Table of Contents

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
GAL's motion for temporary stay allowed 9/12/18

- 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: 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.

Adjudication: 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.

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.

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.

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.

Visitation

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.

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.

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.

Termination of Parental Rights

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.

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).

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: Failure to Make Reasonable Progress

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

Held: Reverse;

Stay granted 8/23/2018; petitions for writ of supersedeas and discretionary review allowed 12/5/2018

- 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.

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 Opinion 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.

Delinquency Disposition: Mandatory Referral to LME/MCO

In the Matter of E.M.., ____ N.C. App. ____ (January 15, 2019)

Held: Vacated and Remanded

- Facts: The juvenile was initially placed on probation as a Level 2 disposition following an admission to conspiracy to criminal common law robbery. He subsequently admitted to violating his probation by being suspended from school and leaving home without permission for three days. Substantial evidence was provided at the hearing on the motion for review regarding the juvenile's long history of mental health issues, including inpatient, outpatient, and intensive in-home services. Additionally, several risk and needs assessments documented mental health treatment needs. The trial court entered a Level 3 disposition and committed the juvenile to a YDC while also ordering custody of the juvenile to the Department of Social Services. The juvenile appealed on the following three issues: 1) entering a disposition without referral to the area mental health services director, 2) finding that the juvenile had been involved in criminal activity while on probation when no competent evidence supported that finding and 3) transferring legal custody to the Department of Social Services.
- Opinion: When evidence of mental health issues arise, referral of the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action is mandatory. G.S. 7B-2502(c). "Evidence of mental illness compels further inquiry by the trial court *prior to entry of any final disposition*." Slip Op. at 6, quoting *In re Mosser*, 99 N.C.App. 523 at 529 (1990). While a substantial amount of evidence regarding the juvenile's mental illness was presented here, any amount of evidence that a juvenile is mentally ill triggers the statutory duty of the trial court to refer the juvenile to the area mental health services director per G.S. 7B-2502(c). This requirement was not rendered unnecessary by a significant history of mental health services prior to disposition or the ability of the trial court to order mental health services during commitment. Instead, the statute envisions involvement of the area mental health services director in the disposition and tasks the area mental health services director with arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. The disposition is vacated because the trial court did not follow this procedure. The court did not therefore consider the second and third grounds for appeal. However, the decision does note that the juvenile's custody shall remain with the Department of Social Services.
- Note this opinion was summarized by SOG faculty member, Jacqui Greene

Criminal Opinion 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.