

Child Welfare Case Update

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Indian Child Welfare Act

Notice Requirements

In re E.J.B., ___ N.C. ___ (Aug. 14, 2020)

Held: Reversed and Remanded; Dissent: Newby, J.

- **Facts:** In 2015, DSS filed a neglect and dependency petition. Throughout the N/D action, DSS, in multiple reports to the court, stated that the children’s father reported he is affiliated with the Cherokee Indian tribe. That action was terminated through a G.S. 7B-911 order granting custody of the children to mother. A second neglect and dependency action was commenced in 2018, and the children were adjudicated neglected and dependent. DSS filed a motion to terminate father’s parental rights, which was granted. Respondent father appeals. During the pendency of the TPR appeal, the trial court held post-TPR hearings under G.S. 7B-908. At one hearing, the trial court found that ICWA notices had been sent to the 3 Cherokee Tribes and the appropriate regional director of the Bureau of Indian Affairs (BIA). Two of the 3 tribes responded that the children were not “Indian children.” No response was received from the United Keetoowah Band of Cherokee Indians (Keetoowah Band), and the trial court determined ICWA did not apply.
- **ICWA:** After various congressional hearings recognizing “abusive child welfare practices that led to an ‘Indian child welfare crisis ... of massive proportions’ ”, Congress enacted the Indian Child Welfare Act in 1978. Sl.Op. at 5. ICWA establishes minimum Federal standards that apply to “child custody proceedings” when an Indian child is involved. A child custody proceeding includes abuse, neglect, dependency; termination of parental rights; pre-adoptive placements; and adoption placements. An “Indian child” is an unmarried person under the age of 18 who is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership and the biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). Under 2016 binding federal regulations promulgated by the BIA, “state courts bear the burden of ensuring compliance with the Act.” Sl.Op. at 10.
- **Holding:** “Because we conclude that the trial court failed to comply with the Act’s [ICWA] notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act an be followed.” Sl.Op. at 1. “If the Keetoowah Band of Cherokee Indians tribe indicates the that the children are not Indian children pursuant to the Act, the trial court shall reaffirm the order terminating respondent-father’s parental rights.... [If the] tribe indicates that the children are Indian children pursuant to the Act, the trial court shall proceed in accordance with the relevant provisions of the Act.” Sl.Op. at 18.
- **ICWA Notice:** The BIA regulations place the burden on state courts to ensure compliance with ICWA by requiring the court to ask each participant, on the record, whether they know or have to reason to know that the child involved is an “Indian child.” 25 C.F.R. 23.107. When there is reason to know, the trial court must ensure the petitioner (DSS in this case) used due diligence to identify and work with all the tribes the child may be a member of or eligible for membership if a biological parent is a member of a tribe, and the court must treat the child as an Indian child during this period. *Id.* “If a tribe fails to respond to multiple

- written requests, the trial court must first seek assistance from the [BIA, and] ... can only make their own determination as to the child's status if the tribe and [BIA] fail to respond to multiple requests." Sl.Op. at 11. There was no evidence in the record, the court inquired at the beginning of the proceeding as to whether any participant knew or had reason to know the child was an Indian child, and although it attempted later comply with the ICWA notice provisions in the post-TPR hearing, the notices were insufficient as they did not include all the required language of 25 U.S.C. 1912 and 25 C.F.R. 23.111(d).
- Dissent: The lack of responses by both the Keetoowah Band (over 7 months) and BIA gives the court no reason to know the children were Indian children such that the trial made the proper determination that ICWA does not apply. The majority has placed the burden of obtaining a response from the tribe on the trial court and DSS and has elevated form over substance. "The purpose of ICWA is to notify Indian tribes that a potential Indian child is involved in a state proceeding, not to delay termination proceedings based on unsubstantiated allegations of Indian heritage." Dissent at 5.

Abuse, Neglect, Dependency

Neglect Adjudication: Findings & Conclusions

In re V.M., ___ N.C. App. ___ (Sept. 1, 2020)

Held: Reversed and Remanded (there is a dissent)

- Facts: DSS received a report after a 4-month-old infant was diagnosed by the hospital with acute alcohol intoxication. The child had ingested alcohol when his mother and uncles had travelled with him out-of-state to a family funeral. On the drive back to NC, the child was fed with formula made with water from a water bottle that had apparently been filled with alcohol by relatives. The child was adjudicated neglected, and the parents appealed that adjudication.
- Standard of review for an adjudication is whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion. Conclusions of law are reviewed de novo.
- The child's status as neglected is a conclusion of law. "[N]ot every act of negligence on part of the parent results in a neglected juvenile." "Sl. Op. at 5. The trial court's summary findings that the child was in an environment where alcohol was being poured into water bottles and that the child had acute alcohol intoxication do not support the conclusion. There was a lack of analysis or additional findings that would have supported a conclusion of neglect. Remanded for additional findings.

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 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.

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.

Abuse/Neglect Adjudication: Unexplained Injuries; Sufficiency of Notice; Sibling

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.
- 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: Discovery; Expert Witness; Emotional Damage, Due Process

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 arguing the court abused its discretion in not allowing him to depose the social worker and that the court erred in allowing a witness to testify as an expert in psychology and child and family evaluations and in adjudicating the juvenile abused and neglected.
- **Discovery:** Rulings on discovery matters are reviewed for an abuse of discretion. Discovery in an abuse, neglect, or dependency action is governed by G.S. 7B-700. The social worker was noticed and subpoenaed for a deposition by the father's attorney pursuant to Rule 30 of the Rules of Civil Procedure. A motion for discovery under G.S. 7B-700, which did not have a request for a deposition, was filed with the court on the same day. DSS opposed the noticed deposition, arguing the provisions of G.S. 7B-700(a) and (c) must be followed, which requires information sharing and, if necessary, a motion for discovery requesting the deposition. The trial court instructed father to first seek information under G.S. 7B-700(a) (information sharing) and if needed to file a motion for deposition under G.S. 7B-700(c). This instruction by the trial court was not a denial of the discovery request, as such there was no abuse of discretion. Further, the court did not err when it did not permit the deposition under Rule 30 because "the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code." Sl.Op. at 11 (citation omitted).
- **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 test 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.

- 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.

Adjudication: Emotional Abuse – Disposition: Evidentiary Requirements; Visitation – Appeal: Rule 2

In re K.W., ___ N.C. App. ___ (July 21, 2020)

Held: Affirmed and Remanded

- Facts: DSS became involved after mother reported to the child's therapist that the children were abused and neglected by their father when there were in his care (joint custody had been ordered under a G.S. Chapter 50 order). Mother made numerous reports of the children's mistreatment by father to various professionals, including medical providers who were assessing the children for abuse, and law enforcement. All of mother's allegations were false. The children would repeat mother's false disclosures and the older child was fearful and anxious about seeing her father and was diagnosed with Generalized Anxiety Disorder. DSS filed a petition and obtained a nonsecure custody order where the children were placed with their father. Based on several inappropriate incidents involving mother and visitation, the court limited her visitation to electronic only. The court adjudicated the older juvenile abused and neglected and the younger juvenile neglected. At disposition, no new evidence was taken; mother was self-represented (with standby counsel), and after arguments were made the court ordered mother visitation remain the same but authorized DSS to allow for in-person visitation when she made progress on her case plan. Mother appeals the abuse adjudication and disposition.
- Appellate court jurisdiction: Generally, arguments not made before the trial court are not reviewable on appeal. App. Rule 2 gives the appellate court discretion to review arguments not made at trial, which occurred here given that mother is indigent and was self-represented at

trial. Mother's notice of appeal was filed after the disposition was rendered but before it was entered. The appellate court granted mother's writ for certiorari to proceed with the appeal.

- Abuse under G.S. 7B-101(1)e. occurs when a parent has created or allows to be created serious emotional damage to the juvenile including severe anxiety. A formal diagnosis is not required. The evidence showed the juvenile had severe anxiety from the "high level of acrimony and vilification of Respondent/father by Respondent/mother." Sl.Op. at 8. The findings of fact support the abuse adjudication. The identification of the mother as the parent who created the emotional damage provided clarity in the order and is not reversible error even though "the adjudication of the child was abused concerns only the status of the child, not the fault or culpability of the parent." *Id.*
- Testimony at Initial Disposition: Mother challenges the disposition based on the court not taking sworn testimony at the initial dispositional hearing. "Mother overstates the formal requirements of an initial disposition hearing." Sl.Op. at 9. There is a statutory two-step: adjudication and disposition. Although the adjudication hearing has heightened requirements to protect the rights and due process of the parent and applies the Rules of Evidence and a standard of clear and convincing evidence, the initial dispositional hearing may be informal, consider evidence that is not barred by the Rules of Evidence, and incorporate into its findings information from written reports and adjudicatory findings. The dispositional hearing is inquisitive and is based on the best interests of the child as opposed to the adjudication which is a formal, adversarial process designed to determine the truth or falsity of the allegations in the petition. G.S. 7B-901(a) allows for the court to rely on written reports and incorporate findings from the adjudication, and if these findings are sufficient to support the disposition, "there is no need for the court to hear additional testimony." Sl.Op. at 10. Sworn testimony is required when the order relies on information from individuals who address the court at the dispositional hearing. Here, no new information was provided such that the lack of sworn testimony was not improper.
 - Author's note: This holding differs from the need to have sworn testimony at a review/permanent planning hearing. The language in G.S. 7B-906.1(c) that applies to those hearing differs from G.S. 7B-901(c), which applies to the initial dispositional hearing, and there are published opinions that address the need for sworn testimony at these types of hearings.
- G.S. 7B-905.1 allows the court to order no visitation to a parent if no visitation is in the child's best interests. The standard of review is an abuse of discretion. The court found that the safety of the children required electronic visitation and only and relied on the findings in the adjudication order about mother causing distress for the children. FN 2 refers to *In re T.R.T.*, 225 N.C. App. 567 (2013) that held electronic visitation is not visitation.
- A visitation order that establishes a plan and allows DSS to expand visitation is not an abuse of discretion. Although the court may not delegate its authority to a custodian, here the discretion was not granted to a custodian but to DSS, which has been given significant discretion by the legislature under G.S. 7B-905.1(b) to manage visits. The order allows DSS to expand visits, not reduce it below the minimum visitation the court established in its order, and is not an impermissible delegation of its authority.

- G.S. 7B-905.1(d) requires the court notify the parties of their right to motion for review of the visitation plan. No such notification was provided at hearing (after reviewing the transcript) or in the order. Remanded for compliance with G.S. 7B-905.1(d).

Adjudication: Neglect – Disposition: G.S. 7B-911

In re S.M.L., ___ N.C. App. ___ (July 21, 2020)

Held: Affirmed in part; reversed in part; remanded

- Facts: At the time DSS filed its petition, there was an existing Ch. 50 custody order regarding the 2 children that awarded mother primary physical custody and father visitation and child support. DSS became involved when the older child disclosed sexual abuse by mother's boyfriend. As a safety plan, the children were temporarily placed with father but were allowed to return to mother upon the assurance that her boyfriend would have no contact with the juveniles. Mother initiated believed her child but then began to doubt the juvenile's disclosure, started having contact with her boyfriend, and inquired of DSS what the ramifications would be if she were to marry him. Father remained appropriate and supportive of the juvenile's account of her abuse. DSS recommended father file a motion to modify the Ch. 50 order, which he filed but his request for ex parte relief was denied due to DSS involvement. DSS filed an abuse and neglect petition for one juvenile and a neglect petition for the other. The court adjudicated the juveniles neglected and entered a disposition that awarded custody to father and referred to an order that needed to be drafted for modification of the Ch. 50 order and termination of the 7B action under G.S. 7B-911. That order was never entered. Mother appeals the adjudications and disposition.
- Neglect requires a finding that there be some physical, mental, or emotional impairment or substantial risk of such impairment as the result of the lack of proper care, supervision or discipline.
- Regarding the older juvenile, the findings of fact support the conclusion of neglect. Although the words in one of the challenged findings of fact were not supported by the evidence, the omission of those words has no effect on the other details in the finding of what occurred, and the remaining findings were supported by clear and convincing evidence. Mother's argument goes to the credibility and weight of the evidence, which is not reviewed on appeal. The court determined mother's testimony about ending her relationship and being supportive of her child was not credible.
- When there has been a period of separation between the parent and child, prior neglect alone is insufficient. Here the court did not adjudicate neglect solely on the finding of sexual abuse but considered what occurred after the child's disclosure, which included mother discrediting the juvenile's sexual abuse disclosure and prioritizing her relationship with her boyfriend. The court properly considered mother's ability to care for the juvenile at the time of the adjudication hearing and determined there was a risk of physical, emotional, or mental impairment to the juvenile.
- Under G.S. 7B-101(15), it is relevant if a juvenile lives in the home of another juvenile who has been abused or neglected by an adult who regularly lives in the home. The trial court has

discretion to determine how much weight to give such evidence, but there must be other factors that suggest the abuse or neglect will be repeated. Regarding the younger child, there were only 2 findings, neither of which address the impact of the other's juvenile's abuse on this juvenile, that there was any reason to believe this juvenile would be abused in the future, or that there was a risk of any impairment for this juvenile. The findings do not support the conclusion of neglect. There is evidence that could support such findings but that is not the role of the appellate court; the case is remanded to the trial court to make such findings.

- G.S. 7B-911 requires the court enter an order that includes the necessary findings to modify the existing Ch. 50 order – a substantial change in circumstances. There also must be a finding that there is not a need for continued state intervention through the juvenile court proceeding. An order's compliance with statutory requirements is reviewed de novo. At disposition, the trial court directed 2 orders be prepared and entered: the 7B and a Ch. 50 order. Only one order, the 7B order, was entered. Remanded for appropriate findings and conclusions.

Abuse (emotional), Neglect, Dependency Adjudications – Evidence and Findings 7B-911 – Modification of Ch. 50 Order; Supervised Visitation Costs – Findings Required In re E.P.-L.M., ___ N.C. App. ___ (August 4, 2020)

Held: Affirmed in Part; Vacated in Part and Remanded (there is a concurrence)

- Facts: Prior to DSS involvement, there was a Chapter 50 civil custody order that awarded joint physical custody to both parents, with the juvenile primarily living with mother as father had moved to Georgia. Mother and juvenile resided with maternal grandmother. DSS became involved when mother and grandmother made multiple reports of sexual abuse of the juvenile by the father. After multiple medical assessments and DSS and law enforcement investigations, none of the reports of sexual abuse were substantiated. During in-home services with DSS, mother refused to agree to a placement of the juvenile with paternal relatives. DSS filed a petition alleging abuse, neglect, and dependency based on mother's substance abuse, housing, and repeated unsubstantiated reports of sexual abuse by the father. At hearing, DSS, the GAL, and father provided stipulations to the court; mother did not stipulate resulting in a hearing where the stipulations were admitted as well as testimony from the social worker, mother, and mother's substance abuse counselor. The child was adjudicated all three alleged conditions. The court entered a dispositional order that awarded custody to father and supervised visitation both electronically and in person for mother through a modification of the Chapter 50 custody order based on a substantial change in circumstances and terminated its jurisdiction in the juvenile action through G.S. 7B-911. Mother appeals, challenging the adjudications based on stipulations, the 7B-911 order, and the visitation order.
- Stipulations and Burden of Proof – Preservation of Issue of Appeal: Mother argues the stipulations were not competent evidence and the trial court erroneously shifted the burden of proof to mother to refute the stipulations. Mother did not preserve the issues raised on appeal as she did not object to the admission of the stipulations or the use of those stipulations as competent evidence. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on

appeal,” and this rule applies to evidentiary arguments in abuse, neglect, and dependency proceedings. Sl.Op. at 9. “*Evidence admitted without objection is properly considered by the court* and, on appeal, the question of its competency cannot be presented for the first time.” Sl.Op. at 10-11 (emphasis in opinion).

- Concurrence (Murphy): Addressing the use of stipulations even though mother did not preserve the argument for appeal. The trial court improperly relied on the stipulation against mother since she was not a party to the stipulation stating “[s]tipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either.” Concurrence at 2. The trial court improperly shifted the burden to mother when it stated “mother’s evidence did not convince the [trial] court that any of these stipulations were in fact accurate.” Concurrent at 6. DSS, as petitioner, has the burden of proof.
- Standard of Review for adjudications is whether the findings are supported by clear and convincing evidence and whether those findings support the conclusions of law. Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal.
- Emotional abuse under G.S. 7B-101(1)e. exists when a parent allows serious emotional damage to the juvenile as evidenced by the juvenile’s severe anxiety, depression, withdrawal, or aggressive behaviors. The findings that are unchallenged and supported by the stipulations which were not objected to are binding, and those findings support the adjudication of abuse. The findings include the child being subjected to multiple unnecessary and harmful medical procedures prior to her turning 4 years old and that those procedures were harmful and inflicted by mother’s actions.
- Neglect involves a juvenile whose parent does not provide proper care, supervision or discipline, who is not provided necessary medical care, and who lives in an injurious environment. G.S. 7B-101(15). It also requires that there be some physical, emotional or mental harm, or substantial risk of such harm, as a result. The trial court has discretion in determining the risk a child is at for a particular type of harm given the child’s age and living environment. The unchallenged findings, which include subjecting the child to multiple unnecessary invasive medical procedures, are sufficient to show the existence or risk of harm to the juvenile when she is in mother’s care and support the adjudication of neglect.
- Dependency under G.S. 7B-101(9) requires findings for both prongs of the definition: that the parent (1) is unable to provide care and supervision and (2) lacks an appropriate alternative child care arrangement. Dependency does not exist when one parent is capable of providing care and supervision. Mother erroneously argues father was available to provide care and supervision to the juvenile at the time of the adjudicatory hearing.
 - Post-petition evidence: G.S. 7B-802 states “the adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in the petition.*” Sl.Op. at 19 (emphasis in opinion). “Absent exceptional circumstances, the trial court may only look to the circumstances before the court at the time the petition was filed when considering whether a juvenile is dependent at the adjudication stage.” Sl.Op. at 19. Exceptions include evidence discovered after the petition is filed that reflects “a ‘fixed and ongoing circumstance’ rather than a ‘discreet

event or one-time occurrence' ” (e.g. paternity). Sl.Op at 19. Distinguishing this case from *In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App., 2019), which reversed a dependency adjudication because of a lack of evidence about mother’s ability to care for the juvenile at the time of the adjudication hearing, the juvenile in this case was in mother’s care (vs. the parent and child having a long period of separation prior to the petition being filed as was the case in *F.S.*) up until and including the time DSS filed its petition.

- When the petition was filed, neither parent was available to provide care and supervision to the child – mother because of her emotional abuse and father because of the allegations of sexual abuse by him, rendering father unavailable.
- Standard of review at disposition is an abuse of discretion. “No party ‘bears the burden of proof in [dispositional] hearings, and the findings of fact need only be supported by sufficient competent evidence.’” Sl.Op. at 26 (quoting *In re L.M.T.*, 367 N.C. 165, 180 (2013)).
- G.S. 7B-911 and Modification of Ch. 50 Custody Order: When determining whether a substantial change in circumstances exists warranting a modification of an existing Ch. 50 custody order, the trial court is not required to literally examine the previous custody order. The trial court considers only those “*events which occurred after the entry of the previous order... [which] prevent[s] relitigation of conduct and circumstances that antedate the prior custody order.*” Sl.Op. at 24 (emphasis in opinion). Here, the trial court considered the events, specifically the child’s adjudications, after the most recent custody order. The evidence and findings of the juvenile’s adjudications based on mother’s actions are sufficient to support the conclusion that there was a substantial change in circumstances.
- Supervised Visitation at a center requires that the court make findings as to who pays and that the party has an ability to pay. No such findings were made. The appellate court is unable to review whether the trial court abused its discretion in ordering mother to pay for visitation. Vacated and remanded for additional findings regarding mother’s ability to pay.

PPO: Waiver of Counsel; Visitation

In re J.M., ___ N.C. App. ___ (Sept. 1, 2020)

Held: Remanded in part; vacated and remanded in part

- Facts: After the adjudicatory hearing where the court rendered a decision that the children were neglected and dependent, respondent mother requested that her attorney be released. The court granted her request but appointed standby counsel. At subsequent hearings, mother represented herself with standby counsel present. The court granted standby counsel’s motion to withdraw for health reasons and appointed a new standby counsel, which mom later asked to be appointed to represent her. At a permanency planning hearing, respondent mother stated she did not want her appointed counsel to represent her. After some questioning, the court granted mother’s request but kept the attorney as standby counsel. At that permanency planning hearing, the court ordered guardianship to the maternal grandmother with visitation to mother. The order authorized the guardian to change the conditions or duration of visits if the parent’s conduct would cause emotional distress or harm to the children. Mother appeals

challenging that she did not waive counsel and the court improperly delegated its authority regarding visitation to the guardian.

- Waiver of counsel is permitted under G.S. 7B-602(a1). Although respondent mother initially stated she was not sure if she wanted assistance from an attorney at the permanency planning hearing, after a series of questions by the court, she answered that she wanted to proceed without attorney representation. This was a waiver of counsel and not a request for new counsel. Although the court's inquiry of mother was adequate to determine if the waiver was knowing and voluntary, the order does not reflect the knowing and voluntary findings required by G.S. 7B-602(a1). Remanded for the required findings and if the waiver is not knowing and voluntary, a new permanency planning hearing.
- Visitation orders are reviewed for an abuse of discretion. G.S. 7B-905.1(c) applies to visitation orders when a child is placed with a guardianship or custodian. Unlike subsection (b), which applies when DSS has custody of a child, G.S. 7B-905.1(c) does not authorize a guardian or custodian to temporarily suspend all or part of a visitation when necessary to protect the juvenile's health and safety. The guardian's ability to unilaterally modify mother's visitation is an improper delegation of judicial authority.

PPO: Findings – Eliminate Reunification, Terminate Visitation

In re C.M., ___ N.C. App. ___ (Sept. 15, 2020)

Held: Affirmed

- Facts: At a permanency planning hearing involving five children, the court eliminated reunification when it ordered concurrent permanent plans of adoption and guardianship. In its order, the court addressed visitation between the children and their mother by continuing the previous order that did not permit visitation between mother and her 2 oldest children and reducing mother's visitation with her 3 youngest children to one last visit only. Mother appealed.
- Standard of review of an order eliminating reunification is whether the court made the appropriate findings, based on credible evidence, whether the findings support the conclusion and whether the court abused its discretion.
 - Evidence: "There is a difference between arguing that there is *no evidence* to support a finding by the trial court, and arguing that there is evidence which *contradicts* that finding. In a nonjury proceeding such as this, the findings of fact 'are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings.' " Sl.Op. at 5 (emphasis in opinion). The evidence of the SW's testimony support the challenged findings.
 - The language of the findings do not need to match the statutory language but must address the statutory substance. Taken together, the findings about mother's limited progress address the substance of G.S. 7B-906.2 finding that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety.

- Standard of review of a visitation order is an abuse of discretion. There was no abuse of discretion when the court terminated visitation based on findings that mother did not make adequate progress and had difficulty managing the visits.

PPO: Parents Acting Inconsistently with Their Constitutional Rights; Visitation

In re I.K., ___ N.C. App. ___ (Aug. 18, 2020)

Held: Affirmed (There is a dissent)

- Facts and Procedural History: Two children were adjudicated dependent due to circumstances related to unstable housing, substance abuse, and domestic violence in the home. A 2017 permanency planning order that awarded guardianship of the children to their grandmother and eliminated reunification was appealed. The court of appeals vacated and remanded that permanency planning order to address respondents' constitutional rights to care, custody, and control of their children before applying the best interests of the child standard in granting guardianship. On remand, the court awarded guardianship of one child to the grandmother, and that order was not appealed. Later, after hearing, the court awarded guardianship of the other child to grandmother. Visitation of a minimum of one hour/week, supervised, with discretion to the guardian to allow for additional visitation was ordered. Respondents appeal that order.
- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence. The determination is not a bright-line test but is instead fact-specific and is based on the parent's conduct and intention toward the child. The totality of the circumstances in the case support the determination that the parents acted inconsistently with their constitutional rights.
- The findings are supported by clear and convincing evidence, and the findings support the conclusion that the parents acted inconsistently with their constitutionally protected rights.
 - Housing: The findings describe a cluttered (hoarding), crowded (parents living with one of their parents and their infant), dilapidated (holes in the floor) trailer and were supported by testimony and reports. The trial court gave more credibility to those reports and testimony when determining the day to day living conditions in the home than mother's photographic evidence of recent improvements. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.
 - Domestic violence and substance abuse: Evidence of father's verbal aggression toward his mother, mother's drug seeking behavior, and both parents marijuana use support the court's findings that the issues with domestic violence and substance abuse have not been satisfactorily resolved.
- Visitation orders are reviewed for an abuse of discretion. There was no abuse of discretion and the order complied with G.S. 7B-905.1(c) and (d).
- Dissent: Competent evidence does not support the findings re: housing, domestic violence, and substance abuse. Findings do not support conclusion of father acting inconsistently with his parental rights (but do support conclusion regarding mother).

PPO: Burden of Proof, Eliminate Reunification - Findings, Visitation

In re L.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- **Facts:** Child was adjudicated neglected and dependent. DSS filed a petition to TPR and before that petition was heard, a permanency planning hearing was held that eliminated reunification as a permanent plan. Respondent mother preserved her right to appeal the permanency planning order (PPO), and after the TPR was granted, she appealed both the PPO and TPR.
- **PPO:**
 - **Burden of Proof:** In a permanency planning hearing, no party bears the burden of proof but rather the trial court determines the child's best interests based on sufficient competent evidence. Although mother correctly identifies the trial court mistakenly applied a clear, cogent, and convincing evidence standard of proof, and that standard conflicts with the applicable standard of proof applied to a PPO, she is not entitled to relief as it constituted harmless error since it required stronger proof to eliminate reunification than is actually required.
 - When eliminating reunification as a permanent plan, the court must make written findings under G.S. 7B-906.2(b) and (d), but the use of verbatim statutory language, although best practice, is not required so long as the substance of the statutory provisions are satisfied. The findings that addressed the court's continued concerns, mother's failure to comply with her case plan, and that the parents continue to act in a manner that is inconsistent with the juvenile's health and safety address the ultimate finding mother's asserts was missing.
 - A review of a trial court's order of dispositional order for visitation is based on an abuse of discretion. There was no abuse of discretion in reducing the visitation as part of the PPO that eliminated reunification that made certain findings regarding mother's lack of progress in her case plan, missing visits, and being late to visits.

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).

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

TPR Grounds: Relinquishment; Other Parent's Constitutional Rights; Subject Matter Jurisdiction

In re E.B., ___ N.C. ___ (Sept. 25, 2020)

Held: Reversed

- **Facts:** Father appealed this TPR to the NC Supreme Court based on a dissent in the Court of Appeals opinion that affirmed the trial court's order terminating his rights. Mother executed a relinquishment to DSS the day after the child was born. DSS placed the child in foster care and contacted the putative father, who was excited about being the child's father and agreed to paternity testing. Father agreed to an out-of-home family services agreement, and subsequently the paternity test confirmed he was the father. Between 2016-2018, the district court held 6 permanency planning hearings, although DSS never filed a petition alleging the child was abused, neglected, or dependent. Father never obtained custody/placement of the child through the permanency planning orders as the court determined he had not satisfied the various requirements it placed on him. Father did have visitation and suggested his sister, who lived in California, be a placement option after an ICPC was conducted, until he was awarded custody. After father moved to California without informing DSS before or immediately after his move, DSS filed a TPR petition; the court had ordered a primary permanent plan of adoption. The TPR was granted on the grounds of neglect, failure to make reasonable progress, and willful abandonment.
- **Holding:** "[P]etitioners [DSS] failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child. We also hold that petitioners have failed to prove that any other ground existed to terminate respondent's parental rights." Sl.Op. at 2.
- **Subject Matter Jurisdiction:** "DSS never filed a petition seeking to have the trial court adjudicate Ella an abused, neglected, or dependent juvenile pursuant to N.C.G.S. §§ 7B-402(a) and -403(a). Thus, the trial court lacked subject-matter jurisdiction to conduct permanency planning and review hearings, and its orders lacked the force of law." Sl.Op. at 5. Without the petition, the trial court lacked the legal authority to demand respondent demonstrate his parenting abilities before taking custody of his daughter. However, the trial court did have jurisdiction to hear the TPR as an abuse, neglect, or dependency petition is not a precondition to a TPR proceeding and DSS had standing through mother's relinquishment to it under G.S. 7B-1103(a)(4).
- **Constitutional Rights:** "We begin by noting that DSS's and the trial court's actions repeatedly infringed upon respondent's constitutional parental rights. '[The] government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status.'" Sl.Op. at 8. Respondent grasped the opportunity to be this child's parent and had a constitutionally protected right to the care, custody, and control of his child. Until the TPR was filed, DSS never sought an order that determined respondent father was unfit or acted inconsistently with his constitutionally protected status as a parent. Without subject matter jurisdiction in the permanency planning and review hearings, the "trial court did not have

authority to act on its own views of what served [the child's] best interests without first finding grounds to displace respondent's constitutional parental rights to make such decisions." Sl.Op. at 10.

- TPR Grounds: "A trial court cannot determine a party's rights based on facts established in or arising from a legally void judicial proceeding." Sl.Op. at 11. There were not sufficient facts that were independent from the void permanency planning orders to prove any of the alleged grounds. Had the court made sufficient findings based on facts that were independent of the invalid hearings and orders, "the mere fact that those invalid proceedings occurred would not preclude the trial court from also concluding that termination was warranted." Sl.Op. at 12.
 - Regarding the abandonment ground under G.S. 7B-1111(a)(7), the findings directly related to the void hearings, focusing mostly on father's failure to satisfy the conditions that were imposed on him. Respondent's express intent to be reunified with his daughter, have his sister be an interim placement, and have his child move to California with him does not show that he willfully determined to abandon his daughter. Additionally, respondent's actions before and during the determinative six-month period are inconsistent with a finding that he willfully intended to forego all his parental duties.
 - Regarding the neglect ground under G.S. 7B-1111(a)(1), petitioner failed to prove there was prior neglect and a likelihood of repetition of that neglect. Respondent had custody of and was appropriately caring for his 3 other children such that the court lacked a basis to infer that respondent, who had not actually neglected this child, would have neglected her if she had been in his care.
 - Regarding the failure to correct the conditions that led to the child's removal ground, G.S. 7B-1111(a)(2) applies when the removal is pursuant to a court order. A voluntary out-of-home family services agreement between respondent and DSS does not apply. There was never a legally valid order that removed the child from respondent.

Personal Jurisdiction: Nonresident Parent; Minimum Contacts Not Required

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.

Personal Jurisdiction: Summons

In re W.I.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: On September 18, 2018, DSS filed a petition to terminate parental rights. A summons was issued on September 21st and served on respondent father on October 3rd. Father timely filed a motion to dismiss raising lack of subject matter jurisdiction due to a lack of proper verification of the petition, which was signed by an authorized representative for the former DSS director. DSS filed a motion to amend the TPR petition to verify by an authorized agent of the current DSS director. The motion to amend was granted, and the trial court ordered DSS to file the amended petition and serve it on father. On November 27th, a new summons issued, and father was served with new summons and amended petition on December 4th. Father filed a motion to quash the November 27th successive summons since it was not an alias and pluries summons

and did not contain and endorsement under Rule 4(d)(1)-(2) of the N.C. Civ. Pro. The motion was denied as the trial court found the amended summons and petition were not a successive summons warranting an alias and pluries summons but were new filings that were permitted by the court. The TPR was granted, and father appeals.

- The purpose of an endorsement or issuance of an alias and pluries summons is to maintain an original action to toll the applicable period of the statute of limitations. “No such consideration is invoked in this case.” Sl.Op. at 7. The trial court permitted the filing of the amended petition and issuance of new summons and referred to it as “new filings”, and father did not contend that the TPR filing would be time-barred.
- Father waived any objection to the court’s personal jurisdiction over him as he never raised the issue of personal jurisdiction in his answer or motion to quash. Instead he raised subject matter jurisdiction.

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.

TPR Adjudication: Standard of Review (cumulative summary of the opinions below)

The standard of review for a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Unchallenged findings are binding on appeal. The appellate court reviews only those challenged findings that are necessary to support the determination that a ground to TPR exists. Findings that are not supported by the evidence are disregarded by the appellate court. Conclusions of law are reviewed de novo. When findings of fact and/or conclusions of law are mislabeled, they will be reclassified and treated under the appropriate standard of review on appeal.

Only one ground is necessary to support a TPR. As such, if the appellate court reviews and upholds one ground, it need not review any remaining challenged grounds.

Denial of TPR: Findings and Conclusions Required

In re K.R.C., ___ N.C. ___ (July 17, 2020)

Held: Vacate and Remand

- Facts: This is an appeal of a private TPR that was denied. Petitioner is the mother, who obtained sole legal and physical custody of the juvenile as a permanent plan in a neglect action. The court retained jurisdiction in the 7B action and waived reviews. Petitioner mother filed a TPR petition against father 26 months after obtaining custody of the juvenile. The petition was denied when the court concluded “the grounds” were not proved by clear, cogent, and convincing evidence.
- Grounds and ground are used interchangeably. Although mother argues the court mistakenly believed she had to prove grounds to TPR rather than one ground, the use of the term “grounds” was not error as “ground” or “grounds” can be used to denote one basis or reason.
- G.S. 7B-1109 and -1110(c) when read together require the trial court make “appropriate findings of fact and conclusions of law” of the existence or nonexistence of the alleged grounds. This applies to both the granting and denial of a TPR. Further Rule 52 of the Rules of Civil Procedure requires the court to find facts specially and separately state conclusions of law. This allows the appellate court to review the record and order. There must be evidence to support findings, findings to support conclusions, and each step must be taken in logical sequence and appear in the order; otherwise, the appellate court cannot determine if the trial court acted correctly. The order does not include ultimate facts, which are the final effect of logical reasoning based on evidentiary facts, that is dispositive of any of the 4 grounds petitioner alleged, and the general conclusion of law does not provide an analysis of the legal standards the trial court applied. The issue here is not a lack of evidence but a lack of adequate findings and conclusions that makes the basis for the order clear.
- Although the failure to address an alleged ground in a TPR order granted under a different alleged ground amounts to a non-adjudication of that ground, this principle does not apply to the denial of TPR. A denial of a TPR at the adjudicatory phase requires the trial court’s evaluation of each and every ground so that an appellate review may take place.
- One of the 4 alleged grounds was dependency under G.S. 7B-1111(a)(6). Petitioner’s lack of argument on this issue suggest that she recognizes this ground does not exist. A dependent

juvenile was in the custody of her mother (petitioner) and therefore is not dependent as she has a parent who is providing care and supervision. See G.S. 7B-101(9).

Neglect/Dependency: Findings of Fact; Conclusion of Law

In re K.L.T., ___ N.C. ___ (July 17, 2020)

Held: Reversed

- **Facts:** In 2016, the juvenile (along with his siblings) was adjudicated neglected and dependent due to a lack of proper care and supervision and an environment injurious to his welfare. Mother had a long history with CPS. The marriage between mother and the juvenile's father was mother's third and domestic violence was present. Throughout the case, mother was awarded supervised visitation. Mother was also ordered to comply with her case plan, which required her to engage in services to address domestic violence, her emotional and mental health, parenting skills, and stable housing. After the primary permanent plan was changed to adoption, with a secondary plan of reunification with mother, DSS was ordered to and did file a TPR. After a hearing, the TPR was granted on the grounds of neglect and dependency. Mother appeals, challenging the court's findings.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. The neglect must result in some physical, mental, or emotional impairment or a substantial risk of such impairment to the juvenile. When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child's best interests and the fitness of the parent at the time of the adjudicatory hearing to TPR. "A termination of parental rights for neglect cannot be based solely on past conditions that no longer exist." Sl.Op. at 29.
- Findings regarding the likelihood of future neglect are unsupported by the evidence and the remaining findings are insufficient to support the ground of neglect.
 - Despite the finding that mother did not fully comply with her case plan, the evidence shows otherwise. Mother completed her domestic violence support group, completed parenting classes, completed outpatient therapy after accomplishing her treatment goals with no further treatment recommended, separated and divorced the juvenile's father and obtained and extended a DVPO against him, maintained stable income with disability benefits and a part-time job, moved into a 3-bedroom home, consistently attended her supervised visitation, and paid monthly child support.
 - The finding about mother's new online relationship that created a red flag that caused the court to question mother's judgment is unsupported by the evidence. The evidence about mother's online communications does not indicate any risk to the juvenile. Without any legitimate basis for believing mother's relationship was likely to cause harm to the juvenile, DSS lacks authority to prohibit mother from engaging in her social interaction.
 - Regarding domestic violence and her past history with DSS, mother's therapists did not believe she needed additional treatment to avoid abusive relationships or to understand why her child was removed by DSS. She also divorced her husband and obtained a DVPO against him. Past cases supporting a finding of likelihood of neglect based on domestic

violence involve a parent continuing to participate in domestic violence, failing to engage in therapy, or refusing to end the abusive relationship. The evidence also showed she developed a detailed safety plan for her son, which acknowledged her role in failing to protect her children, in anticipation of reunification.

- Although mother never had unsupervised visits, the record shows she was not permitted to do so.
- Regarding her housing, the findings focused on the environment and management of the household as two of her other children, who were adults, resided with her. Although the trial court, as fact finder, may make reasonable inferences from the evidence, it “cannot rest on conjecture or surmise... [and] the appellate court may review the reasonableness of the inferences drawn by the trial court from the evidence.” Sl.Op. at 26. Here, the majority of the findings were based on conjecture and were not reasonable inferences that mother would be unable to maintain a safe and stable environment for the juvenile such that he would be at risk of harm.
- Dependency as a ground to TPR under G.S. 7B-1111(a)(6) requires findings that establish (1) the parent’s inability to provide care or supervision and (2) the parent lacking an alternative child care arrangement. The finding that mother was incapable of providing care and supervision was unsupported by the evidence as explained above.

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

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: Findings and Conclusion

In re J.O.D., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2018, the juvenile was adjudicated neglected due primarily to issues of substance use as well as domestic violence. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition alleging neglect. The court granted the TPR, respondent mother filed a no merit appeal. Respondent father appealed arguing there was no likelihood of repetition of neglect.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child's best interests and the fitness of the parent at the time of the adjudicatory hearing to

TPR. “The trial court must consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the adjudication of neglect.” Sl.Op. at 7 (emphasis in opinion).

- The findings are supported by clear, cogent, and convincing evidence and support the conclusion of neglect.
 - The findings showed that father has a history of struggling with opiate addiction as well as use of other drugs. His case plan required he participate in substance abuse treatment. The evidence and findings showed that after initially complying with his case plan, he was discharged from treatment, repeatedly tested positive on his drug screens, and was abusing alcohol such that he did not make meaningful progress at the time of the TPR hearing. The conclusion that a likelihood of future neglect existed was appropriate given father’s history of substance use, failure to follow treatment recommendations, relapse, and alcohol abuse. There was domestic violence in the relationship with mother as well. Respondent father did not complete a domestic violence program and continued to remain in a relationship with discord with mother. Based on social worker testimony, the trial court’s inference that respondents continued to live together was reasonable. Record evidence that would have supported a contrary conclusion will not be reweighed by the appellate court. The trial court is also entitled to not give credit to father’s testimony that he would separate from mother.

In re M.A., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: The children were adjudicated neglected based on lack of proper care and supervision and an injurious environment due to domestic violence and substance use in the home. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition. The TPR was granted and father appeals the neglect ground challenging the likelihood of future neglect. Mother also appeals, arguing the court abused its discretion when determining the TPR was in the children’s best interests (discussed in section below).
- The evidence, including testimony, prior orders, and a GAL report support the findings.
 - An indication of the likelihood of future neglect is a parent’s failure to make progress in completing the case plan. Father acknowledged in the underlying neglect order that domestic violence was a reason for the child’s removal. The court findings include ongoing domestic violence based on the frequency of 911 calls made to the home and father’s unsuccessful discharge from domestic violence classes and failure to demonstrate concepts from those classes. Father’s limited attendance at the classes is not reasonable progress in addressing the domestic violence as required by his case plan. These findings support the adjudication of neglect given the likelihood of future neglect. Because the domestic violence was sufficient to support the neglect ground, the supreme court did not address the findings related to father’s substance abuse or housing conditions.

In re M.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: The children were adjudicated neglected due to the domestic violence in the home. There is a history of several Domestic Violence Protection Orders (DVPO), violations of those orders, and father's arrest for such violations. The parents continued their relationship despite mother stating she would not see father anymore so as to get her children back. DSS filed TPR motions. The TPR was granted, and respondent mother appealed.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent.
- Findings of fact: Assuming arguendo that one of the challenged findings of fact about the parents dinner together is unsupported by the evidence, other unchallenged findings of fact about additional meetings between the parents support the finding that the parents were still together. Although mother testified that she would not return to the children's father, the trial court was not required to credit her testimony given other testimony that was admitted. Father was in jail pending felony and misdemeanor charges at the time of the TPR hearing. Mother's testimony and father's incarceration, given the historical facts of the case, do not support different inferences the trial court should have made about the likelihood of repetition of neglect. The challenged findings are proved by clear and convincing evidence, and the findings as a whole support the conclusion that the neglect ground exists.

In re J.C.L., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent.
- An indication of the likelihood of future neglect is a parent's failure to make progress on their case plan. There were numerous findings, that were supported by clear, cogent, and convincing evidence – the social worker's testimony – that demonstrated the father did not make enough progress to support the court's conclusion that neglect was likely to recur. Respondent continued to test positive for marijuana use, completed only part of his treatment after a long delay, did not follow through on recommendations for therapy, struggled with anger issues, was late in rent and was unable to maintain utilities, did not acknowledge his child's special needs, and blamed others for his failure to complete his case plan. The progress father did make over the 2 years the juvenile was out of his home was limited and insufficient.

Failure to Make Reasonable Progress

In re L.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- **Facts:** Child was adjudicated neglected and dependent. DSS filed a petition to TPR and before that petition was heard, a permanency planning hearing was held that eliminated reunification as a permanent plan. Respondent mother preserved her right to appeal the permanency planning order (PPO), and after the TPR was granted, she appealed both the PPO and TPR.
- **TPR: Failure to Make Reasonable Progress**
 - G.S. 7B-1111(a)(2) authorizes a termination of parental rights when a parent has willfully left the child in foster care or placement outside of 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. Although fully satisfying each condition of a case plan is not required, there must be more than extremely limited progress. A parent must have an ability to show reasonable progress but be unwilling to make the effort. The court made findings of fact about mother's partial progress with trauma group sessions, missed group and individual sessions, inconsistent visitation with the child, inconsistent participation with CDSA, failure to maintain stable housing and employment, and continued involvement with father that involved incidents of domestic violence. Although there was some progress, it was not reasonable progress for which mother had an ability to make. The findings support the court's conclusion that this ground exists.

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- **Facts:** In 2015, the juvenile was adjudicated dependent primarily due to the parents' substance use. Reunification efforts with mother were ceased in 2016. In 2017, DSS filed a TPR petition, which was granted on the ground of failure to make reasonable progress (G.S. 7B-1111(a)(2)), and mother appealed. On appeal, the court of appeals vacated and remanded the case for findings after concluding there was tension in the findings such that the appellate court could not conduct a meaningful review. On remand, the trial court did not take additional evidence and entered an amended adjudication order with additional findings of fact and granted the TPR. Mother appealed the ground and best interests determination (the best interests portion of this appeal is discussed in the section below).
- **G.S. 7B-1111(a)(2)** authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. A trial court should not find a parent has failed to make reasonable progress when that parent has not fully satisfied all the case plan requirements but does have the authority to determine that a parent's "extremely limited progress" supports the ground. Mother's case plan included substance use treatment and stable housing.
- **The findings establish mother made marginal progress** because she did not continue the recommended substance abuse treatment after completing a 6-month program. The court

found that respondent chose to participate in a methadone program without counseling or a plan to wean herself off the methadone and that mother's testimony that she was in AA or NA was not credible. "[T]he fact that respondent decided to address her substance abuse in this manner – without counseling, all the while having the available option to continue with another residential rehabilitation program that would have allowed her to reside with her child – after she completed the program at Our house is of great significance." Sl.Op. at 14. The court's findings support the conclusion that mother failed to make reasonable progress to address the core reason for the child's removal.

- Dissent (3 justices): The additional findings made by the trial court on remand were not based on clear, cogent, and convincing evidence to support the conclusion the mother failed to make reasonable progress. Mother completed a rehabilitation program and had been drug-free for one year, had a stable living arrangement, and was parenting her younger child.
 - Mother was also meeting the requirements of the methadone program. A "drug addiction is a brain disease[; a] parent who is following a doctor's orders in a treatment program should not have that fact held against her, just as one would not conclude that a diabetic relying on medication to control their diabetes rather than diet and exercise is failing to make reasonable progress towards good health." SL.Op. Dissent at 7.
 - Mother's "parenting of another child without any evidence of neglect" should have been relevant to the issue of whether respondent made reasonable progress towards addressing the conditions that led to her son being removed from her care. Sl.Op. Dissent at 7-8.

In re J.S., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2016, the children were adjudicated neglected due to filthy and unsafe conditions in the home and mother's failure to follow the safety plan. Two years later, DSS filed TPR petitions, which were granted. Respondent mother appealed, challenging the grounds and disposition (disposition discussed in section below).
- G.S. 7B-1111(a)(2) authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. This requires that the child be left in foster care/other placement pursuant to a court order. The reasonable progress by a parent is evaluated for the period of time up to the TPR hearing. (agreeing with *In re A.C.F.*, 176 N.C. App. 520 (2006)). There is no requirement that a parent be in the position to regain custody of the children at the time of the TPR hearing. Willfulness is a question of fact; it does not require fault by the parent. Regardless of some efforts and good intentions, a prolonged inability to improve the situation will support a finding of willfulness and lack of progress. A parent's compliance with a court ordered case plan is relevant when there is a nexus between the case plan components that the parent failed to comply with and the conditions that led to the child's removal.
- Findings were sufficient

- Mother complied with several case plan provisions including parenting classes, regular contact with DSS, passing drug screens, and visiting with the children. However, she did not make meaningful progress in improving the housing conditions, which were the primary reason for the children's removal.
- Although mother had cognitive limitations and personality issues, she did not lack the ability to show reasonable progress. There was no indication that mother could not clean and maintain her home and she failed to do so when she was not responsible for providing child-rearing responsibilities to her children. She refused to cooperate with the in-home aide provided by DSS and did not correct the conditions over a 3-year period. The court did not err in determining her actions were willful.
- There is no internal inconsistency in the order that determined mother willfully failed to make reasonable progress and that she was incapable of providing proper care and supervision to the children as part of the ground to TPR for dependency. Whether mother could regain custody of the children at the time of the TPR hearing is irrelevant for the ground under G.S. 7B-1111(a)(2).

Failure to Pay Cost of Care, Parent's Living Expenses

In re J.A.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: The child was adjudicated dependent, and at the time, respondent father was incarcerated. After his release, respondent entered into a family case plan with DSS. He did not comply with his case plan and was fired from his job for gross misconduct. Ultimately, he obtained another job. DSS filed a petition to terminate respondent father's parental rights, which was granted on all 4 alleged grounds and a determination that the TPR was in the child's best interests. Father appeals and challenges the grounds.
- Standard of review is whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion of law. A TPR may be based on one or more statutory grounds, and this opinion addresses one ground only.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay a reasonable portion of the cost of the care of a juvenile in DSS custody if the parent is physically and financially able to do so. The determinative time period is the 6 months preceding the TPR petition. When a parent is employed with some income and has paid nothing, "the trial court did not need to make findings regarding respondent's own living expenses." Sl.Op. at 10. "Respondent's living expenses might be relevant evidence to be taken into account if he had made some child support payments during the applicable time period and the issue was whether the amount he contributed to the cost of Jennifer's care was reasonable, but here the trial court found that he had income and made no contributions at all." *Id.*

Prior TPR and Failure to Establish a Safe Home

In re N.G., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- **Facts:** In 2017, the juvenile was adjudicated dependent. Ultimately DSS filed a petition to TPR, which was granted on multiple grounds. Respondent father appeals the grounds (mother appealed the best interests determination, which is discussed below).
- G.S. 7B-1111(a)(9) authorizes the ground for TPR when a parent's rights with regards to another child of the parent have been involuntarily terminated by a court and the parent lacks the ability or willingness to establish a safe home for the child who is the subject of the current TPR action.
- The challenged findings of fact are supported by clear and convincing evidence, which includes father's stipulations at the underlying adjudicatory hearing in the dependency action about the prior TPR and that his mental health did not allow him to provide a safe home, social worker testimony, father's testimony, and evaluations of experts and their testimony about father's mental health. The findings show that father has (1) a diagnosis of antisocial personality disorder, which is characterized by extensive lying and a disregard for social or moral standards and is difficult to treat, (2) acted in a consistent way with that diagnosis by lying to DSS about his identity and failing to disclose a complete and accurate copy of an evaluation to a second evaluator, and (3) no interest in treatment or in changing. The findings support the court's conclusion that there was a prior TPR and father lacked the ability to provide a safe home.

Abandonment: Single Act

In re J.D.C.H., ___ N.C. ___ (Sept. 25, 2020)

Held: Affirmed

- **Facts:** This case involves a private TPR (mother as petitioner, father as respondent). The parties have 2 children together. Father's last contact with the children was September 2016. Mother remarried. Father was incarcerated from Oct. – Dec. 2018 and upon his release, he contacted mother to ask about seeing the children. Mother denied his request and filed a TPR petition, including willful abandonment as one ground. The court granted the TPR and father appeals, challenging the findings and conclusion of the ground of abandonment.
- G.S. 7B-1111(a)(7) authorizes the termination of parental rights when the parent has willfully abandoned the child for at least 6 months immediately preceding the filing of the TPR petition. Abandonment involves a parent's conduct that manifests a willful determination to forego all parental duties and claims and includes withholding his presence, love, care, opportunity to display filial affection, and support/maintenance.
- Although the determinative time period is those 6 months before the petition is filed, a trial court may consider the parent's conduct outside of that 6-month period to evaluate the parent's credibility and intentions. That includes the parent's conduct after the filing of the TPR petition.
- One single act during the determinative time period, the father's phone call in December 2018, does not preclude a finding that a parent willfully abandoned his children by withholding his love and affection. The findings that father did not send any letters to or call the children and did not provide any emotional, material, or financial support over a 2-year period when he had the ability to do so support the court's conclusion. Although he made the one phone call during the 6-month period, "it is not necessary that a parent absent himself continuously from the child

for the specified six months, nor even that he cease to feel any concern for its interest.” Sl.Op. at 15 (quotation omitted).

Abandonment: Evidence and Findings

In re L.M.M., ___ N.C. ___ (Sept. 25, 2020)

Held: Affirmed; Dissent

- Facts: This is an appeal of a private TPR. In 2017, mother contacted petitioner to request petitioner take temporary custody of mother’s child due to her lack of housing and employment. Petitioner agreed if mother permanently signed over her parental rights, which mother ultimately agreed to. Mother signed a notarized document that purported to transfer permanent parental rights to petitioner. Mother contacted petitioner through Facebook to request a picture of her son and money. After mother’s second request for money, petitioner blocked mother on Facebook. In 2018, mother was incarcerated. In 2019, petitioner filed an adoption petition and this TPR. Mother’s rights were terminated, and mother appeals the grounds.
- G.S. 7B-1111(a)(7) authorizes the termination of parental rights when the parent has willfully abandoned the child for at least 6 months immediately preceding the filing of the TPR petition. Abandonment involves a parent’s conduct that manifests a willful determination to forego all parental duties and claims and includes withholding his presence, love, care, opportunity to display filial affection, and support/maintenance. Although the determinative time period is those 6 months before the petition is filed, a trial court may consider the parent’s conduct outside of that 6-month period to evaluate the parent’s credibility and intentions.
- The findings about mother not having taking *any* action to contact and/or provide financial support for her child, even when incarcerated during some or all of the determinative six month time period are supported by clear and convincing evidence – petitioner’s testimony. That testimony included that petitioner had the same phone number and mother was only blocked on Facebook, not by phone, and petitioner and mother had shared relatives. Although petitioner communicated with mother’s mother, she had not been advised of any attempt by mother to contact her about the child. Mother’s “complete failure to show any interest in Larry after November 2017 – particularly during the six months between 18 July 2018 and 18 January 2019 – supports the trial court’s conclusion that she acted willfully in abandoning the child.” Sl.Op. at 12.
- Evidence of mother’s intentions before the 6 month time period, which includes mother’s initial requires to place her child with petitioner temporarily, represents mother’s intention before the determinative six month period. “The weight to be assigned to respondent’s conduct during this earlier period was a matter left to the trial court’s discretion as fact-finder.” Sl.Op. at 13.
- Because one ground is affirmed, the appellate court does not need to review the two other grounds as adjudication of any single ground to TPR is sufficient to support the trial court’s order.
- Dissent, Earls: Petitioner’s testimony of the lack of actual contact by mother while mother was incarcerated is not clear and convincing evidence that mother did not attempt to make contact. “The absence of evidence is not the same thing as clear, cogent, and convincing evidence.”

Dissent at 6. There is a difference between mother's alleged lack of efforts and petitioner's experience and perceptions of her interactions with the mother. Addressing the ground of neglect, mother recognized she was unable to provide for her child and sought an appropriate alternative caregiver such that these protective actions do not support an inference that she neglected her son.

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.

Abandonment; Best Interests

In re J.T.C., ___ N.C. App. ___ (Aug. 18, 2020)

Held: Affirmed (There is a dissent)

- Facts: Respondent father appeals this 2018 private TPR order granted on the grounds of neglect and willful abandonment (G.S. 7B-1111(a)(1), (7)). This appeal was before the court of appeals

as the appeal was filed prior to Jan. 1, 2019 when appeals of TPRs are before the NC Supreme Court).

- The findings are supported by clear and convincing evidence and the findings support the conclusion that the respondent father willfully abandoned the juvenile during the determinative 6-month period. Efforts made by father's relatives and wife do not preclude an adjudication of abandonment by father when he has the means to take efforts to maintain his relationship with his child and take on parental responsibilities and fails to do so.
- G.S. 7B-1110(a) sets forth the best interests factors for the court to consider. Although a permanent plan is not part of this private TPR, the brief mention of a permanent plan in the findings is not an abuse of discretion. Relevant considerations under G.S. 7B-1110(a)(6) included father's history of domestic violence, criminal record, and ongoing use of substances.
- Dissent based on best interests findings being erroneous resulting in an abuse of discretion.

Disposition: Standard of review (cumulative summary of the opinions below)

A best interests determination is reviewed for an abuse of discretion, which is when the court's ruling is so manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Dispositional findings of fact are reviewed under a competent evidence standard. Unchallenged dispositional findings are binding on appeal.

G.S. 7B-1110(a) Factors

In re J.S., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2016, the children were adjudicated neglected due to filthy and unsafe conditions in the home and mother's failure to follow the safety plan. Two years later, DSS filed TPR petitions, which were granted. Respondent mother appealed, challenging the grounds (discussed in section above) and disposition.
- G.S. 7B-1110(a) requires the court to consider each of the enumerated factors but only make written findings of fact "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [trial] court[.]' " Sl.Op. at 16 (citation omitted).
- There was no conflicting evidence about the likelihood of each child's adoption or the facilitation of the permanent plan if the TPR was granted. For one child, there was no conflicting evidence about the bond between the juvenile and prospective adoptive parents. No findings were required.
- Without a prospective adoptive home for the other children, the factor addressing the bond between the child and prospective adoptive parent is not relevant. Regarding the likelihood of their adoption despite not having a pre-adoptive placement, the adoption social worker testified the children's behaviors had improved and they needed an appropriate adoptive home that provided structure. The evidence supported the finding.

- Regarding the quality of the relationship between mother and her children, the trial court is the authority to credit the testimony of one witness over another when the evidence conflicts. There was no abuse of discretion.

In re N.G., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2107, the juvenile was adjudicated dependent. Ultimately DSS filed a petition to TPR, which was granted on multiple grounds. Respondent mother appealed the best interests determination (father appealed the grounds, which is discussed above).
- At the dispositional stage of a TPR, the court determines whether the TPR is in the child's best interests based on the factors listed in G.S. 7B-1110(a). The trial court properly considered the factors and made findings of fact. The challenged findings were supported by the evidence, which included the social worker's testimony and the GAL report.
- Although a stated purpose of the Juvenile Code is to prevent the unnecessary or inappropriate separation of children from their parents, the child's best interests are the court's paramount consideration, and when it is not in the child's best interests to return home, the child should be placed in an safe, permanent home within a reasonable amount of time. G.S. 7B-100. Here, the child had been in the foster home for almost 2 years without being any closer to reunifying with her parents, and the foster parents were meeting her needs and wanted to adopt her and provider her with a permanent home.

In re E.F., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Respondent mother appeals the best interests determination of the TPR arguing the court abused its discretion.
- Although G.S. 7B-1110(a) requires the court to consider each of the enumerated statutory factors at disposition, written findings are only required for those factors that have conflicting evidence. Competent evidence (testimony and reports) supported the findings, and of the challenged findings, there was no evidentiary conflict requiring written findings.
 - Regarding the factor that the TPR would aid in achieving the permanent plan, the TPR was a necessary precondition for the adoption.
 - Regarding the factor addressing the child's likelihood of adoption, it does not require a certainty of adoption.
 - A "trial court may – and should – consider evidence introduced at the adjudicatory stage of a termination hearing in determining the children's best interests during the disposition stage." Sl.Op. at 8. Although the availability of the maternal grandmother as a placement option was raised once at the adjudication stage, there was no reference to her or any other alternative placement at the disposition phase other than the undisputed evidence that the current placement provider (who was not the maternal grandmother) was appropriate and desired to adopt the children. As such, written findings about the maternal grandmother were not required.

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 S.J.B., ___ N.C. ___ (Sept. 25, 2020)

Held: Affirmed

- Facts: In 2018, the juvenile was adjudicated neglected based on circumstances involving mother's drug use and mental health issues. In 2019, after mother overdosed, was admitted to inpatient treatment and discharged for failing to complete the program, the primary permanent plan was changed to adoption. DSS filed a TPR petition. The TPR was granted, and respondent mother appeals challenging the best interests determination.
- Standard of review at disposition is whether the abused its discretion.
- The court made findings of the G.S. 7B-1110(a) factors, which are unchallenged and, therefore, binding on appeal. Mother's argument that the court should have considered her future plan to enter a residential treatment program where should would have the potential to have the child reside with her after several months has very limited relevance to the child's best interests, particularly since the grounds to TPR were based in part on mother's history of relapse and failure to complete drug treatment. The findings that the foster parents, who wanted to adopt the child, maintained relationships between the child and her half-brother and grandmother showed the court considered the competing goals of preserving family relationship and achieving permanency for the child. It is not the role of the appellate court to reweigh the evidence of the trial court.

Likelihood of Adoption

In re M.A., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- **Facts:** The children were adjudicated neglected based on lack of proper care and supervision and an injurious environment due to domestic violence and substance use in the home. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition. The TPR was granted and mother appealed, arguing the court abused its discretion when determining the TPR was in the children’s best interests. Father also appealed the neglect ground (discussed in section above).
- **Findings of fact were made for each of the relevant statutory factors enumerated in G.S. 7B-1110(a).**
 - The court’s findings that there was a likelihood of adoption was supported by testimony from the adoption recruiter even though there were no prospective adoptive families that had been identified at the time of the TPR hearing. The lack of an adoptive placement or the possibility that the adoption process would be lengthy do not preclude a TPR. The testimony included the adoption recruiter’s belief that the children were likely to be adopted given that they had an ability to form bonds with their caregivers, had no special needs, and were doing well in school and therapy. Additionally, the TPR would make the children eligible to list with adoption service agencies to help identify an adoptive family. The GAL also testified that he was not concerned about the children’s ability to bond with an adoptive family and recommended that TPR was in the children’s best interests given the duration of their time in foster care and need for a safe, permanent home.
 - While a court may consider a child’s wishes, their preference is not controlling because the best interests of the child is the “polar star” of the Juvenile Code. Although G.S. 48-3-601(1) requires a child who is 12 or older to consent to their adoption, that requirement may be waived when the court finds it is not in the child’s best interests. G.S. 48-3-603(b)(2). As such any refusal by a child to consent does not necessarily preclude adoption.

In re J.C.L., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Father challenges the finding that there is a high likelihood his child will be adopted and was placed in a pre-adoptive home since it was a “potential pre-adoptive home.” “This argument rests upon a distinction without a difference, as all pre-adoptive homes are by their nature inherently potential.” Sl.Op. at 22.

In re S.M.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- **Facts:** In its disposition the court findings included that the juvenile needs more stability given her history of trauma before she can be adopted. Mother argues the likelihood of adoption is

unknown unless the court addressed what constitutes stability and whether the juvenile could obtain it before she turned 18.

- The trial court is required to make findings addressing the likelihood of the child’s adoption and is not required to find that the juvenile will achieve the necessary stability for adoption or establish benchmarks a child who has experienced trauma must meet. The findings show the juvenile has a likelihood of adoption if she obtains stability, which requires in part the termination of her mother’s parental rights. Although the trial court recognized the necessary stability may not be achieved, “it is well established that a likelihood of adoption is not necessary for a court to conclude termination of parental rights is in the child’s best interests.” Sl.Op at 16. The court made the appropriate findings and did not abuse its discretion.

In re K.L.M., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Respondent father appeals the TPR order, arguing the court abused its discretion when weighing the best interests factors and concluding it was in the children’s best interest to TPR when there was no adoptive placement.
- In a private TPR, the likelihood of adoption is only one factor for the court to consider. The findings about the children’s young ages, their current living arrangement with their mother and grandparents, their lack of bond with father, and father’s lack of interest and involvement with the children show the court considered the G.S. 7B-1110(a) factors and support the court’s conclusion.

Bond between Juvenile and Parent / Foster Parent

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- Facts: Mother challenges the findings that her relationship with her child was similar to “playmates” and that the trial court improperly compared her relationship to the child’s relationship with the foster parents.
- The findings were supported by the evidence. The social worker’s testimony addressed the relationship and interactions between the child and mother when supervising the visits, which showed mother did not take a parenting role but rather played with the child. There was no evidence that supervised visits prevented mother from demonstrating a parental bond.
- The court did not choose between the parent and foster parent. Mother relies on *In re Nesbitt*, 147 N.C. App. 349 (2001), which is not binding on the supreme court. Additionally, the findings do not compare the two relationships to determine which was better. Instead, the findings evaluate the bond with mother and quality of relationship with the proposed adoptive placement, and the mention of the foster parents in the finding “serves as a somewhat inartful proxy for describing the quality of the parental relationship.” Sl.Op. at 21.

In re J.J.B., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: Respondent parents appeal the disposition portion of a TPR.
- The court made a reasonable inference from the testimony at hearing that the children were bonded to their foster parents.
- Although the court found there was a strong bond between the children and their parents, that bond is just one factor to be considered under G.S. 7B-1110(a). The trial court may give greater weight to other factors. The findings and need for permanency within a reasonable amount of time for the juveniles supported the TPR over a guardianship since the child's best interests are the paramount consideration for the court. See G.S. 7B-100(4), (5). Although the trial court stated that the foster parents should honor the relationship between the children and respondents, that statement was not part of the order, is not a repudiation of the best interests ruling it rendered and entered, and is not an abuse of discretion.

Appealable Order

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- Facts: A TPR adjudication order was entered on March 21, 2019. A separate dispositional order was entered on April 28, 2019. Respondent mother appealed the TPR on both grounds and disposition. DSS filed a motion to dismiss the appeal of the adjudication order, arguing it was untimely.
- G.S. 7B-1001 identifies those order which may be appealed. A final order terminating or denying a termination of parental rights is an appealable order. Notice of the appeal must be made within 30 days of the order's entry and service. There is a two-stage process for TPR: adjudication and disposition. A TPR adjudication order is not an appealable order under G.S. 7B-1001 because it only establishes a ground to TPR and does not terminate parental rights. The TPR order is not final and subject to appeal until the court enters its disposition order. The appeal was timely filed.

Complying with the Mandate

In re S.M.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: DSS obtained an order terminating respondent mother's rights. She appealed, and the court of appeals affirmed the ground but concluded the disposition did not address the juvenile's likelihood of adoption. The case was remanded to the trial court to make findings of this statutory factor. On remand, respondent filed a motion to reopen evidence to show a change in circumstances. The motion was denied and the court entered an amended order with new findings of fact. Mother appeals arguing the trial court could comply with the mandate without reopening the evidence.
- A trial court must strictly follow the mandate. The mandate was for additional findings not for a new dispositional hearing. The appellate decision was silent as to whether the trial court should

take new evidence when the case was remanded for additional findings. As such, the trial court had discretion to determine whether it should take new evidence on remand, and it was not required to do so. There was nothing in mother's motion that identified specific changes that would impact the issue of the likelihood of the juvenile's adoption. Speculation of changed facts over an 18-month period is insufficient to show the trial court abused its discretion. The trial court was able to make the required findings from the evidence presented at the original hearing and thus the trial court complied with the mandate.

UCCJEA

Subject Matter Jurisdiction; Modification, Findings Not Required

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.

Inconvenient Forum

Harter v. Eggleston, ___ N.C. App. ___ (August 4, 2020)

Held: Affirmed

- Facts:
 - 2012, custody action commenced in NC
 - 2013, consent order entered; mother moved to Ohio and consent order modified
 - 2015, order modified granting mother primary physical custody
 - 2018, father filed verified motion to modify 2015 order seeking primary physical custody; ex parte temporary order granted; temporary consent order granted; mother filed verified motion to remove case to Ohio based on NC being an inconvenient forum
 - 2019, mother's motion granted after determination that Ohio is a more convenient forum and declining jurisdiction in NC, staying proceeding. The order was based on the verified pleadings, which the parties requested be accepted as affidavits, and attorney arguments. Father appeals.
- Standard of review of a decision to decline jurisdiction based on inconvenient forum is an abuse of discretion.
- G.S. 50A-207(b) requires findings of fact of relevant factors, and those findings must be based on competent evidence. The court made the requisite findings of fact, based on the affidavits/verified motions that the parties chose to submit to the court and were competent evidence.