

Social Services Attorneys Winter Conference Child Welfare Case Update July 19, 2016-December 21, 2016

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Abuse/Neglect/Dependency

Adjudicatory Hearing

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.

Adjudicatory Hearing: 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.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.

Abuse: Non-Accidental

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

Held: Reversed

***Stay granted by NC Supreme Court on 1/10/17; no decision re: granting PDR or writ of supersedeas**

- 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.

In re K.J.B., ___ N.C. App. ___ (July 19, 2016)

Held: reversed

- For a child to be adjudicated neglected pursuant to G.S. 7B-101(15), the evidence must support findings that the child has suffered emotional, mental, or physical harm or there is a substantial risk of such harm.
- The findings are not supported by competent and clear and convincing evidence. A parent's substance abuse is not per se neglect; there must be evidence showing a nexus between the parent's substance abuse and the harm or substantial risk of harm to the child. Evidence that respondent mother was intoxicated one night when she left her infant in another person's (the babysitter's) care and was not intoxicated the next day when she went to pick up her child do not support an adjudication of neglect.
- In a neglect adjudication, it is relevant whether the child lives in a home where another child has been abused or neglected by an adult who regularly lives in the home. Although the mother's rights to two of her other children were terminated, there was no evidence that the termination of parental rights was based on abuse or neglect. Without such evidence, the court cannot infer that this child is neglected.

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.

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- There must be findings based on competent evidence to support the portion of an order that prohibits contact between the child and her maternal grandfather. There was no evidence before the trial court that the grandfather posed a threat to the child's welfare or that contact with the grandfather was contrary to the child's best interests.

Visitation: Cost of Supervision

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and remanded

- Before ordering a parent to pay for supervised visits, the court must make findings of the cost of visitation and the parent's ability to pay for it.

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.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.*

Permanency Planning Hearing: Notice

In re K.C., ___ N.C. App. ___ (August 2, 2016)

Held: vacate and remand

- G.S. 7B-906.1(b) requires that a parent receive 15 days’ notice of a permanency planning hearing. A parent does not waive his or her right to the statutorily required notice when the parent objects at the beginning of the permanency planning hearing that she did not receive adequate notice. In this case, the court should not have held the permanency planning hearing after the respondent mother objected to the hearing on the basis that that she received notice only 8 days before the hearing that had been previously scheduled as a review hearing was changed to a permanency planning review hearing.

Permanency Planning Hearing: Evidence

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: appeal on this issue dismissed

- Respondent mother’s challenge that the court’s findings of fact were not supported by competent evidence was not preserved for appellate review. No objection or motion to strike was made at the permanency planning review (PPR) hearing to the court’s consideration of reports and documents that were not formally offered into evidence.
- Had the issue been preserved, there was no error because “a court holding a PPR hearing is free to consider written reports or other documentary evidence without a formal proffer or admission into evidence as exhibits.” *In re J.H.*, 780 S.E. 2d 228, 239 (2015).

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).

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).

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-906.1 requires that after the initial permanency planning hearing, subsequent permanency planning hearings must be held at least every six months to review the progress made in finalizing the plan or make a new plan when necessary. These subsequent hearings may be waived by the court if the court finds by clear and convincing evidence each of the five enumerated factors set forth in G.S. 7B-906.1(n). The court cannot waive permanency planning hearings when the statutory criteria are not satisfied.
 - *Author's note:* This case involves a permanent plan appointing a guardian. G.S. 7B-906.1 criteria do not apply when a child is placed in a parent's custody. Instead, G.S. 7B-906.1(k) relieves a court of the duty to hold periodic permanency planning hearings when custody is with a parent.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated

- GS 7B-906.1(n) authorizes the court to waive permanency planning hearings when it finds each of the five statutory enumerated factors by clear, cogent, and convincing evidence. It is reversible error when the court does not (1) make written findings of each factor or (2) identify the burden of proof it applied on the record (e.g., included in the written order or stated in open court) or the "record when viewed in its entirety clearly reveals the court applied the proper evidentiary standard." [*In re M.D.*, 200 N.C. App 35, 39 (2009)]. Here, only one factor was found and it is unknown what standard of proof was used.

Permanent Plan: Relative Consideration

In re E.R., ___ N.C. App. ___ (July 19, 2016)

Held: Reversed in part and remanded in part (*Note*, there are three children born to two different fathers who are the subject of this action; this opinion applies to two children, who are the appellant father's children)

- Prior to ordering guardianship with a non-relative, G.S. 7B-903(a1) requires that the court first consider the children's proposed placement with a relative since the father proposed a placement with his mother, the children's paternal grandmother. G.S. 7B-903(a1) requires that priority be given to an available relative placement at all dispositional hearings (initial, review, and permanency planning) unless the court finds the placement is contrary to the child's best interests. A remand will result when the court does not make specific findings that address how the child's placement with the relative is not in the child's best interests.
- The children are Indian children [25 U.C.S. 1903(4)], and the proceeding is a child custody proceeding governed by the Indian Child Welfare Act (ICWA). The court's compliance with ICWA does not obviate the need to make findings under G.S. 7B-903(a1) when the court orders placement with a non-relative when a relative placement is available.

Guardianship/Custody to Non-Parent: Verification

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.

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-600 and -906.1(j) requires the court verify that a proposed guardian understand the legal significance of the guardianship and has adequate resources to appropriately care for the child. The verification does not require specific findings but there must be competent evidence in the record to support the findings the court does make as part of the verification

requirements. A court cannot make a determination of a proposed guardian's adequacy of resources without evidence of the resources.

- Here, the evidence was not sufficient to support the court's determination that the proposed guardian's resources were adequate. There was evidence of the proposed guardian's source of household income (her husband worked and she received disability) but no evidence of the amount of the household income. There was evidence that the guardian lived in a 4 bedroom house and that the children's placement with her was approved through the Intestate Compact for Children's Placement (ICPC) process, but there was no evidence of the value of the home, amount of any mortgage, debt, or monthly expenses.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part (adequate resources); vacate in part and remand (legal significance)

- GS 7B-906.1(j) requires that the court verify a non-parent who is being awarded custody (or guardianship) of a child (1) has adequate resources to appropriately care for the child and (2) understands the legal significance of the placement.
- Regarding adequate resources, the court must make this determination based on competent evidence that is not merely conclusory, indirect, or inferential of the guardian's resources. The court's determination that the child's paternal cousins (a married couple) had sufficient resources to care for the child was supported by findings of fact, based on competent evidence, that described (1) the cousin's home, child's bedroom, and child's play areas; (2) the cousins' employment; (3) the type of care the child receives, including that the child's medical and developmental needs were being met and that he "lacks for nothing" in terms of toys; and (4) the activities the family engages in, such as vacations and a birthday party on the child's first birthday.
- The court must base its determination that a nonparent understands the legal significance of a placement that awards custody (or guardianship) to him/her on competent evidence for each potential person who the court is considering awarding custody. Citing *In re L.M.*, 767 S.E.2d 430 (2014), sufficient evidence may include (1) testimony from the potential custodian/guardian, (2) a signed guardianship agreement that acknowledges an understanding of the legal significance, or (3) social worker testimony. There was no evidence of either potential custodians' (a married couple) understanding of the legal significance of the placement. The husband did not testify; the wife's testimony did not include her understanding of the significance of the legal relationship; and the DSS report did not address the custodians' understanding of the significance of the legal relationship.

Acting Inconsistently with Parental Rights: Burden of Proof

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and Remanded

- In both Chapter 50 custody and 7B juvenile actions, "[b]ecause the decision to remove a child from a natural parent's custody 'must not be lightly undertaken[,]... [the] determination that a parent's conduct is inconsistent with... her constitutionally protected status must be supported

by clear and convincing evidence.” [citing *Adams v. Tessener*, 354 N.C. 57, 63 (2001)]. The court must make clear that it applied the clear and convincing standard when determining whether the parent’s conduct has been inconsistent with her constitutionally-protected status.

Legislative Changes: Pending Cases (Statutory Construction)

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part

- Changes made to the Juvenile Code by S.L. 2015-135 became effective for actions filed or pending on or after October 1, 2015. Pending is defined as remaining undecided or awaiting a decision. A permanency planning review (PPR) is pending when the PPR hearing is held before October 1, 2015 but an order isn’t entered until after October 1, 2015. A new statute, GS 7B-906.2 requires the court to consider certain criteria at the permanency planning hearing. The court was not required to consider in its order the new criteria that became effective after the PPR hearing where the court heard evidence regarding the permanent plan. Such a requirement would be absurd or illogical.

Appeal: Order Changing Custody

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- G.S. 7B-1001(a) identifies the types of final orders that are entered in an A/N/D proceeding that may be appealed, one of which is “any order, other than a nonsecure custody order, that changes legal custody of juvenile.”
- *Citing Peters v. Pennington*, 210 N.C. App. 1 (2011) and *Peterson v. Rogers*, 337 N.C. 397 (1994), legal custody means “the right and responsibility to make decisions with important long-term implications for a child’s best interests and welfare” and includes a “parent’s prerogative to determine with whom their children shall associate.” An order that continues the previous order of joint legal and physical custody of the child to the father and mother but adds a no contact provision between the child and her maternal grandfather is an order that changes the respondent mother’s legal custody of a juvenile. That order may be appealed pursuant to G.S. 7B-1001(a)(4).

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), -311, and -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.

In re T.D., ___ N.C. App. ___ (July 19, 2016)

Held: Remand

- A termination of parental rights requires that a respondent parent have a fundamentally fair procedure. In North Carolina part of that fundamental fairness is provided by a respondent parent's statutory right court appointed counsel, which includes the parent's right to effective assistance of counsel.
- The record raises serious questions as to whether the respondent received effective assistance of counsel in the termination hearing that lasted nineteen minutes. An attorney's relative silence at a hearing is not per se ineffective assistance of counsel. The trial court must determine (1) whether the attorney's performance was deficient and (2) if so whether the deficiency prejudiced the respondent such that she was deprived of a fair hearing thus entitling her to a new hearing.

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 affect 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.

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: Neglect

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

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

- *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: 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.

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.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

Necessary Party

Tanner v. Tanner, ___ N.C. App. ___ (August 2, 2016)

Held: Vacate order to extent it addresses any issue other than joinder of necessary party;

Remand for hearing on substantive issues with all parties having notice and an opportunity to be heard

Facts:

- 2012 husband transferred over \$300K from his business account to his mother.
- 2013 complaint filed; answer and counterclaim filed
- April 2014 defendant wife filed a motion requesting joinder of plaintiff's mother (appellant) as a necessary party, a determination of ownership interest in the funds transferred to her, and the imposition of a restraining order to prohibit use of the funds
- November 2014 hearing on motion for joinder, constructive trust, and restraining order; mother testifies at the hearing
- January 6, 2015 attorney for appellant enters appearance in court action
- January 7, 2015, appellant's attorney objects to entry of an order from November 2014 hearing
- January 12, 2015, order entered joining mother as a party and imposing constructive trust with mother as trustee and a restraining order on the funds
- An order that determines a claim in an action where necessary parties have not been joined are null and void [*citing Rice v. Randolph*, 96 N.C. App. 112 (1989)]. When it appears to the court that a necessary party is absent, the trial court may refuse to deal with the merits of the action until the necessary party is brought to the action. A court may correct this ex mero motu. [*citing White v. Pate*, 208 N.C. 759 (1983)]
- At the November 2014 hearing, the court was only authorized to determine mother was a necessary party. The court should not have heard the merits of the motion prior to mother being joined as a party. By determining the merits of the motion before mother was made a party, mother was denied an opportunity to be heard as a party. At time of hearing, mother was only identified as a potential party, was not served with summons or any pleadings or notice of proceedings, was not represented by an attorney, did not consent to be added as a party or to proceed with the hearing on an issue that would affect her rights, and only participated as witness who had been subpoenaed to testify.

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

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.