Chapter 12
Appeals[1]

[1] The following sources provided background information and research resources that facilitated the drafting of this Chapter: Training materials from the North Carolina Appellate Boot Camp, Parent Representation Division, sponsored by the School of Government and the Office of Indigent Defense Services, November 13, 2009, and PAMELA WILLIAMS & ALEXANDRA GRUBER, THE SURVIVOR'S GUIDE TO GUARDIAN AD LITEM APPEALS (2007).

12.1 Scope of Chapter

This Chapter addresses general characteristics of appeals in abuse, neglect, dependency, and termination of parental rights (TPR) cases and issues that trial attorneys and trial court judges encounter in connection with these appeals. This Chapter does not comprehensively discuss appellate procedure.

The Juvenile Code addresses certain aspects of appeals, including who can appeal, which orders can be appealed, and notice of appeal. However, appeals in abuse, neglect, dependency, and TPR proceedings are governed primarily by the Rules of Appellate Procedure (Appellate Rules). Appellate Rule 3.1 applies to appeals of orders designated by G.S. 7B-1001.

Resources:
The "Office of the North Carolina Appellate Reporter" section of the North Carolina Administrative Office of the Courts website includes the following:

- The 2017 NORTH CAROLINA RULES of APPELLATE PROCEDURE (and the previous version of the Rules effective through December 31, 2016).
- The North Carolina Court of Appeals Legal Standards (last revised July 26, 2016), with sections on "Appellate Process", "Evidentiary Matters", and "Juvenile Proceedings").

12.2 Parties and Representation

A. Who Can Appeal

1. Parties on appeal. G.S. 7B-1002 limits who has standing to appeal an order designated in G.S. 7B-1001 to

- the juvenile, acting through a guardian ad litem (if one is not appointed under G.S. 7B-601, the court must appoint a Rule 17 GAL for purposes of the appeal);
- a county department of social services (DSS);

- a parent, guardian, or custodian who is not a prevailing party (for a discussion of parent, guardian, and custodian, see Chapter 2.2.B); and
- any party who sought but failed to obtain a termination of parental rights.

See In re J.C.B., 233 N.C. App. 641 (2014). See also section 12.4, below, for a discussion of appealable orders under G.S. 7B-1001.

Note, for purposes of this Manual, a "department of social services" or "DSS" refers to a department as defined by G.S. 7B-101(8a) regardless of how it is titled or structured.

Standing is jurisdictional, and a party invoking the jurisdiction of the court has the burden of proving that he or she has standing to file an appeal. *In re T.B.*, 200 N.C. App. 739 (2009). Whether an appellant has standing to appeal appears to arise most commonly when a party in the abuse, neglect, or dependency proceeding fails to prove his or her standing pursuant to G.S. 7B-1002(4) as a parent, guardian, or custodian and that failure results in the dismissal of the appeal. *See In re T.H.*, 232 N.C. App. 16 (2014); *In re J.C.B.*, 233 N.C. App. 641 (2014); *In re T.B.*, 200 N.C. App. 739; *In re A.P.*, 165 N.C. App. 841 (2004). A party that is designated by G.S. 7B-1002 as a "proper party" for appeal has standing to appeal even when he or she has not been served with the initiating petition and has not appeared at the hearing resulting in the order being appealed. *See In re E.J.*, 225 N.C. App. 333 (2013) (holding the respondent mother who was not served with the neglect and dependency petition and did not appear at the hearing had standing to appeal the adjudication and initial dispositional order because G.S. 7B-1002(4) makes it clear that a parent is a proper party to appeal).

(a) Parent. The Juvenile Code does not define "parent" and does not address the status of a putative father. Yet, a child's parents should be identified and named as respondent parties in an abuse, neglect, or dependency proceeding, unless a statutory exception applies. *See* G.S. 7B-401.1(b); 7B-506(h)(1); 7B-800.1(a)(3); 7B-901(b).

The legal relationship and rights of a biological parent to his or her child are severed by the child's adoption. G.S. 48-1-106(c). *But see* G.S. 48-1-106(d) (exception in a "stepparent adoption" for the spouse of the adoption petitioner who is the child's biological parent). Except for a stepparent adoption, a biological (or adoptive) parent of a child who has been adopted has no parental rights and therefore no standing to appeal as a parent. *In re T.H.*, 232 N.C. App. 16 (2014).

(b) Stepparent. In *In re M.S.*, ___ N.C. App. ___, 785 S.E.2d 590 (2016), the court of appeals held that a stepparent who had not adopted the child was not a parent after it examined the Juvenile Code and applicable adoption statute. The Juvenile Code distinguishes between a parent and stepparent by including stepparent in the definition of "caretaker." By definition, a caretaker is a person who is not the child's parent. G.S. 7B-101(3). Further supporting the distinction between parent and stepparent, the adoption statute defines stepparent as an individual who is the spouse of a child's parent but who is not the child's legal parent. G.S. 48-1-101(18).

A stepparent may become a parent, with standing to appeal, upon the stepparent's adoption of the child. *See* G.S. Chapter 48, Article 4. A stepparent who has a court order awarding him or her guardianship or legal custody of the child becomes the child's guardian or custodian with standing to appeal as a guardian or custodian. *See* G.S. Chapter 35A (guardian); 7B-600 (guardian); 7B-101(8) (definition of "custodian"). Absent an adoption or court order for legal custody or guardianship, a stepparent is a caretaker and lacks standing to appeal.

(c) Caretaker. A "caretaker" is defined at G.S. 7B-101(3) and is any person who is not the child's parent, guardian, or custodian but has responsibility for the child's health and welfare in a residential setting. A caretaker does not have standing to appeal a juvenile order, and an appeal taken by a caretaker will be dismissed. *See* G.S. 7B-1002; *In re M.S.*, ___ N.C. App. ___, 785 S.E.2d 590 (2016) (dismissing appeal; holding the caretaker stepfather lacked standing to appeal adjudication and disposition order). See Chapter 2.2.B.9(c) (discussing caretaker).

(d) Not a prevailing party. G.S. 7B-1002(4) requires that a parent, guardian, or custodian be a nonprevailing party in the order that is being appealed. A prevailing party is one in whose favor the judgment was entered. *In re T.B.*, 200 N.C. App. 739 (2009). When the court grants the party's request, that party is a prevailing party and lacks standing to appeal. *See In re T.B.*, 200 N.C. App. 739 (dismissed respondent's appeal of an order that granted the relief requested by the respondent, which was to not award permanent custody to the paternal grandparents and to order visitation with her).

(e) Aggrieved party. The court of appeals has looked to G.S. 1-271 and held that only an "aggrieved party" may appeal from an order, and an aggrieved party is one whose rights have been directly and injuriously affected by the court's action. *In re C.A.D.*, ___ N.C. App. ___, 786 S.E.2d 745 (2016). A party authorized by G.S. 7B-1002 to take an appeal of a final juvenile order does not have standing if he or she is not an aggrieved party. *See In re C.A.D.*, ___ N.C. App. ___, 786 S.E.2d 745 (holding respondent mother had no standing to appeal the permanency planning order of adoption rather than placement with the maternal grandparents, as she could not claim injury on behalf of the maternal grandparents who did not appeal); *In re B.D.*, 174 N.C. App. 234 (2005) (respondent parents in a termination of parental rights (TPR) action were not aggrieved parties that were directly and injuriously affected by the alleged failure of the court to properly serve the child who was the subject of the TPR action; decided under previous statutory language requiring the child to be served).

2. Joinder of parties. Any two or more parties whose interests are the same may pursue or respond to an appeal jointly. Parties who are appealing may join initially or after taking separate appeals. After joinder, the parties proceed as a single appellant or appellee. N.C. R. APP. P. 5.

3. Relationship of DHHS and county DSS as parties. Even though the North Carolina Department of Health and Human Services (DHHS) is not routinely involved in appeals of abuse, neglect, dependency, or termination of parental rights proceedings, in two related cases

the court of appeals granted DHHS's motions to dismiss the county DSSs' appeals. DHHS was an intervening party in the underlying actions that resulted in the orders on appeal, one of which was an appeal of the order allowing DHHS to intervene. In granting DHHS's motions to dismiss, the court of appeals held that "there is an agency relationship between DHHS and the counties' DSS . . . . It is axiomatic that the principal controls the agent . . . . DHHS is the principal to both DSS divisions. Each county's DSS must act as instructed by its principal." *In re Z.D.H.*, 184 N.C. App. 183, 186 (2007); *In re J.L.H.*, 184 N.C. App. 180, 183 (2007).

4. Nonparticipating party. When one party to an abuse, neglect, dependency, or termination of parental rights proceeding appeals, another party may choose not to participate in the appeal. For example, where both parents participate in the proceeding at the trial level and only one appeals a judgment, the other parent may or may not elect to participate in the appeal. Rule 26(b) of the Appellate Rules requires that copies of all papers filed by a party must be served on all other "parties to the appeal," which would seem to indicate that nonparticipating parties need not be served. However, because a party's decision not to participate in an appeal is typically not marked by a specific declaration or the filing of a specific document to make it clear that he or she is not a "party to the appeal," failure to serve nonparticipating parties in some circumstances could be problematic. Attorneys may view service on nonparticipating parties as the best approach. Attorneys who represent nonparticipating parties in the underlying trial sometimes are allowed to withdraw, in which case papers would be served directly on the party. If a party is unrepresented, he or she should be served at his or her last known address.

B. Appellate Representation in Juvenile Proceedings

1. Appellant representation for DSS. Appellate representation for the county DSS is the responsibility of the individual county. An appeal may be handled by the attorney who represented DSS at trial, another DSS attorney, or an attorney retained or contracted by DSS specifically to represent it in the appeal. The North Carolina Department of Health and Human Services assumes no responsibility for county DSS representation.

2. Appellate representation for parents. The statutory entitlement to counsel for indigent parents continues through any stage of the proceeding, including appeals. *See* G.S. 7B-602(a); 7B-1101.1(a); 7A-451(b) (entitlement to services of counsel continues through any "critical stage"). When notice of appeal is given, a respondent is not required to execute and serve a new affidavit of indigency, and the trial court is not required to make a new determination of eligibility for appointed counsel. *See In re D.Q.W.*, 167 N.C. App. 38 (2004); *see also* G.S. 7A-450(c) (allowing but not requiring question of indigency to be redetermined at any stage of the action or proceeding). However, if the trial court determines it is appropriate, it may review a party's financial status and eligibility for appointed counsel at any time. *See* G.S. 7B-602(a); 7B-1101.1(a); *In re D.Q.W.,* 167 N.C. App. 38. Respondents who are not indigent must bear the cost of their own appellate representation.

For indigent parents, appellate representation is coordinated by the Office of Indigent Defense Services (IDS) and handled by the Office of Parent Representation, a division of the Office of the Appellate Defender in IDS. The appeal is assigned to an assistant appellate

defender or a private attorney who has completed mandatory training and been accepted for placement on the "7B appellate roster." Once appellate entries are completed and signed by the trial judge, the Office of Parent Representation completes a Notice of Appointment that contains the name and contact information of the assigned appellate attorney. This notice is mailed to the juvenile clerk for filing in the district court file and copies are sent to the parties' attorneys and the transcriptionist.

Resource: The Office of Parent Representation of the N.C. Office of Indigent Defense Services maintains on its website, information on appealing juvenile matters, including sample as well as interactive fillable appellate forms and a brief bank. See the "Training & Resources" and "Information for Counsel" sections of the website.

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3. Appellate representation for children. When children participate in appeals through their guardians ad litem, representation is handled by the Guardian ad Litem Services Division (the GAL Program) of the North Carolina Administrative Office of the Courts (AOC). When the GAL Program is notified by the AOC of an appeal, the case is either assigned "in house" to the GAL Appellate Counsel or Associate Counsel, or assigned to an attorney in the GAL pro bono attorney program coordinated by the GAL Program. Occasionally, the trial attorney advocate handles the appeal. When the case is assigned, an Order of Appointment of Appellate Counsel is forwarded to the local GAL program in the judicial district where the appeal originated, for signature by the trial judge. This appointment order is filed in the juvenile court file and served on the parties' attorneys and the transcriptionist.

Resource: The Guardian ad Litem Services Division of the N.C. Administrative Office of the Courts maintains on its website, resources for attorneys and a brief bank.

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4. Appellate representation for guardians or custodians. Indigent respondents who are not parents do not have a statutory right to court-appointed counsel. *See* G.S. 7B-602(a); 7B-1101.1(a) (addressing only an indigent parent's right to appointed counsel). North Carolina appellate courts have not addressed the question of whether there is any circumstance in which an indigent respondent who is not a parent would be entitled to court appointed counsel. IDS, which is responsible for providing representation for indigent parent respondents, defers to the courts on that question and provides by policy that IDS will pay for representation "[i]f a judge concludes that due process requires appointment of counsel for a particular indigent non-parent respondent in an abuse, neglect, or dependency proceeding." N.C. OFFICE OF INDIGENT DEFENSE SERVICES, "Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings" (July 2, 2008).

C. Role of Trial Counsel

The Rules of Appellate Procedure specifically address the role of trial counsel when a different attorney will be handling the appeal in an abuse, neglect, dependency, or termination of parental rights case. Appellate Rule 3.1(a) states that trial counsel is responsible for filing and serving the notice of appeal in the time and manner required. Rule 3.1(c)(2) states that trial counsel for an appealing party has a duty to assist appellate counsel in preparing and serving a proposed record on appeal and that trial counsel is not permitted to

withdraw or be relieved of responsibilities until the record on appeal has been filed with the clerk of the Court of Appeals.

Practice Note: The role and division of responsibilities between trial counsel and appellate counsel in the early stage of an appeal depend on the arrangements made between the attorneys themselves as well as the policies of their respective agencies. Trial counsel should advise the client about the effect of the appeal, make any appropriate motions before appellate counsel becomes involved, and respond to requests for information from appellate counsel.

Resources:
For information related to the responsibilities of respondents' trial counsel in relation to appeals, see

- N.C. COMM'N ON INDIGENT DEFENSE SERVICES, "Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level" (2007).
- N.C. OFFICE OF INDIGENT DEFENSE SERVICES, "Division of Responsibility between Trial and Appellate Counsel Who Are Proceeding Under Appellate Rule 3.1" (2009).

D. Role of Appellant

An appellant may proceed with an appeal without attorney representation. An unrepresented appellant must file and serve the notice of appeal in the time and manner required. N.C. R. APP. P. 3.1(a). The appellant, regardless of whether he is or she is represented, must sign the notice of appeal. G.S. 7B-1001(c); N.C. R. APP. P. 3.1(a). For a further discussion of notice of appeal, see section 12.5, below.

When an appellant is represented, he or she is required to cooperate with counsel throughout the appeal. N.C. R. APP. P. 3.1(a).

12.3 Identifying Issues for Appeal

A. Preserving Issues for Appeal

1. Objection, grounds, and ruling required. To preserve an issue for appellate review, in the trial court a party must

- make a timely request, objection, or motion;
- state specific grounds for the desired ruling (unless the specific grounds are apparent); and
- obtain a ruling on the request, objection, or motion.

N.C. R. APP. P. 10(a). *See also In re E.M.*, ___ N.C. App. ___, 790 S.E.2d 863 (2016) (holding that respondent failed to preserve the issue for appellate review as no timely objection or motion to strike was made to challenge reports and documentary exhibits that were never formally offered into evidence but were repeatedly referred to during trial); *In re*

K.A., 233 N.C. App. 119 (2014) (holding that the issue of the trial court's misapplication of the doctrine of collateral estoppel was properly objected to and therefore preserved for appeal); *In re A.D.N.*, 231 N.C. App. 54 (2013) (acknowledging the respondent's claim that the trial court failed to appoint a GAL for the child although required to do so but declining to address the issue because it was not raised at trial). A constitutional issue not raised at the trial level will not be considered for the first time on appeal. *See, e.g., In re C.P.*, ___ N.C. App. ___, 801 S.E.2d 647 (2017) (declining to address respondent parent's argument, not raised in the trial court, that her constitutional rights were violated by award of guardianship to a non-parent without finding that respondent was unfit or had acted inconsistently with her constitutionally protected status); *In re T.P.*, 217 N.C. App. 181 (2011) (declining to address the trial court's finding that the respondent parent had acted inconsistently with her constitutionally protected parental status). The supreme court in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195 (2008), explained that this appellate rule requirement to make an objection in the trial court "plays an integral role in preserving the efficacy and integrity of the appellate process" because it allows a trial court to correct an error that is timely brought to its attention, thereby preventing unnecessary appellate review and new trials caused by errors.

See Chapter 11.13.B and D for an additional discussion relating to preservation of evidentiary issues for appeal (including motions in limine; specific, continuing, and timely objections; and offers of proof).

2. Issues automatically preserved for appeal. Certain issues are preserved as a matter of law even if no objection was made in the trial court, including but not limited to

- lack of subject matter jurisdiction (N.C. R. APP. P. 10(a)),
- whether the judgment is supported by the findings of fact and conclusions of law (N.C. R. APP. P. 10(a)), and
- questions directed to a witness by the trial court (N.C. R. CIV. P. 46(a)(3)).

Additionally, case law has preserved in some cases the right to appeal a decision in which the trial court failed to follow a statutory mandate that resulted in prejudice to a party, notwithstanding a failure to object at trial. *See State v. Ashe*, 314 N.C. 28 (1985) (addressing trial court actions contrary to statutory mandate); *State v. Hernandez*, 188 N.C. App. 193, 204 (2008) (quoting *State v. Golphin*, 352 N.C. 364, 411 (2000)) (allowing consideration of an issue on appeal although not objected to at trial, because "[w]hen a trial court acts contrary to a statutory mandate, no objection is necessary to preserve the error"); *In re Taylor*, 97 N.C. App. 57, 61 (1990) (reviewing the trial court's failure to conduct a special hearing in a termination of parental rights case despite respondent's failure to object at trial, and stating that "[w]hen … a judge acts in contravention of a statute to the prejudice of a party, the right to appeal is preserved notwithstanding the failure to enter an objection").

However, even when an appellate issue involves a statutory mandate, appellate courts will not necessarily consider the issue on appeal when not objected to at trial. For example, appellate cases have recognized the appointment of a guardian ad litem (GAL) for the child (in certain circumstances) to be a statutory mandate but have not always been willing to consider on

appeal the issue of failure to appoint a GAL where no objection was made at the trial level. *See In re A.D.N.*, 231 N.C. App. 54 (2013) (refusing to rule on the issue of failure to appoint a GAL for the child when an answer denying a material allegation was filed because the lack of a GAL appointment was not objected to at trial).

B. Scope of Appellate Review

With few exceptions only those issues properly preserved at trial may be presented as issues on appeal. Appellate courts will only review issues properly preserved at trial if presented and discussed in briefs. A brief must contain an argument with the contentions as to each issue presented. Issues not presented and discussed in a party's brief are deemed abandoned. N.C. R. APP. P. 28(a), (b)(6). *See In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (respondent mother appealed the trial court's quashing of her subpoena for her son's testimony at the TPR hearing; in the trial court, respondent did not specify whether her son's testimony was to be presented at the adjudication or disposition phase of the hearing but in her appeal, respondent did not challenge the adjudication; as a result, the court of appeals limited its analysis to the dispositional phase). *See also In re J.D.R.*, 239 N.C. App. 63 (2015) (although mother appealed from more than one order, because the brief only addressed the disposition order, appellate review was limited to that issue). Issues are also presented in the record on appeal, but failure to present an issue in the record will not prevent a party from arguing the issue as long as it is presented and discussed in a brief. N.C. R. APP. P. 10(b).

Note that Appellate Rules in effect prior to October 1, 2009 had more stringent requirements with respect to the presentation of issues in the record on appeal, requiring parties to present issues as "assignments of error" in the record or lose the opportunity to argue them. Also note that the issue of subject matter jurisdiction can be raised for the first time on appeal and may be raised by the appellate court sua sponte. *See, e.g.*, *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011) (the court of appeals on its own motion raised the issue of the juvenile court's exclusive jurisdiction).

Cases citing Appellate Rule 28(b)(6) have required a party to an appeal to assert, in his or her brief, specific determinations of the trial court (as opposed to general determinations) as issues to have them reviewed by the appellate court. For example, one cannot assert that there is insufficient evidence for the court's findings generally, or errors in the court's conclusions generally. Rather, a brief must assert a particular finding of fact for which there is insufficient evidence or a particular conclusion for which there are insufficient findings in order to properly present an issue for review by the appellate court. *See*, *e.g.*, *In re A.H.*, 183 N.C. App. 609 (2007) (holding that although respondent assigned error to various findings, under the former appellate rule that required assignments of error, they were not argued in her brief and were deemed abandoned); *In re J.M.W.*, 179 N.C. App. 788 (2006) (refusing to review two of the grounds for termination of parental rights because appellant failed to argue them in her brief); *In re P.M.*, 169 N.C. App. 423 (2005) (holding that where the appellant failed to specifically argue in her brief that specified findings were unsupported by evidence, the appellate court would consider only whether the findings supported the conclusions of law).

The brief itself is not a source of evidence, so representations made in a brief that do not relate to matters in the record cannot be considered by the court. *See In re A.B.*, 239 N.C. App. 157 (2015) (counsel's representations in a brief that attempted to explain an error in drafting a court order could not be considered evidence on appeal).

The scope of the court's review also depends on the contents of the record on appeal. The contents, format, and requirements for the record on appeal are addressed in Appellate Rule 9. The record must contain anything necessary for the appellate court to review all issues presented on appeal, without including unnecessary documents from the court file. For example, the appellate court cannot address an alleged error in admitting a document unless the document is contained in the record on appeal. In the absence of a transcript from the hearing resulting in the order that is being appealed, the appellate court is obligated to treat the trial court's findings as supported by competent evidence. *In re A.L.L.*, ___ N.C. App. ___, 802 S.E.2d 598 (2017). Appellate Rule 9(b)(5)(a) allows a responding party to "supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9" when "the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c) . . . ." These supplemental materials, however, cannot contain documents or issues that were not before the trial court in the case being considered. *See In re M.G.*, 239 N.C. App. 77 (2015) (admonishing counsel for filing supplemental materials containing documents from another case not before the trial court in the present case and raising issues never considered by the trial court).

Practice Note: In an unpublished opinion, the court of appeals admonished all counsel about the unnecessarily large volume of the record on appeal. The court of appeals devoted part of its opinion to discussing the waste of time and resources, pointing out that the record was 770 pages, consisting of what appeared to be copies of everything in the trial record. *In re J.J.*, 199 N.C. App. 755 (2009) (unpublished).

Parties may be judicially estopped from taking inconsistent positions at trial and on appeal, and a party who changes its position has a responsibility to notify the affected courts and explain a change in position to justify its actions. *See In re I.K.*, 227 N.C. App. 264 (2013); *In re Maynard*, 116 N.C. App. 616 (1994).

C. Appellate Rule 2: Prevent Manifest Injustice

The appellate court, pursuant to Appellate Rule 2, may suspend or vary the requirements or provisions of the Appellate Rules and consider issues that are not properly preserved or presented for review, either to "prevent manifest injustice to a party" or to "expedite decision in the public interest." Rule 2 may be invoked upon application of a party or sua sponte. However, the supreme court has recognized that Appellate Rule 2 is an "extraordinary step" that should be "invoked 'cautiously' " in "exceptional circumstances." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196 (2008).

Rule 2 has been applied in appeals of orders entered in abuse, neglect, dependency, and termination of parental rights (TPR) actions. *See, e.g.*, *In re S.B.*, 166 N.C. App. 488 (2004)

(invoking rule sua sponte after determining potential for manifest injustice to respondent father in a TPR proceeding when he was not appointed a guardian ad litem); *In re O.W.*, 164 N.C. App. 699 (2004) (invoking the rule to decide issue of consolidation of neglect and abuse adjudicatory hearing and disposition hearing). The court of appeals has also declined to invoke Rule 2 in juvenile proceedings. *See, e.g., In re P.T.W.*, ___ N.C. App. ___, 794 S.E.2d 843 (2016) (determining application of rule was not necessary to prevent manifest injustice to respondent mother or child on the issue of the trial court abusing its discretion in failing to appoint a GAL for the child in a TPR proceeding where respondent mother willfully failed to make progress on her case plan); *In re E.T.S*, 175 N.C. App. 32 (2005) (declining to invoke rule upon request of respondent mother in a TPR proceeding on evidentiary issue she failed to object to at trial).

The North Carolina Supreme Court recently made clear that application of Appellate Rule 2 by an appellate court should not be automatic, even when there is precedent for its application. In *State v. Campbell*, 369 N.C. 599 (2017), the supreme court reviewed a decision allowing review pursuant to Rule 2 of a fatal variance issue not raised at trial. After citing an earlier appellate decision that invoked Rule 2 to review a similar fatal variance argument, the court of appeals, without further discussion or analysis of Rule 2, addressed the merits of defendant's argument and reversed his conviction. The supreme court reversed and remanded as the process by which an appellate court determines whether a case is one of the "rare 'instances' " appropriate for application of Rule 2 that requires an individual analysis "made in light of the *specific circumstances of individual cases and parties*, such as whether 'substantial rights of an appellant are affected.' " Moreover, "precedent cannot create an automatic right to review via Rule 2" because the decision to suspend a rule of appellate procedure is "always a discretionary determination to be made on a case-by-case basis." *Campbell*, 369 N.C. at 603 (emphasis in original).

The individual analysis required by the appellate court that may result in seemingly conflicting decisions when determining whether to apply Appellate Rule 2 is demonstrated in three court of appeals decisions addressing the trial court's failure to appoint a GAL for the child who was the subject of a TPR action, when that issue was not objected to in the trial court. In two cases the court of appeals invoked Appellate Rule 2 to reach the merits of the issue, and in both cases found prejudicial error in the trial court's failure to appoint a GAL for the child when the respondents filed an answer denying a material allegation, triggering the statutory mandate that a GAL be appointed. *See In re Fuller*, 144 N.C. App. 620 (2001) (determining child who is intended beneficiary of statute requiring appointment of GAL to represent his best interests was unrepresented and the 9-year-old child was not present at the hearing to object to the trial court's failure to appoint him a GAL); *In re Barnes*, 97 N.C. App. 325 (1990) (unrepresented 22-month-old child, who is a party to the proceeding, was unable to make objection to trial court's failure to appoint statutorily mandated GAL; fundamental fairness required the child be represented by counsel when the respondent was represented by counsel). In contrast, the court of appeals did not invoke Appellate Rule 2 to decide the merits of the same issue, finding the rule was inapplicable to the case as there was no manifest injustice to the respondent mother or the child who was not appointed a GAL. *In re A.D.N.*, 231 N.C. App. 54 (2013) (determining respondent mother repeatedly chose substance abuse

over her 2-year-old child during his lifetime and almost entirely abdicated responsibility for him to petitioner, the child's paternal grandmother).

12.4 Which Orders Can Be Appealed

A. Appealable Orders

The Juvenile Code specifies the types of final orders in abuse, neglect, dependency, and termination of parental rights cases that may be appealed by an aggrieved party who has standing to appeal. *See* G.S. 7B-1001(a).

1. No jurisdiction. Any order finding a lack of jurisdiction may be appealed. G.S. 7B-1001(a)(1). A party may not appeal an order under G.S. 7B-1001(a)(1) by claiming a jurisdictional defect, the trial court must have found that it lacked jurisdiction to decide the matter before it. *See In re A.T.*, 191 N.C. App. 372 (2008) (rejecting the appellant's assertion that an order denying a motion to modify a payment provision in a nonsecure custody order was related to a lack of jurisdiction and therefore appealable).

2. Order determining the action. Any order that in effect determines the action and prevents a judgment from which appeal might be taken, including the involuntary dismissal of a petition, may be appealed. G.S. 7B-1001(a)(2). In the case *In re E.H.*, 227 N.C. App. 525 (2013), the trial court denied the GAL's Rule 60 (of the Rules of Civil Procedure) motion for relief from DSS's voluntary dismissal of its petition, and the GAL appealed. The court of appeals held that the trial court's order denying the Rule 60 motion was appealable because it (1) terminated jurisdiction by refusing to set aside the voluntary dismissal and (2) determined the action and prevented a final judgment on the merits.

Orders made during the pendency of an action that do not dispose of the case are interlocutory. Interlocutory orders are not immediately appealable unless failure to grant immediate review would affect a substantial right. *See* G.S. 1-277(a). The burden is on the appellant to establish that a substantial right will be affected, with the test being whether the right itself is substantial and the deprivation of that right would cause injury if not corrected before appeal from the final judgment. *See In re J.G.*, 186 N.C. App. 496 (2007) (and cases cited therein) (holding that the trial court's order affecting DSS's right to choose how to dispose of funds it received as a representative payee for Social Security benefits affected a substantial right and was immediately appealable). *See also In re A.R.G.*, 361 N.C. 392 (2007) (analyzing a previous version of G.S. 7B-1001 and holding that respondent's appeal was properly dismissed because the order was interlocutory and did not affect a substantial right).

3. Initial disposition and underlying adjudication order. An initial disposition order and the adjudication order upon which it is based may be appealed. G.S. 7B-1001(a)(3). An appeal of the adjudication order is made after the entry of the initial dispositional order. *See In re P.S.*, 242 N.C. App. 430 (2015). Temporary dispositional orders entered after adjudication and

before the initial dispositional hearing are not final orders and may not be appealed. *In re P.S.*, 242 N.C. App. 430; *In re C.M.*, 183 N.C. App. 207 (2007).

4. Order changing custody. An order, other than a nonsecure custody order, that changes the legal custody of a juvenile may be appealed. G.S. 7B-1001(a)(4). The appellate courts have examined what constitutes a change in legal custody when considering whether the order is an appealable order.

Legal custody involves "the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare" and includes the "right to control one's children's associations." *In re M.M.*, ___ N.C. App. ___, ___, 795 S.E.2d 222, 224 (2016) (citations omitted). An order that changes the decision-making responsibilities or imposes a new restriction on who a child may have contact with is a change in legal custody and is an appealable order. *In re M.M.*, ___ N.C. App. ___, 795 S.E.2d 222 (holding a permanency planning order that continued joint legal custody between respondent parents but added a provision that prohibited contact between the child and the maternal grandfather was an order that changed legal custody and was subject to appeal).

A temporary dispositional order entered prior to the initial dispositional hearing is analogous to a nonsecure custody order and is not an appealable order based on a change in legal custody. *In re P.S.*, 242 N.C. App. 430 (2015). *See also In re J.V.*, 198 N.C. App. 108 (2009) (stating that a permanency planning order that awarded guardianship to the child's relatives modified the child's custody from DSS to the relatives and was immediately appealable under G.S. 7B-1001(a)(4)).

In analyzing an earlier version of this Juvenile Code provision, which included in the list of appealable orders "any order modifying custodial rights" (and did not include a provision addressing the appeal of an order ceasing reunification efforts, discussed immediately below), the supreme court considered a father's argument that the trial court's determination that it was in the child's best interest to pursue a termination of parental rights (TPR) cut him off as a possible placement and therefore modified custodial rights. *In re A.R.G.*, 361 N.C. 392 (2007). The supreme court rejected this argument, after looking at the definition of "custody" and "legal custody" in Black's Law Dictionary (8th ed. 2004) as " 'the care, control, and maintenance of a child awarded by a court to a responsible adult' or awarded 'to the state for placing the child in foster care if no responsible relative or family friend is willing and able to care for the child.' " *In re A.R.G.*, 361 N.C. at 396. The supreme court held there was no modification of the father's custodial rights after finding that throughout the case the trial court had ordered that legal custody of the child remain with DSS, the father had never been awarded custody, and there had not yet been an order terminating parental rights.

5. Order eliminating reunification as a permanent plan. An order entered under G.S. 7B-906.2(b) with rights to appeal properly preserved may be reviewed on appeal, but the timing of an appeal by a parent is somewhat unusual. G.S. 7B-1001(a)(5). See section 12.5.A, below (discussing timing). Under G.S. 7B-906.2(b), the court must adopt concurrent permanent plans and must designate reunification as a primary or secondary plan unless certain findings regarding reunification efforts are made. *But see* G.S. 7B-906.2(a) (referring to one or more

permanent plans) and (a1) ("[c]oncurrent planning shall continue until a permanent plan has been achieved"). Under G.S. 7B-1001(a)(5)a., an order entered under G.S. 7B-906.2(b) that eliminates reunification as a permanent plan is an appealable order. See Chapter 7.8.C.8 (discussing reunification efforts findings); 7.9.D (discussing elimination of reasonable efforts); and 7.10.A (discussing concurrent permanent plans and reunification).

G.S. 7B-906.2(b) is a new law that became effective for all cases pending or filed on or after October 1, 2015 and has not been the subject of many appeals to date. It replaced G.S. 7B-507(c), which permitted the trial court in any order that awarded custody or placement responsibility of the child to DSS (e.g., nonsecure custody, disposition, review, permanency planning) to order that reunification efforts were not required or should cease. *See* S.L. 2015-136, sec. 7, 14, 16. The order ceasing reunification efforts under G.S. 7B-507(c) was an appealable order under the prior statutory language of G.S. 7B-1001(a)(5) at any stage in the abuse, neglect, or dependency proceeding and was not required to be a permanency planning order. The majority of the case law addresses the cessation of reasonable efforts under G.S. 7B-507(c) and does not address an appeal of an order eliminating reunification as a concurrent permanent plan under G.S. 7B-906.2(b).

The current version of G.S. 7B-1001(a)(5) differs in part from the previous version in that it does not refer to reunification efforts but instead focuses on the elimination of reunification as a permanent plan. However, G.S. 7B-906.2(b) requires that findings related to reunification efforts be made before reunification may be eliminated as a permanent plan. In interpreting G.S. 7B-906.2(b), the court of appeals distinguished between eliminating reunification as a permanent plan and ceasing reunification efforts. *See In re C.S.L.B.*, ___ N.C. App. ___, ___, 803 S.E.2d 429, ___ (2017) (originally unpublished July 18, 2017, but subsequently published) (stating "respondent mother conflates removing reunification as a permanent plan for the children with ceasing reunification efforts" and holding that the trial court was not required to make G.S. 7B-906.2(b) findings about reunification efforts when it did not eliminate reunification as a permanent plan in an order granting the primary plan of guardianship and specifically finding a secondary plan of reunification; but further holding that a secondary plan of reunification gives respondent mother the right to reunification efforts and a court review of those efforts such that the trial court erred in ceasing review hearings and relieving DSS and the child's GAL). The court of appeals distinguished the case from a prior decision under the former G.S. 7B-507(c), which examined the cessation of reunification efforts. *See In re N.B.*, 240 N.C. App. 353 (2015) (an order eliminating reunification as the permanent plan, establishing guardianship as the permanent plan, and awarding guardianship effectively ceased reunification efforts requiring statutory findings regarding reasonable efforts); *see also In re A.P.W.*, 225 N.C. App. 534 (2013) (an order that designates a permanent plan of adoption and directs DSS to file a termination of parental rights petition implicitly ceases reunification efforts making the order appealable (under former version of the statute, referring to G.S. 7B-507(c))).

Legislative Note: Effective for appeals filed on or after January 1, 2019, appeals of G.S. 7B-906.2(b) orders that are heard together with an appeal of a termination of parental rights order will be made directly to the North Carolina Supreme Court. *See* S.L. 2017-41, sec. 8 as amended by S.L. 2017-102, sec. 40.(f), which amends G.S. 7B-1001(a)(5) and enacts G.S.

7B-1001(a1) and (a2). For a discussion of the timing and notice of appeal for an order under G.S. 7B-906.2(b), see section 12.5.A.2, below.

6. TPR order. Any order terminating parental rights or denying a petition or motion to terminate parental rights may be appealed. G.S. 7B-1001(a)(6).

Legislative Note: Effective January 1, 2019, appeals of termination of parental rights orders filed on or after that date will be made directly to the North Carolina Supreme Court. *See* S.L. 2017-7, sec. 2 and 4 as amended by S.L. 2017-41, sec. 8, which replaces G.S. 7B-1001(a)(6) with the enactment of G.S. 7B-1001(a1) and (a2) and adds G.S. 7A-27(a)(5).

7. RIL order. An appeal of a district court order directing DSS to place an individual's name on the Responsible Individuals List is appealed under G.S. 7A-27(b)(2), not G.S. 7B-1001. G.S. 7B-323(f). See Chapter 5.2.B for a discussion of the Responsible Individuals List.

B. When an Appeal Is Moot

When a legal controversy between opposing parties ceases to exist, the case generally is rendered moot. The appellate court will decide a case only if the controversy giving rise to the appeal continues at the time of appeal. *In re A.K.*, 360 N.C. 449 (2006). *See In re J.S.*, ___ N.C. App. ___, 792 S.E.2d 861 (2016) (holding respondent mother's appeal of only the permanency planning order was moot when she did not appeal the accompanying order terminating the court's jurisdiction in the neglect proceeding and resulting Chapter 50 custody order entered pursuant to G.S. 7B-911 as those two orders would remain in effect; further noting respondent mother did not raise exception to the mootness doctrine based on possible collateral legal consequences); *In re A.S., III.*, 229 N.C. App. 198 (2013) (holding that respondent's appeal was moot because the order being appealed had been subsequently modified in a review hearing and any determination of the issues on appeal would have no practical effect, nor did any exceptions to the mootness doctrine apply); *In re B.G.*, 207 N.C. App. 745 (2010) (dismissing an appeal as moot when juvenile reached the age of 18 while the appeal was pending); *In re H.D.F.*, 197 N.C. App. 480 (2009) (dismissing as moot part of the mother's appeal challenging the trial court's finding that returning custody of the child to her was not in the child's best interest, where the trial court apparently had entered a subsequent order returning custody to the mother).

In certain cases, if the continued existence of the judgment itself may result in adverse collateral legal consequences for the appellant, the validity of the judgment continues to be a live controversy and an appeal from that judgment is not moot. *In re A.K.*, 360 N.C. 449 (2006).

1. Exception based on collateral legal consequences of abuse, neglect, dependency adjudication. A parent's regaining custody during a pending appeal challenging an abuse, neglect, or dependency adjudication does not render the case moot because there are collateral legal consequences for the parent. *In re A.K.*, 360 N.C. 449 (reversing and remanding court of appeals dismissal of respondent father's appeal as moot). Possible collateral legal consequences include (1) the use of an abuse or neglect adjudication to

support a determination that another child with whom the parent resides is neglected (*see* G.S. 7B-101(15) definition of "neglected juvenile") and (2) the admissibility of the adjudication in any future termination of parental rights proceeding involving the same child that alleges abuse or neglect as the ground (*see* G.S. 7B-1111(a)(1)). *In re A.K.*, 360 N.C. 449.

2. Exception based on collateral legal consequences of termination of parental rights. The termination of a parent's rights to one child may be a ground for termination of that parent's rights to another child if that parent lacks the ability or willingness to establish a safe home for the other child. G.S. 7B-1111(a)(9). The court of appeals has held that the collateral consequence arising from a possible future application of G.S. 7B-1111(a)(9) makes an appeal of a TPR order not moot. *See In re Baby Boy*, 238 N.C. App. 316, 319 (2014) (appeal of an order terminating respondent mother's parental rights was not moot when the order was entered while an appeal of the child's adoption based on the validity of mother's relinquishment was pending (*see In re Adoption of Baby Boy*, 233 N.C. App. 493 (2014)) and subsequently held valid after the TPR was granted, thus finalizing the adoption; even though the TPR appeal would have no practical effect on the child's parentage, the TPR order "may have an effect on respondent's parental rights in the future as to any other children she has or may have"); *In re C.C.*, 173 N.C. App. 375 (2005) (refusing to dismiss as moot a mother's appeal from a TPR order, when the child took his own life after notice of appeal was given, because a TPR may form the basis of a subsequent proceeding to terminate the parent's rights in relation to another child); *In re J.S.L.*, 218 N.C. App. 610 (2012) (trial court erred when it denied respondent putative father's motion for paternity testing and terminated respondent's parental rights; that respondent's parental rights had been terminated did not render moot his appeal of the denial of the motion for paternity testing because of the collateral legal consequences of a TPR order; if testing did not establish paternity, the trial court would be required to dismiss the TPR petition).

12.5 Notice of Appeal

A. Timing, Manner, and Content of Notice

1. Timing and manner generally. A notice of appeal is filed with the clerk of superior court and must be given in writing within thirty days after entry and service of the order pursuant to Rule 58 of the Rules of Civil Procedure. G.S. 7B-1001(b); N.C. R. APP. P. 3.1(a). See Chapter 4.9.C (relating to entry and service of orders and Rule 58). Rule 58 requires the parties be served within three days of the entry of the judgment. If the party has been served as required, within three days of the entry of the judgement, the thirty-day time period to appeal starts from the date of the entry of the judgment. N.C. R. APP. P. 3(c)(1). The three-day period does not include weekends and legal holidays when court is closed. N.C. R. CIV. P. 6(a). If service is not made within three days of the judgment's entry, the thirty-day time period starts with the date of service; additional time is not added for service by mail. N.C. R. APP. P. 3(c). The court of appeals has held that actual notice that an order has been entered substitutes for proper service under Appellate Rule 3(c), making the service requirements inapplicable, and an email of the order provides a party with actual notice even though email is not a valid

method of service under Rule 4 of the Rules of Civil Procedure. *Magazian v. Creagh*, 234 N.C. App. 511 (2014) (dismissing appeal as untimely after holding plaintiff received actual notice of the order by email within three days of the entry of the judgment, thus requiring the notice of appeal to be filed within thirty days of entry of the judgment and not thirty days from the date the email was received).

Resource: For a discussion of the thirty-day time period to appeal a civil judgment, see Ann Anderson, *Appeal Deadlines and Tolling Under Rule 3(c)(2): Don't Be So Sure!*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (April 6, 2016).

Notice of appeal given within thirty days after the oral rendering of judgment in open court, but before entry of judgment, is timely. *See In re J.L.*, 184 N.C. App. 750 (2007) (holding that the trial court erred in dismissing the respondent's appeal for failure to timely give notice of appeal, when the respondent filed a written notice of appeal after the court rendered its judgment but before the court entered its written judgment); *In re S.F.*, 198 N.C. App. 611 (2009) (holding that notice of appeal was timely where respondent filed the notice nine days after the court orally announced the decision to terminate parental rights, even though the court's written order was not entered until more than a month later). A notice of an appeal from an orally rendered judgment in open court does not vest jurisdiction in the appellate court until that judgment is entered pursuant to the requirements of Rule 58. *In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410 (2016). When a notice of appeal has been filed from an orally rendered judgment made in open court, a second notice of appeal must be filed if the judgment that is written and entered does not generally conform to the judgment that was orally rendered. *In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410.

Any necessary amendment to the notice of appeal must also be filed within the thirty-day time limit. *See In re K.C.*, 199 N.C. App. 557 (2009) (dismissing the appeal when the amended notice of appeal, the only notice that referenced the disposition order, was filed more than thirty days after the order was entered).

2. Timing and manner of appeal of order eliminating reunification as a permanent plan. Reunification is one of six possible permanent plans for a child who is the subject of an abuse, neglect, or dependency action. G.S. 7B-906.2(a). The Juvenile Code defines reunification as the child's placement in the home of either parent or in the home of a guardian or custodian from whose home the child was removed by court order. G.S. 7B-101(18b). Under G.S. 7B-906.2(b), when a court orders concurrent permanent plans, reunification must be designated as a primary or secondary permanent plan unless certain findings regarding reunification efforts are made under G.S. 7B-906.2(b) or were made under 7B-901(c). See Chapter 7.8.A.2 and C.8 and 7.10.A (relating to types of dispositional hearings addressing findings under G.S. 7B-901(c) and 7B-906.2(b)). An order entered under G.S. 7B-906.2(b) is an appealable order, but the requirements for an appeal made by a parent are different.

(a) Immediate appeal for custodian or guardian. A custodian or guardian appealing an order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) must give notice of appeal within thirty days after entry of the order. G.S. 7B-1001(a)(5)c.; 7B-1001(b).

(b) Later appeal for parent. Instead of an immediate appeal of an order eliminating reunification as a permanent plan entered under G.S. 7B-906.2(b), a parent must preserve the right to appeal. G.S. 7B-1001(a)(5). The parent gives notice of an intent to appeal in writing within thirty days after entry and service of the G.S. 7B-906.2(b) order. G.S. 7B-1001(b). After a designated period of time passes, the parent then files the notice of appeal. The timing of the filing of the notice of appeal depends on whether there is a subsequent motion or petition for termination of parental rights (TPR).

Note that the court of appeals has determined that an appeal of order that changed legal custody of the child and ceased reasonable efforts under a former statute (G.S. 7B-507) was immediately appealable under G.S. 7B-1001(a)(4), allowing appeal of any order, other than a nonsecure custody order, that changes legal custody of the child. *In re E.G.M.*, 230 N.C. App. 196 (2013) (order appealed from changed custody from respondent mother to DSS in addition to ceasing reasonable efforts; distinguished from *In re D.K.H*, 184 N.C. App. 289 (2007) which dismissed appeal without prejudice as order did not change custody of child and did not meet criteria under G.S. 7B-1001(a)(5)a.−c., noting father could refile at later time as permitted by G.S 7B-1001(a)(5)).

A TPR is not filed within designated time period. If a TPR petition or motion is not filed within 180 days after entry of the G.S. 7B-906.2(b) order eliminating reunification as a permanent plan, a parent who has given proper notice of the intent to appeal that order may proceed with the appeal at that time. G.S. 7B-1001(a)(5)b. A parent must wait the 180 days before filing the notice of appeal when a TPR petition or motion has not been filed during that 180-day period. *In re D.K.H.*, 184 N.C. App. 289 (2007) (dismissing without prejudice father's appeal from an order ceasing reunification efforts under the former statute, where the father had given proper notice of his intent to appeal, but fewer than 180 days had passed since entry of the order). Once the 180 days has elapsed, the thirty-day time period to file the notice of appeal under G.S. 7B-1001(b) starts to run. The appeal must be filed within those thirty days, which makes it between 181 and 210 days after the entry of the order. *In re A.R.*, 238 N.C. App. 302 (2014) (dismissing respondent's appeal for being untimely as the notice of appeal was filed more than 210 days after the entry of the order ceasing reunification efforts; decided under the former applicable statute). See the Legislative Note at the end of this section, below, effective January 1, 2019, describing changes to these time periods.

Combined with TPR appeal. When a TPR action is filed within 180 days of entry of the G.S. 7B-906.2(b) order eliminating reunification as a permanent plan and there is a subsequent appeal of the TPR order, the appeal of the G.S. 7B-906.2(b) order will be reviewed together with the TPR appeal if

- the TPR motion or petition has been heard and granted;
- the TPR order is appealed in a proper and timely manner; and
- the order eliminating reunification as a permanent plan is identified as an issue in the record on appeal of the TPR.

G.S. 7B-1001(a)(5)a.

The statute is silent with respect to how or when a parent may appeal an order eliminating reunification as a permanent plan when a TPR petition or motion is filed within 180 days and is heard and denied. It is unclear if in that circumstance the G.S. 7B-906.2(b) order is an appealable order.

The introductory sentence to G.S. 7B-1001(a)(5) refers to the rights to appeal being properly preserved, and G.S. 7B-1001(b) states notice to preserve the right to appeal must be given in writing within thirty days of the entry of the order being appealed. However, the court of appeals has considered challenges to these orders (under former G.S. 7B-507(c)) without such notice when combined with the appeal of the TPR order. *See In re A.E.C.*, 239 N.C. App. 36 (2015) (dismissing writ of certiorari as moot and holding father, who did not preserve the right to appeal the orders that ceased reunification efforts by giving a timely notice of appeal of those orders, did properly preserve his right to challenge those orders when he raised them as an issue in his timely appeal of the TPR order). In *In re A.P.W.*, 225 N.C. App. 534 (2012), the court of appeals rejected a GAL's argument that the respondent's appeal of the TPR order was not proper when it failed to raise issues on appeal related to the TPR but instead raised issues arising from the cease reunification order under former G.S. 7B-507(c). The court of appeals held that a proper and timely appeal is governed by G.S. 7B-1001 and Appellate Rule 3.1. The TPR appeal was properly and timely appealed as it correctly identified the orders from which the appeal was taken and the court to which the appeal was taken, was properly signed by the respondent and counsel, and was properly served on the other parties within the required time constraints. The court of appeals heard the issues that were raised that related to the orders ceasing reunification efforts.

The North Carolina Supreme Court has interpreted the language in G.S. 7B-1001(a)(5)a. (when it referred to an appeal of an order ceasing reunification efforts under G.S. 7B-507(c)) that combines appellate review of the order ceasing reunification efforts with review of the TPR order to mean that the two orders are to be reviewed together, not separately. *In re L.M.T.*, 367 N.C. 165 (2013). In this case, the court of appeals held that the permanency planning order that ceased reunification efforts was insufficient and, reversed the order without reviewing the TPR order. The supreme court reversed, holding that both the permanency planning order and the TPR order when read together were sufficient, stating that even if the permanency planning order was deficient, it should have been reviewed in conjunction with the TPR order to determine whether statutory requirements were met. The supreme court relied on the language of G.S. 7B-1001(a)(5)a.3. that required the G.S. 7B-507(c) order be identified as an issue in the record on appeal of the TPR. Since this decision, G.S. 7B-1001(a)(5)a.3. has been amended to refer to an order eliminating reunification as a permanent plan under G.S. 7B-906.2(b), but the language requiring identification of that order as an issue in the TPR appeal remains. *See also In re D.C.*, 236 N.C. App. 287 (2014) (holding the TPR order contained sufficient findings to meet the statutory requirements for cessation of reunification efforts under the former statute and cured the deficiency in the findings in the order ceasing reunification efforts; either order standing alone or read together can be sufficient to satisfy the requirements of G.S. 7B-507).

The court of appeals looked to *In re L.M.T.*, 367 N.C. 165, when denying DSS's motion to dismiss respondent mother's appeal of the cease reunification order for failing to designate that order in the notice of appeal. The cease reunification order was "identified as an issue in the record on appeal [of the TPR] in the list of respondent's 'Proposed Issues'." The appeal of the cease reunification order is combined with the appeal of the TPR order. *In re H.D.*, 239 N.C. App. 318, 322 (2015).

Practice Note: In the notice of appeal from the TPR order, the better practice is to state that the party is also appealing the order eliminating reunification as a permanent plan, pursuant to the party having given timely notice of the intent to appeal that order. Referencing both orders in the notice of appeal from the TPR order helps ensure that the clerk knows which recordings of hearings to submit to the transcriptionist and that appellate counsel, if different from trial counsel, knows immediately that the appeal includes the order eliminating reunification as a permanent plan.

Legislative Note: Effective for appeals filed on or after January 1, 2019, the time period during which a parent must wait before appealing an order that eliminates reunification as a permanent plan pending the filing of a TPR motion or petition is reduced from 180 days to 65 days after entry and service of that order. When a TPR motion or petition is filed during that sixty-five day time period and is subsequently granted, an appeal of both the G.S. 7B-906.2(b) order and the TPR order will be made directly to the North Carolina Supreme Court and will be heard together there. Appeals of G.S. 7B-906.2(b) orders made by (1) guardians or custodians with whom reunification is not a plan made within thirty days of the entry and service of the order or (2) parents when a TPR petition or motion has not been filed within sixty-five days of the entry and service of G.S. 7B-906.2(b) order that eliminates reunification with the parent as a permanent plan will continue to be made to the Court of Appeals. A written notice preserving the right to appeal and the filing of a notice of appeal of the G.S. 7B-906.2(b) order eliminating reunification will be required. *See* S.L. 2017-41, sec. 8 as amended by S.L. 2017-102, sec. 40.(f); *see also* S.L. 2017-7, sec. 2 and 4 (addressing TPR appeals only). These session laws amend G.S. 7B-1001(a)(5) and (6) and create G.S. 7B-1001(a1), (a2) and G.S. 7A-27(a)(5).

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3. Signatures. Both the Juvenile Code and Appellate Rule 3.1(a) require that the notice of appeal be signed by both the appealing party and counsel for the appealing party, if any. G.S. 7B-1001(c). *See In re A.S.*, 190 N.C. App. 679 (2008) (dismissing the appeal for failure of the mother to sign the notice of appeal, but granting her writ of certiorari). *See also In re L.B.*, 187 N.C. App. 326 (2007) (dismissing the appeal because, under an earlier version of the respondent parent guardian ad litem (GAL) statute allowing for GALs of assistance without referring to Rule 17 of the Rules of Civil Procedure, the signatures of respondents' GAL of assistance on the notices of appeal were not sufficient signatures by the "appellant"), *aff'd per curiam*, 362 N.C. 507 (2008). *But see also In re A.S.Y.*, 208 N.C. App. 530, 537 & n.5 (2010) (emphasis in original) (stating that a 2009 amendment to G.S. 7B-1101.1(c) that specifically refers to Rule 17 "significantly alter[ed] the analysis of a GAL's duties," but also stating that its determination in the case relating to duties of a respondent parent GAL *during* the termination hearing did not require it "to touch upon or otherwise disturb the ultimate question determined by the *L.B.* Court, that a notice of appeal signed by the GAL but not the

parent is insufficient to grant jurisdiction of the appeal to this Court"). In 2013, significant amendments were made to G.S. 7B-602 and 7B-1101.1 that repealed the language addressing the duties of a GAL, the role of a GAL of assistance, and the diminished capacity appointment criteria. *See* S.L. 2013-129, sec. 17 and 32. Now, GALs appointed to respondent parents under G.S. 7B-602(c) and 7B-1101.1(c) are GALs of substitution appointed pursuant to Rule 17 of the Rules of Civil Procedure. The court of appeals has not decided whether a GAL of substitution may sign for a respondent parent. Because the sufficiency of a GAL's signature is not altogether clear, the safer practice is for both the GAL and the party to sign the notice of appeal along with the attorney when possible. See Chapter 2.4.F (discussing GALs for respondent parents).

For an appeal by a juvenile, the notice of appeal must be signed by the GAL attorney advocate. G.S. 7B-1001(c). The statute does not contemplate an appeal by a juvenile who is not represented by a GAL attorney advocate. However, G.S. 7B-1002(2) requires that the court appoint a Rule 17 GAL to a juvenile who makes an appeal and has not had a G.S. 7B-601 GAL appointed to him or her. The statute does not address who signs the notice of appeal. See Chapters 2.3.D and 9.4.C (discussing the child's GAL).

4. Contents. The notice of appeal must specify the party or parties taking the appeal and must designate the judgment or order from which the appeal is taken and the court to which the appeal is taken. N.C. R. APP. P. 3(d). Where respondent mother alleged error with the GAL appointment in both the TPR and underlying neglect cases, because her notice of appeal only referenced the TPR order, the court dismissed her argument on appeal related to the underlying neglect case. *In re D.W.C.*, 205 N.C. App. 266 (2010).

Special rules related to the protection of the child's identity apply to the notice of appeal and are explained in section 12.6, below.

Legislative Note: Appeals filed on or after January 1, 2019 of TPR orders and G.S. 7B-906.2(b) orders eliminating reunification as a permanent plan that are heard together with the TPR appeal will be made directly to the North Carolina Supreme Court. *See* S.L. 2017-7, sec. 2 and 4 (addressing TPR appeals only) as amended by S.L. 2017-41, sec. 8 as additionally amended by S.L. 2017-102, sec. 40.(f). These session laws amend G.S. 7B-1001(a)(5) and (6) and create G.S. 7B-1001(a1), (a2) and G.S. 7A-27(a)(5).

B. Service and Proof of Service

Appellate Rule 26(c) addresses the manner of service. Service of the notice of appeal may be made pursuant to Rule 4 of the Rules of Civil Procedure on a party or the party's attorney. Service also may be made by delivering a copy of the notice to the party or the attorney, by mailing a copy to the recipient's last known address, or, if no address is known, by filing it with the clerk. Delivery of a copy means handing it to the attorney or to the party or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of a properly addressed and postage paid envelope or package in a post office or official depository of the United States Postal Service or, for those having access to such services, upon deposit with "the State Courier Service or Inter-Office Mail." When a

document relating to an appeal is filed electronically to the official appellate court website, service also may be accomplished electronically by use of the other counsel's correct and current electronic mail address.

Resources:
For more information on service and filing documents, see

- "Mail Service Center" on the N.C. Department of Administration website for additional information about the state Mail Service Center, including explanations of state courier mail and inter-office mail.
- "North Carolina Supreme Court and Court of Appeals Electronic Filing Site and Document Library" on the North Carolina Appellate Courts website.
- "Attorney's Instructions for Electronic Filing of Documents in the Supreme Court and Court of Appeals of North Carolina" on the North Carolina Administrative Office of the Courts website.

Practice Note: The ability to use electronic filing in abuse, neglect, dependency, or termination of parental rights (TPR) appeals is not specified in the Appellate Rules and appears to depend on

- the type of proceeding from which the appeal is taken,
- the type of document being filed,
- the court (appellate or supreme) in which the document is being filed, and
- current appellate court policies.

As of the time of this writing, the electronic filing website for the appellate courts says that documents for "TPR 3-1 cases" (3-1 is presumably the same as Appellate Rule 3.1) cases, records on appeal, Appellate Rule 9(b)(5) supplements, or memorandums of additional authority are not accepted for electronic filing in the court of appeals. However, some motions and other documents have in practice been accepted for electronic filing in the court of appeals. In the supreme court, electronic filing for all documents in all cases appears to be accepted. Since the electronic filing website is continually evolving, and appellate court policies may change, further information should be sought regarding what documents may be filed electronically. Questions may be directed to 919-831-5708 or efiling@sc.state.nc.us.

For time limits other than the time for serving notice of appeal, three days may be added when service is by mail. N.C. R. App. P. 27(b); *see* N.C. R. App. P. 3(c). The notice of appeal filed with the court must contain an acknowledgment of service signed by the person served or a certificate of service. N.C. R. App. P. 26(d). Failure to file proof of service with the notice of appeal, when not waived by the party entitled to be served, is grounds for dismissal of the appeal. *See Blevins v. Town of West Jefferson*, 361 N.C. 578 (2007) (failure to include certificate of service was waived when the appellee did not raise the issue and participated without objection in the appeal), *aff'g per curiam for the reasons stated in the dissent* 182 N.C. App. 675 (2009); *In re A.C.*, 182 N.C. App. 759 (2007) (dismissing appeal; by filing a motion to dismiss before participating in the appeal without objection DSS did not waive the defect); *In re C.T.*, 182 N.C. App. 166 (dismissing appeal when DSS and GAL did not waive the proof of service requirement), *aff'd per curiam*, 361 N.C. 581 (2007). The failure to show

proof of service affects personal jurisdiction, not subject matter jurisdiction. *In re S.F.*, 198 N.C. App. 611 (2009) (exercising discretion to grant appellant's petition for writ of certiorari and hear the appeal when the appellant did not include a certificate of service in his timely notice of appeal; finding the appellate court had subject matter jurisdiction over appeal and DSS and GAL had actual notice of the appeal).

When parties are joined in an appeal, service on any one of the joined parties is sufficient. N.C. R. APP. P. 26(e).

C. Appellate Entry Forms

Appellate entry forms are North Carolina Administrative Office of the Courts (AOC) forms typically filled out by the clerk of court when notice of appeal has been given. The form is signed by the judge and orders the clerk to furnish copies of the file to the parties, orders assignment of a transcriptionist, and orders appointment of Indigent Defense Services (IDS) appellate counsel when appropriate. The forms also include contact information for persons involved in the appeal and address costs, any need for a translator or interpreter, and the dates of the hearings for which recordings should be sent to the transcriptionist.

AOC Forms:

- AOC-J-160, Appellate Entries in Abuse, Neglect, Dependency, or Termination of Parental Rights Proceeding (March 2016) (for use by respondents).
- AOC-J-161, Appellate Entries for DSS/GAL in Abuse, Neglect, Dependency, or Termination of Parental Rights Proceeding (March 2016) (for use by TPR petitioners, DSS, or child's GAL).

12.6 Protection of the Child's Identity in Juvenile Cases

For appeals and extraordinary writs in juvenile cases, Appellate Rule 3.1(b) provides special protection of a child's identity. *See also* N.C. R. APP. P. 3(b) (juvenile identities are protected for appeals made pursuant to G.S. 7B-2602 and 7B-1001).

A. Identity Substituted or Redacted

The identity of anyone involved in an abuse, neglect, dependency, or termination of parental rights proceeding who is under the age of 18 at the time of the trial proceedings (a "covered juvenile") must be referenced only by the use of initials or a pseudonym in briefs, petitions, and all other filings in the appellate court. The child's name must be similarly redacted from all documents, exhibits, appendices, or arguments submitted with filings. The addresses and social security numbers of covered juveniles also must be excluded from all filings and documents, exhibits, appendices, and arguments, with the exception of sealed verbatim transcripts submitted pursuant to Appellate Rule 9(c). N.C. R. APP. P. 3.1(b).

If parties want to use pseudonyms, they must stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Appellate courts are not bound by the stipulation, and appellate case captions will utilize initials. N.C. R. APP. P. 3.1(b).

B. Exceptions to Substitution or Redaction of Identity

Neither identity substitution nor redaction is required for the following:

- settled records on appeal;
- supplements to the record on appeal filed pursuant to Appellate Rule 11(c);
- objections, amendments, or proposed alternative records on appeal submitted pursuant to Appellate Rule 3.1(c)(2); and
- any verbatim transcripts submitted pursuant to Appellate Rule 9(c).

However, these pleadings and filings are not published on the court's electronic filing site and are available to the public only with the permission of an appellate court. In addition, they must bear a special statement. N.C. R. APP. P. 3.1(b).

C. Special Statement Required

Some appellate documents in a juvenile case must contain a special statement to protect them from public inspection. Documents requiring the statement include

- pleadings and filings not subject to substitution or redaction (explained in section 12.6.A, above),
- the first document filed in the appellate courts, and
- the record on appeal.

N.C. R. APP. P. 3.1(b) and 9(a).

The required statement is as follows:

> FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

12.7 Expedited Appeals Process under Appellate Rule 3.1

Appellate Rule 3.1(c) sets out an expedited process for appeals of abuse, neglect, dependency, and termination of parental rights (TPR) orders. The timelines and the process itself move the case through the appellate system much more quickly than the average case. The appeals are decided on the record and briefs, unless oral argument is ordered by the court of appeals. N.C. R. APP. P. 3.1(e).

Legislative and Practice Note: Appeals filed on or after January 1, 2019 of TPR orders and G.S. 7B-906.2(b) orders eliminating reunification as a permanent plan that are heard together with the TPR appeal will be made directly to the North Carolina Supreme Court. *See* S.L. 2017-7, sec. 2 and 4 (addressing TPR appeals only) as amended by S.L. 2017-41, sec. 8 as additionally amended by S.L. 2017-102, sec. 40.(f). These session laws amend G.S. 7B-1001(a)(5) and (6) and create G.S. 7B-1001(a1), (a2) and G.S. 7A-27(a)(5). It is not yet clear whether the provisions of Appellate Rule 3.1 that address the expedited nature of these appeals and the disposition of the appeal being made on the record and briefs without an oral argument will apply to direct appeals made to the North Carolina Supreme Court, as they have applied to the North Carolina Court of Appeals.

A. Transcript

The Appellate Rules require the clerk of superior court to notify the court reporting coordinator at the North Carolina Administrative Office of the Courts (AOC) about an appeal within one business day of the filing of the notice of appeal and require the coordinator to assign a transcriptionist within two business days of receiving the notice. When an order exists establishing the appellant's indigency, the transcript must be prepared and delivered within thirty-five days of the date of assignment. When there is no order establishing that the appellant is indigent, the appellant has ten days from the date the transcriptionist is assigned to make written arrangements for the production and delivery of the transcript and the preparation and delivery must be within forty-five days from the date of assignment. Motions for extensions of time to prepare and deliver transcripts are "disfavored and will not be allowed by the court of appeals absent extraordinary circumstances." N.C. R. APP. P. 3.1(c)(1).

Practice Note: The printing and distribution of transcripts and copies of transcripts (electronic and hardcopy) is handled exclusively by the AOC. It is against AOC policy for parties to share a copy of the transcript or for one party to make a copy for another party, as this creates problems with billing transcription costs.

B. Record on Appeal

Regarding time limits discussed below, three days may be added to time limits when service is by mail. N.C. R. APP. P. 27(b).

1. Appellant's proposed record. The appellant must prepare a proposed record on appeal and serve it on all other parties within ten days after receipt of the transcript. The contents and requirements for the record on appeal are contained in Appellate Rule 9. N.C. R. APP. P. 3.1(c)(2).

Practice Notes: Appellate counsel prepares the record on appeal based on information contained in the Appellate Entries Form, which is prepared by the clerk of court when notice of appeal is given. See AOC Forms in section 12.5.C, above.

If two or more appellate counsel are working jointly (e.g., one counsel for each parent), the ten-day period for service of the proposed record on appeal begins after the last attorney receives the transcript.

2. Appellee's response. An appellee has ten days after being served with the proposed record to respond by serving on all other parties one of the following:

- notice of approval of the proposed record,
- specific objections or amendments to the proposed record, or
- a proposed alternative record.

N.C. R. APP. P. 3.1(c)(2).

3. Agreement on settled record. The parties then have an additional ten days (twenty days after receipt of the transcript) to come to an agreement on the settled record. Within five business days after coming to an agreement (settling the record), the appellant must file three copies of the settled record with the clerk of the court of appeals. N.C. R. APP. P. 3.1(c)(2).

4. No response by appellee. If all appellees do not respond to the proposed record on appeal within the ten-day time limit, the proposed record becomes the settled record on appeal. The appellant then has five business days from the last date on which the appellees could have responded to file three copies of the settled record with the clerk of the court of appeals. N.C. R. APP. P. 3.1(c)(2). Note that a party could still file a motion to amend the record after this point pursuant to Appellate Rule 9(b)(5).

5. Failure to agree on record. If an appellee responds seeking changes to the record but the parties cannot agree to a settled record within thirty days after receiving the transcript, then within five business days after the last day on which the record could have been settled by agreement (twenty days after receipt of the transcript plus five business days),

- the appellant must file his or her proposed record and
- the appellee must file his or her objections, amendments, or proposed alternative record.

N.C. R. APP. P. 3.1(c)(2).

6. Problem with recording. The fact that the recording is incomplete or of poor quality will require a new hearing only if specific error during the missing or unintelligible portion of the recording is alleged or prejudice to the appellant as a result of the recording problems is shown. *See, e.g.*, *In re Bradshaw*, 160 N.C. App. 677 (2003); *In re Howell*, 161 N.C. App. 650 (2003).

C. Briefs

1. Time limits for briefs. The appellant's brief must be filed within thirty days after the record on appeal has been filed with the court of appeals, and the appellee's brief must be filed within thirty days after appellee is served with appellant's brief. Copies of briefs must be

served on all other parties of record. Motions for extensions of time to file briefs are allowed only in extraordinary circumstances. N.C. R. APP. P. 3.1(c)(3). Three days may be added to time limits when service is by mail. N.C. R. APP. P. 27(b).

2. No-merit briefs. Appellate Rule 3.1(d) allows an appellant to file a "no-merit" brief in appeals taken pursuant to G.S. 7B-1001, under certain circumstances.

(a) Circumstances for no merit brief. A no-merit brief is permitted when appellate counsel conducts a "conscientious and thorough" review of the record on appeal and concludes that there is no issue of merit on which to base an argument and that the appeal would be frivolous.

(b) Contents of no-merit brief. A no-merit brief must identify any issues in the record on appeal that might arguably support the appeal and state why those issues lack merit or would not alter the ultimate result.

(c) Duty to appellant. When appellate counsel files a no-merit brief, he or she must provide the appellant with a copy of the brief, the transcript, the record on appeal, and any Appellate Rule 11(c) supplement or exhibits that have been filed with the appellate court. Appellate counsel also must advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the filing of the no-merit brief. Counsel must attach to the brief "evidence of compliance" with these requirements.

Practice Note: The Office of Indigent Defense Services and the Guardian ad Litem Services Division of the North Carolina Administrative Office of the Courts may have policies related to no-merit briefs that should be consulted by appellate counsel prior to filing a no-merit brief.

12.8 Issues on Appeal and Standards of Review

A. Introduction

Specific issues on appeal from abuse, neglect, dependency, and termination of parental rights proceedings are addressed in the appellate cases discussed throughout this Manual. This section is not a comprehensive presentation of issues on appeal but addresses some general categories of issues in which the appeals in these cases tend to fall and discusses standards of review used for various issues.

B. Sufficiency of Evidence and Findings

1. Generally. Issues dealt with frequently in appeals of abuse, neglect, dependency, and termination of parental rights cases are whether the evidence is sufficient to support the findings of fact and whether the findings of fact are sufficient to support the trial court's conclusions of law. *See, e.g.*, *In re L.M.T.*, 367 N.C. 165 (2013); *In re D.B.J.*, 197 N.C. App. 752 (2009). The court of appeals has taken the "opportunity to urge our district court judges to

make detailed findings of fact on *all* competent evidence relative to juvenile adjudications." *In re H.H.*, 237 N.C. App. 431, 438 (2014) (emphasis in original) (vacating part of disposition order that required mother to maintain stable housing and employment as there were no findings that these issues resulted in the juveniles' removal from the respondent's custody or their adjudications even though there was evidence before the court on these issues).

"[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510 (1997) (citations omitted); *see also In re A.B.*, 179 N.C. App. 605 (2006). However, appellate courts have repeatedly found a trial court's misclassifications of conclusions of law and findings of fact to be inconsequential, stating that if a contested finding of fact is more accurately characterized as a conclusion of law, it is treated as a conclusion of law on appeal. *See In re B.W.*, 190 N.C. App. 328 (2008); *In re R.A.H.*, 182 N.C. App. 52 (2007). Conclusions of law are reviewed de novo. *In re F.C.D.*, ___ N.C. App. ___, 780 S.E.2d 214 (2015).

Where a finding is properly supported by evidence, the finding is binding on appeal, even if there is evidence that would support a finding to the contrary. *See In re C.M.*, 198 N.C. App. 53 (2009); *In re B.W.*, 190 N.C. App. 328 (2008). Where a party fails to except to findings of fact on appeal, they are deemed supported by competent evidence and are conclusive on appeal. *See In re C.M.P.*, ___ N.C. App. ___, 803 S.E.2d. 853 (2017); *In re L.A.B.*, 178 N.C. App. 295 (2006). Erroneous findings that are not necessary to the determination do not constitute reversible error. *In re C.B.*, ___ N.C. App. ___, 783 S.E.2d 206 (2016).

2. Review of findings of fact and conclusions of law at adjudication. The standard of review for adjudications in abuse, neglect, or dependency cases is whether the findings of fact are supported by clear and convincing evidence. *In re R.S.*, ___ N.C. App. ___, 802 S.E.2d 169 (2017). *See* G.S. 7B-805. The standard of review in a termination of parental rights (TPR) proceeding is the same. *See* G.S. 7B-1109(f) (requiring that adjudicatory findings be based on clear, cogent, and convincing evidence) and G.S. 7B-1111(b) (requiring that facts justifying termination be proved by clear and convincing evidence). There is no distinction between "clear, cogent, and convincing" and "clear and convincing" evidence. *See In re Belk*, 364 N.C. 114 (2010); *In re Montgomery*, 311 N.C. 101 (1984). The appellate court then reviews whether the conclusions of law are supported by adequate findings of fact. *See In re C.M.P.*, ___ N.C. App. ___, 803 S.E.2d 853 (2017) (TPR); *In re R.S.*, ___ N.C. App. ___, 802 S.E.2d 169 (abuse, neglect, dependency).

3. Review of dispositional findings. The standard of review that applies to findings of fact in disposition, review, permanency planning, and TPR disposition orders is whether the findings are supported by "competent" or "credible" evidence. *See In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017); *In re B.W.*, 190 N.C. App. 328 (2008); *In re C.M.*, 183 N.C. App. 207 (2007). Appellate courts will review dispositional (or best interest) conclusions of law according to an abuse of discretion standard (described in section 12.8.C, below). Nevertheless, the trial court must consider and make findings about relevant statutory factors. For example, when a child in an abuse, neglect, or dependency proceeding is going to be

ordered in an out-of-home placement, and the court finds a relative is willing and able to provide proper care and supervision of the child in a safe home, the court must place the child in that home unless the court finds the placement would be contrary to the child's best interests. G.S. 7B-903(a1); *In re E.R.*, ___ N.C. App. ___, 795 S.E.2d 103 (2016). In a TPR case, the court must consider and make findings about the dispositional factors set out in G.S. 7B-1110(a) that are relevant. *See In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016); *In re D.H.*, 232 N.C. App. 217 (2014); *In re J.L.H.* 224 N.C. App. 52 (2012).

C. Abuse of Discretion

The appellate court will disturb certain rulings by the trial court only if it finds that the trial court abused its 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.' " *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

Abuse of discretion as a standard of review is most commonly applied to errors alleged in the disposition phase of the case when the court is making discretionary determinations related to the child's best interest. *See, e.g.*, *In re C.P.*, ___ N.C. App. ___, 801 S.E.2d 647 (2017) (affirming guardianship order); *In re J.W.*, 241 N.C. App. 44 (2015) (affirming disposition order that did not return the child to respondent mother's custody); *In re Blackburn*, 142 N.C. App. 607 (2001) and *In re Brim*, 139 N.C. App. 733 (2000) (both reviewing whether TPR was in child's best interest).

Abuse of discretion is also the standard applied in the review of other discretionary determinations, such as whether to grant a continuance or appoint a guardian ad litem for a parent. *See, e.g.*, *In re T.L.H.*, 368 N.C. 101 (holding that trial court exercises its discretion when determining whether there is a substantial question about a respondent parent's incompetency requiring the court to conduct an inquiry, and whether a parent is incompetent); *In re C.D.A.W.*, 175 N.C. App. 680 (2006) (holding that trial court did not abuse its discretion by denying mother's motion for a continuance so that she could enter a drug treatment facility), *aff'd per curiam*, 361 N.C. 232 (2007). A trial court may abuse its discretion not only by making a decision that is arbitrary or unreasoned, but also by failing to exercise its discretion at all. *See, e.g.*, *In re B.S.O.*, 225 N.C. App. 541 (2013) (holding court's refusal to exercise discretion based on a misapprehension of the law requires reversal and remand).

Evidentiary rulings are also reviewed for an abuse of discretion. *See In re M.A.E.*, 242 N.C. App. 312 (2015) (originally unpublished July 21, 2015, but subsequently published) (admission of evidence under the residual hearsay exception, Rule 803(24) of the Rules of Evidence, is within the sound discretion of the trial court); *In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (reviewing decision to quash subpoena for child's testimony as unduly burdensome for an abuse of discretion); *In re Faircloth*, 137 N.C. App. 311 (2000) (a trial court's decision that a witness has the requisite knowledge or training to testify as an expert is within the exclusive province of the trial court and is reviewed for an abuse of discretion).

D. Subject Matter Jurisdiction

A lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal; parties cannot waive or consent to subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343 (2009); *In re T.R.P.*, 360 N.C. 588 (2006). Whether a court has subject matter jurisdiction is a question of law reviewable de novo on appeal. *In re T.P.*, ___ N.C. App. ___, 803 S.E.2d 1 (2017); *In re J.H.*, ___ N.C. App. ___, 780 S.E.2d 228 (2015) (subject matter jurisdiction pursuant to the UCCJEA is reviewed de novo). Orders entered by a court that lacks subject matter jurisdiction are void. *See In re T.R.P.*, 360 N.C. 588 (concluding that because trial court lacked subject matter jurisdiction, review hearing order was void ab initio); *In re A.G.M.*, 241 N.C. App. 426 (2015) (noting that all orders entered in trial court before it had subject matter jurisdiction under the UCCJEA were void ab initio).

Common issues that impact subject matter jurisdiction in abuse, neglect, dependency, and termination of parental rights (TPR) actions include standing, proper verification of the initiating pleading, the Uniform Child-Custody Jurisdiction Enforcement Act, and compliance with certain jurisdictional provisions in the Juvenile Code. Note that deficiencies in the issuance and service of a summons relate to personal jurisdiction and do not affect the court's subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343 (2009).

For a discussion of subject matter jurisdiction and personal jurisdiction in abuse, neglect, dependency, and TPR proceedings, see Chapter 3.

E. Failure to Follow Statutory Mandates and Procedures

Often appeals assert error based on the trial court's failure to comply with mandates or procedures set out in the Juvenile Code or, when applicable, the Rules of Civil Procedure.

For example, the Juvenile Code sets out specific criteria the court must address in its findings in orders resulting from review and permanency planning hearings, and a common issue on appeal is whether the court made all of the required findings. *See, e.g., In re P.A.*, 241 N.C. App. 53 (2015) (holding that when waiving further permanency planning hearings, the failure to make written findings of fact satisfying each of the enumerated criteria in G.S. 7B-906.1(n) is reversible error); *In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017) (reversing and remanding permanency planning order eliminating reunification and waiving further permanency planning hearings because it failed to make findings required by G.S. 7B-906.1(d), (n) and 7B-906.2(b)–(d)); *In re J.K.*, ___ N.C. App. ___, 799 S.E.2d 439 (2017) (reversing and remanding "custody order" that did not make required findings under G.S. 7B-911). Note that earlier cases refer to findings required by G.S. 7B-906 and 7B-907, which have been replaced by G.S. 7B-906.1.

When making required statutory findings of fact, the trial court need not quote the exact statutory language; instead, the findings must embrace the substance of the statutory requirements. *In re L.M.T.*, 367 N.C. 165 (2013); *In re H.D.*, 239 N.C. App. 318 (2015). The appellate courts have noted that the best practice, however, is to use the actual statutory

language. *In re L.M.T.*, 367 N.C. at 167 ("trial courts are advised that use of the actual statutory language would be the best practice").

Even if the appellate court finds error in failing to follow statutory mandates, it may decline to disturb the lower court's ruling unless there is a showing that the error was prejudicial. *See In re H.T.*, 180 N.C. App. 611, 613 (2006) ("[I]n general, technical errors and violations of the Juvenile Code will be found to be reversible error only upon a showing of prejudice"). The Juvenile Code prescribes timelines for conducting hearings and for the entry of orders. After numerous appellate court decisions analyzing whether a trial court's delay in holding a hearing or entering an order was prejudicial, the North Carolina Supreme Court held that the proper remedy for a court's failure to follow the timelines is a petition for a writ of mandamus, rather than an assertion of error on appeal. *In re T.H.T.*, 362 N.C. 446 (2008); *see also In re E.K.*, 202 N.C. App. 309 (2010). For a discussion on the time requirements for orders, including the remedy, see Chapter 4.9.D. See also section 12.9.D, below (discussing writ of mandamus).

F. Motions to Dismiss and Failure to Comply with Appellate Rules

A motion to dismiss an appeal may be made under Appellate Rule 25 if a party fails to comply with the Rules of Appellate Procedure. If a party gives notice of appeal but then fails to take actions required by the Appellate Rules to move forward with the appeal, another party may move to dismiss the appeal. Motions to dismiss must be supported by affidavits or certified copies of docket entries that show the failure to take timely action or otherwise perfect the appeal. Before the appeal is filed in an appellate court, motions to dismiss for failure to take timely action are made to the trial court, and the Rules of Civil Procedure relating to motions practice apply. After an appeal is filed in the appellate court, motions to dismiss are made to that court, and Appellate Rule 37 sets out the procedure for the motion. N.C. R. APP. P. 25(a).

The motion to dismiss must be granted unless

1. compliance or waiver of compliance is shown on the record;
2. the appellee consents to the untimely action; or
3. the court for good cause permits the action to be taken out of time.

N.C. R. APP. P. 25(a).

In determining whether failure to comply with the Appellate Rules warrants dismissal, the appellate court will engage in an analysis of the appropriate remedy for noncompliance, looking at whether the noncompliance is substantial or gross; which, if any sanction should be imposed; and if dismissal is the appropriate sanction, whether the circumstances of the case justify suspension of the rules under Appellate Rule 2 to reach the merits of the appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191 (2008). See section 12.3.C, above (discussing Appellate Rule 2). The supreme court "stress[ed] that a party's failure to comply with nonjurisdictional [appellate] rule requirements normally should not

lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co*., 362 N.C. at 198.

The appellate court may also issue sanctions for the failure to comply with the Appellate Rules. N.C. R. APP. P. 25(b). *See also, e.g., In re T.M.*, 180 N.C. App. 539 (2006) (sanctioning appellate counsel and requiring him to personally pay the costs of the appeal because he submitted a brief in which the one-page statement of facts was almost entirely naked argument and contained no citations to the record, in contravention of the Appellate Rules, and counsel had previously been admonished by the court for Appellate Rules violations).

12.9 Extraordinary Writs, Discretionary Review, and Appeal of Right

The supreme court and the court of appeals have jurisdiction to issue prerogative writs, including mandamus, prohibition, certiorari, and supersedeas. G.S. 7A-32.

A. Writ of Certiorari

A petition for a writ of certiorari, filed in the appellate courts, is a means by which a party may seek appellate review when other means do not exist.

1. Review of trial court. In civil cases a writ of certiorari may be issued by either the court of appeals or the North Carolina Supreme Court to permit review of a decision of the trial court when

- the right to appeal has been lost for failure to take timely action or
- no right of appeal from an interlocutory order exists.

N.C. R. APP. P. 21(a)(1). *See In re S.Z.H.*, ___ N.C. App. ___, 785 S.E.2d 341 (2016) (treating a notice of appeal that was untimely by one day as a petition for writ of certiorari; issuing a writ to review the merits of the appeal).

2. Review of court of appeals. A writ of certiorari may be issued by the North Carolina Supreme Court to permit review of a decision of the court of appeals when

- the right to appeal or petition for discretionary review has been lost by failure to take timely action or
- no right of appeal exists.

N.C. R. APP. P. 21(a)(2).

Requirements for filing, content, service, and responses are contained in Appellate Rule 21.

B. Petition for Discretionary Review

Under Appellate Rule 15, a party may petition the supreme court in writing to certify a cause for discretionary review by the supreme court, either prior to or after the court of appeals rules on a matter, upon any grounds specified in G.S. 7A-31. Under G.S. 7A-31(a), discretionary review may also be initiated by the supreme court on its own motion.

The grounds for granting a petition for discretionary review are as follows:

- Where the court of appeals has not yet made a determination and in the opinion of the supreme court
    - the subject matter of the appeal has significant public interest;
    - the cause involves legal principles of major significance to the jurisprudence of the State;
    - delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm; or
    - the work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

  G.S. 7A-31(b).

- Where the court of appeals has already made a determination and in the opinion of the supreme court
    - the subject matter of the appeal has significant public interest;
    - the cause involves legal principles of major significance to the jurisprudence of the State; or
    - the decision of the court of appeals appears likely to be in conflict with a decision of the Supreme Court.

  G.S. 7A-31(c).

Interlocutory determinations by the court of appeals, including orders remanding the cause for a new trial or for other proceedings, will be certified for review by the supreme court only upon a determination by the supreme court that failure to certify would cause a delay in final adjudication that would probably result in substantial harm. G.S. 7A-31(c); N.C. R. APP. P. 15(h).

Requirements for filing, content, service, and responses for the motion and briefs are set out in Appellate Rule 15.

C. Appeal of Right

A party has a right to appeal a court of appeals decision to the North Carolina Supreme Court when

- there is a dissent in the court of appeals decision or

- the case directly involves a substantial question under the U.S. or North Carolina Constitutions.

G.S. 7A-30.

Requirements for filing, content, service, the record and briefs are set out in Appellate Rule 14.

D. Writ of Mandamus or Prohibition

A writ of mandamus is used to compel a trial court (or any governmental official) to perform a required ministerial act or a mandatory duty.

In describing the remedy of mandamus, the North Carolina Supreme Court specified these required elements:

- the petitioner seeking relief must show a clear legal right to the act requested;
- the respondent must have a clear legal duty to perform the act;
- the duty must relate to a ministerial act, not an act requiring the exercise of discretion (mandamus may be used to compel an official to exercise his or her discretion but not to direct what the result should be);
- the respondent must have neglected or refused to perform the act and the time to act has expired; and
- there must not be an alternative legally adequate remedy.

In re T.H.T., 362 N.C. 446 (2008).

For example, the North Carolina Supreme Court has held that mandamus is the appropriate remedy for the trial court's failure to act within statutory timelines set out in the Juvenile Code. *In re T.H.T.*, 362 N.C. 446. See Chapter 4.9 for an explanation of the statutory time requirements related to entering certain orders in abuse, neglect, dependency, and termination of parental rights proceedings, including the remedy of mandamus.

A writ of prohibition is the converse of mandamus and is used to preclude a court from exceeding its jurisdiction in matters it does not have the power to hear or determine.

Requirements for filing, content, service, and response for mandamus and prohibition are set out in Appellate Rule 22.

Resource: For more on a writs of mandamus and of prohibition, see JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, Vol. 2, Trial (UNC School of Government, 2d ed. 2012). In particular, see Chapter 35 "Appeals, Post-Conviction Litigation, and Writs."

E. Writ of Supersedeas

A writ of supersedeas may be sought to stay the execution or enforcement of any judgment, order, or other determination of a trial court when the judgment is not automatically stayed by the taking of the appeal or when a petition for mandamus, prohibition, or certiorari has been filed and

- a stay order has been sought and denied in the trial court or
- extraordinary circumstances make it impracticable to obtain a stay from the trial court.

N.C. R. APP. P. 23(a)(1).

Requirements for filing, content, service, and response for supersedeas are set out in Appellate Rule 23.

12.10 Trial Court's Role during and after Appeal

A. Trial Court's Role pending Appeal

The Juvenile Code specifically addresses the trial court's ability to enforce orders and exercise jurisdiction in an abuse, neglect, dependency, or termination of parental rights (TPR) proceeding when there is a pending appeal. The specific statute, G.S. 7B-1003, controls over G.S. 1-294, the general statute addressing jurisdiction of a trial court upon perfection of an appeal. *In re M.I.W.*, 365 N.C. 374 (2012).

1. Enforcement of or motion to stay order. During an appeal of an order entered in an abuse, neglect, dependency, or TPR proceeding, the trial court may enforce the order unless a stay is ordered by the trial court or the appellate court. G.S. 7B-1003(a).

A motion in the trial court for a stay when an appeal is taken is governed by Rule 62(d) of the Rules of Civil Procedure. If the trial court denies or vacates a stay, a motion may be made to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Appellate Rule 23. N.C. R. APP. P. 8(a). See section 12.9.E, above (writ of supersedeas). When extraordinary circumstances make it impracticable to move for a stay in the trial court, an application for a temporary stay and writ of supersedeas may be made to the appellate court. N.C. R. APP. P. 8(a).

2. Continued court involvement in non-TPR appeals. Unless the appellate court orders otherwise, when an appeal is pending in an abuse, neglect, or dependency case, the trial court must continue to exercise jurisdiction, conduct hearings (except TPR proceedings, discussed in subsection 3, immediately below), and enter orders related to custody and placement that it finds to be in the child's best interests. G.S. 7B-1003(b).

3. Cannot proceed to TPR during appeal of the underlying matter. G.S. 7B-1003(b)(1) prevents the trial court from exercising jurisdiction and conducting hearings in a TPR action

when an appeal from an underlying abuse, neglect, or dependency action is pending. The North Carolina Supreme Court has held that G.S. 7B-1003(b)(1) prohibits the trial court from exercising jurisdiction over a TPR proceeding until after the issuance of a mandate by the appellate court in the underlying appeal; however, once the appeal has been resolved, the trial court may act on a TPR motion that was filed during the pendency of the appeal. *In re M.I.W.*, 365 N.C. 374 (2012) (TPR motion was filed while appeals of disposition order were pending, but trial court did not act on TPR motion until after the appellate mandate affirming the order had issued and after the time within which a petition for discretionary review could have been filed). In making its ruling, the supreme court reasoned that G.S. 7B-1003 did not divest the trial court of jurisdiction altogether, but rather prohibited the exercise of jurisdiction before the appellate mandate resolving the appeal has issued, and that issuance of the mandate returned the power to exercise jurisdiction to the trial court. *But see In re P.P.*, 183 N.C. App. 423 (2007) (vacating TPR order; TPR petition was filed during an appeal of a permanency planning order that resulted in that order being vacated and remanded but trial court proceeded with the TPR hearing after the appeal was resolved and before complying with the mandate remanding the case; even though the TPR hearing and entry of the TPR order occurred after resolution of the appeal and G.S. 7B-1003(b)(1) prohibits proceeding with TPR hearings "pending disposition of an appeal," the legislature could not have intended the language in G.S. 7B-1003(b)(1) to allow a result that avoids the effects of the appeal).

The prohibition in G.S. 7B-1003(b)(1) against proceeding in a TPR case during the pendency of an appeal applies to appeals from orders designated in G.S. 7B-1001 and does not apply to appeals of orders entered in related cases arising outside of the Juvenile Code. *In re Baby Boy*, 238 N.C. App. 316 (2014) (holding district court had jurisdiction to hear the TPR petition during an appeal of an adoption order that found the mother's relinquishment was void because G.S. 7B-1003 does not apply to orders outside of G.S. Chapter 7B, and the adoption order was entered pursuant to G.S. Chapter 48).

4. Continued court involvement in TPR appeals. While an appeal is pending in a TPR case, the court may enter temporary orders related to custody and placement that it finds to be in the child's best interest. G.S. 7B-1003(b), (c). However, "the trial court has no authority—even in the underlying abuse, neglect, and dependency action—to enter any orders other than ones affecting the custody and/or placement of the juvenile." *In re K.L.*, 196 N.C. App. 272, 273 (2009). The court of appeals in *In re K.L.* stated that TPR proceedings initiated by motion in the abuse, neglect, or dependency action are governed by G.S. 7B-1003(b), and TPR proceedings that are initiated by petition and commence a new action are governed by G.S. 7B-1003(c), but both provisions only allow the court to enter temporary orders affecting the custody and placement of the child that it finds to be in the child's best interest when the TPR appeal is pending.

5. Order requirements pending appeal disposition. Pending disposition of the appeal, orders must meet certain requirements:

- Any order entered during an appeal that places or continues placement of a child in foster care must comply with G.S. 7B-905(b), which requires that a review hearing under G.S. 7B-906.1 be held within ninety days from the dispositional hearing when a child is

removed from the custody of a parent, guardian, custodian, or caretaker. G.S. 7B-1003(e) (note, G.S. 7B-1003(e) also refers to G.S. 7B-905(c) and (d) but those subsections were repealed by S.L. 2015-136, sec. 12; additionally as of October 1, 2017, G.S. 7B-906.1(a) has been amended to require review hearings regardless of whether custody is removed from a parent, guardian, or custodian).

- When the court has found that the child has suffered physical abuse by someone with a history of violent behavior, the court must consider the opinion of the mental health professional who performed the required evaluation on the person before returning the child to the custody of that person pending resolution of the appeal. G.S. 7B-1003(d); *see* G.S. 7B-503(b) (evaluation).

6. Rule 60 of the Rules of Civil Procedure. Rule 60(a) of the Rules of Civil Procedure permits the trial court to correct clerical mistakes and errors in its order arising from oversight or omission up to the time an appeal is docketed in the court of appeals, but the court may not make substantive changes to the order. *In re C.N.C.B.*, 197 N.C. App. 553 (2009) (holding that the trial court could not add a finding that was essential to adjudication of a ground for termination); *In re J.K.P.*, 238 N.C. App. 334 (2014) (court has jurisdiction to correct a clerical mistake, which in this case was the inadvertent checking of a box on the AOC form, pursuant to Rule 60(a) so long as the correction occurs before an appeal is docketed).

Rule 60(b) of the Rules of Civil Procedure permits the trial court to relieve a party from a final judgment, order, or proceeding for the six reasons set out in the statute. When a Rule 60(b) motion is made while an appeal is pending, a request may be made of the trial court to indicate how it would rule on the motion if an appeal were not pending, along with a request to the appellate court to delay consideration of the appeal until the trial court has considered the Rule 60(b) motion. *See In re L.H.*, 210 N.C. App. 355 (2011) (discussing this procedure pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980)).

B. Trial Court's Role after Appeal

1. Modification of order. On affirmation of an order by the appellate court, the trial court may modify its original order as the court finds to be in the child's best interest to reflect the child's adjustment or changed circumstances while the case was on appeal. If modification is ex parte, the court must notify interested parties within ten days to show cause why the modifying order should be vacated or altered. G.S. 7B-1003(c); 7B-1004.

These statutes do not create a right to another review proceeding; they give the trial court discretion to modify or vacate the original order due to changed circumstances. When a party moves to modify or vacate the order, the trial court has discretion to hear or decline to hear evidence. *In re Montgomery*, 77 N.C. App. 709 (1985).

2. Carrying out appellate mandate. The trial court is bound by the mandate of the appellate court but may not act until the mandate issues. The mandate of the court, which consists of certified copies of its judgment and opinion and any direction as to costs, is issued by transmittal from the clerk of the appellate court to the clerk of the trial court. Unless otherwise

ordered, mandates are issued twenty days after the written opinion of the court has been filed with the clerk. N.C. R. APP. P. 32.

Generally, failure to follow an appellate mandate on remand is error. *See In re S.R.G.*, 200 N.C. App. 594 (2009).

- The trial court erred when it failed to carry out the mandate of the court of appeals to make findings according to G.S. 7B-907(b). *In re J.M.D.*, 210 N.C. App. 420 (2011) (decided under previous statute).
- The trial court erred when it ignored the mandate of the court of appeals to hold a new termination of parental rights (TPR) hearing, but the error was not prejudicial when the court, instead, held a permanency planning hearing. *In re R.A.H.*, 182 N.C. App. 52 (2007).
- The trial court committed reversible error when it failed to carry out the mandate of the court of appeals by holding a TPR hearing instead of a permanency planning hearing after remand of the permanency planning order. *In re P.P.*, 183 N.C. App. 423 (2007).

A trial court on remand should also be aware of "the law of the case doctrine" that applies when a question before an appellate court has previously been answered in an earlier appeal in the same case, constituting the law of the case both in subsequent proceedings in the trial court and on a subsequent appeal. *See In re S.R.G.*, 200 N.C. App. 594 (court of appeals reversed a TPR order based on abandonment, one of three grounds alleged by DSS, and remanded for further consideration consistent with its opinion; the law of the case doctrine precluded the trial court on remand from finding one of the other grounds alleged in the petition based on the trial court's previous failure to find that ground).

When an appellate court remands a case to the trial court, the opinion may give the court specific directions or it may say "for further action consistent with this opinion," or "for additional findings." *See, e.g., In re L.C.*, ___ N.C. App. ___, ___, 800 S.E.2d 82, 94 (2017) (remanding "for further proceedings not inconsistent with this opinion"). Within the parameters of the appellate court's mandate, the trial court often has discretion as to how to proceed once the mandate issues. When an appellate court remands a case for additional findings, for example, unless the opinion says otherwise the trial court has discretion as to whether to conduct a further hearing and hear additional evidence. *See In re J.M.D.*, 210 N.C. App. 420 (2011) (rejecting respondent's argument that the trial court erred in refusing to allow her to present evidence on remand, stating that whether to receive new evidence on remand is within the discretion of the court, and in this case there was no abuse of discretion). When a remand allows for a trial court to exercise discretion in determining whether to receive additional evidence, the trial court is not obligated to hear new evidence. *In re A.B.*, ___ N.C. App. ___, 781 S.E.2d 685 (2016) (holding no abuse of discretion when trial court did not hear additional evidence regarding the child's best interests).

An order resulting from a mandate that reverses and remands the order that was appealed must be an entirely new and complete order. *In re A.R.P.* 218 N.C. App. 185 (2012). In *In re A.R.P.*, the court of appeals explained that a reversal is " 'an appellate court's overturning of a lower court's decision[,]' and '[i]n the legal context, 'overturn' means to invalidate.' " 218

N.C. App. at 188 (citations omitted). Because the appealed order is invalidated, the order after remand cannot supplement findings of fact and conclusions of law in the order that has been reversed, and doing so results in an incomplete order. *In re A.R.P*. 218 N.C. App. 185.