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## ICWA:

### Mandatory Inquiry

[In re A.L.](#), 2021-NCSC-92

#### **Held: remanded for compliance with ICWA**

- **Facts:** There is an underlying neglect action where the juvenile was adjudicated neglected. The juvenile’s birth certificate indicates he is “American Indian.” In the underlying neglect action (this author believes at 3 hearings on the need for nonsecure custody), the court determined that the juvenile was a member of the Lumbee tribe, a state-recognized tribe. Ultimately, DSS filed a TPR petition, which was granted. Mother appeals, arguing the trial court did not comply with its duties under ICWA.
- “ICWA imposes a duty on the trial court to ‘ask each participant ... whether the participant knows or has reason to know that the child is an Indian child.’ ” ¶126. The inquiry must be made at the commencement of the child custody proceeding and responses must be on the record. Nothing in the TPR record shows that the trial court made the required inquiry in the TPR action such that the court did not comply with ICWA. Although ICWA applies to federal tribes that are

recognized for services by the Secretary of the Bureau of Indian Affairs, of which the Lumbee tribe is not, without the inquiry, the court cannot know whether there is reason to know whether the child is an Indian child under ICWA and the appellate court cannot determine if the inquiry was made without the responses being on the record. Remanded for the court to inquire of each participant whether there is reason to know the child is an Indian child and receive the responses on the record. If there is reason to know, a new TPR hearing, complying with ICWA provisions, must occur. If there is not reason to know, such as the juvenile is only eligible for membership with the Lumbee tribe, a state-recognized tribe, the court should enter an order to this effect and the TPR remains in place.

## Notice, Cure, Subject Matter Jurisdiction

### In re D.J., 2021-NCSC-105

#### **Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected and dependent. Mother reported Native American heritage, Cherokee and Iroquois, and notices were mailed to some tribes. DSS filed a TPR motion, which was granted by order dated September 18, 2020. Post-TPR, DSS sent notices to all 3 Cherokee and 9 Iroquois tribes. All but one Iroquois and one Cherokee tribe responded that the child was not eligible for membership. In March 2021, notice was sent to the regional Bureau of Indian Affairs (BIA) director requesting assistance. In April, the BIA responded by acknowledging notice was sent to the Iroquois and Cherokee tribes, identified the 2 tribes who did not respond, and stated “you have done due diligence and completed your ICWA responsibilities.” Sl.Op. ¶18 (fact no. 24). Later in April, the last Cherokee tribe responded that the child was not eligible for membership but there had been no response from the last Iroquois tribe. All the letters were admitted into evidence at the post-TPR hearings. The court determined DSS complied with the ICWA notification requirements and that ICWA does not apply. DSS supplemented the appellate record with the post-TPR hearing orders and exhibits addressing the ICWA issue. Mother appeals, arguing the court did not comply with ICWA at the time of the TPR hearing (she also appealed a denial of a motion to continue).
- The trial court complied with ICWA by ensuring DSS used due diligence and complied with 25 CFR 23.105(c) when the tribe did not respond before determining ICWA did not apply. DSS sent the required notices to the tribes and notice to the regional BIA office seeking assistance when two tribes had not responded as required by 25 CFR 23.105(c). The BIA office determined DSS made its due diligence and completed its responsibilities under ICWA. The post-TPR notices cured the trial court’s failure to comply with ICWA prior to the TPR hearing (distinguishing these facts from *In re E.J.B.*, 375 N.C. 95 (2020) where the post-TPR notices sent to the tribes were insufficient under ICWA).
- The court’s prior noncompliance did not deprive the court of subject matter jurisdiction. The tribe did not have exclusive jurisdiction under 25 USC 1911(a) as the child did not reside and was not domiciled on a reservation and is not a ward of tribal court. The supreme court did not address what remedy exists for noncompliance with 25 USC 1912(a) for a proceeding involving an Indian child. Prior noncompliance in this case was not prejudicial.

## Abuse, Neglect, Dependency

### Adjudication

Neglect: DSS determination for in-home services

[In re A.D.](#), 2021-NCCOA-398

#### **Held: Affirmed**

- **Facts:** A report alleging improper discipline was received by DSS. DSS conducted an assessment and determined “services needed.” There was no indication of “substantiation.” The case was transferred to an in-home services worker. Respondent custodian refused to sign the in-home services agreement but did engage in some services during the assessment phase. As the in-home services case continued, respondent refused to participate in services and prevented the social worker from seeing the children. Months later, DSS filed a petition alleging the juveniles were neglected and dependent based in part on respondent’s refusal to engage with services or have the children engage in services. After hearing, the juveniles were adjudicated neglected due to a lack of proper care, supervision, or discipline and living in an injurious environment. Respondent retained legal custody and was subject to a court-ordered protection plan where she was ordered to comply with in-home services. Respondent appealed the adjudication.
- **Clear and convincing evidence showed the juveniles were at substantial risk of harm.** The trial court considers the juvenile’s age and the environment the juvenile is living in when determining whether the juvenile is at risk of a particular type of harm. There was evidence of physical discipline that resulted in marks and injuries to the juveniles and respondent’s refusal to engage in services or allow the children to attend therapy to address their own mental health issues. Previous opinions have upheld a neglect adjudication when a parent has failed to follow through with required treatment for themselves and their children. “Evidence of events after the petition is filed is irrelevant to the determination of whether a child is neglected.” Sl.Op. ¶15.
- **DSS Process:** After an assessment is completed, “DSS determines or substantiates whether abuse, neglect, serious neglect, or dependency occurred” based on the statutory definitions of those terms. Sl. Op. ¶127. When a report is substantiated and transferred to in-home services, DSS *may* file a petition with or without a request for nonsecure custody. DSS determines what services are needed to help the family meet the child’s needs, keep the child safe, and prevent future harm and arranges those services for the family. If a parent, guardian, custodian or caretaker refuses to accept those services, DSS *must* file a petition to protect the juvenile. See G.S. 7B-302(c)-(d). Under the NC Child Welfare Manual, a substantiation and services needed determination are treated the same. “Services needed” is not the equivalent of “unsubstantiated.” When the petition was filed, respondent refused to comply in the DSS in-home services plan, DSS was required to file a petition, and the evidence supports the conclusion of neglected juvenile.

Neglect, Dependency - Findings; Reasonable Efforts

[In re H.P.](#), 2021-NCCOA-299

**Held: Reversed and Remanded for Dismissal**

**Concurs in part and Dissents in part, Inman, J.**

- **Facts:** Reports of suspected neglect based on injurious environment, lack of proper care and supervision, substance use, and domestic violence were first received in 2015. Numerous reports were made over several years, many of which were closed for insufficient evidence to support a finding of neglect. The reports alleged inadequate housing, including the family living in a storage unit and a camper without water or electricity, food insecurity and hunger, and domestic violence. In 2020, DSS substantiated the report and filed a petition alleging neglect and dependency. At the adjudication hearing, neither parent was present; father eventually appeared. The evidence presented was DSS social worker testimony reviewing “Exhibit A,” an attachment to the petition that summarized the years of reports and 37 allegations, 4 of which stated the evidence was insufficient to support other allegations in the exhibit. The court proceeded to disposition, which included testimony from the foster care social worker and the DSS report. The court adjudicated the juveniles neglected and dependent, using a prepared order the DSS attorney drafted prior to the hearing. The order contained 47 findings of fact. Mother appeals.
- **Standard of review** is whether the findings are support by clear and convincing evidence and whether the findings support the conclusions. Conclusions of law are reviewed de novo.
- **The findings are not supported by competent evidence, and the court failed to make the ultimate facts.** Findings of fact require more than a recitation of the evidence and must include specific ultimate facts. It is not per se reversible error to mirror the wording of a petition as the appellate court will examine whether the trial court, through a process of logical reasoning applying the evidentiary facts before it, found the ultimate facts to support the adjudication.
  - Many of the findings of fact are recitations of the allegations in Exhibit A to the petition. Four of the allegations that were found as facts state “there was not evidence” to support other allegations in the petition that were found as facts by the trial court. Sl.Op. ¶124. Exhibit A is not competent evidence because the allegations are contradictory. No evidence supported the allegations of Exhibit A. The court did not make ultimate findings of fact.
  - Many of the findings were recitations of statements that were made to DSS by the children, mother, neighbors without addressing whether the statements were true.
- Findings about inadequate housing, specifically the family living in a storage unit, were not supported. In assessing 2 reports of the family living in a storage unit, the DSS investigation found the parents were living in a motel and later were moving to a camper and would stop residing in the storage unit. “Without evidence of the conditions of the storage unit or other access to necessities, we hold that taking temporary shelter in a storage unit is not per se neglect. Sl.Op. ¶129.
- A finding that mother reported the refrigerator was broken and nothing could be stored in it is a recitation of evidence and does not resolve a material issue of ultimate fact that would support the GAL’s argument that a broken refrigerator created an inability to reliably provide the children with adequate nutrition.

- Some of the findings of fact were really conclusions of law and will be treated as such and reviewed de novo. Findings of fact are objectively ascertained, and conclusions of law require an exercise of judgment.
- Neglect requires harm or substantial risk of harm to the juveniles. There was no evidence of any harm. Although DSS expressed concern about food insecurity, the children were not found to be underweight or malnourished. There were no ultimate findings about proper care and supervision for neglect or dependency grounds. Substantive findings that a young child was running between his parents' campers naked and later was walking alone are not, by themselves, neglect or dependency.
- The conclusion that DSS made reasonable efforts to prevent the children's removal from their home is unsupported.
- Dissent: Concur in that the ultimate facts were not made to support neglect or dependency adjudications. However, the appropriate remedy is reverse and remand for further proceedings to make findings of fact. The contradictions in Exhibit A do not make it incompetent evidence as a matter of law, and it is not the role of the appellate court to reconcile those contradictions. The trial court is the sole authority for making findings of fact and resolving conflicts in evidence, and it should have that opportunity on remand. The majority *sua sponte* raised the question of reasonable efforts, which is not the role of the appellate court. Disagrees with analysis that reasonable efforts were not provided.

## Permanency Planning Hearing

Guardianship: Verification

[In re B.H.](#), 2021-NCCOA-297

### **Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent and was placed in DSS custody, who continued their placement with relatives (which began with nonsecure custody). At a permanency planning hearing, the court awarded permanent guardianship to the relatives the child was placed with and ordered supervised visitation. Mother appealed, arguing the court did not properly verify the guardians understood the legal significance of their appointment.
- G.S. 7B-600(c) and -906.1(j) requires the court verify the person being appointed as guardian understands the legal significance of the appointment and will have adequate resources to appropriately care for the juvenile. Specific findings are not required but there must be competent evidence to demonstrate the guardian's understanding. When two people are appointed, there must be sufficient evidence that both of them understand.
- There is sufficient competent evidence for the court to have made a proper verification. Any evidence that is relevant, reliable, and necessary to determine the juvenile's needs and most appropriate disposition may be considered by the court at a permanency planning hearing. G.S. 7B-906.1(c). Sufficient evidence may include social worker testimony, a court summary, a home study, and/or the testimony of the proposed guardian that addresses the guardians' understanding. Here, there was testimony from one proposed guardian and the social worker as well as a home study. The testimony of one of the proposed guardians about the collective understanding of both proposed guardians is sufficient to find both understood; using the word "we" regarding their discussions between themselves and with the social worker about meeting

the children's needs – raising them and providing a stable environment, education, love, care, and teaching them things. Regarding the social worker's testimony, an affirmative response of "yes" to a question of whether the guardian understands the appointment is sufficient.

#### Guardianship; Eliminate Reunification; Visitation

In re J.R., 2021-NCCOA-491

##### **Held: Affirmed in part; remanded in part**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. The petition was filed after one of mother's children died by homicide where mother and her boyfriend were charged; the charges against mother were later dismissed. Mother was ordered to comply with a case plan addressing her domestic violence, mental health, parenting, employment, and housing. At a 2020 permanency planning hearing, the court entered a guardianship order and a guardianship visitation order, placing the juveniles with their maternal grandfather and eliminating reunification as a permanent plan. The court concluded mother acted inconsistently with her constitutional rights to parent and that reunification efforts would clearly be unsuccessful or inconsistent with the children's health and safety. Visitation was ordered to be supervised, 4 hours/month with the days and times to be agreed upon between mother and the guardian. Mother appeals.
- Acting inconsistently with constitutional rights to parent: Despite mother's arguments, there is no requirement that the court find mother's conduct was willful and intentional as required in a TPR when the ground includes a willfulness prong (distinguishing In re A.L.L., 376 N.C. 99 (2020) addressing TPR on abandonment). Distinguishing Rodriguez v. Rodriguez, 211 N.C. App. 267 (2011), where the juvenile was adjudicated dependent, here the juveniles were adjudicated neglected. "Neglect 'clearly constitute[s] conduct inconsistent with the protected status parents may enjoy.'" Sl. Op. ¶19. The court also found mother did not comply with her case plan by not finding appropriate housing or engaging in any mental health assessments or therapy or domestic violence services. The court's findings support the conclusion.
- Verification for Guardianship: Although the court must verify the guardian understands the legal significance of the guardianship, there is no specific findings the court must make under G.S. 7B-600 or -906.1(j). The guardian and DSS social worker testified to the guardian's understanding. The DSS and GAL reports addresses the grandfather's care of the juvenile's for approximately 1 year. Competent evidence supports the court's conclusion that the grandfather understood the legal significance of the guardianship.
- When determining whether reunification efforts would be unsuccessful or inconsistent with the child's health or safety, the court must make written findings under G.S. 7B-906.2(d). All 4 required findings were made and were supported by evidence (DSS court summary, letter from a service provider, GAL reports, DSS social worker testimony). Although mother had another child in her custody, the court has discretion to weigh the evidence, when determining whether efforts would be unsuccessful or inconsistent with the children's health or safety.
- Visitation orders are reviewed for an abuse of discretion. The order did not comply with G.S. 7B-905.1(c) as the frequency and length of the visits were not unambiguously stated. It is unclear if 4 hours/month is meant to be in one visit of 4 hours per month, or multiple visits of shorter length per month. The court did not abuse its discretion in giving flexibility on determining the day and time of each visit to the agreement of the guardian and mother.

Findings: Custody, Eliminate Reunification, Cease Further Hearings

[In K.P.](#), \_\_\_ N.C. App. \_\_\_ (June 15, 2021)

**Held: Vacated and Remanded**

**Dissent in Part, Concur in Part**

- Facts: The juvenile was adjudicated neglected based on domestic violence. Paternity of the juvenile was an issue, and husband was determined not to be the father and another man was determined to be the father. The child was placed with husband's parents, where his half-siblings were also placed. After an unsuccessful trial home placement, a primary permanent plan of custody with a relative and secondary plan of reunification or custody to a court-approved caretaker was ordered. At the last permanency planning hearing, the court ordered custody to the husband's parents and with supervised visits to mother. No concurrent plan was ordered as the permanent plan of custody to a relative was achieved, and further hearings were waived. Mother appeals.
- A failure to make statutorily required findings is reversible error.
  - Before eliminating reunification as a permanent plan, the court must make the findings under G.S. 7B-906.2(b) and (d). The ultimate finding addressing whether reunification efforts would clearly be unsuccessful or inconsistent with the child's health or safety as required by G.S. 7B-906.2(b) was not made. The findings required by G.S. 7B-906.2(d) were not made. The permanent plan of custody to a relative was not achieved since the child was placed with a non-relative (husband's parents, who were not the paternal grandparents).
  - The order does not verify the custodians understood the legal significance of the appointment as custodians and have adequate resources to care for the juvenile, which is required by G.S. 7B-906.1(j).
  - Before waiving further reviews, the court must make findings of each of the five G.S. 7B-906.1(n) factors, which the court did not do here.
- Dissent in part: The permanent plan of custody to a court-approved caretaker was achieved. Because a permanent plan was achieved, the findings of G.S. 7B-906.2(b) were not required. The findings of G.S. 7B-906.2(d) were made. The verification under G.S. 7B-906.1(j) was made and supported by social worker testimony, step-grandfather's testimony, and the child have lived with the custodians for at least six consecutive months.

Eliminate Reunification: Findings

[In re A.P.W., 2021-NCSC-93](#)

**Held: Affirmed**

- Facts: The juveniles were adjudicated neglected in 2017 due to circumstances involving lack of proper care and supervision and an injurious environment stemming from inappropriate housing and their parents' substance use and criminal activity. In 2019, a permanency planning order (PPO) eliminated reunification as a permanent plan, and the court noted that each parent, through counsel, preserved the right to appeal. No written notice to preserve the right to appeal was filed. DSS filed a TPR petition, which was granted. Each parent appealed the TPR order and filed a petition for writ of certiorari to review the PPO, which was allowed.
- Standard of review of PPO is whether there is competent evidence to support the findings and whether the findings support the conclusion. The dispositional order is reviewed for an abuse of

discretion. An order eliminating reunification appealed with the TPR is considered with the TPR order.

- The record on appeal does not include a transcript or narrative of the permanency planning hearing. The appellate court “presume[s] the findings made by the trial court are supported by competent evidence.” Sl.Op. ¶17. Any challenged findings in the PPO that are based on evidentiary grounds cannot succeed.
- To eliminate reunification as a permanent plan, the court must make certain statutory findings, but it need not use the exact statutory language so long as the substance of the statute’s concerns are addressed. Sufficient findings were made to address the substance of G.S. 7B-906.1(d)(3) and -906.2(b). In reading the PPO with the TPR orders, sufficient findings were made to address the substance of G.S. 7B-906.2(d)(1)-(4). The “findings adequately explain the basis for [the court’s] determination that there were no realistic prospects for reunification” and that reunifying with father in the foreseeable future would be contrary to the children’s health, safety, and general welfare. Sl.Op. ¶32.
- G.S. 7B-906.2(c) addresses findings about the efforts DSS has made to achieve the primary and any secondary permanent plan and whether those efforts were reasonable. The PPO and TPR orders make detailed findings about DSS’s efforts to reunify the children with their father and address the statute’s concerns. There is no merit to father’s argument that the efforts were not reasonable because of his limited time with his children. The trial court, not DSS, conditioned father’s visitation with the children and DSS “is not obliged to defy the trial court’s orders.” Sl.Op. ¶35.

Notice: Eliminate Reunification

[In re E.A.C.](#), 2021-NCCOA-298

**Held: Vacated and Remanded for new hearing**

- Facts: In 2018, the juveniles were adjudicated neglected and dependent and at disposition were placed with a couple, the Morgans. A newborn was also adjudicated neglected and dependent in 2019 and placed with the Morgans. Mother is an undocumented noncitizen and there were several barriers to her accessing services DSS referred her to as a result. DSS referred and transported mother to Catholic Charities for assistance in obtaining a U Visa as a victim of domestic violence, but she did not file the application. In 2019, the court changed the permanent plans, eliminating reunification and identifying guardianship and custody. In 2020, the court entered permanency planning orders awarding guardianship to the Morgans. Mother appeals.
- Notice: An abuse, neglect, or dependency action involves a sequential process, with an adjudication hearing followed by an initial dispositional hearing, a review hearing, and permanency planning hearings. “Although the Juvenile Code has established a sequential process, courts may combine and conduct the adjudicatory, dispositional, and permanency planning hearings on the same day.” Sl.Op. ¶21. However, a permanency planning hearing requires proper notice under G.S. 7B-906.1(b) unless the party waives that notice by attending and participating in the hearing without objection. Mother waived her right to notice of a permanency planning hearing when she participated in a noticed review hearing, and although objected to a change in the permanent plan, she did not object to the holding of a permanency planning hearing.

- Eliminating reunification: No party bears the burden of proof at a permanency planning hearing. However, there must be credible evidence to support the court's conclusions. Reunification must be a primary or secondary plan unless findings are made under G.S. 7B-906.2(b) and (d). There were no findings made under G.S. 7B-906.2(b) that reunification efforts would clearly be unsuccessful and there was only one of the four required findings under G.S. 7B-906.2(d). The findings are insufficient to support eliminating reunification as a permanent plan.
- The trial court did not abuse its discretion in not enumerating specific requirements the parent must do to regain custody. Mother was aware of what she was required to do under the family services plan she entered into with DSS.

Acting Inconsistently with Constitutional Rights; Unfit Parent; Eliminating Reunification  
In re B.R.W., 2021-NCCOA-343

**Held: Affirmed in part; reversed in part**

**There is a concurrence and a concur in part and dissent in part**

- Facts: In 2018, DSS became involved with the family and the juveniles were adjudicated neglected. Circumstances were created by father's violent behaviors, which were in the home the juveniles lived in with father and paternal grandmother. Prior to DSS involvement, starting in 2015, mother left the juveniles with grandmother. Mother had not been involved with the children on a regular basis prior to entering a case plan with DSS after the children were removed from father's home. Despite the lack of mother's involvement with the children, she declared them as dependent for IRS tax purposes. Mother complied with her case plan and obtained unsupervised overnight visits. Mother's sole issue to be resolved in her case plan was obtaining appropriate housing for the children; her current home was overcrowded. At prior permanency planning hearing, DSS recommended reunification with mother, and the children's GAL recommended otherwise. At the last permanency planning hearing, DSS and the GAL recommended permanent guardianship to the paternal grandmother, which was ordered after the court found mother was unfit and acted inconsistently with her constitutional rights. Mother appeals, challenging findings were not supported by clear and convincing evidence and a misapplication of the law.
- Standard of review: A permanency planning order must have competent evidence in the record to support the findings, and the findings must support the conclusion. Conclusions of law are reviewed de novo. The conclusion that a parent acted inconsistently with their parental rights or is unfit is reviewed de novo.
- The findings were supported by competent evidence as "the trial court is the sole judge of the weight and credibility of the evidence, and even if there is contrary evidence [a prior DSS report], the trial court's finding is supported by the evidence presented by the GAL, as well as by other evidence regarding Mother and Stepfather." Sl.Op. ¶ 27.
  - The children expressed their preferences to live with grandmother and displayed adjustment issues at school after overnight weekend visits with their mother. A trial court may consider a child's preference, although their preference is not controlling since the court determines the child's best interests.
- Acting inconsistently with constitutional rights and a parent's unfitness are two separate determinations and are reviewed independently. For both, the determination must be made by clear and convincing evidence. In some cases, a parent's acting inconsistently may include

unfitness (e.g., abuse or neglect), but not all cases involve both elements. A parent may act inconsistently with parental rights without also being unfit. The determination is examined on a case-by-case basis.

- Acting inconsistently with constitutional rights: “[A] parent may cede her constitutionally protected status to another by leaving her child in that persons care.” Sl.Op. ¶ 42. For example, when a parent voluntarily allows the child to reside with a non-parent and allows that non-parent to support and make decisions for the child’s care and education, and “continuing this condition of affairs for so long a time that the love and affection of the child and [non-parent] have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness[.]” *Id.* The court looks at the parent’s intentions and conduct about the relationship between the child and non-parent.
  - Here, the children resided with their grandmother since birth (2015) after mom left to find stable housing. Although mom obtained stable housing in 2017, she did not make an effort to change the children’s living situation until DSS got involved in 2018. Prior to DSS involvement, mother rarely called the children, saw them, or inquired about them. Grandmother made all parental decisions and supported both children. Mother’s lack of involvement with the children prior to DSS involvement was once of the circumstances resulting in the juveniles neglect adjudication. The trial court properly considered the 3 years prior to DSS involvement when determining whether mother acted inconsistently with her constitutional rights. Mother left her children with grandmother for an indefinite period of time without showing any intention that it was temporary.
- Parent’s unfitness: The findings about mother’s compliance with her case plan, which included completed parenting classes, a domestic violence assessment, negative random drug screens, unsupervised visitation, obtaining suitable housing just before the permanency planning hearing, and making adequate progress within a reasonable period of time do not support a determination that mother was unfit. Because the court properly determined mother acted inconsistently with her parental rights, the court did not err in awarding guardianship to grandmother.
- Mother preserved this issue for appeal, complying with Appellate Rule 10, and did not waive it. Constitutional issues may be waived if not raised before the trial court. Here, mother presented evidence and argued against an order of guardianship and instead sought reunification and a trial home placement. A parent can object to the introduction of evidence, but findings of fact are not evidence, and parties cannot object to a rendition of an order. Mother had the opportunity and did raise the issue at the hearing when she presented her evidence and request for reunification and trial home placement. Mother had no other opportunity to object to the court’s findings and rulings at the hearing, and it would not have been proper.
- Eliminating reunification: A parent’s compliance with a case plan “does not automatically lead to a conclusion that the conditions which led to the removal do not exist.” Sl. Op. ¶ 52. Trial court’s conclusions were supported by findings of fact and the court reviewed the required factors.
- Concurrence: The court of appeals could benefit from the supreme court resolving a conflict between this opinion and *In re C.P.*, 258 N.C. App. 241 (2018) about when a parent must raise and preserve the constitutional issue at the trial court.
- Dissent in part: The findings do not support the conclusion that placement of the children in mother’s home is contract to the children’s health, safety, welfare, and best interests and

conditions leading to the children’s removal continue to exist. The children were never removed from mother’s home; mother completed her case plan. Further, the findings were insufficient to support the determination that mother acted inconsistently with her constitutional rights. Since 2018, mother was making consistent progress, and ignoring a parent’s compliance with a case plan would discourage parents and will be detrimental to the success of the DSS program. There may be evidence in the record to make sufficient findings and so vacate and remand should be the remedy.

### Acting Inconsistently with Constitutional Rights

In re I.K., \_\_\_ N.C. \_\_\_ (June 11, 2021)

**Held: Affirmed**

**Dissent, Earls, J.**

- Facts and Procedural History: The juvenile was adjudicated dependent due to circumstances related to unstable housing, substance use, and domestic violence in the home. A 2017 permanency planning order that awarded guardianship to paternal grandmother and eliminated reunification was appealed by both parents. The court of appeals vacated and remanded that permanency planning order to address whether respondent father was acting inconsistently with his constitutional rights to care, custody, and control of the child. On remand, the court awarded guardianship to the grandmother. Father appealed, challenging the findings and conclusions that he acted inconsistently with his parental rights. The court of appeals in a divided opinion affirmed the trial court’s order. Father appealed to the supreme court.
- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence with findings of fact that cumulatively support that conclusion. The conclusion of law is reviewed de novo. The determination is not a bright-line test. The cumulative evidence shows supports the court’s conclusion that father acted inconsistently with his constitutional rights by not refraining from using illegal substances, not adequately addressing his issues with domestic violence, and not obtaining safe and stable housing.
- The findings are supported by clear and convincing evidence, and the findings support the conclusion that father acted inconsistently with his constitutionally protected rights. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.
  - Substance use: The findings show that father continued to use substances after completing his substance abuse treatment program. The evidence showed he had a history of using substances for years, refused to submit to 11 out of 31 drug screens throughout the case, and tested positive on two of the drug screens, one of which was after completing his treatment.
  - Housing: The findings describe an unsafe and inappropriately sized home that was based on testimony of hoarding conditions, holes in the floor covered with plywood, and overcrowding. Despite having an income of more than \$46,000 and assistance offered by DSS, father had no plans to move out of his mother’s inappropriate home or to stop living with the juvenile’s mother when she was found to have acted inconsistently with her parental rights.

- **Domestic violence:** Unchallenged findings document father’s past domestic violence with the juvenile’s mother. Although he completed a domestic violence program, he then had domestic violence incident involving his own mother.
- **Dissent:** The findings are insufficient to support the conclusion that father acting inconsistently with his parental rights, and the findings related to domestic violence and substance use are unsupported by the evidence. The majority sets a low bar in this case that is contrary to the Court’s precedent and “seriously threatens the stability of families throughout the state” who are facing financial constraints. Dissent ¶ 42. There is no evidence of father’s willful conduct evidencing his intent to act inconsistently with his parental rights. Although the findings support a lack of safe and stable housing, living in poor housing conditions is insufficient to conclude a parent acted inconsistently with their parental rights. There was no evidence better housing options were available to respondent such that the majority’s characterization of father choosing to live in the unsafe environment is misplaced.

[In re N.Z.B.](#), 2021-NCCOA-345

**Held: Vacated and Remanded**

- **Facts:** The juvenile was adjudicated as a dependent juvenile. At a permanency planning hearing, the court determined the mother was unfit for care, custody, and control of the child and had acted inconsistently with her constitutional rights to care, custody, and control of her child. Guardianship was ordered to the paternal grandmother. Mother appealed, challenging the lack of an evidentiary standard applied to the court’s determination about mother’s constitutional rights as a parent and that the evidence did not support the conclusion. Mother also raised a UCCJEA argument.
- **Standard of review** of whether a parent has acted inconsistently with their constitutionally protected status de novo.
- The determination of a parent’s constitutionally protected status must be made by clear, cogent, and convincing evidence. There is not bright line rule for making that decision; instead, it requires a fact-specific inquiry by examining the parent’s conduct and intentions toward the child. The order did not state what standard was applied, nor did the court state the standard in open court. The case is vacated and remanded for the application of the clear and convincing standard. Because it is vacated, the appellate court declined to hear mother’s remaining arguments.
- **Author’s Note:** Mother also challenged UCCJEA subject matter jurisdiction, which the appellate court did not address since it vacated the trial court’s permanency planning order. On remand, the district court should make findings addressing its jurisdiction under the UCCJEA. This opinion does not address the record re: UCCJEA jurisdiction. Note that the N.C. Supreme Court has held that the trial court is not required to make specific findings of fact showing it has jurisdiction under the UCCJEA so long as the record reflects that jurisdiction exists. See *In re A.S.M.R.*, 375 N.C. 539 (2020); *In re L.T.*, 374 N.C. 567 (2020).

## Appealable Order

[In re A.L.](#), 2021-NCCOA-245 (motion for rehearing granted, 10/8/2021)

### **Held: Dismissed without prejudice**

- **Facts:** In 2019, the juvenile was adjudicated neglected and at initial disposition was placed in DSS custody. At a permanency planning hearing in September 2020, custody with DSS continued, and guardianship was identified as the primary permanent plan (this author believes with reunification as a secondary plan). In November 2020, the court ordered guardianship and waived further hearings. In December, mother filed her notice to preserve the appeal of the permanency planning order. In January, mother filed notice of appeal to the court of appeals.
- G.S. 7B-1001(a)(5)(a) authorizes an appeal of a permanency planning order eliminating reunification as a permanent plan when certain circumstances are satisfied. Mother met the criteria that requires a written notice preserving her right to appeal. The notice of appeal to the court of appeals was filed before the expiration of the 65-day time period for a TPR to be filed. The appeal is premature and untimely. Mother did not file a writ of certiorari.
  - **Author's note:** the opinion does not discuss G.S. 7B-1001(a)(4), which authorizes an appeal of a final order that changes legal custody of the juvenile (excluding a nonsecure custody order).

## Termination of Parental Rights

### Subject Matter Jurisdiction

No Single Court Requirement with Underlying A/N/D Action

[In re M.J.M.](#), 2021-NCSC-100

### **Held: Affirmed**

- **Facts:** This is a private TPR. The petitioner resides in and filed the TPR in Robeson County. She is the legal guardian of one child pursuant to an underlying A/N/D action brought in Wake County, and a person with whom that juvenile and her sibling have continuously resided with for 2 years immediately preceding the filing of the TPR petition. After being served with the TPR petition, mother did not file an answer. Mother was represented by counsel and a continuance was granted upon mother's request. The TPR was granted and mother appeals challenging subject matter jurisdiction in the TPR involving the juvenile for whom there was an underlying neglect action and the court's failure to appoint a GAL for the juveniles.
- Subject matter jurisdiction can be raised for the first time at any time, including on appeal, and is a conclusion of law that is reviewed de novo. Relying on *In re A.L.L.*, 376 N.C. 99 (2020), subject matter jurisdiction in a TPR is conferred on the district court through the criteria of G.S. 7B-1101, which does not depend on the existence of an underlying A/N/D action or mandate the filing to be in a single court. When the requirements of G.S. 7B-1101 are met in one county, that county has jurisdiction even if an A/N/D action is pending in another county.

UCCJEA: Findings

[In re K.N.](#), 2021-NCSC-98

### **Held: Affirmed**

- **Facts:** The juveniles were placed in nonsecure custody in 2017 and were adjudicated neglected in 2018. In 2018, the respondent parents moved to Michigan and remained there. In late 2018,

DSS filed a TPR petition. A court hearing was held in 2019, where both parents were present. The TPR was granted and father appeals, challenging a lack of subject matter jurisdiction because the court did not make a finding that it has subject matter jurisdiction under G.S. 50A-201 (the UCCJEA) as required by G.S. 7B-1101. Father also appealed the grounds of neglect and failure to make reasonable progress, arguing the court did not consider post-petition evidence of his circumstances up to the date of the TPR. The opinion affirms the TPR identifying the evidence and findings that included post-petition evidence.

- G.S. 7B-1101 addresses jurisdiction in a TPR case. The trial court is not required to make an explicit finding that it has jurisdiction under the UCCJEA, but the record must show that the jurisdictional requirements of the UCCJEA were met when the court exercised jurisdiction. The record showed that although parents moved to Michigan, the children's home state is North Carolina as the children lived with their foster parents in NC for more than 6 consecutive months immediately before the TPR petition was filed.

### Standing, Venue, Verification, UCCJEA: Out-of-State Safety Resource

#### In re M.R.J., 2021-NCSC-112

##### **Held: Affirmed**

- Facts: DSS received a report of suspected child neglect. During the assessment, mother agreed to a safety resource in Wake County but then moved her child to her mother (maternal grandmother) in South Carolina. DSS filed a petition alleging neglect while the child was living in South Carolina, although he was visiting a potential safety resource in Wake County. After the petition was filed, the juvenile was placed in the safety resource in Wake County. The juvenile was adjudicated neglected. DSS filed a motion to TPR, which was ordered on the grounds of neglect and failure to make reasonable progress to correct the conditions leading to the juvenile's removal (G.S. 7B-1111(a)(1) and (2)). Mother appeals, challenging the court's subject matter jurisdiction, raising standing, verification of the petition, and the UCCJEA as issues.
- Subject matter jurisdiction is a question of law that is reviewed de novo and may be raised at any time. The appellate court presumes a trial court properly exercises its jurisdiction unless the party challenging jurisdiction proves otherwise.
- Wake County DSS had standing to file the petition as it had legal custody of the juvenile; the court had subject matter jurisdiction in the underlying neglect case such that its orders were valid. As previously held in *In re A.P.*, 371 N.C. 14 (2018), the definition of "director" under G.S. 7B-101(10) does not impose a geographical limit on which county director may file a petition to invoke the court's jurisdiction. The language of "a county director" (vs "the county director") does not limit the DSS director to a county where the juvenile resides or is found. The statute addressing residency for social services purposes, G.S. 153A-257(a) also does not limit the trial court's subject matter jurisdiction as the venue statute, G.S. 7B-400, refers to G.S. 153A-257 and states the juvenile's absence from his home due to a protection plan during the DSS assessment does not change the original venue when it is necessary to subsequently file a petition.
- Venue is not jurisdictional but instead may be waived if an objection is not timely raised in the trial court. Mother waived any improper venue claim. Additionally, Wake County was the proper venue; the petition alleged that mother is a resident of Wake County and the child was visiting in Wake County and was therefore present in the county when the petition was filed.

- The petition was properly verified before a notary by the social worker, who was acting as the director's authorized representative.
- The court must comply with the UCCJEA to have subject matter jurisdiction in A/N/D and TPR actions. There was no home state at the time the neglect petition was filed. South Carolina was not the juvenile's home state as he had resided there for 131 days and not six consecutive months (G.S. 50A-102(7)). At the time the juvenile was placed in South Carolina, he was not six months old. By the time he was six months old, he had not resided in any one state with a parent or person acting as a parent.
- North Carolina had jurisdiction based on significant connection/substantial evidence under G.S. 50A-201(a)(2). The significant connection and substantial evidence existed with mother's and her older child's residence in NC (rather than mere presence), history with CPS in NC (including the report regarding this juvenile), identification by mother of 2 safety resources in NC, her probation in NC, and the juvenile's birth in and living in NC prior to his safety placement in SC.
- Specific findings of fact demonstrating UCCJEA jurisdiction are not required, but the record must show the requirements for jurisdiction were satisfied when the court exercised its jurisdiction. The record reflects the jurisdictional requirements of the UCCJEA were satisfied.

#### Standing

[In re Z.G.J.](#), 2021-NCSC-102

**Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- Facts: The Juvenile was adjudicated neglected and abused. DSS filed a TPR petition, which was verified by the DSS social worker. The petition stated "[t]he petitioner is Toia Johnson, a social worker employed by the Iredell County Department of Social Services." Sl.Op. ¶14. The DSS address was listed and G.S. 7B-1103(a)(3) was identified as the basis for standing by a DSS with custody of the juvenile through a court order. The custody order was attached to and incorporated in the petition. The court ordered the TPR on all four grounds alleged. Mother appeals, challenging standing and thus subject matter jurisdiction as well as the grounds. This summary focuses on standing, where mother argues the petition was filed in the social worker's individual capacity such that she did not have standing.
- Standing is jurisdictional, and the party challenging the court's jurisdiction has the burden of showing the court did not properly exercise jurisdiction.
- Standing in a TPR is set forth at G.S. 7B-1103, and subsection (a)(3) authorizes a TPR to be filed by a county DSS who has custody of the juvenile through a court order. Reading the allegations as a whole, the social worker identified herself as an employee of the DSS, listed the DSS address, and alleged standing under G.S. 7B-1103(a)(3). It is clear the social worker filed the TPR petition in her capacity as the representative of DSS. Mother did not meet her burden of proving otherwise.

#### Contents of Petition

[In re S.C.L.R.](#), 2021-NCSC-101

**Held: Affirmed as to mother; Reversed as to father**

**Concur in part, Dissent in part (Earls, J., joined by Newby, J.)**

- Facts: Petitioners were custodians pursuant to a 2017 Chapter 50 custody order. The juvenile had been in their care since the juvenile's discharge from the hospital after birth. The TPR was

granted and both parents appealed. They argued that the court lacked subject matter jurisdiction because the TPR petition did not comply with G.S. 7B-1104(2) in that it failed to allege the petitioners had standing under G.S. 7B-1103.

- The allegations were sufficient to comply with G.S. 7B-1104(2) and there is no dispute that the petitioners had standing under G.S. 7B-1103(a)(5) – a person the juvenile has continuously resided with for 2 years immediately preceding the filing of the TPR petition. The petition included the petitioners’ names and address and alleged the petitioners had custody of the juvenile through a 2017 court order and that the child resides with the petitioners. The civil custody order finds the juvenile was residing with the petitioners since birth. The TPR was initiated more than 2 years after the civil custody order was entered.
  - Author’s Note: Effective October 1, 2021, that statute was amended to reduce the time period to 18 months (from 24 months).

## Representation

GAL for Juvenile

In re M.J.M., 2021-NCSC-100

### **Held: Affirmed**

- Facts: This is a private TPR. The petitioner resides in and filed the TPR in Robeson County. She is the legal guardian of one child pursuant to an underlying A/N/D action brought in Wake County, and a person with whom that juvenile and her sibling have continuously resided with for 2 years immediately preceding the filing of the TPR petition. After being served with the TPR petition, mother did not file an answer. Mother was represented by counsel and a continuance was granted upon mother’s request. The TPR was granted and mother appeals challenging subject matter jurisdiction in the TPR involving the juvenile for whom there was an underlying neglect action and the court’s failure to appoint a GAL for the juveniles.
- G.S. 7B-1108 addresses when a GAL is appointed for a juvenile in the TPR proceeding. A GAL must be appointed when a respondent files an answer/response denying a material allegation. Here, mother did not file an answer. The court has discretion to appoint a GAL under G.S. 7B-1108(b). Here, a GAL was not appointed – no party moved for a GAL appointment or objected to the lack of a GAL. The issue was not preserved for appeal. If the issue had been preserved, the record does not show the court misapprehended the law by referring to there not being a GAL because an answer was not filed and did not abuse its discretion when proceeding without further delay and hearing that mother’s only evidence she was offering was her own testimony.

GAL for Parent

In re M.S.E., 2021-NCSC-76

### **Held: Affirmed**

- Facts: Two juveniles were adjudicated neglected based on circumstances created by mother’s untreated mental health and substance use issues and housing instability. Mother continued to use marijuana and cocaine and did not submit to the majority of required drug screens. She did not comply with recommendations for mental health and substance use treatment. Mother did attend some parenting classes and showed improvements in her interactions with the children. Mother had a psychological assessment that showed she had borderline intellectual functioning and recommended a support person for assistance with parenting, a rep payee, review of

written documents with her to ensure she understood. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.

- **Rule 17 GAL:** Under G.S. 7B-1101.1(c), on the motion of a party or its own motion, the trial court may appoint a Rule 17 GAL to a parent who is incompetent. Incompetency is defined at G.S. 35A-1101(7). Incompetency is more than a mental health diagnosis and requires an examination of the parent's courtroom behavior, how they express themselves, and whether they appear to understand what is happening and can assist their attorney. The court must inquire into a litigant's competency when circumstances that are brought to the court's attention raise a substantial question as to that litigant's competency. The standard of review on whether there is a substantial question of incompetency and whether the parent is incompetent is an abuse of discretion.
  - Although mother had an intellectual disability requiring supports and services, and the social worker noted at a prior hearing that mother doesn't understand why the case is happening and why she needs services, there is an appreciable amount of evidence to show mother was not incompetent at the time of the TPR hearing. The evidence shows mother's understanding of her history of homelessness and need for the children to have safe and stable housing, her establishing supportive relationships with others, and exercising appropriate judgment at a CFT meeting (held earlier in the case) when requesting the children remain in their placement because she wasn't ready. Mother attended all the hearings allowing the trial court to observe and evaluate her capacity to understand the proceedings. At the TPR hearing, mother testified in a clear and cogent manner and showed her understanding of the proceedings. There was no abuse of discretion in not conducting an inquiry into mother's competency.

#### Attorney Motion to Withdraw

[In re T.A.M.](#), 2021-NCSC-77

**Held: Affirmed**

**Concur in part, Dissent in Part (Ervin, J., joined by Hudson, J. and Earls, J.)**

- **Facts:** The juveniles were adjudicated neglected due to circumstances created by their parents, domestic violence, substance use, and mental health issues. The parents had done well with their case plan services for a while but then stopped doing so. The primary permanent plan was changed to adoption and DSS filed TPR petitions. Father's location was unknown, resulting in his service by publication. His attorney moved to withdraw based on father's failure to maintain contact with her. The motion was granted, and the hearing was continued. Father appeared at the next scheduled hearing and his same attorney was reappointed to represent him. At the next scheduled TPR hearing, the attorney filed a second motion to withdraw based on father's failure to maintain contact with her and her lack of knowledge about his wishes. Father did not appear at the hearing, and the court granted the attorney's motion to withdraw after engaging in a colloquy with the attorney, who advised the court that she had spoken with father that day and told him if he did not appear at the hearing, she would withdraw and the case would proceed without him and father consented to her withdrawal. The motion was granted, and the TPR was also granted. Father appeals, challenging the court's decision to allow his attorney to withdraw. Mother appealed, challenging the best interests determination. This summary focuses on father's appeal.

- The standard of review for a motion to withdraw is an abuse of discretion, which is when “the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have the result of a reasoned decision.” Sl.Op. ¶120. The appellate court inquiry is “whether the ruling is unreachable by a reasoned decision, see *White [v. White]*, 312 N.C. [770], 777 [1985], which necessarily requires appellate courts to consider broadly the circumstances which may render the ruling justifiable.” *Id.*
- There was no abuse of discretion. The trial court advised father of his responsibility to attend all the TPR hearings, and in the underlying neglect action advised him to maintain contact with his attorney and that if he failed to do so, the attorney may ask the court to be permitted to withdraw such that the case would proceed without his having an attorney represent him. After the TPR petition was filed, the court found that DSS made diligent efforts to locate father, who was actively trying to conceal his whereabouts, and ordered service by publication. The court continued the attorney’s appointment at that time. When the court reappointed his attorney (after the first motion to withdraw was granted), the court again advised father of his responsibility to maintain contact with his attorney and failing to do so may result in another motion to withdraw such that father would be unrepresented when the case proceeded. The attorney filed a second motion to withdraw and made a good faith effort to serve him with the motion and notice of the hearing on the motion. The court granted father’s motions to continue.
- These cases are fact-specific, and this case is distinguishable from *In re K.M.W.*, 376 N.C. 195 (2020) based on father’s actions and his attorney’s execution of her responsibilities. Unlike *K.M.W.* where mother appeared at the hearing and the court failed to determine whether mother was knowingly and voluntarily waiving her right to counsel, father did not appear at the TPR hearing. Father did not make efforts to follow the court’s advisement to attend all the hearing, and he verbally consented to his attorney’s withdrawal.
- Overburdened trial courts and permanency. A parent could successfully manipulate the judicial system to delay a TPR and thwart the purpose of the Juvenile Code in finding permanency for a child at the earliest possible age by repeatedly failing to communicate with their attorney, avoid communications from DSS and other parties, and fail to attend hearings. The court is not required to track down a parent. Here, the court respected father’s statutory right to counsel by giving him reasonable opportunities to participate and be represented by counsel in the TPR proceeding. The court “reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of parent.” Sl. Op. ¶132.
- Dissent: The majority’s opinion is inconsistent with the holding in *In re K.M.W.*, 376 N.C. 195 (2020) and goes against the principle of stare decisis. There has been no attempt to overrule *K.M.W.*, based on a “grievous wrong.” Dissent ¶61. The facts are similar. The trial court erred in granting the attorney’s motion to withdraw without first ensuring proper notice had been provided to father and without conducting a sufficient inquiry into the reasons for the withdrawal or extent father understood his attorney’s request. There was no inquiry into the nature and extent of the attorney’s efforts to serve the motion on father or to ensure father “understood the implications of the action that [counsel] proposed to take or to protect [respondent-father’s] statutory right to the assistance of counsel.” Dissent ¶155 (quoting *In re K.M.W.*). The court did not ensure the father was provided with “reasonable notice” of the

attorney's motion to withdraw as required by G.S. 7B-1101.1(a1) or *In re K.M.W. Id.* The motion and notice to father was sent to an address where father indicated he was not receiving mail. Father's conduct is not a forfeiture of counsel. The purpose of the Juvenile Code is also to "assure fairness and equity," "protect the constitutional rights of juveniles and parent," and "prevent the unnecessary or inappropriate separation of juveniles from their parents." Dissent ¶163.

### Ineffective Assistance of Counsel

#### [In re B.S., 2021-NCSC-71](#)

##### **Held: Affirmed**

- **Facts:** Respondent father's parental rights were terminated on several grounds. Father appeals, raising for the first time on appeal ineffective assistance of counsel warranting reversal of the ground that he failed to legitimate or establish paternity for his child (G.S. 7B-1111(a)(5)). He argues his attorney failed to advise him of the need to execute an affidavit of paternity or explained how to establish paternity as ordered by the court.
- Parents who are indigent have the right to court-appointed counsel in a TPR proceeding. G.S. 7B-1101.1. To give this statutory right meaning, the attorney must provide effective assistance. Ineffective assistance of counsel requires the respondent show that (1) the counsel's performance was deficient and (2) the deficiency was so serious that it deprived him of a fair hearing – meaning there is a reasonable probability that but for the deficiency there would have been a different result.
- Father did not meet his burden to prove ineffective assistance of counsel. A parent will not be protected from a TPR because of an absence of knowledge of his parental duties, and any alleged failure by an attorney to advise a parent-client of their inherent duty to parent is not prejudicial. There is no reasonable probability that any alleged deficiency by the attorney would have affected the outcome of the TPR.

### Adjudicatory Hearing

#### Parents Rights vs Child's Best Interests

#### [In re D.C., 2021-NCSC-104](#)

##### **Held: Affirmed**

- **Facts:** Father appeals a TPR order, arguing the court applied a misapprehension of law when holding the adjudicatory hearing by placing child's interests over parent's constitutionally protected rights and treating the child and parent as adversaries. The court stated at the conclusion of the adjudicatory hearing, "we're hear for this child." Sl.Op. ¶124.
- A TPR consists of 2 stages: adjudication and disposition. A parent's constitutional rights prevails over the child's best interests at the adjudicatory stage. The child's best interests are the polar star at disposition. The court does not proceed to disposition unless it determines one or more TPR grounds exists. When reading the pre-trial order and the court's statement at the conclusion of the adjudicatory hearing in its entirety, the court recognized the parents' constitutionally protected rights and that disposition would not occur until a TPR ground was proved, that it was moving to the dispositional stage, and there the child's best interests would be paramount.

## Motion to Continue

[In re D.J.](#), 2021-NCSC-105

### **Held: Affirmed**

- Facts: Mother, through counsel, requested a continuance of the TPR adjudicatory hearing so that a witness from Lincoln Community Health Center could testify. The motion was denied but the court ruled the witness could testify by phone or WebEx and allowed the attorney to call the witness. The attorney made an offer of proof that the witness was involved with mother, see her twice a month, and connects mother with services mother receives at the health center. DSS clarified there was no dispute the mother received services at the health center and that DSS had contact with the health center including the DSS worker's unsuccessful attempts to obtain records from the witness. Mother's attorney heard from the witness that her employer would not allow her to testify. After the conclusion of DSS's case, the motion to continue was renewed and denied. Mother's rights were terminated, and she appeals (she also raised an ICWA issue on appeal).
- A motion to continue is reviewed for an abuse of discretion, unless it raises a constitutional right. Mother did not raise a constitutional right such that any argument on that issue is waived. A denial of a motion to continue requires a showing that the denial was erroneous and caused prejudice.
- The court is guided by the Juvenile Code, which allows for a continuance beyond 90 days of the petition being filed only in extraordinary circumstances. Continuances are disfavored, and the party seeking the continuance has the burden of proving there are sufficient grounds for the continuance. The court considers whether granting or denying the continuance furthers substantial justice.
- Mother was not prejudiced by the denial. Mother's offer of proof was vague as it does not say what the testimony would be. There was no dispute that mother received some services at the health center. The offer of proof does not address the significance of the witness's potential testimony and any prejudice that would arise.

## Motion to Continue; Motion for Substitute Counsel

[In re M.J.R.B.](#), \_\_\_ N.C. \_\_\_ (June 11, 2021)

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

- Facts: Three juveniles were adjudicated neglected and dependent and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. Prior to the TPR hearing and outside of the presence of his attorney and GAL, father requested his counsel and GAL be replaced and further requested a 2-hour continuance of the hearing so he could take his medication. His requests were denied. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- Motion to Substitute Counsel: The trial court did not abuse its discretion in denying father's motion to substitute counsel when the request was made outside of the attorney's and GAL's presence, there was good cause to deny the request, and the motion was not renewed when counsel did appear for the hearing.

- Motion to Continue: There was no abuse of discretion in denying the motion and father was not prejudiced by the denial of the motion to continue.

#### Evidence at Hearing

##### [In re Z.G.J.](#), 2021-NCSC-102

###### **Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- Facts: The juvenile was adjudicated abused and neglected. DSS filed a TPR petition alleging 4 grounds. The social worker was the only witness at the TPR hearing, testifying she adopted the allegations in the TPR petition as her testimony. The petition was entered in evidence without objection, and no cross-examination of the social worker was conducted. At disposition, mother testified. The court granted the TPR on all 4 grounds. Mother appeals, arguing the court relied on the pleading as its only evidence and challenging all 4 grounds.
- G.S. 7B-1109(e) requires the trial court to “take evidence [and] find the facts” necessary to support its determination of whether the alleged grounds for termination exist. Sl.Op. ¶18. The petitioner has the burden of proof by clear, cogent, and convincing evidence.
- The trial court conducted a proper adjudicatory hearing. Although the adjudicatory hearing was brief, it consisted of oral testimony, which distinguishes this case from court of appeals’ decisions that reversed juvenile orders that were based solely on documentary evidence. As the court of appeals recognized in *In re A.M.*, 192 N.C. App. 538 (2000), there must be some oral testimony but extensive testimony is not required; the trial court may continue to rely on properly admitted documentary evidence. The oral testimony reaffirmed under oath the allegations from the TPR petition, and mother chose not to cross-examine the only witness. There was no error when the court relied on the testimony that adopted the allegations of the TPR petition.

#### Adjudication

##### Standard of Proof: Announcement Required

##### [In re M.R.F.](#), 2021-NCSC-111

###### **Held: Reversed**

- Facts: A TPR was ordered and father appeals, challenging the adjudication as the court did not state the standard of proof it applied at adjudication.
- In examining G.S. 7B-1109(f) and relying on *In re B.L.H.*, 376 N.C. 118 (2020), the trial court is required to announce the standard of proof it is applying on the record in a TPR adjudication. The announcement requirement occurs when the court either announces the “clear, cogent, and convincing” evidence standard in its findings made in open court or in the findings of fact in the written TPR order. The court failed to announce the standard in either open court or the written order.
- When there is competent evidence to support a finding for a TPR ground, the appropriate remedy is to vacate and remand for new findings and conclusions based on the clear, cogent, and convincing standard. In this case, no sufficient evidence existed for any of the grounds. Reversed without remand.

## Neglect

### In re A.C., 2021-NCSC-91

#### **Held: Affirmed**

- Facts: In 2018, the juvenile infant was adjudicated neglected after being born and placed in the NICU for possible drug exposure and respiratory distress and issues of domestic violence. In 2019, DSS filed a TPR motion, which was granted. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect which involves a parent not providing proper care, supervision, or discipline or a juvenile who lives in an injurious environment. When there is a long period of separation, neglect requires prior neglect and a likelihood of repetition of neglect, based on the circumstances at the time of the TPR hearing.
- Detailed findings of fact are more than a mere formality or ritual, but instead are designed “to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.” Sl.Op. ¶29.
- Recitations of a witness’s testimony are not findings of fact. Several findings were nothing more than recitations of the testimony of different witnesses when using the words, the witness “testified,” “contended,” or “indicated.” Sl.Op. ¶12. The court did not evaluate the credibility of the witnesses to resolve any conflicts in the evidence. Those “findings” are disregarded on appellate review. A court may describe a witness’s testimony so long as it makes its own findings to resolve material disputes. The remaining findings are sufficient and allow for appellate review. Findings that are not supported by the evidence are disregarded on appellate review.
- Judicial notice of findings of fact from prior orders, even when based on a lower evidentiary standard, is permissible as the trial court is presumed to disregard incompetent evidence and rely on competent evidence. However, a court may not rely solely on prior orders and reports but instead must receive some oral testimony at the hearing so as to make an independent determination about the evidence presented. At the TPR adjudicatory hearing, the court took judicial notice of prior orders and received oral testimony and made independent factual determinations based on the admitted evidence.
- The trial court evaluates the credibility of the evidence and draws reasonable inferences from that evidence. As the fact finder, the trial court has authority to not accept mother’s justifications for missing visits.
- Although mother made some progress in her case plan, her progress was extremely limited. Mother continued her involvement with the juvenile’s father, where there was domestic violence, and when he did not complete domestic violence counseling; minimized her parenting deficits; was dependent on others for housing and finances; missed 3 months of visits; and did not provide any financial support for her child. The court did not err in determining there was a likelihood of future neglect.

### In re M.Y.P., 2021-NCSC-113

#### **Held: Affirmed**

- Facts: In 2019, the juvenile was adjudicated neglected and dependent based on circumstances resulting from domestic violence, mental health issues, substance use, improper supervision, and lack of stable housing. DSS filed a TPR motion, which was granted on the ground of neglect.

Father appeals, challenging the grounds and best interest determination. This summary focuses on the grounds.

- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or a juvenile who lives in an injurious environment. When there is a long period of separation, neglect requires prior neglect and a likelihood of repetition of neglect, based on the circumstances at the time of the TPR hearing.
- Challenged findings of fact that are not supported by the evidence are disregarded on appellate review. The challenged findings that are unsupported by the evidence are harmless error when the remaining findings support the conclusion of neglect.
- The juvenile was previously neglected as shown by the prior juvenile neglect adjudication, based on father's stipulations, that was not appealed. A neglected juvenile adjudication is about the child's circumstances, not the fault or culpability of the parent.
- "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." Sl. Op. ¶18. Father's case plan addressed the reasons for the juvenile's removal, including services for domestic violence and housing. Father did not make progress on those issues. Although visitation was ordered, father did not consistently visit with his child. The court did not rely solely on father's case plan. Father tested positive for drugs and file to start substance use treatment. These findings support the conclusion.

In re K.B., 2021-NCSC-108

**Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected (for the 3<sup>rd</sup> time). In 2020, DSS filed a TPR motion, which was granted. Mother appeals, challenging the grounds. Father appeals the best interests determination. This summary focuses on mother's appeal.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or a juvenile who lives in an injurious environment. When there is a long period of separation, neglect requires prior neglect and a likelihood of repetition of neglect, based on the circumstances at the time of the TPR hearing. Neglect requires some physical, mental, or emotional impairment or substantial risk of such impairment to the children.
- Failure to make progress on a case plan is indicative of a likelihood of future neglect. The unchallenged findings show mother did not make adequate progress on her case plan at the time of the TPR hearing.
- The challenged findings are supported by clear, cogent, and convincing evidence and support the conclusion of neglect. The court's determination of a likelihood of future neglect was based on evidence at the adjudicatory hearing (DSS social worker testimony) and resulting findings about mother's failure to engage in/complete substance use and mental health treatment, and the substantial risk of harm to the children because of mother's failure to understand the safety concerns of the children when in her unsupervised care while she uses substances, the parentified behaviors of the older child to her younger sibling, the children's mental health diagnoses and need for treatment, and mother's withholding of consent for one child's psychotropic medications.

[In re M.A.](#), 2021-NCSC-99

**Held: Affirmed**

- **Facts:** In 2015, the juvenile was adjudicated neglected due to circumstances involving housing instability and domestic violence. Mother made some progress on her case plan, including finding stable housing for a period of 3 years. At the time of the TPR, she had moved to a studio apartment, with a roommate, and was not on the lease. She had not informed DSS of her move until 5 months later and did not provide her roommate's name until the TPR hearing. She had not satisfactorily completed DV treatment, delayed obtaining her parental capacity assessment for over a year, and did not follow through on all the recommendations. Mother also was not always present at her home for unannounced visits by the dss social worker when mother had unsupervised visitation with her child. The court granted the TPR and mother appeals, challenging the grounds. The appeal focuses on neglect and the likelihood of future neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or a juvenile who lives in an injurious environment. When there is a long period of separation, neglect requires prior neglect and a likelihood of repetition of neglect, based on the circumstances at the time of the TPR hearing.
- The challenged findings are supported by competent evidence including testimony from the dss social worker and psychologist who completed the parental capacity assessment and the assessment. Unchallenged findings also support the court's conclusion of neglect.
- The court may make reasonable inferences (not conjecture) of the evidence presented, which it did in this case. The evidence of Mother's underreporting of DV and inability to articulate what she learned in DV treatment supported the court's reasonable inference that mother was unable to protect herself or her child from being in a DV situation.
- Failure to make progress on a case plan is indicative of a likelihood of future neglect, and compliance with a case plan does not preclude a determination of neglect. Although mother made some progress on her case plan, she did not address the conditions of housing and DV that led to the child's adjudication and removal from her home. At the time of the TPR hearing, mother's housing was unstable, even though she had had a period of housing stability prior to that. Although mother had unsupervised visits before the TPR hearing, the TPR order did not continue those unsupervised visits – the TPR order was not internally consistent. Unsupervised visits approved when mother was living at a different address does not preclude a court from later determining there is a likelihood of future neglect when mother's circumstances changed.

[In re Z.G.J.](#), 2021-NCSC-102

**Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- **Facts:** The juvenile was adjudicated abused and neglected. DSS filed a TPR petition, alleging 4 grounds. The TPR hearing was held 13 months after the TPR petition was filed. The only evidence at adjudication was the social worker's testimony that reaffirmed the allegations in the TPR petition. The TPR was granted on all 4 grounds. Mother appeals, raising standing, an improper adjudicatory hearing, and the 4 grounds. This summary focuses on the grounds, where mother argues the evidence did not support the findings, and the findings did not support the conclusions.

- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. The only evidence DSS offered was the DSS social worker's testimony adopting the allegations in the TPR petition. Since the TPR hearing was conducted 13 months after the TPR petition was filed, there was no evidence about mother's fitness to care for her child at the time of the TPR hearing. Any dispositional evidence that was offered cannot be used to support an adjudication. The court was unable to conclude the probability of repetition of neglect was likely given the lack of evidence on this issue.

In re L.H., 2021-NCSC-110

**Held: Affirmed**

- Facts: DSS has an extensive history with the family, including two prior actions where the juveniles reunified with their mother. The juveniles were adjudicated neglected and abused after a 3<sup>rd</sup> petition was filed. Findings included a history of mother exposing her children to men who sexually abused them; mother making progress after her children were removed; the children returning to mother's care; and the cycle of abuse repeating. DSS filed a TPR motion, which was granted. Mother appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect which involves a parent not providing proper care, supervision, or discipline or a juvenile who lives in an injurious environment. When there is a long period of separation, neglect requires prior neglect and a likelihood of repetition of neglect, based on the circumstances at the time of the TPR hearing.
- The findings establish there was a likelihood of future neglect based on services mother receives when DSS is involved, but mother's continued failure to protect her children or take responsibility for her role in her children's abuse and neglect. Mother has cognitive limitations and a dependent personality, which hinders her judgment about her relationships and the impact of those relationships on her children. The appellate court will not reweigh evidence and place greater weight on testimony as that is the duty of the trial court. The findings of the impact of mother's limitations are supported by the testimony of the doctor who evaluated mother 3 times to assess her parenting capacity and ability to protect her children. The court's findings were not based on speculation.

In re M.S.E., 2021-NCSC-76

**Held: Affirmed**

- Facts: Two juveniles were adjudicated neglected based on circumstances created by mother's untreated mental health and substance use issues and housing instability. Mother continued to use marijuana and cocaine and did not submit to the majority of required drug screens. She did not comply with recommendations for mental health and substance use treatment. Mother did attend some parenting classes and showed improvements in her interactions with the children. Mother had a psychological assessment that showed she had borderline intellectual functioning and recommended a support person for assistance with parenting, a rep payee, review of written documents with her to ensure she understood. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent not providing proper care, supervision, or discipline or the juvenile living in an environment injurious to their welfare. When the parent and juvenile have been separated for a significant period of

time, there must be a showing of past neglect and, which may include a neglect adjudication, and a likelihood of future neglect based on evidence of changed conditions at the time of the TPR hearing.

- “The ‘trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.’ ” In re M.S.E. 1021-NCSC-76 ¶31. The trial court made the required facts to resolve the dispute, and those facts were supported by clear, cogent, and convincing evidence. Further, unchallenged findings are binding on appeal.
- Although findings showed mother obtained safe and appropriate housing, her progress on the rest of her case plan, which addressed engaging in substance use and mental health services, completing drug screens, taking medication as prescribed, and improving her parenting including understanding her son’s mental health needs, was inadequate. The findings support the conclusion of a likelihood of future neglect.

### Neglect by Abandonment/Dependency

In re D.T.H., 2021-NCSC-106

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

- Facts: In 2018, maternal grandparents filed the TPR petition. Maternal grandparents obtained permanent sole custody of the child through a Chapter 50 civil custody order entered in 2011. In 2013 the grandparents and child left the United States and lived in different countries until 2018 due to grandmother’s employment with the Department of Defense. After a hearing, the court terminated father’s parental rights. Father appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect which involves a parent not providing proper care, supervision, or discipline or a juvenile has been abandoned. Current neglect may be shown “without use of the two-part Ballard test [prior neglect and likelihood of future neglect] if a parent is presently neglecting their child by abandonment.” Sl.Op. ¶19. Here, the court did not need to make a finding about the likelihood of future neglect. Unlike G.S. 7B-1111(a)(7), there is not a determinative 6-month time period immediately preceding the filing of the TPR petition for a determination of neglect by abandonment.
- Neglect by abandonment involves a conduct by the parent that “demonstrates a ‘wilful neglect and refusal to perform the natural and legal obligations of parental care and support .... which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child’ as of the time of the termination hearing.” Sl. Op. ¶20.
- The findings that are unchallenged or are properly supported do not support the conclusion that father’s rights were subject to termination.
  - A recitation of testimony is not a proper finding of fact. The appellate court disregards challenged findings that are recitations of testimony.
  - Evidence taken at the dispositional hearing cannot be considered for the adjudicatory phase of the TPR proceeding. The Rules of Evidence apply at adjudication and at disposition, the court may rely on evidence that is relevant, reliable, and necessary to determine the child’s best interests.
  - The record contains conflicting evidence about father’s contact with the child during the years prior to the TPR, including whether the grandparents placed obstacles to father’s attempts to contact his child. The trial court, not the appellate court, must resolve

disputed factual issues. The appellate court disregards a finding that does not resolve a material conflict. Reversed and remanded.

- G.S. 7B-1111(a)(7) authorizes a TPR for willful abandonment during the 6 months immediately preceding the filing of the TPR petition. There were no findings regarding father's conduct during that 6-month period. Additionally, the factual dispute in the record must be resolved by the trial court. Reversed and remanded.
- G.S. 7B-1111(a)(6) authorizes a TPR on the ground of dependency. Both prongs of dependency must be addressed: parent lacks (1) an ability to provide care or supervision and (2) the availability of alternative child care arrangements. There was no evidence addressing the second prong in the record. Reversed.

### Failure to Make Reasonable Progress

In re B.J.H., 2021-NCSC-103

#### **Held: Affirmed**

- Facts: In 2017, the juveniles were adjudicated neglected due to circumstances regarding substance use, mental health, and a lack of stable housing and employment. In 2019, they were placed in a potential adoptive placement and DSS filed a TPR motion. The TPR adjudication hearing was bifurcated after father made that motion. The adjudicatory hearing was held on February 7<sup>th</sup> and the dispositional hearing on June 15<sup>th</sup>. The TPR was granted, and parents appeal challenging the grounds.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground that a parent willfully left the child in foster care for 12 months immediately preceding the petition and failed to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness does not require the parent be at fault and may be found when a parent has a prolonged inability to improve their situation regardless of their good intentions. A parent's reasonable progress is considered up to the time of the TPR adjudicatory hearing.
- A TPR is a 2-stage process: adjudication and disposition. The court is not required to bifurcate the hearings into two separate stages but may hold separate adjudicatory and dispositional hearings. The court moves to the dispositional stage when the court concludes a ground exists at the adjudicatory stage. The court rendered its conclusion that grounds existed at the conclusion of the adjudicatory hearing. The period of a parent's progress up to the TPR hearing refers to the adjudicatory hearing when the 2 stages are bifurcated. To hold otherwise would preclude the court from scheduling bifurcated hearings on different dates or would require the court to hold a portion of the adjudicatory hearing for the final hearing date and is inconsistent with the statutory framework of G.S. 7B-1109 and -1110. At the dispositional hearing, mother did not seek to reopen the adjudicatory stage, which she would have had to do if she wanted the court to consider additional evidence for the adjudicatory stage. Additionally, progress a parent makes is not up to the date the TPR order is entered. G.S. 7B-1109(e) addresses the timing of the entry of the order to 30 days after the completion of the TPR hearing.
- Mother's challenged findings are supported by the evidence, and the finding supports the conclusion. The court made a reasonable inference that mother's failure to return a drug screen was a refusal to submit to drug screens; the lack of a request by DSS for drug screens in the 8 months before the TPR hearing does not undermine the finding that the mother had made no progress on her substance use at the time of the adjudicatory hearing; and the court's findings

that mother's progress on her case plan was extremely limited despite her completing parenting classes was not error. The time involved in this case supports the court's finding that mother's lack of reasonable progress was willful.

- The trial court has the responsibility to determine witness credibility, the weight to give their testimony, and the reasonable inferences to be drawn from that evidence. In response to father's challenge, the court believed the DSS social worker's testimony over that of father's regarding the completion (or not) of a substance use assessment. Judicial notice of prior permanency planning orders (PPO) (one of which said he completed substance use assessment) does not preclude the court from determining credibility in favor of the DSS social worker when resolving a conflict in the testimony. Findings in a PPO are not binding on a court at the TPR hearing given the different application of the Rules of Evidence and lower standard of proof at a permanency planning hearing. A court may take judicial notice of findings of facts in prior orders, including those with a lower standard, because the court is presumed to disregard any incompetent evidence and to not rely on that incompetent evidence. The appellate court gives the trial court deference when the trial court reconciles conflicting evidence, "including the assessment of its prior findings in a permanency planning order and the testimony of a live witness at the termination hearing" as part of the trial court's determination of witness credibility. Sl.Op. ¶143.
- A parent's (non)compliance with a judicial adopted case plan is relevant but is not determinative of the parent's reasonable progress in correcting the conditions. Father's refusal to sign the case plan does not preclude the trial court from assessing father's progress. The court's not ordering father to comply with the case plan or take remedial action also does not preclude a TPR under this ground. Under G.S. 7B-904(d1), the court *may* order the parent to take certain action, but the court is not required to make such an order. In its prior PPOs, the court made findings of father's progress (or lack of progress). See G.S. 7B-906.2(d). The findings support the conclusion that father's progress was not reasonable, and the evidence supported the findings.

#### In re M.R.F., 2021-NCSC-111

##### **Held: Reversed**

- Facts: Grandmother initiated a TPR on October 30, 2019. The TPR was granted on multiple grounds, and father appeals. One of father's arguments is that the juvenile's time period outside of the home under the ground of G.S. 7B-1111(a)(2) was not proved.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground that a parent willfully left the child in foster care or other placement outside the home for 12 months immediately preceding the petition and failed to make reasonable progress under the circumstances. A child's placement outside of the home must be pursuant to a court order.
- There was no evidence or findings that the juvenile was placed outside the home pursuant to a court order for the 12 months immediately preceding the filing of the TPR petition. The evidence was that the child was 6 years old, had been living with petitioner since the child was 13 days old, and that the child was the subject of DSS proceedings that resulted in grandmother having legal guardianship. The evidence did not show when the guardianship order was entered or whether the child lived with petitioner pursuant to a court order before the guardianship order was entered.

[In re A.S.D.](#), 2021-NCSC-94

**Held: Affirmed**

- **Facts:** A petition was filed in 2018, and the juvenile was adjudicated neglected and dependent in 2019. In 2020, DSS filed a TPR motion, which was granted. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground that a parent willfully left the child in foster care for 12 months immediately preceding the petition and failed to make reasonable progress under the circumstances. A parent’s willfulness is “established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.” Sl.Op. ¶10.
- The findings were supported by clear and convincing evidence and support the conclusion that mother failed to make reasonable progress. The court found mother had a significant substance abuse history and received inadequate treatment for that issue. Mother stipulated to the neglect petition allegations, which included her extensive history of polysubstance use; the DSS social worker testified to mother’s history and failure to complete the treatment; the psychological evaluation addressed mother’s history and refusal to take some drug screens. Unchallenged findings and mother’s admission at the TPR hearing support the finding that mother had a transient lifestyle.
- Although the court found mother had recent stability, it found that was not outweighed by her year of instability, which was a permissible inference the court could make. Although mother made some progress on her case plan just before the TPR hearing, the court acted within its authority to determine the improvements mother made were insufficient given the historical facts of the case.

[In re A.L.](#), 2021-NCSC-92

**Held: Affirmed as to TPR (remanded for ICWA inquiry)**

- **Facts:** Juvenile was adjudicated neglected based on circumstances created by mother’s substance use. Mother had unsuccessfully participated in 3 residential treatment programs, having failed to complete any of them. She sporadically attended outpatient services, admitted to using crack, and tested positive for cocaine. A TPR was initiated based on mother’s willfully leaving child in foster care for 12 months and failing to make reasonable progress to correct the conditions that led to the juvenile’s adjudication or removal. Mother did attend a 4<sup>th</sup> residential treatment program that she completed. She did not participate in outpatient treatment and had additional case plan requirements she did not complete. The TPR was granted, and mother appeals challenging the determination that she failed to make reasonable progress.
- Mother’s argument that she consistently sought treatment, relapses are not uncommon, and at the time of the TPR hearing she had been sober and was successfully participating in treatment for 7 months is without merit. The unchallenged findings of mother’s continued substance use and her consistent inability to successfully complete the majority of her inpatient treatment programs along with her failure to maintain sobriety for a meaningful period of time demonstrates extremely limited progress in correcting the conditions leading to the juvenile’s adjudication.

[In re Z.G.J.](#), 2021-NCSC-102

**Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- **Facts:** The juvenile was adjudicated abused and neglected. DSS filed a TPR petition, alleging 4 grounds. The TPR hearing was held 13 months after the TPR petition was filed. The only evidence at adjudication was the social worker's testimony that reaffirmed the allegations in the TPR petition. The TPR was granted on all 4 grounds. Mother appeals, raising standing, an improper adjudicatory hearing, and the 4 grounds. This summary focuses on the grounds, where mother argues the evidence did not support the findings, and the findings did not support the conclusions.
- **G.S. 7B-1111(a)(2) authorizes a TPR** on the ground that a parent willfully left the child in foster care for 12 months immediately preceding the petition and failed to make reasonable progress under the circumstances. A parent's progress is examined up to the time of the TPR hearing. Because there was no evidence about mother's circumstances at the time of the TPR hearing, the court cannot determine whether mother made reasonable progress.

[In re M.J.R.B.](#), \_\_\_ N.C. \_\_\_ (June 11, 2021)

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

- **Facts:** Three juveniles were adjudicated neglected and dependent and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. Prior to the TPR hearing and outside of the presence of his attorney and GAL, father requested his counsel and GAL be replaced and further requested a 2-hour continuance of the hearing so he could take his medication. His requests were denied. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- **G.S. 7B-1111(a)(2) authorizes a TPR** when a parent willfully left the children in foster care for 12 months and failed to make reasonable progress to correct the conditions the resulted in the children's removal.
  - Unchallenged findings of fact are binding on appeal. The unchallenged findings about mother's noncompliance with her case plan addressing substance use treatment, drug screens, a psychological assessment, a domestic violence assessment, medication monitoring, parenting classes, were sufficient to support the ground under G.S. 7B-1111(a)(2) for her 3 older children.
  - For the newborn, the court erred in granting the TPR under G.S. 7B-1111(a)(2) because the juvenile was only in foster care for 9 months, not 12 months as required by the statute.

Failure to Pay Reasonable Portion of Cost of Care

[In re A.P.W.](#), 2021-NCSC-93d

**Held: Affirmed**

- **Facts:** The juveniles were adjudicated neglected in 2017. After reunification was eliminated as a permanent plan, DSS initiated a TPR. In 2020, the court entered orders terminating the parents' rights. This summary focuses on mother's appeal, which challenges the court's failure to

including findings on her income, employment, or capacity for the relative time period such that a finding of willfulness is not supported.

- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay a reasonable portion of the child's care for a continuous period of 6 months immediately preceding the filing of the TPR petition/motion although physically and financially able to do so. The portion of the cost of care must be fair, just, and equitable based on the parent's ability/means to pay. Willfulness is a question of fact.
- Mother signed a voluntary support agreement (VSA) of \$112/month after demonstrating her ability to work based on periods of employment. Under G.S. 110-132(a3), a VSA has "the same force and effect as an order of support entered by that court, and shall enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases." Sl.Op. ¶43. Mother never sought to modify or nullify the VSA and paid nothing toward the cost of care during the determinative 6-month period. The VSA established mother's ability to financially support the children.

In re D.C., 2021-NCSC-104

**Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected and dependent and placed in DSS custody. In 2020, DSS filed a TPR petition, which was granted. The juvenile was in foster care for 34 months and the parents did not pay anything toward the cost of that care although having an ability to do so. The parents appeal, focusing on the lack of notice to the parents that they were obligated to pay such that their actions were not willful.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay a reasonable portion of the child's care for a continuous period of 6 months immediately preceding the filing of the TPR petition/motion although physically and financially able to do so. The cost of care is the amount it costs DSS to care for the child – foster care. The parent's portion must be fair, just, and equitable based on the parent's ability/means to pay.
- Relying on *In re S.E.*, 373 N.C. 360 (2020), parents have an inherent duty to support their children and the lack of a court order, notice, or knowledge of a requirement to pay is not a defense for a parent who has an obligation to pay reasonable costs. Ignorance is not a basis to say the failure to pay was not willful. The supreme court rejected respondents' argument to disavow *In re S.E.*, and instead adhered to and addressed the principle of *stare decisis*. The unchallenged findings should parents had the ability to pay and did not pay any amount.

In re Z.G.J., 2021-NCSC-102

**Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- Facts: The juvenile was adjudicated abused and neglected. DSS filed a TPR petition, alleging 4 grounds. The TPR hearing was held 13 months after the TPR petition was filed. The only evidence at adjudication was the social worker's testimony that reaffirmed the allegations in the TPR petition. The TPR was granted on all 4 grounds. Mother appeals, raising standing, an improper adjudicatory hearing, and the 4 grounds. This summary focuses on the grounds, where mother argues the evidence did not support the findings, and the findings did not support the conclusions.

- G.S. 7B-1111(a)(3) authorizes a TPR on the ground of a parent willfully failing to pay a reasonable cost of the child’s care for the 6 months immediately preceding the filing of the TPR petition when having an ability to do so. The findings on the ground include mother’s employment at times during the case (which covers a 18 month time period), her being able bodied, her paying zero child support while the child was in care, and that zero is not a reasonable amount. The findings do not adequately address the determinative 6-month period.
- Dissent: The lack of a court order or child support order regarding the cost of care is not required for G.S. 7B-1111(a)(3) as this court previously held a parent has an inherent duty to support their children. A finding that a parent has never paid for the cost of a child’s care encompasses the determinative 6-month period. An express reference to the 6-month period is not required when the plain language and context of the findings encompass the period. This case is distinguishable from *In re K.H.*, 375 N.C. 610 (2020), which involved a minor parent, who at times was placed in the same home as the juvenile, and had turned 18 shortly before the TPR hearing.

In re J.E.E.R., 2021-NCSC-74

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected. Father, who resided in New York, was contacted and agreed to participate in genetic marker testing (paternity was adjudicated), a case plan (which he failed to enter into), and an ICPC home study (both home studies were denied). Father was not engaged in services, and DSS ultimately filed a TPR petition, which was granted. Father appeals. This appeal focuses on the ground of failing to pay the reasonable cost of care.
- G.S. 7B-1111(a)(3) authorizes a TPR when a juvenile is in the custody of a DSS and the parent has willfully failed to pay a reasonable cost of the child’s care when financially and physically able to do so, for six consecutive months immediately preceding the filing of the TPR petition. The cost of care is the amount DSS pays to care for the child, e.g., foster care. “A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent’s ability or means to pay. . . . The requirement applies irrespective of the parent’s wealth or poverty.” Sl.Op. ¶14.
- Clear, cogent, and convincing evidence shows father was continuously employed during the relevant time period, making \$200 to \$800/week, the cost of foster care was \$6,158.46, and father paid zero despite having an ability to do so.

Failure to Pay Child Support

In re M.R.F., 2021-NCSC-111

**Held: Reversed**

- Facts: Grandmother initiated a TPR on October 30, 2019. The TPR was granted on multiple grounds, and father appeals, challenging the application of G.S. 7B-1111(a)(4).
- G.S. 7B-1111(a)(4) authorizes a TPR when “one parent” has been awarded custody by court order or through a custody agreement of the parents, and the other parent whose rights are sought to be terminated has willfully failed to pay for child support pursuant to an order or the custody agreement for one year of more next preceding the filing of the TPR petition.

- Here, the petitioner is the child’s grandmother, not a parent. There is no evidence in the record that the child’s mother was awarded custody or had custody through an agreement of the parents or that there was a court order or custody agreement for child support.

#### Fail to Establish Paternity/Legitimate

##### [In re M.R.F.](#), 2021-NCSC-111

###### **Held: Reversed**

- Facts: Grandmother initiated a TPR on October 30, 2019. The TPR was granted on multiple grounds, and father appeals, challenging the G.S. 7B-1111(a)(5).
- G.S. 7B-1111(a)(5) authorizes a TPR for a father to a child who is born out of wedlock when he does not do any of the 5 enumerated actions to legitimate, support, or acknowledge/establish paternity of the child. There must be evidence and findings of all 5 statutory factors.
- There is no evidence the child was born out of wedlock. Father is listed on the child’s birth certificate and the child has father’s surname. There is no evidence father did not take any 5 actions.

#### Dependency

##### [In re Z.G.J.](#), 2021-NCSC-102

###### **Held: Affirmed in part; reversed in part**

**There is a concur in part and dissent in part on G.S. 7B-1111(a)(3) (4-3 decision).**

- Facts: The juvenile was adjudicated abused and neglected. DSS filed a TPR petition, alleging 4 grounds. The TPR hearing was held 13 months after the TPR petition was filed. The only evidence at adjudication was the social worker’s testimony that reaffirmed the allegations in the TPR petition. The TPR was granted on all 4 grounds. Mother appeals, raising standing, an improper adjudicatory hearing, and the 4 grounds. This summary focuses on the grounds, where mother argues the evidence did not support the findings, and the findings did not support the conclusions.
- G.S. 7B-1111(a)(6) authorizes a TPR on the ground of dependency. Since the TPR hearing was conducted 13 months after the TPR petition was filed, there was no evidence about mother’s ability to provide proper care and supervision to her child at the time of the TPR hearing.

##### [In re M.J.R.B.](#), \_\_\_ N.C. \_\_\_ (June 11, 2021)

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

- Facts: Three juveniles were adjudicated neglected and dependent and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. Prior to the TPR hearing and outside of the presence of his attorney and GAL, father requested his counsel and GAL be replaced and further requested a 2-hour continuance of the hearing so he could take his medication. His requests were denied. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- G.S. 7B-1111(a)(6) authorizes a TPR when a parent is incapable of providing care or supervision such that the juvenile is a dependent juvenile and there is a reasonable probability the incapability will continue to the foreseeable future. Dependency requires a finding that the parent lacks an appropriate alternative child care arrangement.

- The findings do not address a lack of appropriate alternative child care arrangement, the reason for the mother’s incapability, and whether the mother’s condition would continue for the foreseeable future. There may be evidence in the record for those findings. Vacated and remanded for entry of a new order.

## Abandonment

### In re S.C.L.R., 2021-NCSC-101

**Held: Affirmed as to mother; Reversed as to father**

**Concur in part, Dissent in part (Earls, J., joined by Ervin, J.)**

- G.S. 7B-1111(a)(7) authorizes a TPR when a parent willfully abandons their child for 6 months immediately preceding the filing of the TPR. Willfulness is a question of fact. Abandonment involves a parent’s intent to forego all parental duties and claims by withholding their love, care, guidance, presence, affection, and support.
- Although the determination of the mother’s willfulness was included in the conclusions of law, the appellate court applies the appropriate standard of review to a finding or conclusion. It is immaterial that willfulness was in the conclusions versus findings.
- The evidence, including testimony from petitioner and respondent mother, supports the court’s findings by clear, cogent, and convincing evidence. Mother’s lack of conduct toward her child reflected the court’s findings that she failed to do anything to express her love, affection, and concern for her child during the determinative time period. She had no contact with her child and did not provide any support. The reason for mother’s actions was her willfulness and no findings regarding impediments were required. “Abandonment is not an ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of a discarded child.” Sl.Op. ¶127 (citation omitted).
- Findings as to father’s willfulness is unsupported by the evidence. Petitioner testified that father has talked with him about his daughter within the 6 month period. Father testified he talks with his child when she visits with his mother (child’s grandmother) and occasionally sees his daughter when his own mother (child’s grandmother) visits.
- Dissent: The findings do not support the conclusion that mother’s conduct was willful. Abandonment, as opposed to willful abandonment, is not a ground to TPR under G.S. 7B-1111(a)(7).

### In re K.J.E., 2021-NCSC-109

**Held: Vacated and remanded**

- Facts: In 2019, mother filed TPR petition against father, alleging father did not provide substantial support or consistent care for the juvenile. Evidence showed father had a child support obligation, was under an income withholding order, and was in arrears at the time the TPR petition was filed. Evidence also showed father had not made any effort to have contact with the child since the child’s birth and his last contact, resulting from mother’s efforts, was in 2017. The TPR was granted, and father appeals, challenging the sufficiency of the findings for the ground.
- G.S. 7B-1111(a)(7) authorizes a TPR when a parent willfully abandons their child for 6 months immediately preceding the filing of the TPR. Abandonment involves a parent’s intent to forego all parental duties and claims by withholding their love, care, guidance, presence, affection, and support. Willfulness is a question of fact.

- The court's findings are insufficient as they do not address the relevant six-month time period and do not address father's conduct (acts or omissions) during that time period but consist of a general statement that father did not make a significant effort to establish a relationship with his child. Regarding father's child support payments, although the finding addresses the six-month time period, it does not address the amount that was withheld or any other circumstances. Evidence was presented that could support additional findings that might support the conclusion, but those findings were made in the dispositional portion of the order. Those dispositional findings are not considered by the appellate court given the different evidentiary standards and burden of proof at the dispositional stage of a TPR hearing.

[In re I.J.W.](#), 2021-NCSC-73

**Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected and dependency based on circumstances created by substance use by both parents and a lack of proper care and supervision. Initially, in a safety plan, the juvenile was placed with father, who obtained a DVPO against mother. Father maintained contact with mother and allowed her contact with the juvenile while they resided in a home that lacked running water, heat, and electricity. Father was ordered to comply with a case plan, and he initially made progress on that plan. He stopped making reasonable progress and disengaged from any services with DSS after a visit was ended because of his aggressive behavior toward the DSS social worker. The court ordered ongoing visitation was conditioned on father completing anger management, which father refused to do. DSS filed a TPR motion more than one year after father stopped working with DSS, had no visits, and did not file a motion to seek a modification of the visitation order. After the TPR was filed, father began to complete services. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment, with a determinative time period of the six months immediately preceding the filing of the TPR petition/motion. The findings of fact are supported by clear and convincing evidence and support the conclusion of willful abandonment. During the relevant six-month period, father had not visited with his child, refused to work on his case plan or with DSS, and did not make any effort to maintain a parental bond with his child. The court found his post-TPR-motion behavior of engaging in services showed he had the ability to comply previously but chose not to do so. His post-TPR-motion actions are outside of the determinative six-month time period and do not bar a TPR on the ground of abandonment.

Prior TPR

[In re T.M.B.](#), 2021-NCSC-114

**Held: Affirmed**

- **Facts:** In 2018, the juvenile was adjudicated neglected (for the 2<sup>nd</sup> time). Also, in 2018, mother's parental rights to 2 other children were terminated. In 2020, the court in a PPO found that mother had made minimal progress on her case plan. The juvenile was placed in prospective adoptive placement. DSS filed a TPR motion, which was granted. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(9) authorizes a TPR when a parent has had their rights to another child in terminated involuntarily and lacks an ability or willingness to establish a safe home. Safe home

is defined as a home where “the juvenile is not at substantial risk of physical or emotional abuse or neglect.” G.S. 7B-101(19). Sl.Op. ¶13.

- The prior TPR is not challenged. Mother challenges the findings regarding her not having the ability to provide a safe home. The appellate court only reviews the challenged findings of fact that are necessary to support the adjudication of a ground. Mother’s challenge to a finding about another child is relevant since the finding involves the previous TPR for mother regarding her child. Evidence supported the findings that mother did not have insight into how to protect her children from sexual abuse or how to care for their trauma, which was demonstrated by their significant mental health diagnoses and treatment needs. The evidence shows mother’s lack of participation in mental health treatment was not a result of COVID restrictions as she had a history of missing several appointments. Although mother started to look for housing, at the time of the TPR hearing, she was living in motel, and prior to that she was living in unsuitable housing. The findings support the court’s conclusion.

## Best Interests

### Exclusion of Evidence; Burden of Proof

In re M.Y.P., 2021-NCSC-113

#### **Held: Affirmed**

- Facts: In 2019, the juvenile was adjudicated neglected and dependent based on circumstances resulting from domestic violence, mental health issues, substance use, improper supervision, and lack of stable housing. DSS filed a TPR motion, which was granted on the ground of neglect. Father appeals, challenging the grounds and best interest determination. This summary focuses on the best interests determination. Father argues the court erred in excluding his testimony about the child’s placement with the child’s maternal grandfather, as the court sustained DSS’s objection, stating the allegation about the grandfather’s suitability as a placement had been litigated and resolved.
- A party must make an offer of proof to preserve an argument about the exclusion of evidence. G.S. 8C-1, Rule 103(a)(2). There was no offer of proof about the excluded testimony and the substance of that testimony is not obvious from the record.
- Assuming the issue was preserved for appeal, the court did not abuse its discretion. G.S. 7B-1110(a) allows the court to consider any evidence it finds to be relevant, reliable, and necessary to determine the child’s best interests. When compared to the adjudicatory stage where the Rules of Evidence apply, the court has more discretion in receiving evidence at the dispositional stage.
- Unlike the adjudicatory stage, there is no burden of proof on any party at the dispositional stage. Trial court consolidated the adjudicatory and dispositional hearings and in its TPR order stated the findings were made by clear, cogent, and convincing evidence. Although the order did not state the different evidentiary standard, after it made findings of the dispositional factors in G.S. 7B-1110(a), it noted that the TPR was in the child’s best interests. This shows the court understood what it had to consider when determining best interests and even if the wrong standard was applied, there was no prejudice to father as DSS would have had to overcome a higher standard.

7B-1110(a) Factors:

[In re K.B.](#), 2021-NCSC-108

**Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected (for the 3<sup>rd</sup> time). In 2020, DSS filed a TPR motion, which was granted. Mother appeals, challenging the grounds. Father appeals the best interests determination. This summary focuses on father's appeal.
- G.S. 7B-1110(a) includes the best interests factors the court considers at disposition when determining the juvenile's best interests.
- The findings that the children's likelihood of adoption was supported by social worker testimony and the GAL report. The findings also reflect that the court recognized the older sibling's adoption was related to her younger sibling's mental health treatment and the prospective adoptive parents' ability to address those needs as there was interest in adopting the siblings as a "sibling group."
- Although there was a strong bond between father and his children, that is just one factor the court considers, and the court has authority to give greater weight to other factors.

[In re M.S.E.](#), 2021-NCSC-76

**Held: Affirmed**

- Facts: Two juveniles were adjudicated neglected based on circumstances created by mother's untreated mental health and substance use issues and housing instability. Mother continued to use marijuana and cocaine and did not submit to the majority of required drug screens. She did not comply with recommendations for mental health and substance use treatment. Mother did attend some parenting classes and showed improvements in her interactions with the children. Mother had a psychological assessment that showed she had borderline intellectual functioning and recommended a support person for assistance with parenting, a rep payee, review of written documents with her to ensure she understood. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.
- The court made sufficient findings under G.S. 7B-1110(a) regarding the disposition and the TPR being in the children's best interests. The findings were supported by competent evidence. Although mother argues the court erred by not making findings of the dispositional alternatives it considered, G.S. 7B-1110(a) does not require written findings of any dispositional alternatives the court considered.

[In re E.S.](#), 2021-NC-72

**Held: Affirmed**

- Facts: This is an appeal by mother and father of the best interests determination to TPR; there is no challenge to the TPR grounds adjudication. Mother's appeal involves her 15-year-old child; her appeal regarding the younger child was abandoned because she did not present any arguments about that child in her brief. Father's appeal involves the younger sibling only.
- After adjudicating a ground to TPR, the court moves to the dispositional stage where it must consider the factors set out in G.S. 7B-1110(a). Written findings are required for relevant

factors, and a factor is relevant when there is conflicting evidence of that factor that placed it as an issue before the trial court.

- Regarding the likelihood of adoption, G.S. 7B-1110(a) does not require the court to consider whether the juvenile who is 12 or older will consent to their adoption. The requirement for a juvenile's consent to their adoption is in G.S. 48-3-601(1), which "is found in an entirely separate chapter of the General Statutes of North Carolina." Sl.Op. ¶15. The question before the district court is whether the TPR is in the child's best interests, and the court does not abuse its discretion by making that finding solely because a 12-year-old or older juvenile is not interested in being adopted. The court is not required to expressly consider the juvenile's consent to adoption, and in this case there was no evidence that the 15-year-old juvenile was not interested in adoption or would not consent to her adoption.
- Regarding the bond between the juvenile and her mother, the evidence that the child had a bond with her mother was uncontested. The finding was, therefore, not relevant. Further, the bond between a child and parent is one factor for the court to consider, and the court had discretion to give greater weight to other factors.
- Regarding a possible relative placement, the court not "expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding." Sl.Op. ¶122). Here, the court made findings, which show the possible relative placement would not be appropriate given the juvenile's bond with the family she was currently placed with who wished to adopt her and the possible interference with the proposed relative placement by father.

In re T.A.M., 2021-NCSC-77

**Held: Affirmed**

**Concur in part, Dissent in Part (Ervin, J., joined by Hudson, J. and Earls, J.)**

- Facts: The juveniles were adjudicated neglected due to circumstances created by their parents, domestic violence, substance use, and mental health issues. The parents had done well with their case plan services for a while but then stopped doing so. The primary permanent plan was changed to adoption and DSS filed TPR petitions. The court granted the TPR petitions and parents appeal. Father challenges the granting of his attorney's motion to withdraw. Mother challenges the court's determination that the TPR was in the children's best interests. This summary focuses on mother's appeal.
- Standard of review is an abuse of discretion.
- The dispositional findings must be supported by competent evidence. The challenged findings of fact are supported by competent evidence, including social worker testimony, the admitted GAL report and visitation logs.
- The "little bond" mother had with the children was supported by the evidence. Although mother argued that she did not have opportunities to act in a parental manner due to her being separated from her children, her limited opportunities arose from her own behavior – substance use relapse, late arrival to visits, and inability to control her emotions during visits.
- The court is not required to consider other dispositional alternative (e.g., guardianship). The court considered the G.S. 7B-1110(a) dispositional factors and reasonably weighed those factors in concluding that TPR was in the children's best interests.

## Specific Relinquishment

[In re M.R.J.](#), 2021-NCSC-112

### **Held: Affirmed**

- **Facts:** In the underlying neglect action, the juvenile’s primary permanent plan was adoption. DSS filed a TPR motion, which was granted. Mother appeals, challenging the court’s dispositional determination that the TPR was in the child’s best interests. Mother executed a specific relinquishment to her sister and brother-in-law and argued the trial court abused its discretion by mistakenly believing the TPR was necessary to provide the juvenile with legal protections to allow for his adoption. The child was placed with a different couple who were also interested in adopting him. (Mother also appealed raising subject matter jurisdiction).
- **The standard of review is an abuse of discretion,** which occurs when the court’s decision is “manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision” or if it applies a “misunderstanding of the relevant law.” Sl.Op. ¶144.
- **The court did not misunderstand the law or abuse its discretion.** A specific relinquishment may be revoked if the specific placement did not adopt the child. G.S. 48-3-704, -707(b). Additionally, at any time before the final adoption decree, mother could challenge the relinquishment on the bases of fraud or duress. G.S. 48-3-707(a)(1). This would deny permanence for a period of time. The TPR facilitates the child’s adoption by adoptive parents who are identified and approved by DSS. There is no evidence as to why the specific couple mother identified, to the exclusion of his current caretakers or other potential adoptive families, is in the child’s best interests. The court appropriately considered the factors under G.S. 7B-1110(a).

## Civil Case Related to Child Welfare

### Paternity for Sperm Donor, Choice of Law

[Warren County DSS ex rel Glenn v. Garrelts](#), \_\_\_ N.C. App. \_\_\_ (June 15, 2021)

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

- **Facts:** Defendant agreed to be a sperm donor for mother. The verbal contract was made and the artificial insemination occurred in Virginia where mother resided. Mother remained in Virginia and gave birth in Virginia in 2011. Mother was the only parent listed on the birth certificate. In 2019, Warren County DSS in NC filed a child support action alleging Defendant was the father. Defendant resided in NC. At the child support hearing, Defendant argued VA law applied, which states a sperm donor does not legally qualify as parent so no child support was owed. DSS argued NC law applies. The district court applied NC law and ordered that Defendant was the father and established current and past due child support. Defendant appealed.
- **Issue:** Choice of law between artificial insemination laws of Virginia and North Carolina in determining whether a sperm donor is a parent.
- The Full Faith and Credit doctrine is inapplicable because there was not an existing order from another state, Virginia. Instead, the court must apply a choice of law analysis because there are multiple states with conflicting substantive laws. Conflict of laws is a legal conclusion that requires a de novo review.
- Matters affecting substantial rights (e.g., causes of actions and damages) are determined by lex loci, the laws of the situs of the claim – the state where the cause of action accrued. Matters

determining procedural rights (e.g., statute of limitations) are determined by lex foci, the law of the forum.

- Paternity law is substantive requiring the lex loci test because parenthood is a fundamental right that is protected by the legal system. Virginia was the situs of the claim – it was where the verbal contract, artificial insemination, pregnancy, and child’s birth occurred. Virginia is the state where “the last event necessary to make the actor liable” took place. Sl.Op. ¶15. This approach follows Illinois and Kansas decisions and ensures predictable and equitable results and prevents forum-shopping to a state that has the most favorable laws for paternity.