

## Child Welfare Case Update

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## Abuse, Neglect, Dependency

### Indian Child Welfare Act: Notice Requirements

In re K.G., \_\_\_ N.C. App. \_\_\_ (March 17, 2020)

**Held: remand**

- Facts: Respondent mother appeals a permanency planning order where the court determined ICWA did not apply.
- Reason to know child is an Indian child: ICWA establishes federal standards that govern applicable child custody proceedings when the court knows or has reason to know the child is an Indian child. Erring on the side of caution because an order could be invalidated for not complying with applicable notice provisions, the court had reason to know an Indian child may be involved when mother indicated she has Cherokee ancestry.
- Notice: An abuse, neglect, or dependency proceeding is an involuntary child custody proceeding requiring notice to the tribes and regional BIA office when the court knows or has reason to know an Indian child is involved. Proof of that notice must be included in the court record. 25 U.S.C. 1912; 25 CFR 23.111. Although the record shows DSS sent notice to the EBCI and Cherokee Nation, there was no indication in the record that the tribes and regional BIA office received the notice through return receipts of certified or registered mail or other proof of service. The question of the trial court’s jurisdiction under ICWA cannot be resolved from the evidence in the record. Remanded to confirm notice is provided to the appropriate tribes and regional BIA office.

## Abuse Adjudication: Status of Juvenile; Findings

*In re A.B.*, \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

### **Held: Affirmed**

- **Facts:** The juvenile was adjudicated abused, neglected, and dependent. At the time the petition was filed, the juvenile had been in father's care. Father had been awarded custody and mother only saw the juvenile for approximately 12 hours over a 2-year period immediately before the A/N/D petition was filed. Respondent mother appeals the adjudication of abuse, arguing that the findings about mother were not supported by the evidence and the findings did not support the conclusions about the mother. The challenged finding and conclusion is that "the parents" and caretaker inflicted or allowed to be inflicted and/or created or allowed to be created a substantial risk of serious physical injury by nonaccidental means.
- **Standard of review** is whether clear and convincing evidence supports the findings of fact and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.
- **Status of Child:** "When determining whether a child is abused, neglected, or dependent, 'the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.' " Sl.Op. at 7 (quoting *In re Montgomery*, 311 N.C. 101, 109 (1984)). Unlike a TPR, which addresses whether the parent's conduct meets the criteria of a statutory ground to TPR, "[t]he purpose of abuse, neglect, and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected, or dependent . . . . The purpose ... should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent." *Id.* (quoting *In re J.S.*, 182 N.C. App. 79, 86 (2007)).
- **Clear and convincing evidence support the findings, which support the conclusion that the juvenile is an abused juvenile.** The evidence and findings detail Amy's circumstances, which involved her starvation and victimization of child torture. These findings support the juvenile having nonaccidental, serious physical injury, "and thus the trial court properly determined [her] status as an abused juvenile." Sl.Op. at 8. Mother's argument about the finding and conclusion are without merit.

*In re K.L.*, \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

### **Held: Reversed and remanded**

- **Facts:** This case involves an appeal of an adjudication of an abused and neglected infant and an adjudication of a neglected juvenile, the infant's 8-year old sibling who was living in the home with the infant. Mother sought medical treatment for the infant, which included x-rays. It was discovered that the infant had 6 fractures in his legs but no other injuries or marks. The cause of infant's injuries were unknown to the parents. The parents were cooperative in seeking treatment for the child and in working with DSS. Mother raised concerns about the infant having rickets because of her family history. The infant has a Vitamin D deficiency but does not have rickets. The father stated two weeks prior to mother seeking medical attention for the infant, the child had fallen off the couch but did not appear injured. A medical provider testified that it

was highly probable the injuries were caused by non-accidental trauma and not a fall from the couch.

- Standard of review of an adjudication is whether clear and convincing evidence supports the findings and whether the findings support the conclusion of law. An abuse or neglect adjudication is a conclusion of law that is reviewed de novo. A de novo review is when the appellate “[c]ourt ‘considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.’ ” Sl.Op. at 10.
- Findings: Of the 4 challenged findings, 2 were not supported by the evidence.
  - The court’s finding that the infant was in the respondent parents’ exclusive care during a 4-day period was not supported by the evidence, which showed the infant was with a babysitter and was held by various family members during that time.
  - Clear and convincing evidence supports the court’s finding that the infant suffered non-accidental trauma that did not result from a fall but does not support the finding that the infant’s fractures occurred when he was in the exclusive care of his parents.
- G.S. 7B-101(1) defines an abused juvenile as one whose parent, guardian, custodian, or caretaker inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means.
- Circumstances Surrounding the Child: “While ‘the determinative factors [in a neglect proceeding] are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. . . , the same is not true in an abuse proceeding.’ ” Adjudications of abuse have been upheld when the cause of the injuries was unclear but the clear and convincing evidence and resulting findings “supported the inference that the respondent-parents were responsible for the unexplained injury.” Sl.Op. at 16. These findings can “support the conclusion that the respondent-parents inflicted or allowed the infliction of the injury at issue.” *Id.* Although the trial court was appropriately concerned that the parents could not explain their child’s injuries, “that alone, as a matter of law, cannot support the trial court’s conclusion that Respondents were responsible for [the] injuries. There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that Respondents inflicted them....” Sl.Op. at 24.
  - *Author’s Note*: This opinion does not discuss the holding in *In re J.S.*, 182 N.C. App. 79 (2007), which was relied upon in *In re A.B.*, \_\_\_ N.C. App. \_\_\_ (June 16, 2020); both of which state abuse, neglect, and dependency is about the child’s status and not the culpability of the parents.

### Neglect: Sufficiency of Notice; Sibling in the Same Home

*In re K.L.*, \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

#### **Held: Reversed and remanded**

- Facts: This case involves an appeal of an adjudication of an abused and neglected infant and an adjudication of a neglected juvenile, the infant’s 8-year old sibling who was living in the home with the infant. Mother sought medical treatment for the infant, which included x-rays. It was discovered that the infant had 6 fractures in his legs but no other injuries or marks. The cause of infant’s injuries were unknown to the parents. The parents were cooperative in seeking

treatment for the child and in working with DSS. Mother raised concerns about the infant having rickets because of her family history. The infant has a Vitamin D deficiency but does not have rickets. The father stated two weeks prior to mother seeking medical attention for the infant, the child had fallen off the couch but did not appear injured. A medical provider testified that it was highly probable the injuries were caused by non-accidental trauma and not a fall from the couch.

- Standard of review of an adjudication is whether clear and convincing evidence supports the findings and whether the findings support the conclusion of law. An abuse or neglect adjudication is a conclusion of law that is reviewed de novo. A de novo review is when the appellate “[c]ourt ‘considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.’ ” Sl.Op. at 10.
- Sufficiency of Notice regarding Neglect: The petition alleging abuse, neglect, or dependency must contain “allegations of facts sufficient to invoke jurisdiction over the juvenile.” G.S. 7B-402(a). “If the allegations are insufficient to put the party on notice as to which alleged grounds are at issue, then the trial court lacks subject matter jurisdiction over the action.” Sl.Op. at 26. But, the petition is adequate if it contains factual allegations that are sufficient to put the party on notice as to each alleged ground for adjudication, even if DSS forgets to check the box on the form petition of the ground. In this case, DSS alleged abuse, both by checking the abuse box, by its allegations, and by tracking the language of the abuse statute. There was no separate claim for or reference to neglect or the statutory language of the definition of neglect in the petition. Respondents did not have notice of the neglect ground for the infant.
- Neglect of Sibling: The definition of neglect under G.S. 7B-101(15) states it is relevant whether the juvenile lives in the home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. Although the trial judge has discretion in determining the weight to give to that factor, prior abuse in and of itself is insufficient to support a neglect adjudication. Other factors are required – factors that suggest the abuse or neglect will be repeated, such as domestic violence or substance abuse issues, an unwillingness to engage in services or work with DSS about the prior abuse or neglect; or the failure to accept responsibility for the prior adjudications. Here, the sibling’s adjudication as neglected is based on the abuse adjudication without any of the additional factors. The findings do not support the conclusion of neglect.

### Abuse/Neglect: Emotional Damage; Parental Discord

In re M.M., \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

#### **Held: Affirmed**

- Facts: Since the juvenile’s birth in 2010, there has been an extensive litigation history involving custody of the juvenile, including a previous DSS action in which the juvenile was adjudicated neglected and a Chapter 50 custody action with multiple orders entered. There is significant animosity and conflict between the parents regarding the child’s custody, and the child is often exposed to that and father’s poor boundaries about his anger toward mother. In 2018, DSS filed a new petition. The child was adjudicated abused due to serious emotional damage and

neglected due to injurious environment. An initial dispositional order was entered that granted physical and legal custody to mother and visitation to father as well as individual and parent counseling for each parent. Respondent father appeals – one argument is that the court erred in adjudicating the juvenile abused and neglected.

- An abused juvenile is one whose a parent creates or allows to be created serious emotional damage to the juvenile. G.S. 7B-101(1)e. A juvenile's serious emotional damage and anxiety may be caused by their parent's actions during marital discord and custody disputes.
- A neglected juvenile is one whose parent does not provide proper care, supervision, or discipline, or who lives in an environment injurious to their welfare. G.S. 7B-101(15). As a result, the juvenile must have some physical, mental, or emotional impairment or substantial risk of such impairment.
- Findings, which are supported by clear and convincing evidence, include the juvenile's living in a state of chronic emotional abuse due to her exposure to her parents' high conflict relationship and father's demeaning statements about mother and constant questioning of her (the juvenile). The findings support the conclusion that as a result, the juvenile suffered serious emotional damage that was evidenced by her health issues and anxiety and was abused and neglected.
- There was no violation of father's due process rights when the first DSS juvenile adjudication order and the civil custody order were entered in evidence. The DSS petition specifically alleged that the juvenile had been in DSS custody earlier and that there was a civil custody order.

### Dependency: Findings

In re M.H., \_\_\_ N.C. App. \_\_\_ (July 7, 2020)

#### **Held: Reversed**

- Facts: One month prior to the juvenile's birth, mother contacted her friend about providing an alternative childcare arrangement for her baby if DSS were to become involved. Mother inquired because of her history with DSS, who currently had 2 of her children in its custody. Her friend agreed and volunteered to share her home with mother and the infant. Mother and the infant moved in with her friend, and although mother was not on the lease, the friend was willing to have her added to it. Twelve days after the child was born, DSS filed a petition because mother failed to correct the conditions regarding her other children's adjudication of neglect related to a lack of stable housing and employment. The juvenile was adjudicated dependent and respondent mother appeals.
- Standard of review of an adjudication is whether there is clear and convincing competent evidence to support the findings of fact and whether the findings support the conclusions of law. Whether a juvenile is dependent is a conclusion of law that is reviewed de novo.
- Dependency under G.S. 7B-101(9) is a two-prong definition: the parent (1) is unable to provide care of supervision and (2) lacks an appropriate available alternative childcare arrangement. Findings as to both prongs are required, and a failure to make both findings is reversible error. A juvenile cannot be adjudicated dependent when the findings indicate they are living with a

parent who is willing and able to provide care and supervision. Mother also took the requisite action to identify a viable alternative childcare arrangement.

- The findings indicate the court's primary basis for adjudicating the juvenile dependent is mother's lack of suitable and stable housing and secondarily her lack of employment. There were no findings about mother and the infant living in mother's friend's home. The lack of findings about the alternative childcare arrangement is reversible error. Remand is not necessary in this case because the findings related to mother's lack of employment and unstable housing (that she was not on the lease) does not establish that mother is unable to provide care or supervision to her child. The evidence and findings about a lack of concern for the child's safety while in mother's care indicate the child is living with a parent who is willing and able to provide care and supervision.

### Adjudication: Expert Witness

In re M.M., \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

#### **Held: Affirmed**

- Facts: Since the juvenile's birth in 2010, there has been an extensive litigation history involving custody of the juvenile, including a previous DSS action in which the juvenile was adjudicated neglected and a Chapter 50 custody action with multiple orders entered. There is significant animosity and conflict between the parents regarding the child's custody, and the child is often exposed to that and father's poor boundaries about his anger toward mother. In 2018, DSS filed a new petition. The child was adjudicated abused due to serious emotional damage and neglected due to injurious environment. An initial dispositional order was entered that granted physical and legal custody to mother and visitation to father as well as individual and parent counseling for each parent. Respondent father appeals – one argument is that the court erred in allowing a witness to testify as an expert in psychology and child and family evaluations.
- Expert Witness: "Whether a witness has the requisite knowledge or training to testify as an expert is within the exclusive province of the trial court, and its decision will not be overturned absent an abuse of discretion." Sl.Op. at 13 (citation omitted). Rule 702 of the Rules of Evidence governs expert testimony and has 3 parts that must be met: 1) the proposed testimony is based on scientific, technical, or other specialized knowledge that will assist the fact finder in understanding the evidence or determining a fact in issue; 2) the witness is qualified as an expert by knowledge, skill, experience, training, or education, and 3) the testimony must meet the 3-prong reliability test in Rule 702(a)(1)-(3). Father challenges the third criterion. The court has discretion in determining how to address the 3-prong reliability text as it will vary from case by case. The court conducted a voir dire of the witness to address each of the prongs: (a) the facts and data used to form his opinion and the clinical protocol he used showing that his testimony was (b) the product of reliable principles and methods and (c) that those methods and principles were applied reliably to the facts of the case. There was no abuse of discretion.



## Permanency Planning Order: Guardianship; Relative Priority

In re A.N.T., \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

### **Held: Vacated and remanded**

- Facts: The juvenile was adjudicated abused and neglected. The juvenile had never resided with either parent and had been living with relatives. After DSS filed its petition, the juvenile was placed with different maternal relatives. Eventually, the child was moved to a non-relative's home due to concerns with the juvenile's placement in the relative's home. Mother consented to this placement. At permanency planning hearings, potential placements with paternal relatives, including the paternal grandmother, were identified. After a hearing where paternal grandmother testified about her desire to have the juvenile placed with her and a description of the conditions of her home and father expressed his desire for the juvenile's placement with his mother, the court ordered guardianship to the current non-relative placement providers after determining that disposition was in the child's best interests. Respondent father appealed.
- 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. Conclusions of law are reviewed de novo.
- Relative Priority: "Our statutes and precedents clearly mandate relative placements of a juvenile to maintain familial bonds. . . . [and] require and presume the juvenile's best interest is served when placed with a family member." Sl.Op. at 16. When the juvenile is placed in out-of-home care, G.S. 7B-903(a1) requires the court to first consider whether a relative is willing and able to provide proper care and supervision in a safe home. If that criteria are met, the court must place the juvenile with the relative unless the court finds that the placement is contrary to the child's best interests. Failure to make the finding will result in remand. Here, the court did not make the statutorily required findings of fact and conclusions of law before ordering guardianship to non-relatives. This opinion reviews previous decisions that addressed this statutory requirement and the need for the finding: *In re D.S.*, 260 N.C. App. 194 (2018); *In re E.R.*, 248 N.C. App. 345 (2016); and *In re L.L.*, 172 N.C. App. 698 (2005).

## Permanency Planning: guardianship verification, parent's constitutional rights, eliminate reunification, waive reviews

In re J.M., \_\_\_ N.C. App. \_\_\_ (May 5, 2020)

### **Held: Affirmed in part; Vacated in Part and Remanded**

- Facts: In March 2016, four children were adjudicated neglected. Over several years, the court ordered reunification as one of the concurrent permanent plans and ordered that respondent mother comply with her case plan. In January 2019, the court entered an order of guardianship of one of the children to her foster parents and waived further review hearings. Respondent mother appeals, raising several issues.
- Waiving further review hearings: G.S. 7B-906.1(n) allows the trial court to waive future review hearings if it finds by clear, cogent, and convincing evidence, each of the five enumerated factors. Respondent argues there was insufficient evidence to support some of the findings. Social worker testimony of mother's inability to adequately care for the child without

supervision and direction is clear, cogent, and convincing evidence for the finding that neither the juvenile's best interests nor the best interests of any party require a review hearing every 6 months (factor (3)). The hearing transcript shows that the trial court informed all parties and their attorneys who were present that the case could be brought for a review at any time through a motion by a party or by the court (factor (4)).

- Constitutional Rights and Parent's Unfitness: A parent may lose her paramount rights to care, custody, and control of her child if there is a finding based on a clear, cogent, and convincing evidence that the parent is unfit or has acted inconsistently with her constitutionally protected status. In awarding guardianship to the foster parents, the court found "both parents are acting inconsistently with the health and safety of the child and are unfit to have custody." Sl.Op. at 10. Specific findings included mother not being able to adequately demonstrate her ability to parent, need for significant monitoring, and need to move back to supervised visits from unsupervised visits. The findings were supported by social worker testimony. Regarding mother's challenge to the weight given to evidence of mother's progress by the trial court, "it is not the function of [the appellate court] to reweigh evidence on appeal." Sl.Op. at 11-12.
- Verification of guardianship: Before a court may order guardianship, it must verify the person(s) being appointed understand the legal significance of the appointment. Although the court must receive evidence of these factors, there are no specific findings that are required. The testimony of both foster parents about their understanding, the social worker testimony that the foster parents understood their responsibilities, and the court's findings that the foster parents are committed to providing for the child to and past the age of majority and are willing to be parties to the action was sufficient verification by the trial court.
- Eliminating Reunification (*Author's Note: The opinion refers to ceasing reunification efforts*):
  - The standard of review is whether the court made appropriate findings, whether the findings are based on credible evidence, whether the findings support the conclusions, and whether the trial court abused its discretion in the disposition.
  - Findings under G.S. 7B-906.2(b) and (d) are required. The order had limited findings addressing only a portion of what was required. There was no finding under G.S. 7B-906.2(d)(3) as to whether the parent remains available to the court, DSS, or child's GAL. Remanded to make the required statutory findings.

## Appeal: Moot

In re A.K.G., \_\_\_ N.C. App. \_\_\_ (March 17, 2020)

### **Held: dismissed**

- Facts: Respondent father appeals a permanency planning order that eliminated reunification as a permanent plan. During the pendency of the appeal the juvenile turned 18.
- Moot:
  - Under G.S. 7B-201(a), the trial court's subject matter jurisdiction over the juvenile proceeding terminates when the juvenile reaches the age of majority. The permanent plan is no longer in effect. Any order by the court of appeals would have no practical effect as the trial court has no jurisdiction.

- None of the exceptions to the mootness doctrine apply in this case. Unlike an adjudication order or a termination of parental rights order, there are no collateral consequences from a permanency planning order that has unfavorable findings of fact. Contrary to respondent's assertion, "[f]indings of fact in a court order from an unrelated legal proceeding are not proper subjects of judicial notice" in a civil custody proceeding for another child. Sl.Op. at 5. The limited exception based on clear and significant public interest issues is not triggered by a fact-bound order involving a permanent plan for a specific juvenile. The capable of repetition yet evading review exception does not apply to this case, where the challenge is to findings of fact and legal conclusions that are specific to the case.
- Noting that the "State's appellate system goes to rather extraordinary lengths to expedite these juvenile cases, and it is, and should be, rare for a juvenile case to be rendered moot in this way." Sl.Op. at 2.

### Appeal: Preserve Issue

In re A.B., \_\_\_ N.C. App. \_\_\_ (June 16, 2020)

#### **Held: Affirmed**

- Facts: This opinion involves an appeal of juvenile adjudication order by the respondent mother.
- Judicial Notice of Prior Orders (Nonsecure Custody): Mother challenges the finding of fact that she lacked an appropriate childcare arrangement (a prong for dependency) for lack of competent evidence. The finding was based on the court's judicial notice of prior nonsecure custody orders.
- This issue was not properly preserved for appeal. "A respondent's failure to object 'to the trial court's taking judicial notice of [] underlying juvenile case files...waive[s] appellate review.'" Sl.Op. at 5 (citation omitted). At adjudication, DSS requested that the court take judicial notice of the nonsecure custody order. Mother did not object or make any argument that the judicial notice should be limited because of possible hearsay evidence being used at the nonsecure custody hearing where the Rules of Evidence do not apply.

## Termination of Parental Rights

### Personal Jurisdiction: Nonresident Parent

In re F.S.T.Y., \_\_\_ N.C. \_\_\_ (June 5, 2020)

#### **Held: Affirmed**

- This is a case of first impression.
- Facts: The children were born in South Carolina and moved with their mother to North Carolina when they were around 3 years old. The father remained in South Carolina. Years later, DSS in NC became involved, and the juveniles were adjudicated neglected. Respondent father

continued to reside in South Carolina. He was represented by counsel at some of the hearings in the NC neglect action. After reunification efforts were ceased, DSS filed a TPR petition. Father filed a motion to dismiss for lack of personal jurisdiction based on lack of minimum contacts with North Carolina, which was denied. Father's parental rights were terminated, and he appeals on the grounds of constitutional due process requirements.

- "Due process" requires that a nonresident against whom relief is sought be provided adequate notice of the suit and be subject to the personal jurisdiction of the court." Sl.Op. at 4 (citations omitted). Generally, due process requires a nonresident to have "...sufficient 'minimum contacts' with the forum state so 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Id.* (quoting *Int'l Shoe Co.* 326 U.S. 310, 316 (1945)). However, "due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings. Sl.Op. at 15.
- North Carolina's long-arm statute provides that personal jurisdiction over nonresidents exists in actions that are brought under North Carolina statutes that specifically confer grounds for personal jurisdiction. G.S. 1-75.4(2). The UCCJEA, which applies to TPR proceedings, states physical presence of or personal jurisdiction over a party or child is not necessary to make a child-custody determination. G.S. 50A-201(c).
- The status exception to minimum contacts has been recognized by the U.S. Supreme Court and "implies that minimum contacts are not required in status cases (e.g., divorce) because jurisdiction is established by the status of the plaintiff, rather than the location of the defendant. Some state courts have concluded the status exception applies to TPR proceedings as the child's status to their parent is at issue, while other state courts have determined the exception does not apply to a TPR. In North Carolina, the best interests of the child are the paramount consideration in TPR cases, and when there is a conflict between the interests of children and parent, the child's best interests prevail. In a TPR, a parent who does not adequately care for their child is involved, and "fairness requires that the State have the power to provide permanence for children living within its borders[,] " which is a matter of state concern. Sl.Op. at 13. The principle of acting in the child's best interests is contradicted by not favoring the child's home state when determining jurisdiction. Although minimum contacts are not required due to the status exception related to the child in TPR proceedings, the respondent parent continues to have a right to actively participate in the TPR proceeding. Any burden imposed on the respondent parent is mitigated by the appointment of counsel and right to seek participation through remote technology.
- The Court of Appeals' opinions in *In re Finnican*, 104 N.C. app 157 (1991) and *In re Trueman*, 99 N.C. App. 579 (1990) are overruled.

## Child's GAL: Attorney Advocate in GAL Role

In re C.J.C., \_\_\_ N.C. \_\_\_ (April 3, 2020)

### **Held: Affirmed**

- **Facts:** Mother filed a TPR to terminate father's parental rights and father filed an answer denying that ground existed. An attorney was appointed as the attorney advocate and GAL for the child. The TPR was granted on the ground of abandonment. Respondent father appeals raising as one issue, that the attorney advocate was not appointed as the GAL such that there was prejudicial error.
- **G.S. 7B-1108(b)** requires that a GAL be appointed for the juvenile when a parent filed an answer denying material allegations in the TPR petition and state "[a] licensed attorney shall be appointed to assist those guardians ad litem *who are not attorneys licensed to practice in North Carolina.*" Sl.Op. at 4 (emphasis supplied in opinion).
- **The form AOC-J-207** was used to appoint an Attorney Advocate and GAL for the child. The form has a checkbox for when an attorney advocate is also acting as the GAL, but in this case the box was not checked. A review of the documents and transcripts in the record show that the failure to check the box was a clerical error as the appointed attorney was identified as the GAL. There was not a prejudicial substantive or procedural error. The GAL met his duties as an attorney and GAL when (1) investigating the case through contact with the parties, visiting with the child, and visiting the petitioner's workplace and (2) reporting his observations to the trial court. His role was unquestioned and unchallenged.

## Motion to Continue

In re A.L.S., \_\_\_ N.C. \_\_\_ (June 5, 2020)

### **Held: Affirmed**

- **Facts:** In 2016, petitioners obtained a G.S. Chapter 50 custody order awarding them sole legal and physical custody of the child after determining both parents had acted inconsistently with their parental rights. In 2018, petitioners filed a TPR against both parents. Respondent mother requested a continuance, which was granted, so that her minor son could testify. When the TPR hearing resumed, respondent mother requested another continuance because her son was not present although he was subpoenaed through the adult he was living with. The court denied the second motion to continue. The TPR was granted, and respondent mother appeals challenging the court's denial of her motion to continue and the ground of abandonment.
- **The standard of a review for a ruling on a motion to continue** is reviewed for an abuse of discretion, unless the motion is based on a constitutional right that presents a question of law for the appellate court. "[R]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." Sl.Op. at 3 (citation omitted). This case does not raise a constitutional issue and is reviewed for an abuse of discretion.
  - **There was no abuse of discretion** in denying the motion to continue the resumed the TPR hearing, which was scheduled one month after the first motion to continue was

granted. G.S. 7B-1109(d) allows for continuances beyond 90 days after the petition is filed “only in extraordinary circumstances when necessary for the proper administration of justice.” The TPR petition was filed on August 28, 2018, and the continued TPR hearing was scheduled to be heard on March 27, 2019, Mother made no showing of extraordinary circumstances. With only a vague description of the expected testimony and no affidavit of offer of proof, respondent mother failed to demonstrate any prejudice from the denial of her motion to continue.

### Neglect: Sufficiency of Evidence and Findings

In re S.D., \_\_\_ N.C. \_\_\_ (April 3, 2020)

#### **Held: Affirmed**

- **Facts:** The child was adjudicated neglected and dependent in part based on father not having established paternity and never having seen or provided any financial or emotional support for the child. In a review order, father’s paternity was established and he was permitted to send mail or gifts to the child through DSS and could call about her well-being. He was also required to contact DSS once he was released from prison so he could begin working a case plan. After he was released from prison, father did not make significant progress on his case plan, and DSS was ordered to initiate a TPR. After the TPR motion was filed, father was arrested on drug charges and violating parole and remained incarcerated until he pled guilty 4 months later. The TPR hearing was held after father’s incarceration ended. The TPR was granted on the ground of neglect and failure to make reasonable progress. Father appeals. This opinion focuses on neglect.
- **Neglect:** G.S. 7B-1111(a)(1) authorizes a TPR when the parent has neglected the juvenile, which includes when a parent does not provide proper care, supervision, or discipline. When a parent and child have been separated for a long period, the petitioner/movant must show past neglect and a likelihood of future neglect by the parent. Factors include the best interests of the child and the fitness of the parent at the time of the TPR hearing. A TPR on the ground of neglect does not require that the respondent parent in the TPR be responsible for the child’s prior neglect adjudication. An adjudication that a juvenile is neglected is based on “...the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” Sl.Op. at 13-14 quoting In re M.A.W., 370 N.C. 149, 154 (2017).
- **Incarceration:** Father was incarcerated for 14 months of the 2-year period that the juvenile was in DSS custody. As previously held, “incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. at 14-15. Although incarceration limits a parent’s ability to show affection, incarceration is not an excuse for a parent to fail to use whatever means are available to show an interest in his child. Father made minimal efforts to show an interest in his child – he sent a single birthday card. His minimal progress on his case plan was a result of his own conduct, including his later incarceration for his continued criminal activity, his missing or cancelling several meetings with DSS, and his not engaging in recommended services. All of these actions limited DSS’s ability to assist him and are not because of DSS’s failure to make reasonable efforts to assist him as he proposes.

- Evidence and Findings: The evidence at the TPR hearing including social worker testimony, the father's testimony, and underlying review orders from the neglect and dependency action. In considering the father's testimony, the trial court determined it was not credible, and a trial court is entitled to make a witness credibility determination "without fear of appellate reversal in light of the applicable standard of review." Sl.Op. at 30. The evidence supports the court's findings that father did not make adequate progress on his case plan or toward reunification, and the findings support the court's conclusion of neglect.

In re N.P., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, the child was adjudicated neglected and dependent. In 2019, the court entered an order terminating respondents' parental rights on all the grounds alleged and concluding it was in the child's best interests. Respondent father appeals, challenging the grounds. This opinion addresses neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when the parent has neglected the juvenile, which includes a parent who does not provide proper care, supervision, or discipline, or an injurious environment. When there is a long period of separation between the child and parent, the petitioner must show past neglect and a likelihood of future neglect by the parent. When looking at future neglect, the court looks to evidence of changed circumstances between the period of past neglect and the time of the TPR hearing.
- The more than 90 findings were sufficient to support the conclusion of neglect. Those findings included father never acknowledging his responsibility for his convictions on multiple sex offenses against a child; not timely completing a court-ordered sex offender assessment and not completing recommended treatment; paranoid behaviors; a lack of stable housing and proper vetting of roommates; and history of poor decision-making and noncompliance with court orders.
- Broad based exceptions to findings of fact that ineffectual as findings that are not sufficiently challenged are presumed to be supported by competent evidence and are binding on appeal. Of the specifically challenged findings, "the district court has the responsibility of making all reasonable inferences from the evidence presented" and here "the district court could reasonably infer from the evidence that respondent could not maintain safe housing... and lacked the ability to do so in the future." Sl.Op. at 7.
- The role of an appellate court is not to substitute its judgment for the trier of fact. The district court had repeated opportunities to observe respondent when determining whether his behaviors (addressed in the findings) impacted his ability to parent such that the child would be placed in an injurious environment.

In re D.W.P., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

**Held: Affirmed (Earls, J. dissent)**

- Facts: In an underlying abuse and neglect action, D.W.P. was adjudicated abused and neglected based on multiple serious injuries (bone fractures) that were in various stages of healing and were caused by nonaccidental means. His sister was adjudicated neglected. No plausible



explanation for the injuries was provided by respondent mother or her fiancé at the time. Respondent mother entered an Alford plea to misdemeanor child abuse, which arose from the injuries to D.W.P. At a permanency planning hearing, the court eliminated reunification and directed DSS to file a TPR petition, which DSS did. The TPR was granted based on neglect and failure to make reasonable progress. Respondent mother appeals on the basis that the findings are not supported by clear, cogent, and convincing evidence. The opinion focuses on neglect.

- Standard of review is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusion of law.
- Findings and Role of Trial Judge: A trial judge's duty is to determine a witness's credibility and how much weight to give that testimony and to draw reasonable inferences from that testimony. These determinations are not subject to appellate review. Findings of fact must be "sufficiently specific" to allow for appellate review of the judgment and are made through processes of logical reasoning based on the evidence presented. Sl.Op. at 6. (citations omitted).
- Findings were supported by clear, cogent, and convincing evidence despite mother's challenge to findings involving (1) her credibility based on the various explanations she provided for how the child may have been injured and her lack of insight about the injuries and failure to make reasonable progress; (2) her probation violation for not obtaining a psychiatric evaluation; (3) her working on reestablishing her relationship, which involved domestic violence, with her now ex-fiance; and (4) her getting married to a different man and withholding that information from the DSS social worker which resulted in a background check on him not being conducted.
- Likelihood of neglect: Because of the period of separation between mother and her child, the court must determine whether there was prior neglect and a likelihood of future neglect, with the determinative factors being the child's best interests and the parent's fitness to care for the child at the time of the TPR hearing. Although respondent mother has made some progress, including completing parenting classes, attending therapy, and regularly visiting with the children, she continued to fail to acknowledge the likely cause of her child's injuries. In a TPR, the child's best interests are paramount and are meant to ensure the child's safety and well-being and to not be punitive against the parent. The findings that mother did not try to understand how her child was injured or how her relationships affect the children's wellbeing support the conclusion that neglect is likely to reoccur.
- Dissent (Earls, J): The findings are not supported by the evidence. Mother was compliant with her case plan. Further, the evidence shows mother (1) was consistent throughout the case that she did not injure her child and did not know how he was injured and (2) acknowledged her responsibility to protect her children as their primary caregiver. Regarding the injured child's sister, the findings of fact relate to her living in the home where another child was abused. That alone is insufficient when there is no evidence that current circumstances present a risk of harm or neglect to her.



## Neglect Adjudication: Findings; Collateral Estoppel, Judicial Notice; Inferences

In re J.M.J.-J., \_\_\_ N.C. \_\_\_ (June 5, 2020)

### **Held: Affirmed**

- Facts: In 2017, the juvenile was adjudicated neglected and dependent. Respondent father did not contest the allegations in the petition that included mother's substance abuse and mental health issues and father's knowledge of those issues as well as his own extensive criminal history involving domestic violence and controlled substances. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition, which was granted on the grounds of neglect and abandonment. Respondent father appeals, arguing the evidence does not support the findings, and the findings do not support the conclusion that grounds existed.
- The standard of review is whether the findings are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusion of law.
- Under G.S. 7B-1111(a)(1) and 7B-101(15), neglect involves a lack of a parent's proper care, supervision, or discipline or when a juvenile lives in an injurious environment. When a parent and child have been separated for a long period of time, the TPR petitioner must show past neglect and a likelihood of future neglect. The trial court considers evidence of changed circumstances between the past neglect and the time of the TPR hearing. Because the determinative factors for whether a child is neglected are the circumstances and conditions surrounding the child and not the fault or culpability of the parent, it is "not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect." Sl.Op. at 20.
- Collateral estoppel applies to father in his challenge to findings that the mother lacked an appropriate child care arrangement at the time the juvenile petition alleging neglect and dependency was filed. The prior adjudication order made that finding and respondent-father, who did not appeal that order, is bound that finding. Collateral estoppel also applies to father's argument about his case plan requirements when the initial dispositional order in the N/D action stated he was required to follow a case plan that identified the services and steps he was to take.
- Judicial notice of all prior orders in the N/D action was taken by the trial court in the TPR. There were findings of fact in a permanency planning order about father's positive test for controlled substances. "Although the permanency planning order is subject to a lower standard of evidentiary proof than a termination of parental rights determination, this [Supreme] Court has acknowledged that '[a] trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence.'" Sl.Op. at 9 *quoting In re T.N.H.*, 372 N.C. 403, 410 (2019). Further, the NC Supreme Court "agree[s] with the Court of Appeals that '[i]t is well-established that a trial court may take judicial notice of its own proceedings.'" Sl.Op. at 13 (citation omitted).
- The trial court determines the reasonable inferences to be drawn from competent evidence, which the trial court did in making its findings regarding respondent's substance abuse and the circumstances for his missed drug screens.

- Incarceration in and of itself is neither a sword nor a shield in a TPR; “the extent to which a parent’s incarceration ... support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent’s incarceration.” Sl.Op. at 20 (citation omitted). Prior to father’s incarceration, he made no attempts to comply with his case plan and continued to test positive for controlled substances supporting the courts findings that past neglect existed and future neglect was likely since father’s circumstances had not changed at the time of the TPR hearing.

### Neglect & Failure to Make Reasonable Progress: Findings

In re Z.A.M., \_\_\_ N.C. \_\_\_ (April 3, 2020)

#### **Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected and dependent. In 2018, the permanency planning order identified adoption and guardianship as the concurrent permanent plans. DSS filed a motion to terminate the parents’ rights on the grounds of neglect and failure to make reasonable progress to correct the conditions. After finding both grounds existed, the court determined it was in the children’s best interests to terminate parental rights to allow the grandparents, who were the children’s placement provider, to adopt the children. Respondent father appeals the grounds challenging the sufficiency of the findings. Both respondents challenged the best interests determination.
- Standard of review of an adjudication order is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed do novo. The appellate court will review the findings and conclusions in the order regardless of how they are classified (e.g., a conclusion is labelled as a finding).
- G.S. 7B-1111(a)(1) authorizes the trial court to terminate a parent’s rights based on neglect. When a parent and child have been separated for a long period, there must be both past neglect and a likelihood of future neglect. A likelihood of future neglect is determined by considering evidence of changed circumstances between the period of past neglect and the time of the TPR hearing.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate a parent’s rights based on their (1) willfully leaving their child in foster care or other out-of-home placement for more than 12 months (2) without showing reasonable progress under the circumstances has been made to correct the conditions that led to the child’s removal.
- Although respondent father argues the trial court did not consider current circumstances, the findings about respondent father’s more recent 3-month period of sobriety was evaluated over the entire 22-month period when the children were out of the home, which showed that he has multiple relapses and that his alcohol abuse preceded the TPR hearing. The trial court appropriately weighed the evidence to conclude there was a likelihood of neglect and failure to make reasonable progress.

In re C.N., \_\_\_ N.C. App. \_\_\_ (April 21, 2020)

**Held: Reversed and Remanded**

- Facts and Procedural History: In an underlying action, the children were adjudicated neglected based on lack of proper care and supervision and an injurious environment. Mother's rights were terminated on the grounds of neglect and willful failure to make reasonable progress with findings that mother was not consistent with her treatment or compliant with her case plan and although appropriate at visits, was not consistent in attending those visits. On appeal of that order, the court of appeals held the findings were insufficient to support neglect and the evidence was insufficient to support failure to make reasonable progress. The NC Supreme Court remanded this case to the COA to reconsider its holding in 831 S.E.2d 878 (2019) given the supreme court's decisions in In re B.O.A and In re D.L.W.
- In re B.O.A. held the court of appeals had applied a restrictive interpretation of the conditions that led to a trial court's removal of the children thus limiting a trial court's authority to order certain requirements in a case plan and instead provided a more expansive interpretation. In this opinion, there was not a restricted interpretation of those conditions. Distinguishing the case from In re B.O.A., here mother made reasonable progress on her case plan.
- In re D.W.P. is distinguishable from the present case as respondent-mother here has not continued to place her children at risk or fail acknowledge neglect as she stipulated to the allegations in the neglect petition.

## Abandonment

In re A.L.S., \_\_\_ N.C. \_\_\_ (June 5, 2020)

**Held: Affirmed**

- Facts: In 2016, petitioners obtained a G.S. Chapter 50 custody order awarding them sole legal and physical custody of the child after determining both parents had acted inconsistently with their parental rights. In 2018, petitioners filed a TPR against both parents. Respondent mother requested a continuance, which was granted, so that her minor son could testify. When the TPR hearing resumed, respondent mother requested another continuance because her son was not present although he was subpoenaed through the adult he was living with. The court denied the second motion to continue. The TPR was granted, and respondent mother appeals challenging the court's denial of her motion to continue and the ground of abandonment.
- The standard of review for an adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusion of law. Conclusions of law are reviewed de novo.
- Abandonment under G.S. 7B-1111(a)(7) has a determinate period of six months immediately preceding the filing of the TPR petition, but the parent's actions outside of that time period may be considered to evaluate a parent's credibility and intentions during the determinative 6-month period. Abandonment involves "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 7 (citation omitted). Whether a parent acted willfully is a question of fact.

- The appellate court is bound by the unchallenged findings of fact, which support the adjudication of abandonment. Although there was ill will between petitioner and respondent-mother, “a parent *will not be excused from showing interest in [the] child’s welfare by whatever means available.*” Sl.Op. at 10 (emphasis in opinion) (citation omitted). Mother made no effort to communicate with or contact the child for 2 years, including the 6-month determinative period, even though she knew the petitioner’s location. The Chapter 50 order, although providing no visitation to mother, did not prohibit contact. Mother never sought to modify the Ch. 50 order.

In re A.G.D., \_\_\_ N.C. \_\_\_ (May 1, 2020)

**Held: Affirmed; there is a dissent (Earls, J.)**

- Facts: In 2014, mother obtain a child custody order granting her sole legal and physical custody of the children and no contact between the children and the father without a further order of the court. Father was incarcerated on pending charges for child related sex offenses. In 2018, mother filed a TPR petition on the grounds of failing to pay child support and abandonment. The TPR was granted on the ground of willful abandonment, and respondent father appeals arguing he was prohibited from having contact with the children.
- Under G.S. 7B-1111(a)(7), a trial court looks to the six consecutive months immediately preceding the filing of the TPR petition and must make facts that the parent had a “purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child].” Sl.Op. at 4-5.
- “Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. at 5. When parents are incarcerated, the court must recognize the limitations on that parent for showing love, affection, and parental concern. The trial court found that with one exception the father did nothing to maintain contact with the children’s mother to learn how the children were doing. There was nothing in the custody order that prohibited father from contacting the mother or other persons for him to indirectly communicate his love, affection, and parental concern for his children. Father’s failure to do “anything whatsoever to express love, affection, and parental concern for the children during the relevant six-month period” supports the TPR. Although his options were limited, it was not impossible for him to show such concern. Precluding a TPR against a parent who has been accused of sexually abusing one of his children solely because the other parent and State took action to protect the family would cause harm to the family members and is inconsistent with the intent of the General Assembly and appellate court precedent.

In re B.C.B., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: Mother petitioned to terminate father’s parental rights on the grounds of abandonment and failure to pay child support. Father’s attorney filed a motion to dismiss alleging insufficient notice of facts. The motion was denied. After hearing, the TPR was granted on the ground of abandonment. Respondent father appeals.

- Notice: G.S. 7B-1104 requires a TPR petition “state ‘[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists.’ ” Sl. Op. at 4. Quoting the court of appeals, “[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions, or conditions are at issue.” Id. Here, the petition included more than a mere recitation of the statutory grounds to TPR; it alleged both grounds, that both actions were willful, and addressed at length respondent father’s violation of the child custody orders in support of the allegation of willful abandonment.
- Abandonment under G.S. 7B-1111(a)(7) looks to a determinative 6 consecutive month period immediately before the TPR petition or motion is filed. Abandonment involves a parent’s conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willfulness is a question of fact.
- Findings of Fact: Findings of fact that are not challenged on appeal are deemed supported by competent evidence and are binding. The appellate court reviews only those findings that are necessary to support the court’s conclusion that a ground exists. Here, the findings of fact about willfulness are supported by clear, cogent, and convincing evidence. Although petitioner had a DVPO against respondent, the respondent was not precluded from contacting the child or petitioner’s parents. Despite having petitioner’s parents’ address, respondent did not contact them or send any cards or gifts to the child. Respondent also failed to exercise his visitation rights. The findings support the court’s conclusion of abandonment.

In re K.N.K., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, mother filed a petition to terminate father’s parental rights on the ground of willful abandonment. Prior to the TPR petition, in 2015, a child custody order awarded mother sole care, custody, and control of the child and twice monthly supervised visitation with father. Mother had a DVPO against father from 2014 – 2018. From 2015- 2018, the DVPO included the child but allowed for supervised visitation. The court ordered the TPR and father appealed both the ground and best interests determinations.
- Abandonment under G.S. 7B-1111(a)(7) looks to a determinative 6 consecutive month period immediately before the TPR petition or motion is filed. Abandonment involves a parent’s conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.
- Willfulness is a question of fact. Because it is an emotion, it is typically proved by circumstances that may be inferred. The court may look outside the determinative 6-month period when evaluating a parent’s credibility and intentions.
- The findings show that from 2014 to the date the TPR was filed, respondent father had no contact or communication with the child even after he was awarded visitation twice a month in the 2016 custody order, did not provide financial support for the child, did not attempt to attend any medical appointments or school/extracurricular activities for the child, and did not

seek a modification of the child custody order. These findings support the ultimate findings that respondent acted willfully, with the intent of foregoing his parental responsibilities.

- At disposition, the court applies the best interests of the child standard, “without regard to any competing interests of respondent. “An adjudication of grounds for terminating parental rights under N.C.G.S. 7B-111(a) constitutes a determination by the trial court that the respondent-parent is unfit or has acted inconsistently with his constitutionally protected status with regard to the subject juvenile.” Sl.Op. at 15.
- A best interests determination is reviewed for an abuse of discretion. Dispositional findings are reviewed on a competent evidence standard. There were detailed findings for each of the factors set forth in G.S. 7B-1110 based on the evidence. In one challenged finding that there was no bond between the child and respondent, the evidence supports there is no child-parent bond. Regarding the father’s testimony about his prior conduct to his child, the court determined the father’s testimony was not credible. There is no abuse of discretion.

### Failure to Pay Reasonable Portion of Cost of Care

In re S.E., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

#### **Held: Affirmed**

- Facts: Four children were adjudicated abused, neglected, and dependent based on physical abuse, sexual abuse of one child, and domestic violence in the home. A permanency planning order identified adoption as the primary permanent plan for each of the children. DSS filed a petition to terminate respondent mother’s parental rights, which was granted on multiple grounds, including willfully failing to pay a reasonable portion of the cost of care for the children while they were placed in DSS custody. Respondent mother appealed.
- Failing to Pay Reasonable Portion of Cost of Care: G.S. 7B-1111(a)(3) involves the juvenile’s placement in DSS custody and the parent’s willful failure to pay a reasonable portion of the cost of care for a continuous period of six month immediately preceding the filing of the TPR petition when the parent is physically and financially able to do so. The cost of care is the amount it costs DSS to care for the child, and the portion of the cost of care for a parent is that which “is fair, just and equitable based upon that parent’s ability or means to pay.” Sl. Op. at 10. Mother paid nothing toward the cost of care despite being employed and having an ability to do so. Her argument that her failure to pay was not willful because she did not know she had to pay or how to pay is without merit. “The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent’s obligation to pay reasonable costs, because parents have an inherent duty to support their children.” *Id.* Additionally, mother was on notice given the findings in each permanency planning order that respondent-parents were not paying child support.

In re J.M., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

#### **Held: Affirmed**

- Facts: In 2016, respondent mother stipulated to facts that established the children were neglected based on a lack of proper care and supervision and an injurious environment. In 2017,

a permanency planning order identified adoption as the primary plan and custody as a secondary plan. The trial court ordered that DSS not pursue a TPR so a home study for a possible kinship placement could be pursued. In 2018, after the possible placement was not approved, DSS filed a TPR petition, and the TPR was granted on four different grounds. Respondent mother appeals. This opinion focuses on the ground of failure to pay a reasonable portion of the cost of care while the children were in DSS custody. The children were in foster care from January 8, 2016 through the relevant 6-month period ending on July 10, 2018. The cost of care for each child was more than \$400,000. In 2016, mother was ordered to pay \$50/month in child support.

- G.S. 1111(a)(3) authorizes a TPR when a parent has willfully failed for a continuous period of 6 months preceding the filing of a TPR to pay a reasonable portion of the care of their child's care when the child has been placed in DSS custody and the parent has a physical and financial ability to pay. Cost of care is the amount it costs DSS to pay for the child's care (e.g. foster care), and the parent pays the portion that is "fair, just and equitable based upon the parent's ability or means to pay." Sl.Op. at 8 (Citation omitted).
- Findings support conclusion: During the determinative 6-month period, respondent mother paid nothing toward the children's cost of care although she had an ability to pay more than zero as she was capable of working. Respondent mother was working at the start of the determinative time period prior to quitting her job, and although the person responsible for managing her Rx to address her mental health issues was unavailable during this period, there is nothing that indicates she could not have found an alternative provider. Her lapse in Rx is based on her own conduct. Mother was also subject to a valid court order for child support and made no efforts to modify or set aside that order.

Dependency: Alternative Child Care Arrangement; Child's Mental Health Needs in PRTF  
In re N.N.B., \_\_\_ N.C. App. \_\_\_ (May 5, 2020)

**Held: Affirmed**

- Facts: In 2017, the juvenile was adjudicated neglected and dependent in part due to his significant mental health issues. Respondent father had not seen the child since 2012 and has been incarcerated since 2014. Father's rights were terminated on several grounds and he appeals. This opinion addresses the ground of dependency, where father challenges the lack of an alternative appropriate child care placement based on his proposal of either his mother or sister being available.
- Dependency under G.S. 7B-1111(a)(6) requires petitioner prove by clear and convincing evidence that the parent is incapable of providing proper care and supervision such that the juvenile is dependent and that there is a reasonable probability that the incapability will continue into the foreseeable future.
- Here, there was not an appropriate alternative child care arrangement. Respondent's mother was not available due to her failing health and inability to have the child reside with her in her retirement community. Respondent's sister was not a viable placement due to the child's need level of treatment needs. Respondent's sister resides in Georgia requiring compliance with the ICPC. Because the juvenile was in a level IV PRTF with a discharge recommendation to a level III



PRTF and not relative, the plan to submit the ICPC request was deemed inappropriate. Although respondent argues his sister is appropriate, available, willing, and has a close relationship with the juvenile, she is not appropriate because of the child's significant psychiatric needs.

### Best Interests: Standard of Review; Dispositional Factors

In re C.V.D.C., \_\_\_ N.C. \_\_\_ (June 5, 2020)

**Held: Affirmed**

- Facts: This appeal involves respondent mother's challenge of the court's conclusion that the TPR was in the children's best interests. Mother's argument involves the standard of review and the findings required by G.S. 7B-1110(a).
- The standard of review, which the N.C. Supreme Court recently reaffirmed, is not a de novo standard of review as respondent argues but is an abuse of discretion standard, which recognizes the appellate court's "long-standing deference to the trial courts in matters related to child custody." Sl.Op. at 5. An abuse of discretion occurs when a trial court's decision is "manifestly unsupported by reason or [is] so arbitrary that it could not have been the result of a reasoned decision." Sl. Op. at 5-6 (citation omitted).
- Whether a trial court failed to comply with the fact-finding requirements of G.S. 7B-1110(a) is a question of statutory interpretation that is reviewed de novo. A de novo review is when the appellate "court considers the matter anew and freely substitutes its own judgment for that of the [trial court.]" Sl.Op. at 7 (citation omitted).
- G.S. 7B-1110(a) requires the court to consider all the factors but does not require written findings as to each factor; however, trial courts are encouraged to make written findings on all the statutory factors in G.S. 7B-1110(a). Relevant factors do not include uncontested issues, those which there is no conflict in the evidence. There was no reversible error when there were no findings regarding the uncontested evidence about the children's likelihood of adoption and strong bond with the foster parents who wished to adopt them. There was no reversible error in not making a finding about the children's bond with their mother when there was no evidence offered about that bond.

In re I.N.C., \_\_\_ N.C. \_\_\_ (June 5, 2020)

**Held: Affirmed**

- Facts: In 2014, the children were adjudicated neglected. In 2016, DSS filed a TPR petition. After a hearing, although the grounds were proved by DSS, the TPR was dismissed because the trial court determined it was not in the children's best interests due to there not being a strong likelihood of adoption. In 2018, the parent's rights to visitation were suspended due to their inappropriate behavior and the children's ongoing behavioral problems being attributed in part to the long-term uncertainties they were experiencing. DSS filed a second TPR petition, which was granted. Respondent mother and respondent father appeal, challenging the court's disposition that concluded the TPR was in the children's best interests.
- Standard of review of a best interests determination is an abuse of discretion.



- Under G.S. 7B-1110(a) the court made findings of relevant factors including that there was a likelihood of adoption as long as the children continue to receive services. This finding is supported by the evidence, including the GAL's, social worker's, and adoption specialist's testimony. The testimony addressed (1) the need to TPR, which would increase the children's chances for adoption, (2) the children's desire for a home they could call their own as they lost confidence in being able to return home, (3) that the children were adoptable even though they had behavioral issues, and (4) that the children were able to form bonds with other people.
- "[T]he responsibility for weighing the relevant statutory criteria delineated in N.C.G.S. 7B-1110(a) lies with the trial court, which 'is permitted to give greater weight to other factors,' rather than with this Court." Sl.Op. at 14. The appellate courts do not reweigh the evidence and make an independent determination on appeal.
- This case is distinguished from *In re J.A.O.*, 166 N.C. pp. 222 (2004). In *J.A.O.*, the juvenile had been foster care since he was 18 months and was placed in 19 different treatment centers over 14 years for his significant mental health issues; his mother had made reasonable progress to correct the conditions that led to the TPR petition; and the GAL believed the child's best interests would not be served by a TPR and that he was unlikely to be adopted. In contrast, the children in this case were 9 and 10 years old when the TPR was granted; their behavioral issues are not as severe as those exhibited by *J.A.O.*; the GAL believed TPR was in their best interests; and the parents had not made reasonable progress 5 years after the children were removed.

In re A.J.T., \_\_\_ N.C. \_\_\_ (June 5, 2020)

**Held: Affirmed**

- Facts: In 2016, the juvenile was adjudicated neglected and dependent. For 2 years, the juvenile was placed in various therapeutic foster homes to address his problematic behaviors. After being placed in a group home, the court found his behaviors and academics had greatly improved. He was subsequently placed in a therapeutic foster home where he was doing well and was bonded with the foster parents. DSS filed a TPR petition. The juvenile was then placed in a Level II group home due to unsafe and defiant behaviors. At a permanency planning hearing, the court found the juvenile was improving. The TPR was heard and granted. Respondents appeal, challenging the best interests determination by asserting the findings do not support the conclusion, which is an abuse of discretion by the trial court.
- Standard of review is an abuse of discretion, and "[t]he trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." Sl.Op. at 8 (citation omitted). The appellate court does not reweigh the evidence to reach a different conclusion from the trial court.
- The trial court made findings of fact for each factor under G.S. 7B-1110(a) and did not abuse its discretion.
  - Age: The juvenile was 14 at the time of the TPR hearing.
    - Although mother argued the child's preference should have been considered as it was in *Mintz v. Mintz*, 64 N.C. App. 338 (1983), the supreme court is not bound by *Mintz*, and that case was a divorce case addressing visitation and not a best interests determination in a TPR. Additionally, *Mintz* affirmed that the trial

judge's duty is to determine the weight to be given to the child's preference and to find and conclude what is in the child's best interests. Relying on *In re J.A.M.*, 372 N.C. 1 (2019), the supreme court stated that it is solely for the trial court to draw any reasonable inferences based on the child's age, demeanor, or attitude, and the weight to give those inferences.

- In response to father's argument that a juvenile 12 and older is required to consent to his adoption, G.S. 48-3-603(b)(2) authorizes the court to waive that requirement when it is in the child's best interests to do so.
- The likelihood of adoption given the juvenile's psychiatric issues requiring multiple placements over 4 years was supported by the evidence and is binding on appeal. The GAL testified the juvenile was likely to be adopted if he finds the right family and that he engages easily with adults.
- TPR will aid in the adoption. The TPR was a prerequisite to achieve the permanent plan of adoption.
- Bond between parent and child is one factor to be considered under G.S. 7B-1110(a), and the trial court may give greater weight to other factors.
- Relationship with prospective adoptive placement. "[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." Sl.Op. at 13-14.
- The supreme court is not bound by *In re J.A.O.*, 166 N.C. App. 222 (2004), and this case is distinguishable. In *J.A.O.*, the juvenile had been foster care since he was 18 months and was placed in 19 different treatment centers over 14 years for his significant mental health issues; mother made reasonable progress; and the GAL believed the child's best interests would not be served by a TPR and that he was unlikely to be adopted. In contrast, in this case, the GAL testified it was likely the juvenile would be adopted and recommended TPR, and the respondents failed to make reasonable progress.

*In re Z.A.M.*, \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected and dependent. In 2018, the permanency planning order identified adoption and guardianship as the concurrent permanent plans. DSS filed a motion to terminate the parents' rights on the grounds of neglect and failure to make reasonable progress to correct the conditions. After finding both grounds existed, the court determined it was in the children's best interests to terminate parental rights to allow the grandparents, who were the children's placement provider, to adopt the children. Respondents appeal. Mother argues the standard of review should be de novo.
- The standard of review of a best interests determination is an abuse of discretion. In response to mother's argument that the review should be de novo, the supreme court reaffirmed the abuse of discretion standard. The appellate court looks to whether the trial court's decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." Sl.Op. at 17. The trial court, which hears the evidence, is in the best position

to assess and weigh that evidence, make findings, and reach conclusions based on that evidence.

- There was no abuse of discretion. The trial court considered the dispositional factors in G.S. 7B-1110 and performed a reasoned analysis in weighing those factors. Although finding there was a strong bond between the children and respondent parents, that factor was outweighed by the findings addressing the primary plan of adoption, the children's relationship with their grandmother, and likelihood of adoption by the grandmother.

In re C.J.C., \_\_\_ N.C. \_\_\_ (April 3, 2020)

**Held: Affirmed**

- Facts: Mother filed a TPR to terminate father's parental rights. After finding grounds, the court determined TPR was in the child's best interests. Father appealed raising as one of his arguments that the court abused its discretion when not making sufficient findings and properly balancing the relevant factors.
- Standard of Review is whether the court abused its discretion, which results in a ruling that is manifestly unsupported by reason or is so arbitrary that it could not have been a result of a reasoned decision.
- G.S. 7B-1110 identifies best interests factors for the court to consider at the dispositional stage of a TPR hearing. Although all the factors must be considered, written findings are required for only those that are relevant. "[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [district] court." Sl.Op. at 10 (citation omitted).
- Relevant factors in this private TPR do not include the relationship between the child and mother/petitioner's long-term boyfriend when there was not a permanent plan of adoption. In this private TPR, there is no permanent plan as the term is used in G.S. 7B-1110(a)(3). The factor regarding likelihood of adoption at G.S. 7B-1110(a)(2) "becomes more relevant in a TPR case in which a child is in the custody of a Department of Social Services agency and termination of the parent's rights leaves the child as a ward of the State." Sl.Op. at 12. Because the child was in the full custody of the mother/petitioner at the time of the TPR, the likelihood of the child's potential adoption is not a sufficiently relevant factor.

## UCCJEA

### Initial Jurisdiction

In re S.E., \_\_\_ N.C. \_\_\_ (Feb. 28, 2020)

**Held: Affirmed**

- Facts: Four children were adjudicated abused, neglected, and dependent based on physical abuse, sexual abuse of one child, and domestic violence in the home. A permanency planning order identified adoption as the primary permanent plan for each of the children. DSS filed a petition to terminate respondent mother's parental rights, which was granted on multiple

grounds, including willfully failing to pay a reasonable portion of the cost of care for the children while they were placed in DSS custody. Respondent mother appealed.

- **UCCJEA:** Respondent mother argues the court lacked subject matter jurisdiction over one of the children (Sara) because the initial A/N/D petition stated that the children had been placed out of the home by child protective services in Oklahoma, putting the NC district court on notice that there was a prior custody determination made in another state. “Where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . [and] the burden is on the party asserting want of jurisdiction to show such want.” Sl. Op. at 6-7 (citations omitted). Respondent mother did not meet her burden when relying on allegations and inferences and failing to mention that the district court found as fact a child other than Sara was removed from mother’s custody in Oklahoma. Additionally, mother stipulated to the district court that the child protective matter in Oklahoma was closed, as was her duty under G.S. 50A-209(a). Given the record, it was reasonable for the district court to infer that Oklahoma did not have continuing jurisdiction. NC had initial custody determination jurisdiction based on NC being Sara’s home state.

## Modification Jurisdiction

In re L.T., \_\_\_ N.C. \_\_\_ (June 5, 2020)

### **Held: Affirmed**

- **Facts:** DSS filed a neglect and dependency petition in March 2017. At that time, mother lived in Ohio, and the juvenile lived with respondent-father in North Carolina. In June 2017, the court continued the adjudication hearing for investigation into whether it had jurisdiction after being informed that there was a prior custody order from Delaware and finding that the child had not lived in NC for 6 months prior to the filing of N/D petition based on the information provided. In September 2017, the court entered an adjudication order after finding that neither parent nor the child resided in Delaware and that the child had been residing in NC with her father since September 2016, giving NC jurisdiction under the UCCJEA. In September 2018, DSS filed a motion to TPR, which was granted. Respondent father appeals arguing the court did not comply with the UCCJEA in the underlying N/D action, resulting in the custody order to DSS void such that DSS did not have standing to file the TPR.
- **Burden:** The NC Supreme Court “presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise.” Sl.Op. at 3. That burden was not satisfied here.
- **Modification Jurisdiction under G.S. 50A-203** requires that NC must have jurisdiction to make an initial child-custody determination (e.g., home state) and that one of the two enumerated statutory factors are met. In this case, it is undisputed that the child and her parents did not presently reside in Delaware, the state that made the initial custody determination. The appellate issue involves whether NC was the child’s home state at the time the N/D petition was filed.
- **Findings Not Required:** “The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect the jurisdictional

prerequisites in the [UCCEA] were satisfied when the court exercised jurisdiction.” Sl. Op. at 3. Although the district court made a finding in its N/D continuance order that the child did not reside in NC for 6 months, suggesting NC was not the child’s home state, that finding was based on preliminary information that was superseded by more accurate information when the case proceeded. The finding in the adjudication order that the child resided in NC since September 2016 was made by clear and convincing evidence, based on evidence in the record, specifically, the father’s testimony. The record shows the child had resided in NC for more than six months when the N/D petition was filed, making NC her home state and giving the NC court modification jurisdiction.

## Civil Case Related to Child Welfare

### Parent’s Constitutional Rights to Care, Custody, and Control; Visitation

*Routten v. Routten*, \_\_\_ N.C. \_\_\_ (June 5, 2020)

#### **Held: reverse majority decision of the Court of Appeals**

- **Facts:** This case involves a custody order between parents born during their marriage. A permanent custody order was entered that awarded sole physical custody to plaintiff father. Defendant mother filed Rule 59 and 60 motions, and an amended permanent custody order was entered that granted sole legal and physical custody to father, denied visitation with mother, and allowed mother to have telephone conversations with the children 2 times a week. Mother appealed arguing the court erred in denying her visitation without determining she was unfit. Relying on *Moore v. Moore*, 160 N.C. App. 569 (2003), the Court of Appeals determined that the trial court violated mother’s constitutionally protected interest as a parent by awarding sole legal and physical custody of the children to father without first making a finding that she was unfit or acted inconsistently with her constitutional rights as a parent. There was a dissent and father appealed to the supreme court. This summary addresses one of the two arguments that were addressed.
- G.S. 50-13.5(i) authorizes the trial court to deny visitation to a parent if there are written findings of fact that the parent is unfit to visit the child or visitation rights are not in the child’s best interests. The term “or” means either of the two circumstances is sufficient to deny visitation. The trial court found visitation would not be in the children’s best interests, which is a proper standard to apply under G.S. 50-13.5(i).
- In a custody action between two parents, both have the same constitutionally-protected paramount right to care, custody and control of their children. There is no constitutionally based presumption that favors one parent over another as opposed to a custody action involving a parent and a third-party (non-parent). The trial court applies the best interests of the child standard when making custody and visitation decisions between parents.
- *Moore v. Moore* misapplied the presumption that applies to a parent in an action with a non-parent to an action involving two parents and is overruled.