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Abuse, Neglect, Dependency

Indian Child Welfare Act

In re A.P. , ___ N.C. App. ___ (August 7, 2018)

Held: Remanded to determine and ensure that the ICWA notification requirements are met

- Facts and procedural history: In March 2016, Mecklenburg County DSS filed a neglect and dependency petition and obtained a nonsecure custody order for A.P. In June 2016, A.P. was adjudicated neglected and dependent and placed in DSS custody. Respondent mother appealed, arguing the Mecklenburg County DSS director lacked standing to file the petition. The Court of Appeals held that the Mecklenburg County DSS director lacked standing to file a petition because the child did not reside and was not found in Mecklenburg County when the petition was filed. The N.C. Supreme Court reversed the Court of Appeals and remanded the case to the Court of Appeals to address the other issues raised by respondent mother. One issue is whether the adjudicatory hearing should have been continued for further investigation into the applicability of the Indian Child Welfare Act (ICWA). The evidence at the adjudicatory hearing included a DSS form that indicated "A.P. and her mother have 'American Indian Heritage' within the 'Cherokee' and 'Bear foot' tribes." Sl. Op. at 9. Respondent mother's attorney raised the issue that the federally recognized tribes were not provided with any notice under ICWA. The trial court noted it made an ICWA inquiry at the hearing on the need for continued nonsecure custody, found ICWA did not apply, and did not order DSS to provide notice the tribe (there is no transcript of the hearing on the need for nonsecure custody in the record).
- When the trial court knows or has reason to know that a child is an Indian child, the party seeking foster care placement (or a termination of parental rights) of that Indian child must comply with the notice provisions set forth in 25 U.S.C. 1912. A hearing may not be held until at least 10 days after the parent or Indian custodian and Indian tribe or BIA secretary have received the notice, and if requested, an additional 20 days must be granted. 25 U.S.C. 1912. An "Indian child" is any unmarried person under the age of 18 who is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and the biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4); *In re A.D.L.*, 169 N.C. App. 701 (2005). The court has reason to know a child is an "Indian child" if any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe or organization, or agency informs the court that it has discovered information indicating that the child is an Indian child. 25 C.F.R. 23.107(c)(7). The tribe determines the child's status as an Indian child. The respondent mother's potential Indian heritage with a federally recognized tribe is sufficient to provide the court with reason to know the child is an Indian child. The trial court should confirm and work with the tribes to verify whether the child is a member and must treat the child as an Indian child until it is determined on the record that the child does not meet the definition of Indian child. 25 C.F.R. 23.107(b)(1)−(2). The trial court must direct DSS to send notice to the tribes in compliance with 25 C.F.R. 23.111. If a response from the tribe is not received, "the Respondent-mother must meet her burden to produce evidence to sustain ICWA's application to this case." Sl. Op. at 10. This interpretation aligns with previous holdings that have erred on the side of caution to ensure ICWA notification requirements are addressed

rather than risk the trial court's orders being voided in the future for failing to comply with ICWA requirements. *See In re A.R.*, 227 N.C. App. 518 (2013); *In re C.P.* 181 N.C. App. 698 (2007).

- Author's Note: Prior to December 12, 2016, there were no effective federal regulations implementing ICWA, which is a federal law that was enacted in 1978. However, in this opinion, the Court of Appeals discusses and applies some, but not all, of the regulations that became effective after the orders subject to the appeal were entered. Further discussion and hyperlinks to resources re: ICWA can be found in the A/N/D TPR Manual, Chapter 13.2, here.

Adjudication: Consent v. Stipulations, Findings, Neglect, Invited Error

In re R.L.G., ___ N.C. App. ___ (June 19, 2018)

Held: vacate and remand for further proceedings

- Facts: At the adjudication hearing, DSS read respondent mother's (RM) admission into the record, and mother agreed to the truth of the admission under oath. RM admitted that the juvenile is neglected in that she did not provide proper care and supervision, ensure regular school attendance, the child had 25 absences and 37 tardies in one school year and did not pass 3 core classes, and RM did not take her child to medical well child visits. The court accepted the admission, adjudicated neglect based solely on the admission, and moved on to the disposition hearing. Separate adjudication and initial disposition orders were entered, which RM appealed.
- Procedurally, an adjudication occurs through a hearing or a consent. A consent "is an agreement of the parties, their decree, entered upon the record with the sanction of the court", and requires the 3 elements of G.S. 7B-801(b1) be satisfied, one of which is that the court makes sufficient findings of fact. Sl. Op. at 4 (citation omitted). There is separate statute, G.S. 7B-807, that addresses procedures for factual stipulations, one of which allows for the facts to be read into the record, followed by an oral statement of agreement from each party stipulating to the facts. The procedure used here was a stipulation to certain facts by RM under G.S. 7B-807 and not a valid consent order under G.S. 7B-801(b1). *See In re L.G.I.*, 227 N.C. App. 512 (2013); *In re K.P.*, 790 S.E.2d 744 (2016) (both holding there was no consent order).
- The findings of fact do not support the conclusion that the juvenile is neglected. RM's admission that the child is "neglected" is a conclusion of law, and "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." Sl. Op. at 9-10 (citation omitted). No findings were made as to the reasons for the child's poor attendance, whether the absences were excused, or whether the failure to pass 3 classes was a result of poor attendance or lack of proper care, supervision, or discipline. The finding that well child checks were missed do not support an adjudication of neglect based on not receiving necessary medical care. The findings do not address the frequency or reasons for the missed visits, the medical conditions requiring the visits, or the adverse effect of missing the visits on the child's health. A finding incorporating by reference the findings of the pre-adjudication order in full does not support an adjudication of neglect. The adjudication order did not indicate it was relying on any finding in the pre-adjudication order when making the neglect determination; the pre-adjudication order is described as addressing jurisdictional issues; and the finding referenced on appeal by DSS is not a finding as it states "DSS made the finding" and "the trial court may not delegate its fact finding duty by relying wholly on DSS reports and prior court orders." Sl. Op. at 15-16.

- The doctrine of invited error, which "applies to 'a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining' " does not apply to RM. Sl. Op. at 12 (citation omitted). RM stipulated to facts about the child's school attendance, grades, and missed medical visits and did not request the trial court adjudicate neglect or remove her child from her care.

Neglect Adjudication

In re C.C., ___ N.C. App. ___ (July 3, 2018)

Held: Affirmed

- Facts: The respondent father (who is the appellant) was incarcerated at all relevant times in the case. This appeal focuses on the circumstances of neglect created by mother. DSS became involved because of reports related to the mother's substance abuse, mental health issues, unstable housing, prostitution, and inappropriate supervision of the child. At the time of the report to DSS, the child had been living with mother's former foster mother for a significant period of time. About one month after the DSS report, the child moved to maternal grandmother's (GM) home. Mother agreed to enter a residential drug treatment program with her infant (not subject of this appeal) while her other daughter (who is the subject of this appeal) remained with GM. Mother was discharged from the program due to her continued use of illegal drugs and breaking the program's curfew. DSS informed mother it intended to file a petition seeking custody of the children. Mother requested that her children be placed with her for former foster mother, which occurred after DSS approved this kinship placement. DSS filed the petition alleging neglect. Subsequently, mother contacted the DSS social worker to inquire about moving to New Jersey and having the children placed with a relative there. DSS filed a supplemental neglect petition and sought a nonsecure custody order based on mother's intent to move with the children to New Jersey. After a hearing, the child was adjudicated neglected, and a subsequent dispositional order was entered. Respondent father appeals, arguing there was no finding or evidence supporting a finding of a substantial risk of harm to the child and that the child was not a neglected juvenile because her needs were being met in the voluntary kinship placement.
- Neglect: G.S. 7B-101(15) defines neglected juvenile as "a juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker." Case law has established that as a result of that improper care, supervision, or discipline, there must be some physical, mental, or emotional impairment or substantial risk of such impairment to the child. Where there is no such finding, there is no error if the evidence supports such a finding.
- When a child has been voluntarily removed from the parent's home before a neglect petition is filed, the court should consider evidence of changed conditions in light of the evidence of prior neglect and the probability of repetition of neglect and consider the best interests of the child and fitness of the parent to care for the child at the time of the adjudication hearing. *Quoting In re H.L*, 807 S.E.2d 685 (2017).
- This case is similar to *In re H.L.* and *In re K.J.D.*, 203 N.C. App. 653 (2010), which affirmed the neglect adjudications when the parents failed to remedy the conditions that required the voluntary safety placement, and differs from *In re B.P.*, 809 S.E.2d 914 (2018), which reversed the neglect adjudication when mother, by the time of the adjudication hearing, had made

significant improvements to correct the conditions that led to the safety placement. Here, the child was in a kinship placement because of father's inability to provide care due to his incarceration and mother's inability to care for the child because of issues related to substance abuse, mental health, unstable housing, prostitution, and inappropriate supervision. Although the ultimate finding of a substantial risk of harm to the child was not made, the evidence supports that finding: "[t]he trial court's findings make it abundantly clear that conditions leading to the placement of [the child] outside of the home had not been corrected. At the time of the adjudication hearing, [father] was still incarcerated, and [mother] had not (1) successfully engaged in substance abuse treatment; (2) enrolled in mental health treatment or parenting classes; or (3) obtained employment."

In re M.N., ___ N.C. App. ___ (July 3, 2018)

Held: reversed in part and remanded

- When adjudicating neglect, the trial court must make sufficient findings, supported by competent evidence, of harm or substantial risk of harm to the juvenile. In this case, the court found that the guardians had been arrested on drug-related charges. The parties concede that (1) no evidence of harm or substantial risk of harm was introduced, and (2) the necessary findings regarding harm or substantial risk of harm were not made. The conclusion of neglect is not supported by findings or evidence and is reversed as to the child who is the subject of the order that was appealed. (The adjudication of neglect of two other children was not appealed).

Dependency: Motion to Dismiss

In re K.G., ___ N.C. App. ___ (July 17, 2018)

Held: reversed adjudication and remanded to dismiss petition (note, because DSS has custody through the delinquency order, the holding does not require custody be returned to the parents)

- Facts: The juvenile was placed in DSS custody through an order entered in a delinquency action. DSS initiated a dependency action, alleging the juvenile was incarcerated, had stolen money from his parents (respondents), repeatedly ran away from home and refused to go home, and the parents reported to law enforcement when the juvenile ran away and have sought services from DJJ to help manage the juvenile's behavior.
- Issue: Whether the trial court erred in denying the respondent's 12(b)(6) motion to dismiss DSS's petition alleging dependency based on a failure to state a claim for which relief may be granted.
- Standard of review: The appellate court reviews de novo whether the allegations in the complaint are, as a matter of law, sufficient to state a claim upon which relief may be granted. The allegations are treated as true and are construed liberally. A denial of a motion to dismiss will be reversed only when the "plaintiff is entitled to no relief under any set of facts which could be proven to support the claim." Sl. Op. at 4.
- In a dependency petition, the allegations must address the respondents' inability to provide for the child's care or supervision and lacked an appropriate alternative child care arrangement. Here, the allegations in the petition if taken as true do not address either prong for a dependency adjudication and instead "at best establish that [the juvenile] is a delinquent or undisciplined juvenile,… matters to be addressed in his pending juvenile delinquency court

cases, and that Respondents were working with juvenile justice officials to obtain services for [the juvenile]." Sl. Op. at 5-6. Respondents are willing and able to care for and supervise the child, and the child's willful acts (e.g., his behavior and refusal to go home) do not determine the parent's ability to care for the juvenile.

Evidence: Rule 803(24) Residual Exception re: Child's Statements

In re W.H., ___ N.C. App. ___ (August 21, 2018) (motion to publish granted)

Held: Affirmed

- Facts: This case involves 2 boys and 2 girls who were born to mother and father. In December 2011, mother reported to DSS that father sexually abused the older daughter. The daughter was interviewed by the DSS social worker and disclosed the sexual abuse. In the following month, the daughter had a forensic evaluation at the TEDI Bear Clinic where she did not disclose the sexual abuse, and the report indicated that recantation of child sexual abuse is not uncommon. Later that month, the daughter met the DSS social worker again and redisclosed the sexual abuse. More than 3 years later, DSS reopened the case when the younger sister disclosed sexual abuse by the father. A different DSS social worker interviewed both daughters and both described inappropriate sexual contact by the father. The younger daughter disclosed to the TEDI Bear Clinic. Both girls were interviewed by the sheriff's department and stated that their father did something they "didn't like." At a preliminary hearing in the abuse and neglect proceeding, the trial court determined the girls were unavailable to testify and the residual hearsay exception applied to the girls' statements to the interviewers at the TEDI Bear Clinic, DSS social workers, and law enforcement. All 4 children were adjudicated neglected and the girls were adjudicated abused. Father appeals.
- The appellate court reviews the admission of evidence under the residual hearsay exception for an abuse of discretion, and "the appellant must show that '[he or she] was prejudiced and a different result would have likely ensued had the error not occurred.' " Sl. Op. at 5 (citation omitted).
- The residual hearsay exception in Rule 803(24) requires a 6-prong analysis by the trial court: "(1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission." Sl. Op. at 5.
    - Notice is sufficient when "it gives the opposing party 'fair opportunity to meet the proffered evidence.' " Sl. Op. at 5 (citation omitted). Here, notice was sufficient to allow the father to prepare. DSS sent the father written notice of its intent to use the daughters' out-of-court statements that were made to the DSS social workers, law enforcement, and the TEDI Bear Clinic between 1 week – 7 months before the statements were introduced at the various hearings and trial. Additionally, the statements were provided to the father months before the notice was sent to him.
    - Factors a court considers when determining whether a statement is trustworthy include the declarant's (1) personal knowledge of the underlying event, (2) motivation to be truthful, (3) history of recanting, and (4) practical availability at trial for cross-examination. Although recantation is a factor, "none of these four factors, alone or in

combination, may conclusively establish or discount the statement's circumstantial guarantees of trustworthiness." Sl. Op. at 6-7 (citations omitted). The lack of a finding about the 2012 TEDI Bear interview is not fatal.

- The trial court determined the daughters were unavailable to testify after finding testifying would traumatize the daughters, cause them confusion, and that there would be a risk that they would not testify truthfully due to guilt and fear. The findings that guilt and fear may impact the testimony distinguish this case from *State v. Stutts*, 105 N.C. App. 557 (1992), which held any statements (including out-of-court statements) made by the child were untrustworthy because she could not tell truth from fantasy.

Permanent Plan: Guardianship/Custody; Relative Preference; ICPC; Cease Reunification Efforts

In re I.K., ___ N.C. App. ___ (August 7, 2018)

Held: Vacated and remanded for additional findings

- Facts: Two children were adjudicated dependent based on circumstances related to their parents' inability to provide proper care and supervision due to substance use, domestic violence, and unstable housing. Prior to the filing of the petition, the children were living with their maternal grandmother. The children continued to remain in their grandmother's care throughout the course of this dependency action. The permanency planning order that is the subject of this appeal awarded guardianship of both children to the grandmother and ceased reunification efforts.
  - Author's Note**:** The opinion refers to the cessation of reunification efforts and appears to be using that term synonymously with eliminating reunification as a permanent plan. *See In re J.A.K.*, 812 S.E.2d 716, fn 4 (2018). This author believes the order appealed is the elimination of reunification and resulting cessations of reunification efforts as the court of appeals has previously held elimination of reunification as a permanent plan and the cessation of reunification efforts differ. *See In re C.P.*, 812 S.E.2d 188 (2018); *In re C.S.L.B.*, 803 S.E.2d 419 (2017). The order eliminating reunification as a permanent plan is an appealable order under G.S. 7B-1001(a)(5)a.
- Before a court may award guardianship [or custody] to a nonparent based upon the child's best interests, it must first find [by clear and convincing evidence] that the parent is unfit or has acted inconsistently with his/her constitutionally protected status to parent. The permanency planning order does not contain that finding. Respondents did not waive that finding as they were not afforded the opportunity to raise the issue at the permanency planning hearing when the trial court did not permit respondent's counsel to make arguments. *See In re R.P.*, 798 S.E.2d 428 (2017).
- The standard of review for a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law, which are reviewed de novo. "Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of the trial court's judgment.' " Sl. Op. at 13 (citation omitted).

- At a permanency planning hearing, reunification efforts may be ceased when the court makes findings under G.S. 7B-906.2(b) and (d). Two of the challenged findings that address the respondents' minimal progress are not sufficiently specific to allow the appellate court to determine what evidence in the record was relied upon to make that finding. Although evidence in the record supports the finding of minimal progress, there is also evidence that tends to show reasonable progress and supports another finding made by the trial court that respondents' compliance with their case plans were improving. The DSS and GAL reports that were incorporated by reference have mixed information regarding respondents' progress or lack thereof on their respective case plans. For example, when looking at the information since the last permanency planning hearing the reports address both the respondents' participation in treatment and parenting classes and their appearing to be under the influence of drugs at a family event.

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.
- G.S. 7B-903(a1) addresses the out-of-home placement of a juvenile. This statute mandates (through the use of the word "shall") that the court (1) first consider whether a relative is willing and able to provide proper care and supervision to the child in a safe home, and (2) if so, place the child with that relative unless there is a finding that the placement is not in the child's best interests. "Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." Sl. Op. at 4 (citation omitted). There have never been the required findings or conclusions of law resolving the issue of relative placement and the child's best interests.

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- Facts: Respondent mother appeals from a permanency planning order that awarded custody of her two children, who had been previously adjudicated neglected, to relatives who reside in Arizona. An ICPC home study was requested but not completed. Mother also appeals the termination of the juvenile court's jurisdiction and entry of a Chapter 50 custody order pursuant to G.S. 7B-911.

- ICPC: Regarding out-of-home care, G.S. 7B-903(a1) requires that a child's placement with a relative comply with the Interstate Compact on the Placement of Children (ICPC). One requirement of the ICPC is that the receiving state (where the child is going to) notify in writing the sending agency that the proposed out-of-state placement does not appear to be contrary to the child's best interests. The ICPC applies to a placement in foster care or as a preliminary to a possible adoption. G.S. 7B-3800. Looking at (1) the definition of "foster care" under AAICPC Regulation 3(4)(26), which includes the home of a relative, and (2) the holding in *In re V.A.,* 221 N.C. App. 637 (2012) , which looked to *In re L.L.*, 172 N.C. App. 689 (2005), that determined the ICPC applied to the out-of-state placement with a relative, placement with an out-of-state relative is a foster care placement requiring compliance with the ICPC. To the extent there is a later opinion, *In re J.E.*, 182 N.C. App. 612 (2007), that held placement with the out-of-state relative is not a foster care placement or preliminary placement to adoption triggering the ICPC and conflicts with the *In re V.A.* (2012)/*In re L.L.* (2005) holdings, the court is bound by the older cases. Because there was no written notification from the receiving state, the trial court "was not authorized to award custody" to the out-of-state relatives.
- Verification: Before ordering custody (or guardianship) to someone other than a parent, the court must verify the person (1) understands the legal significance of the placement and (2) will have adequate resources to appropriately care for the child. G.S. 7B-906.1(j). Although there are no specific findings that must be made, the record must show the court received and considered reliable evidence of those two factors. The evidence, which was a DSS report and social worker testimony about the source but not amount of income and that there were no concerns about the financial affidavit the proposed custodians completed, lacked specificity and was insufficient to support the findings that the resources were adequate. There was no evidence, such as testimony from the prospective custodians or social worker or a signed statement by the prospective custodians, showing the custodians' understanding of the legal relationship.

Visitation

In re W.H., ___ N.C. App. ___ (August 21, 2018) (motion to publish granted)

Held: Affirmed

- Facts: This case involves 2 boys and 2 girls who were born to mother and father. The girls were adjudicated abused based on father sexually abusing them. All the children were adjudicated neglected. Respondent father appeals the adjudication and dispositional order.
- Dispositional orders of visitation are reviewed for an abuse of discretion. There was no abuse of discretion when the trial court ceased visits between the father and all the children when determining visitation was against all of the children's best interests, health, and safety. "Father's conduct toward his daughters directly influenced the trial court's determinations, but only insofar as it suggested that further contact could put the sons' safety at risk." Sl. Op. at 9.

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- The visitation order between respondent mother and the child who is placed in Arizona that establishes a weekly visit for a minimum of two hours if the mother moves to Arizona does not comply with G.S. 7B-905.1(c). The court must specify the minimum frequency and length of

visits and whether the visits shall be supervised. The order does not address the frequency or length of visits if the mother does not move to Arizona, and it does not address supervision at all.

Termination Jurisdiction: 7B-911

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- G.S. 7B-911: The trial court must make the findings required by G.S. 7B-911(c) before terminating its jurisdiction in the juvenile proceeding. Here, it is undisputed that the order contained no findings that addressed either section of G.S. 7B-911(c)(2): there was no need for continued state intervention on behalf of the child through a juvenile court proceeding, and at least 6 months have passed since the court determined placement with the relatives who are being awarded custody is the permanent plan. The findings in the permanency planning order are internally inconsistent as they require DSS to remain involved with reunification efforts, placement, and care of the child while also "closing" and releasing DSS from the matter.

Appellate Issues (Standing, Vacated Order, Mootness)

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.
- Respondent father has standing to appeal. He is not asserting the interests of the relative but is asserting his own interest to have the court consider a potentially viable relative placement. Because the relative was not a party in this action with a right to appeal, this case is distinguished from *In re C.A.D.*, 786 S.E.2d 745 (2016), which held the respondent mother was not aggrieved by the permanency planning order and lacked standing to present an argument that affected the grandparents when the grandparents were parties to the proceeding (as former custodians) and could have but did not appeal the order.
- "When an order of a lower court is vacated, those portions that are vacated become void and of no effect." Sl. Op. at 7 (citation omitted). The previous permanency planning order was vacated in its entirety and the case was remanded for further proceedings. The case returned to the prior review and permanency planning orders, which was custody to DSS. After remand, the

new order from the trial court, which re-incorporated findings and conclusions from the voided order, is a new single order from which respondents could raise any argument on appeal.

- A 2017 guardianship review order that ceased all contact between the child and grandmother does not moot this appeal. The trial court has not addressed the question of whether the relative should have been given priority placement as required by G.S. 7B-903(a1).

In re M.N., ___ N.C. App. ___ (July 3, 2018)

Held: Standing to appeal exists

- Facts: This is an appeal of adjudication of neglect and initial dispositional order that terminates the appellants' (grandparents) 2009 guardianship order, which was entered in an earlier abuse and neglect proceeding pursuant to G.S. 7B-600. Prior to the entry of that guardianship order in the first abuse and neglect action, the grandparents had been awarded legal and physical custody of the child. This second petition, which alleged neglect and dependency, was based on the grandparents' arrests on multiple drug-related charges. DSS argues there is a deficiency in the 2009 guardianship order such that the grandparents are caretakers and lack standing under G.S. 7B-1002 to appeal.
- G.S. 7B-1002 specifies those parties that have a right to appeal and includes "a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party."
- A dispositional order in a prior action is not subject to collateral attack in a subsequent action when the basis to void the order is non-jurisdictional. At the time this action was filed, the grandparents were guardians as a result of the 2009 order and under G.S. 7B-401.1(c) are parties to this action with standing to appeal as the nonprevailing party under G.S. 7B-1002. Even if the guardianship order was void, the earlier custody order made the grandparents custodians as defined by G.S. 7B-101(8). As custodians, the grandparents are parties to the first and second proceedings under G.S. 7B-401.1(d). As nonprevailing custodians, they have a right to appeal the adjudication and initial dispositional orders under G.S. 7B-1002.

Termination of Parental Rights

Ground: Failure to Make Reasonable Progress

In re B.O.A., ___ N.C. App. ___ (July 17, 2018)

Held: Reverse

- Facts: In 2015, DSS filed a petition alleging a 4 month old was neglected due to an injurious environment related to her exposure to domestic violence between her parents and an unexplained bruise on the infant's arm. A nonsecure custody order was entered. In 2016, the child was adjudicated neglected and was placed in the home of her paternal grandmother for the duration of the case. Respondent agreed to an out-of-home services agreement that required her to obtain mental health assessments and follow recommendations, complete a domestic violence program and follow recommendations, submit to random drug screens, participate in weekly group substance abuse therapy, participate in medication management, complete parents classes and apply the skills learned during visitation, refrain from criminal activity, obtain and maintain stable income, and submit proof of income and budgeting to maintain household bills. In 2017, DSS filed a TPR petition, which was granted after concluding

the respondent willfully left the juvenile in foster care or other placement outside the home for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the child's removal (G.S. 7B-1111(a)(2)), and the TPR was in the child's best interests.

- Standard of review: Whether there is competent evidence to support the findings of fact and whether the findings of fact support the conclusion of law. The conclusion of law is reviewed de novo.
- The child was adjudicated neglected and removed from the home due to domestic violence and a bruise on the child's arm. The finding that the respondent completed domestic violence classes but has not demonstrated skills that she was to learn in those classes is unsupported by the evidence. The social worker testified that the respondent was hostile to DSS. Under G.S. 50B-1, domestic violence is limited to acts "by a person with whom the aggrieved party has or had had a personal relationship," which does not include the relationship between the mother and DSS and does not correlate to the domestic violence component of her case plan regarding demonstrating skills learned. Sl. Op. at 8. The social worker and respondent both testified that the respondent did call the police for assistance in having her live-in boyfriend removed from the home after he refused to leave. Respondent further testified her call to the police was her implementation of skills she learned, and the boyfriend was not present when the police arrived. This evidence supports a finding that respondent sought assistance prior to domestic violence occurring. Evidence showed respondent obtained a 50B order against the child's father and had no further contact with him after the 2015 incident.
- The finding that there was no credible evidence that respondent is unable to protect her child is stricken and disregarded. DSS has the burden as petitioner to prove the alleged grounds by clear and convincing evidence; "it was not respondent's burden to prove the nonexistence of the ground." Sl. Op. at 11.
- Findings regarding respondent's failure to demonstrate what she learned in parenting classes during visitation is unrelated to the reasons that the child was removed from the home due to domestic violence and an unexplained bruise on the child's arm. There was no evidence of any concerns regarding physical abuse or inappropriate interactions between respondent and the child. Although DSS argued the out-of-home services agreement identified the real issues related to substance abuse, mental health issues, and parenting skills, DSS did not allege any of these conditions in either the nonsecure custody order or petition alleging neglect, and the adjudication of neglect was not based on any of these conditions. "Without prior notice or allegations, they cannot now be asserted as conditions which led to [the juvenile's] removal for purposes of G.S. 7B-111(a)(2)." Sl. Op. at 12. Respondent's lack of progress to comply with these provisions of her service agreement is irrelevant for a TPR based on failure to make reasonable progress to alleviate the conditions leading to the child's removal or adjudication.

Insufficient notice, evidence, and findings

In re J.M.K., ___ N.C. App. ___ (Sept. 4, 2018)

Held: Reversed

- Facts: The case involves a private termination of parental rights action initiated by the mother against the father. The petition alleged failure to pay child support and failure to legitimate, G.S.

7B-1111(a)(4) & (5) as grounds. Respondent father's rights were terminated on the grounds of abandonment, failure to pay child support, and failure to legitimate, and he appeals.

- Standard of review is whether clear, cogent, and convincing evidence supports the findings of fact, and whether the findings of fact support the conclusion of law adjudicating the ground to TPR. The findings and conclusions must "reveal the reasoning which led to the court's ultimate decision." Sl. Op. at 3.
- Regarding the abandonment ground, the petition neither alleged nor put the respondent father on notice that his parental rights were subject to termination due to abandonment. As a result, the adjudication of abandonment must be reversed.
- In a TPR based on failure to pay child support, the "petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed." Sl. Op. at 5 (citations omitted). There was no evidence of a child support order.
- A court may terminate a father's parental rights to a child born out of wedlock when the father, prior to the filing of the TPR petition (or motion) fails to take any of the enumerated actions set forth in G.S. 7B-1111(a)(5). The trial court must make specific findings of fact for each of the 5 subsections. Here, the trial court only made findings addressing subsections (a), (c), and (d) and did not address subsections (b) (legitimate the child through G.S. 49-10 or -12.1) and (e) ("establish paternity" through one of the designated statutes or other judicial proceeding).

Appeal: No Merit Brief; Rule 3.1

In re L.V., ___ N.C. App. ___ (July 3, 2018)

Held: Dismissed

Stay of mandate granted 7/17/18 (motion for en banc rehearing filed)

- Pursuant to N.C. App. Rule 3.1(d), a no-merit brief was filed by respondent mother's attorney. Although advised by her attorney that she has a right to file a pro se brief, respondent mother failed to do so. No issues were argued or preserved for review.
- In a footnote, the opinion quotes *State v. Velesquez-Cardenas*, ___ N.C. App. ___ (sl. op. concurrence at 3 filed 4/18/2018), "Rule 3.1(d) does *not* grant indigent parents the right to receive an *Anders*-type review of the record by our Court, to consider issues not properly raised."