapists on staff and provides intake, referral, ongoing case management and long-term follow-up. LAP has a cadre of trained lawyer volunteers who have dealt with and overcome the most common issues lawyers encounter. These volunteers serve as mentors to lawyers who reach out to LAP and provide their own experience as to what worked for them. LAP also hosts lawyer peer support and discussion groups across the state.

  BarCARES and LAP work cooperatively and cross-refer. For example, if a lawyer contacts LAP and is a member of the NCBA or a member of a participating judicial district bar, voluntary bar association or law school, LAP will refer the lawyer to the BarCARES program. Similarly, if a lawyer has been seeing a BarCARES therapist, and the therapist thinks the lawyer would benefit from additional support like speaking to peers who have overcome similar issues, the BarCARES therapist will recommend that the lawyer contact LAP.

  Both programs are confidential and work together for the good of North Carolina's legal community.

  For more information on BarCARES visit: www.barcares.org.

  For more information about The Lawyer Assistance Program visit: www.nclap.org.

What's All the Buzz About?

By Robynn Moraites

A recent national ABA study on attorney mental health and drinking has been getting a lot of buzz. Pun intended. Based on some small, historic studies and anecdotally, to be sure, we have known for years that attorneys are at greater risk for depression, anxiety, and alcohol problems than the general public and even other professionals. This landmark study, however, is the first to ever bring into sharp focus, with hard data and real numbers, what we are facing in our profession across a spectrum of mental health issues. The study was conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs. The findings were published in the peer-reviewed *Journal of Addiction Medicine* in February 2016.

Over 15,000 attorneys participated in the national study, and the dataset was culled to retain only currently licensed and employed attorneys. Responses from attorneys who were retired, unemployed, working outside of the legal profession, suspended, or otherwise on any form of inactive status were eliminated, leaving approximately 12,800 responses. Demographics were diverse in both gender and race and captured a robust range of practice settings, practice areas, years in practice, and positions held. This is the most comprehensive data ever collected regarding attorney mental health, and the single largest dataset.

Drinking: 21% Drinking at Harmful or Dependent Levels and 36% Drinking at Problematic Levels

Study participants completed a ten-question instrument known as the Alcohol Use Disorders Identification Test (AUDIT-10), which screens for different levels of problematic alcohol use, including hazardous use, harmful use, and possible alcohol dependence. The test asks about quantity and frequency of use and includes questions as to whether an individual has experienced consequences from drinking. The study found that 21% scored at levels consistent with harmful use including possible alcohol dependence. Males scored higher at 25%, compared to 16% for women. When examining responses purely for quantity and frequency of use (known as the AUDIT-3), the study found an astonishing 36% of respondents drinking at problematic levels. While there is no hard and fast line to define "problematic" levels, problematic drinking behaviors can include drinking at lunch or regularly binge drinking. Binge drinking is typically defined as consuming enough to have a blood alcohol content level of 0.08. That's about four drinks for women and five drinks for men in a two hour timeframe. When the same AUDIT-3 screening measure was used in a comprehensive survey of physicians, 15% of physicians reported use at this level—less than half of the number of attorneys reporting such use. It appears that more than one in three attorneys are crossing the line from social drinking to using alcohol as a coping mechanism.

Shocking Reversal of Earlier Findings: Today's Younger Lawyers at Far Greater Risk

In a significant reversal of a conclusion reached by the last documented, statistically valid study—a 1990 study out of Washington State—the study found that younger lawyers struggle the most with alcohol abuse. Respondents identified as 30 years or younger had a 32% rate of problem drinking, almost one in three, higher than any other age group. This finding directly contradicts the Washington study that found the longer an attorney practiced, the greater the risk of developing problems with alcohol. That data reversal is very significant, signaling major changes in the profession in the last 20 to 30 years. And with job prospects at an all-time low, and student debt at an all-time high, these younger lawyers who are most in need of treatment are least able to afford it. The LAP Foundation of NC, Inc. is working to bridge that gap. Please see page 20 for the story.

Depression, Stress, and Anxiety: 28% Report Concerns with Depression

Depression and anxiety often go hand in hand. The study found that 28% of attorneys, more than one in four, struggle with some level of depression, representing almost a ten percent increase from the 1990 Washington study. Males reported at a higher rate than females for depression. Nineteen percent reported mild or high levels of anxiety, with females reporting at a higher rate than males. Interestingly, when examining the full span of one's career, approximately 61% and 46% reported experiencing concerns with anxiety and depression, respectively, at some point in their career. Respondents also reported experiencing unreasonably high levels of stress (23%), social anxiety (16%), attention deficit hyperactivity disorder (12.5%), panic disorder (8%), and bipolar disorder (2.4%). More than 11% reported suicidal thoughts during their career. Three percent reported self-injurious behavior, and 0.7% reported at least one suicide attempt during the course of their career.

Like the findings associated with alcohol use, mental health conditions were higher in younger, less experienced attorneys and generally decreased as age and years of experience increased. The study also revealed significantly higher levels of anxiety, depression, and stress among those with problematic alcohol use, meaning mental health concerns often co-

occurred with an alcohol use disorder.

Barriers to Seeking Help – No Surprises

As part of the study, participants were asked to identify the biggest barriers to seeking treatment or assistance. Categorically, fear of being "found out" or stigmatized was the overwhelming first choice response. Regarding alcohol use, 67.5% said they didn't want others to find out, and 64% identified privacy and confidentiality as a major barrier. The responses for mental health concerns for these same two reasons were 55% and 47%, respectively. Additional reasons included concerns about losing their law license, not knowing who to ask for help, and not having insurance or money for treatment.

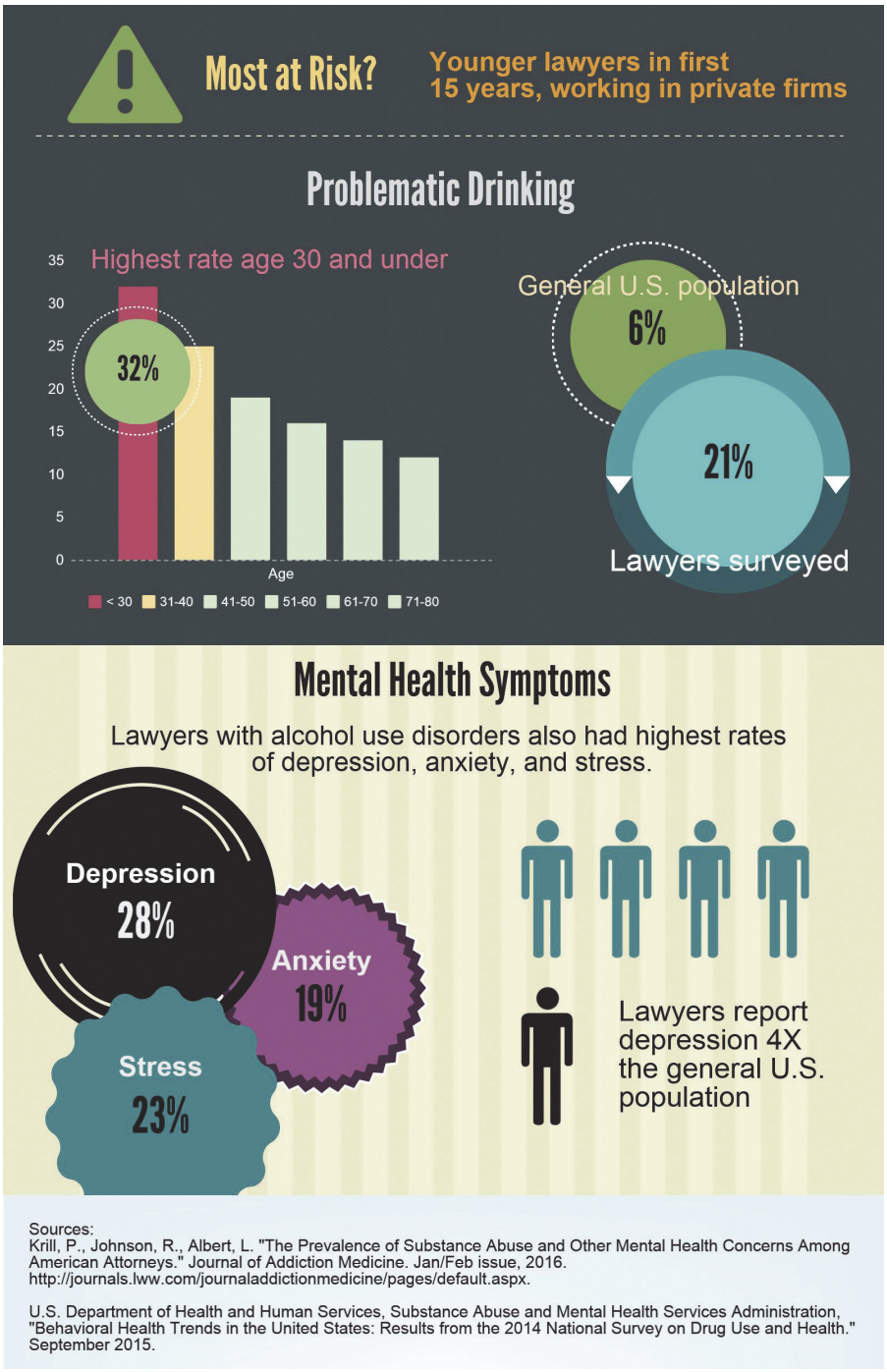
A surprising 84% indicated awareness and knowledge of lawyer assistance programs (LAPs), but only 40% would be likely to utilize the services of a LAP with privacy and confidentiality concerns again cited as the major barrier to seeking help through LAP programs.

Help and Hope

The data is far more extensive than can be outlined in this short article. There are telling findings about drug use, including use of prescription stimulants. Rates of depression, anxiety, and problematic drinking were also correlated to practice setting, with large firms and bar associations ranking highest. We can slice the data and analyze it extensively for years to come. But the key takeaway is that we now have hard data showing that one in three-to-four of us are at real risk and are not likely to seek out assistance.

Only 7% of participants reported that they obtained treatment for alcohol or drug use, and only 22% of those respondents went through programs tailored to legal professionals. Participants who sought help from programs tailored specifically for legal professionals had significantly better outcomes and lower (healthier) scores than those who sought treatment elsewhere. This suggests that programs with a unique understanding of lawyers and their work can better address the problems.

When I first took this job as director of our NC LAP, I met a lawyer in a spin class. She was sitting on the bike next to me and recognized me because my photo had appeared in a local bar newsletter. She said, "I hope I never have to call you or have need for your program's services." I thought about her comment for a moment and said, "Our volunteers are some of the happiest, most balanced, most resilient lawyers—people—you could ever hope to meet. They don't come to us that way. But if they follow our suggestions, they become so. And they even like being lawyers again." She said, "Wow. That's cool. I never thought about it like that." Because we are confidential, most lawyers never see the miracles of healing and regeneration that take place every day in the transformed lives of those who are willing to pocket their pride and simply ask for help. There is help and there is hope, and plenty of it. ■



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U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health." September 2015.

Robynn Moraites is the executive director of the North Carolina Lawyer Assistance Program.

Infographic reprinted with permission from the February 2016 Wisconsin Lawyer article, "Landmark Study: US Lawyers Face High Rates of Problem Drinking and Mental Health Issues," published by the State Bar of Wisconsin.

BarCARES and LAP—Working in Harmony

By Zeb Barnhardt and Robynn Moraites

There is some confusion for some between the NC Lawyer Assistance Program (NC LAP) and BarCARES. We hope to clear up the confusion. Both programs assist lawyers who need counseling, medications, or treatment for the full panoply of addictions and mental health issues. Both are confidential programs. Both are also free of charge. But they operate very differently—each working as a superb complement to the other.

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NC LAP is a program of the NC State Bar, and the BarCARES Program is sponsored by the NC Bar Association (NCBA). BarCARES provides referral for counseling services to lawyers who are either members of the NCBA or of local bar associations that have subscribed to the program. The program also serves district court judges, paralegals, and members of the Eastern Bankruptcy Institute. Members in qualifying districts are entitled to three free visits a year with a counselor in the BarCARES referral network. In many districts, a unique feature of BarCARES is that any of the three free annual visits may be used by a family member and are not limited to only the lawyer. Following the free visits offered within BarCARES, an attorney can generally continue work with the same counselor, if need be, using insurance benefits.

All BarCARES contact is made through HRC Behavioral Health & Psychiatry, PA, the organization that administers and arranges counseling provider services for the BarCARES program. BarCARES has a network of counselors and therapists across the state who specialize in treating a wide variety of mental health and addiction conditions, as well as work with normal stress and personal dilemmas that could interfere with lawyer performance and/or quality of life.

NC LAP provides services to all lawyers, judges (both federal and state), and law students in the state. While NC LAP has three full-time, licensed counselors on staff and provides some short-term or targeted direct counseling services, most of their work involves initial assessment, referral, and longer-term support and case management. First, NC LAP provides an initial consult to determine what issues most need attention and assistance. NC LAP then refers lawyers to counseling services that are likely the best fit, or makes treatment recommendations based on the unique needs of the lawyer. NC LAP may pull from its network of over 200 lawyer and judge volunteers across the state who have overcome similar issues, and connect the lawyer with a peer support person or a lawyer discussion group. For lawyers who are recovering from any drug or alcohol problems, NC LAP supports them when they return from treatment for the first few years with mentor pairing, support groups, and case management. NC LAP also runs peer support and discussion groups across the state. These groups are not limited to lawyers recovering from alcohol or drug problems—lawyers dealing with stress,

depression, and other issues also benefit. Many lawyers who engage with NC LAP long term eventually become volunteers. NC LAP provides ongoing training for its volunteers, and through its support groups and annual conferences, volunteers and clients become a tight-knit community across the state.

BarCARES and NC LAP work cooperatively and cross-refer. For example, if a lawyer contacts NC LAP and is located in a BarCARES district, in the event long-term counseling is recommended (and it almost always is), NC LAP will match the lawyer with the most suitable counselor in the BarCARES network, so that the first three visits each year are free. For example, NC LAP counselors know which counselors in the BarCARES network specialize in career counseling, divorce, depression, and the like. And NC LAP can pair client and therapist personalities and approaches—sometimes we need a comforting ear, sometimes we need a kick in the rear. Getting that match right is important. Sometimes a lawyer has a unique issue that requires a specialized counselor. When NC LAP has requested that lawyers be paired with such specialists, BarCARES has agreed to bring those NC LAP-recommended counselors "in network" for the benefit of the lawyer. This has proved especially helpful in smaller, more rural districts. Similarly, if a lawyer has been seeing a counselor in the BarCARES network, and the counselor thinks the lawyer would benefit from additional support like speaking to peers who have overcome similar issues, or that the lawyer needs more comprehensive, engaged support than traditional therapy can provide, the BarCARES counselor will recommend that the lawyer contact NC LAP. Lawyers who are cross-referred in this way sign releases allowing the BarCARES and NC LAP counselors to confer about what would be most helpful to the lawyer along the way. Lawyers who take advantage of these programs fare incredibly well and receive a network of support enjoyed by few.

Both programs are confidential and work together for the good of North Carolina's legal community. Each program can be contacted independently. Few states have such comprehensive resources available to their lawyers and judges. We should count ourselves lucky. ■

Zeb Barnhardt practiced for 30 years in corporate and securities law. He was a member of the founding Board of Directors of BarCARES of North Carolina; chaired a task force to bring BarCARES and the NC LAP together to focus on common goals; and now serves as president of LAP Foundation of North Carolina, Inc.

Robynn Moraites is the director of the North Carolina Lawyer Assistance Program.

The Robin Williams in Each of Us

By Ronnie Ansley

When you look in the mirror, do you ever see Robin Williams staring back at you? Every attorney who has ever dealt with a client is in many ways like Robin Williams, in more ways than you may have considered. No, we are not funny all of the time, but we are relieving the pressures life can heap upon our clients, whether by their own doing or by someone else's. Each of us is called upon to deal with the part of our population which, in many cases, cannot handle their own problems without the assistance of the professional who can say and do the things which will ease their situation, even if only for a short time.

When the audience arrives, the curtain goes up, and no matter what is going on in the life of the performer—whether Robin Williams or the attorney—the nerves must steady, the brain must switch on, and the words that come out must comfort, console, amuse, or otherwise ease the crowd. When information is conveyed that makes the audience/client uncomfortable, something must follow that will ease the crowd and make them feel as if they have not wasted their money on useless babble.

While a client is with the lawyer, the stage is lit and the performer is the most insightful person in the world. The client believes the person they are with has insight and understanding they could only wish for. They turn their problems over to the lawyer and allow their problems to leave them. The problems are heaped upon the lawyer, who is left to deal with them—deal with them in a way that will make the client the good guy, no matter what the problem is. The client feels the attorney should make him or her laugh, cry, forget the problems, feel better—take the weight of the world off of his/her shoulders and put it on thier own.

When the client leaves the venue, the attorneys, like Robin Williams, must study, work, review, prepare, practice, and spend countless hours getting ready for the next client/show/battle. The client is long gone, leaving the attorney to not only do the work and heavy lifting, but also the worrying about the client's situation. Over time, bit by bit, the pressure begins to wear on the attorney and his/her mental attitude.

Comedians are always supposed to be funny, and attorneys are always supposed to be mentally strong, fighting for the client's desired outcome, no matter what. We all know this is NOT correct nor a healthy way to live. However, too many of our colleagues buy into this way of thinking, which is detrimental to the attorney, the attorney's family, the attorney's business, and every part of the attorney's personal and professional life. Left uncorrected, this type of thinking can be deadly. Far too often we lose brothers and sisters in our profession to depression, drug/alcohol abuse, or suicide.

IF you or someone you know is suffering, feeling alone, or is at the end of the rope, please know YOU ARE NOT ALONE. Talk to a friend or colleague, talk to a counselor, or contact the BarCARES Program or the NC Lawyer Assistance Program. We are very fortunate in NC to have some of the best resources in the country when it comes to lawyers' mental health.

We all need somewhere and someone to turn to, to lean on, and to rely upon when we have reached the end of our rope. You have options. You have friends. You are not alone. Reaching out for assistance is a sign of strength, not weakness. We lost Robin Williams far too soon. You are an important part of our legal family, the legal community, and we need you healthy and happy for many years to come. ■

Ronnie Ansley practices primarily in the areas of criminal & juvenile law, from traffic tickets to murder cases. Ronnie also works with parents of defiant children and offers consulting services to fellow attorneys helping them develop a "theory of the case" for upcoming criminal and civil trials.