District Court Judges Summer Conference
Child Welfare Case Update
September 23, 2016-June 6, 2017

By Sara DePasquale, School of Government, UNC-Chapel Hill

Contents

Abuse/Neglect/Dependency 5
Subject Matter Jurisdiction: Standing 5
In re A.P 5
Notice Pleading 6
In re K.B. 6
Appointed Counsel: No Right to Self-Representation 6
In re J.R. 6
Adjudication Findings 7
In re L.C. 7
In re L.Z.A 7
Adjudication by Consent 8
In re J.S.C. 8
Adjudication by Hearing or Consent 8
In re K.P. 8
Evidence: Self-Incrimination 9
In re L.C. 9
Abuse: Non-Accidental 10
In re K.B 10
In re L.Z.A. 10
Neglect: Stipulated Findings 10
In re G.T 10
Neglect: Evidence, Findings, Conclusions 11
In re K.B. 11
In re L.C. 11
In re J.A.M. 12
In re L.Z.A. 12
Dependency: Findings 13
In re L.C 13

Visitation: Minimum Outline 13
In re L.Z.A. 13
Visitation: Findings for No Visits 13
In re T.W. 13
Initial Disposition: Findings of Aggravating Factors 14
In re G.T. 14
In re L.C. 14
In re L.Z.A. 14
Disposition: Relative Placement Consideration 15
In re L.C 15
Permanency Planning Hearing: Reasonable Efforts, Reunification, Findings 15
In re T.W. 15
Cease Reasonable Efforts: Evidence and Findings 16
In re P.T.W. 16
In re J.T. 17
Permanency Planning Hearing: 7B-906.1 vs. 7B-1000 17
In re J.S. 17
Permanency Planning Hearing: Waive Reviews 18
In re T.W. 18
Permanent Plan: Guardianship; Parent's Constitutional Rights; Verification of Resources; Findings 18
In re C.P. 18
In re R.P., ... 19
In re T.W. 19
Guardianship: Parental Rights Retained 20
In re M.B. 20
7B-911: Orders 20
In re J.K 20
Clerical Error 21
In re J.K 21
Interstate Compact on the Placement of Children (ICPC): Moot 21
In re M.B. 21
Appeal: Moot 21

In re J.S. 21
Responsible Individual List 22
Subject Matter Jurisdiction, Stay, Findings/Conclusions 22
In re Patron 22
Termination of Parental Rights (TPR) 22
Subject Matter Jurisdiction: 7B-1101 22
In re J.M. 22
Subject Matter Jurisdiction: Verified Motion 23
In re E.B. 23
Appointment of GAL for Child 23
In re P.T.W. 23
Ineffective Assistance of Counsel 23
In re M.Z.M. 23
Evidence: Expert Witness 24
In re K.G.W. 24
Evidence: Quash Subpoena/Motion in Limine 24
In re A.H. 24
Grounds: Findings, Circumstances at Time of Hearing 26
In re A.B 26
Ground: Failure to Correct Conditions 27
In re L.L.O 27
Ground: Neglect 28
In re L.L.O. 28
In re C.L.S. 28
Ground: Dependency 28
In re D.T.N.A. 28
Ground: Willful Abandonment 29
In re D.T.N.A. 29
In re D.M.O. 29
Prior TRP/Safe Home; Incarceration; Findings 30
In re J.D.A.D 30
Best Interests 30

In re A.H. 30
UCCJEA 31
Modification Jurisdiction 31
In re T.E.N 31
In re T.R 31
Civil Cases Related to Child Welfare 32
Personal Jurisdiction: Minimum Contacts 32
Hedden v. Isbell 32
Jurisdiction Between Custody and Ch. 35A Guardianship of Minor 32
Corbett v. Lynch 32
Criminal Case with Application to Child Welfare 33
Child Abuse: Corporal Punishment 33
State v. Varner 33
Rule 412 Evidence (Prior Sexual History of Victim) 34
State v. Jacobs 34
Convicted Sex Offender Permanent No Contact Order with victim's children 35
State v. Barnett, Jr. 35
Sex Offense with a Child and Sex Activity by a Substitute Parent 35
State v. Johnson 35

Abuse/Neglect/Dependency

Subject Matter Jurisdiction: Standing

In re A.P., ___ N.C. App. ___ (April 18, 2017)

Held: Vacate

Stay granted 5/9/2017; PDR filed 5/23/2017

- Facts regarding residence
  - At time of child's birth, respondent mother resided in Cabarrus County.
  - Respondent mother agreed to safety plan with Cabarrus County DSS where child lived in a home in Rowan County while mother obtained inpatient treatment in Mecklenburg County.
  - Upon respondent mother's discharge, she and child moved to a home in Mecklenburg County and entered into agreement with Cabarrus County DSS that she would participate in in-home family services plan. Cabarrus County transferred case to Mecklenburg County DSS.
  - Respondent's sister discovered respondent and child living outside of agreed to home, and sister took child back to the home in Rowan County, which was approved by Mecklenburg County DSS.
  - Respondent moved to South Carolina and agreed child would stay in Rowan County home.
  - Respondent returned to Mecklenburg County and was jailed and later received in-patient treatment there.
  - Respondent notified Mecklenburg County DSS she was residing in Cabarrus County.
  - The next day, Rowan County placement provider called Mecklenburg County DSS to inform it that she could not care for child. Mecklenburg County DSS contacted Cabarrus County DSS to discuss transferring the case back, but Cabarrus County DSS could not confirm respondent mother was residing in its county.
  - 6 days later, Mecklenburg County DSS took physical custody of the child and obtained nonsecure custody from a Mecklenburg County magistrate.
  - Child was adjudicated dependent and neglected in Mecklenburg County district court.
- Abuse, neglect, and dependency actions are "purely 'statutory in nature and governed by Chapter 7B'", which requires certain procedures and subjects the court to certain limitations (*citing In re T.R.P.,* 360 N.C. 588, 591 (2006)). GS 7B-401.1(a) authorizes a county social services department's director or authorized representative to file a petition alleging a juvenile's abuse, neglect, or dependency. GS 7B-101(10) includes in its definition of director of the county department "the county in which the juvenile resides or is found."
- Mecklenburg County DSS did not have standing to file the juvenile petition, and standing is jurisdictional. The petition did not invoke the court's jurisdiction as it did not allege the address or residence of respondent mother or child or the child's physical presence in Mecklenburg County. Pursuant to GS 153A-257(a), the child's legal residence was that of the person with whom she resided for four months -- in Rowan County -- because the child was not residing with a parent or relative and was not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility or similar institution or facility. At the time the petition was filed, the child was not found in Mecklenburg County. Because

Mecklenburg County DSS did not have standing, the trial court lacked subject matter jurisdiction.

- The provision of GS 7B-402(d), which provides that when a petition is filed in a county that is not the child's residence, the petitioner must provide a copy of the petition and notices of hearing to the director of the county department where the child resides, addresses notice and not standing requirements.

Notice Pleading

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- The court adjudicates "the existence of nonexistence of any of the conditions alleged in a petition" (GS 7B-802) and "if the court finds… that allegations in the petition have been proven by clear and convincing evidence, the court shall so state" in its written order (GS 7B-807). Factual allegations may be included in an attachment to a form petition (*citing In re D.C.*, 183 N.C. App. 344 (2007).
- Although the box on the form petition identifying the condition of dependency was not checked, the factual allegations attached to the petition were sufficient to put the respondent mother on notice of the alleged ground of dependency. The alleged facts included statements that identified specific injuries to the child, the child's mental health diagnosis and medication, that "the legal custodian was unable to provide an alternative placement resource for the child", and "the legal custodian failed to provide proper supervision" after the child was left home and sustained injuries. The factual allegations encompass the language reflected in GS 7B-101(9), which defines dependency: the failure to provide for the child's care or supervision and the lack of an appropriate alternative child care arrangement.
- Additionally, the court's order entering stipulations for adjudication started with a statement that the petition alleges abuse, neglect, and dependency, which shows the respondent mother had adequate notice that dependency would be at issue for adjudication.

Appointed Counsel: No Right to Self-Representation

In re J.R., ___ N.C. App. ___ (November 1, 2016)

Held: Affirmed

- G.S. 7B-602(a1) states the court "may" allow a parent to proceed pro se when the court finds that the parent makes a knowing and voluntary waiver of appointed counsel. The use of the word "may" means the court has discretion when determining whether a parent may proceed without the assistance of counsel; the court is not required to allow the respondent parent to proceed pro se.
- A parent does not have a statutory or constitutional right to self-representation. Previous language in the Juvenile Code that provided for the right to self-representation was removed by amendments made to the Code since 1998. The Sixth Amendment addresses the right to self-representation and applies to criminal proceedings; it does not apply to abuse, neglect, or dependency proceedings.

- The court did not abuse its discretion in denying the respondent mother's request to proceed pro se. In support of its decision, the court found the mother's waiver was not knowing and voluntary as
    - she was facing potential criminal charges that were related to the incident resulting in the abuse and neglect proceeding and she would not be able to protect herself from self-incrimination if she were to proceed pro se, and
    - she was being influenced and possibly coerced by her abusive boyfriend (who was a caretaker in the action) to request that her counsel be released so that she could proceed pro se.

Adjudication Findings

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: affirm in part, vacate in part, remand

- A finding of fact that states respondent "proffered in pertinent part, the following testimony" that then summarizes respondent's testimony is not a finding of fact but is instead a recitation of the witness' testimony.
- It is not per se reversible error for findings of fact to be verbatim recitations of allegations contained in the petition if there is evidence in the record to support those findings and the court's logical reasoning in making the findings regardless of whether the findings themselves mirror the language in a pleading. The court's findings are supported by the respondent's own testimony.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- "[I]t is not per se reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *In re* J.W., ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015). Although the adjudication order in this case included some findings of fact that were verbatim recitations of the allegations in the petition, the record shows the trial court exercised a process of logical reasoning, based on the evidentiary facts before it, to find the ultimate facts necessary to adjudicate the child abused and neglected. The record shows the court engaged in an independent decision-making process when it (1) made substantive findings in its order that are not verbatim recitations of the language in the petition, (2) considered evidence from days of witness testimony and the admitted medical records, and (3) took the matter under advisement and modified a proposed finding it discussed with the parties.
- Findings of fact that addressed the possible time frames for the child's injuries were supported by competent evidence. There was one finding that was not supported by evidence, but the error was not prejudicial.

Adjudication by Consent

In re J.S.C., ___ N.C. App. ___ (May 2, 2017)

Held: Affirmed

- There are two procedural paths for an abuse, neglect, or dependency adjudication: (1) an adjudicatory hearing and (2) adjudication by consent.
    1. An adjudicatory hearing involves a judicial process that determines the existence or nonexistence of any of the conditions alleged in the petition and requires the allegations in the petition to be proved by clear and convincing evidence. G.S. 7B-802, -805; *In re K.P.*, ___ N.C. App. ___, 790 S.E.2d 744 (2016).
    2. An adjudication by consent occurs in the absence of an adjudicatory hearing and requires that (i) all parties be present or represented by counsel who are present and authorized to consent, (ii) the child is represented by counsel, and (iii) the court makes sufficient findings of fact. G.S. 7B-801(b1); *In re K.P.*, ___ N.C. App. ___, 790 S.E.2d 744 (2016).
- When a trial court enters a consent adjudication order based entirely on stipulated facts (which are judicial admissions and are binding on the party who agreed to the stipulation), the court does not engage in the process of fact-finding, which includes receiving and weighing evidence and assessing witness credibility. The court has no occasion to apply the clear and convincing evidence standard required under G.S. 7B-805 "Quantum of proof in an *adjudicatory hearing*" (emphasis supplied in opinion). It was not reversible error for court to fail to state in its consent adjudication order that the adjudicatory findings were based on the clear and convincing evidentiary standard under G.S. 7B-805 (applying to an adjudicatory hearing).
- Note the opinion does not address the application of G.S. 7B-807(a), which provides that if the court finds from the evidence (including stipulations) that the allegations in the petition have been proved by clear and convincing evidence to so state, because the appellant did not timely raise this issue.

Adjudication by Hearing or Consent

In re K.P., ___ N.C. App. ___ (October 4, 2016)

Held: reverse and remanded in part; vacated in part

- Note, because the court of appeals reversed and remanded the adjudication order, the subsequent orders (including permanency planning order) are vacated

- G.S. 7B-802 requires the trial hold an adjudicatory hearing, where allegations in the petition alleging the child is abused, neglected, or dependent are proved by clear and convincing evidence. G.S. 7B-807(a) allows the court to accept the parties' stipulations to adjudicatory facts when those stipulated facts are either (1) made in writing, signed by each party, and submitted to the court or (2) read into the record with each party orally agreeing to the stipulated facts. These mandatory statutory procedures were not complied because there was no adjudicatory hearing. Instead, two DSS reports were submitted to the court, no testimony was taken, and an exchange between the court and various counsel about dispositional issues (visitation, transportation, support) occurred.

- G.S. 7B-801(b1) authorizes a consent adjudication order when (1) all parties are present or represented by counsel who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact. An adjudicatory order is not valid when it fails to find that there was a stipulation to adjudicatory facts or a consent to an adjudication of the children was reached. In this case, there was no evidence that the parties stipulated to adjudicatory facts or that consent was reached. There was also no evidence that a proposed consent order had been drafted for the parties to reach an agreement.

Evidence: Self-Incrimination

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: vacate adjudication of abuse, remand to disregard portions of respondent's testimony

- Facts: Respondent mother, who had pending misdemeanor child abuse charges as a result of leaving her child in a specific person's care in violation of a safety plan with DSS, was summonsed to appear at the adjudicatory hearing. She was called as the sole witness in the A/N/D adjudicatory hearing by the DSS attorney. After answering questions about the safety plan that she agreed to after her child was injured the first time, the respondent mother invoked her V Amendment right when she was directly asked who she thought caused her child's injuries. The court ordered her to answer after concluding that she had waived her right to invoke the privilege by answering earlier questions about the safety plan and the specific individual.
- The V Amendment privilege against self-incrimination in a future criminal proceeding extends to civil proceedings. The finder of fact in the civil action may use the witness' invocation of that privilege to infer that the testimony would have been unfavorable to her.
- The standard of review for alleged constitutional violations is de novo. Applying the reasoning discussed in *Herndon v. Herndon,* 368 N.C. 826 (2016) regarding the V Amendment's application to a voluntary versus a compelled witness, respondent mother was a compelled (not voluntary) witness as a result of being called by the adverse party even in the absence of a subpoena. Unlike a voluntary witness, who can choose whether or not to testify after weighing the advantage of taking the privilege against putting forward her version of the facts and her reliability as a witness, a compelled witness must testify and "has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate." *Herndon* at 830. It is at that point that a compelled witness may invoke or waive the privilege. If the compelled witness invokes the privilege, the court may order her to testify if it determines the answer will not be self-incriminating. Respondent's answer was incriminating, and she was deprived of her constitutional right against self-incrimination. The court should not have considered the answer when determining whether the child was abused.
- Although not all constitutional errors are prejudicial, respondent mother was prejudiced in this action. The finding that respondent knew that an individual caused the child's initial injuries supports the determination that the child was abused as a result of respondent allowing the creation of a substantial risk of serious physical injury by other than accidental means when the child suffered a second round of injuries after being left by the respondent in that same

individual's care. *See* GS 7B-101(1). Although not knowing the weight given to respondent's testimony, it appears that her testimony likely constituted the primary basis for the finding.

Abuse: Non-Accidental

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- **Self-Harm = Other than Accidental Means:** GS 7B-101(1)a. and b. define abused juvenile to include a juvenile whose parent inflicts or *allows to be inflicted* serious physical injury on the juvenile by other than accidental means or who *creates* or allows to be created *a substantial risk of serious physical injury* to the child by other than accidental means. The court concluded both criteria existed and found the supporting facts by clear and convincing evidence. The child has significant mental health issues that required placements outside the home, including residential care. Upon the child's discharge from residential care, respondents allowed his psychotropic Rx to lapse after they failed to follow up with a psychiatrist. The child had several injuries (bruising on eyes and lips, a fractured finger, a puncture wound on his finger, and scratches on his nose) that the child provided conflicting explanations for, which was supported by the testimony of two doctors and reports admitted in evidence that included respondent mother's acknowledgement that the child gave different explanations. The adjudication of abuse is based in part on the respondents allowing the child to cause injuries to himself, which is supported by the finding that the lack of a reasonable explanation for the injuries created a condition likely to lead to serious physical injury. Specifically, respondents failed to properly supervise the child, who they knew had significant mental health and behavior issues, to make sure he did not cause injuries to himself. They allowed his medication to lapse. The child did not experience any substantial injuries when outside of the home, which demonstrated those placements provided proper supervision. At home, he was injured and those injuries were by other than accidental means that the respondents allowed to occur as a result of their failure to maintain his Rx and provide adequate supervision to meet his special needs.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- A child may be adjudicated abused when he or she sustains unexplained non-accidental injuries even without a finding of a pattern of abuse or the presence of risk factors. The evidence and findings of fact show the child, while in her parents' care, suffered two fractures and a subdural hematoma that expert witnesses had determined were caused by non-accidental trauma. The lack of an explanation and/or a rule-out of every possibility for the cause of the child's severe injuries are not required for an abuse adjudication.

Neglect: Stipulated Findings

In re G.T., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed

- Respondent mother stipulated to the facts alleged in the department's neglect and dependency petition, which included

1. mother used marijuana, meth, and cocaine during her pregnancy and the child was born with a rapid heartbeat and signs of withdrawal;
2. the mother was belligerent at the hospital, refused to take her psychiatric medication, had to have the infant removed from her, and was held on an involuntary commitment; and
3. the father was present at child's birth despite a DVPO ordering no contact with the mother after he stabbed her, dislocated her jaw, and held a gun to her head threatening to kill her.

- The stipulated findings of fact support the court's conclusion that the child is neglected as a result of (1) lacking proper care, supervision, or discipline from a parent, (2) living in an injurious environment, (3) being exposed to controlled substances resulting in the child's impairment, and (4) being at substantial risk of an impairment as a result of mother's erratic behavior in the hospital and disregard for the DVPO against the father.

Neglect: Evidence, Findings, Conclusions

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- Review of a court's adjudication order is based on whether the findings of fact are supported by clear and convincing evidence and whether the legal conclusions are supported by the findings. The trial court's findings are binding if evidence exists to support the finding even if evidence supports a contrary finding. Unchallenged findings are binding on appeal.
- GS 7B-101(15) defines a neglected juvenile as one who does not receive proper care, supervision, or discipline from a parent….or who is not provided necessary medical care… or who lives in an environment injurious to his welfare. The conclusion of neglect was supported by the findings that respondent failed to follow the child's discharge recommendations to obtain a psychiatrist for the child and that the child's Rx lapsed for almost two weeks because the child did not have a doctor to refill the Rx. These findings were based on testimony of the social worker and expert. Additional findings were that the respondents did not provide proper supervision or correct discipline to address the child's emotional needs and behavior issues given the pattern of injuries he suffered over time that required more supervision and hypervigilance.

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: affirmed in part

- GS 7B-101(15) defines a neglected juvenile in part as one who does not receive proper care, supervision, or discipline from a parent or who is not provided necessary medical care or who lives in an environment injurious to his or her welfare.
- Findings about the respondent mother's decision to leave her child in the care of an individual who was barred by a safety plan from having contact with the child and the respondent's failure to timely obtain medical treatment for significant injuries that occurred when the child was in that individual's care were supported by competent evidence and support a neglect

adjudication. The 2-day delay in seeking necessary medical care supports the neglect adjudication.

In re J.A.M., ___ N.C. App. ___ (Dec. 20, 2016)

Held: Reversed

***Stay granted by NC Supreme Court on 1/10/17; PDR filed 1/31/2017**

- Facts: Mother had six other children who were involved with the department primarily because of domestic violence with the fathers of those children. Eventually, her rights to the children were terminated. Father has a prior history with the department due to domestic violence. His child was reunified with the mother (who is not the respondent mother in this action). A report was made to the department after the child in this action was born. During the assessment, the social worker determined the home was appropriate, the child seemed healthy and well-cared for, and the police had not been called to the home. Based on the parents' prior history with the department, the social worker wanted the parents to agree to a Safety Assessment. The parents refused to work with the department. The department filed a petition, and the child was adjudicated neglected. Respondent mother appealed.
- There were three findings of fact about the child's current living situation -- one of which was that the mother never acknowledged her role in the termination of her parental rights to her other children. This finding was not supported by the evidence as the only evidence that was introduced was the mother's testimony that the TPR involved her own poor decisions and choices.
- The conclusion of neglect is not supported by the findings of fact. The only relevant findings include (1) the mother failed to ask the child's father about his alleged assault on his own sister and (2) different findings about each parent's long history with the department and their other respective children who were neglected. Although there was no evidence that the parents remedied the issues that caused prior injurious environments regarding their other children, the department must introduce evidence to prove its allegations of neglect by clear, cogent, and convincing evidence. Here, there was no evidence that services were needed to alleviate any concerns about an injurious environment. There was no evidence or findings about current domestic violence or any domestic violence between the parents or in the presence of the child. Instead the findings were about the domestic violence that occurred more than 3 years before this child's birth. There were no findings that the child suffered from a physical, mental, or emotional impairment or had a substantial risk of such impairment as a consequence of living in the respondent-mother's home.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- A juvenile is neglected when (1) he or she does not receive proper care, supervision, or discipline from a parent, guardian, custodian, or caretaker or lives in an injurious environment and (2) as a result, the child experiences a physical, mental, or emotional impairment or substantial risk of such impairment.
- A child may be adjudicated neglected when the evidence and findings show the child suffered non-accidental injuries while in her parents' custody even though there is no explanation for

how those injuries occurred. The child's skull and arm fractures and subdural hematoma while in her parents' custody establish that the child either did not receive proper care or supervision or lived in an injurious environment and suffered a physical impairment as a result.

Dependency: Findings

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: vacated and remanded in part

- GS 7B-101(9) defines dependent juvenile and requires the court to address and make findings of two prongs: (1) the parent's ability to provide care or supervision and (2) the availability to the parent of alternative child care arrangements. Failure to make both findings is reversible error. The court failed to make findings of either prong.

Visitation: Minimum Outline

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- An order that states visitation shall be supervised and take place in accordance with the current plan meets the requirements of G.S. 7B-905.1 to set out the duration, frequency, and level of supervision, when the current plan, was memorialized in a prior order. The plan established visits on Tuesdays and Saturdays from 12 p.m. to 2 p.m. at the department's facility, and allows for expanded visits. By reading the two orders together, the court set forth a plan that established supervised visits, twice a week (frequency) for two hours a visit (duration).

Visitation: Findings for No Visits

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed in part

- When a child is placed outside of the home, G.S. 7B-905.1(a) requires that the court order appropriate visitation that is in the child's best interests and consistent with the child's health and safety. The court does not have to order visitation when it makes findings that visitation is not in the child's best interests or that the parent has forfeited her right to visitation. An order denying visitation is reviewed for an abuse of discretion.
- There was no abuse of discretion when the court denied visitation between respondent mother and her child after finding visitation was not desirable and the mother was awaiting her criminal trial (which included a no contact order) for allegedly sexually abusing her child, was not compliant with substance abuse or mental health treatment, and was acting in a manner that was inconsistent with her child's health and safety.

Initial Disposition: Findings of Aggravating Factors

In re G.T., ___ N.C. App. ___ (October 18, 2016)

Held: Reversed in part

There is a dissent and an appeal has been filed with the NC Supreme Court

- GS 7B-901(c)(1)e. authorizes a court to cease reunification efforts with a parent "if the trial court **makes** a finding that: a court of competent jurisdiction **has determined** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile: … chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile."
- Statutory interpretation requires a plain and unambiguous reading of the statute to determine legislative intent. Based on the different verb tenses used in the statute, the present perfect tense of "has determined" requires that the court reference a prior order from a previously held hearing rather than make a determination in the current disposition hearing. This previously held hearing could be an adjudicatory or other prior hearing in the same juvenile case or in a collateral proceeding held in a trial court. The prior adjudication order did not contain the ultimate finding of fact that the respondent mother allowed the continuation of chronic or toxic exposure to controlled substances that caused impairment of or addition in the newborn. The findings that toxicology results for the newborn were pending and that the newborn's withdrawal and impairment at birth supported the neglect adjudication but not the ultimate finding of fact needed to cease reasonable efforts with the respondent mother.

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: vacated and remanded in part

- Citing to *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d. 274 (2016) and its interpretation of the language in GS 7B-901(c), the trial court cannot determine for the first time in an initial dispositional order that aggravating circumstances under GS 7B-901(c) exist. Without those findings being made in an order prior to the initial dispositional order, the court's conclusion that reasonable reunification efforts must cease was erroneous.
    - Author's Note: *In re G.T.,* decided by a divided panel, is currently before the N.C. Supreme Court

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- At initial disposition, the trial court adopted a concurrent plan of reunification and adoption. Because the court did not order that reasonable efforts for reunification are not required, the court did not have to make findings of fact of at least one aggravating factor enumerated in G.S. 7B-901(c).
- When the court orders a concurrent plan of reunification and adoption at initial disposition, the court is not required to make findings specified by G.S. 7B-906.1, which governs review and permanency planning hearings. When the court holds its permanency planning hearing, it will

need to make the necessary statutory findings governing permanency planning hearings at that time.

- *Author's Note: It appears that the court ordered concurrent planning as the initial dispositional order and did not specify that the plan was a permanent plan.*

Disposition: Relative Placement Consideration

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: vacated and remanded in part.

- GS 7B-903(a1) requires the court to consider relative placement and order such placement if the court finds the relative is willing and able to provide proper care and supervision in a safe home unless the court finds the placement is not in the child's best interests. Failure to make the finding that a child's placement with the relative is not in the child's best interest will result in a remand. In ordering a primary permanent plan of adoption and secondary permanent plan of guardianship that did not specify the relative that the respondent mother suggested for possible placement, the court was required to make the finding about the placement not being in the child's best interests. Waiting for DSS to complete an evaluation of the relative's home for a potential placement does not obviate the need for that finding.

Permanency Planning Hearing: Reasonable Efforts, Reunification, Findings

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Vacate in part and remand

- *Citing In re* Shue, 311 N.C. 586 (1984), the essential aim of dispositional and review hearings is to reunite a child (who has been removed from his or her parent's care) with his or her parents. As a result, the Juvenile Code limits when a court may order that reasonable efforts to reunify a parent with his or her child is not required.
- The court's authority to order that reasonable efforts for reunification are not required because of any of the factors enumerated in G.S. 7B-901(c) is limited to the initial dispositional hearing and order only. G.S. 7B-901(c) factors do not apply to review or permanency planning hearings and orders.
    - *Author's Note*: *See In re* G.T., ___ N.C. App. ___ (October 18, 2016), which held that G.S. 7B-901(c) does not authorize the court to make a determination in the initial dispositional hearing that a factor exists but instead requires the court to find that there was a prior order that determined one of the factors enumerated in G.S. 7B-901(c) exists.
- At permanency planning, if the initial dispositional order did not order reasonable efforts are not required pursuant to a G.S. 7B-901(c) factor, a court may only order reunification is not a primary or second permanent plan (and thereby relieve the department of providing reasonable efforts to reunify a parent with his/her child) after making an ultimate finding of fact designated in G.S. 7B-906.2(b): "…reunification efforts clearly would be unsuccessful or would be

inconsistent with the juvenile's health or safety." Although the court made evidentiary findings of fact pursuant to G.S. 7B-906.2(d) about the mother's lack of progress, it did not make the required ultimate finding of fact.

- The court's finding under G.S. 7B-906.1(d)(3) that efforts to reunite the juvenile with his or her parent would clearly be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable time requires the court to consider a permanent plan for the child. If this finding is made at a review hearing, it "trigger[s] the court's duty to commence the permanent planning process as early as the initial 90-day review hearing." G.S. 7B-906.1(d) does not authorize an order ceasing reunification efforts.
    - *Author's Note*: the language of the finding specified in G.S. 7B-906.1(d)(3) is based on amendments made by S.L. 2016-94, effective July 1, 2016, which are referenced in FN 4 of the published opinion
    - *Author's Second Note*: If the review hearing has not be designated as a permanency planning hearing and 15 days' notice of a permanency planning hearing was not provided to the parent, the court may not proceed to permanency planning after making the 7B-906.1(d)(3) finding at the review hearing if the parent objects. The court will have to schedule a subsequent permanency planning hearing that provides the statutorily required notice. *See* G.S. 7B-906.1(b); *In re* K.C., ___ N.C. App. ___ (August 2, 2016) which was published after initially being unpublished (note that Westlaw does not reflect the change to it being a published opinion).

Cease Reasonable Efforts: Evidence and Findings

In re P.T.W., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- A review of an order ceasing reasonable efforts for reunification is based on
    - whether the trial court made appropriate findings of fact,
    - whether those findings are based on competent evidence,
    - whether the findings support the court's conclusion, and
    - whether the court abused its discretion with respect to the disposition.
- Competent evidence is evidence that a reasonable mind accepts as adequate to support the finding. The department of social services report, which was submitted to the trial court and admitted into evidence without objection at the cease reunification hearing, is competent evidence. In addition, the department social worker's testimony is competent evidence.
- Based on the contents of the department's report and the social worker's testimony, the court's findings of the mother being substantiated for sexual abuse of another one of her children who was not the subject of this action, her failure to comply with the case plan, her failure to demonstrate sustained parenting improvements, her lack of awareness about her history of domestic violence with the child's father, and her failure to maintain stable housing were supported by competent evidence.
- The court's finding that the respondent mother did not reengage in therapy when she moved to another county were not supported by competent evidence as the only evidence introduced on that issue was the mother's testimony of her efforts to continue with therapy and her

attendance at one session. However, the remaining facts that were found by the court support the court's ultimate decision to cease reasonable efforts for reunification.

- The facts and conclusions must be based on evidence that is *presented at the hearing* that results in an order ceasing reasonable efforts (emphasis in original). The court's finding that the mother failed to demonstrate parenting improvements were supported by the department's report and social worker's testimony, both of which were introduced at the hearing. Although on appeal, respondent mother pointed to prior court orders that indicated she was making progress with her parenting, those orders and examples of her improved parenting were not offered at the hearing that resulted in the order ceasing reasonable efforts for reunification.

    - *Author's Note: This case was decided under G.S. 7B-507, which was amended effective October 1, 2015. Additional Note: In its recitation of the procedural history of the dependency and subsequent termination of parental rights actions, this opinion appears to use the generic term "review hearing" for each type of hearing that occurred in the actions (the adjudicatory, initial dispositional, review, permanency planning and termination of parental rights hearings).*

In re J.T., ___ N.C. App. ___ (February 21, 2017)

Held: Vacate and remand for further proceedings

- When a court fails to hear evidence at a permanency planning hearing, its findings of fact are not support by competent evidence. A court's incorporation by reference of court reports (the DSS report and the GAL report) without any oral testimony from a witness are insufficient to support findings of fact. Statements by attorneys are not evidence.
- When an order ceasing reunification efforts contains insufficient findings of the criteria required to cease reasonable efforts, a termination of parental rights (TPR) order may cure those defects by making the required findings in the TPR order. Here, the TRP order failed to include the findings required to cease reunification. Both orders must be vacated.

Permanency Planning Hearing: 7B-906.1 vs. 7B-1000

In re J.S., ___ N.C. App. ___ (Nov. 15, 2016)

Held: Affirmed

- The language of 7B-1000(a), which addresses a review hearing that authorizes the court to modify or vacate an order based on a change in circumstances or the needs of the juvenile, does not apply to a permanency planning hearing held pursuant to G.S. 7B-906.1. Respondent mother's argument that the court did not comply with G.S. 7B-1000(a) in a 7B-906.1 hearing lacks merit.

Permanency Planning Hearing: Waive Reviews

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Remanded

- G.S. 7B-906.1(a) requires that after the initial permanency planning hearing, the court must hold permanency planning hearings at least every six months. It is reversible error for the court to waive these subsequent hearings when it has not made written findings of fact by clear and convincing evidence of each of the factors enumerated in 7B-906.1(n).

Permanent Plan: Guardianship; Parent's Constitutional Rights; Verification of Resources; Findings

In re C.P., ___ N.C. App. ___ (March 7, 2017)

Held: Affirmed

- The Due Process clause protects a parent's paramount constitutional right to custody and control of his/her child. Before applying the best interests of the child standard when determining (at a permanency planning hearing) custody or guardianship to a non-parent, the court must find that the parent is unfit or has acted inconsistently with his/her constitutionally protected status. However, if a parent does not raise the right to that determination before the trial court, he/she waives the right to that determination.
- The court's conclusion that guardianship was in the child's best interest is supported by the findings that were based on competent evidence, specifically the social worker's testimony addressing respondent's failure to complete the domestic violence program, three years after the children were removed because of domestic violence. Although there were findings of respondent's progress, those findings should not be viewed in isolation but must be considered as part of the totality of all the court's findings. The findings regarding respondent's progress reflect the court's consideration of her progress when making its determination. There was no abuse in discretion in determining that guardianship with the child's caretaker was in the child's best interests.
- Before the court orders guardianship, it must verify the proposed guardian (1) understands the legal significance of the appointment and (2) has adequate resources to appropriately care for the child. There are no specific findings that must be made; the record must contain competent evidence for both components of the verification. Although the proposed guardian's testimony of "yes" answers in response to the court's questions would not have been sufficient evidence of his resources or ability to care for the child, the record also included reports from the department and the child's GAL. Those reports established the child was living in a stable, approved home with his own bedroom, toys, and tv; appeared happy and safe; responded positively to the proposed guardian's structure and consistency; transitioned to public school, had a decrease in prior behavioral issues; and attended his many medical, dental, and therapy appointments. Although the record showed a short period were the proposed guardian had been laid off, there was evidence that the GAL believed the proposed guardian was now working, and the proposed guardian's application for TANF (welfare) benefits during his brief period of unemployment demonstrated his appreciation of the financial burden of caring for the child and his intent to prepare for it. The findings also included the motion and order allowing

the proposed guardian to intervene, which addressed his consistent provision of food, clothing, and necessities to the child in the past. The court's determination that the proposed guardian's resources were adequate are satisfied by the evidence of the proposed guardian's long close relationship with the child, willingness to intervene in the action, and the undisputed evidence of his demonstrated ability to provide for the child.

- *Author's Note*: G.S. 7B-401.1(h) was amended in July 2016, removing the right of a caretaker to intervene in an A/N/D proceeding.

In re R.P., ___ N.C. App. ___ (March 21, 2017)

Held: reverse and remand

- Before ordering guardianship to a nonparent as a permanent plan, the court must find by clear and convincing evidence that the respondent parent was unfit or acted inconsistently with his constitutionally protected status as a parent. This finding is required even when a juvenile has previously been adjudicated neglected and dependent. Here, the order made no reference to the respondent father's constitutionally protected status as a parent.
- Although a respondent parent can waive the required findings regarding his/her constitutionally protected parental status when the issue is not raised before the trial court, the respondent father did not waive those findings here. Procedurally, there had been a permanency planning hearing the month before, where the court determined that the concurrent permanent plans were guardianship and reunification and that it would proceed with the permanent plan of guardianship at the next hearing. Guardianship was not ordered until the next permanency planning hearing, where the evidence at that hearing was limited to visitation only. As a result, the respondent father was not offered the opportunity at that hearing to raise an objection on constitutional grounds and, therefore, did not waive his right to the required findings.

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Vacate in part and remand

- Although specific findings are not required by G.S. 7B-906.1(j), the court must verify that a non-parent who will obtain custody (or guardianship) of the child understands the legal significance of the placement and will have adequate resources to care for the child.
- There was competent evidence in the record that showed the aunt, who was obtaining custody of the child, understood the legal significance of a custody order. The evidence included the department social worker's report and information from the child's guardian ad litem, the department social worker, and the aunt.
- Evidence that a child has been successfully maintained in the home for several months is not sufficient evidence to verify that there are adequate resources. The court must make an independent determination that the resources available to the potential custodian are adequate to care for the child. The following evidence was insufficient: the child was successfully maintained in the aunt's home for ten months and had his own room; the aunt was unemployed but receiving unemployment benefits and was looking for work; the guardian ad litem thought the aunt needed more financial support to care for the child; and other relatives were providing additional support and assistance to care for the child.

Guardianship: Parental Rights Retained

In re M.B., ___N.C. App. ___ (May 16, 2017)

Held: Affirmed

- GS 7B-906.1(e) provides that at a permanency planning hearing where the child is not placed with a parent, the court shall consider the following criteria and make written findings of those that are relevant. The factor in (e) addresses whether guardianship or custody with a suitable person who is not the parent should be established and if so "the rights and responsibilities that should remain with the parents."
- There is no requirement that the court make findings that constitute individual decisions on whether a parent retains every right and responsibility that he or she had before the order granting custody or guardianship. Unless the order provides otherwise, the parent's rights and responsibilities, apart from visitation, are lost when the child is in the custody or guardianship of another person. Respondent mother retained no rights when the order only addressed visitation, which was suspended until she showed her mental health stabilized. The order complied with G.S. 7B-906.1(e)(2).

7B-911: Orders

In re J.K., ___ N.C. App. ___ (April 18, 2017)

Held: Affirm in part (permanency planning order); reverse and remand custody order

- GS 7B-911 provides the procedures for transferring a GS 7B abuse, neglect, or dependency proceeding to a Chapter 50 civil action when DSS involvement is no longer needed and the case is properly handled as a custody dispute between private parties. Compliance with GS 7B-911 is jurisdictional, and there are several mandatory requirements on the trial court in both the Chapter 50 and 7B actions.
- When there is not a prior civil custody action, the civil custody order entered by the 7B court must instruct the clerk to treat the order as the initiation of a civil custody action, designate the parties to the action, determine the caption for the action, make findings and conclusions supporting a Ch. 50 custody order, and make a finding that there is not a need for continued state intervention through juvenile court. The permanency planning order established the permanent plan as custody with respondent father, ordered DSS and the GAL to close their files, and relieved the attorneys of their duties, indicating the court intended to terminate jurisdiction in the juvenile proceeding. The "custody order" returned physical and legal custody to the respondent father; made findings and conclusions supporting a Ch. 50 custody order; and although not using the exact statutory language, found that continued state intervention was no longer needed. But, the "custody order" but did not include provisions transferring jurisdiction to a Ch. 50 matter. Reverse and remand the "custody order" so that the court may enter a civil custody order and terminate juvenile court jurisdiction in compliance with 7B-911.

Clerical Error

In re J.K., ___ N.C. App. ___ (April 18, 2017)

Held: Remand for clerical error

- In an order that contained findings of fact and conclusions of law supporting custody of the child with respondent father to achieve the primary permanent plan of reunification with the respondent father, two other conclusions of law that stated returning the child to the "respondents" (plural) would be contrary to the child's welfare were clerical errors. Clerical mistakes in an order arise from a minor mistake or oversight and not from judicial reasoning.
- When a clerical error is discovered on appeal, remand to the trial court for correction is appropriate so that the record speaks the truth.

Interstate Compact on the Placement of Children (ICPC): Moot

In re M.B., ___N.C. App. ___ (May 16, 2017)

Held: Moot

- Facts: At a permanency planning hearing that occurred as a result of a remand by the court of appeals for the court to consider further evidence of the proposed guardian's financial ability to care for the child, the court appointed guardianship to the paternal great-grandmother, whom the child had been living with continuously since June 2014. The court found the child and guardian lived in Ohio. Within one month of the entry of the permanency planning order, the child and guardian moved back to North Carolina. Respondent mother appealed requesting a remand for further proceedings consistent with the ICPC. The respondent mother served the guardian the notice of appeal at the guardian's North Carolina address.
- The guardian's return to North Carolina renders the issue of the applicability of the ICPC and respondent mother's appeal moot: "An issue is moot when a determination is sought on a matter, which when rendered, cannot have any practical effect on the existing controversy."

Appeal: Moot

In re J.S., ___ N.C. App. ___ (Nov. 15, 2016)

- Facts: At a permanency planning hearing held pursuant to G.S. 7B-906.1, the permanent plan remained reunification, with legal and physical custody of the children continuing to be awarded to the children's father. Visitation for the mother was reduced. The court entered a separate G.S. Chapter 50 civil custody order and terminated its jurisdiction in the G.S. Chapter 7B proceeding pursuant to G.S. 7B-911. Respondent mother appealed the permanency planning order only.
- Respondent mother's failure to appeal the civil custody order pursuant to G.S. Chapter 50 and the 7B-911 order that terminated the court's jurisdiction moots the effect of the mother's challenge to the permanency planning order. The two orders that were not appealed would still be in effect.

Responsible Individual List

Subject Matter Jurisdiction, Stay, Findings/Conclusions

In re Patron, ___ N.C. App. ___ (November 15, 2016)

Held: Affirmed

- Facts: Respondent is the stepmother (a caretaker) to the juvenile, who when he was 17 years old, she hit in the back of the head with a coffee cup that required 4 staples to close the wound. The county department substantiated her for abusing the juvenile and notified her of its intent to place her on the Responsible Individual List (RIL). Respondent requested a judicial review but the hearing was not scheduled until after the juvenile turned 18 years old.
- The Juvenile Code, specifically 7B-200(a)(9), 7B-311, and 7B-323, confers exclusive original jurisdiction over actions involving the Responsible Individuals List to the district court. The district court does not lose jurisdiction because the juvenile turned 18 prior to the hearing on the petition for judicial review. G.S. 7B-323(e) authorizes the court to conduct the review hearing "at any time," which includes after the juvenile has reached the age of majority. The relevant inquiry is whether the abuse or serious neglect occurred when the juvenile was under 18 years old. The evidence introduced at the hearing shows the juvenile was 17 years old when the abuse occurred.
- G.S. 7B-324(b) gives the court discretion when determining whether it will stay the judicial review after a motion to stay the proceeding because of a pending criminal action resulting from the same incident was filed by the respondent. There was no abuse of discretion in denying the motion to stay. Referring to Rule 52 of the Rules of Civil Procedure, the court was not required to make findings of fact and conclusions of law in its order denying the motion to stay since the respondent did not request that the court make findings of fact.
- The court's findings were supported by competent evidence in the record. After finding that a juvenile was abused by the respondent, who is a responsible individual, the court is mandated to conclude as a matter of law that the respondent be placed on the RIL. G.S. 7B-311(b)(2).

Termination of Parental Rights (TPR)

Subject Matter Jurisdiction: 7B-1101

In re J.M., ___ N.C. App. ___ (October 4, 2016)

Held: Vacated

- GS 7B-1101 establishes that the district court has exclusive original jurisdiction to hear a termination of parental rights action to "any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." The court lacked subject matter jurisdiction as none of the 3 prongs were satisfied. The child resided in Wake County with his court appointed guardians after the court ordered a permanent plan of guardianship. The guardians filed the TPR petition in Durham County, but the Durham County Department no longer had custody of the child as a result of the guardianship order to the petitioners. There was no evidence the child was found in Durham County when the TPR petition was filed in the district court in Durham County.

Subject Matter Jurisdiction: Verified Motion

In re E.B., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- The trial court had subject matter jurisdiction to terminate respondent mother's parental rights after the child's guardian ad litem filed a verified motion to terminate parental rights. Respondent mother's counsel did not receive a copy of the verification page of the motion; however, the record showed the court order included in its findings of fact there was a verified motion filed in the action. In addition, the GAL was permitted to amend the record on appeal to add an affidavit from the Deputy Clerk of Court stating the verification page was attached to the GAL's motion but that the verification page was inadvertently retained by the clerk's office. A file stamped verified motion was attached to the Deputy Clerk's affidavit.

Appointment of GAL for Child

In re P.T.W., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- Under the Juvenile Code, the court must appoint a guardian ad litem (GAL) to represent the child when a petition is filed by the county department that alleges the juvenile is abused or neglected [G.S. 7B-601(a)] or in a termination of parental rights (TPR) action where the respondent parent files an answer denying a material allegation in the petition or motion [G.S. 7B-1108(b)]. When a GAL appointment is not statutorily required in a TPR, the court may exercise its discretion and appoint a GAL to represent the child's best interests [G.S. 7B-1108(c)].
- In this TPR action, the respondent parent did not file an answer. There was an underlying dependency action, where the court had not appointed a GAL to represent the child. The court was not statutorily required to appoint, and did not appoint, a GAL to represent the child's best interests. Respondent did not object to the court's failure to appoint a GAL for the child, and therefore, did not preserve the issue for appeal.
- The trial court acted within its discretion when it did not appoint a GAL to represent the child's best interests in the TPR proceeding. The court heard testimony from the petitioner, respondent, and respondent's family member. There was no evidence that it was unreasonable for the court to determine the child's best interests without the assistance of a GAL.

Ineffective Assistance of Counsel

In re M.Z.M., ___ N.C. App. ___ (Dec. 20, 2016)

Held: Affirm

- Reviewing prior published opinions, this opinion discusses ineffective assistance of counsel. Indigent parents in a termination of parental rights proceeding have a statutory right to effective assistance of counsel. A claim of ineffective assistance of counsel requires the respondent parent show that counsel's performance was deficient; the deficiency was so serious as to deprive the represented party of a fair hearing; and the respondent was prejudiced

by counsel's alleged deficient performance. Attorneys have a responsibility to advocate on the behalf of their clients. A counsel's silence or lack of positive advocacy could be part of a strategy and trial tactics. When reviewing the counsel's performance, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

- In this case respondent mother's counsel did not cross examine either of the two witnesses called by the petitioner (the mother and county department social worker) or introduce any evidence or arguments on behalf of respondent mother during the adjudicatory phase of the hearing that addressed the 3 alleged grounds (7B-1111(a)(1) neglect, (a)(7) abandonment, and (a)(2) willfully failing to correct the conditions). Instead, respondent's counsel waited until the dispositional phase of the hearing to introduce evidence (the mother's testimony) and offer a "thoughtful and reasoned argument" against the termination of parental rights based on it being contrary to the children's best interests, which addressed the importance of maintaining a relationship between the children and their mother. Counsel's silence during the adjudicatory phase appears to be a tactical decision to concede the grounds alleged. Respondent-mother has failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding. She was not denied effective assistance of counsel.

Evidence: Expert Witness

In re K.G.W., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed

- After an offer of proof, the court sustained the department's and guardian ad litem's objection to the testimony of respondent mother's expert witness in the disposition (or best interests of the child) stage of a termination of parental rights hearing. The offered witness is a clinical psychologist who had no contact with or observation of the child and lacked experience in abuse, neglect, or dependency proceedings. The court determined the offered expert witness did not have testimony that would assist it as the trier of fact because of the expert's lack of familiarity with the child and with juvenile proceedings. The court, as trier of fact, has discretion to determine the credibility and weight to give to evidence, and this court's determination that the testimony would not be helpful did not deny respondent mother's rights.

Evidence: Quash Subpoena/Motion in Limine

In re A.H., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- Facts: Respondent mother subpoenaed her 13-year old son, who suffered from significant mental health issues and who was the subject of the action, to appear and testify at the termination of parental rights (TPR) hearing. The child's GAL filed a motion to quash. At the hearing on the motion to quash, respondent mother would not specify whether the subpoena was for testimony at the adjudicatory hearing, the dispositional hearing, or both. Respondent mother and the child's therapist testified at the hearing on the motion to quash. Respondent mother testified to what she thought her child would testify to, including his experience living

with her versus living in foster care, and that she understood his testimony could be taken remotely, in chambers, or outside of the courtroom. The child's therapist testified that the child's testifying could result in emotional or behavioral regression and increased anxiety. The court granted the motion to quash. At a later hearing, the court terminated respondent mother's parental rights. Respondent mother appealed the orders quashing the subpoena and terminating her parental rights (TPR), arguing that the court abused its discretion. The appeal of the TPR focused on the dispositional stage, where the court concluded the TPR was in the child's best interests. Based on the mother's arguments on appeal, the appellate court limited its analysis to the dispositional hearing only.

- The standard of review for a court's evidentiary decision is abuse of discretion. The order quashing the subpoena was not an abuse of discretion; it was based on the court's conclusion that compelling the child to testify would be unreasonable and oppressive [G.S. 1A-1, rule 45(c)(3) and (5)] and that the testimony offered limited probative value and would be detrimental to the child's well-being. The court further concluded the child's best interests is the paramount concern. The conclusions were based on the court's findings that included the child had little contact with his mother, the child was agitated for days after speaking with his mother about her wanting him to testify, and that he would likely experience significant emotional distress and regression. These conclusions and findings demonstrate that the court considered the relevancy of the child's testimony -- for example, the lack of probative value of the child's testimony and the G.S. 7B-1110(a) best interests of the child factor addressing the bond between the parent and child. The court's balancing of the relevance of the child's testimony and the detrimental effect it would have on the child met the purpose of the Juvenile Code to assure fairness and equality and provide the mother with a meaningful opportunity to participate in the hearing.
- *Quoting State v. Simpson*, 314 N.C. 359, 370 (1985), "in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record…[T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred."
- The exclusion of the mother's testimony of what her child would have testified to as an offer of proof was not an abuse of discretion because the essential substance of the child's testimony the mother sought to elicit had previously been made known to the court in the hearing on the motion to quash. At that hearing, respondent mother represented to the court a "specific forecast" of her son's testimony. *Citing State v. Martin*, ___ N.C. App. ___, 774 S.E.2d 330, 333 (2015), a "specific forecast" typically includes
    - the substance of the testimony,
    - the basis of the witness' knowledge,
    - the basis of the attorney's knowledge of the testimony, and
    - the attorney's purpose for offering it.

  Respondent mother asserted (1) her son would testify to his life with her, his life in foster care, the difference between them, his experience being institutionalized and hospitalized while in DSS custody, and noncompliance with his IEP; (2) that the basis of her son's knowledge was his own personal experience; (3) her own knowledge of her son's testimony; and (4) the purpose for offering the testimony was to have her son present his wants and needs to the court.

Because respondent mother provided a specific forecast of her son's testimony, the informal offer of proof was sufficient to establish the essential element or substance of the excluded testimony.

- A better practice regarding an offer of proof is (1) the attorney should announce to the court his/her intention to make an offer of proof before eliciting any testimony about the substance and (2) the trial court allows the attorney to proceed with a formal offer of proof.

Motion in Limine

- Facts: Prior to the TPR hearing, respondent mother (without her assistance of counsel) filed with the court a "parent report" and "green folder" that consisted of several documents. The child's GAL filed a motion in limine to strike the documents from the court file. The motion was granted. Respondent mother appeals.
- Respondent mother was not prevented at the TPR hearing from seeking to properly introduce into evidence the documents that had been filed with the court and stricken from the court file before the TPR hearing. A court's ruling on a motion in limine is preliminary in nature, and a court may reconsider the admissibility of challenged evidence based on other evidence that is presented at trial. To preserve the underlying evidentiary issue, the party must attempt to introduce the evidence at trial. By failing to do so, respondent mother did not preserve this issue for appeal.

Grounds: Findings, Circumstances at Time of Hearing

In re A.B., ___ N.C. App. ___ (April 18, 2017)

Held: vacate and remand for additional findings

- Facts: The children had been adjudicated neglected and dependent, in part based on an injurious environment and improper supervision created by the parents' substance abuse and domestic violence. Respondent mother's case plan involved obtaining a substance abuse evaluation and following any recommendations, random drug screens, completing a court-approved parenting course and demonstrating learned skills during visitations, attend visitation and the child's medical and school appointments, maintain suitable housing for at least 6 months, and maintain employment to be able to financially provide for the children for 4-6 months. After two years, the concurrent permanent plan was changed from reunification with mother and adoption to adoption and guardianship. A TPR was granted on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal 3 years earlier.
- The findings of fact do not support either ground.
    - GS 7B-1111(a)(1) Neglect. When the child has been placed outside of the home for a significant period of time, a TPR based on neglect must be based on findings and evidence of prior neglect and the probability of repetition of neglect. The court must consider any evidence of changed conditions since the prior neglect adjudication and determine the parent's fitness to care for the child at the time of the termination hearing. *See In re Ballard*, 311 N.C. 708 (1984).

- GS 7B-1111(a)(2) Willfully failing to correct conditions. Willfulness does not require a finding of fault but requires a failure to exhibit reasonable progress or a positive response toward DSS efforts, and failure to fully satisfy all elements of the case plan is not the equivalent of a lack of reasonable progress. *Citing In re A.C.F.*, 176 N.C. App. 520, 528 (2006), "the nature and extent of the parent's reasonable progress must be evaluated for *the duration leading up to the hearing on the motion or petition to terminate parental rights*." (emphasis in original)
- The court made findings that summarize the respondent mother's progress or lack thereof on specific dates in the past (based on past hearings) and did not merely find certain findings were made at prior hearings. But, the court made no findings of the mother's conduct or circumstances after the prior review hearing and up to the termination of parental rights hearing.
- An ultimate finding of fact that supports the ground must be supported by a process of a logical reasoning from adequate evidentiary facts found by the court. The facts found by the court do not support the ultimate finding. Evidence shows the respondent mother's progress improved over time with (1) negative drug screen after her 3rd round of treatment, (2) her eventual separation from respondent father and obtaining a DVPO that remains in effect, (2) working full-time and being current on child support, (4) completing the only ordered parenting classes from 2 years before, and (5) regularly attending visits and being appropriate with 3 of the 4 children. There is conflicting material evidence on willfulness and reasonable progress (from DSS and respondent) that were not resolved by the court's order, such as her willingness to share her availability for random drug screens and the reason for not having utilities or providing information for a background check on an adult who lives in her home.

Ground: Failure to Correct Conditions

In re L.L.O., ___ N.C. App. ___ (April 4, 2017)

Held: Vacated and remanded

- GS 7B-1111(a)(2) requires a two part analysis: (1) the child has willfully been left by the parent in foster care or placement outside the home for over 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. The order does not contain findings that support the court's conclusion. The order contained inconsistent findings that were not resolved by the court. There was also conflicting evidence that the court findings did not resolve.
- Note: Although the opinion did not address whether the TPR motion provided sufficient notice of an alleged ground because neither respondent raised the issue, it noted that the TPR motion's failure to cite the statutory ground, GS 7B-1111(a)(2), or state any of the terms used in the statute, such as "willfully left," "reasonable progress," or "conditions which led to the removal" would put respondent at a disadvantage in preparing for the hearing.

Ground: Neglect

In re L.L.O., ___ N.C. App. ___ (April 4, 2017)

Held: Vacated and remanded

- When the child has not been in the parent's custody for a significant period of time before the TPR hearing and the ground is neglect, the trial court must consider the history of neglect and the probability of a repetition of neglect.
- The child was adjudicated neglected based the failure of her parents to provide necessary medical and remedial care. The court's findings that address the parents' lack of employment, failure to provide financial assistance to the child, missed and failed drug screens, irregular contact with the child, and insufficient housing do not "address or mention the probability of repetition of neglect or failure to provide necessary medical or remedial treatment to" the child. An order that lacks the required finding of fact that the parent was likely to repeat the neglect does not establish the ground for termination and is not harmless error.

In re C.L.S., ___ N.C. ___ (Sept. 23, 2016)

Held: Affirmed per curium *In re* C.L.S., ___ N.C. App. ___ (January 16, 2016)

- *Citing* previous published opinions, "incarceration alone … does not negate a father's neglect of his child." A parent can show an interest in his child's welfare despite being incarcerated.
- There was sufficient evidence provided through the DSS social worker that the father neglected C.L.S. by failing to provide love, support, affection, and personal contact to the child from the time paternity was established up to the termination hearing. Specifically, after the father's paternity was adjudicated, he stated he did not want to pursue reunification. Later, he expressed an interest in reunification but failed to attend appointments with the social worker. After being incarcerated, he failed to sign the case plan, meet the child, or provide financial support for the child.

Ground: Dependency

In re D.T.N.A., ___ N.C. App. ___ (Dec. 6, 2016)

Held: reversed

- To terminate parental rights, the focus of the adjudicatory phase is on "whether the parent's individual conduct satisfied one or more of the statutory grounds which permit termination." (citing In re T.D.P. 164, N.C. App. 287, 288, aff'd per curium, 359 N.C. 405 (2005).
- When adjudicating the ground at **GS 7B-1111(a)(6)**, the court must find the parent (1) does not have an ability to provide care or supervision to the child and (2) lacks an available alternative child care arrangements for the child.
    - The evidence does not support the court's findings that the respondent father was incapable of providing proper care and supervision because he failed to comply with his case plan, engaged in poor decision making, was unable to provide for the child's daily needs, and used drugs. Regarding his **drug use**, the court's finding that assumed the respondent's refusal to take drug tests would have resulted in positive results is not supported by the record, which included judicial notice of the court file that contained permanency planning orders where the court found the respondent had negative drug screens as part of his criminal probation and a court report that stated respondent had

tested negative for illegal substances. Even if drug use was proven, the petitioner has the burden of showing that abuse prevents the parent from providing proper care and supervision for the child, and there was no such evidence.

- The finding that the respondent father did not offer **another child care placement** was contradicted by evidence from the case file that showed the respondent father recommended a relative for placement, which was approved but not utilized by the department, at the beginning of the underlying dependency case.

Ground: Willful Abandonment

In re D.T.N.A., ___ N.C. App. ___ (Dec. 6, 2016)

Held: reversed

- To terminate parental rights, the focus of the adjudicatory phase is on "whether the parent's individual conduct satisfied one or more of the statutory grounds which permit termination." (citing *In re* T.D.P. 164, N.C. App. 287, 288, aff'd per curium, 359 N.C. 405 (2005).
- The ground of abandonment (GS 7B-1111(a)(7)) requires a showing that the parent engaged in conduct that manifests a willful determination to forego all parental duties and relinquish all claims to the child. The finding that the respondent father failed to provide for a plan for the child or comply with his own case plan is unsupported by evidence. Evidence showed that he did not engage in conduct to willfully forego his parental duties as he entered into and substantially complied with a case plan that included being current in child support, regularly visiting with the child, attending parenting classes, and participating in the child's medical appointments.

In re D.M.O., ___ N.C. App. ___ (December 6, 2016)

Held: Vacate and remand

- G.S. 7B-1111(a)(7) authorizes the termination of a parent's rights (TPR) when the parent has willfully abandoned the child for at least six months immediately preceding the filing of the TPR petition. Willfulness is a question of fact that must be supported by competent evidence and requires purpose and deliberation and not merely an intention to do a thing. Abandonment requires conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.
- The findings of fact regarding respondent mother's willfulness do not support the conclusion that she willfully abandoned her child during the relevant six month time period. The findings are that the mother failed to visit with the child, attend his sports games, or contact the father (petitioner in this private TPR) during the relevant time period. But the evidence showed respondent mother was incarcerated for all but 33 days of the 180 relevant days and that she struggled with drug addiction and substance abuse and participated in a drug treatment program during the same relevant time period. The court's findings must address the limitations incarceration imposes on a parent to exercise her parental rights (in this case request and exercise visitation, attend sports games, or communicate with the father). There were no findings as to whether respondent mother made the effort or had the ability to exercise any of those rights given her incarceration, addiction issues, and participation in a drug treatment

program. There were no findings that if she had the ability to make the effort that she failed to do so.

- Testimony from petitioner-father and respondent-mother regarding her efforts to communicate with the father and contact the child conflict. On remand, the court must resolve the material conflicts in the evidence related to the respondent's willfulness regarding her conduct in order to make a conclusion as to whether willful abandonment exists.

Prior TRP/Safe Home; Incarceration; Findings

In re J.D.A.D., ___ N.C. App. ___ (April 18, 2017)

Held: reversed

- Facts: Mother is petitioner; father is respondent. Respondent father has been incarcerated since 2015 and is not expected to be released until October 2018. The TPR was granted on the ground set forth at G.S. 7B-1111(a)(9) after the court found the respondent is unable to provide a home for the child but did not find that his failure to establish a safe home was willful.
- G.S. 7B-1111(a)(9) allows a termination of parental rights when two prongs are satisfied by clear, cogent, and convincing evidence:
    - (1) the respondent's parental rights to another child of his/hers have been involuntarily terminated by a court and
    - (2) the parent lacks the ability or willingness to establish a safe home ("safe home" is defined at G.S. 7B-101(19)).
- Although a parent's incarceration is relevant when determining whether the grounds for termination exist, "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision" (*citing In re C.W.* 182 N.C. App. 214, 220 (2007)). The court's only rationale to support the TPR ground was the adjudicatory fact addressing the respondent's incarceration. The finding does not support the conclusion of law that the ground exists.
- Evidence of the Respondent's lack of approval for visitation, minimal financial support for the child, continued use of illegal substances, and failure to obtain necessary substance abuse treatment support the petitioner's claims regarding the respondent's inability to provide a safe home but there were no *adjudicatory findings* of these issues (emphasis added). Some of this evidence was relief upon in disposition but not for adjudication.

Best Interests

In re A.H., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- There is competent evidence in the record (the social worker's testimony) to support the court's findings regarding best interests. Those findings demonstrate the court (1) considered the criteria enumerated at G.S. 7B-1110(a) and (2) made a reasoned decision within its discretion.
- The court specifically made findings regarding the likelihood of adoption [7B-1111(a)(2)], whether a termination of parental rights would aid in the accomplishment of a permanent plan of adoption [7B-1110(a)(3)], and the bond between respondent mother and child [7B-1111(a)(4)]. Although the evidence showed the child has a diagnosis of autism, it also demonstrated that he "would be considered adoptable" and having him be available for

adoption after a TPR supports the finding that his likelihood of adoption is good. The absence of an adoptive placement does not bar a TPR. Although respondent mother introduced competing evidence regarding a strong bond between her and the child, it is a well-established principle that "findings of fact supported by competent evidence are binding on appeal, despite evidence in the record that might support a contrary finding."

UCCJEA

Modification Jurisdiction

In re T.E.N., ___ N.C.App. ___ (April 4, 2017)

Held: Vacated for lack of jurisdiction

- Procedural History/Timeline:
  - 2009 child born in New Jersey and lived with parents there
  - 2009 NJ restraining order (mom v dad) that provided for parenting time/visitation
  - 2011 Final Restraining Order from NJ court granting temporary custody to mom
  - 2012 Amended Final Restraining Order from NJ court granting supervised visits to dad
  - Aug. 2013 mom and child move to NC; dad remains in NJ
  - Oct. 2013, modification of visitation by NJ court
  - Jan. 2015, mom files TPR in NC, which is granted in 2016
- Modification jurisdiction is governed by GS 50A-203, which requires a two-prong analysis. A North Carolina court may modify an out-of-state custody determination if (i) North Carolina has jurisdiction to make an initial determination under GS 50A-201(a)(1) or (a)(2) and (ii) the court of the other state determines it no longer has exclusive continuing jurisdiction or NC would be a more convenient forum, or the court of the other state or the NC court determines the child, child's parents, and any person acting as a parent do not presently reside in the other state.
- In this case, the first condition was met as NC was the child's home state when the TPR action was commenced, but the second condition required the court of the other state to determine it no longer had exclusive continuing jurisdiction or that NC was a more convenient forum since the respondent father continued to reside in the other state.
- Citing previous opinions, one of which quotes the Official Comment to GS 50A-202, the record must contain an order from the original decree state that indicates it no longer has jurisdiction. *See In re K.U.S.G.*, 208 N.C. App. 128 (2010); *In re N.R.M.*, 165 N.C. App. 294 (2004). Petitioner's testimony that the NJ court transferred jurisdiction and a finding of fact in the trial court's TPR order that the NJ court transferred jurisdiction of the custody proceeding to NC is insufficient to establish modification jurisdiction in NC. The NC court never acquired subject matter jurisdiction.

In re T.R., ___ N.C. App. ___ (November 15, 2016)

Held: Affirmed

- Timeline:
  - 2007: child born in Illinois; mom and dad reside there
  - 2011: divorce and custody ordered to mom in IL
  - 2012: child and mom move to FL; dad remains in IL

- June 2014: child and mom move to NC; dad still in IL
- July 2014: DSS files petition alleging neglect; nonsecure custody ordered; Dad still in IL
- Sept. 2014: NC judge contacts IL judge; IL docket entry that NC is the proper forum and IL case will be transferred; NC order includes finding that based on conversation with IL judge, NC is proper forum and has jurisdiction
- Jan. 2015: adjudication and disposition order entered
- 2016: permanency planning order awards custody to father in IL; mother appeals based on lack of subject matter jurisdiction under the UCCJEA

- North Carolina had subject matter jurisdiction under the UCCJEA to hear the neglect proceeding. Jurisdiction is based on G.S. 50A-203, which authorizes NC to modify the previously entered custody order from IL (modification jurisdiction).
- For modification jurisdiction, NC met applicable criteria under GS 50A-203:
  - NC had jurisdiction to make an initial custody determination pursuant to GS 50A-201(a)(2) because the IL court determined NC was a more appropriate forum to hear the custody case. The IL docket entry satisfied the requirement of a court order. Illinois courts have recognized a docket entry as an order, and the docket entry itself contains the attributes of a court order including the conclusion that the case should be transferred to NC.
  - The respondent and child had a significant connection with NC as they had been living here, and
  - substantial evidence concerning the alleged child neglect was available in NC.

Civil Cases Related to Child Welfare

Personal Jurisdiction: Minimum Contacts

Hedden v. Isbell, ___ N.C. App. ___ (Nov. 1, 2016)

Held: Affirmed

- Citing *Lockert v. Breedlove*, 321 NC 66 (1987), the court has personal jurisdiction over a party who is served while in North Carolina pursuant to Rule 4(j) of the Rules of Civil Procedure, and the minimum contacts analysis is not required. *See* G.S. 1-75.4.

Jurisdiction Between Custody and Ch. 35A Guardianship of Minor

Corbett v. Lynch, ___ N.C. App. ___ (Dec. 20, 2016)

Held: Affirmed

- Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.
- Procedural History:
  - August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
  - August 5, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.

- August 7, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

- The clerk of superior court had jurisdiction over the guardianship proceeding as the children had no "natural guardian" (no biological or adoptive parent). G.S. 35A-1221. The custody order did not divest the clerk of jurisdiction as G.S. 35A-1221(4) requires the application for guardianship to include a copy of any order awarding custody. Guardianship of the person includes custody. G.S. 35A-1241(a)(1) and -1202(10). NC statutes "provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person." The clerk retains jurisdiction over the guardianship proceeding, including modifications. G.S. 35A-1203(b), (c). The appointment of a general guardian in a Ch. 35A guardianship proceeding renders a Ch. 50 custody action moot.
- The holding "does not affect any jurisdiction the district court may have to issue ex parte orders under Chapter 50 for temporary custody arrangements where the conditions of G.S. 50-13.5(d)(2)-(3) are met."

Criminal Case with Application to Child Welfare

Child Abuse: Corporal Punishment

State v. Varner, ___ N.C. App. ___ (March 7, 2017)

Held: reversed and remanded

Stay granted 4/1/ 2017; PDR filed 4/25/2017

- Facts: Defendant disciplined his 10 year old son's refusal to eat dinner by counting down from three and then striking his son's thigh three times with a paddle. The next day the son's thigh (from his knee to his waist) was bruised, and for several days the son was in pain, walked with a slight limp, and was unable to participate in gym class at school. The father was charged with felony child abuse and was convicted of misdemeanor child abuse.
- Appellate issue relates to the jury instruction regarding a parent's right to inflict "moderate punishment" to correct his child. The instruction did not define "moderate punishment" as there was disagreement over whether it should be defined as causing "lasting injury."
- NC Supreme Court precedent referred to by the opinion
  - As a general rule, a parent (or person acting in loco parentis) is not criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment. *State v. Pendergrass,* 19 N.C. 365 (1837); *State v. Alford*, 68 N.C. 322 (1873)
  - An exception includes when a parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury." *State v. Alford*, 68 N.C. 322, 323 (1873)
  - Another exception is when "the parent does not administer the punishment 'honestly' but rather 'to gratify his own evil passions' irrespective of the degree of physical injury

inflicted." *State v. Thorton*, 136 N.C. 610, 615 (1904); *State v. Pendergrass,* 19 N.C. 365 (1837)

- The jury instruction did not inform the jury that a parent is not criminally liable for injuring his child when administering corporal punishment unless the jury could infer from the evidence that the correction produced or was calculated to produce lasting injury or was done with the purpose of gratifying malice. Without defining moderate punishment, the jury could have convicted based on its determination that the punishment was excessive, which is not the standard set forth by the NC Supreme Court. There was some evidence (the father's cursing and yelling before administering the punishment) for the jury to consider when determining whether the defendant acted with malice.
  - *Author's Note*: the opinion states that the NC Supreme Court has not disavowed its previous holdings requiring a parent act with malice or cause permanent injury for criminal liability. However, the holding also refers to G.S. 7B-101(1)(c) and the General Assembly's limitation on a parent's authority to discipline his/her child in the juvenile proceeding context by defining "abuse" as the use of "cruel or grossly inappropriate" procedures or devices to discipline a child.

Rule 412 Evidence (Prior Sexual History of Victim)

State v. Jacobs, ___ N.C. App. ___ (March 21, 2017)

Held: No error

- Relevant Facts**:** Defendant appeals conviction for first-degree sex offense with a child (Defendant is the father of the 13-year-old victim). The state filed a motion in limine under G.S. 8C-1, Rule 412 to prohibit the defense from referencing any STDs that may have been detected in the victim (of which she was diagnosed with two) and that were not diagnosed in the defendant. The evidence was ruled inadmissible.
- Rule 412 sets aside the idea that any previous sexual behavior of a complainant is relevant in a rape proceeding. The Rule is designed to protect the witness complainant from unnecessary humiliation and embarrassment while shielding the fact finder from unwanted prejudice that may result from evidence with little relevance and low probative value to the case. The Rule prohibits evidence of a complainant's sexual behavior unless it falls within one of four identified categories, one of which is evidence of specific instances of sexual behavior offered to show that the act charged was not committed by the defendant. Rule 412(b)(2).
- Evidence that a complainant has an STD implicates Rule 412 because an STD denotes sexual behavior and is commonly associated with sexual activity, sexual intercourse, and carries the same type of stigma Rule 412 was designed to prohibit.
- The offer of evidence that the victim was diagnosed with STDs that the defendant did not also have was properly excluded. It was offered for the purpose of raising speculation that the victim must have been sexually active with someone else. Without also offering an alternative explanation or specific act to prove that the sexual act defendant was charged with was committed by someone else, the criteria under Rule 412(b)(2) was not satisfied.

Convicted Sex Offender Permanent No Contact Order with victim's children

State v. Barnett, Jr., ___ N.C. ___ (December 21, 2016)

Held: reversed in part COA decision, remanded for entry of new permanent no contact order

- Facts: Defendant dated the victim. For the last two months of their relationship, he lived with her and her 3 minor children. After the relationship ended, when defendant was retrieving his belongings from the apartment, he assaulted the victim. Afterwards he repeatedly threatened her life by text and letter and sent one letter to one of the victim's daughters. Defendant was convicted of habitual misdemeanor assault, attempted second-degree rape, assault on a female, and deterring appearance by a witness. His sentence included a "Convicted Sex Offender Permanent No Contact Order" and named the victim and her three minor children. The defendant appealed the provision that included the minor children. The Court of Appeals vacated the order as to the children after determining the court lacked statutory authority to prohibit contact with the victim's children because the statute focused on contact between the defendant and victim. The State sought discretionary review.
- The purpose of the statute and legislature's intent protects the particular victim of the sex offense and not third persons. However, the trial court has authority to enter a no contact prohibition with the victim's children or others when the prohibition is supported by appropriate findings that indicate contact with other persons would constitute indirect contact with the victim or engagement in any of the prohibited actions in G.S. 15A-1340.50(f)(1) through (f)(7). The inclusion of the children to prohibit indirect contact with the victim does not extend the protection of the entire no contact order to the children.

Sex Offense with a Child and Sex Activity by a Substitute Parent

State v. Johnson, ___ N.C. App. ___ (May 2, 2017)

Note: this summary focuses only on that portion of the opinion that addresses sex offender registration

Held: Reversed and remanded as to lifetime sex offender registration

- Facts: Defendant was convicted in 3 separate judgments, each one representing a specific incident between himself and his 10-year-old stepson, of sex offense with a child and sex activity by a substitute parent (6 counts total). Defendant received 3 consecutive sentences of 300-420 months imprisonment, lifetime sex offender registration, and enrollment in lifetime satellite based monitoring (SBM).
- Sex offender registration assists law enforcement in the protection of the public from persons convicted of sex offenses or certain other offenses committed against minors (G.S. 14-208.5; see also 14-208.6A). A person with a "reportable conviction" registers for at least 30 years (G.S. 14-208.7), and a person who is a recidivist, convicted of an aggravated offense, or is classified as a sexually violent offender registers for life (G.S. 14-208.23). G.S. 14-208.6(1a)(ii) allows an offense to be aggravated if it includes "engaging in a sexual act involving vaginal, anal, or oral *penetration* with a *victim who is less than 12 years old*" (emphasis added).
- When determining whether an offense is an aggravated offense, the court looks to the elements of the convicted offense and not the underlying facts. Although "reportable convictions," neither sexual offense with a child nor sexual activity by a substitute parent are aggravated offenses. Neither statute requires the element that the victim be less than 12 years old. Additionally, neither crime requires the element of penetration.