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Child Welfare Case Update

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Abuse, Neglect, Dependency

Adjudication: Neglect

In re J.A.M., ___ N.C. ___ (Feb. 1, 2019)

Held: Affirmed

- Facts: DSS received a report about the child's birth and a petition was filed alleging neglect because of the parents' histories with DSS for their other children. Mother's significant 10-year involvement with DSS regarding her other children results from her older children's exposure to her violent relationships. In the most serious incident, one child suffered life-threatening injuries caused by his father/mother's partner at the time; mother delayed obtaining immediate assistance for the child, and she refused to acknowledge the child's significant special needs resulting from the injuries. Mother's parental rights to her six other children were terminated for her failure to change her pattern of domestic violence. Father's history regarding his other child was also related to domestic violence.
- Procedural History: This is the second appeal to the NC Supreme Court of an adjudication order of neglect (the initial dispositional order is not the subject of the appeal). In the first appeal, the Court of Appeals (COA) reversed the adjudication after determining the evidence did not support the findings of fact and the findings of fact did not support the conclusion of neglect based on an injurious environment. The Supreme Court granted a discretionary review and held the COA applied the wrong standard of review and reversed and remanded the decision to the COA for application of the correct standard. On remand, the COA majority affirmed the neglect adjudication after holding the findings were sufficient and "our Court may not reweigh the underlying evidence on appeal." Sl. Op. at 9. The dissent determined there was no clear and convincing competent evidence that the child was at substantial risk of neglect. That opinion was appealed to the Supreme Court.
- Issue: "Whether the Court of Appeals majority correctly determined that the clear and convincing evidence and the trial court's findings of fact supported its conclusion of law that the juvenile J.A.M. was neglected." Sl. Op. at 1. Answer: Yes.
- "A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' N.C.G.S. 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." Sl. Op. at 11. The prior case alone is not determinative. The trial court has discretion to determine how much weight to give evidence of a prior neglect determination. Regarding a newborn, the trial court's decision must be predictive in nature in assessing whether there is a substantial risk of future abuse or neglect to the child based on the historical facts of the case.
- In this case, there were other factors the trial court found, all of which were supported by clear and convincing evidence and support the conclusion of neglect. The court found mother failed to acknowledge her role in the TPR to her other six children, denied the need for services with DSS, and was involved with the child's father who had a domestic violence history which is one of the reasons her other children were removed from her care. These findings were supported by exhibits of the TPR and adjudication/disposition orders for mother's six other children and

the criminal record of respondent father's convictions for assault on a female (his sister), (2) the unchallenged testimony of the DSS social worker that mother rejected DSS services as unnecessary, and (3) mother's testimony that she knew father had been charged with assault on a female but did not ask him if it was true and that she had no role in her other child's serious injuries.

- "The trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." Sl. Op. at 10. The trial court assesses a witness's demeanor and credibility "often in light of inconsistencies or contradictory evidence." Sl. Op. at 15, Here, the court made a credibility determination of the testimony that supported its finding that mother failed to take responsibility for her role in the TPR of her other children.

Disposition: Evidence, Findings, Conclusions of Law

In re B.C.T., ___ N.C. App. ___ (May 7, 2019)

Held: Reverse and Remand

- Facts: DSS received a report about mother's home and her younger child. At the time, her older child was living with a family friend. Mother, her live-in boyfriend (a caretaker), and DSS entered into a family services agreement that focused on emotional and mental health issues, family relationships/domestic violence, and parenting skills. Mother voluntarily agreed to allow her younger child to be placed with the same family friend who was caring for her older child. Months later, DSS filed two petitions (one for each child) alleging abuse and neglect and noting that the petitions were filed because boyfriend, who mother was still living with, had not completed the family services agreement although mother had made progress on her plan. Based on mother's stipulations, the children were adjudicated neglected. Mother complied with the case plan, exceeded DSS recommendations, and throughout the entirety of the case (investigation through appeal) had unsupervised and unlimited contact with both children. At disposition, DSS recommended the younger child's reunification with mother but based on the wishes of the older child and time that he had spent with family friend, that custody of the older child be ordered to family friend. The court ordered (1) the younger child remain in DSS custody with placement with family friend and supervised visits with mother of at least one hour every other week, and (2) Chapter 50 custody (via G.S. 7B-911) of the older child to family friend with one hour of supervised visits per week with mother. Mother appeals the disposition orders.
- Findings of Fact: The standard of review is whether the findings are supported by competent evidence. Findings based on competent evidence are binding even when there is evidence that would support a contrary finding. Here, the challenged findings were not supported by competent evidence.
    - The finding that the family friend's home is safe, suitable, and appropriate is not supported by the evidence, which consists of the children having toys that a child desires including a four-wheeler or ATV and video games. Having what one desires is not necessarily in the best interests of the child. There is no evidence regarding substantive information about the home or care of the children.
    - The finding that it is not likely the child will be returned home within the next 6 months and placement with the parent is not in the older juvenile's best interests is not

supported by the evidence. The evidence showed mother did everything required of her.

- Findings related to conditions which led to the child's removal still exist, a return home is contrary to the child's welfare, and mother is not a fit and proper person are not supported by the evidence. The evidence showed that by the disposition hearing mother and boyfriend had fully complied with the family services agreement and DSS recommendations. There was no evidence that the conditions leading to the removal still existed other than the older child wished to remain with family friend. Custody to a third party requires that the parent is unfit or has acted inconsistently with her constitutionally protected rights and cannot be based on a child's preference or the material advantages a third party may offer the child. There were no findings and no evidence that mother acted inconsistently with her parental rights.

- Conclusion of Law of Child's Best Interests: A conclusion of law must be supported by findings. A determination of best interests is reviewed for an abuse of discretion. Conclusions of law are reviewed de novo. Best interests findings include characteristics of the parties competing for custody and may concern physical, mental, or financial fitness or other relevant factors and are more than mere conclusions. *See Hunt v. Hunt*, 112 N.C. App. 722 (1993). Here, the findings cannot support the conclusion of law regarding the child's best interests as the evidence does not support the findings.

Visitation

In re J.L., ___ N.C. App. ___ (March 19, 2019)

Held: vacated and remanded in part; affirmed in part

- Facts: After filing a petition alleging neglect and dependency, DSS obtained nonsecure custody of a newborn and placed the child with Mr. and Mrs. C (foster parents). After adjudication, the initial disposition continued custody with DSS, who continued the child's placement with Mr. and Mrs. C. In a permanency planning order, custody with DSS continued (as did DSS's placement with Mr. and Mrs. C); reunification efforts with mom were ceased; and a primary plan of guardianship with a court-approved caretaker and secondary plan of adoption was ordered. Mother's visitation was ordered for one hour of supervised visits/month. At a subsequent permanency planning hearing, DSS and the GAL recommended a change in placement to foster parents who had adopted two of the child's older half-siblings. The permanency planning order awarded guardianship to Mr. and Mrs. C. and ordered that mom have no in-person visits with the child but could have telephonic communication that was monitored by Mr. and Mrs. C. Respondent mother appeals.
- When awarding guardianship, a determination that the following rights and responsibilities remain with mother - inheritance, financial responsibility, and visitation - is a conclusion of law. That conclusion of law is not inconsistent with a provision for no visitation but for monitored telephonic communication. The court determines the scope and duration of visitation that is in the child's best interests and consistent with his health and safety. A review of an order denying visitation is for an abuse of discretion. There was no abuse of discretion. The court's ultimate finding that visitation was not in the child's best interests and consistent with his health and safety was supported by evidentiary findings of mother's (1) long CPS history

resulting in the removal of her other children with the same issues identified for this child, (2) minimal participation in services to resolves the issues, (3) failure to attend visits, and (4) executed relinquishment of the child.

- G.S. 7B-905.1(d) requires that "if the court retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan entered…" Neither the order nor transcript review indicate the court notified mother of her right to file a motion for review of the visitation plan. Vacated and remanded for compliance with G.S. 7B-905.1(d).

In re Y.I., ___ N.C. App. ___ (Dec. 4, 2018)

Held: Affirmed in part; vacated in part and remanded

- Facts: Two children were adjudicated neglected and dependent after being removed from their mother's home. Upon learning of the children's removal, father immediately began working with DSS. Respondent mother was ordered to comply with her case plan, and respondent father had an out-of-home services plan. At a permanency planning hearing, the court ordered custody of the children to their father, visitation with the mother at a supervised visitation center, and relieved DSS and the attorneys from the action. Respondent mother appeals.
- The order complies with the visitation provisions set forth in G.S. 7B-905.1: the minimum length (minimum of one hour each visit), frequency (twice per month), and whether the visits shall be supervised (occur at supervised visitation center). However, the order does not addresses what costs (if any) of the supervised visitation to be held at the specified center and who is to bear the expense. It appears that respondent mother would bear the cost since DSS was relieved, but the court must first determine whether mother has an ability to pay. Visitation vacated and remanded for further findings of fact.

First Permanency Planning Hearing: Reunification vs. Reunification Efforts

In re M.T.-L.Y., ___ N.C. App. ___ (May 21, 2019)

Held: Affirmed in part, vacated in part, and remanded

- Facts: An infant was adjudicated neglected. At disposition, the child was placed in DSS custody. At the dispositional hearings (this author believes those hearings were the initial dispositional and then a review hearing), the court ordered as conditions of reunification that mother abstain from alcohol or drugs, submit to drug testing as requested by DSS, have a psychological evaluation, enter into a family services agreement for reunification, complete parenting classes, attend her two weekly supervised visits, confirm her employment and wages, notify DSS within 24 hours of any change in her employment or household status, participate in the child's medical appointments, and maintain regular communication with DSS. At the first permanency planning hearing, mother did not appear but was represented by her attorney. The court found that mother did not comply with her court-ordered conditions and that there was slim likelihood of reunification, mother failed to make adequate progress within a reasonable period of time, was not available to the court, and acted inconsistently with the child's health and safety. The court ordered (1) DSS cease reunification efforts and (2) a primary permanent plan of adoption and secondary plan of guardianship. ("PPO"). DSS filed a motion to TPR, which was granted. Mother appeals the TPR and as part of that appeal, the PPO.

- Reunification as a Permanent Plan: At the permanency planning stage involving a neglected juvenile, the court must adopt concurrent permanent plans, designating a primary and secondary plan. When determining which plans to order, reunification is addressed in G.S. 7B-906.2(b). Although that statutory language seems to plainly allow the trial court to omit reunification as permanent plan in any permanency planning hearing (PPH), this court is bound by *In re C.P.*, 812 S.E.2d 188 (2018). C.P. held the trial court may remove reunification as a concurrent plan in "subsequent" PPHs and not the initial PPH. Bound by that holding, the trial court erred in removing reunification as a concurrent plan in the first and only PPH. The PPO and TPR are vacated.
- Cessation of Reunification Efforts: Before In re C.P., the court of appeals held in *In re H.L.*, 807 S.E.2d 685 (2017), that reunification efforts could be ceased at the first permanency planning hearing if the required findings of G.S. 7B-906.2(b) were made. Although In re C.P. believed the trial court is prohibited from ceasing reunification efforts at the first PPH, it recognized it was bound by the prior holding of In re H.L. The standard of review of an order ceasing reunification efforts is whether the trial court made appropriate finding based on credible evidence; whether the findings support the conclusions; and whether the court abused its discretion with respect to disposition. The court's findings are not contradictory. "[P]artially performing a required condition does not necessarily preclude a conclusion that the performance is inadequate". Sl. Op. at 22. The findings are sufficient and are based on evidence that mother failed to verify her participation in substance abuse treatment, her employment and her living arrangements with DSS; did not comply with the family services agreement, visitation schedule, drug testing, or attendance at her child's medical appointments; violated the safety plan; and tested positive for drugs. Although the court did not use the statutory language in G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety, the findings address the statute's concerns. *See In re L.M.T.*, 367 N.C. 165 (2013).
- Reservations about In re C.P. are based on the statutory language in G.S. 7B- 906.2(c) and 7B-906.1(d)(3), which was not examined in C.P. Those statutes seem to contradict the interpretation of G.S. 7B-906.2(b) in C.P. Additionally, the holding of C.P. raises more questions than answers, affecting "what 'efforts' social services must perform [under G.S. 7B-906.2(b)] when reunification efforts have been ceased but reunification is still included in a permanent plan" (Sl. Op. at 18); rights (or lack thereof) to appeal an order ceasing reunification efforts but keeping reunification as a permanent plan; and creating a dichotomy between reunification and reunification efforts as opposed to keeping them as a unitary concept. "To avoid confusion of our DSS workers and trial courts and to promote permanency for children in these cases, we encourage the North Carolina General Assembly to amend these statutes to clarify their limitations." Sl. Op. at 19.

Permanency Planning Hearing: Permanent Plan Required

In re D.A., ___ N.C. App. ___ (Dec. 4, 2018)

Held: Reversed and remanded

- Facts: In May 2017, the child was adjudicated neglected. The first review and permanency planning hearing was held in June 2017, and the court awarded DSS custody with a trial home

placement with respondent father. In August 2017, the child was removed from father's home and placed with maternal grandparents. A subsequent permanency planning hearing was held in October 2017, and the permanency planning order concluded respondent acted inconsistently with his parental rights and ordered legal custody to the maternal grandparents; waived further review hearings; and relieved DSS, the child's GAL, and the respondent's attorney.

- Issue on appeal: Respondent father appeals arguing the findings do not support the cessation of reunification efforts. "Because the trial court failed to comply with the statutory mandate and adopt a permanent plan for [the child], however, we [the court of appeals] decline to address the argument, and reverse and remand" for the trial court to adopt one or more permanent plans as required by G.S. 7B-906.2. Sl. Op. at 6.
- Under G.S. 7B-906.2(a)–(b), (1) the trial court "shall" adopt one or more concurrent permanent plans with a primary and secondary plan identified; (2) reunification "shall" remain a primary or secondary plan unless certain findings are made; and (3) concurrent planning "shall" continue until a permanent plan has been achieved. "Shall" is a mandate to trial judges, and failure to comply with that mandate is reversible error. The trial court never established a permanent plan for the child as required by G.S. 7B-906.2.

Permanency Planning Hearing: Role of Foster Parents

In re J.L., ___ N.C. App. ___ (March 19, 2019)

Held: vacated and remanded in part; affirmed in part

- Facts: After filing a petition alleging neglect and dependency, DSS obtained nonsecure custody of a newborn and placed the child with Mr. and Mrs. C (foster parents). After adjudication, the initial disposition continued custody with DSS, who continued the child's placement with Mr. and Mrs. C. In a permanency planning order, custody with DSS continued (as did DSS's placement with Mr. and Mrs. C); reunification efforts with mom were ceased; and a primary plan of guardianship with a court-approved caretaker and secondary plan of adoption was ordered. Mother's visitation was ordered for one hour of supervised visits/month. At a subsequent permanency planning hearing, DSS and the GAL recommended a change in placement to foster parents who had adopted two of the child's older half-siblings. Although not parties, Mr. and Mrs. C as the current placement provider testified, and the court permitted their counsel to facilitate their testimony on direct examination. Two experts testified. The expert procured by Mr. and Mrs. C and called by the child's GAL attorney advocate was directly examined by Mr. and Mrs. C's counsel. The permanency planning order awarded guardianship to Mr. and Mrs. C. and ordered that mom have no in-person visits with the child but could have telephonic communication that was monitored by Mr. and Mrs. C. Respondent mother appeals.
- Role of foster parents and their attorney. With limited exceptions, a foster parent is not a party to the action but the court is statutorily required to consider information from any person providing care for the juvenile and any other person that aids in the court's review. G.S. 7B-401.1(e1), (h); -906.1(c). "The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his control of a case will not disturbed absent a manifest abuse of discretion." Sl. Op. at 10 (citation omitted). Mother did not show an abuse of discretion when

the court permitted Mr. and Mrs. C's counsel to (1) facilitate their testimony by direct examination and (2) as requested by the child's GAL attorney advocate conduct the direct and redirect of the expert witness. Mr. and Mrs. C were not permitted to intervene, and their counsel did not present other witnesses, introduce exhibits, cross-examine witnesses, make objections, or present closing arguments as a party is permitted to do. "This holding is limited to the specific facts of this case." Sl. Op. at 12.

Permanency Planning Hearing: Competent Evidence

In re J.L., ___ N.C. App. ___ (March 19, 2019)

Held: vacated and remanded in part; affirmed in part

- Facts: After filing a petition alleging neglect and dependency, DSS obtained nonsecure custody of a newborn and placed the child with Mr. and Mrs. C (foster parents). After adjudication, the initial disposition continued custody with DSS, who continued the child's placement with Mr. and Mrs. C. In a permanency planning order, custody with DSS continued (as did DSS's placement with Mr. and Mrs. C); reunification efforts with mom were ceased; and a primary plan of guardianship with a court-approved caretaker and secondary plan of adoption was ordered. Mother's visitation was ordered for one hour of supervised visits/month. At a subsequent permanency planning hearing, DSS and the GAL recommended a change in placement to foster parents who had adopted two of the child's older half-siblings. Although not parties, Mr. and Mrs. C as the current placement provider testified, and the court permitted their counsel to facilitate their testimony on direct examination. Two experts testified. The expert procured by Mr. and Mrs. C and called by the child's GAL attorney advocate was directly examined by Mr. and Mrs. C's counsel. The permanency planning order awarded guardianship to Mr. and Mrs. C. and ordered that mom have no in-person visits with the child but could have telephonic communication that was monitored by Mr. and Mrs. C. Respondent mother appeals.
- The standard of review of a permanency planning order is whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. At a permanency planning hearing (PPH), the court may consider any evidence it finds to be relevant, reliable, and necessary to determine the child's needs and most appropriate disposition. G.S. 7B-906.1(c). Mother challenges the expert doctor's testimony that did not involve a personal evaluation of the child but was based on a review of reports and a prior PPH as insufficient, unreliable, and too speculative to support the court's findings that the infant would suffer trauma from being removed from the only home he has ever known. The doctor's testimony about her experience and the literature regarding child attachments and the loss of those attachments resulting in trauma and other negative consequences was sufficient competent evidence to support the findings.

Permanency Planning: Parent's Constitutional Rights

In re J.L., ___ N.C. App. ___ (March 19, 2019)

Held: vacated and remanded in part; affirmed in part

- Facts: After filing a petition alleging neglect and dependency, DSS obtained nonsecure custody of a newborn and placed the child with Mr. and Mrs. C (foster parents). After adjudication, the initial disposition continued custody with DSS, who continued the child's placement with Mr.

and Mrs. C. In a permanency planning order, custody with DSS continued (as did DSS's placement with Mr. and Mrs. C); reunification efforts with mom were ceased; and a primary plan of guardianship with a court-approved caretaker and secondary plan of adoption was ordered. At a subsequent permanency planning hearing, the court awarded guardianship to Mr. and Mrs. C. and ordered that mom have no in-person visits with the child but could have telephonic communication that was monitored by Mr. and Mrs. C. Respondent mother appeals.

- Parent's Constitutional Rights & Clear and Convincing Standard. When considering whether to award custody or guardianship to a nonparent, the court must address whether the parent is unfit or acted inconsistently with her constitutionally protected status as a parent. That determination must be made by clear and convincing evidence and failure to indicate that standard was applied is error. Neither the permanency planning order nor transcript of the hearing indicate that the standard was applied. Remanded for findings.

Permanent Plan: Custody to Father, G.S. 7B-911

In re Y.I., ___ N.C. App. ___ (Dec. 4, 2018)

Held: Affirmed in part; vacated in part and remanded

- Facts: Two children were adjudicated neglected and dependent after being removed from their mother's home. Upon learning of the children's removal, father immediately began working with DSS. Respondent mother was ordered to comply with her case plan, and respondent father had an out-of-home services plan. At a permanency planning hearing, the court ordered custody of the children to their father, visitation with the mother at a supervised visitation center, and relieved DSS and the attorneys from the action. Respondent mother appeals.
- Standard of Review of a permanency planning order is whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The court makes a best interests determination, which is reviewed for an abuse of discretion.
- Based on the findings that (1) respondent mother has not made substantial progress to address the issues resulting in the children's removal; (2) the father worked with DSS and made adequate progress with a reasonable period of time; and (3) after being placed with their father, the children made significant progress in their educational needs, the court did not abuse its discretion in ordering custody to the father.
- When a child is placed in the custody of a parent or other person, G.S. 7B-911 requires the court to determine whether jurisdiction in the juvenile proceeding should be terminated and custody awarded through a G.S. Chapter 50 order. G.S 7B-911 "does not expressly require that the court make a finding as to whether jurisdiction in the juvenile proceeding should be terminated and the matter transferred to a Chapter 50 action." Sl. Op. at 8. The findings and procedures under G.S. 7B-911(b) and (c) are required if the court chooses to terminate jurisdiction and transfer the matter to a chapter 50 custody case. Here the court did not choose to terminate its jurisdiction.

Appellate Issues (Standing, Vacated Order, Mootness)

In re J.L., ___ N.C. App. ___ (March 19, 2019)

Held: vacated and remanded in part; affirmed in part

- Facts: After filing a petition alleging neglect and dependency, DSS obtained nonsecure custody of a newborn and placed the child with Mr. and Mrs. C (foster parents). After adjudication, the

initial disposition continued custody with DSS, who continued the child's placement with Mr. and Mrs. C. In a permanency planning order, custody with DSS continued (as did DSS's placement with Mr. and Mrs. C); reunification efforts with mom were ceased; and a primary plan of guardianship with a court-approved caretaker and secondary plan of adoption was ordered. At a subsequent permanency planning hearing, DSS and the GAL recommended a change in placement to foster parents who had adopted two of the child's older half-siblings; mother supported that change. The permanency planning order awarded guardianship to Mr. and Mrs. C. Respondent mother appeals.

- A motion to dismiss the appeal for lack of standing must be made by motion under N.C. App. Rule 37 and not raised for the first time in a brief.
    - *There is a concurrence on this issue*.

  Although the appellees' motion to dismiss made through their brief is not properly before the court, standing is jurisdictional and is, therefore, a threshold issue the court must address. Respondent mother, as the party invoking the court's jurisdiction has the burden of proving she has standing to appeal. G.S. 7B-1001(a)(4) authorizes a parent who is a nonprevailing party to appeal. "A prevailing party is defined as one in whose favor the decision or verdict is rendered and judgment entered." Sl. Op. at 7 quoting *In re T.B.*, 200 N.C. App. 739, 746 (2009). The order appealed from awarded guardianship to Mr. and Mrs. C over mother's objection and request that her child be placed with the foster parents who adopted the child's half siblings; as such, mother is a nonprevailing party. This case is distinguishable from *In re C.A.D.*, 247 N.C. App. 552 (2016). There, the appellate court held the mother was not aggrieved by the trial court's order that did not place her child with maternal grandparents, who were parties in the action and could have but did not appeal. In this case, the foster parents the mother desired placement with are not parties and could not have independently appealed the order. Mother is asserting her parental interest in having the child placed in a home with his half siblings.

Appellate Record & Argument

In re B.C.T., ___ N.C. App. ___ (May 7, 2019)

Held: Reverse and Remand

- Facts: DSS received a report about mother's home and her younger child. At the time, her older child was living with a family friend. Mother, her live-in boyfriend (a caretaker), and DSS entered into a family services agreement that focused on emotional and mental health issues, family relationships/domestic violence, and parenting skills. Mother voluntarily agreed to allow her younger child to be placed with the same family friend who was caring for her older child. Months later, DSS filed two petitions (one for each child) alleging abuse and neglect and noting that the petitions were filed because boyfriend, who mother was still living with, had not completed the family services agreement although mother had made progress on her plan. Based on mother's stipulations, the children were adjudicated neglected. Mother complied with the case plan, exceeded DSS recommendations, and throughout the entirety of the case (investigation through appeal) had unsupervised and unlimited contact with both children. At disposition, DSS recommended the younger child's reunification with mother but based on the wishes of the older child and time that he had spent with family friend, that custody of the older child be ordered to family friend. The court ordered (1) the younger child remain in DSS custody

with placement with family friend and supervised visits with mother of at least one hour every other week, and (2) Chapter 50 custody (via G.S. 7B-911) of the older child to family friend with one hour of supervised visits per week with mother. Mother appeals the disposition orders.

- Voluntary Placement Reviews under G.S. 7B-910: "The requirements of G.S. 7B-910 apply to a 'voluntary placement agreement' but not a 'temporary parental safety agreement.' " Sl. Op. at 12. Although mother argues that the court was required to hold a hearing within 90 days of the voluntary placement, the record is insufficient to consider the argument because the voluntary foster care agreement with DSS, if any, is not in the record on appeal. The appellant has the duty to include information that is necessary for an issue raised on appeal.
- Swapping Horses: At trial, DSS recommended the younger child be returned to mother's custody. The court is not required to, and did not, follow DSS recommendations. On appeal of that disposition order, DSS argued the order should be affirmed. DSS is not exempt from the rule that "parties are not allowed to make different arguments on appeal than before the trial court to 'swap horses between courts in order to get a better mount.' " Sl. Op. at 24. "DSS is not obligated to adopt a different position on appeal just to oppose the appealing parent if it has previously determined the parent has a safe and appropriate home and the child should be returned to the parent." Sl. Op. at 25.

Appeal of Permanency Planning Order Moot by TPR Appeal

In re H.N.D., ___ N.C. App. ___ (April 16, 2019)

Held: Affirmed in part; Dismissed in part

- Facts: In 2014 one child was adjudicated dependent based upon an agreement between mother and DSS related to domestic violence between mother and father. In 2015, a newborn sibling was adjudicated dependent based upon a stipulation by mother about continued domestic violence issues between her and father. A 2017 permanency planning order (PPO) identified adoption as the permanent plans for the children and not reunification with mother, which had been the permanent plan. The order included findings about the long and continuing history of domestic violence between mother and father. Mother preserved her right to appeal the PPO. A TPR was filed and mother's rights were terminated by order dated June 27, 2018. One of the grounds the court concluded existed is the "dependency" ground under G.S. 7B-1111(a)(6). Mother appealed both the TPR (adjudication only) and PPO "ceasing reunification efforts." Sl. Op. at 4.
- TPR
    - The standard of review of the adjudication phase of a TPR is whether the findings of fact are supported by clear and convincing evidence and whether the findings support the conclusion of law. Conclusions of law are reviewed de novo.
    - G.S. 7B-1111(a)(6) requires that the parent be incapable of providing proper care and supervision for the juvenile such that the juvenile is dependent under G.S. 7B-101 and there is a reasonable probability the incapability will continue for the foreseeable future. There is clear and convincing evidence, via testimony, mother's previous statements and stipulations, and a comprehensive mental health assessment and parenting evaluation, to support the court's findings that (1) the juveniles are dependent under G.S. 7B-101; (2) mom does not have an ability to provide proper care

and supervision because of her unwillingness to separate from father, minimization of domestic violence, and failure to participate in recommended family or individual counseling to address the domestic violence; and (3) given her willful failure to engage in recommended services and the continuing domestic violence, there is a reasonable probability that mom's incapability will continue for the foreseeable future.

  - Proper care and supervision and foreseeable future. Although mother argues she and father were never ordered to not have contact with each other, that is not the question for the court. The question "is whether mother is incapable of providing for the proper care and supervision of her children, and if so, whether Mother's incapability is reasonably probable to continue into the foreseeable future." Sl. Op. at 12-13. Mother's stated intent to keep father in hers and the children's lives despite the domestic violence she has suffered from him is clear and convincing evidence that she is incapable of providing proper care and supervision to the children, who are dependent, and that incapability will continue for the foreseeable future.

- The appeal of the PPO "ceasing reunification efforts" is moot by the subsequent TPR order. Because the findings and conclusions in the TPR order did not rely on the PPO but instead relied on testimony as well as evidence of *current conditions* and made findings and conclusions not found in the PPO, the TPR renders the appeal of the PPO moot. (emphasis added). This case is similar to *In re V.L.B.*, 164 N.C. App. 743 (2004).
  - Author's Note: This opinion refers to the PPO "ceasing reunification efforts" but this author believes the appeal is of the elimination of a reunification as a permanent plan, which is authorized by G.S. 7B-1001(a)(5). The court of appeals has distinguished reunification efforts from reunification as a permanent plan. See *In re C.P.*, 812 S.E.2d 188 (2018).

Responsible Individuals List (RIL): Procedural Issues

In re Duncan, Jr., ___ N.C. App. ___ (Nov. 20, 2018)

Held: Dismiss in part and affirmed in part

- Facts**:** After DSS determined the petitioner was a caretaker who abused a juvenile, it provided notice to the petitioner that it intended to place him on the state's Responsible Individuals List (RIL). Petitioner requested a judicial review. He also filed a motion to dismiss/deny asserting that he is not a caretaker and a motion for jury trial. A December order denied the motion to deny/dismiss, and a January order denied the motion for a jury trial. Petitioner appeals both orders. DSS filed a motion to dismiss the appeal, arguing both orders were interlocutory and not immediately appealable.
- Motion to Dismiss: There is no right of immediate appeal to an interlocutory order denying a NC Rule of Civil Procedure 12(b)(1) or a 12(b)(6) motion to dismiss. The trial court's denial of the motion to dismiss did not include a determination of whether petitioner was a caretaker. Petitioner is not precluded from making the argument that he is not a caretaker at the hearing for judicial review.
- Motion for Jury Trial: Although an interlocutory order, the denial of the petitioner's motion for jury trial affects a substantial right that could be lost without immediate review. G.S. 7B-323(b) does not provide for a statutory right to a jury trial in a judicial review of a RIL placement

proceeding. Like a termination of parental rights action, the judicial review of a RIL placement proceeding did not exist at common law and is therefore not subject to a constitutional right to a jury trial. Although petitioner did not preserve for appellate review the argument that the DSS action to place an individual on the RIL is similar to a common law defamation action, the court of appeals determined the argument would fail. The trial court did not err in denying the motion for jury trial.

Responsible Individuals List (RIL): Due Process and Timeliness of Notice

In re Willie Reggie Harris, ___ N.C. App. ___ (May 7, 2019)

Held: Affirmed

- Facts: In 2013, after completing an investigative assessment, DSS substantiated abuse of a 13-year-old juvenile and identified petitioner, who was a caretaker, as the responsible individual. More than 3 years later, in 2017, DSS mailed a letter notifying petitioner of its intent to place him on the Responsible Individuals List (RIL). Petitioner timely filed for judicial review. At the hearing, after the close of DSS's evidence, petitioner argued that DSS filed the notice too late for petitioner to prepare a defense and was prejudicial. The trial court concluded petitioner should not be placed on the RIL due to DSS's multi-year failure to comply with the statutory time period to serve petitioner with notice as required by G.S. 7B-320. DSS appealed.
- Time requirements: The specific time limits (and methods) the DSS director must comply with to initiate the inclusion of an individual's name on the RIL are established in G.S. 7B-320. They include (1) personal delivery within 5 working days of the completion of the investigative assessment or (2) if personal notice is not made within 15 days and DSS has made diligent efforts to locate the identified individual, by registered or certified mail, return receipt requested to the individual's last known address. DSS did not provide the notice within the statutory time period or within the 2-year statute of limitations that apply to misdemeanors.
- Due Process: Petitioner's argument and the trial court's determination did not address whether the delay was a jurisdictional defect but instead was based on due process principles. Placement on the RIL deprives an individual of their constitutional liberty interest and requires due process including the right to notice and an opportunity to be heard before such placement. *In re W.B.M.*, 202 N.C. App. 606 (2010). The 3+ year delay was prejudicial and "deprived petitioner of his ability to mount a defense to preserve his protected liberty interest." Sl. Op. at 7.

Termination of Parental Rights

Continuance; Effective Assistance of Counsel

In re M.T.-L.Y., ___ N.C. App. ___ (May 21, 2019)

Held: Affirmed in part, vacated in part, and remanded

- Facts: DSS filed a TPR motion in an underlying neglect action after the first permanency planning order ceased reunification efforts with mother and entered a primary permanent plan of adoption and secondary plan of guardianship. Although mother was present at the TPR hearing, her attorney moved to continue the TPR hearing on the basis that she had little contact with mother before the hearing date. The motion to continue was denied. After a hearing, the court

granted the TPR. Mother appeals arguing the denial of the motion to continue violated her constitutional right to effective assistance of counsel as she was not able to have sufficient in-person communication to prepare.

- Continuance and Effective Assistance of Counsel: The appellate court reviews a decision on a motion to continue for an abuse of discretion. If the denial of a motion to continue involves the right to effective assistance of counsel, it is a reviewable question of law, which is reviewed de novo. Parents have a right to effective assistance of counsel in a TPR proceeding, which includes adequate time for the client and counsel to prepare a defense. Prejudice is presumed when a continuance that is essential to allow for adequate time to prepare for trial is denied; however, a court does not err in denying the motion to continue when the lack of preparation results from a party's own action. Mother's attorney was the same attorney who had been representing her for a year in the neglect action. They had effectively communicated by alternative means including email, phone, and text. There was three months between the motion and hearing to prepare. Mother was not deprived of effective assistance of counsel and there was no error in denying the motion to continue.

Ineffective Assistance of Counsel; Insufficient Record

In re C.D.H., ___ N.C. App. ___ (June 4, 2019)

Held: Remand for further proceedings

- Facts: DSS filed a motion to terminate mother's parental rights as part of an underlying neglect case. In the neglect case, mother appeared at a continued nonsecure custody hearing in September 2016. Mother did not attend any other hearing in the action, including at adjudication, disposition, review, permanency planning, and TPR. Mother was represented by the same counsel, who did appear at the hearings. In the review and permanency planning orders, the court made findings about mother's visitation, although inconsistently, with the child; partial participation in and compliance with her case plan; and maintenance (for the most part) of communication with the court, DSS, and GAL. At the February 2018 TPR hearing, mother's attorney did not (1) advise the trial court of any attempts to contact mother, (2) move to continue the hearing, (3) make objections or cross-examine witnesses, or (4) present evidence or arguments on mother's behalf. After the TPR was granted, mother appealed raising as the sole issue ineffective assistance of counsel.
- Standard of Review: "Respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." Sl. Op. at 6 (citation omitted).
- Statutory Right to Counsel: "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Sl. Op. at 5 (citations omitted). For indigent parents, that includes a statutory right to counsel, unless waived, and effective assistance of a counsel.
- Insufficient Record on Appeal: The record on appeal is silent as to why counsel acted as she did. "Counsel's failure to advocate for mother is not necessarily an indication of ineffective assistance of counsel." Sl. Op. at 8. Neither the court nor counsel addressed on the record (there may have been a discussion off the record) why mother was absent. The record shows very limited evidence of mother's relationship with her counsel, who she was represented by at

previous hearings, and reasons for mother's absence from the hearings even though she has some engagement with the child and DSS outside of court.

- Waive Right to Effective Assistance of Counsel: Mother may have waived her right to effective assistance of counsel based on her own actions – her failure to attend any court hearing other than the one hearing on the need for nonsecure custody. There may be other reasons for counsel's lack of advocacy. The record is insufficient. The appellate court will not speculate.
- The appropriate remedy is remand for the trial court to determine whether mother was denied effective assistance of counsel. The court should inquire into what efforts counsel made to contact and adequately represent mother at the hearing; if necessary, make a prejudice determination (was mother deprived of a fair hearing); and determine whether respondent is entitled to appointed counsel in a new TPR hearing.

In re A.R.C., ___ N.C. App. ___ (June 4, 2019)

Held: Remanded for further proceedings

- Facts: In 2016, mother's 4 children were adjudicated neglected. In February 2017, DSS filed a TPR petition for all 4 children. After a hearing in November 2017, mother was appointed a Rule 17 guardian ad litem (GAL) based on incompetency. Mother's GAL and attorney were notified of the TPR hearing, scheduled in March 2018. Mother had been hospitalized for mental health treatment. At the TPR hearing, mother was not present but her GAL and attorney were. There was no inquiry as to why mother was not present. Mother's attorney filed an answer and a motion to dismiss the TPR petitions but did not object to any evidence, cross-examine witnesses, or present evidence or arguments. Mother's rights to her children were terminated and she appealed.
- Standard of Review: "Respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." Sl. Op. at 4-5 (citation omitted).
- Right to Counsel: "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures," which includes a statutory right to counsel and effective assistance of a counsel. Sl. Op. at 4 (citations omitted).
- Insufficient Record on Appeal: The record shows mother's absence was noted but the reasons for it were not discussed. In the period between mother's appearance at the hearing re: her competency/need for a GAL and the TPR hearing, mother was hospitalized, and this period is of particular concern. The appellate court cannot determine why mother was not present at or what her condition was at the time of the TPR hearing. There is limited evidence of mother's relationship with her attorney or GAL re: contact with them or instructions she gave them about her case. Nothing explains the discrepancy between mother's attorney's filing of an answer and motion to dismiss and lack of advocacy for mother during the actual hearing. Without knowing the reason, the appellate court cannot determine if the attorney's performance was deficient. The appellate court will not speculate.
- The appropriate remedy is remand for the trial court to find those facts and make a determination of the adequacy of the attorney representation. The trial court should inquire " 'into efforts by [Mother's] counsel to contact and adequately represent [her] at the termination of parental rights hearing' and determine 'whether [she] is entitled to appointment of counsel in

a new termination of parental rights proceeding.' " Sl. Op. at 8 (citations omitted). If a prejudice determination is necessary, the trial court, after having all the facts, should determine whether mother was deprived of a fair hearing.

Insufficient notice, evidence, and findings

In re L.S., ___ N.C. App. ___ (Dec. 4, 2018)

Held: Reversed

- Facts: In 2015, two children were adjudicated dependent. In the dependency case, respondent father agreed to an out-of-home services agreement to address substance abuse, mental health, and domestic violence issues. After the primary permanent plan of adoption was ordered in 2017, DSS initiated a TPR against both parents. Regarding respondent father, the court terminated his parental rights based upon G.S. 7B-1111(a)(2) (failure to make reasonable progress) and 7B-1111(a)(5) (failure to legitimate children born out of wedlock). Respondent father appeals.
- Insufficient Notice Pleading: A TPR petition must state "facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists." Sl. Op. at 8 (citations omitted). Although factual allegations are not required to be exhaustive, "they must put a party on notice as to what acts, omissions or conditions are at issue." *Id*. Neither the body of the TPR petition nor the incorporated affidavit of the DSS social worker (which is an account of DSS's efforts provided to the father) refer to the father's willful failure to make reasonable progress. The TPR petition did not provide insufficient notice to respondent father of this TPR ground.
- Insufficient Evidence: A TPR based upon G.S. 7B-1111(a)(5) (failure to legitimate) requires that the petitioner prove and the trial court find by clear, cogent, and convincing evidence that (1) before the TPR petition was filed, (2) the father of a child born out of wedlock failed to take each of the enumerated actions. The findings of fact were not based on clear, cogent, and convincing evidence. DSS did not present any evidence that the children were born out of wedlock or that respondent father failed, prior to the filing of the TPR petition, to take actions specified in G.S. 7B-1111(a)(5)a., b., c., and e.

Insufficient Notice Pleading and Findings, Abandonment, Failure to Pay Child Support

In re I.R.L., ___ N.C. App. ___ (Jan. 15, 2019)

Held: reversed in part, vacated and remanded in part

- Facts: I.R.L. was born in 2014. Mother and father lived with I.R.L. for 3 months in 2015 until mother and child moved out of the home. In April 2016, mother obtained a one-year DVPO against father, which prohibited contact with mother but did not forbid contact with any minor child residing with mother. On March 20, 2017, one month before the DVPO expired, father filed a complaint for visitation with I.R.L. and mother filed a TPR petition against father alleging father had not contacted or seen I.R.L. and had not paid any financial support since 2015. The TPR was granted on the grounds of failing to pay child support and abandonment. Father appeals.
- G.S. 7B-1111(a)(7) requires that the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition. During the relevant time period, Sept. 20, 2016 to Mar. 20, 2017, the court found (1) the father had not seen the

child, inquired about the child, or provided substantial financial support for the child, (2) there was a DVPO against father for one year, and (3) father filed for visitation on Mar. 20, 2017. There were no findings addressing the willfulness of father's conduct, which is a required element of the ground. Because of the DVPO, the willfulness finding was especially important since any communication, gifts, or requests to visit the 3-year-old child would have had to been directed to mother, who father was specifically prohibited from contacting. The findings were inadequate to support the conclusion that father willfully abandoned the child. Vacated and remanded to make appropriate findings.

- G.S. 7B-1111(a)(4) requires the parent has willfully failed to pay child support as required by a decree or custody agreement for one year or more preceding the filing of a TPR petition. 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 7. Although there was testimony of a December 2014 child support order for $50/month, the TPR order does not include findings indicating there was such an order. The findings are insufficient to support the conclusion of law. Further, the petition did not provide sufficient notice to father of the failure to pay child support ground when it alleged father "has failed to provide substantial support or consistent care for the minor child." This allegation "may be an assertion under a ground of abandonment" and is insufficient to father on notice of the TPR ground under G.S. 7B-1111(a)(4). Sl. Op. at 8. There was no allegation of a willful failure to pay support as required by an order or separation agreement or reference to G.S. 7B-1111(a)(4). Reversed.

Adjudication: Abandonment

In re C.K.C., ___ N.C. App. ___ (Dec. 28, 2018)

Held: reversed

- Facts: In 2014, grandmother (and petitioner in this TPR) initiated a G.S. Chapter 50 custody action and obtained an ex parte emergency custody order of the two children. In 2016, a consent order was entered in the Chapter 50 action that awarded (1) grandmother with joint legal custody of the two children and primary physical custody, (2) grandfather and his wife with joint legal custody and secondary physical custody with visitation, and (3) the termination of father's child support order and no visitation with father. The consent order provided that grandmother will file an action to terminate respondent father's parental rights, which no party will oppose. In October 2017, respondent father filed a motion to modify the Chapter 50 consent order alleging a substantial change in circumstances and seeking sole custody. In November 2017, grandmother filed a TPR petition alleging neglect and abandonment under G.S. 7B-1111(a)(1) & (7), which was granted in March 2018. Respondent father appeals the TPR, challenging both grounds.
- The standard of review for a ground to TPR is whether there is clear, cogent, and convincing evidence to support the findings of fact and whether the findings of fact support the conclusions of law. The conclusion of law is reviewed de novo.
- "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." Sl. Op. at 4 (citation omitted). Willfulness is more than intention; it has purpose and deliberation.

Willful abandonment is more than a parent's failure to live up to his parental obligations; "findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody." Sl. Op. at 5. Willfulness is a question of fact.

- Willful abandonment under G.S. 7B-1111(a)(7) involves the six consecutive months immediately preceding the filing of the TPR petition, although the court may consider the parent's conduct outside of this determinative time period when evaluating a parent's credibility and intentions. During the six month relevant time period, respondent father filed a motion to modify the Chapter 50 consent order seeking sole custody, which demonstrates that he did not intend to forego all parental duties and relinquish all parental rights to the children. Neglect under G.S. 7B-1111(a)(1) includes a juvenile who has been abandoned (as defined by G.S. 7B-101(15)). The finding of neglect must be based on evidence that shows neglect at the time of the termination hearing. Respondent father's attempt to regain custody of his children precludes the court's determination that respondent-father neglected the children through abandonment.
- "The consent order, as construed by the trial court, is void as against public policy, insofar as it constitutes an agreement that Respondent-father's parental rights should be terminated or that Respondent-father relinquished his parental rights…" Sl. Op. at 7. There was not a properly executed consent or relinquishment for adoption, and a TPR requires the statutory process of a two-step process involving an adjudicatory and dispositional stage. *See In re Jurga*, 123 N.C. App. 91 (1996); *Foy v. Foy*, 57 N.C. App. 128 (1982).

Appeal: No Merit Brief; Rule 3.1

In re I.B., ___ N.C. App. ___ (Nov. 20, 2018)

Held: Affirmed

- Facts: Respondent mother's parental rights were terminated. In compliance with NC Appellate Rule 3.1(d), her attorney filed a no merit brief and notified respondent mother of her right to file a pro so brief. No pro se brief was filed. The court of appeals conducted an independent review of the appellate record.
- *Anders* vs. App. Rule 3.1(d): Through the enactment of NC Appellate Rule 3.1(d), the NC Supreme Court created an *Anders*-like process for juvenile cases. *See Anders v. State of California*, 386 U.S. 738 (1967). App. Rule 3.1(d) does not include all the procedures of the *Anders* process. Specifically excluded from Rule 3.1(d) are the requirements under *Anders* that (1) appellant's counsel moves to withdraw from the representation and (2) the appellate court conducts an independent review of the record to confirm whether the appeal is frivolous before granting the motion to withdraw and dismissing the appeal. Under *Anders*, if the appellate court determines the appeal is not frivolous, it either denies the attorney's motion to withdraw or grants it and appoints a new attorney and orders the attorney to file a brief on the merits. Under App. Rule 3.1(d), counsel does not seek to withdraw. The attorney may continue to advise the client on procedural and substantive matters, which assures the client will be able to file a pro se brief that raises the arguments the client wants the appellate court to review. The appellate court can then adjudicate the appeal of issues raised in the briefs. When interpreting the procedural rule, the appellate court looks to the text, which here is plain and unambiguous. The language of App. Rule 3.1(d) does not require the appellate court to conduct an

independent review of the record. Although not required, the court of appeals has discretion to review conduct the review where appropriate.

In re D.A., ___ N.C. App. ___ (Oct. 16, 2018)

Held: Dismissed

- When respondent-counsel complies with App. Rule 3.1(d) by filing a no-merit brief and notifying the client, in this case respondent-mother, of her right to file a pro se brief, and respondent-mother fails to file a pro se brief, no issues have been argued or preserved for appellate review. Citing *In re L.V.*, 814 S.E.2d 929 (2018).
- When respondent-counsel files a no-merit brief pursuant to App. Rule 3.1(d) but is unable to comply with the requirements of the rule regarding sending notice to the client (in this case respondent-father) of the no-merit brief, record, transcript, and right to file a pro se brief after making diligent efforts to do so, the appellate court may invoke App. Rule 2 to "expedite a decision in public interest" and suspend the portion of App. Rule 3.1(d) that mandates service on the client. Where the respondent father failed to communicate his present address to counsel, the appellate court must make a case-by-case consideration when applying App. Rule 2. In this case, appellate counsel made an exhaustive effort to serve his client, who at trial refused to disclose his address, and App. Rule 2 was invoked. The respondent father failed to file a pro se brief to argue or preserve issues for appellate review.

In re L.E.M., ___ N.C. App. ___ (Oct. 2, 2018)

Held: Dismiss Appeal

There is a dissent and a concurrence in result only

- Facts: The trial court granted the petition to terminate respondent father's parental rights, which was initiated by DSS who had custody of the child pursuant to a neglect and dependency action. The TPR was based on the grounds of neglect and failure to make reasonable progress to correct the conditions that led to the child's removal. G.S. 7B-1111(a)(1)–(2). Respondent father timely appealed. Respondent father's counsel filed a no merit brief and requested the appellate court conduct an independent review of the case pursuant to Appellate Rule 3.1(d). Counsel also notified respondent father of his right to file his own arguments directly with the court of appeals, but he did not do so.
- Opinion: By appellant's failure to file written arguments (a pro se brief) with the appellate court, "no issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." Sl. Op. at 6 quoting *In re L.V.*, ___ N.C. App. ___ (July 3, 2018). Being bound by precedent, respondent's appeal must be dismissed.
- Concurrence: Although the court is bound by *In re L.V.,* "I believe [it] erroneously altered the jurisprudence of cases arising under [App.] Rule 3.1…. [and] significantly impacts the constitutional rights of North Carolinians… whose fundamental right to a parental relationship with his child should only be terminated as contemplated by law." Sl. Op. concurrence at 1. No merit briefs arise from *Anders v. California*, 386 U.S. 738 (1967), which applies to criminal cases. Although the court of appeals held that *Anders* procedures involving a full examination of the proceeding by the appellate court to determine whether the case is wholly frivolous do not apply to TPR cases (*In re N.B.,* 183 N.C. App. 114 (2007)), the N.C. Supreme Court then adopted

App. Rule 3.1(d). The rule allows for no merit briefs and an *Anders*-like procedure in appeals of juvenile orders, including a TPR. *See* G.S. 7B-1001. Although App. Rule 3.1(d) authorizes the parent to file a pro se brief, it does not appear to require a parent to file such a brief for appellate review. Rather than address previous case law that consistently conducted *Anders*-type reviews under Rule 3.1(d), the holding in *In re L.V.* was supported by dicta, which is not controlling authority, in a concurrence, which is not binding on the court, and "I believe *In re L.V.* is an anomaly in our case law that must be corrected...." Sl. Op. concurrence at 5.

- Dissent: Adopting the analysis of the concurrence, the dissent disagrees with the conclusion that the court is bound by *In re L.V.* because it is contrary to settled law established in prior opinions that continue to be controlling. App. Rule 3.1 requires appellate counsel to file an appellate brief that includes issues that might support the appeal and state why those issues are without merit or would not change the result, the purpose of which seems to be to allow the counsel to request a review by the appellate court for potential error that counsel has not identified.

In re I.P., ___ N.C. App. ___ (Oct. 2, 2018)

Held: Dismiss Appeal

There is a dissent and a concurrence in result only, both of which are discussed in *In re L.E.M.*, which was filed concurrently with this opinion.

- Respondent father's counsel filed a no merit brief under Appellate Rule 3.1(d) for an order that terminated father's parental rights on five different grounds, noting there was no error on the ground of neglect and no abuse of discretion in determining the TPR was in the child's best interest. Counsel complied with the requirements of Rule 3.1(d), including notifying respondent father of his right to file a pro se brief. Counsel filed a motion requesting an extension of time for respondent father to file a pro se brief, which was granted. Respondent father filed his brief late, appears to request the appeal be held in abeyance (which was denied), and argues a "bare assertion of error unsupported by citation to any record evidence or legal authority" and is therefore abandoned. Sl. Op. at 8. *See In re C.D.A.W.*, 175 N.C. App. 680 (2006); App. Rule 28(b)(6). Respondent father's arguments are untimely and not properly before the court as they are unsupported allegations of error. Citing *In re L.V.*, ___ N.C. App. ___ (July 3, 2018), the appeal must be dismissed as no issues have been argued or preserved for appellate review.

Civil Opinions Related to Child Welfare

Reporting Requirements

Rouse v. Forsyth County DSS, ___ N.C. App. ___ (Nov. 6, 2018)

Held: Affirmed in part; vacated in part

- This is an employment case involving the discharge of a Senior Social Worker in the Family and Children's Division After Hours Unit at Forsyth County DSS. One of the issues addressed in this opinion discusses mandated reporting under G.S. 7B-301.
- Facts: The social worker provided "supportive counseling" (a Forysth County DSS policy that supplemented the state's screen in and screen out policy regarding a report of abuse, neglect, or dependency) to a homeless father and son to assist the father in finding temporary housing

for his 12-year-old son. In providing "supportive counseling," the social worker spoke with the son's mother to see if the son could stay with her. During that conversation, the mother gave various reasons why the son could not stay with her, one of which she blurted out "he [the son] molested my daughters." The social worker asked follow up questions of the mother who immediately recanted. The social worker also questioned the father and son both of whom denied the recanted allegation. Ultimately, the mother agreed to allow the son to stay with her starting the next night. The social worker did not document the allegation or treat it as a report of abuse but instead documented her provision of supportive counseling and the efforts made on behalf of the father and son. Weeks later, Forsyth County DSS was contacted by another county DSS about the same family and an allegation of child-on-child sexual misconduct. Afterwards, the social worker was discharged from her employment, which she successfully appealed before an administrative law judge (ALJ). Forsyth County DSS appealed the ALJ decision, arguing in part that the social worker's failure to generate a CPS report under G.S. 7B-301(a) after interviewing the father, son, and mother was grossly inefficient job performance constituting just cause for dismissal.

- Discussion of reporting requirements: Evidence (specifically the social worker's testimony) supported the finding of fact that the social worker treated the meeting with the family as a "general inquiry" about foster care since no party made a report and she had no independent cause to suspect abuse of child. Sl. Op. at 15. A violation of G.S. 7B-301, which requires a report by a person who has cause to suspect a child is abused, neglect, or dependent, was not established by the greater weight of the evidence. "Cause to suspect" has not been defined by the courts; however, "the standard is not just a suspicion.... a person deciding whether to make a report also must consider a child's statements, appearances, or behavior (or other objective indicators) in light of the context; the person's experience; and other available information." Sl. Op. at 18-19 quoting Janet Mason, Reporting Child Abuse and Neglect in North Carolina 67 (3rd ed. 2013). The social worker testified that based on the context of the statements, her experience, and her observation and interaction with the son, she had no cause to suspect abuse. Respondent failed to prove the social worker had cause to suspect and knowingly failed to make a report in violation of G.S. 7B-301. The social worker performed her job requirements regarding the "supporting counseling" practice utilized by Forsyth County DSS.

Effect of TPR on Grandparent Visitation

Adams v. Langdon v. Malone, ___ N.C. App. ___ (March 19, 2019)

Held: Reversed and remanded

- Relevant Facts: Father filed a child custody action against mother. In 2011, father obtained a temporary custody order granting him primary custody of their child. In 2012, maternal grandmother filed a motion to intervene in the custody dispute, which was granted. Also in 2012, a permanent custody order was entered that provided sole custody to father, visitation of one weekend/month plus one additional Saturday/month with grandmother, and no visitation with mother. In Sept. 2017 in a separate termination of parental rights (TPR) action initiated by father, mother's parental rights were terminated. In Nov. 2017, grandmother/intervenor filed a show case motion for visitation in the custody action. In 2018, the trial court ruled the custody action did not survive the TPR and grandmother's

visitation rights terminated with the termination of mother's parental rights. Grandmother appealed that order. (Note, grandmother appealed another order in the custody action that is not addressed in this summary).

- Grandmother's visitation rights were not extinguished by the termination of mother's parental rights. In 2012, prior to the TPR, grandmother intervened and obtained an order giving her visitation rights in the parent's ongoing custody dispute. Because she became a party to a custody proceeding, "the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time." Sl. at 11 quoting *Quisinberry v. Quisinberry*, 196 N.C. App. 118, 122 (2009). Once grandmother became a party, she is a party for all purposes. This is similar to the situation in *Sloan v. Sloan*, 164 N.C. App. 190 (2004). After the unexpected death of the child's father, the court retained jurisdiction of the custody action between the parents and permitted the paternal grandparents to intervene and seek a modification and enforcement of the custody order that was entered in that action prior to the father's death that awarded them telephonic visits with their grandchild. Here, the intervenor's visitation rights exist independently of the mother's parental and custodial rights such that she could seek to enforce through rights through contempt proceedings.

Service by Publication: Due Diligence

Henry v. Morgan, ___ N.C. App. ___ (March 19, 2019)

Held: Affirmed (defendant's motion to dismiss)

- "When a plaintiff's attempts to find and serve a defendant do not meet the due diligence standard described in Rule 4(j1) of the North Carolina Rules of Civil Procedure, service by process of publication is improper and dismissal is appropriate." Sl. Op. at 1.
- The exercise of due diligence to locate and serve defendant is a conclusion of law that is reviewed de novo. Due diligence does not involve a "restrictive mandatory checklist" but does require the plaintiff to "use all resources reasonably available to her in attempting to locate defendents." Sl. Op. at 4-5. It is examined on a case-by-case basis. The focus is not on what plaintiff did not do but on what plaintiff did do. Here, Plaintiff's attempts to serve defendant at one address where defendant did not reside and one general google search was insufficient when readily available resources were left unexplored, such as a DMV or public records search (Defendant's driver's license states his correct address) or request of defendant's attorney for defendant's address or whether he would accept service.

Criminal Opinions Related to Child Welfare

Evidence of Prior Acts: Rules 404 and 403

State v. Godfrey, ___ N.C. App. ___ (Dec. 18, 2018)

Held: No Error

- Facts: Defendant appeals his conviction of a first-degree sex offense with a child, arguing the trial court erred in admitting evidence of prior bad acts. The conviction is based on an incident that occurred in May 2004, when the victim was 12 years old, although she did not report the

crime until 2016. In the "May 2004" incident for which Defendant was charged, the victim testified that when she was staying at the defendant's home, he pulled her into the laundry room, removed her pants and underwear, and digitally penetrated her vagina with his middle finger until she freaked out and ran away. The victim testified to two other incidents that Defendant was not charged with: (1) the "bed incident," which occurred a month or two before the May 2004 incident when the victim was staying at Defendant's home, and where Defendant crawled into bed with the victim and digitally penetrated her vagina with his middle finger until she freaked out and ran away, and (2) the "Lick Mountain" incident, when the victim was staying at Defendant's place two or three years before the May 2004 incident, and where Defendant while wrestling with victim, carried her to his bed and digitally penetrated her vagina with his middle finger. The trial court permitted the testimony of prior acts for the purpose of showing a "common plan or scheme" to digitally penetrate the victim under Rule of Evidence 404(b) and determining the testimony was more probative than prejudicial under Rule 403.

- The standard of review of a trial court's Rule 403 determination is an abuse of discretion. The appellate court reviews de novo the legal conclusion that evidence is/is not covered by Rule 404(b).
- Rule 404 limits the introduction of character evidence but allows evidence of other crimes, wrongs, or acts to show a person acted in conformity therewith when the evidence is relevant to a fact or issue and is not for the purpose of showing defendant has the propensity to commit an offense of the nature of the crime charge. Evidence of a similar sex offense involving the same victim as the victim of the crime for which defendant is on trial is often viewed as showing Defendant's "common scheme or plan" to sexually abuse the victim. The evidence may be excluded under Rule 403 when its probative value is outweighed by unfair prejudice. "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." Sl. Op. at 10 (citation omitted). Here, the three incidents involved the same type of sexual act involving penetration, however, slight, by an object (the defendant's middle finger) into a genital opening of a person's body (the victim's vagina). Additionally, all three incidents occurred while the victim was staying with the Defendant. Each incident involved the same victim, same mode of penetration, and same circumstance and were sufficiently similar to show a common scheme or plan by Defendant to digitally penetrate the victim while she was under his control. Although the Lick Mountain incident was two or three years earlier, the time period does not inherently render the evidence of this prior act so remote as to eliminate its probative value given its striking similarity to the other incidents. There was no abuse of discretion in admitting the testimony regarding both prior acts.