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Abuse, Neglect, Dependency

Adjudication

Evidence: Hearsay; Child's Statements

In re A.J., ___ N.C. App. ___, 891 S.E.2d 25 (2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.
- "The court reviews an adjudication 'to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings, in turn, support its conclusions of law.' " Sl. Op. at 4. The reviewing court disregards findings which lack sufficient evidentiary support and examines whether the remaining findings support the court's conclusions.
- To admit hearsay under the residual exception, the trial court must conduct a six-part inquiry consisting of whether proper notice was sent; whether the hearsay statement is not covered elsewhere, possesses circumstantial guarantees of trustworthiness, is material, and is more probative then other evidence that can be procured by reasonable efforts; and whether the interests of justice will be served by its admission. The court must make findings reflecting its inquiry. Sl. Op. at 7. No findings were made at the hearing or in the order addressing this required six-part inquiry, and therefore, the juvenile's statements were not properly admitted under the residual hearsay exception and should have been excluded upon mother's objection.
- A statement of a party opponent must be offered against the party and be the party's own statement. Rule 801(d). While parents are party opponents to the petitioner (DSS) in abuse, neglect, dependency actions, the juvenile is not a party to the case, and therefore, her statements do not fall under any of the Rule 801(d) exceptions for statements of a party opponent and were inadmissible.
    - *Author's Note*: The opinion does not address G.S. 7B-401.1(f) and 7B-601(a), which state a juvenile is a party to the action and does not discuss whether a juvenile is a party opponent to the petitioner (DSS) or any other party in the action.

- "We disregard the challenged findings, or portions thereof, which rely upon [the juvenile's] inadmissible hearsay statements or those which are otherwise unsupported." Sl. Op. at 9.
- As the majority of the evidence supporting the allegations in the petition were based upon the juvenile's statements, absent the inadmissible hearsay evidence from the social workers' testimony, the conclusions of neglect and dependency are unsupported by the remaining findings of fact. The erroneous admission of hearsay and other unsupported testimony prejudiced mother.

Neglect

In re A.H., ___ N.C. App. ___, 888 S.E.2d 411 (2023)

Held: Reversed

Dissent, Flood, J.

- Facts: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up. Father pursued the child on foot until she reached a cross road and he turned back to return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father and called the police. Following a DSS investigation spanning a couple of hours that same afternoon, DSS filed a petition alleging neglect and dependency. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child who he determined was safe upon observing her with a crowd. Within an hour of dropping the other two minors off with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appeals the adjudication and subsequent disposition order placing the child with DSS, contending that the findings are unsupported by the evidence and/or inadequate to support the adjudication.
- "An adjudication order is reviewed 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.' " Sl. Op. at 6. (citation omitted)
- Several findings determined to be unsupported by the evidence or improper are stricken. The child's statement that her Father thought she'd gotten run over and just walked back to his truck is conjecture and insufficient to support a proper finding of fact regarding Father's knowledge of the child being in danger. Findings restating the social worker's testimony without any evaluation of credibility are improper.
- The remaining findings are insufficient to support a legal conclusion of neglect. The child's actions of darting into the road, standing alone, do not constitute neglect, as the findings only show Father turned his back before the child crossed the road, not whether Father perceived a dangerous situation and was neglectful in failing to attend to it. Additionally, without the court making further findings supported by evidence introduced by DSS, Father's failure to return to the scene or contact DSS within the 24 hour period between the events and the filing of the

petition, while also tending to the other two minors in his care, do not amount to neglect. "The absence of evidence is not evidence." Sl. Op. at 13 (citation omitted).

- Dissent: "Based on the totality of the evidence and the findings of fact… the trial court did not err by concluding [the child] was neglected when Respondent-Father left her in an 'environment injurious to her welfare' and that she was 'at risk of physical, mental, and emotional impairment.' " Dissent at 21 (citation omitted). Findings of Father walking away as the child entered the roadway, leaving her with strangers, and not inquiring as to her well-being was "treatment that fell 'below the normative standards imposed upon parents by our society.' " *Id*. (citation omitted).

In re A.J., ___ N.C. App. ___, 891 S.E.2d 25 (2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.
- G.S. 7B-101(15) defines a neglected juvenile as one who does not receive proper care, supervision, or discipline or who lives in an injurious environment.
- Some of the findings of fact were supported by inadmissible hearsay evidence. Those findings are disregarded. There was no properly admitted evidence to support the alleged second incident of mother choking child.
- Evidence does support that an argument between mother and child occurred in the car (first incident) and the incident that occurred when mother informed the juvenile that she would be transferring schools (third incident) but does not support the full findings about each incident.
- Supported findings regarding the first and third incidents are insufficient to establish mother's improper care or supervision of her children.
    - "An argument between a parent and child or use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect." Sl. Op. at 11-12.

  - "The place of the family's residence and choice of their children's school is a parent's prerogative under parental care, custody, and control." Sl. Op. at 12. The court found the properly admitted evidence establishes that the 13-year-old has "a recalcitrant and undisciplined pattern of behavior," while mother testified she believed her actions relating to the car incident and school transfer were necessary due to the 13-year-old's aggressive behavior. Sl. Op. at 13.
  - "Where a child is residing in a voluntary kinship arrangement prior to any DSS involvement, and no evidence or adjudicatory findings support a conclusion the child has been subjected to harm in the parent's primary care, custody, and control, 'the findings and evidence do not support a conclusion' of the child 'living in an environment injurious to her welfare and not receiving proper care and supervision.' " Sl. Op. at 13 (citation omitted). With the 13-year-old juvenile living with relatives during all relevant periods and with mother's permission, the trial court erred in adjudicating the 13-year old as neglected.
- Under G.S. 7B-101(15), it is relevant whether a juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. The court made no evidentiary findings concerning the other older juvenile who did not live with her mother, and only one relevant finding concerning the youngest juvenile – her presence during the third incident. This single finding does not support the conclusion that the youngest juvenile was neglected. With the evidence failing to support the 13-year-old juvenile as neglected, the trial court "erred in, ipso facto" adjudicating the two siblings neglected juveniles.
- The findings describing the behaviors of mother and the youngest child during the adjudicatory hearing is irrelevant when determining the existence or nonexistence of the conditions alleged in the petition, which is the purpose of the adjudicatory hearing. *See* G.S. 7B-802.

Dependency

In re A.H., ___ N.C. App. ___, 888 S.E.2d 411 (2023)

Held: Reversed

Dissent, Flood, J.

- Facts: A 9-year-old child was adjudicated neglected and dependent based on incidents occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up and instead pursued the child on foot until he had to turn back and return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father, called the police. Following a DSS investigation spanning a couple of hours the same afternoon, DSS filed a petition alleging dependency and neglect the following morning. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child and determined she was safe upon observing her with a crowd. Within an hour of dropping the other two minors with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appeals from adjudication and the subsequent disposition order

placing the child with DSS, contending that the findings are unsupported by the evidence and/or inadequate to support the adjudication.

- An adjudication of dependency requires the trial court to ' " address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." ' Sl. Op. at 13. (citation omitted).
- DSS failed to introduce evidence that the Father did not have alternative child care arrangements available. Findings as to both prongs are required. Sl. Op. at 13.
- Father not contacting DSS or providing DSS with alternative arrangements within the 24 hours, and Father's wife not offering to take the juvenile into her custody or sharing the Father's contact information with DSS, does not meet DSS's evidentiary burden of showing no such arrangements exist.
- Dissent: The trial court fulfilled its duty to "address the parent's ability to provide care and alternative childcare arrangements." Dissent at 21. Father left the scene, did not return or contact DSS, and left town; Father's wife was not willing to assist in finding care or offering Father's contact information. DSS could not have attempted to work a plan with Father under these circumstances or gain assistance from Father's wife. Findings are supported by clear and convincing evidence to support the child's adjudication as dependent.

In re A.J., ___ N.C. App. ___, 891 S.E.2d 25 (2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.
- In determining dependency, the trial court must address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements. Failure to address both prongs will result in reversal of the court.
- The findings do not support the conclusion of dependency. There were no evidentiary findings or conclusions regarding the mother's ability to care for or to supervise the two older juveniles. The portion of the findings that were supported and described mother's arguments with the 13-year-old do not show mother's behavior as "wholly unable to parent." There was no contrary evidence to mother's testimony that she was willing and able to care for the two older juveniles

and continue to parent the youngest juvenile. References to mother's mental state are not supported by findings. Evidence does not support a finding that mother's voluntary placement of the older juveniles with relatives was necessary or due to mother's unwillingness or inability to parent, but rather related to mother witnessing traumatic events and being hospitalized following a car accident.

Visitation

Denial

In re A.J.L.H., ___ N.C. App. ___, 890 S.E.2d 921 (2023)

Held: Vacated in Part and Remanded

- Facts and procedural history: Returned on remand from the supreme court, *see* 384 N.C. 45 (2023), this matter involves an appeal of the adjudication and visitation portion of the initial disposition order. All three children share the same mother. Respondent step-father is the biological father of the youngest child; the two older children have different biological fathers. DSS filed a petition based on the repeated use of corporal punishment with a belt that caused bruising and marks on the oldest child, who was 9 years old, as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents did not believe their disciplinary methods were cruel or unusual. After hearing, the oldest child was adjudicated abused and neglected and the younger siblings were adjudicated neglected. At initial disposition, the oldest child was placed with a relative and the younger siblings were placed in foster care. Only the biological father of one of the younger children was granted supervised visitation; respondent mother, and respondent (step)father, and the third biological father, were denied visitation, after a determination that visitation was not in the children's best interests while respondents were working on their case plans with DSS. The court also denied placement of the younger juveniles with respondent-father's relatives and denied requests to attend medical appointments. The court of appeals vacated and remanded the adjudication of neglect for the oldest juvenile, ordered the trial court to dismiss the adjudications of the siblings, and ordered on remand that if the older juvenile was adjudicated the trial court order general and increasing visitation with the mother. The supreme court reversed the court of appeals decision, thereby affirming the adjudication orders, and held the court of appeals instruction to the trial court regarding disposition improper. The supreme court returned the matter to the court of appeals to address the respondents' remaining arguments regarding the disposition order. Respondents argue the trial court abused its discretion when it prohibited any visitation between respondent parents and their children.
- "The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " Sl Op. at 7, citing *In re A.J.L.H.,* 384 N.C. at 57. "The standard of review that applies to an [assertion] of error challenging a dispositional finding is whether the finding is supported by competent evidence." Sl. Op. at 8.
- Visitation may be denied "when it is in the juvenile's best interest consistent with the juvenile's health and safety." Sl. Op. at 8 (citation omitted). Based on precedent, factors a court must consider is whether the parent has a long DSS history, if the reason for the child's removal is related to previous issues that led to another child's removal, whether the parent failed to or minimally participated in the case plan, whether a parent failed to consistently attend visits, and whether a parent relinquished their rights.

- "After initially concluding a parent is either unfit or has acted inconsistent with his or her parental rights, 'even if the trial court determines that visitation would be inappropriate in a particular case. . . it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.' " Sl. Op. at 8.
- The trial court failed to make specific determinations of the factors affecting visitation for "*each child with each parent*." Sl. Op. at 9 (emphasis in original). There were no findings or conclusions regarding unfitness or conduct inconsistent with their parental rights, which must occur when no visitation is ordered. The dispositional findings must be supported by clear and convincing evidence.
  - *Author's note:* This author believes the requirement that the dispositional findings be made by clear and convincing evidence relate to those that support a conclusion that parent is unfit or has acted inconsistently with their constitutionally protected rights.
- "Neither the record nor the order provides a finding or explanation for the objectively disparate treatment accorded to [one of the younger children]'s biological father and the other three parents involved in the matter, nor the denial of family or relative placement, and participation in the children's medical appointments." Sl. Op. at 11. These failures constitute an abuse of discretion.
- Court vacated the dispositional portions of the order and remanded to the trial court to make the "required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*." Sl. Op. at 11 (emphasis in original).

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

Held: Vacated and Remanded

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

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

Electronic-only

In re K.B., ___ N.C. App. ___, 891 S.E.2d 479 (2023)

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

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.
- Trial courts must "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." G.S. 7B-905.1(a).
- The court of appeals has held that ordering electronic-only visitation is equivalent to granting no visitation and therefore the court must make specific findings equivalent to the findings

required in granting no visitation. Sl. Op. at 8-9 (citations omitted). The court "must make 'specific findings that' a parent 'forfeited her right to visitation or that visitation would be inappropriate under the circumstances.' " Sl. Op. at 10 (citation omitted).

- The findings regarding visitation are insufficient to meet the requirements for electronic-only visitation. Limited findings include the current visitation plan of weekly virtual visits and telephone calls, initiated by mother, are inconsistent and often during school hours and dinner time, and provide the date of the last in-person visit.
- Frequent in-person visitation may not be eliminated solely due to the distance between children placed in-state and an out-of-state parent.
- G.S. 7B-905.1(c) requires an order providing for visitation to "specify the minimum frequency and length of the visits and whether the visits shall be supervised." Noncompliance with the requirements of G.S. 7B-905.1 is referred to as "leaving the terms of visitation to the discretion of the custodians." Sl. Op. at 11, FN 2.
- The order providing for electronic-only visitation twice a week only meets the requirement of specifying the minimum frequency of the visits, while not addressing the length or supervision of the visits. Therefore, the order improperly delegates authority regarding visitation.

Permanency Planning Order

Eliminate Reunification; Reasonable Efforts

In re J.M., 384 N.C. 584 (2023)

Held: Reversed court of appeals (thus affirming trial court elimination of reunification)
Concur in part; Dissent in part: Morgan, J.
Dissent: Earls, J.

- Facts: In 2019, the juvenile infant was adjudicated abused and neglected and the older sibling was adjudicated neglected. The circumstances resulted from life-threatening nonaccidental injuries to the infant who had rib fractures, brain bleeds, and retinal hemorrhages that were caused while in the sole care of her parents who closely supervised contact between the infant and their other children and others. The parents subsequently separated. Both were ordered to comply with case plans. At permanency planning hearings, the court acknowledged respondents' progress on their case plan, including completing services, but cautioned that their failure to explain the injuries was a barrier to reunification. Ultimately, the court eliminated reunification as a permanent plan despite the parents' progress and an increase in visitation because of their failure to acknowledge how the child was so severely injured. Mother also believed that she should share custody with the father and that she had no concerns about the children being alone with him now. The court found that reunification efforts would clearly be unsuccessful and inconsistent with the children's health and safety. Respondents' appealed. The court of appeals reversed the trial court's decision and held that a precondition to reunification of admitting fault without finding the parent's forfeited their constitutional rights to care, custody, and control of their children was unlawful. The court of appeals also found DSS did not make reasonable efforts because it did not interview the two oldest children (who were not subject to the action), which may have provided an explanation for the injuries. The supreme court granted a petition for discretionary review.

- Standard of review of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusion of law. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the findings." Sl.Op. 10. The court may consider any evidence that is relevant, reliable, and necessary to determine the juvenile's needs and the appropriate disposition. The disposition is reviewed for an abuse of discretion. "In the rare instances when a reviewing court finds an abuse of . . . discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court." Sl.Op. 11 (citation omitted).
- Reunification as a primary or secondary plan is not absolute because the court may eliminate reunification as a permanent plan when it makes the required findings under G.S. 7B-906.2. Those findings do not have to track the exact language of the statute but the findings must show "that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." Sl.Op. 14-15 (citation omitted).
- When reviewing whether DSS made reasonable efforts, defined at G.S. 7B-101(18), the court of appeals was bound by precedent that required it to treat the findings of fact in the adjudication order, which was not appealed, as binding. The appeal was of the permanency planning order and should not have been transformed to a collateral attack on the adjudication order. The adjudication order found no one other than the parents could have inflicted the serious injuries on the juvenile.
- Similar to *In re D.W.P.*, 373 N.C. 327 (2020) (a TPR case), the evidence supports the findings and conclusion that "the respondents' persistent unwillingness to acknowledge responsibility for [the infant's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and 'inconsistent with the [juvenile's] health or safety.' " Sl.Op. 26-27. Further, unlike a TPR order, a permanency planning order that eliminates reunification "does not foreclose the possibility that one or both respondents might one day regain custody" of their children. Sl.Op. 26. This opinion cautions the holding is based on the facts of the case and does not stand for the proposition that a parent's refusal to acknowledge responsibility for the abuse will always result in a conclusion that reunification efforts will be clearly unsuccessful or inconsistent with the child's health or safety.
- Parents were on notice that the court was considering eliminating reunification as a permanent plan and did not argue the proposed change eliminating reunification would be improper on constitutional grounds. The issue was not preserved for appellate review.
- Concur in part; Dissent in part:
    - Concur that court did not err in eliminating reunification for father, the failure to preserve for appeal, and the discussion on reasonable efforts.
    - Dissent as to eliminating reunification for mother. The court's findings of mother's lack of explanation for the injuries is insufficient to conclude reunification efforts would be clearly unsuccessful or inconsistent with the juvenile's health and safety. Mother took reasonable step to ensure the children's well-being, including separating from father, substantially complied with her case plan, acknowledged the child suffered nonaccidental harm although she did not know how, and engaged with all the required

services. Mother's steps to correct the conditions distinguish these facts from *In re D.W.P.*

- Dissent: The findings are insufficient to support the conclusion that reunification efforts with mother would clearly be unsuccessful or inconsistent with the children's health and safety. Mother complied with her case plan, which included drug screens, substance use treatment, domestic violence and life skills classes, parenting skills, employment, and separated from father. The sole fact is the parents not explaining how the child was injured. This fact alone is insufficient. The parents maintained that they did not know how the child was injured. This is beyond their control. Unlike *In re D.W.P.*, the parents did not provide absurd explanations for the child's injuries, and they did take remedial steps and demonstrated growth. These are relevant factors the court should have considered in applying a holistic approach. DSS could have provided more evidence about the cause of the child's injuries, like testimony from the older siblings.

Guardianship: Legal Significance; ICPC Home Study

In re K.B., ___ N.C. App. ___, 891 S.E.2d 479 (2023)

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

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.
- Before awarding guardianship, the court must determine the proposed guardian understands the legal significance of the placement pursuant to G.S. 7B-600. Specific findings are not required, but the record must show "the trial court received and considered adequate evidence on this point." Sl. Op. at 3-4 (citation omitted).
- Evidence shows the trial court received adequate evidence of the guardian's understanding of the legal significance of the placement. The court received evidence including that the children had been living with the great aunt for three years during which time she provided care such as scheduling and taking them to medical appointments and meeting teachers, and the great aunt testified that she wanted and was willing to continue providing care, understood her obligations to comply with court orders involving the children, and acknowledged the greater control of a guardian.

- The trial court should consider the children's best interest when placing them in 'out-of-home' care, but "[p]lacement of a juvenile with a relative outside of this State *must* be in accordance with the Interstate Compact on the Placement of Children [ICPC]." G.S. 7B-903(a1).
- "Where the ICPC applies, 'a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.' " Sl. Op. at 5 (citation omitted) (emphasis in original). However, "[t]here is no obligation under the ICPC that a home study by completed *to rule out* an out-of-state relative as a placement option." Sl. Op. at 5 (emphasis in original).
- No abuse of discretion to award guardianship to the great aunt, an in-state person, without the benefit of the completed previously ordered home-study of the grandmother, an out-of-state person. The order granting guardianship to the great aunt is based on the children's best interests and supported by findings and conclusions, most notably that the juveniles had lived with the great aunt for three years and had bonded with her. "[I]t is only when a trial court judge *actually places a child with an out-of-state person* that the trial court lacks discretion to make that placement without the benefit of a home study of *that person*, because such study is required under the ICPC." Sl. Op. at 7 (emphasis in original).
- Stating in the decretal portion of the order that "the matter is closed and DSS and its counsel are released and relieved of further responsibilities regarding this matter," but noting retention of jurisdiction, is not error. The clause is not read as preventing mother from filing motions in the future concerning her children, as her parental rights have not been terminated and she was granted visitation rights by the court. Sl. Op. at 7-8.
- Dissent: The majority improperly reviewed the issue concerning the home study requirement under the ICPC for "abuse of discretion rather than de novo," as the issue addresses statutory compliance under G.S. 7B-903(a1). Dissent at 2 (citation omitted). Under the court's prior caselaw, "the ICPC definitively applies to the situation here where there is a potential placement with an out-of-state relative, [g]randmother." Dissent at 3-4. The court's interpretation that the ICPC only applies when a child is actually placed with an out-of-state relative contradicts (1) the purpose the Juvenile Code in attaining permanency as soon as possible, and (2) the purpose of the ICPC to exchange information between states to ensure any outside placement is not contrary to the best interests of the juvenile. Whether the court must wait for a completed ICPC home study when considering a potential placement with an out-of-state relative is decided on a case-by-case basis. In this case, the court was required to wait for the home study evaluating the grandmother as a potential placement, who was identified within days of the filing of the petition as potential placement. The home study was ordered three times with only DSS at fault for not complying with the court's orders, while mother and grandmother continued to assert the need for the study throughout the proceedings. It cannot be assumed that the placement decision would be the same if the home study were received, as without the home study, "it is impossible to be certain what we, the parties, or the trial court would learn about [g]randmother's home or her capacity to care for more children." Dissent at 9.

Guardianship: Verification of Understanding the Legal Significance

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

Held: Vacated and Remanded

- Facts: Juvenile was adjudicated neglected due to lack of proper care, supervision, or discipline and living in an environment injurious to her welfare where she was at risk for abuse based on

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

- Permanency planning review orders are reviewed to determine "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). Any evidence that the court finds "relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition" may be considered at a permanency planning hearing. G.S. 7B-906.1(c).
- The court is required "to determine whether the proposed guardian 'understands the legal significance of the appointment' and 'will have adequate resources to care appropriately for the juvenile." Sl. Op. at 7; G.S. 7B-600(c), G.S. 7B-906.1(j). "The record must contain competent evidence demonstrating the guardian's awareness of [their] legal obligations," which can be satisfied by testimony of a desire to take guardianship, signing a guardianship agreement acknowledging an understanding of guardianship, and social worker testimony of a guardian's willingness to assume legal guardianship. Sl. Op. at 7 (citation omitted).
- Joint guardianship requires sufficient evidence that both persons understand the legal significance of guardianship appointment.
- There was insufficient evidence that the proposed guardians jointly understood the legal significance and responsibilities of guardianship. Although the testimony of one of the proposed guardians confirmed the information in the financial portion of the affidavit was accurate, the section about the understanding of the legal significance of the appointment was not addressed by the testimony or the DSS or GAL reports. The affidavit that was entered into evidence was not signed by either proposed guardian nor notarized. No other evidence was offered to support the finding that either, let alone both, proposed guardians understood the legal significance of the guardianship appointment.

Termination of Parental Rights

Personal Jurisdiction; Ineffective Assistance of Counsel

In re M.L.C., ___ N.C. App. ___, 889 S.E.2d 458 (2023)

Held: Affirmed

- Facts: The juvenile was adjudicated dependent. Later, DSS filed a TPR petition. No summons was issued, but a Notice of Motion seeking TPR and a Notice of the TPR hearing listing March 26-27, 2022 were served on mother by sheriff. On the 2nd noticed date, mother's attorney was present and advised the court that mother had appeared the day before (the first noticed hearing date) and was advised to return the next day. Mother was not present on the next day, and her attorney moved to continue the hearing. The court denied the continuance. No objection about service was made. The court held the TPR hearing and granted the TPR. Mother appealed. Mother raises lack of personal jurisdiction and ineffective assistance of counsel.
- Personal jurisdiction is obtained through service of process or by the party's voluntary appearance or consent. Under Civ. Pro. Rule 12(h)(1), when a party does not raise the defense of lack of personal jurisdiction by motion or in a responsive pleading, it is waived. "[S]ummons-related defects implicate personal jurisdiction." Sl.op.4 (citation omitted). "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons." *Id.* (citations omitted). A court may obtain personal jurisdiction over a party even without a summons when that party consent or makes a general appearance, which can including appearing at the hearing without making an objection. "[L]itigants often choose to waive the defense of defective services when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process." Sl.Op.5 (citation omitted). Trial counsel appeared at the hearing and did not make an objection and at the hearing, he cross-examined the witness and elicited testimony that was beneficial to mother. This is more than a cursory appearance but was a general appearance that waived any objection to personal jurisdiction.
- In a TPR, court-appointed counsel must provide effective assistance. A successful ineffective assistance of counsel claim must show the counselor performance was deficient and that deficiency was so serious that it deprived the party of a fair hearing. To prove the deprivation of a fair hearing, the party must prove there is a reasonable probability that there would have been a different result but for the counsel's errors. Mother is unable to prove this standard and counsel's performance was not deficient.

Adjudication

Abandonment: Obstruction of Ability to Contact, Restrictive Parole Conditions

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

Held: Reversed and Remanded

- Facts: Father appeals the order terminating his parental rights on the ground of willful abandonment. Mother and Father executed a 2011 consent order shortly after the child at issue was born in which they agreed to joint custody of the child, Mother was given primary custody,

and Father was ordered to pay monthly child support. Father was incarcerated in Indiana from 2014 to 2017 following two felony convictions relating to sexual misconduct against a minor. Upon release in 2017, Father was subject to restrictive parole conditions which included an absolute bar to any form of contact or communication with any minor child, including his biological child, without prior approval from the Indiana Parole Board. Father petitioned the Parole Board for modification of his parole conditions in 2017 and 2019, which were denied. Mother filed the termination petition in June 2021. Father again petitioned the Parole Board for modification of his parole conditions in 2021 after the filing of the petition, which was denied. Father appeared at the adjudication hearing while incarcerated for a sex offense charge in North Carolina. Father challenges two findings of fact as unsupported by the evidence and argues the court's conclusion of willful abandonment is unsupported by the findings.

- Standard of review: A trial court's adjudication that a ground exists to terminate parental rights is reviewed "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). Conclusions of law that a ground exists to terminate parental rights are reviewed de novo.
- An ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning. Sl. Op. at 9. Findings of ultimate fact are conclusive on appeal "if the evidentiary facts reasonably support the trial court's ultimate finding [of fact.]" Sl. Op. at 7 (citation omitted).
- G.S. 7B-1111(a)(7) authorizes the termination of parental rights on the grounds of willful abandonment if the trial court finds that that the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." Sl. Op. at 8 (citing G.S. 7B-1111(a)(7)). The determinative period for adjudicating willful abandonment is the six months preceding the filing of the petition, though the trial court can look to a parent's conduct outside of the determinative period "in evaluating a parent's credibility and intentions." Sl. Op. at 8.
- "Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." Sl. Op. at 11 (citation omitted). The trial court's "findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." Sl. Op. at 11. Willful intent is a factual determination of the trial court.
- The challenged finding that Father failed to make sufficiently reasonable efforts to request approval from the Parole Board to allow contact with his child post-release is an ultimate finding. This ultimate finding of Father's intentions is supported by the evidentiary facts regarding the frequency of Father's attempts to modify his parole conditions.
- The trial court's finding of fact that Father did not send any cards, letters, gifts, or tokens of affection to the child during the determinative period fails to address Father's restrictive parole conditions that barred contact without approval of the Parole Board. This finding is disregarded to the extent the finding implies Father "possessed the ability to contact [the child] without subjecting himself to a real and significant risk of criminal prosecution." Sl. Op. at 10.
- The findings are insufficient to sustain a conclusion of willful abandonment. Though undisputed that there was no contact during the determinative period, Father remained current on his child support obligations during the determinative period and petitioned the Parole Board for modification of his parole conditions after the TPR petition was filed. Father completed tests required for consideration of any modification of his parole conditions, and promptly petitioned the Parole Board for modification of his parole conditions in 2017 and again in 2019. These

findings show Father's actions are "not consistent with a parent who has manifested a willful determination to forgo all parental duties and all parental claims to the child." Sl. Op. at 12.

- Although Father's conduct in Indiana is reprehensible, it is not willful abandonment. The court will not speculate on other grounds for termination not alleged in the petition and the holding does not prevent Mother from bringing a new TPR petition.

Abandonment; Obstruction of Ability to Contact

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

Held: Affirmed in Part, Vacated in Part

- Facts: Father challenges adjudication order terminating his parental rights of three children and dispositional order prohibiting contact with the children. Mother and father were married with two children. The couple divorced during a period of father's incarceration and had a brief reconciliation following father's release, during which time mother became pregnant with their third child. The couple again separated during father's subsequent incarceration, during which their third child was born. After father's release, father briefly lived with mother and the children, during which time mother paid all expenses. The couple again separated in January 2020. Father began calling mother and threatening her and the children. Mother blocked father from contacting her by phone and changed her phone number. In March, April, and July 2020, father sent money and toys through a relative to send to the mother for the children, but since the couple's final separation, father did not attempt to communicate or otherwise offer support to the children. Father was again incarcerated from September through December 2020. In December, upon release, father moved to Arizona. In February 2021, mother obtained a temporary domestic violence protective order (DVPO) against father, which became a final order in April 2021. In March 2021, mother filed the petition to terminate father's parental rights. After hearing, the court issued the TPR order based on abandonment, neglect by abandonment, and neglect by failure to provide proper care. The court also ordered father to have no further communication or contact with the children. Father appeals.
- An adjudicatory order is reviewed to determine "whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to de novo review." Sl. Op. at 6 (citations omitted).
- G.S. 7B-1111(a)(7) authorizes termination of a "party's parental rights when it finds that the parent 'has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.' " Sl. Op. at 6. "To find abandonment, the trial court must find that the parent's conduct 'manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]' but the relevant inquiry is limited to the statutory period of six months." Sl. Op. at 7 (citations omitted).
- Challenged findings regarding the parties' relationship and father's failure to provide care, financial support, a safe and loving home, and emotional support to the children are supported by clear, cogent, and convincing evidence. Mother testified as to the time periods of their relationship, her provisions of total financial support for the children, her provision of a home for the children since birth, the children's injuries when left alone with father in the past, and the older children's desire to stay away from their father.
- The findings support the court's conclusion of abandonment. "The obstruction of a parent's ability to contact the children is relevant to the court's consideration; however, the trial court

must consider the parent's other actions and inactions in determining the impact of the obstruction on the parent's lack of contact." Sl. Op. at 1. Although mother obtained a temporary DVPO that was in effect for one and a half months of the determinative six-month period, it did not prohibit contact with the children. Mother blocked father after repeated threatening phone calls. During the determinative statutory period from September to March, father was incarcerated from September to December, moved to another state following release without attempting to see the children, and, while calling mother repeatedly, did not contact his children. Father did not offer any excuse for not seeking custody or signing a voluntary support agreement when the court found he had the means, opportunity, and ability to do so. Father did not provide financial or emotional support for the children.

- The DVPO did not preclude contact with his children.

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

Held: Affirmed

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

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

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

Disposition

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

Held: Affirmed in Part, Vacated in Part

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

Appeal

Writ of Certiorari

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

Held: Affirmed

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

Role of Child's GAL; Waive Issue

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

Held: Affirmed

- Facts: This matter involves a private TPR initiated by mother against father. Father filed an answer denying the allegations. The court appointed the public defender's office as the GAL for the juvenile. The public defender's office delegated the GAL duties to a licensed attorney, per local rules. The GAL completed an investigation and prepared a GAL court report in which termination of father's parental rights was recommended. The GAL testified at the dispositional hearing. Father did not raise objections or concerns about the GAL's role and need for the juvenile to have separate legal representation. The TPR was granted on the grounds of willful abandonment. Father appeals, asserting the trial court erred by failing to appoint an attorney for the minor child and failing to make sufficient findings of fact to support its conclusions. Father also filed a Rule 60 motion raising the failure to appoint separate legal representation for the child. This summary focuses on father's challenge regarding the role of the child's GAL.
- Rule of Appellate Procedure 10(a)(1) states that"[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, or motion, stating

the specific grounds for the ruling the party desired to make if the specific grounds were not apparent from the context." Sl. Op. at 17-18.

- G.S. 7B-1108 determines when a GAL is appointed for a child in a TPR proceeding. The court of appeals has held that violations of G.S. 7B-1108 are not automatically preserved for appellate review. Sl. Op. at 18 (citation omitted).
- Father did not preserve the issue of the attorney's role as the child's GAL for appellate review. Father failed to object at trial regarding the attorney's role as the child's GAL or the need for separate legal representation for the child.
- Appellate Rule 2, which allows the appellate court to suspend or vary the requirements of any appellate rule of procedure, is used cautiously and in exceptional circumstances, which do no not exist here.

Appellate Review: Single Ground

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

Held: Affirmed in Part, Vacated in Part

- Facts: This is an appeal of a private TPR, where father's rights were terminated on the grounds of abandonment, neglect by abandonment, and neglect. The court of appeals affirmed the ground of abandonment and discussed the jurisprudence regarding the affirmation of one ground is sufficient to support a TPR order.
- "An adjudication of any single ground for terminating a parent's rights under G.S. 7B-1111(a) will suffice to support a termination order," and the court need not review any of the remaining grounds challenged on appeal once the court has affirmed one particular ground for termination exists. Sl. Op. at 12 (citation omitted).
- "This opinion recognizes that the validity of additional grounds for termination may be relevant and impact a parent's ability to regain their parental rights in a reinstatement of parental rights action pursuant to G.S. 7B-1114 (effective October 1, 2011). In that action, the court must consider whether the parent seeking reinstatement has "remedied the conditions which led to the juvenile's removal and termination of the parent's rights." G.S. 7B-1114(g)(2).
- "As we affirm the trial court's finding of abandonment in accordance with G.S. 7B-1111(a)(7), we need not review either of the remaining grounds for the purposes of the termination of parental rights," "as resolving these issues would have no practical effect on the case." Sl Op. at 12, 13. Further, father has not argued for reconsideration of the court's "single ground" jurisprudence.

UCCJEA

Subject Matter Jurisdiction: From Temporary to Home State

This opinion is also summarized and discussed in the On the Civil Side blog post, UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases

In re N.B. & N.W., ___ N.C. App. ___, 890 S.E.2d 199 (2023)

Held: Affirmed

- Facts: Mother and four children lived in Washington State. This case involves two of the children who relocated to North Carolina. In October 2020, Mother separated from husband and began relocating with her children to North Carolina. Two of the children were picked up by an aunt and brought to NC later that month. In December, DSS received a report of sexual abuse by

mother's husband of one of the children staying with the aunt. In January 2021, Mother travelled with one of the children involved in this case to Pennsylvania. DSS filed petitions regarding all four children in January 2021 (the petitions for two of the children who relocated to Pennsylvania were voluntarily dismissed). Mother returned to North Carolina with the other child who is the subject of this case and appeared before the court on February 4, 2021. The court exercised temporary emergency jurisdiction to enter nonsecure custody orders for the two children. In March, the court held the adjudication hearing, at which time the mother had relocated to Charlotte The court entered its adjudication and disposition order on July 6, 2022, after determining NC had home state jurisdiction and adjudicated one of the children as a neglected and dependent juvenile and the other as a neglected and abused juvenile, continued DSS custody, suspended Mother's visitation, and ceased reasonable efforts for reunification with Mother. Mother appeals and only challenges the court's subject matter jurisdiction over the proceedings under the UCCJEA.

- "Whether a court possesses subject matter jurisdiction is a question of law, which this Court reviews de novo on appeal." Sl. Op. at 5 (citation omitted).
- "The jurisdictional requirements of the UCCJEA must be satisfied for a court to have authority to adjudicate petitions filed pursuant to our Juvenile Code." Sl. Op. at 6.
- G.S. 50A-204 "provides that the courts of this State may exercise 'temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.' " Sl. Op. at 8-9 (citation omitted). It is uncontested that NC was not the home state of any of the children at the commencement of the proceedings as none of the children had resided in the State for six months, and that the trial court properly exercised temporary emergency jurisdiction at the initiation of the proceedings. The trial court had temporary emergency jurisdiction to enter the initial, temporary nonsecure custody orders.
- This State can become the home state of the child if a child-custody proceeding has not been or is not commenced in a court of a state having home state jurisdiction under N.C.G.S. §§ 50A-201 through 50A-203, whereby the child-custody determination made by the court in this State exercising temporary emergency jurisdiction can be declared the final determination if so provided. G.S. 50A-204(b). Applying *In re M.B.*, 179 N.C. App. 572 (2006), a case with nearly identical facts, the trial court properly declared that NC had obtained home-state jurisdiction under the UCCJEA after it initially exercised temporary emergency jurisdiction. At the time of the adjudication and disposition order, the children and Mother had lived in North Carolina for well over six months and no other custody order existed in any other state with jurisdiction. NC acquired home state jurisdiction.

UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) governs a state's subject matter jurisdiction to hear child custody cases, including abuse, neglect, dependency (A/N/D), and termination of parent rights (TPR). *See* G.S. 50A-102(4); 50A-106. Without following the jurisdictional requirements of the UCCJEA, the court lacks subject matter jurisdiction. Any orders entered when a court lacks subject matter jurisdiction are void ab initio. In re T.R.P., 360 N.C. 588 (2006). I receive numerous inquiries about the UCCJEA in A/N/D cases. A common question involves North Carolina's use of temporary emergency jurisdiction and whether it ever becomes initial custody jurisdiction when North Carolina becomes the juvenile's "home state" after the A/N/D petition has been filed in district court. Earlier this month, the court of appeals answered this question when it published *In re N.B*., ___ N.C. App. ___ (July 5, 2023). This blog serves as a follow up to my previous blog post about temporary emergency jurisdiction under the UCCJEA.

Jurisdiction under the UCCJEA

The UCCJEA provides for four types of subject matter jurisdiction in child custody proceedings:

- initial custody determination (G.S. 50A-201),
- modification jurisdiction of a child custody order (G.S. 50A-203),
- temporary emergency jurisdiction (G.S. 50A-204), and
- exclusive, continuing jurisdiction (G.S. 50A-202).

In re N.B. addresses temporary emergency jurisdiction and its conversion to initial custody determination based upon North Carolina becoming the child's "home state."

"Home State" and How It Relates to Subject Matter Jurisdiction

A child's "home state" is the state where the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the infant's home state is the state in which the child lived from birth with a parent or person acting as a parent. G.S. 50A-102(7). The commencement of a child custody proceeding is when the initiating pleading is filed in court, which for child welfare cases is the A/N/D petition. G.S. 50A-102(5); 7B-405.

Initial custody determination exists when the state is the child's "home state" and there has never been a child custody proceeding or determination for the child. G.S. 50A-201(a)(1). *See* G.S. 50A-102(3) (definition of "child custody determination"; 50A-102(4) (definition of "child custody proceeding"). Additionally, if the child has left a state but that state was the child's home state within six months before a custody proceeding is initiated, that state has initial custody jurisdiction

so long as a parent or person acting as a parent continues to live in that state. G.S. 50A-201(a)(1). If there is a prior custody order entered in another state, the state where the child now lives has jurisdiction to modify the other state's custody order if the conditions of G.S. 50A-203 are satisfied. One of the criteria for modification jurisdiction is whether the state where the child now lives is the child's "home state."

Some A/N/D cases involve situations where the child is determined by a county department of social services (DSS) to be abused, neglected, and/or dependent but the child has not lived in North Carolina for six months. What can a DSS and the North Carolina district court do when North Carolina does not have initial custody or modification jurisdiction under the UCCJEA?

Temporary Emergency Jurisdiction

The UCCJEA provides for temporary emergency jurisdiction when a state has neither initial custody nor modification jurisdiction when

- the child is present in the state and
- the child has been abandoned or it is necessary in an emergency to protect a child because the child, their sibling, or their parent is threatened with or subjected to mistreatment or abuse.

G.S. 50A-204(a).

Temporary emergency jurisdiction enables DSS to immediately file an A/N/D petition in district court for a juvenile who has been substantiated as abused, neglected, and/or dependent but who has not lived in North Carolina for the immediately preceding six months. Temporary emergency jurisdiction provides the North Carolina court with subject matter jurisdiction to enter a temporary order. In an A/N/D action, that temporary order is the nonsecure custody order. *See* G.S. 7B-503 through -507.

Depending on whether there has been or is a child custody proceeding or determination in another state, the North Carolina court may be required to communicate with the court of the other state to address subject matter jurisdiction. *See* G.S. 50A-204(d). While exercising temporary emergency jurisdiction, the North Carolina court may only enter temporary orders. *Id.* (See my earlier blog post). In some cases, temporary emergency jurisdiction may transition to initial custody jurisdiction based on a change in the child's home state.

In re N.B.: Temporary Emergency Jurisdiction Transitions to Home State Initial Custody Determination

The Facts: In 2020, the two children who were the subject of the A/N/D action resided with their mother and her husband in Washington state (Note, there are two other children who are not

included in this opinion). In October, mother separated from her husband and started to relocate to North Carolina. Later in October, one child moved to North Carolina and stayed with her aunt. In January, another child moved in with other relatives in North Carolina. In December, the child who lived with her aunt disclosed that mother's husband had been sexually abusing her. A report to DSS was made and mother denied any allegations and refused to cooperate with DSS. In January, DSS filed a petition alleging abuse, neglect, and dependency for the child who disclosed the sexual abuse and neglect and dependency for the sibling. The district court entered nonsecure custody orders for the two children based upon temporary emergency jurisdiction. By March, mother had relocated to North Carolina and had housing here. An adjudication and disposition hearing was heard in March, and an order was entered in July. The order contained a conclusion that it initially exercised temporary emergency jurisdiction but North Carolina had obtained home state jurisdiction since mother and the two children had lived here for more than six months and there was no custody order from another state. Mother appealed arguing that North Carolina did not have subject matter jurisdiction under the UCCJEA.

The Issue

The issue on appeal was "whether (and under what conditions) temporary emergency jurisdiction under the UCCJEA may eventually ripen into home-state jurisdiction." Sl.Op. 6. The answer is yes when specific criteria are met.

The Analysis

It is undisputed that when DSS initiated the A/N/D case, North Carolina was neither child's "home state" and that the district court properly exercised temporary emergency jurisdiction at the commencement of the action. As a result, the district court had subject matter jurisdiction to enter the nonsecure custody orders. However, mother argued that the district court lacked subject matter jurisdiction to enter an adjudication order under temporary emergency jurisdiction based upon the passage of time – six months – which made North Carolina the children's home state. The court of appeals rejected mother's argument.

The court of appeals looked to three prior published opinions. Two of those opinions involved a TPR where at the commencement of the TPR, North Carolina was the home state. Prior to the initiation of the TPRs, DSS had custody of the respective children because of underlying A/N/D cases where DSS had been awarded custody. The A/N/D cases initially involved temporary emergency jurisdiction as neither child had resided in North Carolina for six months before the A/N/D actions were commenced. *See* In re N.T.U., 234 N.C. App. 722 (2014); In re E.X.J., 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). In both cases, no child custody proceedings had ever been initiated in another state. Because *In re N.B*. does not involve a TPR, the court of appeals also looked to In re M.B., 179 N.C. App. 572 (2006). Like *In re N.B.*, *In re M.B.* was an A/N/D case. In *In re M.B.*, the district court initially exercised temporary emergency jurisdiction and adjudicated the juvenile neglected and placed the juvenile in DSS custody. The

district court recognized that North Carolina had become the child's home state and ordered that its adjudication become a final order under G.S. 50A-204(d). While the appeal in *In re M.B.* was pending, there was confirmation that no child custody proceedings had been filed in another state. The court of appeals determined that the issue of temporary emergency jurisdiction was moot and never discussed G.S. 50A-204.

In *In re N.B.*, the court of appeals examined G.S. 50A-204(b), which explicitly states:

if a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

The plain language of this statute "contemplates that a court exercising emergency jurisdiction may enter an initial child-custody determination, which 'includes a . . . temporary . . . order.' *Id.*" Sl.Op. 9. Here, mother and both her children lived in North Carolina for more than 6 months and there was never a child custody order from or proceeding in another state such that North Carolina was home state when the adjudication and dispositional order were entered. As a result, at the time the adjudication and dispositional orders were entered, North Carolina's temporary emergency jurisdiction had transitioned to initial custody determination. In making its holding, the court of appeals recognized it was following the holding of two unpublished cases, *In re K.M.*, 228 N.C. App. 281 (2013) (unpublished) and *In re L.C.D.*, 253 N.C. App. 840 (2017) (unpublished).

A Word of Caution

Subject matter jurisdiction can be raised at any time. *In re K.J.L.*, 363 N.C. 343 (2009). It is a conclusion of law with a de novo standard of review. *In re N.B.* Although North Carolina can become a child's home state, transitioning North Carolina's temporary emergency jurisdiction to initial custody jurisdiction, consider the following:

- There cannot have been a child custody determination made in another state.
- A child custody proceeding cannot have been or be commenced in another state. It is possible that a child custody proceeding is initiated in a child's home state after an A/N/D petition has been filed in North Carolina and before North Carolina obtains home state jurisdiction.

Be wary about having an adjudication hearing prior to North Carolina becoming the child's home state. In *In re N.B.*, the court of appeals referred to the passage of time up to the entry of the adjudication and dispositional order (the hearing was conducted earlier, before North Carolina had home state jurisdiction). Since an adjudication is not a temporary order, to avoid any confusion and possible jurisdictional defects, it is prudent to wait to hold the adjudicatory hearing until North Carolina has become the child'

2023 Child Welfare Legislative Changes

As the 2023 Legislative Session continues, many session laws that amend child welfare statutes, including abuse, neglect, dependency; termination of parental rights (TPR); adoption of a minor; and foster care licensing became effective on various dates. Some of these changes are significant. Some session laws focus on specific statutory changes involving an individual juvenile or family; other session laws make changes to state systems.

Infant Safe Surrender: S.L. 2023-14, Section 6.2 significantly amends North Carolina's infant safe surrender law for all infants who are safely surrendered on or after October 1, 2023. A new Article 5A has been added to G.S. Chapter 7B (the Juvenile Code) that enacts G.S. 7B-520 through -528 and G.S. 7B-1105.1 and amends G.S. 7B-501 (the previous infant safe surrender law) and other corresponding statutes. Under the new infant safe surrender law, infants who are reasonably believed to be no more than 30 days of age may be safely surrendered by a parent; previously the age limit was no more than 7 days of age. Only designated professionals may accept a safely surrendered infant. These are the same professionals in the previous version; however, the previous version allowed any person to accept a safely surrendered infant, and that is no longer authorized under the new law.

The definition statute, G.S. 7B-101, adds to the defined terms "non-surrendering parent," "safely surrendered infant," and "surrendering parent" and amends the definition of "neglected juvenile" to explicitly state a juvenile is not abandoned when the juvenile is a safely surrendered infant. The identity of a surrendering parent must be kept confidential unless a statutory exception applies. A county department of social services (DSS) no longer treats a safely surrendered infant as a dependent juvenile but instead follows the new procedures set forth in the new Article 5A. Those procedures include publishing a notice of a safely surrendered infant within 14 days of receiving the safely surrendered infant; and identifying, locating, and contacting a known non-surrendering parent and placing the infant with the non-surrendering parent when there is no cause to suspect the infant is an abused, neglected, or dependent juvenile based on circumstances created by the non-surrendering parent. The rights of both the surrendering and non-surrendering parent are addressed. The North Carolina Department of Health and Human Services (DHHS) is required to create information about the rights of the surrendering and non-surrendering parent that is available for dissemination through its website in a printable and downloadable format and is translated in commonly spoken and read languages in the State.

When a TPR involving the parents of a safely surrendered infant is commenced, there must be a preliminary hearing under new G.S. 7B-1105.1 within 10 days of the filing of the TPR petition. The hearing addresses the circumstances of the infant's safe surrender, the identities (if known) of the respondent parents, and the method of notifying and serving the respondent parents, which includes notice by publication containing statements required by G.S. 7B-1105.1. The TPR grounds statute at G.S. 7B-1111(a)(9) authorizes the termination of a parent's parental rights when there has been a prior TPR for another child of the parent and the parent is unable or unwilling to

establish a safe home for the juvenile who is the subject of the current TPR. The statute is amended to explicitly state a prior TPR for a safely surrendered infant does not apply to this ground.

There is more to say about the amendments made to the infant safe surrender law. I have written a bulletin explaining in detail these changes; that bulletin will be available in the next few weeks here.

Non-discrimination in Placement of a Child: Effective May 16, 2023, S.L. 2023-14, Section 6.5, amends G.S. 48-3-203 (an adoption statute for agency placement of a child) and 131D-10.1 (the Foster Care Children's Bill of Rights) to add a new subsection (a1) to each statute. Under the new subsection (a1), an agency cannot deny or delay the opportunity for an individual to become a foster or adoptive parent or the placement of a child for adoption or foster care because of the race, color, or national original of the individual or the child involved. These amendments essentially incorporate the federal Multiethnic Placement Act (MEPA) anti-discrimination provisions into state law. For more information about MEPA, see Chapter 13.3 of the Abuse, Neglect, Dependency – TPR Manual here.

Foster Care Rates and Licensing: S.L. 2023-14, Section 6.7 increases the monthly foster care and adoption assistance rates effective July 1, 2023. For children 0-5 years old, the rates increase to $702 (from $514). For children 6-12 years old, the rates increase to $742 (from $654). For children 13-17 years old (inclusive) and young adults participating in Foster Care 18-21, the rates increase to $810 (from $698). Foster care and adoption assistance rates are codified at G.S. 108A-49.1.

S.L. 2023-82 enacts G.S. 131D-10.2C, which addresses the number of children that may be placed in a family foster home at any time. The law incorporates many provisions in 10A N.C.A.C. 70E.1001. The maximum number of children is five and includes the foster parent's own children, children placed in foster care, any children residing in the home, and any children who are receiving in-home day care or are being babysat. There are two exceptions that relate to placing siblings together. First, a family foster home may exceed this limit if written documentation is submitted to the foster home's licensing authority that siblings are placed together, and all other licensure requirements are met. In that case, each sibling's family services agreement must state that the siblings are placed together and address the foster parents' skills, stamina, and ability to care for the children. Second, a family foster home may exceed the limit if the home would qualify for placement of one child or siblings but for the maximum number of children in the home, and written documentation is submitted to the licensing authority that siblings are placed together. Each sibling's family services agreement must state that the siblings are placed together. This new law is effective October 1, 2023, unless an amended state plan must be submitted by DHHS to the U.S. Department of Health and Human Services for approval to maintain federal funding for foster care maintenance payments. In that case, the law is effective when U.S. DHHS approves the amended state plan.

Placement with a Relative (Kinship Care) Payment and Licensing: Both state and federal law have been amended to address licensing and payment for relatives who are a court-ordered placement for a juvenile who has been adjudicated abused, neglected, or dependent.

By November 16, 2023, S.L. 2023-14, Section 6.6 requires the Division of Social Services at DHHS (Division) to develop and implement a policy that allows a relative (related by blood, marriage or adoption) of a juvenile who is providing foster care to receive half the reimbursement rate of a licensed family foster home. The monthly rates of an unlicensed relative placement are $351 for a child 0-5 years old, $371 for a child 6-12 years old, and $405 for a child 13-17 years old (inclusive). The state and county share 50% of the nonfederal share of the costs. For the state share, $5,766,390 in recurring funds has been appropriated to the Division for the 2023-25 biennium.

Effective November 27, 2023, 88 Federal Register 66700 (September 28, 2023) amends the definition of "foster family home" at 45 C.F.R. 1355.20(a) for the purposes of Title IV-E eligibility to allow for states to establish a set of licensing requirements and approval standards for relative foster family homes that are different from the standards that are used to license and approve non-relative foster family homes. A relative foster home licensed with the lower standards must receive the same payment as a licensed non-relative foster home (amended 45 C.F.R. 1356.21(m)(1)). This provision will only apply if North Carolina DHHS chooses to participate. My colleague, Timothy Heinle, blogged about this change when it was proposed, which you can read here.

DHHS Rapid Response Team: Effective June 29, 2023, S.L. 2023-65, Section 3.4 amends G.S. 122C-142.2(g) to add the Division of Child and Family Well-Being to the DHHS Rapid Response Team. Under G.S. 122C-142.2(f) and (g), one of the duties of the Rapid Response Team is to work with a county DSS, hospital, and LME-MCO or prepaid health plan to coordinate a plan for a juvenile who is in DSS custody, presented to a hospital emergency department for mental health treatment but does not need hospitalization, and for whom an appropriate placement is not available.

Transportation of High-Risk Juveniles: Section 9J.13 of the 2023 Appropriations Act, S.L. 2023-134, enacts G.S. 7B-905.2, which addresses the transportation of juveniles in DSS custody with serious emotional mental, or behavioral disturbances that pose a risk of harm to self or others and who reside outside of a residential placement because of those disturbances. These juveniles are defined as "high-risk juveniles" at G.S. 7B-905.2(a)(1). DSS may make a written request to or enter into a transportation agreement with a "high-risk juvenile transporter" to transport the juvenile. A high-risk juvenile transporter is a law enforcement agency, the Division of Juvenile Justice of the Department of Public Safety (DJJ), or the Department of Adult Corrections (DAC). G.S. 7B-905.2(a)(2). If the high-risk juvenile transporter agrees, transportation must be provided in the county where the juvenile resides but is not limited to that county. The cost and expenses of transportation are the responsibility of the county DSS with custody of the high-risk juvenile. The high-risk juvenile transporter may use reasonable force and reasonable restraints (determined by the high-risk juvenile transporter) to restrain the high-risk juvenile if necessary to protect the

transporter or others. The high-risk juvenile transporter is immune from criminal or civil liability when taking reasonable measures under this statute so long as the transporter was acting in good faith and did not engage in gross negligence, wanton conduct, or intentional wrongdoing. This law is retroactive to July 1, 2023.

Use of Special State Reserve Funding for Transporting Homeless and Foster Students: Section 7.30 of the 2023 Appropriations Act, S.L. 2023-134, enacts G.S. 115C-250.5. This new law creates a "Transportation Reserve Fund for Homeless and Foster Students" to cover extraordinary costs for the transportation of homeless students and students in foster care that local school administrative units and charter schools may apply for from the Department of Public Instruction (DPI). DPI must establish eligibility guidelines that look to total prior-year expenditures for students who are homeless or in foster care. Award maximums are for 50% of the extraordinary transportation costs. Under federal laws, a juvenile who is in DSS custody and is removed from their home or foster care/relative placement is entitled to remain in the school they were attending prior to a change in their placement when it is in the best interests of a juvenile. For more information about these federal laws, specifically the Every Student Succeeds Act (ESSA), see Chapter 13.7 of the Abuse, Neglect, Dependency – TPR Manual here.

Remove Appeal by Right because of a Dissent: Section 16.21.(d) of the 2023 Appropriations Act, S.L. 2023-134, amends G.S. 7A-30 to remove an appeal by right to the North Carolina Supreme Court from any opinion of the Court of Appeals where there is a dissent. This section is effective for appeals filed with the Court of Appeals on or after October 3, 2023.

Mandatory Reporting to Law Enforcement Juvenile Victims of Certain Crimes: Effective October 3, 2023, Section 9L.1 of the 2023 Appropriations Act, S.L. 2023-134, amends G.S. 14-318.6(h) to exempt psychiatrists from reporting to law enforcement when juveniles (including adults who were juveniles at the time of the criminal offense) are victims of certain specified crimes designated in G.S. 14-318.6. Licensed family and marriage counselors are also exempt from the reporting requirements as related to the primary client (the person who contracted with the therapist for professional services for diagnosis and treatment) only and not other family members. For more information about this universal mandatory reporting law, see my previous blog post here.

Medicaid and Children in Foster Care: Effective October 3, 2023, Section 9E.21 of the 2023 Appropriations Act, S.L. 2023-134, requires the Division of Health Benefits (DHB) at DHHS to convene a workgroup of designated entities to identify innovative Medicaid service options that would address gaps in medical care for children who receive foster care services. The Medicaid services must be trauma informed and evidence-based. Within three months of the workgroup's completion, DHB must start to distribute funding to LME/MCOs and prepaid health plans for the use of the identified innovation Medicaid service options. DHHS must provide training (or delegate the training to an LME/MCO) to all county DSSs and offer training to tribal welfare offices on the Medicaid services that are funded under this section.

Also effective October 3, 2023, Section 9E.22 of the 2023 Appropriations Act, S.L. 2023-134, requires DHHS to issue a request for proposals for a single statewide children and families (CAF) specialty plan contract by December 1, 2024. Specific provisions of the plan are governed by new G.S. 108D-1(5a); 108D-24; 108A-62; and 122C-115.7.

Foster Care Trauma-Informed Assessment: Section 9J.12 of the 2023 Appropriations Act, S.L. 2023-134, requires the Division of Social Services of DHHS to work in partnership with specified divisions within DHHS, prepaid health plans and primary care case management entities that service children at risk of or currently placed in foster care, county DSSs, Benchmarks, individuals with lived experiences, and others who are identified by the partnership to develop a trauma informed assessment for children who are at risk of entering or are currently placed in foster care, and because of their trauma are at a higher risk of needing behavioral health or other services. A final assessment, standardized training curriculum and methodology, vendor, and a plan for a statewide rollout must be completed by September 30, 2024. Using a phased-in approach, the first assessments must begin on October 1, 2024 and be statewide by September 30, 2025. DSS must refer juveniles who have been determined to be abused or neglected for an assessment within 5 working days of the determination. Juveniles, ages 4 – 17, who are in foster care must receive a standardized assessment within 10 working days of a referral. Juveniles included in the Medicaid CAF specialty plan must receive a standardized assessment. DHHS must create a Division of Social Services Statewide Dashboard that is updated monthly and includes specified data regarding the implementation of the standardized assessments.

DSS Social Worker Training: Effective June 29, 2023, S.L. 2023-65, Section 7.4 adds G.S. 131D-10.6A(c)(2) to allow DHHS to provide a full or partial exception to the required 72 hours of preservice training for a child welfare services worker when that worker has prior child welfare work experience in another state and completed an equivalent child welfare training.

Juvenile Court Certification for District Court Judges: Effective July 21, 2023, S.L. 2023-103, Section 7 amends G.S. 7A-147(c) to require that the training district court judges must complete for juvenile court certification includes a trauma informed topic that addresses adverse childhood experiences and adverse community environments. For district court judges interested in juvenile court certification, the current the mandatory child development course offered by the School of Government addresses this requirement, and the Mental Health Issues in Juvenile Law course offered by the School of Government for the advanced child welfare and/or juvenile justice certifications does as well.

Child Fatality Task Force: Two session laws make amendments to the Child Fatality Task Force. S.L. 2023-65, Sections 3.1 and 3.2 change the membership of the Task Force to replace the director of the Division of Mental Health, Developmental Disabilities, and Substance Use Services with the director of the Division of Child and Family Well-Being.

Section 9.H15 of the 2023 Appropriations Act, S.L. 2023-134, enacts G.S. 143B-150.25 through

-150.27 effective October 3, 2023. This section of the Appropriations Act creates a State Office of Child Fatality Prevention within DHHS, Division of Public Health. The State Office is the lead agency for the State Child Fatality Prevention System and its powers and duties are specified in G.S. 143B-150.27. The State Child Fatality Prevention System consists of local teams that review child fatalities under Article 14 of G.S. Chapter 7B, the North Carolina Child Fatality Task Force created in G.S. 7B-1402, the State Office established by this new law, and the medical examiner child fatality staff. The intent in creating a State Office is to restructure North Carolina's Child Fatality Prevention System by July 1, 2025 so that the state system is centralized, reduces redundancy, maximizes the data and information of child fatality reviews, and strengthens the system's effectiveness. Corresponding amendments are made to Article 14 of G.S. Chapter 7B. Effective January 1, 2025, a new G.S. 108A-15.20 creates "citizen review panels" that comply with the federal Child Abuse Prevention and Treatment Act (CAPTA) and will evaluate the extent that the State is fulfilling its child protection responsibilities under the CAPTA state plan. Citizen review panels may review child fatalities and near child fatality cases.

Stay Updated: There are more bills that are pending that make additional changes to the Juvenile Code. Some of you have been following S625, which if passed will make significant amendments to the Juvenile Code. That bill is currently in the House and has not passed as of the date of this blog. Be sure to stay informed. If and when more changes become law, I will blog about them.

S.L. 2023-106: Parents' Rights, Who Is a Parent, and Juvenile Abuse, Neglect, and Dependency Cases

On August 16th, the legislature used an override of the Governor's veto to pass S.L. 2023-106 (S49), a law enumerating the rights of parents regarding their children's education, health care, and mental health needs. But in addressing a parent's rights, the law contains some exceptions when the child is alleged to be abused, neglected, or dependent. Notably, the new law defines "parent" as "any person with legal custody of a child, including a natural or adoptive parent or legal guardian." In cases where a department of social services (DSS) has filed a petition alleging a juvenile is abused, neglected, or dependent, DSS may obtain custody of the juvenile, or the court may ultimately award legal custody or guardianship to a person who is not the juvenile's parent. As a result, the new law impacts abuse, neglect, and dependency cases. This post discusses the new law as it relates to abuse, neglect, and dependency cases only and is not a comprehensive discussion of the new law generally.

Overview of S.L. 2023-106

There are three parts to S.L. 2023-106, two of which are the focus of this post.

- Part I of the law, "Parents' Bill of Rights," creates a new Chapter in the General Statutes, Chapter 114A, and became effective on August 15, 2023.
- Part II of the law focuses on educational issues by creating a new Article 7B to the state's education laws in G.S. Chapter 115C and amending other educational statutes. Part II became effective at the beginning of this school year (2023-2024).
- Part III of the law enacts new statutes in G.S. Chapter 90 that address parental consent for medical treatment of a minor and is not effective until December 1, 2023. (To learn about Part III of the law, see my colleague's blog post here).

Who is a "parent"?

Parts I and II of S.L. 2023-106 define a "parent" as "[a] person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian." G.S. 114A-1(5); 115C-76.1(5). Legal custody or guardianship is granted by a court order. The expanded definition of parent gives legal custodians and guardians newly enumerated rights as set forth in S.L. 2023-106. Because the definition focuses on legal custody, a natural or adoptive parent who does not have legal custody of their child does not have these rights. For example, if there is a court order awarding legal custody or guardianship to another individual (e.g., a grandparent), that individual is the "parent," and the natural or adoptive parent is not for purposes of this new law.

Also under Parts I and II of the law, a "child" is defined as a person under 18 years old who is not emancipated by marriage or court order. G.S. 114A-1(2); 115C-76.1(2).

Is DSS a parent? Often in an abuse, neglect, or dependency action, DSS seeks a court order awarding it custody of the juvenile. *See* G.S. 7B-504 and -506 (nonsecure custody); 7B-903(a)(6) (dispositional alternatives after adjudication). When legal custody of the juvenile is ordered to DSS, DSS has the right to make decisions regarding the child, including issues related to the child's placement and matters that are generally made by the child's custodian. *See* G.S. 7B-507(a)(4); 7B-903.1(a). A DSS is a county's child welfare agency. G.S. 7B-101(8a). The legislature did not include in the definition of "parent" an agency with legal custody but rather referred to "a person" with legal custody of a child. However, rules for statutory construction state that "the word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." G.S. 12-3(6). There is nothing about the context that indicates a county DSS with a court order of custody is not a "person" with legal custody making it a "parent" with the rights provided for in S.L. 2023-106.

When legal custody is ordered to DSS, there is no other legal custodian or guardian for the child. The effect of interpreting the definition of "parent" to not include a county DSS with legal custody would be to leave that child without a "parent" who can exercise the rights provided for in S.L. 2023-106. This would be an absurd result given that there is not an exception carved out for any category of children, let alone children who are often considered one of the most vulnerable populations in our state – those that are abused, neglected, or dependent. *See In the Matter of Brake*, 347 N.C. 339 (1997) (in construing a statute, presumption that legislature acted with reason and common sense and did not intend an absurd result). Finally, although DSS obtains custody, it is the DSS director, who is of course a person, who acts on behalf of the department and the child. *See, e.g.*, G.S. 108A-14(a)(6), (11), (12), (13); 7B-300; 7B-401.1; 7B-903.1.

Part I: The Parents' Bill of Rights

The Parents' Bill of Rights is set forth at the new G.S. 114A-10 and enumerates ten specific rights of a parent, which include

- directing the child's education;
- directing the child's moral or religious training;
- enrolling the child in a school the child is eligible by law to attend in compliance with compulsory attendance laws;
- accessing and reviewing the child's educational records, which is authorized by the federal Family Educational Rights and Privacy Act (FERPA) (for more information about FERPA and its application in abuse, neglect, and dependency cases, see Chapter 14, section 14.5 of the Abuse, Neglect, Dependency, and TPR Manual);
- making health care decisions for the child unless otherwise provided for by law;
- accessing and reviewing the child's medical records as authorized by HIPAA and not otherwise prohibited by law;
- prohibiting the creation, sharing, or storage of the child's biometric scan without prior written parental consent unless ordered by a court or required by law (e.g., fingerprinting,

photographing, and collecting DNA samples when the criteria are met under the juvenile delinquency laws is still permitted);
- prohibiting the creation, sharing, or storage of the child's blood or DNA without prior written parental consent unless ordered by a court or required by law (e.g., DNA samples when a juvenile is alleged to commit certain crimes and the delinquency case is transferred to superior court is still permitted);
- prohibiting the creation of a video or voice recording of the child without a parent's prior written consent unless certain exceptions apply, including court recordings, security surveillance, and certain school activities; and
- being promptly notified if a state employee suspects the child has been a victim of a crime unless an exception applies. Under this new law, a "state employee" includes an employee of the state, a political subdivision of the state (e.g., a county or municipality), or any public school unit. *See*S. 114A-1(6).

There are exceptions set out in the Parents' Bill of Rights that are specifically related to abuse, neglect, or dependency cases (and criminal, delinquency, and undisciplined cases as well).

- When the child is the subject of a DSS assessment for abuse, neglect, or dependency, a video or voice recording of the child may be made without prior written parental consent. G.S. 114A-10(9)b.
- When the parent is the subject of an assessment of abuse, neglect, or dependency and DSS requests that medical records for the child not be provided to the parent, the parent does not have a right to access the child's medical records. G.S. 114A-10(6)a.2.
- If a state employee (which includes employees of a political subdivision of the state and public school units) who suspects the child is a victim of a crime has made a report to law enforcement or DSS and notifying the parent of the employee's suspicions would impede DSS's or law enforcement's assessment, the parent does not have a right to be promptly notified. G.S. 114A-10(10).

This last right regarding prompt notification to the parent that a state employee (which includes employees of a political subdivision of the state and public school units) suspects the child is a victim of a crime raises some questions regarding a report to DSS if the crime also constitutes abuse, neglect, or dependency as defined in the Juvenile Code (G.S. Chapter 7B). *See* G.S. 7B-101(1), (9), and (15) (defining "abused juvenile", "dependent juvenile", and "neglected juvenile"). Any individual, including a state employee, who has cause to suspect a child is abused, neglected, or dependent must make a report to the county DSS where the child resides or is found. G.S. 7B-301(a). A state employee is obligated to make a report to DSS when the crime it suspects the child is a victim of also constitutes juvenile abuse, neglect, or dependency. Unless the exception (discussed below) applies, the parent is entitled to prompt notification that the state employee suspects the child is a victim of a crime. The statute does not specify who must promptly notify the parent, how notice is to be provided, or what must be included in the notice. DSS must keep any information it receives in an abuse, neglect, or dependency case in "strictest confidence"

and may not disclose the identity of a reporter absent a court order. G.S. 7B-302(a1); (a1)(1a), (a3); 7B-303(e); 7B-700(a). As a result, one can presume that the obligation to notify the parent is on the state employee who suspects that a criminal offense has been committed. The state employee is not obligated to inform the parent they made a report to DSS. Upon receiving notification of the child's suspected victimization of a crime, it is likely the parent will conclude that the state employee made the report to DSS.

One exception to notifying the parent exists: when a report is made to DSS or law enforcement and notice to the parent would impede either agency's investigation. The law does not specify who makes the determination that notice to the parent would impede an investigation – the state employee who is the reporter or the agency who received the report. If a state employee has reported the suspected crime to DSS, it is presumably because the employee suspects the child is abused, neglected, or dependent. Juvenile abuse, neglect, and dependency result from circumstances created by the juvenile's parent, guardian, custodian, or caretaker (except for a minor victim of human trafficking, who is abused and neglected regardless of who created the circumstances). Accordingly, when a state employee suspects the child is a victim of a crime that also constitutes abuse, neglect, or dependency, it is reasonable for that employee to believe that promptly notifying the "parent" of such a crime would impede a DSS investigation, since the parent would likely be notified by the state employee before any investigation was commenced by DSS and/or law enforcement. In other words, the state employee's prompt notification to the parent in such a circumstance would "tip off" the parent to the fact that they may be under investigation for a crime, which may include the juvenile's abuse, neglect, or dependency, they are suspected of committing against their child. That notification may hamper the investigation and potentially endanger the child at issue.

There are instances where some of the rights established in the new G.S. 114A-10 will be superseded by federal law. For example, a parent has a right to enroll the child in a school the child is eligible to attend, but if the child has been removed from their home and is placed in DSS custody, the federal Every Student Succeeds Act (ESSA) and Fostering Connections Act apply. These two federal laws require child welfare agencies and public school districts to work together to ensure a child's educational stability when a child is removed from their home. The laws require the child to remain in the school they were attending at the time of their removal when it is in the child's best interests to do so. A best interests determination is made in a Child and Family Team meeting, which the parent has a right to attend and participate in. Ultimately, DSS and/or the court hearing the abuse, neglect, or dependency case will make the determination if consensus cannot be reached. If the child must transfer schools, their enrollment must be immediate, even if the child's educational records are not available, to avoid a gap in schooling. For more information about ESSA, see Chapter 13, section 13.7 of the Abuse, Neglect, Dependency, and TPR Manual, here.

The Parent's Bill of Rights also includes statutory limitations on the rights of a parent. A parent does not have the right to abuse or neglect their child as defined in the Juvenile Code or to engage

in unlawful conduct. G.S. 114A-15(a). The new law does not prohibit a state official or employee (which includes officials and employees of a political subdivision of the state and public school units) from acting in their "official capacity within the reasonable and prudent scope of his or her authority." G.S. 114A-15(b)(1). The Parents' Bill of Rights also does not prevent a court from issuing orders that are permitted by law. G.S. 114A-15(b)(2). For example, a court with subject matter jurisdiction in an abuse, neglect, or dependency action may enter an order that removes the child from the custody of the parent (*see* G.S. 7B-504; 7B-506; 7B-600; 7B-903), limits the parent's right to make medical decisions for the child (*see* G.S. 7B-505.1; 7B-903.1(e)), limits the parent's rights to make education or other decisions for their child (*see* G.S. 7B-903.1(a)-(b)), and limits visitation and contact with the child (*see* G.S. 7B-905.1).

Notably, when the court does enter an order that awards custody or guardianship to a suitable person who is not the parent, *that custodian or guardian now has all the rights that are enumerated in the Parents' Bill of Rights*. These rights also apply to DSS when it has legal custody of a juvenile. At the same time, if the custody or guardianship order does not specify what, if any, rights the natural or adoptive parent retains, the natural or adoptive parent no longer has rights under the Parents' Bill of Rights. *See* G.S. 7B-903.1(a); *In re M.B.*, 253 N.C. App. 437 (2017).

Part II: Parental Guides and Notifications related to Education

Part II of the law enacts new statutes that address parental involvement in a child's education.

Under the new G.S. 115C-76.20(b), public school units (defined at G.S. 115C-5(7a)) must

- inform parents of their legal rights and responsibilities regarding their child's education (specified in G.S. 115C-76.25),
- provide annually a guide for parents about their child's achievement and educational progress, and how a parent can help their child succeed in school (what is required in the guide is specified in the new G.S. 115C-76.30), and
- develop policies to effectively involve parents in their child's education and school (specified in G.S. 115C-76.35).

Under the new G.S. 115C-76.25, parents have legal rights regarding their child's education, twelve of which are specifically enumerated, including

- consenting or withholding consent for participation in reproductive health and safety education programs;
- seeking a medical or religious exemption from immunization requirements (note, if a child is in DSS custody through an order in an abuse, neglect, or dependency case, DSS may consent to immunizations unless the court orders otherwise because of a parent's bona fide religious exemption; *see*S. 7B-505.1(a), (c)(3);
- reviewing statewide standardized assessment results;

- requesting their child's evaluation for a gifted program or identification as a student with a disability (for more information about the Individuals with Disabilities in Education Act (IDEA), see Chapter 13, section 13.8 in the Abuse, Neglect, Dependency and TPR Manual here);
- inspecting and purchasing textbooks and other instructional materials;
- accessing information about promotion, retention, and graduation requirements;
- regularly receiving report cards that address the student's academic performance, conduct, and attendance;
- accessing information about the State's standards and report card, attendance, and textbook standards;
- participating in parent-teacher organizations;
- opting in for certain data collection for their child;
- requiring parental consent before a student participates in surveys that include protected student information (*see*S. 115C-76.65); and
- reviewing records of all materials their child has borrowed from the school library.

When a parent submits a written request for information that they have a right to access under the law, the principal has 10 business days to provide the information or inform the parent that because of the volume or complexity of the request, it will be 20 business days from the date of the request before the parent receives the information. G.S. 115C-76.40. If the information is not given, a process for contacting the superintendent and then the governing body of the public school unit is provided in the statute.

Under the new G.S. 115C-76.45, the public school unit must adopt procedures to notify the parent of the student's physical and mental health, including providing information about health care services that are offered at the school. The statute also addresses how the parent provides consent for health care services and how the parent may obtain access to physical and mental health records. In an abuse, neglect, or dependency case, a court order that removes a juvenile from a parent, guardian, or custodian likely designates who has authority to consent to medical treatment for the juvenile. *See* G.S. 7B-505.1; 7B-903.1(e). The court order should control. Further, a parent is not entitled to access medical records for their child under two circumstances. First, medical records are not provided when DSS is conducting an assessment of abuse or neglect and DSS requests the medical records not be released to the parent. G.S. 115C-76.45(c); *see* G.S. 114A-10(6). Second, the public school unit's education and health records are not provided to the parent when "a reasonably prudent person would believe that disclosure would result in the child becoming an abused or neglected juvenile" as defined by the Juvenile Code. G.S. 115C-76.45(c). For example, if a school has a reasonable belief that releasing information in the child's medical records to the parent would cause the parent to abuse or neglect the child, the school is not required to disclose those records to the parent.

A child's gender identity and a parent's rights are also addressed in the new education laws. If a child wants to change their name or pronoun, the school unit must first provide notice to the parent.

G.S. 115C-76.45(a)(5). Note, the child's request to change their name is not limited to situations involving gender identity; it may include a change of name to a nickname, e.g., Kiki from Kirsten. For kindergarten through 4th grade, gender identity, sexual activity, or sexuality must not be included in the curriculum, including instruction provided by third parties. However, responses to student-initiated questions about gender identity, sexual activity, or sexuality may be provided. G.S. 115C-76.55.

The public school unit must adopt a procedure for the parent to raise concerns about the procedures or practices the school unit utilizes to comply with the rights contained in these new laws. Ultimately, a parent may seek a hearing before the State Board of Education or in court. G.S. 115C-76.60.

Because of the expanded definition of "parent," public school units will need to be aware that a DSS with an order of legal custody or another person with a court order of custody or guardianship have these rights under Part II of the new law. Conversely, the child's natural or adoptive parents may not have these rights by virtue of a court order that is entered in an abuse, neglect, or dependency action. Court orders entered in abuse, neglect, or dependency actions are withheld from public inspection, so the legal custodian or guardian will need to notify the school of their status and relationship to the child. *See* G.S. 7B-2901(a). The court may also change custody or guardianship during a school year. As a result, the school may have to work with more than one "parent" for an individual student who is the subject of an abuse, neglect, or dependency action, as there may be different parents for this student during their school career.