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Abuse, Neglect, Dependency

Adjudication

Neglect

[In re G.C.](#), 2022-NCCOA-452

Held: Vacated and Remanded

Dissent, Griffin, J.

- **Facts:** The juvenile was adjudicated neglected based on stipulations that addressed the underlying facts related to mother’s previous DSS cases with her two older children, and the death of the parents’ infant, who was the younger sibling to the juvenile who is the subject of this action. Mother’s older children 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. 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 of death by asphyxiation. The court adjudicated the juvenile neglected and father appeals, arguing mother’s prior conviction and previous DSS cases involving her older children do not support current or future neglect regarding this juvenile.
- **G.S. 7B-101(15)** authorizes the court to consider whether the juvenile lives in a 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. The trial judge has discretion to determine how much weight to give that evidence, but an adjudication of neglect cannot be based solely on prior DSS involvement related to other children. There must be clear and convincing evidence that current circumstances present a risk of physical, mental, or emotional impairment to the juvenile. There must be other factors to suggest the neglect will be repeated.
- **There were no findings of harm of substantial risk of harm to the juvenile** as a result a lack of proper care, supervision, or discipline. There were no findings of other factors that indicated a risk of harm to this juvenile. Remanded to determine whether facts to support neglect adjudication can be found by clear and convincing evidence.
- **Dissent:** The other factors relied on were the circumstances of the death of this juvenile’s younger sibling while under mother’s supervision. Although there is not a specific finding of substantial risk of harm, it is not error since the record contains evidence on this issue.

Permanency Planning Order

Guardianship

[In re R.J.P.](#), 2022-NCCOA-407

Held: Affirmed in Part; Remanded in Part

- **Facts:** In 2017, when working an in-home services plan, the juvenile was placed by parents with the Palmers. Eventually, the case was closed. In 2020, a new case was opened and the juvenile was placed with the Turners. The juvenile was adjudicated neglected and continued to be placed with the Turners. As part of disposition, visitation between the juvenile and the Palmers was ordered. Due to mother's incarceration and COVID-19 restrictions, there were no visits ordered with mother. Initially DSS and the GAL were recommending co-guardianship between the Turners and Palmers but subsequently changed their recommendation to guardianship with the Turners only, after concerns about the Palmers and the ability of the two proposed guardians to work cooperatively together arose. After a permanency planning hearing, the court ordered sole guardianship with the Turners, visits with the Palmers, and no visits with the mother. Mother appealed.
- **"In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount."** Sl.Op. ¶ 19 (citation omitted). The unchallenged findings, which are binding on appeal, support the court's conclusion that sole guardianship is in the juvenile's best interests. The one challenged finding is supported by competent evidence despite evidence that would support a contrary finding. Because competent evidence supports the challenged finding, the appellate court need not consider mother's alternative evidence. The findings support the conclusion of sole guardianship to the Turners and visitation with the Palmers.

Eliminate Reunification; Appeal with TPR

[In re C.H.](#), 2022-NCSC-84

Held: Affirmed in part; Remanded in part

- **Facts:** In 2019, the juveniles were adjudicated neglected. At disposition, father was ordered to comply with his case plan addressing mental health, domestic violence, parenting, housing, and employment. In 2019, at a permanency planning hearing, the court ceased reunification efforts but continued its decision about whether to remove reunification as a permanent plan to the next hearing. At the next hearing in 2020, the court eliminated reunification as a permanent plan. Respondent filed his notice to preserve appeal. DSS filed a TPR petition, which was granted. Father filed notice of appeal of the permanency planning order and referenced the TPR order without filing a separate notice of appeal. The GAL and DSS moved to dismiss the appeal because father did not follow the procedures of G.S. 7B-1001(a1)(2). Father filed a petition for writ of certiorari, which was granted. Father's appeal challenges the ceasing of reunification efforts while reunification was a permanent plan, and the permanency planning order (PPO) that eliminated reunification due to insufficient findings. Father argued that because the PPO was deficient, the TPR must be vacated under G.S. 7B-1001(a2).
- **The standard of review** of a PPO is whether there is competent evidence to support the findings and whether the findings support the conclusions of law. The PPO is reviewed for an abuse of discretion about the child's best interests.

- The court ceased reunification efforts in a PPO while reunification remained a permanent plan until the court made a final determination on reunification at the next hearing. Relying on *In re C.S.L.B.*, 254 N.C. App. 395 (2017), father argued reasonable efforts must continue when reunification is a plan. *In re C.S.L.B.* is distinguishable as guardianship was ordered in that case and there were no findings about the parent being abusive to or uncooperative with DSS social workers – findings that were made in this appeal. “[I]t was permissible for the trial court in this case to cease reunification efforts while allowing respondent an additional opportunity to demonstrate that he could comply with treatment recommendations regarding his mental health and potentially be reunited with his children.” Sl.Op. ¶ 26.
 - Author’s Note: Effective October 1, 2021, G.S. 7B-906.2(b) was amended to require reunification be eliminated as permanent plan when the court finds reunification efforts would clearly be unsuccessful or inconsistent with the juvenile’s health or safety.
- Before eliminating reunification as a permanent plan, the court must make findings under G.S. 7B-906.2(b) and 7B-906.2(d). The 4 findings under G.S. 7B-906.2(d) the degree of the parent’s success or failure toward reunification. The statutory language, although best practice, need not be used. When an appeal of an order eliminating reunification is made with an appeal of a TPR, the two orders are reviewed together. The findings of fact in the TPR are supported by the evidence: the social worker’s testimony. The findings of fact do not address G.S. 7B-906.2(d)(3), whether the father remained available to the court, DSS, and GAL.
- Relying on *In re L.R.L.B.*, 377 N.C. 311 (2021), a failure to make findings under G.S. 7B-906.2(d) requires a remand for entry of additional findings and does not require the TPR order be vacated. “Unlike the specific finding that ‘reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety’ which is required by G.S. 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under N.C.G.S. 7B-906.2(d)(3) is required to support the trial court’s decision.” Sl.Op. ¶ 42 (quoting *In re L.R.L.B.*).

[In re M.T.](#), 2022-NCCOA-593

Held: Affirmed

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

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

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

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

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

Visitation

[In re R.J.P.](#), 2022-NCCOA-407

Held: Affirmed in Part; Remanded in Part

- **Facts:** In 2017, when working an in-home services plan, the juvenile was placed by parents with the Palmers. Eventually, the case was closed. In 2020, a new case was opened and the juvenile was placed with the Turners. The juvenile was adjudicated neglected and continued to be placed with the Turners. As part of disposition, visitation between the juvenile and the Palmers was ordered. Due to mother's incarceration and COVID-19 restrictions, there were no visits ordered with mother. Initially DSS and the GAL were recommending co-guardianship between the Turners and Palmers but subsequently changed their recommendation to guardianship with the Turners only, after concerns about the Palmers and the ability of the two proposed guardians to work cooperatively together arose. After a permanency planning hearing, the court ordered sole guardianship with the Turners, visits with the Palmers, and no visits with the mother. Mother appealed.
- **G.S. 7B-905.1** requires the court to address visitation that is in the juvenile's best interests, and no visits may be ordered when the court finds the parent has forfeited their right to visitation or that visitation would be detrimental to the child's best interests and welfare. Mother was ordered no visits while incarcerated but the court did not address visitation and whether mother had any visitation rights upon her release, which was imminent. Remanded.

Termination of Parental Rights

Subject Matter Jurisdiction

G.S. 7B-1101: Findings re: UCCJEA

[In re J.D.O.](#), 2022-NCSC-87

Held: Affirmed

- **Facts:** In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use. In 2020, DSS filed TPR petition, which was granted. Mother appeals, raising a lack of subject matter jurisdiction and challenging the grounds.
- **G.S. 7B-1101** addresses jurisdiction in TPR actions. Mother argues the court lacked subject matter jurisdiction because the order did not include findings to establish it had jurisdiction under the UCCJEA. This argument has been rejected by the supreme court in *In re K.N.*, 378 N.C. 450 (2021), which was not incorrectly decided. As previously held, "[t]he trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction." Sl.Op. ¶10 (citation omitted). The record shows NC was the children's home state. The order's statement that this court has jurisdiction over the parents and subject matter is sufficient.

Standing

[In re A.A.](#), 2022-NCSC-66

Held: Affirmed

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The TPR was granted and mother appeals. One of her challenges is that petitioner lacked standing because she did not specifically alleged the juvenile had lived with petitioner for 2 years immediately preceding the filing of the TPR petition and there were not findings of fact about how long the child lived with the petitioner.
- Standing implicates subject matter jurisdiction. When a person's standing is challenged, the record must include evidence that is sufficient to support a finding of standing.
- The Juvenile Code does not require specific language in a TPR petitioner regarding standing nor does it require specific findings of fact regarding standing. The record shows the juvenile resided continuously with petitioner for more than the requisite time period. Petitioner alleged she and the juvenile's father had primary custody of the child while they were married (2015-2019) and that the child continued to reside with petitioner after the marriage ended and up to the date of the TPR petition being filed. The court took judicial notice of several trial court orders (civil custody orders) which showed petitioner had standing. There was no evidence the juvenile did not live with petitioner at any time during the relevant time period.

Motion to Continue; Ineffective Assistance of Counsel

[In re A.M.C.](#), 2022-NCSC-82

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. On January 25, 2021, DSS filed a TPR motion. The TPR hearing was scheduled for April 8th but was continued to April 16th. At the TPR hearing, mother's attorney requested a continuance that was denied. The TPR was granted, and mother appeals. Mother argues her attorney did not have an opportunity to adequately prepare for the hearing when the motion to continue was denied.
- Requesting a motion to continue to have more time to prepare does not equate to a motion based on a constitutional right. Because the motion to continue before the trial court was not based on a constitutional right, the standard of review is an abuse of discretion. Any argument the motion was based on a constitutional right is waived.
- In considering an abuse of discretion, the appellate court looks to the Juvenile Code, which allows for a continuance beyond 90 days when extraordinary circumstances exist and are necessary for the proper administration of justice. Mother did not show extraordinary circumstances existed to continue the hearing beyond 90 days (the hearing was scheduled on the 81st day). Although mother was incarcerated when the TPR was heard, her 35 days of incarceration out of the 81-day period from the motion being filed and the hearing being held are not extraordinary circumstances. Conjecture that jail staff interfered with her preparation with her attorney is insufficient; there must be direct evidence of interference.

- Mother has not proved ineffective assistance of counsel due to the denial of the motion to continue. Her attorney had been appointed to represent her in 2019, filed an answer to the TPR motion, made objections, and cross-examined a witness.

[In re B.B.](#), 2022-NCSC-67

Held: Affirmed

Dissent, Earls, J. (IAC Claim)

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. Mother had been incarcerated but was released the day before the TPR hearing. Mother did not appear at the TPR hearing. A motion to continue was requested by mother's counsel, which was denied. The TPR was granted. Respondent appealed.
- Continuances are disfavored. The party seeking the continuance has the burden of showing there are grounds to continue under G.S. 7B-1109, which requires extraordinary circumstances when a continuance goes beyond 90 days from when the petition is filed. A motion to continue is grounds for a new trial when (1) the denial was an error, and (2) the respondent was prejudiced by the denial. Mother did not show she was prejudiced as she did not show that she would have testified and that her testimony would have changed the outcome.
- Mother argues she received ineffective assistance of counsel because they did not ensure she was present at the TPR hearing. Mother must show (1) the counsel's performance was deficient such that she was denied a fair hearing, and (2) that there was a reasonable probability that there would have been a different outcome but for her attorney's deficient performance. The binding findings of fact show respondent mother did not meet her burden that there was a reasonable probability of a different result.

[Motion to Continue](#)

[In re B.E.](#), 2022-NCSC-83

Held: Affirmed

- Facts: In 2017, the juveniles were adjudicated neglected and dependent based on parents' domestic violence, substance use, homelessness, and failure to provide adequate supervision. Later in 2017, respondents were arrested on charges of drug trafficking. Ultimately, father was convicted and incarcerated. In 2019, DSS filed a TPR petition. The TPR hearing was continued 3 times based on father's request due to his attorney attempting to arrange for father to participate from prison. The attorney's efforts were unsuccessful. A 4th request for a continuance was made and denied. The hearing proceeded, and the court terminated both parents' right. Both parents appeal the grounds and father also appeals the denial of his motion to continue.
- A motion to continue is reviewed for an abuse of discretion. If the motion is based on a constitutional right, it is reviewed de novo.
- Father argues the denial of his motion to continue violated his due process rights; however, the motion at the trial court did not raise father's constitutional rights and as such it is waived this appellate argument. The denial is, therefore, reviewed for an abuse of discretion.
- G.S. 7B-1109 requires the hearing be held within 90 days absent extraordinary circumstances. Continuances are disfavored. Although the court found that father's attorney made various extensive efforts to ensure father's participation, those efforts went unanswered by the prison.

The hearing had been continued 3 previous times and 8 months had passed since the TPR petition was filed. There was no indication another continuance would improve the chances of father's participation. Father did not meet his burden to show there were extraordinary circumstances warranting a further continuance.

Sufficient Notice Pleading

[In re D.R.J.](#), 2022-NCSC-69

Held: Reversed

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The motion incorporated prior orders from the underlying juvenile case. The court ordered the TPR on both grounds alleged, neglect, failure to make reasonable progress, and willful abandonment. Father appeals.
- G.S. 7B-1104(6) requires that a TPR motion allege sufficient facts to warrant a determination that a ground exists. Although the factual allegations do not need to be exhaustive or extensive, they must be sufficient to put a party on notice as to what acts, omission, and conditions are at issue.
- The motion does not adequately allege neglect or failure to make reasonable progress, rejecting the GAL's and DSS's arguments that the attached orders were sufficient notice. No statements in the motion allege the statutory language for neglect or failure to make reasonable progress. A TPR motion cannot be conformed to evidence presented at the hearing, which is what DSS and the GAL are attempting to do. The court erred in concluding neglect and failure to make reasonable progress existed. The court also erred in concluding father willfully abandoned the juvenile as that ground was alleged for mother only.
- Father did not waive appellate review by not objecting at trial since he did not have notice of the grounds that were decided until the written TPR order.

Court Appointed-Counsel

[In re R.A.F.](#), 2022-NCCOA-754

Held: Vacated and Remanded for new hearing

Dissent, Tyson, J.

- Facts: In 2015, the juveniles were adjudicated neglected. In 2017, permanency was achieved when the court entered G.S. 7B-911 and Ch. 50 custody orders that terminated juvenile court jurisdiction and awarded permanent custody to the children's aunt and uncle. In 2021, aunt and uncle filed a TPR petition. In April, mother was personally served and was appointed provisional counsel. Mother and provisional counsel spoke and mother asserted she wanted to contest the TPR. In May, provisional counsel requested an extension to file an answer, which was granted. No answer was filed. In June, notice of the July hearing was sent to mother's provisional counsel, father's provisional counsel, and father. In July, a pretrial hearing was held, which was immediately followed by the TPR hearing. Mother was not present, but her provisional counsel was. Counsel informed the court that she did have contact with mother earlier when mother reported she was in a treatment facility. Counsel contacted the treatment facility and learned mother had successfully graduated but did not have contact with mother since the last phone

call in April. The court released provisional counsel, on its own motion, and determined all service and notice requirements were satisfied. The TPR hearing followed, and the TPR was granted. Mother appeals arguing the court erred in releasing her counsel.

- TPR proceedings require that parents be provided with fundamentally fair procedures and include a parent’s right to counsel and adequate notice.
- When an attorney makes an appearance in a case, the attorney may not withdraw without justifiable cause, reasonable notice to the client, and the court’s permission. The court’s decision is discretionary. The general rule regarding withdrawal “presupposes that an attorney’s withdrawal has been properly investigated and authorized by the court.” Sl. Op. ¶ 20 (citation omitted). “[W]hen the parent is absent from a [TPR] hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent’s rights are adequately protected.” *Id.* Because mother’s attorney filed motions for extensions of time, petitioner’s attorney presumed mother’s attorney made an appearance. “This presumption provides a possible explanation for why Petitioners’ attorney did not service Mother with notice of the TPR hearing” and served only Mother’s attorney. Sl. Op. ¶ 21.
- G.S. 7B-1101.1 requires the court to dismiss provisional counsel if at the first hearing after service the respondent does not appear. The statute presumes respondent was given notice of the hearing and decides whether to participate.
- G.S. 7B-1108.1 requires the court at a pretrial hearing to consider retaining or releasing provisional counsel and whether all summons, service of process, and notice requirements have been met.
- The trial court should have inquired into the efforts mother’s attorney made to contact mother to ensure mother’s rights were adequately protected and that she knew about the hearing. No inquiries about whether mother received notice of the hearing were made. There is no evidence in the record that mother knew of the hearing. The court’s findings that the notice requirements were met were not supported by competent evidence. A violation of a right to counsel does not require mother to prove prejudice to obtain appellate relief.
- Concur in result. Acknowledging the tension between the parent’s due process rights and the best interests of a child who has lived with a foster parent for more than 4 years and the limbo the children and foster parents experience.
- Dissent: The unchallenged findings are that mother’s provisional counsel tried to engage mother to participate in the proceeding. Unchallenged findings are binding. Mother was served with the summons, failed to keep her appointments and update her address. There is no abuse of discretion.

GAL for Parent

[In re J.A.J.](#), 2022-NCSC-85

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother’s substance use and mental health issues. Mother’s psychological evaluation showed her prognosis for significant and lasting behavior change as poor. Mother’s contact with the children was ceased due to her behaviors. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals. One of mother’s challenges is that the court erred in not appointing mother a Rule 17 GAL.

- G.S. 7B-1101.1(c) allows the court to appoint a Rule 17 GAL for a parent who is incompetent. An incompetent adult lacks the ability to manage their own affairs or communicate important decisions. When there is a substantial question as to whether a parent is incompetent, the court must make a proper inquiry in a hearing. The court may consider the nature and extent of the parent’s diagnosis made by mental health professionals and how the parent behaves in the courtroom. The standard of review is an abuse of discretion and “except in the most extreme instances,” the trial court should not “be held to have abused its discretion by failing to inquire into that litigant’s competence.” Sl.Op. ¶ 23 (citation omitted).
- Mother participated in the hearings: she entered stipulations; denied allegations; made progress on her case plan; engaged in a psychological evaluation; and although making extemporaneous interjections during witness testimony at the hearing, those interjections demonstrated her understanding of the issues being addressed. The court did not abuse its discretion in not holding a hearing to determine mother’s competency.

Collateral Attack on Underlying A/N/D Custody Order

[In re D.R.J.](#), 2022-NCSC-69

Held: Reversed

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion that was granted. Father appeals. One of his arguments is that he was “unfairly denied custody” as the juvenile should have been placed with him since there was no finding of his unfitness or acting inconsistently with his parental rights and the circumstances regarding the neglect resulted from mother’s substance use.
- Father stipulated to facts resulting in the juvenile’s adjudication and did not appeal the adjudication and dispositional orders. A “failure to appeal ‘generally serves to preclude a subsequent collateral attack . . . during an appeal of a later order terminating the parent’s parental rights[.]’ ” Sl.Op. ¶ 10 (citation omitted). Because the underlying juvenile orders are not void for lack of subject matter jurisdiction, father is precluded for making a collateral attack on those orders.

Denial of TPR

[In re N.W.](#), 2022-NCSC-91

Held: Affirmed

- Facts: Mother filed a TPR petition against father alleging willful abandonment. In 2016, mother obtained a DVPO in Kentucky that prohibited father from contacting mother and children, which mother had extended until October 2020. Also in 2016, the parties agreed to a custody and visitation order in Kentucky with mother having sole custody and father being allowed to seek a review for visits and contact with the children one year later after he completed recommendations. Father was ordered to pay \$1500/month in child support. In 2018, mother and children moved to NC. Father filed a motion to seek to have supervised visits but the Kentucky court declined to exercise jurisdiction. In 2020, father moved to NC and filed a petition to have the KY order registered in NC. One month later, mother filed the TPR petition. Father

filed an answer, and after a hearing, the court dismissed the TPR for failure to prove willful abandonment. Mother appeals.

- The burden of proof is on the petitioner and the evidentiary standard is clear, cogent, and convincing evidence. G.S. 7B-1109.
- G.S. 7B-1111(a)(7) authorizes a TPR when a parent has willfully abandoned their child for the 6 months immediately preceding the filing of the TPR petition. Abandonment involves a parent's conduct that "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." Sl. Op. ¶ 15. Willfulness is a question of fact. The determinative period is the 6 months immediately preceding the filing of the petition, but the court may consider conduct outside this window to determine credibility and intentions.
- During the 6-month period, father paid child support through a wage withholding and sought to have the KY custody order registered in NC. These actions alone are not definitive indicators of a parent's intent to stay in their child's life, but the court's findings of father's actions outside of the determinative period show father's attempt to become involved with his children. Father was prohibited from having contact with the mother and children, complied with the recommendations of the KY custody order, and attempted to have the ability to have contact with his children.

[In re B.F.N.](#), 2022-NCSC-68

Held: Vacated and Remanded

- Facts: In 2015, mother-petitioner obtained a DVPO against father and an order awarding primary custody to mother and secondary joint custody with visitation to the father. In 2017, father assaulted mother in the children's presence. Mother obtained a new DVPO and a modified custody order that granted exclusive care, custody, and control of the children to mother. The custody prohibited contact with petitioner or the children and imposed several conditions father had to complete before he could file a motion to modify based on a substantial change in circumstances. In 2020, mother filed a TPR petition alleging neglect by abandonment and willful abandonment. The court denied the TPR based on insufficient evidence. Mother appeals.
- "[T]he trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the trial court's denial of the termination petition." Sl. Op. ¶ 13. G.S. 7B-1110(c) requires the court to make appropriate findings of fact and conclusions of law when denying a TPR. Fact finding requirements are crucial to allow for an effective appellate review. When a TPR is denied, there must be the ability to conduct an appellate for each and every ground alleged.
- G.S. 7B-1111(a)(7) authorizes a TPR when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. The findings about father's actions, which included completing conditions imposed by the custody order, were outside of the determinative 6-month period. There were no findings about what actions father took during the 6-month period and whether father could have filed a motion to modify during the 6-month period, which would be relevant to determine his willfulness. The court is unable to conduct an appellate review of this ground.
- G.S. 7B-1111(a)(1) authorizes a TPR based on neglect by abandonment. There is no determinative time period. Although the court made findings about father's current

circumstances such that there was not a likelihood of repetition of neglect, the order does not address whether there was neglect by abandonment.

Adjudication

Neglect: Judicial Notice of Prior File; Findings

[In re J.D.O.](#), 2022-NCSC-87

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use. In 2020, DSS filed TPR petition, which was granted. The court took judicial notice of the underlying file. Mother appeals, raising a lack of subject matter jurisdiction and challenging the grounds, arguing the facts were not supported by the evidence and do not support the conclusion of neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions of the parent's fitness and the child's best interests at the time of the TPR hearing.
- "[A] trial court may take judicial notice of the underlying juvenile case file at a hearing on a termination of parental rights petition." Sl.Op. ¶ 16. However, the trial court cannot rely solely on prior order and court reports. There must be some oral testimony and an independent determination of the evidence presented. The court stated it would take judicial notice of the adjudication order and later stated it was taking judicial notice of the entire file. The written TPR order finds the court took judicial notice of the entire file. The court's oral statement of what it was taking judicial notice of was superseded by its written findings in the order, which was all the documents in the underlying file. In challenging the consideration of exhibits, Mother did not show the court relied on inadmissible evidence rather than witness testimony when making its findings of fact.
- Many of the court's findings are not findings but are recitations of testimony. Those non-findings are disregarded. In assessing the entire order, the adjudicatory findings support the conclusion. Other challenged findings are supported by the evidence – social worker testimony. Although some favorable factors for mother were not included, "[t]he trial court is not ... 'required to make findings of fact on all the evidence presented, nor state every option it considered.'" Sl.Op. ¶ 28 (citation omitted).
- Regarding prior neglect, there is no merit to mother's argument that an adjudication is about the child's status and does not satisfy G.S. 7B-1111(a)(1). Case law has established a prior adjudication of neglect is sufficient to establish prior neglect in a TPR based on G.S. 7B-1111(a)(1), and there is no requirement that the parent whose parental rights are at issue be responsible for the prior neglect adjudication. Having not appealed the underlying adjudication order, mother is bound by collateral estoppel.
- Regarding the likelihood of future neglect, a parent's failure to make progress on their case plan is indicative of a likelihood of future neglect, while their compliance with a case plan does not preclude a finding of neglect. The inquiry is not an inventory of what components of the case plan the parent achieved. Although mother was engaging in treatment, she did not resolve her issues with substance use such that the children could return to her care.

- Cumulative error is applied rarely in a review of a criminal conviction. “[C]umulative errors lead to reversal when ‘taken as a whole’ they ‘deprived [the] defendant of his due process right to a fair trial free from prejudicial error.’” Sl. Op. ¶ 47 (citation omitted). Cumulative error has not been recognized in a TPR or in civil cases generally and will not be expanded to this TPR appeal.

Neglect

[In re M.R.](#), 2022-NCSC-90

Held: Affirmed

- Facts: In 2017, two juveniles were adjudicated neglected based on circumstances involving unstable housing and mother’s substance use. In 2018, mother gave birth to a baby who tested positive for substances and that baby was ultimately adjudicated neglected. DSS filed motions to TPR both parents’ rights, which were granted. Mother appeals, challenging the ground of neglect and the best interests determination. Father appeals the best interests determination.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect (such as an adjudication) and the likelihood of future neglect based on the changed conditions of the parent’s fitness and the child’s best interests at the time of the TPR hearing.
- Unchallenged findings support the court’s conclusion of a likelihood of future neglect. Those findings address mother’s history with DSS, unstable housing, the children’s irregular school attendance and grade retention, mother’s arrests for new drug-related offenses and subsequent incarceration, mother’s illegal drug use including during pregnancy, and mother’s lack of prenatal care. Although mother did enroll in a substance use treatment program (TROSA) and was compliant with the program, she was not scheduled to complete that program until after the TPR hearing and would only be eligible for day visits with the children. The progress mother was making with her case plan (which started 21 months after the children were placed in DSS custody) does not preclude a finding of neglect. At the time of the TPR hearing, mother did not have the ability to provide proper care, supervision, and discipline.

[In re B.E.](#), 2022-NCSC-83

Held: Affirmed

- Facts: In 2017, the juveniles were adjudicated neglected and dependent based on parents’ domestic violence, substance use, homelessness, and failure to provide adequate supervision. Later in 2017, respondents were arrested on charges of drug trafficking. Ultimately, father was convicted and incarcerated. In 2019, DSS filed a TPR petition. The court terminated both parents’ right. Both parents appeal the grounds and argue the court erred in determining there was a likelihood of future neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing.
- Father argues the court erred in not considering his ability to participate in services while he was incarcerated and challenges findings of fact. The findings are supported by clear, cogent, and

convincing evidence – the social workers’ testimony. The one unsupported finding is disregarded. Incarceration, although not by itself a basis to TPR, is relevant, and “the extent to which a parent’s incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent’s incarceration.” Sl.Op. ¶ 26 (citation omitted). The court considered father’s incarceration as a relevant factor after finding facts about father’s behavior over the course of the case which includes times when he was not incarcerated. This includes father’s actions resulting in his arrest, his domestic violence against mother when he had been released from prison, his minimal progress on his case plan when he was released, and his not seeing or speaking with his children since 2017. The court also found it was likely the parents would reunite after father was released and their history of domestic violence and drug dealing made them unsafe to parent.

- Mother challenges findings of fact that are supported by clear, cogent, and convincing evidence – social workers’ testimony. Mother also argues she made significant progress so that there was no longer a likelihood of repetition of neglect. Although mother made progress, both social workers and the GAL had concerns about mother’s ability to parent all her children as she would get overwhelmed. Mother’s progress was insufficient to show there was not a likelihood of repetition of neglect. Mother does not challenge the finding regarding the likelihood the parents would reunite when father was released from prison and that there drug dealing and domestic violence makes them unsafe to parent.

[In re R.L.R.](#), 2022-NCSC-92

Held: Affirmed

- Facts: In 2019, the juvenile was adjudicated neglected and dependent due to circumstances resulting from mother's substance use, improper supervision, and an injurious environment. After mother failed to make progress on her case plan and the child’s relative with whom she was placed expressed a desire to adopt, the primary permanent plan was identified as adoption. In 2020 DSS filed a TPR motion. While the TPR was pending, the relative changed her mind about adoption, and the child was moved to a foster home. The TPR was granted. Mother appeals, challenging the grounds and best interests determination.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing. Regarding the likelihood of future neglect, a parent’s failure to make progress on their case plan or visit with their child is indicative of a likelihood of future neglect, while compliance with a case plan does not preclude a finding of neglect.
- The challenged findings of fact are supported by clear and convincing evidence – social worker testimony. One challenged finding that is not supported by the evidence is disregarded. The findings support the determination of a likelihood of future neglect.
- Although mother made progress after the TPR was filed, which the trial court considered, that progress was insufficient to show mother’s behavior changed in a way that ensured the child’s safety and welfare and that any change would be sustained. “ [A] ‘case plan is not just a checklist,’ ” but rather the parents must “demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors.” Sl. Op. ¶ 23 (citation

omitted). For example, being compliant with drug testing for the last 3 months after being noncompliant for 19 months is insufficient progress. Mother argued she was unable to demonstrate her changed behaviors because her visits were suspended. The suspension of visits was based on mother's failure to consistently visit with their child and the negative impact those missed visits had on the child. In addition to these findings, her failure to maintain suitable housing, stable employment, and transportation support the court's determination.

[In re B.B.](#), 2022-NCSC-67

Held: Affirmed

Dissent, Earls, J. (IAC)

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. Mother had been incarcerated was but released the day before the TPR hearing. The TPR was granted on the grounds of neglect. Respondent appealed, arguing the court did not consider the limitations her incarceration imposed on her regarding her ability to work her case plan or provide support.
- Incarceration is neither a sword nor a shield in a TPR proceeding. The findings, which are supported by clear and convincing evidence, show the court considered mother's actions when she was not incarcerated during times when her children were in DSS custody. Mother did not complete any part of her case plan or send letters, notes, gifts, necessities, or support to the children. Her case plan required she refrain from engaging in criminal activity yet she was arrested and had new criminal charges. These findings support the determination of a likelihood of future neglect.

[In re M.K.](#), 2022-NCSC-71

Held: Affirmed

- Facts: In 2019 the juvenile was adjudicated neglected due to circumstances involving mother's mental health, substance use, domestic violence/anger management, unstable housing and employment. Mother was ordered to comply with her case plan. After several permanency planning hearings where the court found mother was not making progress on her case plan, DSS filed a TPR petition. The TPR was granted and mother appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing. Regarding the likelihood of future neglect, a parent's failure to make progress on their case plan is indicative of a likelihood of future neglect, while compliance with a case plan does not preclude a finding of neglect.
- Mother challenges several findings – some of which are unsupported and are disregarded for appellate reviews, others of which are supported by the record, including permanency planning orders the trial court took judicial notice of.
- The evidence and findings support the determination of a likelihood of future neglect. Mother was not participating in medication management or therapy as ordered and failed to maintain stable housing and submit to random drug screens as ordered. Although mother was not ordered to address domestic violence, the court did not err in considering mother's continued

violence. “Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child.” Sl.Op. ¶ 39. The court considers all the evidence of relevant circumstances that occurred before or after the prior neglect adjudication. Mother’s continued domestic violence was appropriately considered when determining if the juvenile was likely to suffer a repetition of neglect. Further, part of the neglect adjudication was due to mother’s domestic violence. During the visits mother attended, she did not demonstrate appropriate parenting.

[In re A.N.S.](#), 2022-NCCOA-521

Held: Affirmed

- **Facts:** The juvenile was adjudicated neglected and at initial disposition, DSS was relieved of providing reunification efforts to father. Father shot and killed mother in front of the children. Father was arrested and awaiting trial for first-degree murder. DSS did not engage with father and provide a service plan. DSS filed a TPR petition, which was granted, and father appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When there is a period of separation between the child and parent, there must be past neglect and a likelihood of future neglect based on the circumstances at the time of the TPR hearing.
- Although father argues that the court relied on the 2018 shooting event as the ground for TPR, the trial court considered father’s conviction of first-degree murder with a sentence of life (which occurred after the TPR was filed) and the fact that DSS has not and will not provide services to father to help remedy the conditions that led to the child’s adjudication to determine neglect existed. Further, father cannot provide proper care, supervision, or discipline to his child if he is in prison for life without the possibility of parole.

[In re M.T.](#), 2022-NCCOA-593

Held: Affirmed

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

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

DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother’s expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her

testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

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

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

wellbeing of a child and is not meant to be punitive against the respondent parent. Finally, unchallenged findings of fact show that domestic violence between the parents did not occur before the abuse, neglect, and dependency petition was filed. This case differs from those where domestic violence existed before the A/N/D petition is filed and is part of the basis for the children's removal.

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

Neglect; Failure to Make Reasonable Progress

[In re M.B.](#), 2022-NCSC-96

Held: Vacated and Remanded

Dissent, Berger, J., joined by Newby, J.

- In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use, unsanitary home conditions, and improper supervision. Mother was ordered to comply with her case plan, which included a substance use assessment and follow up with recommendations including drug screening, parenting classes, obtaining and maintaining suitable housing, and maintaining employment. Mother was not following the case plan recommendations or regularly attending visits. The primary permanent plan was changed to adoption, and DSS filed a TPR motion in 2020. The motion alleged the grounds of neglect and failure to make reasonable progress. After the TPR was granted on both grounds, mother appealed.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect. The court looks to past and present factors, including changed circumstances and the parent's progress toward eliminating the conditions that caused the children's removal. "[T]he factors alone does not amount to making the determination itself" of a likelihood of future neglect. Sl. Op. ¶ 14. The court must "distinctly determine a parent's likelihood of neglecting a child in the future. *Id.* "Even when 'competent evidence in the record exists to support such a finding, . . . the absence of this necessary finding [still] requires reversal.'" *Id.*
 - Although the court found the relevant factors, the court did not make the ultimate determination by clear and convincing evidence of the likelihood of a repetition of neglect.

- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the juvenile in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. Willfulness of a parent’s failure to make reasonable progress is when the parent has the ability to make the progress but is unwilling to make the effort to do so. There must be adequate findings that the parent acted willfully.
 - The order does not address whether mother acted willfully when leaving the children in foster care without making reasonable progress.
- Dissent: Unchallenged findings were sufficient to show neglect and failure to make reasonable progress. The majority places form over substance.

Failure to Make Reasonable Progress

In re A.D., 2022-NCCOA-551

Held: Reversed

- Facts: In 2019, the juvenile was adjudicated neglected based on circumstances created by mother’s substance use. In 2020, putative father was identified and paternity was established. Father agreed to a case plan with DSS. Father had transportation issues due to a lack of driver’s license, some criminal involvement, but was working sporadically, seeking housing closer to his daughter but moved frequently, maintaining contact with DSS, and working within COVID-19 restrictions. In 2020, DSS filed a TPR petition after the primary permanent plan was changed to adoption. At the time of the TPR hearing, father had complied with much of his case plan, including obtaining subsidized housing, employment, completing parenting classes, completing a substance use assessment, seeking treatment for mental health and substance use, maintaining some contact with DSS, and attending the majority of his visits. The TPR was granted after the court determined father complied with the minimal requirements of his case plan. Father appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves their child in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. Willfulness may be found even when a parent makes some efforts to regain custody. Reasonable progress must be made regardless of whose fault it was that caused the child to be placed in foster care. Compliance with a case plan is relevant in determining whether a parent has made reasonable progress up to the time of the TPR hearing. “[A] parent’s failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of reasonable progress.” Sl.Op. ¶ 66.
- Challenged findings regarding father not seeking paternity or custody and not making progress with his case plan are unsupported. Other challenged findings are supported by the evidence. The court is not required to make findings on all the evidence presented.
- The findings do not support the conclusion that father failed to make reasonable progress to correct the conditions that led to the juvenile’s removal. “While Father has not fully satisfied all elements of his case plan, he has not shown ‘a prolonged inability to improve [his] situation,’ which would warrant terminating his parental rights...” Sl.Op. ¶167.

[In re A.H.G.](#), 2022-NCCOA-451

Held: Affirmed

- **Facts:** In 2020, the juveniles were adjudicated neglected and dependent. In 2021, DSS filed a TPR petition, which was granted. Mother appeals, arguing she made reasonable progress, the findings were unsupported, and the court abused its discretion when determining TPR was in the children’s best interests.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully fails to make reasonable progress under the circumstances. “Perfection is not required.” Sl.Op. ¶12. “Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.” *Id.* Poverty cannot be the sole basis for termination of parental rights under this ground.
- The challenged findings are supported by clear and convincing evidence. “The ‘trial court need not make a finding as to every fact which arises from the evidence; rather the [trial] court need only find those facts which are material to the resolution of the dispute.’ ” Sl.Op. ¶26 (citation omitted). The trial court made material findings.
- Mother argues her lack of progress on parenting education resulted from a lack of services available in her native language, but mother’s therapist attempted to work on parenting in mother’s individual sessions. Although mother maintained a 2-bedroom home that was clean and tidy, the court found the size was inadequate because 2 of the 3 children had been sexually abused and inappropriately touched each other. Although recognizing mother had financial difficulties, poverty was not the sole reason for the TPR. Mother failed to make progress on appropriate discipline for the children, an inability to manage their sexualized behaviors, and her inconsistently attending her own therapy. TPR affirmed even though mother made some effort to improve her situation and made some progress on her case plan.

[In re H.B.](#), 2022-NCCOA-453

Held: Affirmed

Dissent, Woods, 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 2020, mother’s parental rights to one of the juveniles was terminated. 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.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves their child in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal.
- “A trial court may take judicial notice of findings of fact made in prior orders.” Sl.Op. ¶ 37. But, the court may not rely solely on those prior orders. The court must take some oral testimony at the hearing and make an independent determination of the evidence that is presented at hearing. The court took judicial notice of the underlying neglect and dependency file and accepted a DSS Timeline into evidence at the TPR hearing. The witness testimony corroborated the evidence and prior orders regarding the history with mother and mother’s failure to follow through and comply with her case plan. The order’s finding, although minimal and unartfully drafted, are sufficient.

- Dissent: The findings are insufficient. The oral findings, which were more substantial, are not included in the written order. The order should be vacated and remanded for additional findings to support the conclusion of law.

Failure to Pay Reasonable Cost of Care

In re M.C., 2022-NCSC-89

Held: Affirmed

- Facts: The juveniles were adjudicated neglected in 2017. In July 2019, DSS filed a TPR motion, which was granted. Father appeals.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent's rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile's care despite having the physical and financial ability to do so. The cost of care is the cost to DSS, and a parent should pay the portion that is just, fair, and equitable based on the parent's ability. The " 'cost of care' under N.C.G.S. 7B-1111(a)(3) contemplates the monetary cost of foster care that DSS is required to pay for the care of the children." Sl.Op. ¶ 16.
- The determinative 6-month period is Jan. 17 – July 17, 2019. The children were in foster care and the room and board was more than \$14K. Father was incarcerated until mid-February and after June. Father was employed while he was not incarcerated and made zero although he had the ability to pay more. Father did pay for a birthday party, where he brought toys, shoes and clothing for the juveniles. "[T]his sporadic provision of gifts, food, and clothing does not preclude a finding by the trial court that respondent-father failed to provide a reasonable portion of the cost of care for the children when he made no payments to DSS or the foster parents during the relevant six-month period." Sl.Op. ¶ 15.

In re J.C.J., 2022-NCSC-86

Held: Affirmed

- Facts: In 2018, the juveniles were adjudicated neglected. In 2020, DSS filed a TPR motion that was granted. Parents appeal, challenging the grounds and best interests determination.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent's rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile's care despite having the physical and financial ability to do so. The cost of care is the cost to DSS, and a parent should pay the portion that is just, fair, and equitable based on the parent's ability.
- "[T]he sporadic provision of gifts for the benefit of the [juveniles] by respondent-mother does not preclude a determination that respondent-mother had failed to pay a reasonable portion of the cost of the care that the [juveniles] had received following their removal from the family home given that respondent-mother made no payment to DSS or the foster parents during the pendency of the case, including the determinative six-month period...." Sl. Op. ¶ 15.
- The absence of a court order or notice of the need to pay support is not a defense to this TPR ground because a parent has an inherent duty to support their children. The challenge that this ground violates the Fourteenth Amendment of the Constitution is raised as she did not raise this issue at the trial court.

- The findings that father has paid zero and had been employed throughout the pendency of the case shows he was continuously employed from the start of the case up to the TPR hearing, which necessarily includes the 6-month determinative time period.

[In re D.R.J.](#), 2022-NCSC-69

Held: Reversed

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent's rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile's care despite having the physical and financial ability to do so.
- The findings are insufficient to support the conclusion the ground exists. There is one finding related to this ground, which is that the parent paid nothing toward the cost of care despite have in the physical and financial ability to do so. There were no findings about the cost of care or the father's ability to pay. No evidence on those issues were introduced at the hearing. The evidence does not support the finding.

[In re L.M.B.](#), 2022-NCCOA-406

Held: Affirmed

- Facts: The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds; father also challenges the best interests finding and the validity of the order.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay for a reasonable portion of the child's cost of care for the six months immediately preceding the filing of the TPR when the parent is financially and physically able to do so.
- Here the relevant time period is July 29, 2020 to January 29, 2021. Although parents selectively challenged some findings, the remaining 245 unchallenged findings (which are binding on appeal) support the court's conclusion that parents failed to pay a reasonable portion of the cost of care. Mother was employed or receiving unemployment benefits throughout the life of the case and father received disability benefits, yet the parents paid zero in child support.
- Although the parents provided clothes, diapers, and toys at visits, there is nothing in *In re J.A.E.W.*, 375 N.C. 112 (2020) that requires the trial court to consider "in kind" contributions as a form of support. Although the court acknowledged these gifts, the court did not err when determining that the gifts did not qualify as court-ordered financial support payments. In this case, the parents had been ordered to provide child support and the court found there was no agreement between DSS and the parents that the contributions would offset the support obligation.

[In re A.C.](#), 2022-NCCOA-552

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected. The court found that father failed to comply with his case plan. In 2020, father was incarcerated for different periods of time for probation violations. A TPR motion was also filed in 2020, which was granted. Father appeals.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay for a reasonable portion of the child's cost of care for the six months immediately preceding the filing of the TPR when the parent is financially and physically able to do so.
- The court had clear, cogent, and convincing evidence of father's employment and income during the relevant six month period from the testimony of the DSS employee that did not include the GAL report, which father challenges should not have been considered because it was not admitted or offered in evidence. The issue regarding the GAL report is not considered by the appellate court.
- Evidence shows father was employed at some point during the relevant statutory six month period when he was not incarcerated and that he paid nothing toward the cost of care. These findings are sufficient to address the statutory time period.
- Although the amount of the father's specific earnings during the relevant time period were not in evidence, the evidence showed he was earning some money through employment, he paid zero toward the cost of care. The finding he had the ability to pay something more than zero in that 6-month period is sufficient.

Dependency

[In re D.R.J.](#), 2022-NCSC-69

Held: Reversed

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(6) authorizes the court to terminate a parent's rights when the parent is incapable of providing for proper care and supervision and lacks an appropriate alternative child care arrangement.
- The findings are insufficient to support the conclusion the ground exists. There is one finding related to this ground, which addresses the parent's inability to provide proper care and supervision. There is no finding about whether there was an appropriate alternative child care arrangement. The findings must address both prongs of the ground. No evidence on the issue of an appropriate alternative child care arrangement introduced at the hearing.

Abandonment

[In re A.A.](#), 2022-NCSC-66

Held: Affirmed

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The

TPR was granted and mother appeals. One of her challenges is that the evidence does not support the findings and the findings do not support the conclusion of willful abandonment.

- G.S. 7B-1111(a)(7) authorizes a termination of parental rights when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. A parent's conduct implies the parent's willful determination to forego all parental duties and relinquish all parental claims.
- The findings of fact are supported by the evidence and support the conclusion. Although mother did have some contact with the child, it was outside the determinative time period. Although mother had a child support wage garnishment, she was aware that garnishment was going to father after father while he was incarcerated, father and petitioner had separated, and the child remained with petitioner.

[In re J.A.J.](#), 2022-NCSC-85

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother's substance use and mental health issues and father's incarceration. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. A parent's conduct implies the parent's willful determination to forego all parental duties and relinquish all parental claims.
- Incarceration limits a parent's ability to show an interest in their child but does not excuse a parent from showing that interest by the means that are available. Father had the ability to phone or write letters to his child but never did. The social worker testimony and prior permanency planning orders that were admitted in evidence showed that father had not contacted or sent mail to his child. Evidence father points to regarding his actions fall outside the determinative 6 month window.

Best Interests of the Child

Evidence: Exclusion of Expert Witness

[In re M.T.](#), 2022-NCCOA-593

Held: Affirmed

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

At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting

classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

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

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

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

Factors

[In re M.R.](#), 2022-NCSC-90

Held: Affirmed

- Facts: In 2017, two juveniles were adjudicated neglected based on circumstances involving unstable housing and mother's substance use. In 2018, mother gave birth to a baby who tested positive for substances and that baby was ultimately adjudicated neglected. DSS filed motions to TPR both parents' rights, which were granted. Mother appeals, challenging the ground of neglect and the best interests determination. Father appeals the best interests determination.
- The challenged findings are supported by competent evidence: social worker testimony.
- The trial court has discretion to determine the weight to give completing G.S. 7B-1110(a) factors. There was no abuse of discretion. The parent-child bond is one of many factors considered by the court. A child's wishes are not controlling on the trial court since the best interests of the child is the "polar star."
- The need for child adoptee who is 12 or older to consent to the adoption does not preclude a TPR. Consent to adoption is governed by G.S. Chapter 48 and not the Juvenile Code. G.S. Chapter 48 allows the minor's consent to be waived when the court finds it is not the child's best interests to consent.

[In re R.L.R.](#), 2022-NCSC-92

Held: Affirmed

- Facts: In 2019, the juvenile was adjudicated neglected and dependent due to circumstances resulting from mother's substance use, improper supervision, and an injurious environment. After mother failed to make progress on her case plan and the child's relative with whom she was placed expressed a desire to adopt, the primary permanent plan was identified as adoption. In 2020 DSS filed a TPR motion. While the TPR was pending, the relative changed her mind about adoption, and the child was moved to a foster home. The TPR was granted. Mother appeals, challenging the grounds and best interests determination.
- In considering the child's best interests the court looks to the factors at G.S. 7B-1110(a). The court considered the factors and the findings were supported by the evidence that there was no bond between the child and parent. The absence of an adoptive placement is not a barrier to TPR and the findings, based on evidence, show she has a high likelihood of adoption. The appellate court will not reweight the evidence. Mother argues additional criteria that are codified in other states should be considered. This is an argument for the General Assembly. Further the catch-all, "any relevant consideration," allows for other information to be considered, which in this case was the impact of adoption on this child. A trial court is not required to consider non-TPR related dispositional alternatives in the dispositional stage of the TPR because its focus is on the child's best interests.

[In re L.M.B.](#), 2022-NCCOA-406

Held: Affirmed

- Facts: The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds and the validity of the order. Father also challenges the best interests determination.
- The “trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom.” If a different inference may be drawn from the evidence, the trial judge alone determines the credibility of the witnesses and which inferences to draw and which to reject.” Sl. Op. ¶ 26 (citation omitted). The court did not abuse its discretion in determining the TPR was in the child’s best interests. The court considered all the factors in G.S. 7B-1110(a) and made findings addressing the relevant factors. The findings were supported by competent evidence.

[In re A.H.G.](#), 2022-NCCOA-451

Held: Affirmed

- Facts: In 2020, the juveniles were adjudicated neglected and dependent. In 2021, DSS filed a TPR petition, which was granted. Mother appeals, arguing she made reasonable progress, the findings were unsupported, and the court abused its discretion when determining TPR was in the children’s best interests.
- G.S. 7B-1110(a) requires the court consider the enumerated factors and made written findings of those that are relevant. One factor is a catchall, “any relevant consideration.” Mother argues the court was required to make findings about the lack of Spanish-language services for mother and the impact of a TPR on the children’s culture. “Assuming language and culture are included in the catchall[,]” the court considered and made findings about those issues.

[In re H.B.](#), 2022-NCCOA-453

Held: Affirmed

Dissent, Woods, 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 2020, mother’s parental rights to one of the juveniles was terminated. 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.
- A disposition is reviewed for an abuse of discretion. The trial court considers all the factors enumerated in G.S. 7B-1110(a) and must make written findings of those that are relevant. A factor is relevant when there is conflicting evidence on that factor.
- The parent-child bond is not a dispositive factor at disposition. The court did not abuse its discretion when considering all the factors in G.S. 7B-1110(a). The court found there was no parent-child bond, which mother challenges.
- Dissent: there is no evidence to support the finding to show no parent-child bond.

Continued Contact with Parents

[In re J.C.J.](#), 2022-NCSC-86

Held: Affirmed

- Facts: In 2018, the juveniles were adjudicated neglected. In 2020, DSS filed a TPR motion that was granted. Parents appeal, challenging the grounds and best interests determination. In this case, the foster parents and parents engaged in shared parenting. Respondents argue the court should consider the continuation of contact with the children and birth family, including the parents, as a factor.
- Although citing other states' dispositional standards that include continued contact between parents and the children, those statutes do not apply to TPR proceedings but instead apply to dispositions in abuse, neglect, dependency, children in need of services, and placements in residential treatment programs. One of the purposes of TPRs in NC is to place the child's needs and best interests above the parents so the juvenile can have a permanent plan of care as early as possible. G.S. 7B-1100(3). "[T]here is no basis for the use of a 'least restrictive disposition' test in this Court's termination of parental rights jurisprudence." Sl.Op. ¶ 28. The court considered the proper dispositional factors and did not abuse its discretion.

GAL Recommendations, Other Parent's Rights

[In re A.A.](#), 2022-NCSC-66

Held: Affirmed

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The TPR was granted and mother appeals. One of her challenges is to the best interests determination as the GAL did not recommend TPR, the child did not want a TPR, and the father's rights were not terminated.
- A court is not bound by the recommendations made by the GAL. The GAL's recommendations are important evidence, but the court has the authority to weight all the evidence. Not following the GAL's recommendations is not an abuse of discretion.
- The evidence does not support mother's argument that the child did not want mother's rights terminated.
- The trial court's focus at the dispositional phase of the TPR is the child's best interests and not equity between the parents. There was no abuse of discretion in terminating mother's rights when the father's rights were not terminated.
- Concur: The majority should have recognized as favorable that mother complied with her court ordered child support and did not have an affirmative duty to make sure it was paid to petitioner/child. However, as previously determined, child support payments do not bar a conclusion of abandonment.

Juvenile's Mental Health

[In re J.A.J.](#), 2022-NCSC-85

Held: Affirmed

- **Facts:** In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother's substance use and mental health issues and father's incarceration. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals. The parents argue that the court abused its discretion in determining the TPR was in the juvenile's best interests. They argue that due to his mental health need, he was not a candidate for adoption as he had 17 placements in 28 months and was in a psychiatric hospital at the time of the TPR hearing.
- The evidence at the hearing, including social worker testimony, was that the juvenile was doing well at the hospital and had had 2 previous placement that lasted for several months. The evidence also showed that once the juvenile was cleared for adoption, he would be eligible for more resources (e.g., registered on NC KIDS) to find an adoptive placement.
- This case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004) as this child was 9, was making progress on his therapeutic goals, had long-lasting placements showing he could maintain a long-term placement, and does not have a relationship with father.

Order

Rules 52 and 63

[In re K.N.](#), 2022-NCSC-88

Held: Vacated and Remanded for new hearing

- **Facts:** This is the second appeal of a TPR order. In the first appeal, the order was vacated and remanded so the court could make sufficient findings of fact to support the conclusion that the TPR ground existed. In the remand, the trial court had discretion to determine whether to take additional evidence. The judge who originally heard the TPR died prior to the remand. The chief district court judge acted as the substitute judge under Rule 63 of the Rules of Civil Procedure. A new TPR order was entered based on the substitute judge reviewing the record, trial transcripts, and proposed findings of fact submitted by the parties. No new evidence was taken. The order included new more detailed findings of fact to support the conclusion that the TPR ground was proved. Father appealed, arguing the order was void as the substitute judge did not have the authority to make new findings of fact under Rule 52 of the Rules of Civil Procedure.
- Statutory interpretation is a question of law that is reviewed de novo. Rules 52 and 63 impose statutory mandates, and when a court acts contrary to a statutory mandate and a defendant is prejudiced by it, the issue is preserved for appeal even if an objection is not made at trial. Defendant was prejudiced by the fact finder not holding a hearing to have personal knowledge of the facts made.
- Rule 52 requires the court hearing an action without a jury to find the facts, state the conclusions, and direct the entry of judgment. Rule 63 authorizes the chief district court judge to act as a substitute judge when by reason of death the judge who heard the hearing is unable to

perform their duties, including entering a judgment. If the substitute judge cannot perform those duties because they did not preside at the hearing, the judge may grant a new hearing.

- “[A] substitute judge who did not preside over the matter lacks the power to find facts or state conclusions of law.” Sl.Op. ¶17. Here, the substitute judge did not hold a hearing and acted contrary to Rules 52 and 63, such that the order is a nullity. Additionally, the order on the first appeal was vacated making it a nullity. By finding facts and making conclusions of law without hearing evidence, the substitute judge “engaged in distinctly judicial and not ministerial action.” Sl.Op. ¶20. With the original order vacated, the substitute judge should have ordered a new hearing.

[In re E.D.H.](#), 2022-NCSC-70

Held: Affirmed

Dissent, Hudson, J. joined by Earls, J. and Morgan, J.

- Facts: At the conclusion of the adjudication hearing, the judge found grounds existed and moved to disposition. At the end of the disposition, the judge took the matters under advisement. An in-chambers conference with the attorneys was later held. The judge retired. Weeks later, a TPR order was entered that was signed by a substitute judge. The order states “Findings of fact, conclusions of law, and decretal announced in chambers on the 28th day of August by the Honorable [judge] . . . [a]dministratively and ministerial[ly] signed by the Chief District Court Judge on this [date].” Sl. Op. ¶ 8. Respondents appeal, challenging the validity of the order.
- Interpreting the Rules of Civil Procedure is a statutory interpretation that is reviewed de novo.
- Rule 52 requires the court hearing an action without a jury to find the facts, state the conclusions, and direct the entry of judgment. Rule 63 authorizes the chief district court judge to act as a substitute judge when by reason of retirement the judge who heard the hearing is unable to perform their duties, including entering a judgment. If the substitute judge cannot perform those duties because they did not preside at the hearing, the judge may grant a new hearing. “[A] substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside.” Sl.Op. ¶13.
- “[T]he presumption of regularity applies to the specific action of a Chief Judge signing and entering an order with findings of fact and conclusions made by a retired judge....” The party challenging the order has the burden of proving it was improperly entered and overcoming the presumption of regularity. Respondent would have to show that the chief judge violated Rules 52 and 63 by signing the order when not knowing whether the presiding judge made findings of fact and conclusions of law that were included in the order. Respondent did not meet their burden as the in chambers conference was held off the record and respondent did not in off-the-record evidence in the record on appeal as allowed for by App. Rule 9(c)(1). The finding that the judge who presided over the hearing made findings of fact and conclusions of law is unchallenged and, therefore, binding.
- Dissent: The presumption of regularity should not apply. There should be a de novo review of whether the chief judge’s actions were ministerial or judicial, which is a conclusion of law. The finding in the order was challenged and is not binding since the entire appeal challenges this fact. Remedy should be to vacate and remand.

[In re L.M.B.](#), 2022-NCCOA-406

Held: Affirmed

- **Facts:** The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds; father also challenges the best interests finding and the validity of the order.
- Rule 52 of the Rules of Civil Procedure requires the court to find facts, make conclusions, and “enter judgment accordingly.” Sl. Op. ¶130. Although the presiding judge did not sign the order, Rule 63 authorizes entry of judgment when the judge is unavailable for “other reason.” Sl. Op. ¶131. The substitute judge performs a ministerial rather than judicial task. Here the chief district court judge signed on behalf of the presiding judge rather than in his own name. The written order is consistent with the oral rendition of the presiding judge, and there is no indication any substantive determinations were made by the signing (substitute) judge. The signing of the order was ministerial in nature and proper under Rule 63.

Jurisdiction Pending Appeal

[In re B.B.](#), 2022-NCSC-67

Held: Affirmed

Dissent, Earls, J. (IAC)

- **Facts:** In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. The TPR was granted. Respondent’s appealed. The trial court entered an amended TPR order that added findings of fact. On appeal, respondents argued that the trial court lacked jurisdiction to amend the order as it was more than a clerical amendment.
- The trial court did not have jurisdiction to amend the TPR order after the notice of appeal was filed. Although G.S. 7B-1003 authorizes the trial court to have jurisdiction while an appeal is pending, it prohibits the trial court from exercising jurisdiction in a TPR when an appeal is pending. The trial court made substantive changes to the order after the appeal was pending. That amended order is void, and the original order is reviewed for the appeal.

Appellate Jurisdiction; Notice of Appeal

[In re R.A.F.](#), 2022-NCCOA-754

Held: Vacated and Remanded

Dissent, Tyson, J.

- **Facts:** Mother appeals a TPR through a written notice addressed to the North Carolina Supreme Court. There is no notice of appeal to the NC Court of Appeals.
- Appellate Procedure Rule 3(d) governs notices of appeal and requires that the notice designate the court to which the appeal is taken. Failure to follow Rule 3 requires a dismissal of the appeal. However, “[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal.” Sl.Op. ¶ 14 (citations omitted). By filing her record of appeal and brief with the court of appeals, it is reasonably inferred that mother sought relief from the court of appeals. There was no prejudice to the other party as they could also infer the appeal was meant to be heard by the court of appeals and filed their brief with the

court of appeals. Dismissal is not warranted. Further, Appellate Rule 21(a)(1) allows the court of appeals to treat the appeal as a petition for writ of certiorari, which in its discretion was granted.

- Dissent: The failure to follow Rule 3(d) is jurisdictional and warrants dismissal. There is no petition for writ of certiorari pending before the court and the defective notice of appeal and brief do not meet the requirements Rule 21(c) requires for a petition for writ of certiorari. To correct the deficiencies with the purported petition for writ of certiorari, the court would have to invoke Appellate Rule 2, which it did not do. This court lacks jurisdiction to hear the appeal.