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Abuse, Neglect, Dependency

Adjudication

Neglect: Ultimate facts; Risk of Harm Finding Not Required

[In re G.C.](#), ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming trial court adjudication)

Dissent, Earls J. joined by Morgan, J.

- **Facts:** The juvenile was adjudicated neglected due to living in an injurious environment and not receiving proper care and supervision. Mother had a previous DSS case with her two older children who had been adjudicated abused, neglected, and dependent and had been in DSS custody since 2017. In 2019, mother was convicted of misdemeanor child abuse related to these 2 older children. Two other juveniles were born. In 2020, mother placed the youngest juvenile in a pack and play with blankets and bottles and found him unresponsive. He died and the autopsy report could not rule out death by asphyxiation. DSS filed a petition for the older sibling to the juvenile who died in part because the parents had been informed about proper sleeping arrangements for infants, which involved not having blankets in the crib. The court adjudicated the juvenile neglected and father appealed, arguing mother’s prior conviction and previous DSS cases involving her older children do not support current or future neglect regarding this juvenile. The court of appeals vacated the adjudication of neglect and remanded because there was no finding of any physical, mental, or emotional impairment or substantial risk of such impairment to the juvenile. Based on a dissent, DSS appealed to the supreme court.
- Under G.S. 7B-101(15), a neglected juvenile involves a parent who does not provide proper care, supervision, or discipline or creates an injurious environment to the juvenile’s welfare. It is relevant if a juvenile lives in the home where another juvenile has died because of suspected abuse or neglect or another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.
- In footnote 3, prior caselaw misusing the term “ultimate fact” is overturned. “[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning” and is not a conclusion of law or a mixed question of law and fact. Quoting *Woodard v. Mordecai*, 234 N.C. 463, 470, 472 (1951), “[t]here are two kinds of facts: ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts...”. The court made ultimate findings that the juvenile does not receive proper care, supervision, or discipline from her parent and that she lived in an environment that was injurious to her welfare. The ultimate findings were supported by the evidentiary facts including that the juvenile lived in the same home as the mother, the mother’s prior criminal conviction, the adjudication of the older siblings, and the circumstances of the death of the younger sibling.
- An adjudication of neglect cannot be based solely on the adjudication of other juveniles. Rather, “there must ‘be some physical, mental, or emotional impairment of the juvenile or *a substantial risk of such impairment* as a consequence of the failure to provide ‘proper care, supervision, or discipline.’ ‘ *In re J.A.M.*, 372 N.C. 1, 9 (2019)” (emphasis in original). Sl. Op. at 11. There is no requirement that the trial court make a specific finding of the substantial risk of an impairment based on statute or supreme court precedent. Any opinions by the court of appeals that require a finding of fact is overruled. (Fn 5). Here the adjudication was also based on current circumstances that created a risk to this juvenile.

- Dissent: The younger infant’s cause of death was undetermined and also could be consistent with SIDS. This possibility is not addressed by the majority. The court of appeals correctly required the finding of harm or substantial risk of harm to the juvenile. The lack of requirement to require such a finding interferes with parents’ constitutional rights.

Neglect

In re K.J.M., ___ N.C. App. ___ (April 21, 2023)

Held: Affirmed

- Facts: A 6-year-old juvenile was adjudicated neglected. Mother was incarcerated. Father was deceased. Mother left the juvenile with her mother who placed the juvenile with a non-relative. That non-relative caretaker was arrested for possession of methamphetamine while the child was present. There was no one available to care for the juvenile. Although mother identified her brother and sister-in-law as an option, those relatives were not willing to care for the juvenile. The neglect adjudication was based on a lack of proper care, supervision, or discipline, and an injurious environment. Mother appealed after the initial dispositional order was entered challenging the adjudication order only.
- Mother successfully challenged some findings of fact as conclusions of law. Regardless of how they are labeled, the appellate court applies the proper standard of review, which for conclusions of law is a de novo review.
- G.S. 7B-101(15) defines neglect as a parent, guardian, custodian, or caretaker who does not provide proper care, supervision, or discipline to a juvenile or creates an injurious environment to the juvenile’s welfare. Additionally, case law requires there must be a physical, emotional, or mental impairment or substantial risk of such impairment as a result. This requirement results from the State’s “authority ... to regulate the parent’s constitutional right to rear their children, *Meyer v. Nebraska*, 262 U.S. 390 ... (1923), only when ‘it appears that parental decisions will jeopardize the health or safety of the child.’ ” Sl.Op. at 24 (citation omitted).
- The challenged finding that the juvenile was without a caretaker of any kind after the caretaker’s arrest is supported by the evidence since neither parent was available, the grandmother had placed the child with the caretaker who was arrested, and the brother and sister-in-law were unavailable to provide care. The court logically reasoned there was no other available caretaker. Regardless of whether grandmother was appropriate, grandmother being available as a caretaker was not admitted in evidence. The evidence showed she had given her caretaker role to another person and mother did not identify grandmother as a potential resource when approached by DSS. Mother’s argument on appeal that grandmother was appropriate and available was not argued before the trial court, and mother cannot swap horses on appeal having argued grandmother’s actions led to the child’s removal at the adjudication hearing.
- The findings were supported by clear and convincing evidence, which includes social worker testimony. The statements made by the caretaker, which were included in the allegations in the petition, were excluded as hearsay and were not considered by the court. The statement “the allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence” do not mean the trial court concluded that all of the allegations were proved. That is a hypertechnical reading. Further the court’s statement regarding clear, cogent, and convincing evidence complies with G.S. 7B-807, which requires the court recite the standard it relied upon for adjudication.

- The findings support the conclusion of a substantial risk of harm to the child. At six years old, the juvenile did not have caretaker which at the time of DSS intervention appeared to be indefinite. A child that age faces a substantial risk of harm or impairment when without a caretaker for an indefinite period of time. In *In re D.C.*, 183 N.C. App. 344 (2007), a 16 month old was at substantial risk of harm when left alone for more than 30 minutes in a hotel room. This case is not distinguished from *In re D.C.* because of the difference in age or location. Here, the juvenile would have been “capable of exploring and encountering various hazards” when left alone for an indefinite period of time. Sl. Op. at 26. The court does not have to wait for actual harm to occur.

[In re M.C.](#), 2022-NCCOA-786

Held: Affirmed

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

[In re G.W.](#), 2022-NCCOA-784

Held: Affirmed

- Facts: DSS filed an abuse and neglect petition regarding the two older siblings involving improper care. During that case, G.W. was born. At the time of G.W.’s birth, mother tested positive for substances. Based on parents’ behaviors at the hospital, the hospital refused to allow G.W. to be

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

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

Abuse, Neglect: Hearsay; Findings; Inappropriate Discipline

[In re A.J.L.H.](#), ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming adjudication orders); Remand to court of appeals for arguments on initial dispositional order

Dissent: Earls, J. joined by Morgan, J.

- **Facts:** This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. 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. The petition alleged the oldest child was abused and neglected and the younger siblings were neglected. After hearing, the children were adjudicated and the parents were denied visitation. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudications of neglect for one juvenile based on the trial court's reliance on inadmissible hearsay evidence and reversed and ordered the trial court to dismiss the adjudications of the siblings because it was based solely on the adjudication of the older juvenile. The supreme court granted a petition for discretionary review.
- **Hearsay evidence** involved the oldest child's statements made to others. The ruling on an evidentiary issue by the trial court "will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." Sl.Op. at 9 (citation omitted).
 - A hearsay exception includes statements made to show the action taken by the person to whom the statement was made. The child's statements met this exception to show why DSS became involved and were not admitted to prove the truth of the statement about the abuse. The court of appeals should not have assumed the ruling was erroneous.
- A reviewing court determines whether the conclusions are supported by the findings and whether the findings are supported by clear and convincing evidence. The reviewing court disregards information in a finding that is not supported by the evidence and examines the remaining findings that are supported by clear and convincing evidence to determine whether those findings support the court's conclusions. A "reviewing court should not speculate about how 'heavily' the trial court might have relied on one finding as opposed to another." Sl. Op. at 10.
 - The abuse adjudication is supported by findings of marks on the juvenile's back caused by a belt, a bruise on the child's neck area and were confirmed by the respondent's admissions of the frequent (vs. sparing) use of physical discipline, having the child stand in a corner for hours and sleep on the floor. Based on the frequency, this is cruel or grossly inappropriate procedures or devices to modify behavior. It is also an injurious environment supporting the neglect adjudication.
- An adjudication of neglect cannot be based solely on the adjudication of other juveniles. Here, the younger siblings were neglected based on a risk of harm because the respondents were not willing to commit to stopping their use of discipline of the older juvenile or acknowledge that it was abuse. The court's assessment of a substantial risk of harm is predictive in nature based on the historical facts of the case and does not require the court to wait for actual harm to occur to the child.

- Dissent in part: The court of appeals was correct in determination the adjudication of the siblings as neglected was based solely on the adjudication of the older sibling. There was no other factors that showed a risk based on current circumstances to the juvenile.

Neglect; Dependency

[In re D.S.](#), 2022-NCCOA-674

Held: Reversed

- Facts: Infant was born and tested positive for THC and was also placed in NICU due to low blood sugar. Report to DSS was made and based on mother's prior history with DSS involving substance use and unstable housing, agreement was made where infant was discharged from hospital to father's home. Two weeks later, DSS and law enforcement did a courtesy check, where father was not present for approximately 5 minutes. When father arrived, social worker and law enforcement officer entered home with father and found infant sleeping in his room; no one else was present in the home. DSS filed a neglect and dependency petition. The juvenile was adjudicated neglected and dependent based on stipulations and father appealed.
- Under G.S. 7B-101(15), neglect involves the lack of proper care, supervision, or discipline and/or an environment that is injurious to the juvenile's welfare. There must be some physical, emotional, or mental impairment, or substantial risk of such impairment, to the juvenile as a result.
- Prior involvement with DSS standing alone is insufficient to support an adjudication of neglect. The court must find other factors that suggest the neglect will be repeated. In reviewing the conclusion of law (neglect) de novo, the unchallenged findings do not support the conclusion. The stipulations do not address when and why mother had a past DSS history, other than general references to substance use and unstable housing, and do not address the presence of any factors that would suggest the neglect from mother's prior DSS case would be repeated. There were no findings addressing the relationship between THC and the infant's low blood sugar levels. The infant was placed with father, who had no prior DSS history. There is no findings or evidence of harm or substantial risk of harm to the juvenile.
- There were no findings that leaving the child briefly unattended caused harm or a substantial risk of harm. This case is distinguishable from *In re D.C.*, 183 N.C. App. 344 (2007), where the child was left alone in a motel room for 30 minutes and was in distress. Here, the infant was sleeping in his crib when left briefly alone and was in no apparent distress. There is no indication that the child was more at risk than what he would have been if his father were sleeping in another room.
- The argument of DSS that the court should look to criminal statutes, specifically G.S. 14-318, for neglect and adopt a per se rule that a violation of the criminal statute is neglect is rejected. Neglect is defined in the Juvenile Code, which has a purpose of preventing the unnecessary separation of juveniles from their parents. The Juvenile Code "is not intended to punish parents; it is intended to ensure the wellbeing of juveniles." Sl. Op. ¶125. "We see no reason to link two distinct Chapters of our General Statutes when our legislature intentionally drafted § 7B-101(15) without reference to Chapter 14 when it easily could have chosen to..." Sl. Op. ¶124. There were no findings that father's home was inappropriate.
- Dependency under G.S. 7B-101(9) requires findings that both parents lack the ability to provide care or supervision and lack an appropriate alternative child care arrangement. Although the

findings show mother was incapable of providing proper care, mother had father as an appropriate alternative childcare arrangement. The minimal facts that the child was left alone for 5 minutes does not establish both parents were unable to provide proper care or supervision and lacked appropriate alternative childcare arrangements.

[In re J.N.J.](#), 2022-NCCOA-785

Held: Affirmed

Dissent, Murphy, J.

- Facts: At the time of the juvenile's birth, mother had two children who were in DSS custody, having been adjudicated neglected and dependent. The primary permanent plan for those juveniles was adoption based on mother's lack of compliance with her case plan. The juvenile in this action was born prematurely and was admitted to the NICU. He is a medically fragile child, requiring a breathing tube and ventilator, 24-hour-a-day supervision (so 2 full-time caretakers), and an environment free of smoke and smoke residue (home, car, personal contact). The homes of both mother and father smelled of smoke, and both parents admitted to being smokers. Father did not complete any medical training, and mother completed only some medical training. Neither parent provided names of two appropriate caregivers to care for the juvenile. When the juvenile was 6 months old and still in the NICU, DSS filed a petition alleging neglect based on lack of proper care and supervision and an injurious environment as well as dependency. After a 2-day hearing, the juvenile was adjudicated neglected and dependent and after the initial dispositional hearing, was placed in DSS custody. Mother appeals the adjudication and disposition.
- Although the findings in the court order mirror the allegations from the petition, the findings are supported by clear and convincing evidence. It is not per se reversible error for the findings to mirror the wording of a petition or pleading. The record of the hearing must demonstrate the trial court found the ultimate facts necessary to adjudicate the juvenile based on its process of logical reasoning and the evidentiary facts before it. At the hearing, there was social worker testimony, and one of the social worker corroborated many of the allegations in the petition. Additionally, the trial court's oral rendition demonstrated the court used a process of logical reasoning based on the evidence before it to find the necessary ultimate facts to support the adjudication.
- Neglect involves a parent not providing proper care, supervision, or discipline and/or creating an environment that is injurious to the child's welfare. There must be physical, mental, or emotional impairment or substantial risk of such impairment. For newborns or a medically fragile infant, the court must assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case and is predictive in nature.
 - A prior adjudication of a sibling, standing alone, is insufficient. There must be additional factors that suggest the neglect will recur. Failing to correct the conditions resulting in the prior adjudication, including addressing domestic violence, may support a likelihood of future neglect. The court properly found the parents were unable to provide proper care and supervision. Mother appeared controlled by father. The smoking by both parents and smoke in their homes created an injurious environment that would result in a substantial risk of physical impairment to this medically fragile infant.
- Dependency requires a juvenile to be in need of assistance because the parents are unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care

arrangement. The court found that each parent was unable to provide proper care and supervision. Although father proposed alternative child care arrangements, his relatives were not willing to provide care to the juvenile. Mother failed to specifically identify any alternative caregivers and suggestions of a friend or sister were rejected as proper placements for her other children who were in DSS custody. Neither her friend or sister could provide 2 full-time live-in caretakers the juvenile required for his medical needs. The adjudication of dependency was proper.

- Dissent: The court's order contained a significant portion of its findings from the allegations in the petition that were not based on evidence before the court and do not appear to reflect the trial court's process of logical reasoning. Looking to an oral rendition is unprecedented and is a departure from the ordinary appellate review process.

Dependency: Evidence

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

Held: Reversed and Remanded Court of Appeals Decision

- Facts and Procedural History: DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid on the infant, and burning her infant's feet with a lighter. The infant was left alone on the porch, and the neighbors took her to the hospital. Mother was charged with felony child abuse. DSS filed a petition alleging abuse, neglect, and dependency. The court held an adjudication, disposition, and permanency planning hearing on the same day. At the adjudication hearing, over objection, the social worker testified to the initial report, which was offered not for the truth but for why DSS became involved. The court also took judicial notice of medical records that had been admitted at a nonsecure custody hearing without objection. The juvenile was adjudicated abused, neglected, and dependent. The child was placed in DSS custody but that custody would be transferred to a willing relative once a relative complied with certain requirements. The court ordered the cessation of reunification efforts. Mother appealed. The Court of Appeals determined mother received ineffective assistance of counsel based on a lack of objection to hearsay and reversed the dependency adjudication because the trial court did not look at the circumstances that existed at the time of the adjudicatory hearing. DSS and mother both filed a petition for discretionary review, which were granted. This summary focuses on evidentiary issues.
- Failing to object at trial to the court taking judicial notice of underlying juvenile files waives appellate review. There was no objection made when the court took judicial notice of the medical records that had been previously admitted without objection in the hearing on continued nonsecure custody. Mother waived this review.
- Ineffective assistance of counsel places the burden on the party alleging it that the counsel's performance was deficient, the deficiency was so serious that the party was deprived of a fair hearing, and there is a reasonable probability that, but for the counsel's errors, there would have been a different result. This is a heavy burden as there is a strong presumption that the counsel's performance was within the range of reasonable professional assistance, and an attorney is given wide birth in strategy decisions. Mother's attorney objected to the social worker's testimony, which was overruled. Counsel gave an explanation for why he did not object to the

admission of the medical records – that were already in evidence. Neither NC appellate court has directly addressed whether a trial court at adjudication can take judicial notice of evidence that was admitted at a nonsecure custody hearing. As a result, “we are unable to conduct that respondent-mother’s counsel’s conduct was ‘unreasonable’ given ‘prevailing professional norms.’ ” Sl. Op. ¶ 22 (citation omitted). There was no ineffective assistance of counsel.

- G.S. 7B-802 states “the adjudicatory hearing shall be a judicial process designed to adjudicate the existence of nonexistence of any of the conditions alleged in a petition.” The court’s determination of abuse, neglect, or dependency is “fixed at the time of the filing of the petition. This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party.” The court of appeals’ reversal of the dependency adjudication because father and relatives were placement alternatives does not apply the plain language of G.S. 7B-802. When the petition was filed, father’s paternity was not established and his location was unknown, and relatives were not available placements because there were no completed home studies. The trial court’s findings that when the petition was filed, mother did not provide alternative placements with family members who presented themselves to DSS and did not have information about father and how to contact him were correct. The adjudication of dependency was not error.

Disposition

Initial: Parent’s Constitutional Rights

In re K.C., ___ N.C. App. ___ (May 2, 2023)

Held: Vacated

There is a Dissent

- Facts: DSS filed a neglect petition based on circumstances related to mother’s substance use, mental health, domestic violence, and housing issues. Parents and DSS agreed to a safety plan where the juvenile would reside with father, who was the non-removal parent. DSS did not seek nonsecure custody. After the juvenile was adjudicated neglected, the court held the initial dispositional hearing. The court ordered temporary custody to a parental aunt and uncle, which is the first time the court contemplated removing the juvenile from her father. The court determined father acted inconsistently with his parental rights. Father was ordered to comply with a case plan and received 3 hours a week of unsupervised visitation. Father appeals.
- A determination that a parent acted inconsistently with their parental rights is a conclusion of law that is reviewed de novo.
- The findings are that father temporarily had the juvenile stay with his sister and husband (aunt and uncle). In those 3 months, father visited with the child. The child returned to father’s home, which is also the home of his mother and aunt who assisted with childcare. Father was arrested and DSS discovered father has an extensive criminal history. Some findings of fact addressed socioeconomic factors, which are irrelevant to whether a parent has acted inconsistently with their parental rights and are not considered by the appellate court. They are relevant to a best interests determination. These findings include father living with his mother, moving frequently, the house was not clean, and a history of unstable employment.
- While the juvenile was in father’s care for approximately 15 months, DSS did not seek nonsecure custody and reported that the child was doing well, father was meeting her needs, is utilizing

family supports, and is providing a safe home. DSS recommended placement with the aunt and uncle.

- The temporary time the child lived with her aunt and uncle does not undermine father’s constitutional protected status. Viewing father’s conduct cumulatively, having support from family to care for the child, taking the child with him when he worked, having past criminal convictions, and have a domestic violence charged is not a forfeiture of father’s constitutionally protected status. The petition does not contain any allegations that father neglected his child, was unfit, or acted inconsistently with his parental rights. Father’s constitutional rights remain.
- Dissent: At initial disposition, the court does not need to address whether father acted inconsistently with his parental rights when awarding temporary custody. This conclusion is only required when permanent custody is being ordered. The standard of review should have been an abuse of discretion of the initial disposition and not a de novo review of a conclusion of law that was premature and unnecessary. The court did not abuse its discretion when awarding temporary custody to relatives based on the child’s best interests.

[In re J.N.J.](#), 2022-NCCOA-785

Held: Affirmed

Dissent, Murphy, J.

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

Cease Reunification Efforts

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

Held: Reversed and Remanded Court of Appeals decision

- Facts and Procedural History: DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid

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

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

Permanency Planning Hearing

Withdrawal of Counsel; Eliminate Reunification

[In re L.Z.S.](#), 2022-NCSC-129

Held: Reversed and Remanded

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

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

later filed a TPR petition, where father was reappointed his attorney and appeared at the TPR hearing. The TPR was granted. Father appeals the order allowing his attorney to withdraw at the permanency planning hearing, the order eliminating reunification, and the TPR order.

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

Eliminate Reunification

[In re T.D.N.](#), 2022-NCCOA-787

Held: Vacate and Remand

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

- **Facts:** In 2020, the juvenile was adjudicated neglected. Part of the basis for the adjudication was mother's mental instability. In 2021, the court eliminated reunification as a permanent plan for each parent because of their lack of progress on their case plans. The court made findings that reasonable efforts would be unsuccessful, futile, and inconsistent with the juvenile's health and safety. The court also found that legal custody of the child cannot be returned to the parents but may be possible within the next 6 months if the parents completed their case plan. Concurrent permanent plans of custody and guardianship were ordered. Mother appealed.
- **Standard of review** is whether competent evidence supports the findings and whether the findings support the conclusions of law.
- The court made the required finding under G.S. 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety. However, the finding that reunification may be possible within 6 months is materially contradictory. Although an order may include both favorable and unfavorable findings where the court weighs all the findings and makes a conclusion of law based on the findings that are given the most weight, an order cannot be upheld when the findings are "antagonistic, inconsistent, or contradictory such that the reviewing court cannot 'safely and accurately decide the question.' " Sl.Op. ¶11 (citation omitted). The court also ordered mother to have a parental capacity evaluation, which is unnecessary if reunification is not a permanent plan. It is unclear if these inconsistencies were a minor mistake or inadvertence. Further, the court did not find the parental capacity evaluation was in the child's best interests.
- **Dissent in part; concur in part:** The two findings do not materially contradict one another and does not support vacating the order. One finding is unsupported by the evidence. The court erred in ordering mother to have a parental capacity evaluation without determining it was in the child's best interests.

Eliminate Reunification; Achieve Permanent Plan; Verification by Custodian

[In re K.P.](#), 2022-NCSC-128

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

- **Procedural History:** District court entered a permanency planning order that achieved a permanent plan of custody, eliminated reunification as a permanent plan, and waived further hearings. Mother appealed, and the court of appeals vacated and remanded the order for insufficient findings to eliminate reunification, verify the guardians understanding of their appointment, and waive further hearings. There was a dissent, and an appeal was made by DSS to the NC Supreme Court.
- **Facts:** The juvenile was adjudicated neglected based on an injurious environment due to domestic violence and substance use. The child was ordered in DSS custody and placed with the Phillips (step-grandparents). The Phillips are the parents of mother's spouse, who the court determined was not the child's father and determined another man was the child's father. Mother was not making adequate progress on her case plan. At a permanency planning hearing,

the Phillips expressed a desire to be the child’s legal custodians and Mr. Phillips testified to such as well as his income. The court found the juvenile was doing well in the Phillips’ home, the Phillips had the financial ability to care for the juvenile, and determined the child’s best interests would be to award permanent custody to them. Permanent custody to the court approved caretakers, was one of the concurrent plans identified at the previous permanency planning hearing, was ordered and achieved. Reunification was effectively eliminated as a permanent plan. Mother appealed.

- G.S. 7B-906.2(b) unambiguously states “[r]eunification shall be a primary or secondary plan unless the court made written findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety.” Sl. Op. ¶ 18. ‘Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. “or”), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.’ *Id.* (citations omitted). “[T]he use of the disjunctive term “or” in N.C.G.S. § 7B-906.2(b) demonstrates that the satisfaction of any one of the three delineated circumstances which are identified in the statute, even to the exclusion of the remaining two circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan.” Sl. Op. ¶ 21.
- Agreeing with the dissent, the achievement of a permanent plan occurred, regardless of whether it was labeled as the primary permanent plan or a concurrent permanent plan. Also agreeing with the dissent, the findings are sufficient to support the conclusion to eliminate reunification and satisfy the statutory requirement of G.S. 7B-906.1(d)(1) and 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile’s health or safety.
- Agreeing with the dissent, the testimony of Mr. Phillips and the DSS social worker demonstrated the Phillips understood the legal significance of their appointment as custodians. Further G.S. 7B-906.1(j) establishes that the juvenile’s stable placement for 6 consecutive months is evidence of adequate resources. Here, the juvenile resided with the Phillips for 7 consecutive months, and Mr. Phillips gave uncontroverted testimony about their ability to support the juvenile. The court made the sufficient required verifications.
- The decision of the court of appeals regarding waiving further hearings is not before the supreme court and remains undisturbed. That holding was the court did not make all 5 findings required by G.S. 7B-906.1(n).

Eliminate Reunification; Guardianship

[In re N.T.](#), ___ N.C. App. ___ (June 6, 2023)

Held: Affirmed

- Facts: The children were adjudicated neglected after the one month old was admitted to the hospital with an unexplained skull fracture resulting from non-accidental means, blunt force trauma, while in the sole care of the parents. The children were placed with the grandparents throughout the case. Mother’s explanation for the injuries was trauma at birth. Father’s explanation was an accidental car seat incident where the infant fell out of the car seat. Neither explanation was supported by the medical evidence. After determining the parents did not

correct the conditions the led to the children’s adjudication/removal from home, it entered a permanency planning order that eliminated reunification, concluded the parents were unfit/acted inconsistently with their parental rights, and awarded guardianship to the grandparents. Both parents appeal.

- A court considers an order that eliminates reunification for an abuse of discretion. The standard is the child’s best interests.
 - The trial court made the required findings under G.S. 7B-906.2(b) and (d) that were based on competent evidence from social worker, GAL, respondent’s and grandfather’s testimony as well as reports from the DSS, GAL, mother, and each parent’s therapist.
- The conclusion that the parents were unfit and acted inconsistently with their constitutional rights were supported by the findings, which were supported clear and convincing evidence. The findings included the cause and circumstances of the child’s injuries remain unknown and unaddressed; neither parent thinks therapy is beneficial; neither parent’s therapy focuses on the circumstances surrounding the infant’s injuries, adequate steps to ensure the children’s safety have not been made.
- The guardianship order was based on the children’s best interests, which was not an abuse of discretion.

Role of Appellate Court

Visitation

In re A.J.L.H., ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming adjudication orders); Remand to court of appeals for arguments on initial dispositional order

Dissent/Concure in Part: Morgan, J. joined by Earls

- Facts: This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. 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. The petition alleged the oldest child was abused and neglected and the younger siblings were neglected. After hearing, the children were adjudicated and the parents were denied visitation. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudications of neglect for one juvenile reversed, ordered the trial court to dismiss the adjudications of the siblings, and ordered at disposition, if the older juvenile was adjudicated to order general and increasing visitation with the mother. The supreme court granted a petition for discretionary review.
- “The instruction to the trial court [on disposition] is improper and beyond the role of an appellate court.... The assessment of the juvenile’s best interests concerning visitation is left to the sound discretion of the trial court” that is reviewed for an abuse of discretion. Sl.Op. at 17. When there is an abuse of discretion, the remedy is to vacate the disposition order and to “express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court.” Sl.Op. at 17.

Termination of Parental Rights

Notice Pleading

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

Held: Reversed and remanded

- **Facts:** Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father's nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1104(6) requires a petition state "the [f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists." Sl. Op. at 8. Allegations need not be exhaustive but they must put a party on notice of the acts or omissions that are at issue. Father was put on notice of the ground for willful failure to pay child support for one year immediately preceding the petition. Only 1 of the 11 grounds address the willful failure to pay child support pursuant to a court order. Failing to include the citation for the statutory ground is not inadequate when the language of the allegation puts the party on notice. Failing to allege there is a judicial decree or child support order does not render the petition insufficient, although including a child support order exists is the better practice. The allegations stated father "refused" to pay child support, and refused shows an active decision to not pay, which is a willful decision to not pay.

Personal Jurisdiction

Service of Process; Summons Requirements

[In re C.T.T.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- **Facts:** Father filed a TPR petition against mother and a summons was issued on the same day. Four days later, provisional counsel was appointed to mother, such that the provisional counsel's name was not listed on the summons. Mother was personally served with the petition and summons, and one month later, mother's provisional counsel was served. Counsel raised a deficiency with the original summons, which was outdated. Father obtained permission from the court to reserve mother by publication as her whereabouts at that time were unknown. Mother's counsel filed a motion to dismiss arguing the notice by publication did not comply with G.S. 7B-1106 because information about filing an answer, the child's first name, and the name of provisional counsel were not included. The court concluded the original summons complied with the statute and the notice by publication was moot since mother had been previously served. The court denied the motion to dismiss. Mother was not present for the hearing, and the court released provisional counsel. The TPR was granted, and mother appeals.
- G.S. 7B-1106 requires a summons to be served with a TPR petition is filed. The statute also identifies what must be included in the summons. Personal jurisdiction is generally accomplished with the service of a summons.

- There is no statutory requirement that the attorney’s name be listed on the summons, rather the statute requires the counsel be served with the petition and summons. Mother was personally served with a summons that complied with G.S. 7B-1106(b). Provisional counsel was served and appeared at the first pretrial conference. The statute also requires the parent is entitled to appointed counsel, that provisional counsel be appointed, and that the court reviews the right to provisional counsel at the first hearing after the respondent is served. This all occurred. The court had personal jurisdiction over mother. Even though the notice by publication was defective, it was moot since the original summons was sufficient.

Release of Provisional Counsel

[In re R.A.F.](#), ___ N.C. ___ (April 28, 2023)

Held: Reverse court of appeals decision and remand to court of appeals

Dissent in part: Morgan, J., joined by Earls, J.

- Facts: Mother was served with a TPR petition and summons and was appointed provisional counsel. Her provisional counsel requested an extension of time to respond to the TPR petition, which was granted. Notice of hearing was served by petitioners on provisional counsel but not on mother. Mother did not appear at the TPR hearing. The court held a limited inquiry asking if the provisional counsel had contact with their client. Provisional counsel replied they spoke with mother initially after service and heard from her when she was in a treatment facility. Provisional counsel discovered mother graduated from the facility and had not heard from her. The court released provisional counsel and proceeded with the TPR hearing. The TPR was granted. Mother appealed. In a divided opinion, the court of appeals vacated and remanded for a new hearing based on fundamental fairness principles including whether mother had notice of the hearing. An appeal to the supreme court followed.
- G.S. 7B-1108.1 addresses the pretrial to a TPR and requires the court to consider the retention or release of provisional counsel and whether all summons, services of process and notice requirements have been met.
- G.S. 7B-1101.1 addresses the appointment of counsel for a respondent parent and states “at the first hearing after service upon respondent parent, the court shall dismiss the provisional counsel if the respondent parent does not appear at the hearing...” Sl.Op. at 8. The court of appeals determined this statute presumes the parent has notice of the hearing and there was no evidence mother knew about the hearing. This issue was not raised on appeal before the court of appeals, and the appellate court’s role is to not create an appeal. The parent cannot now change their position and argue before the supreme court that she lacked notice.
- The court found and concluded mother was served and was appointed provisional counsel with return of service in the court file. Notice of the hearing was made. Mother did not appear for the hearing. Service and notice requirements were met, and provisional counsel was released pursuant to statute. The court acted properly.
- Dissent in part: The record shows mother was not served with the notice of hearing and the court’s inquiry to provisional counsel did not adequately focus on the issue of notice yet the court found all notice requirements were met. Fundamental fairness applies to TPRs.

[In re C.T.T.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: Father filed a TPR petition against mother and provisional counsel was appointed to mother. Mother was personally served with the petition and summons as was her provisional counsel. Mother’s provisional counsel made arguments to dismiss based on insufficiency of process, which were denied. Mother was not present for the hearing, and the court released provisional counsel. The TPR was granted, and mother appeals. This summary addresses the release of provisional counsel.
- “The purpose of provisional counsel is to ensure a respondent parent’s rights are adequately protected for termination proceedings.” Sl.Op. at 10-11 (citation omitted). The court must determine whether provisional counsel should be retained or released when the parent fails to appear at the hearing.
- The court’s release of provisional counsel was proper under G.S. 7B-1108.1 and -1101.1(a)(1). Mother was personally served. Mother was in communication with her provisional counsel. Counsel was aware that mother would not be attending the hearing. The court inquired of provisional counsel at the TPR hearing about their communication with mother and determined counsel made adequate efforts to inform mother of her rights.

Indian Child Welfare Act

Active Efforts; Incarcerated Parent

[In re N.D.M.](#), ___ N.C. App. ___ (April 21, 2023)

Held: Reversed and remanded

- Facts: In 2018, the juvenile was adjudicated neglected and dependent. The court determined the child was an Indian child and ICWA applied. Father was incarcerated and had his paternity established. Father was ordered to comply with a case plan including a comprehensive clinical assessment, substance use assessment, drug screens, parenting classes, and obtaining a legal means of income, transportation, and stable housing. Father was ordered no visitation. In 2019, father was released from prison but had not entered into a case plan. In 2019, father was reincarcerated and had not engaged in any services. The court had found throughout the hearings that DSS provided active efforts by communicating with the parents, establishing father’s paternity, identifying services, and monitoring the parents’ status. In 2020, DSS filed a TPR petition regarding father. Father’s rights were terminated on all 5 grounds alleged after the court found father did not complete his services, did not enter a case plan, did not participate in services while incarcerated, did not engage with DSS, and did not establish or maintain a relationship with the child. The court also found DSS made active and reasonable efforts to reunify father and child. Father appeals.
- Whether DSS provided active efforts for reunification under ICWA is reviewed de novo. Findings that relate to active efforts are more appropriately labeled a conclusion of law that are reviewed de novo. The findings do not support the conclusion that active efforts were provided.
- ICWA requires the TPR petitioner to “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” Sl.Op. at 7; 25 U.S.C. 1912(d). Active efforts must be provided to both the Indian and non-Indian parent. “Active efforts” is

defined in 25 C.F.R. 23.2. Whether the active efforts are sufficient is determined on a case-by-case basis. Although incarceration “may have a direct bearing on what active remedial efforts are possible ... neither incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts.” Sl.Op. at 10 (citation omitted). Active efforts are not passive, which is when the parent is expected to develop their own resources to work a plan. Instead, “active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources.” *Id.*

- Other than the DNA test for paternity, DSS did not make efforts to contact father in any way while he was incarcerated. Creating a case plan is passive. There is no evidence DSS did anything actively to help the father with the steps of the plan or with accessing or developing resources that were necessary to complete the plan. There is no evidence that DSS communicated with father or prison staff to determine what services were available in the prison that would help father satisfy the case plan. Although father was denied visitation, there was no evidence DSS helped facilitate communication by phone or letters between father and child. When father was not incarcerated, DSS made no efforts to locate or communicate with him. Father did not thwart DSS’s efforts by showing he was unwilling to participate, as he signed and returned the paternity results from prison, attended almost every court date, requested current pictures of his child at a permanency planning hearing, and wrote a letter to the court stating DSS had not provided the pictures.
- In looking at other state court opinions, some have looked to what efforts were provided to the other, non-incarcerated parent when determined if active efforts were provided to the family. Here, the efforts provided to mother were not active efforts designed to prevent the breakup of the family.

Adjudication

Standard of Proof: Clear and Convincing Evidence

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

Held: Reversed and remanded

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

Denial of TPR; Standard of Review

[In re S.R.](#), ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirmed denial of TPR)

- Facts: This is a private TPR where mother petitioned to terminate father's parental rights on the grounds of neglect, failure to pay child support, and willful abandonment. Findings addressed mother's agenda of setting father up to not pay child support so that the ground to TPR was available. The TPR was denied on all three grounds. Petitioner appealed arguing that some findings were not supported by clear and convincing evidence and the conclusion that no grounds existed was not supported by the findings. The court of appeals affirmed. The supreme court granted a petition for discretionary review.
- The standard of review of a TPR adjudication is whether the findings of fact are supported by clear and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. This is the proper standard of review for a denial of a TPR adjudication. To the extent the court of appeals opinion could be interpreted to apply an abuse of discretion standard, it is modified to identify the correct standard.
- The trial court considers the evidence, determines its credibility and weight, and finds the relevant facts.
- G.S. 7B-1111(a)(4) authorizes a TPR based on a parent's willful failure to pay child support for one year or more immediately preceding the TPR petition when a parent has been awarded custody of the child and a support order is in place. The TPR order does not include findings that there was a child support order requiring father to pay child support but instead finds father paid child support until mother elected to no longer have an income garnishment for father's wages to pay child support. There was evidence to show there was a child support order but no finding. Mother has the burden of proof and father's failure to directly deny an allegation does not meet that burden. Further, there were no findings regarding whether father willfully failed to pay.
- The court made no findings to support neglect or willful abandonment. Mother's argument that father neglected the child because of his past behavior is not supported by the findings that father's prior suicidal threat was not threatening or combative toward mother or the unborn child. Regarding willful abandonment, the court found father made some efforts to have a relationship with his child that were hindered by mother.

Findings of Fact

[In re H.B.](#), ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirming TPR)

Dissent: Morgan, J. joined by Earls, J.

- Facts: In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother's substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2021, DSS filed a TPR petition to terminate mother's parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition. Regarding the adjudication, mother argues the court's reliance on an exhibit created by DSS as a timeline of mother's lack of progress to support the ground of failure to make reasonable progress to correct the conditions was error and the reference to the exhibit in the order was an insufficient finding of fact to support the conclusion that the ground existed. The

court of appeals affirmed the TPR and there was a dissent. Mother appealed to the supreme court.

- The finding of fact states “the Court relies on and accepts into evidence the Timeline, marked DSS Exhibit’ ”, in making these findings and finds the said report to [be] both credible and reliable.” Sl.Op. at 5. There was no objection to the admission of the Timeline in evidence. The Timeline showed H.B. was in DSS custody for more than one year, mother continually missed her visits and failed to attend her substance use and mental health appointments. Because the order was found to be “both credible and reliable,” the finding is more than a reference of evidence in the record but is an indication that the court determined this evidence was credible and is a proper evidentiary finding.
- The majority opinion states “We stress that our holding today is not an endorsement of this sort of fact finding.” Sl. Op. at 9. The better practice is to have express, specific findings of the facts rather than recite or reference evidence that it finds to be credible. The court could have found the mother missed visits on specific dates as well as missed appointments for substance use and mental health treatment without an explanation for why she missed those visits.
- Dissent: The trial court did not find facts specially as required by Rule 52 of the Rules of Civil Procedure. The findings are insufficient to support the TPR grounds. The findings do not state what happened in space and time. The majority has relaxed the standard for appellate review and augments the trial court’s insufficient findings of fact. The order should be vacated and remanded for findings.

Neglect: Likelihood of Future Neglect

[In re A.W.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father’s parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father’s rights were terminated, and he appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or creating an injurious environment to the child’s welfare. When there has been a period of separation, there must be past neglect and likelihood of future neglect. The court looks at the likelihood of future neglect based on circumstances between the past neglect and the time of the TPR hearing.
- The findings supporting a high likelihood of future neglect are supported by the evidence, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father’s psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father continues to show angry outbursts and emotional dysregulation, use substances, and continue to have contact with mother despite a DVPO.

Failure to Make Reasonable Progress: Waive Issue for Appeal

[In re K.M.C.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: The juveniles were adjudicated neglected based on mother’s substance use on three separate occasions, twice after being reunified with mother. Domestic violence between the

parents also occurred. The case plan required mother to obtain comprehensive clinical assessments, complete recommendations, comply with drug screens, obtain and maintain a safe residence including informing the social worker of her physical address and phone number. Mother completed an assessment but provided inaccurate information. She did not complete any recommendations from that assessment, did not submit to drug screens and admitted to using substances, denied the social worker access to the home on numerous attempts, and has not maintained consistent contact with the social worker. The court granted the TPR and mother appeals.

- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the child in foster care for 12 months while failing to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. When looking at the parent's progress, the court looks at the facts and circumstance up to the time of the TPR hearing. A child is willfully left in foster care when a parent has the ability to make reasonable progress but is unwilling to make the effort. A prolonged inability to make progress is willful even when a parent has good intentions and makes some efforts.
- Mother made late efforts to obtain psychological and substance use evaluations, provided inaccurate information, failed to follow up with recommendations, refused the drug screens, and admitted to using substances. Mother willfully failed to make reasonable progress.
- Mother argues collateral estoppel should have prevented the court from looking at the prior orders in her two earlier cases of neglect. The social worker testified to those cases and the orders were admitted in evidence without objection. Mother did not preserve this issue for appeal.

[In re D.C.](#), ___ N.C. App. ___ (May 16, 2023)

Held: Affirmed

- Facts: The juveniles were adjudicated neglected. After parents' failed to make progress on their case plan, DSS filed a TPR petition. The petition was granted based on a preponderance of the evidence standard. The parents appealed. The supreme court reversed and remanded and issued a mandate that the trial court consider the record before it to determine whether DSS proved by clear, cogent, and convincing evidence that one or more the TPR grounds existed. On remand, the court heard arguments from counsel, reviewed the record, stated the earlier standard of proof was a clerical error, and entered a new order findings 2 grounds based on the clear, cogent, and convincing evidence standard. Mother appealed the grounds.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves a child in foster care for 12 months and fails to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness is when a parent has an ability to make progress but is unwilling to make the effort. When noncompliance with a court-ordered case plan is a factor, there must be a nexus between the components of the case plan and the conditions that led to the child's removal.
- Mother did not make reasonable progress despite having an ability to do so. Mother was ordered to participate in parenting classes for 12 hours and mother chose to attend a 4-hour online class. DSS notified mother this was insufficient. Mother was also ordered to engage in therapy yet reported she does not trust or need counseling and will not participate in it.

Failure to Pay Child Support

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

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father's nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1111(a)(4) requires the court make two findings of fact: (1) an order or agreement requires the payment of child support and (2) the parent willfully failed to pay the child support as ordered or agreed to.
- Although a child support order was not entered in evidence, mother presented sufficient evidence of the existence of a child support order when she testified to its existence. Father also testified that there was a child support order that he was unable to pay.
- Willfulness involves doing something deliberately and purposefully. Because a child support order exists, mother was not required to prove father had an ability to pay. Father's testimony was that he was unable to pay the full amount although he had some income during the relevant time period indicating he has the ability to pay something. Mother testified father paid nothing. Mother presented sufficient evidence that the trial court could have found father willfully failed to pay. This warrants a remand.

Dependency

[In re A.W.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father's parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father's rights were terminated, and he appeals.
- G.S. 7B-1111(a)(6) authorizes a TPR on the ground of dependency when a parent is incapable of providing proper care and supervision such that the child is dependent under G.S. 7B-101(9) and the incapability is likely to last for the foreseeable future. The incapability may result from substance use, mental illness, or other condition that renders the parent unable to parent the juvenile.
- The findings supporting father's incapability are supported by the evidence, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father's psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father has borderline personality disorder and other mental illnesses, continues to show mania and emotional dysregulation, including suicide attempts via overdoses, and a lack of empathy, and use substances.

Abandonment

[In re S.I.D.-M.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

Dissent in part

- **Facts:** Mother filed TPR against father alleging abandonment, failure to pay child support, and dependency. Prior to the TPR, mother had a custody order granting her sole custody and a modified order that suspended father's visits until he "presents himself to the Court and show just cause as to why his visits should be reinstated." Sl.Op. at 2. The modification was based on father's mental health issues. The court denied the TPR on 2 of the grounds but granted it on the abandonment ground. Father appeals, challenging the evidence was insufficient to support the findings of fact and the findings do not support the conclusion.
- **G.S. 7B-1111(a)(6)** allows for a TPR when a parent has willfully abandoned their child for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment involves conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims by withholding one's presence, love, care, opportunity to show filial affection, and fails to support the child. Willfulness requires purpose and deliberation.
- **A trial court weighs the evidence and determines its credibility.** The trial court's finding that an email was sent to mother by father's attorney before the TPR was filed was supported. Without the email, father's testimony, or a more equivocal answer from mother that the email was to resume visitation, the court was not obligated to address what the purpose of the email was. The evidence also supports the findings that father did not attempt to contact mother during the determinative 6-month period. Although father believed there was a no-contact order, it was based on his not reading the order suspending visitation, which set forth what father had to do to obtain visits. The court inferred father was not motivated or interested enough in resuming visits. The findings support the conclusion of abandonment.
- **Dissent in part:** Mother did not meet her burden of proof for the abandonment ground and the findings are not supported by clear, cogent, and convincing evidence.

Prior TPR

[In re A.W.](#), ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- **Facts:** DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father's parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father's rights were terminated, and he appeals.
- **G.S. 7B-1111(a)(8)** authorizes a TPR on the ground of a prior involuntary TPR and a lack of ability or willingness to establish a safe home. Safe home is a home where there is not a substantial risk of physical or emotional abuse or neglect to the juvenile. G.S. 7B-101(19).
- There is no dispute father's rights to another child were involuntarily terminated. **The findings supporting father's inability or unwillingness to establish a safe home are supported by the evidence**, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father's psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father did not address the underlying issues for why the child came into care or his substance use, continues to show angry

outbursts and emotional dysregulation, and continues to have contact with mother despite a DVPO.

Disposition

Bond between parent and child

[In re H.B.](#), ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirming TPR)

Dissent: Morgan, J. joined by Earls, J.

- **Facts:** In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother's substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2021, DSS filed a TPR petition to terminate mother's parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition. Regarding the disposition, mother argues the court's finding that there was no bond between her and her child is unsupported by the evidence. The court of appeals affirmed the TPR and there was a dissent. Mother appealed to the supreme court.
- The best interests determination at disposition is reviewed for an abuse of discretion. The court considers factors in G.S. 7B-1110(a).
- Any evidence that supports a finding, even when there is competing evidence, will uphold the finding as the appellate court does not reweigh the evidence. There was some evidence mother had no bond with her child given her failure to visit with her child.
- **Dissent:** There was no evidence that mother and child did not have a bond. The evidence showed the child recognized her mother as mother and was happy to see her when visits did occur.

[In re B.M.S.](#), ___ N.C. App. ___ (April 21, 2023)

Held: Affirmed

- **Facts:** The juvenile was adjudicated neglected based on circumstances related to mother's substance use. After mother did not make progress on her case plan, DSS filed a petition to terminate her parental rights. The TPR was granted on the grounds of neglect and failure to make reasonable progress, and the court determined it was in the child's best interests to terminate mother's parental rights. Mother appeals, challenging the best interests determination and arguing the findings of fact are not supported by competent evidence.
- The best interests determination is reviewed for an abuse of discretion. The findings are reviewed under a competent evidence standard.
- At disposition, the court may consider written reports and other evidence about the child's needs that is relevant, reliable, and necessary. The court may also incorporate findings made at adjudication. One challenged finding was not supported by the evidence. The evidence was mother did not have stable housing yet the testimony and DSS report shows mother resided with her mother for 3 years. Other challenged findings are supported by competent evidence including social worker testimony and unchallenged findings of adjudicatory facts that were incorporated in the dispositional order.
- The court must consider the factors in G.S. 7B-1110(a). The court made findings of fact about all of the factors. The trial court considered mother's bond with her child and the potential impact

of severing that bond and the court determined the TPR was in the child’s best interests. There is no abuse of discretion when the court weighed the various factors.

Disposition on Remand; Current Circumstances; Nunc Pro Tunc

In re K.J.E., ___ N.C. App. ____ (April 21, 2023)

Held: Vacated in part and Remanded (Adjudication Affirmed)

- Facts: Mother filed a TPR against father for willful abandonment, which was granted. Father appealed, and the supreme court vacated the adjudication portion and remanded based on insufficient findings for the adjudication. In 2022, on remand, the trial court entered its second order with additional adjudicatory findings and terminated parental rights. A GAL was reappointed to the juvenile but the court denied father’s motion to receive new evidence. The court relied on the 2020 record and entered the 2022 order nunc pro tunc to 2020. Father appealed, challenging the disposition portion only.
- “The trial court was required on remand during the disposition stage ... to determine the best interests of the child at or near the time of the 2022 hearing.” Sl.Op. at 3. Although a trial court has broad discretion to decide whether to hear new evidence on remand, this discretion is not unlimited. It is not *per se* error for a best interests determination made on remand to be based on the record of the earlier hearing, when for example, no party attempts to offer new evidence. The court looks at evidence that is relevant, reliable, and necessary and has “wide discretion to determine whether ‘to admit or deny evidence at the dispositional phase’ ”. Sl.Op. at 8 (citation omitted). The supreme court was silent on whether the court must hear new evidence on remand, giving the trial court discretion to make that decision. However, “a trial court *must* generally hear any evidence relevant to a best interest determination if the evidence is not cumulative.” Sl.Op. at 6 (emphasis in original). Father was not permitted to make an offer of proof such that the appellate court cannot decide if refusing to allow the evidence father would have offered was an abuse of discretion. Not allowing father to make the offer of proof was error.
- A motion to continue the matter for 30 days so the GAL could perform her duties was denied. The court has discretion to deny a motion to continue but the “Supreme Court has suggested a trial court should not begin to make a determination before a GAL can perform her duties.” Sl.Op. at 9. The court of appeals makes no determination whether the court abused its discretion.
- On this remand, the court must exercise discretion when determining whether it is then in the child’s best interests to terminate his father’s rights. “It would seem to be an abuse of discretion if the trial court, on remand from our opinion today, made a best-interest determination based on 2020 information where the court could access new information.” Sl.Op. at 10. If the court does not take new evidence, it is encouraged to detailed findings as to why that evidence would not be relevant, reliable, or necessary. The court does have broad discretion to determine what evidence to hear in the disposition.
- Here the court entered the new order *nunc pro tunc* to the earlier order’s date, which suggests the court believed it was not required to look at the best interests of the child at the time of the hearing on remand. A *nunc pro tunc* order cannot be used “to accomplish something which ought to have been done but was not done.” Sl.Op. at 4 (citation omitted). The use of *nunc pro*

tunc was improper as the court was not trying to correct findings it had made in 2020 but rather it added findings it failed to make at the earlier hearing.

Order

Rule 60(a); Clerical Mistake

[In re A.R.B.](#), ___ N.C. App. ___ (June 6, 2023)

Held: Vacated and remanded

- Facts: Mother filed a petition to terminate father’s parental rights. After a hearing, the court granted the TPR. In its order, the court stated that there is clear and convincing evidence that the TPR is in the child’s best interests. Father appealed. Mother then filed a Rule 60(a) motion to address that the standard of clear and convincing evidence was applied to the grounds phase. The court determined it was good practice to grant the motion and clarify that it applied clear, cogent, and convincing evidence standard. An amended order was entered specifying that clear, cogent, and convincing evidence supporting the grounds. Father appealed the amended order.
- Rule 60(a) is used to correct clerical mistakes resulting from an oversight or omission. The mistakes may be corrected during the pendency of an appeal before the appeal is docketed in the appellate division.
- The court may correct clerical mistakes, not make substantive modifications. A clerical mistake is one “that does not alter the court’s reasoning or determination in ruling on an order.” Sl.Op. 8. If the court alters the effect of the order, it is an abuse of discretion.
- Case law has established that correcting a standard of proof is reversible error. In this case, the standard of proof was added. Past opinions have held that not announcing or writing the standard of proof of clear, cogent, and convincing evidence to the TPR grounds is reversible error. These opinion “speak directly to the importance of the trial memorializing its employment of the correct standard of proof during the proceedings in this context.” Sl.Op. 10. The plain language of the statute refers to “clerical error,” which “Black’s Law Dictionary defines... as ‘an error resulting from a minor mistake or inadvertence...’ ” Sl.Op. 11. The recording device malfunctioned so it is impossible to know if the court announced the proper standard it was applying. Based on a comparison of the original and amended orders, the addition of the clear, cogent, and convincing evidence standard to the grounds “alters the effect of the original order.” Thus, the addition of the language was a substantive modification and, therefore, an abuse of discretion.

Appeal

Writ of Certiorari

[In re R.A.F.](#), ___ N.C. ___ (April 28, 2023)

Held: Reverse court of appeals decision and remand to court of appeals

Dissent in part: Morgan, J., joined by Earls, J.

- Facts: This is an appeal of a TPR that involves the release of mother’s provisional counsel. After the TPR was granted, mother, who was pro se, appealed to the supreme court rather than the court of appeals. One month before mother filed her appeal, the supreme court had jurisdiction to hear TPR appeals but the statute was amended to place appeals of TPRs to the court of appeals at the time of mother’s appeal. The court of appeals and parties to the appeal received notice from and briefed the appeal in the court of appeals. The court of

appeals issued a writ of certiorari pursuant to Appellate Rule 21(a)(1). There was a dissent that the Appellate Rules do not allow for the court of appeals to treat the filings as a petition for writ of certiorari.

- “By law, the Court of Appeals has jurisdiction to issue a writ of certiorari in any case in aid of its own jurisdiction. N.C.G.S. 7A-32(c).” (emphasis in original). Separately, Appellate Rule 21 gives litigants a procedure that requires a petition for writ of certiorari but that rule does not limit the court of appeals. There is no statute that limits the authority of the court of appeals to issue a writ in this TPR case. The court of appeals had proper appellate jurisdiction.

Mandate

[In re D.C.](#), ___ N.C. App. ___ (May 16, 2023)

Held: Affirmed

- **Facts:** The juveniles were adjudicated neglected. After parents’ failed to make progress on their case plan, DSS filed a TPR petition. The petition was granted based on a preponderance of the evidence standard. The parents appealed. The supreme court reversed and remanded and issued a mandate that the trial court consider the record before it to determine whether DSS proved by clear, cogent, and convincing evidence that one or more the TPR grounds existed. On remand, the court heard arguments from counsel, reviewed the record, stated the earlier standard of proof was a clerical error, and entered a new order findings 2 grounds based on the clear, cogent, and convincing evidence standard. The parents appealed arguing the trial court did not comply with the mandate by not reconsidering the evidence and holding a new dispositional hearing.
- Whether a trial court complied with the appellate court’s mandate is reviewed de novo. The trial court must strictly follow the mandate, and the plain language of the mandate is controlling.
- The plain language of the mandate was to review and reconsider the record before it and apply the clear, cogent, and convincing evidence standard when making its findings of fact. The trial court’s order states it reviewed the record and evidence and arguments of counsel and applied the clear, cogent, and convincing evidence standard. Despite what father argues, the mandate did not include a requirement that the trial court hold a dispositional hearing. The court was not required to hear additional evidence or hold a new hearing. The court followed the mandate language to review and reconsider the record before it.

Remand: Fundamentally Fair Procedures

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

Held: Vacated and remanded

- **Facts:** In 2019, father’s parental rights were terminated and father appealed. On appeal, the supreme court reversed in part, vacated in part, and remanded in part the TPR for an order that contained proper findings and conclusions of laws regarding the ground of neglect and likelihood of repetition of neglect and the whether the TPR was in the child’s best interests. In 2021, on remand, the trial judge held an in-chambers meeting with the DSS attorney and the child’s GAL. Neither father nor his attorney were provided notice of the meeting or participated in the meeting. There was no record of the meeting. A new TPR order was entered, and father appealed.

- Parents must be provided with fundamentally fair procedures, consistent with the Due Process Clause, when the State moves to destroy weakened familial bonds. Judicial Canon 3(A)(4) requires a judge “accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law, and except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding.” Sl.Op. at 5.
- The trial court acted under a misapprehension of law that father was no longer a party and not entitled to due process. Father was entitled to proper service of notice, notice, and an opportunity to be heard, just like he was afforded at the initial TPR proceeding. A remand is required as father was not given an opportunity to participate or be heard before the new TPR order was entered.

UCCJEA

Subject Matter Jurisdiction

In re M.B., ___ N.C. App. ___ (April 21, 2023)

Held: Vacated and remanded for lack of subject matter jurisdiction

- Facts: The juvenile was born in 2013 and lived with his mother in the Washington, D.C. area since his birth. In 2018, the Maryland court concluded he was a child in need of assistance and placed him in the custody of Maryland DSS. In 2020, the Maryland court reunified the juvenile with his mother and terminated the child in need of assistance action but stated the order remains in effect until the child is 18 unless modified by a court of competent jurisdiction. In October 2020, mother was arrested for DWI, drug possession, and child abuse in North Carolina. DSS filed a petition, and the juvenile was placed in the nonsecure custody of DSS. From October 15 – December 1, 2020, the juvenile was in foster care in NC; mother was staying at a hotel in NC. On December 1st, the juvenile was placed with relatives in NC and mother moved back to Washington, D.C. The juvenile was adjudicated, and dispositional hearings were held. The court found that mother’s permanent address is in Washington, D.C. and ultimately placed the juvenile with a relative in Maryland where the juvenile would be closer to his permanent home. At a permanency planning hearing, the court entered two orders: the first giving guardianship to the relative and the second giving legal custody to the relative. Mother appeals raising subject matter under the UCCJEA.
- The standard of review of whether the NC court has jurisdiction under the UCCJEA is de novo. If the court lacks jurisdiction, “then the whole proceeding is null and void, i.e., as if it had never happened.” Sl.Op. at 12 (citation omitted).
- Maryland was the home state based on the juvenile and mother residing in Maryland for at least six months before DSS in NC filed its petition. Further, the NC court orders make numerous references to Maryland as the juvenile’s home. As the home state, Maryland had jurisdiction to make an initial custody determination. Maryland’s custody order was an initial custody determination. G.S. 50A-201(a)(1).
- Maryland, as the home state, retained exclusive continuing jurisdiction, as the Maryland order stated it remains in effect until the child turns 18; the mother and child have a significant relationship with Maryland and substantial evidence is there; the mother resides in Maryland; and the child lived all but 9 months of his life in Maryland. G.S. 50A-202.

- NC exercised temporary emergency jurisdiction when the child was found here and was subjected to or threatened with mistreatment or abuse. G.S. 50A-204(a). When exercising temporary emergency jurisdiction, the court must determine whether a previous child custody determination has been made. If there was not a previous child custody determination, “temporary emergency jurisdiction ‘becomes a final determination ... and this State becomes the home state of the child.’ ” Sl.Op. at 15-16; G.S. 50A-204(b). If there was a previous child custody determination, the court must specify the duration of the jurisdiction in its order and communicate with the court of the home state. G.S. 50A-204(c)-(d). Because of the previous Maryland custody order, the temporary emergency jurisdiction did not “morph” into home state jurisdiction. The NC court had an affirmative duty to communicate with the Maryland court to resolve the emergency or determine the length of the temporary order.

Adoption

Father’s Consent

Providing Tangible Support

In re B.M.T., 2022-NCCOA-838

Held: Affirmed

- Facts: Petitioners for adoption appeal district court order concluding father’s consent was required for the child’s adoption based on his acknowledging paternity, communicating and visiting with mother while pregnant and child after birth, and providing tangible support to mother during pregnancy and after the child’s birth. Mother and father continued in a relationship when mother was pregnant. Father provided mother with food and baby formula, clothing for herself and baby, cash (which was sometimes accepted and sometimes refused), transportation, housing, and personal items (e.g., car seat, diapers) during her pregnancy and after the child’s birth. Without father’s knowledge, mother executed a consent for adoption and placed child with petitioners and stated father’s identity was unknown. Afterwards, mother and father signed a voluntary acknowledgement of paternity resulting in the child’s amended birth certificate. Petitioners later filed a petition for adoption. Father was served with notice of the adoption petition and objected to the adoption. A hearing on whether father’s consent was required was held by the district court, which found father’s consent was required.
- Standard of review is whether there is competent evidence to support the findings and whether the findings support the conclusion. The trial court determines witness credibility and the weight of the evidence.
- G.S. 48-3-601 requires a man, before the adoption petition is filed, to acknowledge his paternity, provide reasonable and consistent payment for support including tangible means of support that is within his financial means, and visited or communicated with (or attempted to) mother during or after her pregnancy and the child after their birth. Petitioners concede father acknowledge paternity and communicated with mother.
- Respondent has the burden of showing (1) he provided payments for the support of mother, minor child, or both, (2) the payments were reasonable based on his financial means, and (3) the payments were consistently made. Attempts or offers of support are insufficient. NC Supreme Court holdings note the importance of a “payment record.” The findings that father provided tangible support before the filing of the adoption petition are supported by competent evidence.

Father had receipts, bank and credit card statements, and a pregnancy expense report he created. Father also set up his own home with a bed, toys, and clothing so that he could care for his child.

Civil Cases Related to Child Welfare

Child Custody and Admission of DSS Child Protective Records

[Kozec, Jr. v. Murphy](#), 2022-NCCOA-902

Held: Vacated and Remanded

- Facts: Mother filed a motion to modify a permanent custody order seeking father's prohibition from having contact with the children. DSS child protective records were obtained and placed under a protective order allowing the parties' attorneys to review them after the court determined under G.S. 7B-302(a1) that the records were relevant and necessary to the trial and were unavailable from another source. At the hearing, father sought the admission of those records, which mother objected to. The court sustained her objection after determining live witness testimony was required to authenticate the DSS records. The court modified the custody order and father appealed, challenging the exclusion of the DSS records based on the court's misapprehension of law.
- Standard of review is whether the court abused its discretion when excluding the DSS records.
- The court misapprehended the law when determining DSS records must be authenticated by a live witness testimony, rather than determine whether the records qualify as public records under Rule 902(4) of the Rules of Evidence, which allows for certified copies of public records. Despite mother's argument that there was no authenticating affidavit to the CPS records, the authenticating affidavit is part of the record on appeal. The trial court did not consider the affidavit based on its misapprehension of the law that live witness testimony to authenticate the records was required. This misapprehension of law is an abuse of discretion requiring the order be vacated and remanded. On remand, the parties shall have an opportunity to present arguments on whether the DSS records fall under the hearsay exception from Rule 803(8) or whether they are public record that can be authenticated by affidavit under Rule 902(4).