

TPR Case Update

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Termination of Parental Rights

Hearing for need for GAL for parent; Recusal; Neglect Adjudication

In re Z.V.A., 835 S.E.2d 425 (N.C. S.Ct. 2019)

Held: Affirmed

- **Facts:** There is an underlying neglect action with a permanency planning order (PPO) of adoption and reunification. The PPO ordered DSS to proceed with a termination of parental rights for the parents. A week after the TPR was filed by DSS, the child was placed with the maternal aunt in New Jersey. After a TPR hearing, the court concluded neglect existed as to each parent and the TPR was in the child’s best interests. Both parents appealed the TPR order.
- **GAL appointment for mother:** G.S. 7B-1101.1(c) authorizes the court to appoint a GAL for a respondent parent who is incompetent upon the court’s own motion or the motion of a party. G.S. 7B-1101.1(c). Failure to appoint a GAL is reviewed for an abuse of discretion, which is when a court’s ruling is so arbitrary or manifestly unsupported by reason. Substantial deference is given to the district court regarding decisions involving a party’s competence (defined at G.S. 35A-1101(7)) because it interacts with the litigant and is able to form a better assessment of the litigant’s mental condition than an appellate court that is limited to reviewing the cold, written record. “When the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [district] court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant’s competence.” Sl.Op. at 5 quoting *In re T.L.H.*, 368 N.C. 101, 456 (2015) (emphasis in Sl.Op.). There is no extreme instance in this case and the court did not abuse its discretion in not conducting an inquiry to mother’s competency when despite an indication that mother has a mental disability based upon an IQ of 64, findings showed mother was able to work, attend school, and complete domestic violence classes that were part of her case plan.
- **Neglect:** When a child and parent have been separated for a long period of time, neglect under G.S. 7B-1111(a)(1) requires a showing of past neglect and the likelihood of future neglect. To determine the likelihood of future neglect, the court must consider evidence of changed circumstances between the period of past neglect and the time of the TPR hearing. Clear, cogent, and convincing evidence supports the district court’s findings that father was willing to

leave the child alone with mother despite her not being fit to care for the child, that respondents displayed constant marital discord during supervised visits with the child, and respondents intended to remain together. These findings support the conclusion of neglect based on prior neglect and the likelihood of future neglect.

- **Recusal:** “A court is not required to recuse itself absent a motion from a party, and when no such motion is made, the issue is not preserved for appellate review.” Sl.Op. at 11. Applying Rule of Appellate Procedure 2, the supreme court exercised its discretion to address parent’s argument for recusal, which was based on a statement made by the trial judge that at the previous permanency planning hearing he was willing to send the child to the care of the maternal aunt in New Jersey as he did not think the child could be with her parents and as such it was in the child’s best interests to TPR. This statement by the district court judge was merely an explanation that the court had taken that earlier step when determining the child’s best interests at the time that decision was made and was not a reflection that the court had reached a conclusion to terminate the parents’ rights prior to the TPR hearing. A determination that this statement was judicial bias would have the illogical consequence of a district court judge never being able to preside over a TPR after ordering a permanent plan that is compatible with the need for a TPR.

Neglect; Insufficient Findings; Incarceration, Domestic Violence, Substance Use, DV

In re K.N., ___ N.C. ___, ___ S.E.2d ___ (Jan. 24, 2020)

Held: Vacated and remanded for further proceedings

- **Facts:** Child was adjudicated neglected and dependent in an underlying juvenile action. Respondent father’s case plan included complete anger management and substance abuse evaluations and follow all recommendations, successfully complete parenting education, participate in a domestic violence intervention program, secure and maintain appropriate housing, comply with probation, and do not incur any new criminal charges. The trial court ultimately ordered concurrent permanent plans of adoption (primary) and reunification (secondary). DSS was ordered to initiate a TPR. The TPR was granted on the ground of neglect. Respondent father appeals, arguing the findings were not supported by the evidence, and the findings do not support the conclusion of neglect.
- **Neglect Standard:** When a child has been separated from a parent for a long period of time, the neglect ground requires a showing of both past neglect and a likelihood of future neglect by that parent. In determining the likelihood of future neglect, “the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect,” and “the determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*” Sl.Op. at 11 (emphasis in original; citations omitted).
- **Findings:** The trial court’s findings were insufficient to support the conclusion of neglect. There were very few findings that directly related to the respondent’s ability to care for his child or the extent to which his behavior affected his child’s welfare. The court could have made additional findings based on evidence in the record that may have been sufficient, such as respondent’s long history of drug abuse and extensive criminal record, the effect of the current criminal charges and the impact those charges would have on respondent’s ability to care for his child,

respondent's slow pace in completing his case plan and hostility towards people managing some of those services in which he refused to participate, and an additional domestic violence incident.

- Although one finding that did address the respondent's ability to care for his child is that respondent was currently incarcerated and awaiting trial on a number of criminal charges, incarceration in and of itself is not a sword or a shield in a TPR. The findings should include an analysis of the relevant facts and circumstances, including the length, of the parent's incarceration. Other findings do not establish that respondent failed to comply with the portions of his case plan that address domestic violence or substance abuse components of his case plan. There was no explanation about the finding that respondent provided diluted drug screens, how the court viewed those diluted screens, or the nature or extent of any earlier substance abuse issues of the respondent.

Abandonment and Neglect, Insufficient Findings, Willfulness, Court Questioning of Witnesses

In re N.D.A., 833 S.E.2d 768 (N.C. S.Ct. 2019)

Held: Vacated and remanded

- Facts: This is a private TPR that was granted based on willful abandonment and neglect from which respondent father appeals, challenging the sufficiency of the facts to support the conclusions of law.
- Standard of Review for TPR adjudication is based on whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Findings of fact
 - Recitation of a witness's testimony is not a finding of fact. The "finding" in the TPR order that father "testified that he attempted to set up visits with the child but could not get any assistance in doing so" without a determination of his credibility is not a finding of fact and must be disregarded. Sl.Op. at 6.
 - The finding that father "had significant problems with substance abuse for many years" was supported by the evidence, specifically father's testimony. Sl.Op. at 6.
 - An ultimate finding of fact " ' is a conclusion of law or at least a determination of a mixed question of law and fact' and should be 'distinguished from the findings of primary, evidentiary, or circumstantial facts.' " Sl.Op. at 8-9 (citation omitted). The findings that (1) the child has been neglected by the father and (2) the father has willfully abandoned the child do not involve the exercise of judgment and are not findings. Their classification as such do not alter the need for the trial court to make factual findings sufficient to support a TPR ground.
- Abandonment implies conduct on the part of a parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child and is demonstrated by a parent withholding his presence, love, care, opportunity to display filial affection, and willful neglect to provide support and maintenance to the child. Willful intent is a question of fact.

- Under G.S. 7B-1111(a)(7) the determinative time period is the immediate six months preceding the filing of the petition although a court may consider a parent’s conduct outside that time period to evaluate a parent’s credibility and intentions. The court findings did not adequately address the willfulness of the father’s actions. The father’s unchallenged testimony showed he unsuccessfully attempted to make arrangements to visit the child and there was no determination regarding father’s credibility or findings about whether father, who was incarcerated, had the ability to contact the child or petitioner or pay financial support during the relevant period. The lack of findings addressing father’s ability, which goes to intent/willfulness, do not support the ultimate determination that father willfully abandoned the child.
- Under G.S. 7B-1111(a)(1), abandonment is included in the definition of neglect. Here, the TPR was based on current neglect (vs. past neglect and a likelihood of future neglect). The time period is not limited to the six months immediately preceding the filing of the petition, allowing the court to look at a more extended period of time. Abandonment based on neglect involves a parent’s conduct that demonstrates “willful neglect and refusal to perform the natural and legal obligations of parental care and support.” Sl.Op. at 16. The findings do not adequately address father’s willfulness. There were no findings that addressed whether father, who was incarcerated, had the ability to contact the child or petitioner, exercise visitation, or pay support.
- Burden and court questioning of witnesses: At the adjudicatory stage of a TPR, the petitioner bears the burden of proof by clear, cogent, and convincing evidence that one or more alleged grounds exists. Under N.C.R. Evid. 614(b), the court “may interrogate witnesses, whether called by itself or by a party.” Sl.Op. at 20. “It is proper for the judge to propound competent questions to a witness [during a trial] in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked.” (citation omitted). Sl.Op. at 20. There was no bias against respondent or in favor of petitioner from the trial court’s questioning of witnesses regarding work schedules, reason for method of contacting respondent, nature and extent of contact between petitioner and respondent, dates and length of incarceration, and the number of attempted contacts with petitioner. Each question was relevant to the issue to be determined.

Post-Relinquishment subject matter jurisdiction re: permanency planning hearings; Abandonment

In re E.B., 824 S.E.2d 169 (N.C. Ct. App. 2019)

Held: Affirmed, Dissent in part

- Facts: In 2016, mother executed relinquishment to DSS the day after the child was born. A putative father was named and paternity testing confirmed he is the child’s father. Father entered into an out of home family services agreement with DSS. Child was placed in foster care and from 2016–Jan. 2018, the court held 6 permanency planning and review hearings resulting in 6 orders placing requirements on father. In April 2018, DSS filed a TPR petition, which was granted. Father timely appealed. Father also filed a petition for writ of certiorari, which was granted, for a review of the 6 permanency planning orders arguing lack of subject matter jurisdiction.

- Subject matter jurisdiction and permanency planning orders: Father argues and DSS concedes the trial court lacked subject matter jurisdiction to conduct review and permanency planning hearings because a petition alleging abuse, neglect, or dependency pursuant to G.S. 7B-402 and -403 was never filed with the court. Without the filing of an abuse, neglect, or dependency petition, no action was commenced and therefore the court lacked subject matter jurisdiction. As a result, each of the 6 permanency planning orders is void, and the requirements that those orders placed on the father must be disregarded.
 - Author's note: This opinion does not address G.S. 7B-909 hearings, "review of agency's plan for placement," when there has been a relinquishment and a child has not been adopted within 6 months. That statute does require a petition be filed but it is not a petition alleging abuse, neglect, or dependency.
- TPR - Abandonment: G.S. 7B-1111(a)(7) consists of a ground to TPR based on willful abandonment. Willfulness is a question of fact that must be supported by clear, cogent, and convincing evidence that shows "conduct on the part of the parent which manifests a willful determination to [forego] all parental duties and relinquish all parental claims to the child." Sl.Op. at 9. Relevant factors include financial support and emotional contributions displaying love, care, and affection. The determinative period is the 6 months preceding the filing of the petition, which in this case was Oct. 10, 2017 – April 10, 2018. The unchallenged findings support the trial court's conclusion of abandonment. Father allowed his sister to handling the child's care and placement, moved out of state without telling DSS, failed to attend the permanency planning hearings and a child support hearing, did not request visits despite being authorized to do so, and did not make any Skype calls to the child despite having that opportunity.
- Dissent: "because the ground for termination alleged by DSS and adjudged by the trial court are inextricable intertwined with the invalid review hearing process, I would conclude the trial court erred in adjudicating grounds upon which to terminate Respondent-Father's parental rights." Sl.Op. at 1 (dissent)

Abandonment

In re C.B.C., 832 S.E.2d 692 (N.C. S.Ct. 2019)

Held: Affirmed

- Facts: This is a private TPR initiated by maternal grandparents against respondent father. After mother's death in 2012, a custody dispute between maternal grandparents and father was initiated, with maternal grandparents ultimately obtaining permanent custody in 2015. Respondent father was granted no visitation but was specifically authorized by the court order to petition for visitation after he was released from prison upon demonstrating his addressing his ongoing substance abuse and mental health issues. Respondent father was also permitted the right to write to his daughter. A first TPR was brought and denied. This is a second TPR, where the court concluded there were grounds to TPR based on neglect and willful abandonment and that the TPR was in the child's best interests. Respondent father appeals.
- Standard: A TPR involves a two-stage process: adjudication and disposition. At adjudication, the petitioner has the burden of proving a ground by clear, cogent, and convincing evidence. The

court reviews the adjudication by determining whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. If there is an adjudication, the court proceeds to the disposition stage, which considers the best interests of the child.

- “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims.” Sl. Op. at 5 (citations omitted). Willful is a question of fact. “[I]f a parent withholds [that parent’s] presence, [] love, [] care, the opportunity to display filial affection and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” Sl. Op. at 5-6 (citations omitted).
- Under G.S. 7B-1111(a)(7) the relevant time period to determine abandonment is the 6-month period preceding the filing of the TPR petition. Respondent was incarcerated half that time, yet “incarceration, standing alone, is neither a sword nor a shield” in a TPR. Respondent, although having limited options to show affection, “*will not be excused from showing interest in [the] child’s welfare by whatever means available.*” Sl. Op. at 6 (emphasis added by supreme court, citing quoting In re D.E.M., 810 S.E.2d 375, 378 (N.C. Ct. App. 2018).
- The findings included respondent had regular income during part of the relevant period but did not provide any support for the child, made no effort to communicate with the child except for one birthday card that was sent after he was served with the TPR, made no effort to contact the custodians about the child’s well-being despite having their contact information, and made no efforts to modify the existing custody order. These findings support the conclusion of willful abandonment.
- The father’s participation in the first TPR hearing “does not preclude the trial court from later finding that he has willfully withheld his love, care, and affection during the determinative six-month period.” Sl. Op at 8-9. Although a court may consider a parent’s conduct outside of the determinative 6-month period, that goes to evaluating a parent’s credibility and intentions and does not preclude a finding of willful abandonment during the determinative 6-month period.

In re E.H.P., 831 S.E.2d 49 (N.C. S.Ct. 2019)

Held: Affirmed

- Facts: In 2013, a temporary custody order was entered awarding mother sole temporary custody and providing that father shall have no contact with the children until allowed by further order of the court. No motions were filed to seek a change in that temporary custody order. In 2018, mother petitioned for and obtained a TPR against respondent father. Father appealed on both the grounds (willful abandonment under G.S. 7B-1111(a)(7) and failure to pay child support) and disposition that is was in the children’s best interests.
- The standard of review for a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and the finding support the conclusions of law. The disposition is reviewed for an abuse of discretion.
- “Abandonment implies conduct on the part of a parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” Sl. Op. at 7 (citations omitted). “It has been held that if a parent withholds his presence, his love, his care, the

opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” Sl. Op. at 8 (citations omitted). Here, respondent concedes he had no contact with the children during the determinative 6-month time period under G.S. 7B-1111(a)(7). Although there was a temporary custody order forbidding contact between him and the children, father made no effort to modify the terms of the temporary order to allow contact between him and the children. “A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order.” Sl. Op. at 9-10. Although father was incarcerated during the relevant time period, he was aware of his ability to seek relief from trial court orders as he filed a motion to suspend his child support. Father’s conduct is sufficient to meet the standard of willful abandonment.

- An adjudication of a single ground under G.S. 7B-1111(a) is sufficient to support a TPR. Having affirmed one ground, the court need not address the appeal on the ground of willful failure to pay child support.
- At disposition, the court made detailed findings addressing the criteria of G.S. 7B-1110(a) include the bond with and strong likelihood of adoption by their stepfather and the lack of bond with their father. There was no abuse of discretion in determining the TPR is in the children’s best interests.

Neglect, Failure to Make Reasonable Progress, Conclusions Not Supported

In re C.N., 831 S.E.2d 878 (N.C. Ct. App. 6, 2019)

Held: reversed

- Facts: In 2016 DSS filed a petition after law enforcement and EMTs responded to an incident involving injuries to an infant who spilled Mr. Clean on herself. They observed a dirty home that had needles in it, mother’s reported use of marijuana, past incidents of domestic violence, and concerns about mother’s mental health. Based on mother’s stipulations, the children were adjudicated neglected due to improper care, supervision, or discipline and living in an environment injurious to the children’s welfare. Mother’s court ordered case plan included obtain and maintain stable income and housing, complete a mental health assessment and comply with all recommendations, sign releases for DSS and the GAL, submit to random drug screens, and successfully complete parenting classes and substance abuse treatment. The court ordered weekly supervised visitation for mother. In 2018, the court ultimately changed the permanent plans to a primary plan of adoption and concurrent plan of reunification. DSS filed a TPR petition alleging neglect and willful failure to make reasonable progress under G.S. 7B-1111(a)(1) & (2). The court ordered the TPR based on both grounds and mother appealed. DSS did not file a response or brief in the appeal.
- Standard of review: Whether clear, cogent, and convincing evidence exists to support the court’s findings of fact and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Neglect: Where the juvenile has been removed from the parent’s custody, the court must consider evidence of changed conditions in light of the prior neglect and the probability of the repetition of neglect. The court made specific findings that included mother completed the

assessments but has not been consistent with treatment, is not compliant with her case plan, lives with and is dependent on her boyfriend, was late to some and did not attend some visits with the children but when she did visit she was appropriate, took 13 of 38 drug screens with mixed results, and just started to re-engage with services on the day of the TPR hearing. DSS has the burden of overcoming the presumption of parental fitness by clear, cogent, and convincing evidence that a ground exists to terminate parental rights. Failure to make reasonable progress on a case plan may indicate a likelihood of future neglect but such failure must be viewed by considering the abilities and means of the parent including their resources and priority for securing basic life necessities. Mother made some progress on her case plan to reduce the likelihood of future neglect by completing parenting classes, the assessments, re-engaging in services, recently submitting to drug testing, being employed, and obtaining stable housing and transportation. "Here, the juveniles were removed from Respondent-mother's care after the youngest child spilled Mr. Clean onto herself and Respondent-mother called for medical assistance. No evidence shows and the trial court made no findings indicated such actions were likely to be repeated." Sl. Op. at 10.

- **Failure to Make Reasonable Progress:** Mother completed her assessment and sought mental health services. "While evidence tending to show missed therapy sessions may support the trial court's finding that her attending treatment was inconsistent, a parent's inconsistent attendance at therapy sessions does not alone show a lack of reasonable progress, particularly when a parent is working or seeking to comply with other provisions of her plan to meet her and her children's needs." Sl. Op. 12. Reasonable progress does not require perfection but does require more than extremely limited progress. Undisputed evidence shows mother made reasonable progress by reenrolling in substance abuse treatment, continuing therapy, taking medication for her mental health issues, completed parenting classes, improved her housing and transportation, was employed, and maintained better contact with DSS. Although mother's stable housing and transportation were partly attributable to her boyfriend, her "case plan does not and cannot require that she alone be responsible for providing her housing and transportation." Sl. Op. at 14. Additionally, housing and transportation do not relate to the causes or conditions for the children's removal. See G.S. 7B-904 (court's authority). DSS has not met its burden against the parental presumption of fitness.

Failure to Make Reasonable Progress, Findings, Case Plan Nexus to Conditions of Removal In re B.O.A., 831 S.E.2d 305 (N.C. S.Ct. 2019)

Held: Reverse COA decision

- **Facts and Procedural History:** DSS received a report after law enforcement responded to a domestic violence call where both parents were arrested and the infant child presented with a bruise on her arm. A petition alleging neglect was filed by DSS. Mother and DSS entered into a case plan where mother agreed to compete DV counseling and avoid DV situations; complete a mental health assessment and take medication as prescribed; complete parenting classes and utilize the skills during her visits; remain drug-free, submit to random drug screens, and participate in weekly substance abuse therapy; refrain from criminal activity; and maintain stable income for 3 months. The child was adjudicated neglected based on an injurious

environment, and at disposition, mother was ordered to comply with the provisions of the case plan that she agreed to. Ultimately, DSS initiated a TPR, which was granted based upon mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from mother's home. Mother appealed, and the court of appeals reversed the TPR based on a lack of evidence to support some findings and the trial court's reliance on portions of her case plan (substance abuse, mental health, and income) that were not relevant to the conditions that led to the child's removal – domestic violence and a bruise on the infant's arm. The supreme court granted discretionary review.

- Standard of review: whether the findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the conclusions of law. A finding of fact that is supported by clear, cogent, and convincing evidence is conclusive even if the record contains evidence that would support a contrary finding.
- Statutory interpretation of conditions that led to the removal of the juvenile: "It is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.... Legislative intent controls the meaning of the statute." Sl. Op. at 13 (citations omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." Sl. Op. at 14 (citations omitted). There is nothing in the language of G.S. 7B-1111(a)(2) that suggests the only "conditions of removal" that are relevant "are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile." *Id.* In looking at other related statutes, G.S. 7B-904(d1)(3), a more expansive reading of the language in G.S. 7B-1111(a)(2) is appropriate. "[T]he trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home. In addition, G.S. 7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, to modify and update a parent's case plan in subsequent review proceedings.... Thus the relevant statutory provisions appears to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and indirect underlying causes of the juvenile's removal...." Sl. Op. at 15-16.
- "Parental compliance with a judicially adopted case plan" is relevant in determining whether grounds exist pursuant to G.S. 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." Sl. Op. at 20-21. A more restrictive interpretation would fail to recognize the complex issues that must be resolved in an abuse, neglect, or dependency case and "would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency." Sl. Op. at 21. "[A] child's removal is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation." *Id.* A judge's authority,

however, is not unlimited. Reasonable progress does not require full compliance with all the elements of a case plan. The extent to which a parent has reasonably complied with a case plan provision that addresses an issue that directly or indirectly contributed to the child's removal is relevant for a determination of whether the parent failed to make reasonable progress under G.S. 7B-1111(a)(2). In this case, "the necessary nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [Bev's] removal' from the parental home exists." Sl. Op. at 22. Mother's progress was limited and not reasonable as she abused and/or did not take her prescriptions, did not submit to her drug tests and failed some of them, did not demonstrate parenting skills she learned during visits, and did not complete the mental health evaluation and attend therapy.

In re C.J., ___ N.C. ___, ___ S.E.2d ___ (Jan. 24, 2019)

Held: Affirmed

- **Facts:** Child was adjudicated dependent. Respondent mother was ordered to complete a diagnostic therapeutic assessment and substance abuse assessment and follow all recommendation; complete drug screens; obtain and maintain verifiable employment and stable housing suitable for the child; and communicate with DSS. After failing to make progress on her case plan, the court ordered a primary permanent plan of adoption. DSS filed a TPR, which was granted in part on the ground of failing to make reasonable progress to correct the conditions that led to the child's removal (G.S. 7B-1111(a)(2)). Respondent mother appeals.
- **Review of challenged findings:** Findings of fact that respondent mother challenged as unsupported by clear, cogent, and convincing evidence were not necessary to support the court's conclusion of a TPR ground and were addressed on appeal. The appellate court reviews only those findings that are necessary to support a determination that TPR grounds existed.
- **Case Plan Nexus to Conditions Leading to Removal:** Quoting *In re B.O.A.*, 831 S.E.2d 305, 314 (N.C. S.Ct. 2019), "a trial court's conclusion on this ground [G.S. 7B-1111(a)(2)] is supported when there exists 'a nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [the juvenile's] removal from the parental home.'" Sl. Op. at 5. The adjudication and dispositional orders found the child's removal was based on mother leaving the child with her (mother's) boyfriend after she was arrested and extradited to Mississippi because of drug-trafficking and stolen weapons charges. Mother had an extensive history with the Mississippi child protective agency, which had an open case because of allegations mother used the child to obtain drugs. Mother's demeanor at the hearing raised concerns by the court that she was under the influence or suffering from a mental health condition. These findings established the required nexus. The findings that mother did not address any part of her case plan or visit with her child was supported by clear, cogent, and convincing evidence and support the court's conclusion that G.S. 7B-1111(a)(2) existed for TPR.

Failure to Make Reasonable Progress

In re I.G.C., 835 S.E.2d 432 (2019)

Held: Affirmed

- **Facts:** The Children were adjudicated dependent juveniles due to drug use and domestic violence involving both parents. Case plans were ordered to address parenting, substance

abuse, mental health, domestic violence, stable housing, employment, no further criminal charges, visitation, and attendance at team meetings with DSS. DSS filed a motion to terminate parental rights after concurrent permanent plans of adoption and guardianship were ordered. The parents' rights terminated on the grounds of neglect and failure to make reasonable progress to correct the conditions that led to the children's removal. Respondent parents' appeal. Respondent father's appeal was by a no merit brief and is affirmed after an appellate court review.

- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The mother's limited progress is well documented in the findings of fact as she never completed the substance abuse treatment or domestic violence program, missed multiple drug screens and tested positive on two, and had two DWI offenses after agreeing to the case plan. Although mother completed parenting courses and participated in some substance abuse and domestic violence treatment and had three negative drug screens, these services were of a lesser duration and intensity than recommended and were not approved by the court. The evidence supports the findings that mother did not maintain stable employment for at least six months, had not resided in the same residence for at least six months, and had frequent moves constituting housing instability. Although she was making some progress on her case plan, mother waited too long before working on her case plan to make reasonable progress to correct the conditions leading to the children's removal by the time of the TPR hearing.

In re A.R.A., 835 S.E.2d 417 (N.C. S.Ct. 2019)

Held: Affirmed

- Facts: The family has an extensive history with DSS based on substance abuse and domestic violence by father against the children and respondent mother. The children initially came into care through a voluntary placement by mother so that she and father could live together. DSS filed a petition and the children were adjudicated neglected. Throughout the 2 year action, mother and father continued to reside together and denied the impact that the domestic violence and substance abuse history had on the children. After making limited progress, the court ordered a primary permanent plan of adoption, and DSS filed a TPR petition which was granted on the grounds of neglect and willful failure to make reasonable progress. Respondent mother appeals the TPR order, challenging the grounds and best interests determination.
- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Unchallenged findings are deemed to be supported by competent evidence and are binding on appeal.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The findings that respondent mother lacked an understanding or did not accept responsibility for the circumstances leading

to the children's removal is supported by clear, cogent, and convincing evidence as she continued to live with father who did not comply with his case plan, blamed the children and other people for his return home, and defended father throughout the TPR hearing. Mother did not make reasonable progress in her case plan that included providing a safe and stable home environment for the children.

- The trial court determines the credibility of witnesses, the weight to give the testimony, and the reasonable inferences made from that testimony. It was reasonable for the court to infer that the social worker was prevented from having access to the home when respondent parents repeatedly cancelled home visits. Evidence, through social worker testimony, supported the finding that mother either refused or failed to provide a new address (after being evicted) to DSS and made it difficult for the social worker to conduct home visits to assess whether there was safe and stable housing for the children. Respondent mother did not rebut the clear, cogent, and convincing evidence by DSS, and her failure to do so is not a shifting of the burden of proof on to respondent mother. The court reasonably inferred mother placed her relationship with the father over the children's safety even though there was no evidence of domestic violence occurring after the children's removal.
- The standard of review of a best interests determination at disposition is an abuse of discretion. Agreeing with the court of appeals, G.S. 7B-1110(a) requires the court to consider all the factors designated therein but is only required to make written findings of relevant facts. When there is conflicting evidence of a factor, placing it at issue before the district court, that factor is relevant. Here, the hearing transcript shows the court considered all the factors and made the necessary findings, which addressed the child's age (9 years old), likelihood of adoption (via social worker testimony), that any bond between the child and parent was outweighed by the need for the child's permanence, and "other" factors addressing the child's attachment and success in the foster home as well as his therapy. The quality of the relationship between the child and prospective adoptive parent or other permanent placement was not relevant as there was not a potential adoptive placement at the time of the TPR hearing.

Prior TPR and Failure to Safe Home

In re T.N.H., 832 S.E.2d 54 (N.C. S.Ct. 2019)

Held: Affirmed

- Facts: Respondent mother appeals a TPR based on G.S. 7B-1111(a)(9) (prior involuntary TPR and lack of ability or willingness to establish a safe home). Mother has an extensive DSS history dating back to 2000 that resulted in several of her children being removed from her care and not returned to her. Regarding T.N.H., a neglect petition was filed by DSS in 2015 due to domestic violence and threats to the juvenile by the juvenile's father. In 2015, T.N.H. was adjudicated neglected based on stipulations made by the parties, including mother. In 2017, guardianship was awarded with supervised visitation ordered with mother and father. In 2018, a new neglect petition was filed. T.N.H. was adjudicated neglected based on a lack of proper care and supervision. He had been permitted to stay with his parents unsupervised in a motel room, where he left the room and met a man who sexually abused him. His parents never reported the abuse, and his parents (and the man) were charged with felony child abuse. Mom is

incarcerated. DSS initiated this TPR, which was granted. The appeal asserts that there was insufficient evidence and insufficient findings of fact for the TPR.

- The court must take evidence, find facts, and adjudicated the (non)existence of a ground under G.S. 7B-1111(a). “While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions, and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.” Sl. Op. at 8 quoting *Quick v. Quick*, 305 N.C. 446, 451-52 (1982) (emphasis in original).
- Here, the trial court’s reliance in part on evidence from prior proceedings and findings in earlier orders is proper and appropriate. Respondent is collaterally estopped from re-litigating the findings of fact in the 2015 and 2018 neglect adjudications that were based on her stipulations and were not appealed. “We agree with the Court of Appeals’ precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented.” Sl. Op. at 12. The trial court took judicial notice of the record. Several of the findings about respondent’s lack of progress were from the 2018 adjudicatory order which applies the clear and convincing evidence standard. The trial court also heard testimony from the social worker about the history and current lack of progress and based its finding in part of that testimony and demonstrates the court’s independent determination of the evidence.
- Regarding G.S. 7B-1111(a)(9), respondent’s rights to another child were terminated by court order. The record supports the court’s finding that respondent lacks the ability or willingness to provide a safe home given her current incarceration with unknown release date, lack of stable home upon her release from prison and history of unstable housing, failure to satisfactorily complete her case plan, sexual abuse of T.N.H. while in her care and failure to believe his disclosure or to report the abuse, and lack of understanding of his trauma and mental health needs.

Permanency Planning Order & TPR Best Interests and Likelihood of Adoption

In re J.H., ___ N.C. ___, ___ S.E.2d ___ (Jan. 24, 2020)

Held: Affirmed

- Facts: Four children were adjudicated abused and neglected. The court ordered respondent mother to engage in a case plan – complete a mental health assessment and follow all recommendations, maintain employment and appropriate and safe housing for a minimum of 6 months, participate in parent coaching and implement the skills during visits, and sign necessary release forms for the court and DSS to monitor her progress. At a permanency planning hearing, the court ordered concurrent plans of adoption and reunification with the children’s fathers. Respondent mother preserved the right to appeal this permanency planning order (PPO). Mother’s rights were subsequently terminated, and she appealed both the PPO and TPR. The TPR appeal is limited to the dispositional determination that TPR was in the children’s best interests.
- Standard of review: Appellate review of an order that eliminates reunification as a permanent plan “is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusion of law” and “to determine . . . whether

the trial court abused its discretion with respect to disposition.” Sl.Op. at 5. At disposition, the trial court considers the child’s best interests.

- Reunification must be a primary or secondary plan unless findings are made under G.S. 7B-906.2(b) and (d). The court made findings the mother made some progress on her case plan but was not in compliance with other requirements of her case plan and was unable to safely parent her children. The evidence, including reports from the parenting coach, supported the court’s finding that respondent mother only made “some progress.” Based on the extensive findings and underlying evidence, there was no abuse of discretion when the trial court eliminated reunification with the mother because that was in the children’s best interests.
- TPR, BIC, and Likelihood of Adoption: The trial court did not abuse its discretion when determining the TPR was in each of the 4 children’s best interests. The trial court made findings of each factor in G.S. 7B-1110(a) and specifically addressed the likelihood of each child’s adoption. Each child has significant development delays, but “general truths” about the difficulty of placing children with behavior challenges and/or developmental delays and children in foster care with adoptive families “cannot overcome the particularized evidence ... supporting the trial court’s factual findings that each of these children had a high probability of being adopted.” Sl.Op. at 14-15. The court found that one child was placed with his biological father and there was a strong likelihood of a stepparent adoption by the father’s wife. One child was placed in a specialized facility and the grandmother had expressed an interest in adopting him. One child was placed in his prospective adoptive home and has a good relationship with the prospective adoptive parent. One child had multiple families who were interested in adopting her. All of the children were thriving in their placements and were benefitting from not being in their mother’s custody.

Disposition- Best Interests Findings

In re S.D.C., ___ N.C. ___, ___ S.E.2d ___ (Jan. 24, 2020)

Held: Affirmed

- Facts: This TPR results from an underlying neglect and dependency action. In that action, the child’s paternal grandmother had been identified as a potential relative placement, was not recommended by DSS, and was not ordered as a placement. The child remained in DSS custody. After a year, the concurrent permanent plans were changed to a primary plan of adoption and secondary plan of reunification with respondent father, and DSS was ordered to initiate a TPR. After a hearing, respondent father’s parental rights were terminated. He appeals, raising as the sole issue that the trial court abused its discretion when concluding the TPR was in the child’s best interests arguing that the trial court did not adequately consider whether the child could be placed with a relative.
- Standard of review: At the dispositional stage of a TPR, the court determines whether the TPR is in the child’s best interests and looks to G.S. 7B-1110(a). The standard of review is abuse of discretion, which is when the trial “court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl.Op. at 8.
- Availability of Relative Placement: Unlike an abuse, neglect, or dependency action where the trial court is required to consider the availability of a relative placement, the trial court is not

expressly directed to consider the availability of a relative placement in a TPR. The trial court may treat that issue as a “relevant consideration” when determining best interests, which will depend on the particular proceeding and the extent to which the record contains evidence that tends to show whether a relative placement is, in fact, available. See G.S. 7B-1110(a)(6).

- **Evidence and Relevant Factor:** If at the TPR hearing, conflicting evidence about the availability of a potential relative placement is presented, “the trial court should make findings of fact addressing ‘the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanency for the children as offered by their prospective adoptive family.’ ” Sl.Op. at 9. If “the record does not contain any evidence tending to show the availability of a potential relative placement, the trial court need not consider or make findings of fact considering that issue.” *Id.*
- **Evidence and Findings:** The record of the TPR did not contain evidence tending to show that a potential relative placement was available for the child. Although the underlying neglect and dependency adjudication order and initial dispositional order that identified the grandmother as a potential relative placement option was admitted, that dispositional order and subsequent permanency planning orders had determined that the child’s best interests were served by remaining in DSS custody versus being placed with the relative. “Thus, we have no hesitation in concluding that [the child’s] potential placement with a relative was not a fact that the trial court was required to consider or make findings about during the dispositional phase of this termination of parental rights proceeding.” Sl.Op. at 10.

In re A.U.D., 832 S.E.2d 698 (N.C. S.Ct. 2019)

Held: Affirmed (Newby, J. dissent)

- **Facts:** This a private TPR initiated by a child-placing agency, BCS, against respondent father. After the twins’ birth, mother placed children in the care of her aunt. Subsequently, she executed a relinquishment to BCS. BCS removed the children from aunt’s home and placed the children with a prospective adoptive family where they continued to reside. BCS filed a TPR petition. In the TPR, respondent father’s paternity was established and after a hearing, the court denied the TPR after determining that although the ground of failure to legitimate/establish paternity existed, the TPR was not in the children’s best interests. BCS appeals. The issue on appeal is the best interests of the children determination.
- **Standard of review:** The court’s dispositional determination regarding a child’s best interests is reviewed for an abuse of discretion. An “abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl. Op. at 5 (citations omitted).
- **G.S. 7B-1110(a)** sets forth the statutory criteria for best interests of the children. The trial court must consider all the factors, which the record demonstrates the trial court did. However, written findings are not required of each factor, although a better practice would have been to make written findings of those factors identified by BCS. Under the circumstances of this case, the failure to do so is not reversible error. There was no conflict in the evidence regarding the likelihood of adoption; it was undisputed that no bond existed between the children and father; and because this was a private TPR, there was no permanent plan for the children.

- Although the GAL recommended TPR, the trial court is not bound by that recommendation; instead the trial court has the authority to weigh all the evidence.
- A stated purpose of the Juvenile Code is to prevent “the unnecessary or inappropriate separation of juveniles from their parents” (G.S. 7B-100(4)) and to place the best interests of the juvenile who is not to be returned home as the paramount consideration for the court (G.S. 7B-1000(5)). Here, the trial court considered the competing purposes of the Juvenile Code and the dispositional factors in G.S. 7B-1110(a). Those considerations also included other relevant circumstances that the mother solely relinquished the children to BCS; father was not afforded an opportunity to care for the children before the relinquishment; he proactively attempted (unsuccessfully) to establish paternity; he sought to have the aunt, who had provided appropriate care for the children, obtain custody of the children until his release from prison when he could care for them; and he engaged in services that would result in self-improvement while he was incarcerated. Although evidence would support a contrary finding, the appellate court lacks authority to reweigh the evidence.
- Rule 58 establishes that a judgement is entered when it is reduced to writing, signed by the judge, and filed with the clerk. As held by the court of appeals, oral findings made by the trial court may change before the final written order is entered. Any differences between the oral findings rendered at the hearing and those established in the written order is not an error.
- Dissent: The adjudicatory stage focuses on the fairness to the parent and safeguards the parent’s interests. The dispositional stage requires that the best interests of the children control and safeguards the children’s best interests. The trial court misapplied the law and abused its discretion when it improperly weighed factors related to the father’s interest at disposition under the catchall provision of G.S. 7B-1110(a)(6). The five specific enumerated factors in G.S. 7B-1111(a)(1)-(5) are all relevant and directed the trial court’s discretion down a specific path which would have been to TPR.

In re Z.L.W., 831 S.E.2d 62 (N.C. S.Ct. 2019)

Held: Affirmed

- Respondent father’s rights to his 2 children were terminated; both children had previously been adjudicated neglected and had a primary permanent plan of adoption. Father appeals the TPR, arguing the court abused its discretion when determining the TPR was in the children’s best interests despite finding there was a strong bond between the respondent and children.
- After a ground to TPR has been found, the court proceeds to the dispositional phase which considers factors under G.S. 7B-1110(a) when determining if the TPR is in the child’s best interests. The standard of review is an abuse of discretion, which is when “the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl. Op. at 5-6.
- The court made findings about the children’s ages, likelihood of adoption, need to achieve the permanent plan of adoption, bond with the respondent father, quality of relationship with the prospective adoptive parents, and other factors, none of which were challenged and are therefore binding on appeal.
- Although the court made a finding that the children had a strong bond with respondent father, that factor is just one that must be considered under G.S. 7B-1110(a). The court may give more

weight to the other factors, and the “court’s determination that other factors outweighed respondent’s strong bond with [the children] was not manifestly unsupported by reason.” Sl. Op. at 9. In response to father’s argument that other dispositional alternatives should have been considered so that a relationship with father could be maintained, G.S. 7B-100(5) states “the best interests of the juvenile are of paramount consideration by the court and ... when it is not in the juvenile’s best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time.*” (emphasis in opinion).

Proper Order and Appeal: Signing Judge

In re C.M.C., 832 S.E.2d 681 (N.C. S.Ct. 2019)

Held: Affirmed

- **Facts:** Infant was adjudicated abused, neglected, and dependent and at initial disposition, reunification efforts with both parents were ceased. At a permanency planning hearing, the court adopted a primary plan of adoption and secondary plan of guardianship. DSS filed a petition to terminate parental rights. At the end of the TPR hearing, the court rendered a decision, noting findings and conclusions, and asking DSS counsel to draft the order. The order was signed by Judge Leslie, who was not the presiding trial judge. The respondent mother appealed. Two days later, DSS filed a Rule 60 motion seeking that the orders be vacated and the trial court sign a new TPR order. The motion was granted and a new order was signed by the trial court. Respondent mother appealed the new TPR order.
- **Issue:** Did the trial court lack authority to vacate the first TPR order after mother had noted an appeal of that order?
- **Rule 60(b)(4) & (6)** allows the trial judge to grant relief from any order that was entered by mistake or inadvertence or any other reason justifying relief. Adopting reasoning by prior opinions published by the court of appeals, the TPR order signed by Judge Leslie was nullity because Rule 52 requires the judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions based on the facts, and (3) enter judgment. Rule 58 provides that “a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk.” Sl. op. at 7- (emphasis added by supreme court). “A party may not properly appeal from a judgment until it has been entered.” Sl. Op. at 8. Since the first TPR order was not a viable order that was entered, the appeal by respondent mother did not divest the trial court of jurisdiction to make the necessary correction.

No-Merit Brief, App. Rule 3.1

In re L.E.M., 831 S.E.2d 341 (N.C. S.Ct. 2019)

Held: Vacate court of appeals order of dismissal; affirmed district court TPR order

- **Procedural history:** Respondent father appealed an order terminating his parental rights. Pursuant to Rule 3.1(d) (now Rule 3.1(e), which is substantially similar), Respondent’s attorney filed a no-merit brief and raised 3 issues for review. Respondent did not file a pro se brief. The court of appeals dismissed the appeal based on a previously published opinion, *In re L.V.*, 814 S.E.2d 928 (2018), that held the court lacked authority to consider the appeal because there

were no issues raised for review since the respondent had not filed a pro se brief. There was a dissent and a concurrence in result only that both addressed the erroneous holding of *In re L.V.* An appeal by right was made to the NC Supreme Court.

- **Holding:** Appellate “Rule 3.1 mandates an independent review on appeal of the issues contained in a no-merit brief...” Sl. Op. at 1. *In re L.V. is overruled.*
- The origin of the no merit brief stems from the U.S. Supreme Court rule that allows for an *Anders* review in criminal cases. After the court of appeals previously held such a review does not apply to termination of parental rights cases, the N.C. Supreme Court adopted Appellate Rule 3.1(d), which authorizes a no-merit brief for appeals of TPR and abuse, neglect, or dependency orders. In interpreting Rule 3.1(d), the court is “mindful of the fundamental interests implicated in a proceeding involving a termination of parental rights. The United States Court has recognized that ‘[w]hen the State initiates a parental rights termination proceeding... [a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is a commanding one.’ ” Sl. Op. at 8. (citations omitted). Rule 3.1 suggests that briefs will be considered and an independent review will be conducted without stating or implying that the review is contingent on whether a pro se brief is actually filed.
- Rather than remand for an independent review, in the furtherance of the goals of the Juvenile Code to expeditiously resolve cases and obtain permanency for the juvenile, the supreme court conducted its own review of the issues raised in the no-merit brief. After considering those issues and the record, the supreme court affirmed the trial court’s order as being supported by competent evidence and based on proper legal grounds.

Opinions affirming TPR orders based on a no-merit brief are not summarized.