

# Child Welfare Case Update

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Parent Attorneys Summer Conference 2021

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## Indian Child Welfare Act

### Mandatory Inquiry

In re M.L.B., 377 N.C. 335 (2021)

**Held: Reversed and remanded**

- **Facts:** In 2015 the juvenile was adjudicated neglected. In 2019, DSS filed a TPR petition alleging several grounds. The TPR was granted, and both parents appeal challenging the findings. This opinion determines the evidence (witness testimony) is not clear, cogent, and convincing evidence that supports the challenged findings that are necessary to support the conclusion of law for any of the alleged TPR grounds. Additionally, an issue regarding ICWA was raised.
- **Under ICWA regulations**, the trial must ask participants in a TPR hearing, on the record, whether they know or have reason to know the child is an Indian child. 25 C.F.R. 23.107. By not complying with the mandatory inquiry the trial court could not determine whether it had reason to know that the juvenile was an Indian child. Remanded for the court to make the inquiry and receive the participants’ responses on the record. The court must also “instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.” Sl.Op. ¶19. The supreme court notes that “All participants should become familiar with the Indian Child Welfare Act of 1978, codified at 25 U.S.C. ch. 12, and the corresponding regulations, including but not limited to the regulations codified at 25 C.F.R. §§ 23.101 - .144, to ensure compliance with the ICWA and to assert objections on the record if compliance in a proceeding has not occurred.” Sl.Op. at fn 3.

### Notice Requirements

In re E.J.B., 375 N.C. 95 (2020)

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

- **Facts:** In 2015, DSS filed a neglect and dependency petition. Throughout the N/D action, DSS, in multiple reports to the court, stated that the children’s father reported he is affiliated with the Cherokee Indian tribe. That action was terminated through a G.S. 7B-911 order granting custody of the children to mother. A second neglect and dependency action

- was commenced in 2018, and the children were adjudicated neglected and dependent. DSS filed a motion to terminate father's parental rights, which was granted. Respondent father appeals. During the pendency of the TPR appeal, the trial court held post-TPR hearings under G.S. 7B-908. At one hearing, the trial court found that ICWA notices had been sent to the 3 Cherokee Tribes and the appropriate regional director of the Bureau of Indian Affairs (BIA). Two of the 3 tribes responded that the children were not "Indian children." No response was received from the United Keetoowah Band of Cherokee Indians (Keetoowah Band), and the trial court determined ICWA did not apply.
- ICWA: After various congressional hearings recognizing "abusive child welfare practices that led to an 'Indian child welfare crisis ... of massive proportions' ", Congress enacted the Indian Child Welfare Act in 1978. Sl.Op. at 5. ICWA establishes minimum Federal standards that apply to "child custody proceedings" when an Indian child is involved. A child custody proceeding includes abuse, neglect, dependency; termination of parental rights; pre-adoptive placements; and adoption placements. An "Indian child" is an unmarried person under the age of 18 who is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership and the biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). Under 2016 binding federal regulations promulgated by the BIA, "state courts bear the burden of ensuring compliance with the Act." Sl.Op. at 10.
  - Holding: "Because we conclude that the trial court failed to comply with the Act's [ICWA] notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act an be followed." Sl.Op. at 1. "If the Keetoowah Band of Cherokee Indians tribe indicates the that the children are not Indian children pursuant to the Act, the trial court shall reaffirm the order terminating respondent-father's parental rights.... [If the] tribe indicates that the children are Indian children pursuant to the Act, the trial court shall proceed in accordance with the relevant provisions of the Act." Sl.Op. at 18.
  - ICWA Notice: The BIA regulations place the burden on state courts to ensure compliance with ICWA by requiring the court to ask each participant, on the record, whether they know or have to reason to know that the child involved is an "Indian child." 25 C.F.R. 23.107. When there is reason to know, the trial court must ensure the petitioner (DSS in this case) used due diligence to identify and work with all the tribes the child may be a member of or eligible for membership if a biological parent is a member of a tribe, and the court must treat the child as an Indian child during this period. *Id.* "If a tribe fails to respond to multiple written requests, the trial court must first seek assistance from the [BIA, and] ... can only make their own determination as to the child's status if the tribe and [BIA] fail to respond to multiple requests." Sl.Op. at 11. There was no evidence in the record, the court inquired at the beginning of the proceeding as to whether any participant knew or had reason to know the child was an Indian child, and although it attempted later comply with the ICWA notice provisions in the post-TPR hearing, the notices were insufficient as they did not include all the required language of 25 U.S.C. 1912 and 25 C.F.R. 23.111(d).
  - Dissent: The lack of responses by both the Keetoowah Band (over 7 months) and BIA gives the court no reason to know the children were Indian children such that the trial made the

proper determination that ICWA does not apply. The majority has placed the burden of obtaining a response from the tribe on the trial court and DSS and has elevated form over substance. “The purpose of ICWA is to notify Indian tribes that a potential Indian child is involved in a state proceeding, not to delay termination proceedings based on unsubstantiated allegations of Indian heritage.” Dissent at 5.

[In re N.K.](#), 375 N.C. 805 (2020)

**Held: Remanded (ICWA issue)**

- Facts: Mother appeals the termination of her parental rights, arguing the trial court failed to comply with the ICWA requirements involving notice to the tribes. Based on a reason to know an Indian child may be involved, DSS sent notice to several tribes and the Bureau of Indian Affairs. The Eastern Band of Cherokee Indians responded there was no affiliation. Responses were not received from other tribes the notice had been sent to. The court determined the child was not an Indian child.
- The court relies on its earlier opinion, *In re E.J.B.*, 375 N.C. 95, 846 S.E.2d 472 (2020).
- The notices that were sent to the tribes are not part of the record such that the appellate court cannot determine whether the notices are sufficient under the ICWA regulations. There is no indication as to whether DSS contacted the BIA for assistance after the other tribes failed to respond.
- Remanded for further proceedings to address whether the notice provisions of ICWA were complied with prior to the entry of the TPR and whether the child is an Indian child.

## Abuse, Neglect, Dependency

### Motion to Continue

[In re L.G.A.](#), 2021-NCCOA-127

**Held: Affirm in part; vacate in part**

- Facts: The juvenile was adjudicated neglected due to domestic violence between the parents and the case continued through dispositional hearings. During the course of the case, the mother had been represented by multiple attorneys and had been convicted of misdemeanor communicating threats against a previous DSS social worker. She was also banned from contacting that social worker or from entering the DSS office. In 2019, father filed a motion for review seeking custody of the juvenile, alleging positive changes to his situation. Mother requested a continuance which was denied. The court awarded full legal and physical custody of the juvenile to father and provided supervised visitation to mother upon her release from jail. Mother appealed. One issue is focused on whether the court erred in denying her continuance based on constitutional rights.
- Standard of review for a motion to continue is an abuse of discretion unless the motion is based on a constitutional right, which presents a question of law. A new trial is required when there is

a showing that both (1) the denial was erroneous and (2) the party suffered prejudice as a result.

- G.S. 7B-803 addresses motions to continue, which requires mother meet the burden of showing good cause regarding the need additional evidence requested by the court or other information addressing the best interests of the juvenile or the completion of expeditious discovery. Mother did not allege this type of information, such that mother had the burden of proving extraordinary circumstances for the proper administration of justice or the child's best interests. Mother's request is based on her constitutional right against self-incrimination while she had a pending criminal charge for communicating threats. G.S. 7B-803 does not support her argument since a pending criminal charge arising out of the same incident as the juvenile case shall not be the sole extraordinary circumstance. She was not statutorily entitled to a continuance. Additionally, mother's criminal charges did not arise from the same incident; they were based on her actions after the petition was filed. The parties indicated they had no intention of questioning her if she chose to testify. The trial court offered to act as a gatekeeper. Mother did not testify. "The trial court provided adequate safeguards to protect Mother's due process rights." Sl.Op. ¶14.

## Evidence

### Residual Hearsay Exceptions re: Children's Statements

In re B.W., 274 N.C. App. 280 (2020)

#### **Held: Vacate in part; reverse in part; remand**

- Facts: As part of an assessment of a report of abuse and neglect, two of the three children (ages 11.5 and 7.5 years old) were interviewed by a clinical social worker at a Child Advocacy Center (CAC). The interview was videotaped. The older child disclosed he was repeatedly raped and sexually assaulted by a male friend of his mother's who occasionally spent the night; the younger child disclosed she had been touched inappropriately by the same man. DSS filed a petition; the children were removed from their home, and they began receiving counseling. Prior to the adjudicatory hearing, DSS filed a notice and motion to introduce the children's hearsay statements under Rules 803(24) and 804(b)(5). At a pre-adjudication hearing, the court orally ruled the children would be unavailable to testify; no written order was prepared. Later, mother's attorney subpoenaed the children for their testimony at the adjudicatory hearing, which the district court orally quashed upon the request of DSS and the children's GAL. At the adjudicatory hearing, over objection, to the CAC interviewer's hearsay testimony and the admission of the interview videos. The alleged perpetrator testified and denied the allegations. The two children were adjudicated abused and all three children were adjudicated neglected. Mother appeals.
- Residual Hearsay Exceptions are reviewed for an abuse of discretion. There must also be a showing that the appellant was prejudiced and a different result would likely have occurred.
- Rules 803(24) and 804(b)(5) require the court make specific findings. The NC Supreme Court requires the district court to conduct a 6-part inquiry. The only distinction between the two residual hearsay rules is the finding of unavailability for the declarant, which is required by Rule 804(b)(5). A court's failure to make the required findings or erroneous findings results in the

appellate court reviewing the record to determine if it supports the trial court's conclusion about the admissibility of the statements under the residual hearsay exception.

- The trial court's oral ruling about the children's unavailability in the pre-adjudicatory hearing is not an entered judgment such that there are no findings of fact (there is no order). Although there was testimony from the children's therapist at the pre-adjudicatory hearing, that testimony is not addressed in the adjudication order. DSS contends the record includes a letter from the counselor, but that letter is not a substitute for sworn testimony. The findings of the children's unavailability in the adjudication order are not supported by competent evidence.
- The introduction of the residual hearsay prejudiced mother – "Where the court's findings and conclusions are not supported by other evidence, the admission of incompetent evidence is prejudicial." Sl.Op. at 17. Without inadmissible hearsay, there is no clear and convincing evidence supporting the conclusion that the children were abused and neglected.

#### Hearsay at Adjudication; Competent Evidence at Disposition

In re A.J.L.H., 275 N.C. App. 11 (2020)

##### **Held: Vacate and Remand (Stay Allowed 1/21/21)**

- Facts: This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. After a DSS assessment of abuse based on the use of corporal punishment with a belt that caused bruising on the oldest child, who was 10 years old, DSS and the parents entered into a safety plan. Months later at a CFT meeting, DSS decided to file a petition alleging the oldest child was abused and neglected and the younger siblings were neglected. The safety plan had not been violated but the parents did not believe their disciplinary methods were cruel or unusual. After hearing, the children were adjudicated and the parents were denied visitation. The parents appeal challenging the adjudications and denial of visitation.
- The Juvenile Code requires the protection of a parent's due process rights and the rules of evidence apply to adjudicatory hearings. G.S. 7B-802, -804.
  - The oldest child's out-of-court statements, which were objected to, were inadmissible hearsay. The child's letter to the court as also inadmissible hearsay. No hearsay exception was offered or applies. Additionally, the child was not found to be unavailable as a witness.
  - Prior reports involving the mother's DSS history are a permitted business record exception to hearsay under Rule 803(6). There was a proper foundation laid for the business records.
- There was an abuse of discretion in denying any visitation between the mother and her children and the father and his child as the court relied on incompetent and inadmissible evidence. Regarding the petition that has not been dismissed by this opinion, the visitation prohibition is vacated and remanded for the court "to order generous and increasing visitation between [juvenile] and her mother. Sl.Op. at 20.

## Abuse/Neglect Adjudication

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.

#### Corporal Punishment; Another Juvenile in the Same Home

In re A.J.L.H., 275 N.C. App. 11 (2020)

##### **Held: Vacate and Remand (Stay Allowed 1/21/21)**

- Facts: This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. After a DSS assessment of abuse based on the use of corporal punishment with a belt that caused bruising on the oldest child, who was 10 years old, DSS and the parents entered into a safety plan. Months later at a CFT meeting, DSS decided to file a petition alleging the oldest child was abused and neglected and the younger siblings were neglected. The safety plan had not been violated but the parents did not believe their disciplinary methods were cruel or unusual. After hearing, the children were adjudicated and the parents were denied visitation. The parents appeal challenging the adjudications and denial of visitation.
- Abuse under G.S. 7B-101(1)(a)-(b) refers to "serious physical injury." "The nature of the injury is dependent on the facts of each case." Sl.Op. at 14. In this case, the evidence of temporary marks and bruises resulting from a spanking on the oldest child is not serious physical injury and does not support an abuse adjudication by clear and convincing evidence. There was no admissible evidence to support an abuse adjudication under G.S. 7B-101(c), which involves the use of cruel or grossly inappropriate discipline. The adjudication intertwines findings that were supported by

competent admissible evidence and findings that relied on inadmissible evidence. Remanded for a new hearing.

- Neglect requires harm or risk of harm to the juvenile. The prior abuse of another juvenile living in the home, standing alone, is insufficient to support an adjudication of neglect. The neglect conclusion regarding the younger siblings is based solely on the abuse and neglect adjudication of the oldest sibling. Adjudication is reversed and petition is dismissed and children are to be immediately returned to their mother and (step)father.

### Child Pornography

In re N.K., 274 N.C. App. 5 (2020)

**Held: Affirm (adjudication); vacate in part/remand (visitation in dispositional order)**

- Facts: This case involves two siblings, one of whom was adjudicated abused and neglected and the other was adjudicated neglected based on mother's preparation and dissemination of pornographic pictures of one of her sons. In its disposition order, the court ordered visitation with the mother when her and the children's therapists recommended visitation occur and that the father's visitation be supervised.
- Standard of review of an adjudication is whether there is clear, convincing, and competent evidence to support the findings of fact and whether the findings of fact support the conclusion of law. A dispositional order is reviewed for an abuse of discretion.
- Evidence and findings support the conclusions.
  - The unchallenged finding of fact, supported by clear, convincing, and competent evidence (witness testimony and mother's admission) that mother took pornographic pictures of one of her sons, although falsely claiming her brother did, and disseminated those pictures to law enforcement support an abuse and neglect adjudication.
  - G.S. 7B-101(1)(d) defines an abused juvenile as including certain criminal actions, including preparing obscene photographs of the juvenile, permitting the juvenile to assist in a violation of obscenity laws, disseminating obscene materials of the juvenile and/or material that is harmful to the juvenile, and first and second degree sexual exploitation of the juvenile. "The question in this case is not whether respondent-mother is guilty of the alleged crimes; we are only considering whether the district court findings are supported by clear and convincing evidence." Sl.Op. at 4. Additionally, the unchallenged findings about father being aware of mother's criminal charges and actions leading to the charges support the adjudications; the question is not whether father knew or believed mother was guilty of the alleged crimes.
  - Under G.S. 7B-101(15), a neglected juvenile is one who lives in an environment that is injurious to the juvenile's welfare and includes a child who lives with a person who has abused or neglected other juveniles. The adjudication of abuse and evidence that supports that adjudication are enough to substantiate both that juvenile's and his brother's adjudication as neglected as there were living in an environment that is injurious to their welfare.

## Neglect Adjudication

### 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. ¶27. 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.

## Harm or Risk of Harm

In re S.R.J.T., 2021-NCCOA-94

**Held: Affirm in part, Reverse in part, remand disposition order**

**There is a concur in part/dissent in part**

- **Facts:** In 2017, the child was adjudicated neglected and dependent due to circumstances of drug abuse and domestic violence in the home. The dispositional order ceased reunification efforts, granted guardianship to the aunt, and suspended visitation and further hearings. Mother appeals both the adjudication and disposition.
- **Standard of review for an adjudication** is whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion of law. Conclusions of law are reviewed de novo.
- **G.S. 7B-101(15) defines neglect** in part as a juvenile who lives in an injurious environment to his welfare. There must be harm or a substantial risk of harm to the child, but “failure to make specific findings regarding a child’s impairment or risk of harm will not require reversal where the evidence supports such findings.” Sl.Op. ¶7.
- The **findings are supported** by evidence and support the conclusion. There is evidence that the child is suffering with PTSD. “We affirm the trial court’s adjudication of neglect on this basis and need not address the other adjudicatory grounds in the court’s order.” Sl.Op. ¶11.

## Findings & Conclusions

In re V.M., 273 N.C. App. 294 (2020)

**Held: Reversed and Remanded (there is a dissent)**

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

## Dependency Adjudication

### Findings for Both Parents

In re Q.M., 275 N.C. App. 34 (2020)

**Held: Vacated and Remanded**

- **Facts:** At the time the juvenile was born, the mother was a ward of a county DSS due to her incompetency. DSS filed a petition alleging dependency and named the putative father. Mother was appointed a Rule 17 GAL. After a paternity test, a hearing to establish the putative father's paternity was held, but an order was not entered until months later. Prior to the adjudicatory hearing, DSS had nonsecure custody and the juvenile was placed in foster care. The child was adjudicated dependent, and a dispositional order continued custody with DSS and placement with the child's father. No visitation was ordered with mother. Mother appeals.
- When determining whether a juvenile is dependent, G.S. 7B-101(9) requires the court to address both parents (1) ability to provide proper care and supervision and (2) the availability of alternative child care arrangements. Citing *In re V.B.*, although post-petition evidence is generally not admissible in an adjudicatory hearing, post-petition evidence of paternity is a fixed and ongoing circumstance the court may consider. "Respondent-Mother's inability to care for [the juvenile] on her own does not create a sufficient basis to adjudicate [the juvenile] dependent where Respondent-Father was known to DSS and, in fact, spoke with [the juvenile's] social worker in direct contemplation of caring for [the juvenile]. Sl.Op. at 14. The findings do not address the second prong – the availability of alternative child care arrangements – remanded to make proper findings supported by clear and convincing evidence and to re-evaluate whether the juvenile is dependent.

## Neglect/Dependency Adjudication

### Newborn; Death of Sibling

In re A.W., 377 N.C. 238 (2021)

**Held: Affirmed**

- **Facts:** In 2017, the respondent's 2-month-old infant died of blunt force injuries while in respondents' care. Her death was ruled a homicide, and father was incarcerated on charges related to her death. In 2018, the juvenile in this action was born to respondent parents and DSS filed a petition alleging neglect and dependency that stated her sibling died while in the respondents' care as a result of suspected abuse and neglect. Also in 2018, DSS filed a motion to terminate both parents' parental rights on the grounds of neglect and dependency. The court adjudicated the juvenile neglected and dependent, ceased reunification efforts, and eliminated reunification as a permanent plan. A separate order terminated mother's rights on both alleged grounds. Mother appealed the adjudication and disposition orders in the court of appeals and the TPR order in the supreme court. The NC Supreme Court granted a motion to consolidate the actions on appeal.
- G.S. 7B-101(15) defines a neglected juvenile in part as a juvenile whose parent does not provide proper care, supervision, or discipline, or who lives in an environment injurious to their welfare and states, "In determining whether a juvenile is a neglected juvenile, it is relevant whether that

juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect.” Sl.Op. ¶10. Neglect also requires that there be harm (physical, mental, or emotional) or substantial risk of harm to the juvenile. An adjudication of neglect cannot be based solely on previous DSS involvement but must address current circumstances that present a risk to the juvenile. Regarding newborns, the trial court’s determination must be predictive in nature when assessing substantial risk of future of abuse or neglect based on historical facts in the case.

- The adjudication was not based solely on the basis of the death of this juvenile’s sibling. Other factors of risk included mother’s continuation of providing an implausible explanation (the family dog, a great dane) for the injuries causing the infant’s death; her failure to explain the other injuries to that child; her continued relationship with the father; and the respondents’ colluding to deceive the court of the nature of their relationship such that the risk of impairment to this juvenile existed.
- The challenged findings of fact that respondents colluded and worked together on their statements about how the injuries that caused the sibling’s death occurred are supported by clear and convincing evidence. Based on the evidence, the court made a reasonable inference that the parents worked together to provide an explanation that concealed the truth.
- G.S. 7B-101(9) defines a dependent juvenile as one whose parent, guardian, or custodian (1) is unable to provide care and supervision and (2) lacks an appropriate alternative child care arrangement. Both prongs must be addressed by the court.
  - The court reasonably inferred mother was unable to properly care for and supervise this juvenile due to the death of her other child by nonaccidental means and her continuing relationship with the father while he was charged in that child’s death.
  - There was not an appropriate alternative child care arrangement. Although several individuals were suggested by mother, none of them believed the sibling’s injuries resulting in her death were anything but accidental. From that evidence, the trial court reasonably inferred that these individuals would not be appropriate as they would not follow a safety plan and provide a safe environment.

## Initial Disposition

### Cease Reunification Efforts/Reunification

In re A.W., 377 N.C. 238 (2021)

#### **Held: Affirmed**

- Facts: In 2017, the respondent’s 2-month-old infant died of blunt force injuries while in respondents’ care. Her death was ruled a homicide, and father was incarcerated on charges related to her death. In 2018, the juvenile in this action was born to respondent parents and DSS filed a petition alleging neglect and dependency that stated her sibling died while in the respondents’ care as a result of suspected abuse and neglect. Also in 2018, DSS filed a motion to terminate both parents’ parental rights on the grounds of neglect and dependency. The court adjudicated the juvenile neglected and dependent, ceased reunification efforts, and eliminated reunification as a permanent plan. A separate order terminated mother’s rights on both alleged grounds. Mother appealed the adjudication and disposition orders in the court of appeals and

the TPR order in the supreme court. The NC Supreme Court granted a motion to consolidate the actions on appeal.

- G.S. 7B-901(c) includes an aggravating factor to cease reunification efforts when the parent's conduct increases the enormity and adds to the consequences of neglect. The court's determination this factor existed was supported by the evidence that mother failed to acknowledge her child died from abuse, colluded with father to provide an explanation, and maintained her relationship with the father.

## Disposition

### Relative Placement

In re N.K., 274 N.C. App. 5 (2020)

**Held: Affirm (adjudication); vacate in part/remand (visitation in dispositional order)**

- Facts: This case involves two siblings, one of whom was adjudicated abused and neglected and the other was adjudicated neglected based on mother's preparation and dissemination of pornographic pictures of one of her sons. In its disposition order, the court ordered visitation with the mother when her and the children's therapists recommended visitation occur and that the father's visitation be supervised.
- Relative Placement: G.S. 7B-903(a1) consists of two steps: (1) whether there is a relative who is willing and able to provide proper care and supervision in a safe home and (2) placement of the juvenile in that home absent findings that the placement is contrary to the child's best interests. If the court finds there was not an available relative who could provide proper care and supervision in a safe home, the court is not required to consider whether placement with a relative is in the child's best interests. Here, the court determined there was not an available relative who met the first step as neither of the two relatives suggested by father were appropriate, based on the DSS report that was admitted as evidence, the findings in the nonsecure custody order, and the father not presenting any evidence to the contrary.
- Visitation: G.S. 7B-905.1 requires the court to address visitation when the child has been removed from the home.
  - Regarding mother, an order denying visitation must make appropriate findings, and if visitation is ordered, the court must specify the minimum frequency and duration and whether the visits shall be supervised. The court may not delegate its authority to set a visitation as that is a judicial function. Here the court delegated its authority to allow visitation and to set the terms of that visitation to therapists (mother's and each child's).
  - Regarding father's visitation, remanded to ensure the order includes provisions regarding his right to file a motion for review under G.S. 7B-905.1(d).

## Guardianship and Waive Further Hearings

[In re S.R.J.T.](#), 2021-NCCOA-94

**Held: Affirm in part, Reverse in part, remand disposition order**

**There is a concur in part/dissent in part**

- **Facts:** In 2017, the child was adjudicated neglected and dependent due to circumstances of drug abuse and domestic violence in the home. The dispositional order ceased reunification efforts, granted guardianship to the aunt, and suspended visitation and further hearings. Mother appeals both the adjudication and disposition.
- **Standard of review of an order ceasing reunification efforts** is whether the findings are based on competent evidence and whether the findings support the conclusion. An abuse of discretion standard is applied.
- **Mother's constitutional rights to care, custody, and control** of her child was not raised by mother at the hearing and is waived for appellate review. Mother was on notice guardianship was an issue through the recommendations of DSS and the GAL through their reports.
- **Waiving further hearings under G.S. 7B-906.1(n)** requires the court to make all the findings in that statute, which was not done. This is reversible error. Reverse and remand.
- **Author's Note:** This opinion refers to permanency planning, but it appears from the opinion that the order appealed from was an initial dispositional hearing.

## Custody to Father; Judicial Notice

[In re L.G.A.](#), 2021-NCCOA-127

**Held: Affirm in part; vacate in part**

- **Facts:** The juvenile was adjudicated neglected due to domestic violence between the parents and the case continued through dispositional hearings. In 2019, father filed a motion for review seeking custody of the juvenile, alleging positive changes to his situation. The court awarded full legal and physical custody of the juvenile to father and provided supervised visitation to mother upon her release from jail. Mother appealed. One issue challenges the court's award of custody to father as mother argued father's past conduct should have been considered.
- **Standard of review** of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusions. The best interests determination is for an abuse of discretion.
- The **findings** address father's progress since the last disposition in the action, and other findings are based on competent evidence. The trial court has the discretion as the finder of fact to determine the credibility and weight of the evidence. The findings support the court's conclusion to award custody to father and is not an abuse of discretion.
- **Judicial notice is governed Rule 201 of the Rules of Evidence**. A judicially noticed fact must be one that is not subject to reasonable dispute because it is either generally known within the court's jurisdictional territory or is capable of accurate and ready determination from sources whose accuracy cannot be reasonably questioned. Here, the trial court took judicial notice of the widely known benefits of the service program father participated in. This fact is based on the judge's personal experience and is not an indisputable matter or a matter of common knowledge as such it is not appropriate for judicial notice. Further, mother did not waive

appellate review of this issue by not objecting to this finding when the court rendered it at the conclusion of the hearing. The rendition by the judge is not an order under Rule 58 of the N.C. Civ.P. Rules and is not required to occur at the conclusion of a hearing. There is no legal basis for an objection to the rendered ruling.

## Visitation

### Minimum Outline of Frequency, Length, Level of Supervision

[In re N.K.](#), 274 N.C. App. 5 (2020)

**Held: Affirm (adjudication); vacate in part/remand (visitation in dispositional order)**

- **Facts:** This case involves two siblings, one of whom was adjudicated abused and neglected and the other was adjudicated neglected based on mother's preparation and dissemination of pornographic pictures of one of her sons. In its disposition order, the court ordered visitation with the mother when her and the children's therapists recommended visitation occur and that the father's visitation be supervised.
- **Visitation:** G.S. 7B-905.1 requires the court to address visitation when the child has been removed from the home.
  - Regarding mother, an order denying visitation must make appropriate findings, and if visitation is ordered, the court must specify the minimum frequency and duration and whether the visits shall be supervised. The court may not delegate its authority to set a visitation as that is a judicial function. Here the court delegated its authority to allow visitation and to set the terms of that visitation to therapists (mother's and each child's).
  - Regarding father's visitation, remanded to ensure the order includes provisions regarding his right to file a motion for review under G.S. 7B-905.1(d).

## Cost of Supervision

[In re L.G.A.](#), 2021-NCCOA-127

**Held: Affirm in part; vacate in part**

- **Facts:** The juvenile was adjudicated neglected due to domestic violence between the parents and the case continued through dispositional hearings. In 2019, father filed a motion for review seeking custody of the juvenile, alleging positive changes to his situation. The court awarded full legal and physical custody of the juvenile to father and provided supervised visitation to mother upon her release from jail. Mother appealed. One issue challenges the court's order of supervised visitation with addressing mother's ability to pay those costs.
- **Standard of review** of a visitation order is an abuse of discretion.
- **The court must make findings of mother's presentability to pay for supervised visitation.** Here mother was incarcerated at the time of the hearing. The court ordered that mother will have supervised visits upon her release and that based on mother's past employment (prior to incarceration) she had an ability to pay. There was no evidence as to what mother's financial circumstances would be after her release. The court must also make findings about the costs of the supervised visitation.

In re K.M., 2021-NCCOA-232

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

- Court order did not include provisions from rendered judgment designating guardians as responsible for paying cost of supervised visitation center fees after finding mother did not have an ability to pay for the costs but guardians did.

Order Suspending Visitation

In re K.M., 2021-NCCOA-232

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

- Facts: In permanency planning order, court made findings that unsupervised visitation or supervised visits between mother and child that were supervised by someone who was not training in supervision techniques was contrary to the child's best interests and inconsistent with the child's health and safety. The court ordered supervised visits at a supervised visitation center but suspended those visits temporarily when the center was closed because of COVID-19. Mother appealed.
- G.S. 7B-905.1(a) authorizes the court to suspend visits when certain conditions exist. The trial court placed a reasonable limitation on the suspension of in-person visits, which was limited to the specified facility reopening or another adequate supervised visitation center becoming available.
- For a full discussion of this case, see On the Civil Side blog post [here](#).

Juvenile's Preference; GAL's Role

In re J.C.-B., 2021-NCCOA-65

**Held: Vacated and Remanded**

- Facts: This is the second appeal of a permanency planning order. This case started in 2017, when the juvenile was 13 years old and was adjudicated neglected and dependent due to his mother's mental health and its impact on her parenting. He is now 17. Since the start of the case, he has been placed with his grandmother. In the first appeal, the permanent plan of custody with grandmother and transfer of the action to a Chapter 50 civil custody action pursuant to G.S. 7B-911 was vacated and remanded. While that first appeal was pending, mother and son started emailing one another and mother was ordered to not have contact with her son. On remand, the court ordered custody to grandmother, eliminated reunification as a permanent plan, and ordered no contact between mother and juvenile until recommended by the juvenile's therapist. Mother appeals.
- Visitation and the juvenile's preference: At a permanency planning hearing, the court must consider information from the juvenile and the juvenile's GAL. G.S. 7B-906.1(c). Although the court is not bound by the juvenile's express wishes, the court must consider those wishes, particularly when the child is approaching the age of majority, as part of the totality of the circumstances. One of the GAL's duties is to ascertain and convey to the court the juvenile's express wishes. G.S. 7B-601(a). Here, this juvenile's wishes were never sought or conveyed to the court – they were not included in the GAL report. Instead, the GAL provided outdated letters

from the juvenile's service providers which do not state his preference. This juvenile, who is old enough to seek emancipation, was not called to testify. As a 17 year old, "his opinion carries great weight." Sl.Op. ¶159. Violations of these two statutory provisions requires reversal and remand.

## Notice of Right to Review

In re J.M., 2021-NCCOA-92

### **Held: reversed and remanded**

- **Facts:** This opinion involves an appeal of a permanency planning order (PPO) that eliminates reunification as a permanent plan. In that order, no permanent plan was achieved and the case was continuing with further permanency planning hearings. The opinion reverses and remands the PPO for evidence not supporting the findings and the findings not supporting the conclusion to eliminate reunification. One issue raised in the appeal was that the error was committed when the trial court did not advise the parents of their right to seek review of the visitation order.
- **Visitation:** Contrary to respondent's arguments, the court is not required to advise the parents of their right to file a motion for review of the visitation plan. The court is statutorily required to conduct periodic permanency planning hearings, which requires the court to review the visitation plan. The G.S. 7B-905.1(d) requirement to advise the parties of the right to review the visitation plan "is limited to instances to instances where the trial court retains jurisdiction but is not otherwise mandated to conduct such reviews." Sl.Op. ¶42.

## Permanency Planning

Waiver of Counsel; Visitation

In re J.M., 273 N.C. App. 280 (2020)

### **Held: Remanded in part; vacated and remanded in part**

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

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

#### Motion to Continue

In re L.G., 274 N.C. App. 292 (l.i.2020)

**Held: Remanded**

- Facts: The juvenile was adjudicated abused and neglected based on circumstances involving her parents' substance use and housing instability. Mother did not appear at the last permanency planning hearing due to her enrolling in an inpatient substance abuse treatment facility immediately before the hearing. Mother was represented by her attorney, who made an oral motion to continue, which the court denied. After hearing, the court entered a permanency planning order (PPO) that established a primary permanent plan of guardianship and secondary plan of reunification. A second order, a guardianship order, was entered. Mother appeals.
- A motion to continue is reviewed for an abuse of discretion (no constitutional right was raised) and whether prejudice resulted from the court's error. The party seeking a continuance has the burden of showing there are sufficient grounds, and the court considers whether the continuance will further substantial justice. Mother did not meet her burden. There was no abuse of discretion. A parent's absence from the hearing is not per se prejudicial. Mother's attorney advocated for mother. Additionally, no indication of whether mother intended to testify or an offer of the forecast of her potential testimony was provided.

#### Guardianship; Required Findings; Waive Reviews vs Terminate Jurisdiction

In re L.G., 274 N.C. App. 292 (2020)

**Held: Remanded**

- Facts: The juvenile was adjudicated abused and neglected based on circumstances involving her parents' substance use and housing instability. Mother did not appear at the last permanency planning hearing due to her enrolling in an inpatient substance abuse treatment facility immediately before the hearing. Mother was represented by her attorney, who made an oral motion to continue, which the court denied. After hearing, the court entered a permanency

planning order (PPO) that established a primary permanent plan of guardianship and secondary plan of reunification. A second order, a guardianship order, was entered. Mother appeals.

- G.S. 7B-906.1(e) requires the court to make certain findings about whether it is possible for the juvenile to be placed with the parent within the next 6 months and if not, why that placement is not in the child's best interests before the court may order a guardianship. The possibility of the juvenile's placement with either parent within the next 6 months is not addressed in the PPO although there are several findings that could support a conclusion that it was not possible for the child to be placed with either parent. Remanded for the trial court to consider the issue and the make appropriate finding under G.S. 7B-906.1(e)(1).
- Waive Reviews/Terminate Jurisdiction: G.S. 7B-906.1(n) authorizes the court to waive periodic permanency planning hearings if it makes each of the 5 enumerated findings by clear and convincing evidence. One of those findings is that the child will have been in the current placement for one year four days after the hearing. The court lacked authority to waive the hearings since the juvenile had not resided in the placement for one year at the time of the hearing. The PPO also states that the action may be removed from the juvenile docket and DSS and the appointed attorneys will be released as of the one year date (4 days after the hearing), that any party may request a review, and that "jurisdiction of this [c]ourt over such person shall dissolve." Sl.Op. at 19. Additionally, reunification was ordered as a secondary plan, entitling mother to reasonable efforts provided by DSS and the right for the court to review those efforts. Remanded to satisfy G.S. 7B-906.1(n) findings and to retain jurisdiction and for DSS to continue reunification efforts.

#### 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.

## Permanency Planning: Eliminate Reunification

### Notice

#### 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.

## Notice, Motion to Continue, Findings

In re H.A.J., 377 N.C. 43 (2021)

### **Held: Affirmed**

- **Facts:** In 2018, the juveniles were adjudicated neglected based on circumstances related to mother's substance use and the children's exposure to domestic violence. At a 2019 permanency planning hearing, DSS and the children's GAL recommended that reunification be eliminated as a permanent plan. Mother objected due to lack of notice of that recommendation and due process concerns. The court proceeded with the hearing and ordered concurrent plans of adoption and guardianship, eliminating reunification as a permanent plan. Mother preserved her right to appeal. DSS filed a TPR petition, which was granted on the ground of neglect. Mother appeals both orders.
- A motion to continue is reviewed for an abuse of discretion, but if it is based on a constitutional right, it is a question of law that is fully reviewable. A respondent must show material prejudice or how her case would have been better prepared when arguing the trial court's failure to provide additional time is a constitutional violation. Here there was no error or violation of mother's due process rights.
  - The hearing was designated as a permanency planning hearing such that mother had notice that the court could change the children's permanent plan and that she needed to present evidence regarding her position for the proper disposition for the juvenile. The Juvenile Code does not require notice of a change in recommendations be provided. Further, a court is not required to follow a DSS recommendation.
  - It is unclear if mother requested a continuance as opposed to making an objection, but if it were a request for a continuance, nothing in the record demonstrated how mother was materially prejudiced by a denial of a motion to continue and her brief does not identify evidence, defenses, or testimony she was unable to present at trial.
- Findings under G.S. 7B-906.2(b) and (d) are required when eliminating reunification as a permanent plan. A verbatim recitation of the statutory language is not required. Although not using that precise statutory language, the court addressed the statutory factors required by G.S. 7B-906.2(d) "by showing 'that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time' " Sl.Op. ¶16.

## Findings

In re D.C., 275 N.C. App. 26 (2020)

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

- **Facts:** The juvenile was adjudicated neglected, and at initial disposition the court found DSS had made reasonable efforts for reunification and directed those efforts continue. An initial permanency planning hearing was scheduled to establish the initial permanent plan. A review hearing was held where the court entered two orders under G.S. 7B-911: a custody of the

juvenile to her placement provided and an order terminating its jurisdiction in the juvenile matter. Mother appeals both orders, arguing the findings required under G.S. 7B-906.2 to cease reunification efforts and eliminate reunification as a permanent plan were not made.

- Standard of review for a dispositional order is whether the findings are based on credible evidence, whether the findings support the conclusions, and whether the court abused its discretion. The failure to make statutorily required finding is reversible error.
- Before ceasing reunification efforts and eliminating reunification as a permanent plan, the court must make findings in G.S. 7B-906.2(b) and (d). The order did not include reunification as a permanent plan and ceased reunification efforts when it released DSS of responsibilities. Under G.S. 7B-906.2(b), the court was required to find that reunification efforts would be clearly unsuccessful or inconsistent with juvenile's health or safety. The findings in both orders (the custody and 7B orders) when read together were insufficient because the G.S. 7B-906.2(b) finding and one of the four required findings under G.S. 7B-906.2(d) were not made.

#### Required Findings; Reasonable Efforts; Parent's Constitutional Rights

##### In re J.M., 2021-NCCOA-92

###### **Held: reversed and remanded**

- Facts: There were four children in the home; the 2 older juveniles were not subject to this action, were not interviewed by DSS, and remained in their home. The two younger juveniles are the subject of this action, which resulted from a report by the hospital after the youngest juvenile was shown to have severe injuries including brain injuries, retinal hemorrhages, and healing rib fractures. Almost a year after the petition was filed, the youngest child was adjudicated abused and neglected and the sibling neglected after the court found the children were in the exclusive care of their parents when the injuries occurred. Prior to the adjudication, parents entered into and participated in case plans. At disposition, the court found mother substantially completed her case plan and had father leave the home based on her belief he injured the youngest child. At permanency planning, the court found respondents were complying with their case plans and increased visitation. There were no concerns about respondents' interactions with the children or the safety of the children, and the parents were engaged in shared parenting with the foster mother, who supervised the visits. At a permanency planning hearing, parents maintained they did not know how the injuries occurred. A permanency planning order found the life-threatening injuries were nonaccidental and occurred while in the exclusive care of the parents who did not acknowledge responsibility for the injuries such that there was no mitigation of the risk of harm to the juveniles. The permanency planning order eliminated reunification as a permanent plan. Parents appealed.
- Standard of review is whether the findings are based on competent evidence and whether the findings support the conclusion. An abuse of discretion standard is applied. The determination of parental unfitness if review de novo.
- In eliminating reunification/ceasing reunification efforts, the court must make findings under G.S. 7B-906.2(b) and (d). Subsection (d) focuses on the parent's actions. The findings that reunification efforts with mother would be inconsistent with the juvenile's health and safety are not supported by the evidence. Instead, the evidence showed mother could appropriately care

for the children just as she was for the older two juveniles who remained in her care and were not harmed. Mother also had father move out. The evidence shows father's progress in his case plan services, which contradict a conclusion that reunification would be unsuccessful or inconsistent with the children's health or safety.

- This case is distinguishable from *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) when neither parent accepted responsibility for their infant's nonaccidental injuries. There were no other children that lived in the home, unlike this case. DSS did not interview the two older children when investigating the cause of the injuries. There is no evidence that either parent is protecting the other parent like in *In re Y.Y.E.T.* Further, the evaluations in *In re Y.Y.E.T.* were unable to make service recommendations, unlike this case. Here, the evidence shows that mother complied with all the recommendations that were made, and she was benefitting from those services. Mother corrected the conditions that led to the children's removal. Father was recommended services, engaging in those services, and was changing his behavior and making progress.
- Reasonable Efforts Not Made: DSS must provide reasonable, not exhaustive, efforts toward reunification. See G.S. 7B-101(18). Efforts DSS provided include attempting to locate a relative placement, complete safety assessment, create and implement case plans, supervise visits, arrange for assessments, and conduct CFTs. DSS did not interview, nor offer a reason for not interviewing, the older two children during their assessment of the youngest child's injuries. The N.C. Child Welfare Manual published by N.C. DHHS, which guides the assessments, requires face-to-face interviews with all children residing in the home. (July 2019). By not interviewing all the children, DSS "could not have diligently investigated all potential causes of [the juvenile's] injuries." Sl.Op. ¶151. As a result, DSS failed to make reasonable efforts for prompt reunification.
- Parents' Constitutional Rights: "The trial court's insistence for Respondents to admit blame as a pre-condition to continuing reunification and as a basis to cease reunification has no lawful basis without the threshold finding of unfitness or conduct inconsistent with their constitutionally protected status as a parent. The fact Nellie suffered injuries does not, by itself, prove Respondents harmed her, were neglectful, or acted inconsistently with their constitutionally protected parental status." Sl.Op. ¶154.

In re S.D., 2021-NCCOA-92 (2021)

**Held: reversed and remanded**

- Facts: In 2017, the juveniles were adjudicated dependent in part because of a history of homelessness and unsafe housing, mother's unaddressed mental health issues and parenting deficits, and failure to address the youngest child's development delays and medical needs. In the dispositional stage, mother was ordered to comply with a case plan that addressed these issues. The court made findings that mother was complying with her case plan, including attending parenting classes, finding and maintaining employment, and participating in mental health services. Mother's visitation increased and she was granted both supervised and unsupervised visitation. In 2020, at a final permanency planning hearing, the court awarded guardianship of the youngest child to his foster parents, who had been caring for him and seeing the progress he made in their care. The court found mother had opportunities to obtain housing through referrals from the DSS social worker as well as referrals for a housing voucher but

declined to accept housing. The court also made findings about mother's late arrival and early departure from visits and inability to attend to the youngest child's needs. In the order awarding guardianship, the court determined that permanency was achieved for this child and ceased further hearings. Mother appealed, arguing the evidence did not support the findings and that DSS did not make reasonable efforts.

- Standard of review is whether the findings are based on competent evidence and whether the findings support the conclusion. An abuse of discretion standard is applied. The determination of parental unfitness is review de novo.
- The evidence does not support the findings.
  - Housing: The evidence does not support a finding that mother declined to accept housing. Although DSS referred the mother to Section 8 through the family reunification program (FUP), there was a 3-year waiting list. Mother also attempted to find housing on her own with rental deposit assistance. DSS's referral to an agency that is another branch of Section 8 housing without knowing whether the rental units on the agency's list provided to mother were available is not sufficient evidence that mother declined the housing. The DSS social worker never inquired as to the availability of any housing units mother viewed. Mother's testimony was that there was a shortage of housing due to Hurricane Florence and that some of the units she viewed were either occupied or not in good condition and that she did not turn down a viable residence. "Speculation that, in general, people who earn 'decent' wages should be able to find housing... is not proof that Respondent-Mother could obtain adequate housing for herself and the children." Sl.Op. ¶137.
  - Unable to meet the child's needs or participate in therapy: Orders in the action do not include a requirement that mother attend the child's medical appointments or therapy. The evidence does not show mother did not understand the child's medical needs or was unable or unwilling to provide proper care for him.
  - Late arrival/early return on visits: When taken in context, the evidence shows mother's arrival and departure times were due to traffic or school pick-up times.
- Reasonable Efforts Not Made: DSS must provide reasonable, not exhaustive, efforts toward reunification. See G.S. 7B-101(18). DSS's efforts included developing a case plan, holding CFT meetings, linking mother to mental health services and parenting education, confirming completion of services, facilitating visits, and ensuring the children's needs were met. DSS did not provide meaningful assistance to mother in obtaining housing when she was provided an unvetted list of addresses and a referral to Section 8 with a 3-year waiting list.
- The court did not make findings that mother acted inconsistently with her constitutional right to parent or that she was unfit before granting guardianship to a third party.
- In eliminating reunification/ceasing reunification efforts, the court must make findings under G.S. 7B-906.2(b) and (d). Subsection (d) focuses on the parent's actions. Although the order does not expressly cease reunification efforts, awarding guardianship and ceasing further reviews precludes the possibility of reunification. The findings about mother's lack of progress in securing housing did not consider mother's low credit score and lack of housing due to

Hurricane Florence. The findings do not address the required statutory criteria and is reversible error.

- Waiving further hearings under G.S. 7B-906.1(n) requires the court to make all the findings in that statute, which was not done. This is reversible error.

In re J.C.-B., 2021-NCCOA-65

**Held: Vacated and Remanded**

- Facts: This is the second appeal of a permanency planning order. This case started in 2017, when the juvenile was 13 years old and was adjudicated neglected and dependent due to his mother's mental health and its impact on her parenting. He is now 17. Since the start of the case, he has been placed with his grandmother. In the first appeal, the permanent plan of custody with grandmother and transfer of the action to a Chapter 50 civil custody action pursuant to G.S. 7B-911 was vacated and remanded. While that first appeal was pending, mother and son started emailing one another and mother was ordered to not have contact with her son. On remand, the court ordered custody to grandmother, eliminated reunification as a permanent plan, and ordered no contact between mother and juvenile until recommended by the juvenile's therapist. Mother appeals.
- Standard of review for whether a parent has acted inconsistently with their parental rights is de novo, which is when the appellate court "considers the matter anew and freely substitutes judgment for that of the lower tribunal." Sl.Op. ¶15.
  - A permanent custody order that awards custody to a non-parent must be vacated when the order does not find by clear and convincing evidence that a parent is unfit or has acted inconsistently with their constitutionally protected rights.
  - There was no evidence or findings to conclude mother was unfit or acted inconsistently with her parental rights. The evidence showed mother responded to emails from her son, attended counseling appointments with him, complied with her case plan requirements, filed a motion for contempt against grandmother when visits were withheld, and was working as a teacher.
- G.S. 7B-906.1(j) requires the court verify the proposed custodian's understanding of the legal significance of the custody placement. An order without that verification must be vacated and remanded.
  - G.S. 7B-906.1(j) states that "the fact that the prospective custodian or guardian has provided stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." Sl.Op. ¶30. This evidence does not per se compel the conclusion that the custodian understands the legal significance of the placement.
- The standard of review of an order eliminating reunification is whether the findings are supported by credible evidence, whether the findings support the conclusion, and whether the court abused its discretion.
  - The findings are unsupported by the evidence and do not support the conclusion to eliminate reunification efforts and reunification.

- G.S. 7B-906.2(c) requires the court to make findings about whether DSS's reunification efforts were reasonable. Under G.S. 7B-101(18), reasonable efforts are required to be "diligent." The efforts in this case "were not aimed at reunifying [the juvenile] with his mother." Sl.Op. ¶41. Efforts to assess the juvenile's well-being, although an important part of monitoring progress toward reunification, are not "concrete action steps" for reunification. DSS never requested an assessment of mother's home in her new state. DSS moved to have the court discontinue all contact between mother and her son. The reunification efforts "were arguably non-existent." Sl.Op. ¶45.

### Findings, Custody, Cease Further Hearings

[In K.P.](#), 2021-NCCOA-268

#### **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.

Acting Inconsistently with Constitutional Rights; Unfit Parent  
[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.

[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).

[In re I.K.](#), 2021-NCSC-60

**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 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 a domestic violence incident involving his own mother.
  - Dissent: The findings are insufficient to support the conclusion that father acted 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.

### Acting Inconsistently with Constitutional Rights; Visitation

In re I.K., 273 N.C. App. 37 (2020)

**Held: Affirmed (There is a dissent)**

- Facts and Procedural History: Two children were adjudicated dependent due to circumstances related to unstable housing, substance abuse, and domestic violence in the home. A 2017 permanency planning order that awarded guardianship of the children to their grandmother and

eliminated reunification was appealed. The court of appeals vacated and remanded that permanency planning order to address respondents' constitutional rights to care, custody, and control of their children before applying the best interests of the child standard in granting guardianship. On remand, the court awarded guardianship of one child to the grandmother, and that order was not appealed. Later, after hearing, the court awarded guardianship of the other child to grandmother. Visitation of a minimum of one hour/week, supervised, with discretion to the guardian to allow for additional visitation was ordered. Respondents appeal that order.

- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence. The determination is not a bright-line test but is instead fact-specific and is based on the parent's conduct and intention toward the child. The totality of the circumstances in the case support the determination that the parents acted inconsistently with their constitutional rights.
- The findings are supported by clear and convincing evidence, and the findings support the conclusion that the parents acted inconsistently with their constitutionally protected rights.
  - Housing: The findings describe a cluttered (hoarding), crowded (parents living with one of their parents and their infant), dilapidated (holes in the floor) trailer and were supported by testimony and reports. The trial court gave more credibility to those reports and testimony when determining the day to day living conditions in the home than mother's photographic evidence of recent improvements. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.
  - Domestic violence and substance abuse: Evidence of father's verbal aggression toward his mother, mother's drug seeking behavior, and both parents marijuana use support the court's findings that the issues with domestic violence and substance abuse have not been satisfactorily resolved.
- Visitation orders are reviewed for an abuse of discretion. There was no abuse of discretion and the order complied with G.S. 7B-905.1(c) and (d).
- Dissent: Competent evidence does not support the findings re: housing, domestic violence, and substance abuse. Findings do not support conclusion of father acting inconsistently with his parental rights (but do support conclusion regarding mother).

Constitutional Rights, Evidence, Findings, Clerical Error

In re A.S., 853 S.E.2d 908 (2020)

**Held: Vacated and Remanded**

- Facts: The juveniles were adjudicated neglected. Starting with nonsecure custody and continuing through two permanency planning hearings, the juveniles were placed with their paternal grandparents. Based on the grandparents' request prompting a motion for review by DSS, one of the juveniles was placed in a different home. The permanent plans were primary of reunification and secondary of guardianship. Throughout the case, mother complied with her case plan and made progress. At the last permanency planning hearing, DSS and the GAL recommended reunification continue to be a permanent plan for both juveniles. The court ordered reunification with mother continue as a permanent plan for the one juvenile who was

no longer placed with paternal grandparents and awarded custody of the other juvenile to the grandparents and eliminated reunification as a secondary plan as permanency had been achieved. Mother appeals.

- Standard of review is whether competent evidence supports the findings and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- DSS characterizes one challenged finding of fact as a clerical error – the finding states mother has not remained available to the court, DSS, or GAL when other findings of fact contradict that challenged finding, and no evidence supports that finding. “A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” Sl.Op. at 8. Using the word “not” changes the entire meaning, making it unclear as to whether it is a clerical error. The finding is unsupported by the evidence.
- Findings that mother delayed participating in her case plan and services are unsupported by the evidence. The record shows mother started engaging in her services before the adjudication and continued to engage in the services. Further the finding that mother has not alleviated the conditions leading to the children’s removal is unsupported as the evidence shows the opposite.
- The conclusion that mother was unfit and acted inconsistently with her constitutionally protected status is based on the findings of her delaying engaging in services and not alleviating the conditions that led to the children’s removal – both of which are unsupported by the evidence. Employing a de novo review, the conclusion of law is error.

#### Findings, Terminate Visitation

In re C.M., 273 N.C. App. 427 (2020), aff’d per curiam, 377 N.C. 105 (2021)

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

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

progress address the substance of G.S. 7B-906.2 finding that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety.

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

#### Burden of Proof, Findings, Visitation

In re L.E.W., 375 N.C. 124 (2020)

**Held: Affirmed**

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

#### Insufficient Findings, Impact on TPR

In re L.R.L.B., 377 N.C. 311 (2021)

**Held: Remanded**

- Facts: In an underlying neglect action, at a permanency planning hearing, reunification efforts/reunification was eliminated as a permanent plan. Mother preserved her right to appeal. DSS filed a TPR petition, and the TPR was granted on the grounds of neglect and failure to make reasonable progress. Mother appealed the permanency planning order (PPO) and TPR order. Mother challenges the PPO only and argues the errors in the PPO require the TPR to be vacated under G.S. 7B-1001(a2).

- G.S. 7B-1001(a2) requires the appellate court to review the two orders “together” and states, “if the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated.” Sl.Op. ¶10.
- The challenged findings of the PPO are supported by competent evidence, including social worker testimony, and are binding on appeal. However, the findings are insufficient to eliminate reunification as they do not include all four required findings under G.S. 7B-906.2(d). The trial court is not required to use the exact language of the statute but must address the statute’s concerns. Here, the court made findings as to the substance and concerns raised by G.S. 7B-906.2(d)(1), (2), and (4). The order does not address G.S. 7B-906.2(d)(3) – “whether the parent remains available to the court, the department, and the guardian ad litem of the juvenile.” Sl.Op. ¶20.
- There is a difference between a fatally defective PPO and an incomplete order with insufficient findings of fact. An order with insufficient findings of fact may be cured by findings in the TPR. A PPO eliminating reunification is reviewed together with a TPR order, and “incomplete findings of fact in the [PPO] may be cured by findings of fact in the termination order.” *In re L.M.T.*, 367 N.C. 165, 170 (2013); Sl.Op. ¶22. The 2017 amendments made to G.S. 7B-1001 have not abrogated the holding in *In re L.M.T.* since the two orders continue to be reviewed together. Here, the court made the ultimate finding required by G.S. 7B-906.2(b) to eliminate reunification as a permanent plan. The failure to address G.S. 7B-906.2(d)(3) warrants a remand for the trial court to correct this deficiency. The DSS and GAL reports address the issue, but the court must make findings of mother’s availability.
- The language of G.S. 7B-1001 – when a PPO is vacated or reversed the TPR must be vacated – became is new.
  - The error in the PPO is not moot. The statutory language precludes a finding that harmless error in the PPO can be mooted by a TPR order (*cf. In re H.N.D.*, 265 N.C. App. 10 (2019) not applying the new language).
  - Vacating the PPO and the TPR is not required. The appropriate remedy is remand. This court’s precedent in *In re L.M.T.* allowing the PPO to be cured by the TPR authorizes this remedy. The court of appeals opinions offered by mother to support vacating the PPO are not binding or instructive. Further, “[w]e do not discern that the Legislature enacted N.C.G.S. § 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under N.C.G.S. § 7B-906.2(d)(1)-(4) from its trial court order which eliminates reunification from a child’s permanent plan.” Sl.Op. ¶35. Unlike G.S. 7B-906.2(b), which addresses whether reunification efforts would clearly be unsuccessful or clearly inconsistent with the juvenile’s health or safety, no particular finding in G.S. 7B-906.2(d) is required to support the court’s conclusion to eliminate reunification but instead “merely requires the trial court to make ‘written findings as to each of the’ issues enumerated.” *Id.* A finding that the parent made herself available to the court, GAL, and DSS does not preclude the trial court from eliminating reunification based on the other factors. The failure to include this one finding is not material and prejudicial warranting a vacating and reversal of the PPO resulting in the TPR being vacated.

## Rule 63: Substitute Judge

### Judge Resigns; Stipulations

#### In re R.P., 2021-NCCOA-66 (2021)

**Held: Vacated and remanded for new adjudication and disposition hearing**

- **Facts:** Due to circumstances created by parents' substance use, DSS filed a petition alleging Juvenile 1 (J1) was neglected and Juvenile 2 (J2) was neglected and abused. At the adjudication hearing, the parties stipulated to 13 statements of fact including that J1 was neglected and J2 was neglected and abused. The stipulations were introduced as evidence and no other evidence was offered at the hearing. The judge indicated he would make findings of fact consistent with those in the stipulation and would enter a neglect adjudication for J1 and neglect and abuse adjudications for J2. Disposition followed where the evidence consisted of DSS and GAL court reports. The judge stated he would make findings consistent with the stipulations and the GAL and DSS reports, that DSS made reasonable efforts, and that the best interests of the children were to remain in DSS custody. The DSS attorney was asked to draft the order. The judge hearing the adjudication and disposition resigned before the orders were signed. The chief district court judge signed the orders. Respondent parents appeal arguing the orders are void or alternatively the stipulations alone do not support the adjudications.
- **Rule 63 of the N.C. Rules of Civ. Pro.** authorizes the chief district court judge to sign orders when a district court judge resigns. The first judge did not recite, render, or sign the order and he did not adjudicate the evidence and state the conclusions of law. "Rendering and entering judgment was more than a ministerial task," such that the chief district court judge was "without authority to sign the adjudication and disposition orders" making them a nullity. Sl.Op. ¶27.
  - **Adjudication orders:** Neither the record nor hearing transcript show that the judge presiding over the adjudicatory hearing rendered or made his final findings of fact and conclusions of law in the unfiled and unsigned orders but instead stated he would enter the adjudication "as is admitted to." Sl.Op. ¶23. As a result, any action of the chief district court judge to cause the orders to be entered was not solely a ministerial duty. *See In re Whisnant*, 71 N.C. App. 439 (1984).
  - **At disposition**, a judge must consider competent evidence that is necessary to determine the juvenile's needs and most appropriate disposition. The signing of the order was not a ministerial act. The findings in the written order exceeded the four rendered findings by the first judge.
- **Stipulations of fact are permitted by G.S. 7B-807(a).** The parties stipulated to underlying facts of the adjudications, and those stipulated facts could properly have been included in the adjudication order. Stipulations to conclusions of law are generally invalid and are not binding on the trial or appellate courts. Here, the parties agreed to stipulations of fact, not a consent adjudication order under G.S. 7B-801(b1). The judge could not have relied solely on the stipulated conclusion of abuse and neglect for the juvenile's adjudications. No other evidence was admitted.

## Appeal

### Standing

In re A.J.L.H., 275 N.C. App. 11 (2020)

**Held: Vacate and Remand (Stay Allowed 1/21/21)**

- **Facts:** This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. After a DSS assessment of abuse based on the use of corporal punishment with a belt that caused bruising on the oldest child, who was 10 years old, DSS and the parents entered into a safety plan. Months later at a CFT meeting, DSS decided to file a petition alleging the oldest child was abused and neglected and the younger siblings were neglected. The safety plan had not been violated but the parents did not believe their disciplinary methods were cruel or unusual. After hearing, the children were adjudicated and the parents were denied visitation. The parents appeal challenging the adjudications and denial of visitation.
- **There is a distinction between a parent and stepparent.** A stepparent is a caretaker and does not have standing to appeal the orders regarding his stepchildren. See G.S. 7B-101(8); 7B-1002(4). As the parent of the youngest child, he does have standing to appeal the order related to her.

### Notice of Appeal; Signatures

In re Q.M., 275 N.C. App. 34 (2020)

**Held: Vacated and Remanded**

- **Facts:** At the time the juvenile was born, the mother was a ward of a county DSS due to her incompetency. DSS filed a petition alleging dependency and named the putative father. Mother was appointed a Rule 17 GAL. After a paternity test, a hearing to establish the putative father's paternity was held, but an order was not entered until months later. Prior to the adjudicatory hearing, DSS had nonsecure custody and the juvenile was placed in foster care. The child was adjudicated dependent, and a dispositional order continued custody with DSS and placement with the child's father. No visitation was ordered with mother. Mother appeals.
- **Notice of Appeal:** Mother was appointed a Rule 17 GAL due her incompetency. The notice was signed by mother's counsel but was not signed by mother or her court-appointed Rule 17 GAL. DSS filed a motion to dismiss for failing to comply with G.S. 7B-1001, requiring the notice be signed by the attorney and mother. The court granted DSS's motion. Mother had also filed an amended notice of appeal with the attorney's and GAL's signatures and filed a petition for writ of certiorari since the amended notice was untimely. The writ was granted as the defect in the first notice was corrected.

## Remand

### Substitute Judge

[In re J.M.](#), 854 S.E.2d 158 (2020)

#### **Held: Affirmed**

- **Facts:** This is the second appeal of an adjudication and dispositional order regarding a juvenile. In the first appeal, the court of appeals remanded the adjudication of the juvenile as “seriously neglected” because of a misapprehension of law (serious neglect applies to responsible individuals; neglect applies to juveniles). The remand was for the district court to consider neglect within the proper statutory framework. The district court judge that heard the first adjudication hearing was no longer a judge, and a different judge was assigned to hear the remand. On remand, the second judge admitted the hearing transcript of the first hearing as well as other exhibits that had been admitted at the first hearing and took judicial notice of the findings of fact that were undisturbed by the court of appeals and the adjudication of this juvenile’s sibling as a neglected juvenile. No new evidence was admitted at the adjudicatory hearing held on remand. The juvenile was adjudicated neglected. After the adjudication and dispositional orders were entered, respondent father appeals, arguing the substitute judge on remand exceeded her authority and resolved an evidentiary conflict.
- **Rule 63 of the NC Rules of Civ Pro** applies to this case (unlike *In re Whisnant*, 71 N.C. App. 439 (1984)). The first judge was unable to perform the duties of the court on remand because of the expiration of his term and his not being re-elected during the pendency of the appeal. Under Rule 63 the second judge was authorized to perform the duties of the court on remand; “ [t]his court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider [on remand] an order entered by a judge who has since ‘left the bench.’” Sl.Op. at 9 (citations omitted). The remand in this case does not have the effect of a vacatur where portions of the order are void and of no effect. Instead, the remand was limited and precise, and a “remand is not intended to be an opportunity for either respondent or petitioner to retry its case.” Sl.Op. at 10 (citation omitted). The substitute judge complied with the mandate on remand to reconsider the juvenile’s adjudication within the statutory framework and did not commit error.
- **The holding of *State v. Bartlett*, 368 N.C. 309 (2015), which interpreted G.S. 15A-977(d), is not relevant.** That was a criminal case. There is not a similar requirement for an adjudication order in the Juvenile Code.
- **The substitute judge did not resolve an evidentiary conflict.** The substitute judge was bound by the unchallenged findings of the first adjudication order. Those findings show a pattern of the mother making and recanting allegations about respondent’s mistreatment of her children. The first judge described mother as not being forthcoming and that the evidence corroborated mother’s recanted allegations. The substitute judge’s findings are consistent with the first judge’s original findings of fact.
- **The focus on the credibility of mother in this appeal is misguided because the determinative factors for a neglect adjudication are “the circumstances and conditions surrounding the child, not the fault or culpability of the parent.”** Sl.Op. at 15. An appeal reviews findings and

conclusions about the child's status and "should not be morphed ...into a question of culpability regarding the conduct of an individual parent." *Id.*

#### Compliance with Mandate; Two Actions with Same Juvenile; Termination of Guardianship

In re K.S., 274 N.C. App. 358 (2020)\* (*This opinion was rewritten after Dec. 1*)

##### **Held: Reverse and Remand (stay allowed 2/5/21)**

- **Facts and Procedural History:** This is an appeal by the juvenile's guardians of a permanency planning order that terminates their guardianship and focuses on the district court's lack of compliance with a prior appeal and the mandate resulting from it. That prior opinion is *In re M.N.*, 260 N.C. App. 203 (2018).
  - K.S. was born in 2007 and was adjudicated neglected and abused later that year. In 2009, permanency was achieved when maternal grandparents were appointed as guardians. Further review hearings in the action were waived.
  - In 2016, DSS filed a second petition alleging K.S. was neglected and dependent based on the guardians having drug-related charges. In 2017, K.S. was adjudicated neglected and in a dispositional order, the guardianship of K.S. was terminated. The guardians, who are named as parties, appealed.
  - On appeal, the adjudication and disposition were reversed due to insufficient findings of fact and a lack of evidence to support the findings of fact that K.S. was neglected. The case was remanded "for further proceedings 'not inconsistent with th[e] opinion.'" Sl. Op. at 5.
  - On the day the appellate opinion was filed, DSS filed a motion for review/permanency planning hearing to terminate the grandparents' guardianship due to the guardians' substance use and criminal charges. The guardians filed a motion raising res judicata and estoppel as affirmative defenses.
  - The district court conducted a hearing to address the appellate mandate and "provided DSS with the option of addressing the matter on remand for further findings of fact as to the adjudication of Kaitlyn as a neglected juvenile or, alternatively, proceeding with its motion for review." Sl.Op. at 5-6. A permanency planning hearing was held on DSS's motion for review as the trial court concluded DSS "elected to proceed with the motion for review/permanency planning hearing" and purported to dismiss the second petition which had been the subject of the previous appeal. After hearing, the court terminated the guardianship. The guardians appealed raising as one issue that the district court lacked subject matter jurisdiction at a permanency planning hearing to terminate their guardianship based on the remand from the previous appeal and as another issue that the district court's proceedings on remand were inconsistent with the appellate mandate.
- **Subject matter jurisdiction to terminate the guardianship:** Under G.S. 7B-200 and -201, the district court retained jurisdiction over K.S. under the first petition as it did not enter an order terminating its jurisdiction and K.S. has not turned 18 or been otherwise emancipated. Jurisdiction over that first action did not terminate when the second petition (2016) was

purportedly dismissed after the appellate remand. The district court retains subject matter jurisdiction in the first action.

- Compliance with the Remand: “ ‘The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure.’ ” Sl.Op. at 10. The 2018 reverse and remand “for further proceedings ‘not inconsistent with th[e] opinion’ ” mandate required “DSS to provide sufficient evidence to adjudicate Kaitlyn neglected (as alleged in the Second Petition) by showing harm or risk of harm.” Sl.Op at 13. By conducting a permanency planning hearing in the first action without first conducting a new adjudicatory in the 2016 action was reversible error. The matter is remanded for the district court to comply with the previous mandate to make findings as to whether there was harm or risk of harm to K.S. and make the appropriate conclusions of law. “Thereafter, the parties may proceed as permitted under law while taking into consideration this Court’s previous holdings.” Sl.Op. at 15.

## Termination of Parental Rights

### Subject Matter Jurisdiction

Pending Appeal of A/N/D Order

In re J.M., 377 N.C. 298 (2021)

**Held: Vacated in part; affirmed in part**

- Facts and procedural history: There is an underlying juvenile case to this TPR, where the son was adjudicated abused and the daughter “seriously neglected.” Father appealed, and son’s adjudication was affirmed while daughter’s adjudication was reversed and remanded due to a misapprehension of law (neglect not seriously neglected). On August 6, 2019, the children’s GAL filed motions to TPR father’s rights to both children. On August 8, 2019, the neglect petition for the daughter came back for hearing pursuant to the remand. The remand hearing was conducted in August with adjudication and disposition orders entered on November 1, 2019. Father appealed the remand orders. On the same day but after the notice of appeal was filed, the court heard the GAL’s motion to TPR father’s rights, which was granted. Father appeals the TPR orders. (The appeal regarding son involves a no-merit brief and father’s pro se brief which included a claim for ineffective assistance of counsel; the opinion held father’s arguments were meritless.)
- In juvenile actions, the court’s subject matter jurisdiction is established by statute – the Juvenile Code. Because of the nature of juvenile cases, the legislature has provided for a modified approach for appeals of juvenile orders, which allows the trial court to continue to exercise jurisdiction while the appeal is pending with the exception of hearings to terminate parental rights. G.S. 7B-1003. Regarding TPRs, the court is not divested of subject matter jurisdiction but it is prohibiting from exercising jurisdiction in the TPR while the appeal is pending. “The ‘issuance of the mandate by the appellate court,’ upon the conclusion of the appeal, ‘returns the power to exercise subject matter jurisdiction to the trial court.’ ” Sl.Op. ¶17.

- When the GAL filed the motion to TPR, there was no appeal pending, but when the trial court started the TPR hearing, it was after the notice to appeal was filed and the court was aware of that notice of appeal. The trial court should not have exercised jurisdiction in the TPR for daughter since his appeal of the remand orders was pending. The court acted in excess of the G.S. 7B-1003(b) statutory limits on its subject matter jurisdiction. The TPR order for daughter is void and vacated.

G.S. 7B-1101 and the UCCJEA; Out-of-State Parents; Minor Parent  
[In re N.P.](#), 376 N.C. 729 (2021)

**Held: Affirmed**

- Facts: In 2017, when respondent mother and father were visiting North Carolina, from their home in Virginia, mother went into premature labor. The baby was born in New Hanover County 23 weeks prematurely and remained in the hospital due to all her medical needs. DSS become involved and filed a petition, where the infant was adjudicated neglected and dependent. In that matter, the trial court determined it had temporary emergency jurisdiction under the UCCJEA. Mother and father returned to their homes in Virginia after they entered into a case plan with DSS. The parents remained in Virginia while the child remained in NC in foster care. In October 2018, DSS filed a TPR petition which was granted. Mother appeals, raising the district court's lack of subject matter jurisdiction.
- Subject matter jurisdiction cannot be conferred by consent or through waiver and may be raised at any time, including on appeal. A court has no authority to act without subject matter jurisdiction and any orders entered are void. If the lower court lacks subject matter jurisdiction, the appropriate action for the appellate court is to vacate orders that were entered without authority.
- Subject matter jurisdiction is established by the Juvenile Code. G.S. 7B-1101 states the district court has exclusive original jurisdiction in TPR cases for any juvenile who resides in, is found in, or is in the legal or actual custody of a county DSS in the judicial district at the time the TPR petition/motion is filed. It further provides that there must be jurisdiction under the UCCJEA and that a nonresident parent's rights may be terminated when the court has jurisdiction under initial or modification jurisdiction under the UCCJEA and the parent has been served pursuant to G.S. 7B-1106. The question of subject matter jurisdiction in a TPR under G.S. 7B-1101 focuses on the custody, location, or residence of the *child* in a TPR, not the *parents*. (emphasis at Sl.Op. ¶11). At the time the TPR petition was filed the conditions of G.S. 7B-1101 were satisfied: the juvenile resided in New Hanover County and was in the legal custody of New Hanover County DSS; NC was the juvenile's home state; and mother was served pursuant to G.S. 7B-1106 (there is no dispute on this last factor).
- The UCCJEA is an overarching jurisdictional scheme that applies to abuse, neglect, dependency and TPR proceedings. Initially, in the neglect/dependency action, the NC district court exercised temporary emergency jurisdiction in the underlying neglect and dependency action. Mother argues temporary jurisdiction should have expired given the parents' residence in Virginia. In assuming arguendo that temporary emergency jurisdiction expired before the TPR petition was

filed (as mother argues), “We are not required to determine with exactness the junction at which the temporary emergency regarding the child’s well-being may have ended.” Sl.Op. ¶11. At the time the TPR was commenced, NC was the child’s home state – child lived with a person acting as a parent (the foster parents) for at least 6 consecutive months immediately preceding the commencement of the TPR action. See G.S. 50-102(7).

- Although mother argues the court should have applied the dispositional alternative G.S. 7B-903(a)(6) in the neglect/dependency case to transfer custody of the juvenile to the responsible authorities in her home state, Virginia, North Carolina was the juvenile’s home state such that G.S. 7B-903(a)(6) was not an option.
- Although mother argues she was a minor, G.S. 7B-1101 explicitly states “The court shall have jurisdiction to terminate the parental rights of any parent *irrespective of the age of the parent.*” Sl.Op. ¶16 (emphasis in opinion). This language is unambiguous.

Standing; UCCJEA

[In re A.S.M.R.](#), 375 N.C. 539 (2020)

**Held: Affirmed**

- Facts: Respondent challenges the underlying neglect adjudication order for alleged evidentiary errors and insufficient findings, arguing that the defects in that order make the order invalid and result in DSS not having custody of the juvenile. Respondent’s additionally raise the failure to include findings addressing UCCJEA subject matter jurisdiction in the underlying adjudication order is a jurisdictional defect such that the order is void. Based on these errors, respondent argues DSS lacks standing to file a TPR.
- “Respondents are precluded from contesting the validity of the trial court’s [neglect] adjudication order in the present appeal, which is an appeal only of the trial court’s subsequent termination order.” Sl.Op. at 4. By failing to appeal the neglect adjudication order, respondent has abandoned any non-jurisdictional challenges to that order. A TPR proceeding is separate and distinct from an underlying adjudication of a juvenile’s abuse, neglect, or dependency proceeding. In examining prior court of appeals opinions that addressed non-jurisdictional challenges to prior adjudication orders in TPR actions, “we conclude that the principals set out in Wheeler and its progeny are correct. For the reasons set out in those decisions, a respondent’s failure to appeal an adjudication order generally serves to preclude a subsequent collateral attack on that order during an appeal of a later order terminating the parental rights.” Sl.Op.at 8. See *In re Wheeler*, 87 N.C. App. 189 (1987). The adjudication order granted custody to DSS, and DSS had standing to file the TPR.
- Quoting a previous opinion, *In re L.T.*, 374 N.C. 567, 569 (2020), “the trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction.” Sl.Op. at 11. “[T]he lack of explicit findings establishing jurisdiction under the UCCJEA does not constitute error because the record unambiguously demonstrates that ‘the jurisdictional prerequisites in the Act were satisfied.’” *Id.* Here, the record reflects NC was the

children's home state at all relevant times and NC had jurisdiction in the adjudication proceeding.

Standing; DSS with Custody

[In re K.S.-D.F.](#), 375 N.C. 626 (2020)

**Held: Affirmed**

- **Facts:** DSS initiated a juvenile action in 2008 when it filed a petition alleging the juveniles were neglected. In 2009, the juveniles were adjudicated neglected and ultimately a permanent plan of guardianship was achieved in 2010. The court retained jurisdiction but waived further reviews. In 2016, DSS filed a motion for review due to the children being returned to their mother by the guardians. DSS obtained an order for nonsecure custody. Permanency planning hearings were conducted, and in 2018 DSS filed a motion to terminate parental rights. The TPR was granted, and respondents appeal, arguing DSS lacked standing to file the TPR and the court abused its discretion in determining TPR was in the child's best interests.
- Respondent's argument that the court lacked jurisdiction to order a nonsecure custody order upon a motion for review instead of a petition because nonsecure custody provisions only apply pre-adjudication has no merit. Jurisdiction is based on the filing of a properly verified petition and extends through all stages of the action. Here the court obtained jurisdiction in 2008 when the petition was filed such that the trial court had jurisdiction to enter the nonsecure custody order in 2016 giving DSS custody. DSS had standing to file the TPR petition.

County of Filing

[In re A.L.L.](#), 376 N.C. 99 (2020)

**Held: Reversed**

**Concur in part, Dissent in Part, Newby, J.**

- **Facts:** The juvenile was adjudicated dependent in an underlying juvenile action based on circumstances related to mother's mental health issues. During the course of the underlying dependency action, mother was ordered to comply with her case plan, which she did but she was still engaging in inappropriate behaviors and had parenting deficits. Ultimately the court appointed permanent guardians for the juvenile under G.S. 7B-600, achieving a permanent plan. The guardians filed the TPR petition so they could adopt. The TPR was granted on the grounds of dependency and willful abandonment. Mother appeals both grounds and argues the court lacked subject matter jurisdiction.
- Subject matter jurisdiction is a question of law that is reviewed de novo. Subject matter jurisdiction may be raised at any stage of the proceedings, including on appeal. When the court lacks subject matter jurisdiction, its orders are void.
- Respondent argues the Davie County district court lacked subject matter jurisdiction because the Davidson County district court previously entered a permanency order that awarded guardianship to the petitioner and Davie County's action would override the Davidson County's permanency planning order. The Davie County district court had subject matter jurisdiction. Subject matter jurisdiction in a TPR is governed by G.S. 7B-1101, and the petitioners had standing to initiate the TPR under G.S. 7B-1103, which they did in the county where they resided

with the juvenile. Jurisdiction in a TPR does not require an underlying abuse, neglect, or dependency action. Additionally, the Juvenile Code does not require a TPR action to be filed in the same district court as an A/N/D action if one exists. If the requirements of G.S. 7B-1101 exist, the court has jurisdiction even if an A/N/D action is pending in another county.

## 7B Statutory Time Limits

Delay in Hearing: Writ of Mandamus, Not Appeal

In re C.R.L., 377 N.C. 24 (2021)

### **Held: Affirmed**

- **Facts:** In 2015, an underlying neglect action was commenced by DSS. Arising from that action, DSS filed TPR petitions on March 22, 2017. Although the court ordered DSS to notice the TPR cases for hearing in orders dated between Oct. 4, 2017 and July 25, 2019, the TPR was not heard until Dec. 9-10, 2019, almost 33 months after the petitions were filed. The TPR was granted, and the order found the TPR was hearing more than 90 days after the petition was filed. Father appeals, raising the delay in holding the hearing with the statutory time period as his sole challenge. The parties agree the TPR hearing occurred well outside the statutory time limit and that there were no continues for extraordinary circumstances.
- G.S. 7B-1109(a) states the TPR hearing shall be held no later than 90 days from the filing of a TPR petition/motion unless the court continues the hearing under subsection (d). G.S. 7B-1109(d) allows the court to continue the hearing for up to 90 days based on good cause to receive additional evidence including conducting discovery, receiving reports/assessments the court requested, or other information needed for the best interests of the child. Continuances beyond 90 days from the filing of the petition/motion “shall be granted only in extraordinary circumstances when necessary for the proper administration of justice....” Sl.Op. ¶17.
- Applying a previous holding in *In re T.H.T.*, 362 N.C. 446 (2009) addressing the delay in entering an adjudication and disposition order, “this statutory violation should have been remedied while it was occurring by the filing of a petition for writ of mandamus.” *Id.* As previously stated in *In re T.H.T.*, “the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not ‘sit back’ and rely upon an appeal to cure all wrongs.” Sl.Op. ¶18. Granting an appeal would “compound the delay in obtaining permanence for the child.” Sl.Op. ¶19. Here, father did not file a writ of mandamus at any point in the 33-month delay or offer any explanation. By failing to file a petition for a writ of mandamus, father “missed his opportunity to remedy the violation of N.C.G.S. § 7B-1109.” Sl.Op. ¶11.

## Personal Jurisdiction

Service by Publication, Rule 4(j1)

In re S.E.T., 375 N.C. 665 (2020)

### **Held: Vacated**

- **Facts:** This is a TPR initiated by petitioner-mother against respondent father. A summons was issued but was returned by the sheriff as unserved with a notation that respondent had no

address located within the county and that respondent was not at the address provided and had been banned from that address. Petitioner sought an order for service by publication, which was granted. Notice of service by publication was made. Respondent did not answer or appear at the hearing, and the TPR was granted. Father appealed, arguing the order was void as the court did not have personal jurisdiction over him due to the failure to comply with Rule 4(j1) of the Rules of Civil Procedure.

- “A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void.” Sl.Op. at 6. Here, the court had no personal jurisdiction over respondent.
- Service by publication in a TPR must comply with both the provisions of G.S. 7B-1106 (which requires court findings and approval before publication) and G.S. 1A-1, Rule 4(j1). The statutory requirements for service by publication is strictly construed.
- Rule 4(j1) requires that after service is completed an affidavit be filed with the court that contains information specified in the rule including the circumstances warranting service by publication. A failure to file the affidavit that complies with the requirements of Rule 4(j1) is reversible error. The affidavit executed by the publisher does not satisfy the Rule 4(j1) requirements as it did not address the circumstances warranting service by publication. The G.S. 7B-1106 motion for publication that was signed by petitioner’s attorney under Rule 11 does not satisfy the affidavit requirement of Rule 4 (j1). Documents not under oath are not affidavits.

## Relinquishment

### Other Parent’s Constitutional Rights; Subject Matter Jurisdiction

In re E.B., 375 N.C. 310 (2020)

#### **Held: Reversed**

- Facts: Father appealed this TPR to the NC Supreme Court based on a dissent in the Court of Appeals opinion that affirmed the trial court’s order terminating his rights. Mother executed a relinquishment to DSS the day after the child was born. DSS placed the child in foster care and contacted the putative father, who was excited about being the child’s father and agreed to paternity testing. Father agreed to an out-of-home family services agreement, and subsequently the paternity test confirmed he was the father. Between 2016-2018, the district court held 6 permanency planning hearings, although DSS never filed a petition alleging the child was abused, neglected, or dependent. Father never obtained custody/placement of the child through the permanency planning orders as the court determined he had not satisfied the various requirements it placed on him. Father did have visitation and suggested his sister, who lived in California, be a placement option after an ICPC was conducted, until he was awarded custody. After father moved to California without informing DSS before or immediately after his move, DSS filed a TPR petition; the court had ordered a primary permanent plan of adoption. The TPR was granted on the grounds of neglect, failure to make reasonable progress, and willful abandonment.

- **Holding:** “[P]etitioners [DSS] failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child. We also hold that petitioners have failed to prove that any other ground existed to terminate respondent’s parental rights.” Sl.Op. at 2.
- **Subject Matter Jurisdiction:** “DSS never filed a petition seeking to have the trial court adjudicate Ella an abused, neglected, or dependent juvenile pursuant to N.C.G.S. §§ 7B-402(a) and -403(a). Thus, the trial court lacked subject-matter jurisdiction to conduct permanency planning and review hearings, and its orders lacked the force of law.” Sl.Op. at 5. Without the petition, the trial court lacked the legal authority to demand respondent demonstrate his parenting abilities before taking custody of his daughter. However, the trial court did have jurisdiction to hear the TPR as an abuse, neglect, or dependency petition is not a precondition to a TPR proceeding and DSS had standing through mother’s relinquishment to it under G.S. 7B-1103(a)(4).
- **Constitutional Rights:** “We begin by noting that DSS’s and the trial court’s actions repeatedly infringed upon respondent’s constitutional parental rights. ‘[The] government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent’s conduct is inconsistent with his or her constitutionally protected status.’ ” Sl.Op. at 8. Respondent grasped the opportunity to be this child’s parent and had a constitutionally protected right to the care, custody, and control of his child. Until the TPR was filed, DSS never sought an order that determined respondent father was unfit or acted inconsistently with his constitutionally protected status as a parent. Without subject matter jurisdiction in the permanency planning and review hearings, the “trial court did not have authority to act on its own views of what served [the child’s] best interests without first finding grounds to displace respondent’s constitutional parental rights to make such decisions.” Sl.Op. at 10.
- **TPR Grounds:** “A trial court cannot determine a party’s rights based on facts established in or arising from a legally void judicial proceeding.” Sl.Op. at 11. There were not sufficient facts that were independent from the void permanency planning orders to prove any of the alleged grounds. Had the court made sufficient findings based on facts that were independent of the invalid hearings and orders, “the mere fact that those invalid proceedings occurred would not preclude the trial court from also concluding that termination was warranted.” Sl.Op. at 12.
  - **Regarding the abandonment ground under G.S. 7B-1111(a)(7)**, the findings directly related to the void hearings, focusing mostly on father’s failure to satisfy the conditions that were imposed on him. Respondent’s express intent to be reunified with his daughter, have his sister be an interim placement, and have his child move to California with him does not show that he willfully determined to abandon his daughter. Additionally, respondent’s actions before and during the determinative six-month period are inconsistent with a finding that he willfully intended to forego all his parental duties.
  - **Regarding the neglect ground under G.S. 7B-1111(a)(1)**, petitioner failed to prove there was prior neglect and a likelihood of repetition of that neglect. Respondent had custody of and was appropriately caring for his 3 other children such that the court lacked a basis to infer that respondent, who had not actually neglected this child, would have neglected her if she had been in his care.

- Regarding the failure to correct the conditions that led to the child’s removal ground, G.S. 7B-1111(a)(2) applies when the removal is pursuant to a court order. A voluntary out-of-home family services agreement between respondent and DSS does not apply.

## Family Court

In re J.A.M., 375 N.C. 325 (2020)

Held: Affirmed

- Facts: This appeal of a TPR has a lengthy procedural history including an underlying juvenile action and prior appeals. This appeal is made pursuant to Appellate Rule 3.1(e), where respondent mother’s counsel filed a no merit brief, and respondent mother filed a brief raising several issues. This summary focuses on one issue - recusal and family court districts.
- Although mother raised judicial bias, there was none. The practice of “one judge, one family” is recognized in North Carolina and “reflects a central policy of the state.” Sl. Op. at 10, 11. A judge is not required to recuse themselves in a TPR when they have presided over earlier permanency planning hearings and ordered adoption as the primary permanent plan.

## Attorney for Respondent Parent

Withdrawal of Counsel; Knowing and Voluntary Waiver; Forfeiture

In re K.M.W., 376 N.C. 195 (2020)

**Held: Reversed and Remanded for a new hearing**

**Dissent, Morgan, J. and Newby, J.**

- Facts: There is an underlying neglect action, where mother was represented by court-appointed counsel. DSS filed a TPR petition against respondent mother. Mother’s attorney in the underlying neglect action filed a motion to withdraw in the TPR actions (but to remain in the neglect action) as mother had retained her own counsel with a back payment award of SSI. At a hearing, mother confirmed that she wished to retain her own counsel and waive her right to court-appointed counsel. Mother signed a waiver of counsel form at the hearing. The court granted the motion to withdraw and mother’s privately retained attorney filed answers to the TPR petitions. At a scheduled permanency planning hearing, mother did not appear but her court-appointed attorney did. The court relieved the court-appointed attorney as he had not had contact with his client for months. The privately retained attorney filed a motion to withdraw in the TPR actions. At the hearing on his motion where mother did not appear, he stated his reason for withdrawal was that it was mother’s request. The court granted the motion to withdraw. Mother was mailed the notice of TPR hearing that noted her attorney had been discharged. Mother arrived several minutes after the TPR hearing started and after the social worker started to testify. The court did not inquire as to whether mother was represented by counsel or whether she wished to have counsel appointed or to represent herself. Mother did represent herself. The TPR was granted and mother appealed, arguing the court erred by allowing her attorney to withdraw without providing her proper notice and allowing her to proceed pro se without making an inquiry as to whether she wished to have counsel.

- Standard of review of a withdrawal of a parent’s attorney in a TPR is an abuse of discretion. But, the “ ‘general rule presupposes that an attorney’s withdrawal has been properly investigated and authorized by the court,’ so that, ‘[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion.’ ” Sl.Op. 23. Whether a parent has waived or forfeited their right to counsel in a TPR is based on statutory criteria and is reviewed de novo.
- Federal and state law establish that “[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” Sl.Op. at 22. Under N.C. law, that includes a statutory right to counsel in TPR proceedings – G.S. 7B-1101.1.
- A parent may waive that right “ ‘after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary.’ ” N.C.G.S. § 7B-1101.1(a1).” *Id.* The court inquiry is not required when a litigant forfeits that right “by engaging in ‘actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all[,]’ ” such as engaging in “egregious dilatory or abusive conduct.” Sl.Op. at 23-24.
- Here, the court erred by allowing the privately retained attorney to withdraw from the TPR proceeding. When the parent is absent from the hearing on the motion to withdraw, the court must inquire into efforts the attorney made to contact the parent to ensure the parent’s rights are adequately protected. Nothing in the record shows that mother was served with a copy of the motion to withdraw. The trial court did not make an inquiry into whether she was served with the motion; whether the attorney informed his client of his intent to withdraw, and what efforts he made to ensure mother understood what he was proposing to do or to protect her statutory right to counsel.
- The court erred by allowing mother to represent herself without inquiring about whether she wished to appear pro se. Her signing the waiver of counsel form related to her ability to employ privately retained counsel and was not a waiver of her right to any and all counsel. She did not indicate on the form she wished to represent herself. The court had an obligation to make the inquiry at the time she appeared for the hearing (albeit late). There was not a knowing and voluntary waiver after an examination by the court in accordance with G.S. 7B-1101.1(a1). Her conduct was not egregious such that she forfeited her right to counsel.
- As with criminal cases, a showing of prejudice is not required for appellate relief on this issue.
- Mother is entitled to a new hearing where her statutory rights to counsel are adequately protected.
- Dissent: Although agreeing that mother’s conduct was not egregious to warrant forfeiture of counsel, her conduct constituted a waiver of counsel. She repeatedly failed to appear for hearings, was not in contact with her court-appointed counsel, appeared for the TPR hearing after it started, and left the courtroom without explanation for a period of time during the TPR hearing. The requirements imposed on trial courts by the majority should be a best practice for implementation and should not result in error if the trial court fails to follow them.

## 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 been 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 had 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 hearings, 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 ¶161. 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 explain 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.

[In re T.N.C.](#), 375 N.C. 849 (2020)

**Held: Affirmed**

- Facts: The children were adjudicated neglected in an underlying action. DSS filed a TPR petition, alleging neglect and failure to make reasonable progress (G.S. 7B-1111(a)(1)-(2)). At the time of the TPR hearing, mother was incarcerated but she was present at the hearing and represented by an attorney. Mother’s attorney made a short cross-examination of the one DSS witness (the social worker) at the adjudicatory stage of the hearing and gave a conciliatory closing argument at the adjudication and dispositional stages. The TPR was granted, and respondent mother appeals arguing she had ineffective assistance of counsel such that the TPR proceeding was fundamentally unfair.
- G.S. 7B-1101.1(a) provides parents who are indigent with the right to appointed counsel in TPR cases. Appointed counsel must provide effective assistance. Ineffective assistance of counsel claims require the parent to show that (1) the counsel’s performance was deficient and (2) the deficiency was so serious that it deprived her of a fair hearing, meaning that but for counsel’s errors there is a reasonable probability there would have been a different result.
- Although a substantial amount of the tone of mother’s counsel’s advocacy was acquiescent in nature, it did not rise to a level of disparagement of mother before the court causing an adverse impact on the court like the case in *State v. Davidson*, 77 N.C. App. 540 (1985). Mother’s counsel mentioned multiple facts in her favor, including some progress on her case plan, her bond with her children, and her desire to keep her parental rights as well as emphasizing her positive traits, like she has been easy to deal with and does not make excuses. Mother’s counsel unequivocally asked the court to rule in his client’s favor.
- Mother has failed to show her counsel’s performance was deficient by the tone of the closing arguments or brevity of the cross examination, and as such, mother cannot show prejudice she suffered in the proceeding. The strength of the undisputed evidence does not show a reasonable probability the outcome would have been different.

Motions for substitute counsel and to continue

[In re M.J.R.B.](#), 2021-NCSC-62

**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.

## GAL for Respondent Parent

### Sua Sponte Inquiry on Competency

The standard of review for whether an inquiry concerning a respondent parent's incompetency and whether a GAL should be appointed is an abuse of discretion. Substantial deference to the trial court is appropriate given that the trial judge interacts with the litigant and has a better basis for assessing that litigant's mental condition versus an appellate court's review of a cold, written record. The evaluation of competency involves more than a diagnosis by a mental health professional. The litigant's behavior and lucidity demonstrate the litigant's understanding of the situation and ability to assist their attorney and address important issues.

### In re Q.B., 375 N.C. 826 (2020)

#### **Held: Affirmed**

- Facts: In 2017 in an underlying neglect and dependency case, DSS arranged for mother to complete a psychological evaluation. The evaluation reported mother had an intellectual disability that caused clinical impairment of her functioning (IQ=63). DSS requested a hearing on mother's need for a Rule 17 GAL. After hearing, the court determined that although mother was low functioning, she was not incompetent and in need of a Rule 17 GAL because she understood the role of the court and parties and the court's function to determine the juvenile's status. The child was adjudicated neglected and dependent. Separately, DSS had an adult protective case for mother. In 2018, mother was adjudicated incompetent and a different county DSS was appointed as the guardian of her person (GOP) under G.S. Chapter 35A. Adult Protective Services remained in place and as part of the disposition in the juvenile case, mother was ordered to comply with the APS recommendations. Ultimately, DSS initiated a TPR, and a hearing was held in 2019. The TPR was granted, and mother appeals arguing the court abused its discretion by failing to sua sponte conduct a 2<sup>nd</sup> inquiry into whether mother required a Rule 17 GAL for the TPR hearing based on new evidence that existed after the first inquiry, including the adjudication of incompetency, appointment of a GOP, and role of APS.
- Similar to *In re T.L.H.*, 368 N.C. 101 (2015), "the record contains 'an appreciable amount of evidence tending to show that [respondent] was not incompetent' at the time of the termination hearing." Sl.Op. at 12. There had been an earlier inquiry where respondent was found to not be incompetent; her competency is supported by her attendance at all the hearings enabling the court to observe her capacity; her testimony at the TPR hearing indicated

she understood the nature of the proceeding and she responded in an appropriate and lucid manner to questions about her parenting and her case plan; the social workers testified to respondent's complying with many of her case plan provisions (e.g., obtain housing, follow APS recommendations, complete a parenting program, attend visits), showing respondent understood what she needed to do to reunify with her daughter; and two months before the TPR hearing, the GOP was changed to a limited guardianship.

- “Neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17.” Sl.Op.at 16. The adjudication of incompetency and appointment of a GOP and an APS services counselor do not mandate a sua sponte competency determination. The role of a GOP and Rule 17 GAL differ; the GAL duties are “solely for purposes of assisting a parent during a particular juvenile proceeding” and are much more limited than the role of a GOP. Sl.Op.at 17. As a result, the court typically limits the scope of examination of incompetency for the purposes of a Rule 17 GAL appointment to “whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case.” *Id.* “Thus, it follows that an individual can simultaneously be found incompetent under Chapter 35A yet not require a GAL under Rule 17.” Sl.Op.at 18. There was no abuse of discretion.
- There is no requirement in Rule 17(c) that requires a DSS to request a GAL appointment for a respondent parent it believes is incompetent.

In re N.K., 375 N.C. 805 (2020)

**Held: Remanded (ICWA issue)**

- Facts: There is an underlying neglect and dependency action. Ultimately, DSS files a petition to TPR, which is granted. Mother appeals. One of her challenges is that the court failed to conduct a competency hearing of mother on its own motion to determine whether she needed a Rule 17 GAL.
- The standard of review for whether an inquiry concerning a respondent parent's incompetency and whether a GAL should be appointed is an abuse of discretion. Substantial deference to the trial court is appropriate given that the trial judge interacts with the litigant and has a better basis for assessing that litigant's mental condition versus an appellate court's review of a cold, written record. The evaluation of competency involves more than a diagnosis by a mental health professional. The litigant's behavior and lucidity demonstrate the litigant's understanding of the situation and ability to assist their attorney and address important issues.
- G.S. 7B-1101.1(c) authorizes the appointment of a Rule 17 GAL for a respondent parent who is incompetent. Looking to the definition of G.S. 35A-1101(7), an incompetent adult “lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.” Sl.Op. at 6.
- A trial just must inquire into the litigant's competency when there is a substantial question about the litigant's competency.

- Although the respondent mother did not testify at the TPR hearing, she was present for the hearings in the underlying neglect and dependency action as well as the TPR hearing, giving the judge ample opportunity to observe her demeanor and behavior throughout the proceedings.
- The record contains ample evidence showing mother was not incompetent, such as her entering into a service agreement with DSS; participating in negotiating a stipulation regarding the juvenile's status as neglected and dependent; verified the answer to the TPR petition; served as her own payee for her social security benefits; acknowledged her need for treatment, expressed a preference for certain providers, and participated in treatment programs; attend visits; was consistently available to the court, DSS, and the child's GAL; and expressed a preference for her child to be placed with relatives.
- There was no abuse of discretion for failing to conduct an inquiry into whether a GAL was needed.

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, and 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.

## Duties and Participation

[In re J.E.B.](#), 376 N.C. 629 (2021)

**Held: Affirm**

**Dissent, Morgan**

- **Facts:** There is an underlying abuse and neglect action. DSS filed a petition to terminate respondent mother's rights. At the TPR hearing, mother's appointed Rule 17 GAL and court-appointed attorney were present. The attorney sought to withdraw, but his motion was denied. The attorney stated that himself, the GAL, and respondent would determine what strategy they would use to present evidence. At times, the Rule 17 GAL cross-examined witnesses and made a part of the closing argument; mother's attorney served as counsel during the proceeding. The TPR was granted. Mother appeals arguing the Rule 17 GAL violated G.S. 7B-1101.1(d) – the GAL shall not act as the parent's attorney – and alternatively, she was denied ineffective assistance of counsel.
- In a TPR, parents must be provided with “ ‘fundamentally fair procedures’ consistent with the Due Process Clause of the Fourteenth Amendment.” ¶ 10.
- This is a question of statutory interpretation, which is reviewed de novo. “The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment.” ¶ 11.
- G.S. 7B-1101.1(a)-(c) provides a parent who is indigent with the right to court-appointed counsel, and a GAL when certain conditions are met. G.S. 7B-1101.1(d) states “[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney.” The language is unambiguous. The statutory mandate is that the attorney and GAL for the parent not be the same person so that respondent receives the benefit of both. We do not read the phrase “act as the parent's attorney” in isolation; the phrase has the same function as the sentence before it that the parent attorney shall not be appointed as the GAL. The statute does not prevent the GAL from conducting cross-examination or presenting arguments before the court – essentially, assist counsel in the presentation of evidence. Further, “respondent's appointed attorney did not functionally abdicate his responsibilities, leaving the guardian ad litem to ‘act as the parent's attorney’ in the absence of the parent's actual legal counsel.” ¶ 14. The statute was not violated.
- Mother's claim of ineffective assistance of counsel is unsupported.
- **Dissent:** Although concurring with the majority that the statute requires two separate people, the dissent discusses statutory interpretation. The majority does not follow the fundamental tenet of statutory construction to give the words their plain and simple meaning. Although each person here performed their assigned statutory duties, the GAL also acted as mother's attorney. There was a violation of the statute resulting in prejudice to mother to warrant a vacate and remand for a new TPR hearing.

[In re W.K.](#), 376 N.C. 269 (2020)

**Held: Affirmed**

- Facts: Respondent father appeals the termination of his parental rights to his two children, arguing his Rule 17 GAL did not participate sufficiently to meet statutory requirements of the GAL role such that the trial court abused its discretion in conducting the TPR hearing. (The father also challenges the ground of neglect, which is determined to have been supported by the findings that were based on clear and convincing evidence).
- The role of an appointed Rule 17 GAL and appointed counsel for the respondent parent differ. See G.S. 7B-1101.1(d) (they may not be the same person). Neither Rule 17 nor G.S. 7B-1101.1 specify the exact duties of a GAL. Father's asking the GAL, what's your name, standing alone, does not mean the GAL did not satisfy his statutory duties. There was no evidence indicating the question meant the GAL had not met with the respondent or failed to appropriately interact with respondent or represent respondent's interests during the TPR process. Although respondent argues the GAL could have been more active at the TPR hearing, respondent has not identified any action the GAL could have taken that would have improved a favorable result in the TPR. Nothing shows the GAL did not adequately assist respondent and protect his due process rights, and the appellate court "will not presume error from a silent record." Sl.Op. at 10. Respondent has not shown any reversible error by his Rule 17 GAL.

[Motion to Continue](#)

[In re J.E.](#), 377 N.C. 285 (2021)

**Held: Affirmed**

- Facts: Father appeals a TPR, arguing the court erred in denying his motion to continue, depriving him of a fair hearing and his right to due process. The TPR petition was filed on July 2, 2019, and respondent was served and in court on July 11, 2019. The hearing was continued twice upon motion of the parents – September 2019 and November 2019. At the last hearing, the respondents' attorneys agreed to a special setting of the TPR hearing in December. At that December hearing, counsel for each parent were present but the parents were absent.
- Standard of review of a motion to continue is an abused of discretion unless it is based on a constitutional right, which is fully reviewable as a question of law.
- "A parent's absence from a termination proceeding does not itself amount to a violation of due process." Sl.Op. ¶14. Father waived the argument that the denial of his motion to continue violated his constitutional rights when the reason for the motion to continue did not assert father's constitutional rights or lack of notice to preserve due process.
- G.S. 7B-1109 governs motions to continue a TPR and requires extraordinary circumstances when necessary for the administration of justice for any continuance going beyond 90 days after the initial petition is filed. Continuances are disfavored, and the burden of showing sufficient grounds is on the party seeking the continuance. "The chief consideration is whether granting or denying a continuance will further substantial justice." Sl.Op. ¶15. Five months had passed from the filing of the TPR petition. Father did not explain his absence or lack of contact with his attorney or DSS knowing the TPR was pending. Father did not show extraordinary

circumstances. There was no abuse of discretion. Father did not argue how he was prejudiced, and such prejudice seems unlikely given his attorney's advocacy at trial and the unchallenged findings of fact supporting the TPR.

[In re A.J.P.](#), 375 N.C. 516 (2020)

**Held: Affirmed**

**Dissent: Earls, J.**

- **Facts:** The juvenile was adjudicated a dependent juvenile based on circumstances due to mother's substance use and criminal activity and putative father's criminal activity and inability to care for their infant and lack of an appropriate alternative child care arrangement. Mother and putative father executed a relinquishment. It was later discovered putative father was not the biological father and a TPR on unknown fathers was initiated. Respondent father contacted DSS to indicate he might be the father, and he was determined to be so. Father was incarcerated but entered into a family services plan and the dependency case continued. Eventually DSS filed a TPR alleging father had willfully left the juvenile in foster care and failed to make reasonable progress and willfully abandoned the juvenile. The TPR petition was filed in April 2019 and the hearing was continued in May 2019 because respondent father's attorney withdrew due to a conflict of interest and a new attorney was appointed and needed time to prepare. The TPR hearing was scheduled for July 2019 and at the beginning of the hearing father's attorney requested a continuance so he could review a previous order that was not included in the court file. The request was denied. The court held the hearing and concluded both grounds existed. Father appeals.
- Because the motion to continue was not based on a constitutional right, the standard of review is an abuse of discretion.
- Continuances are addressed by G.S. 7B-803 and 7B-1109(d). To continue a TPR hearing beyond the 90-day statutory period, father was required to show extraordinary circumstances existed to support a second continuance. There was no such showing. There were numerous references in the court file to the order father's attorney did not have. The court did not abuse its discretion.

[In re S.M.](#), 375 N.C. 673 (2020)

**Held: Affirmed**

- **Facts:** The six children had been adjudicated neglected based on dirty conditions in the home, poor hygiene, lack of schooling, domestic violence, and substance abuse. A case plan addressing these issues, the need for a mental health assessment, and a psychosexual evaluation by father due to allegations of sexual abuse of one of the children was ordered. After the parents' noncompliance with the case plan, DSS filed TPR petitions alleging neglect and failure to correct the conditions. On the day of the TPR hearing, 89 days after the TPR was filed, father's attorney moved for a continuance because the psychosexual evaluation had been received the day before. The court denied the request based on the father's choosing to significantly delay obtaining the evaluation. The TPR was granted, and both parents appeal challenging the best interests determination. Father also challenges the court's denial of his motion to continue the hearing. Mother challenges the grounds as well.

- Father argues the denial of the continuance violated his constitutional right to due process, and combined with the right to counsel and to confront witnesses, includes a reasonable time to prepare for the hearing. When the motion is based on a constitutional right, it is a question of law that is reviewed de novo. Otherwise, the denial of a motion to continue is reviewed for an abuse of discretion.
- Father did not raise the constitutional issue at the hearing requesting the continuance but instead states the continuance was needed so father could respond to the evaluation by following the recommendations. As such, father waived this argument such that an abuse of discretion review is appropriate.
- G.S. 7B-1109(d) addresses continuances in a TPR with the chief consideration being whether the continuance will further substantial justice. Continuances are not favored, and the party seeking the continuance has the burden of showing the grounds to continue exist. Father failed to prove extraordinary circumstances for the proper administration of justice existed such that the hearing should be continued beyond the 90-day time limit. Father's procrastination was the reason for the delay in the psychosexual evaluation and did not rise to extraordinary circumstances. There was no abuse of discretion.

### Consolidate TPR with Neglect Action

In re A.W., 377 N.C. 238 (2021)

**Held: Affirmed**

- Facts: In 2017, the respondent's 2-month-old infant died of blunt force injuries while in respondents' care. Her death was ruled a homicide, and father was incarcerated on charges related to her death. In 2018, the juvenile in this action was born to respondent parents and DSS filed a petition alleging neglect and dependency that stated her sibling died while in the respondents' care as a result of suspected abuse and neglect. Also in 2018, DSS filed a motion to terminate both parents' parental rights on the grounds of neglect and dependency. The court adjudicated the juvenile neglected and dependent, ceased reunification efforts, and eliminated reunification as a permanent plan. A separate order terminated mother's rights on both alleged grounds. Mother appealed the adjudication and disposition orders in the court of appeals and the TPR order in the supreme court. The NC Supreme Court granted a motion to consolidate the actions on appeal.
- G.S. 7B-1102(c) authorizes the trial court on its own motion or motion of a party to consolidate a TPR and A/N/D action that is filed in the same judicial district and involves the same juvenile.
  - Mother had notice that a permanent plan was at issue through the notice and motion of the TPR, where a permanent plan of adoption was recommended, and "in a hearing where a parents' rights in their child are subject to termination, the parent has necessarily been informed that the child's permanent plan is at issue." Sl.Op. ¶129.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When there is a period of separation between the juvenile and the parent, the court must find past neglect (which may include an adjudication of neglect) and a likelihood of future neglect based on evidence of any changed conditions at the time of the TPR hearing.

- The determination that there is past and a likelihood of future neglect with mother, even though father is incarcerated, is supported by the evidence. Mother did not acknowledge the intentional injuries to her child resulting in her death, did not provide a plausible explanation for those injuries, continued her relationship with father, and without acknowledging the cause of death, DSS could not provide a plan to address the safety concerns in the home.

## TPR Adjudication

**Standard of Review:** Whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion of law. Unchallenged findings are deemed supported by the evidence and are binding on appeal. Conclusions of law are reviewed de novo.

**Standard of Proof:** Clear, Cogent, and Convincing Evidence

In re B.L.H., 376 N.C. 118 (2020)

### **Held: Affirmed**

- **Facts:** A TPR was granted on several grounds: G.S. 7B-1111(a)(1), (2), (5), and (7). Respondent father appeals raising a single issue – the court erred by failing to affirmatively state the statutory standard of proof in its TPR order.
- A court does not commit reversible error by failing to explicitly state the statutory burden of proof set forth in G.S. 7B-1109(f) in its written TPR order if the trial court explicitly states the proper standard of proof in open court at the hearing. “We hold the trial court satisfies the announcement requirement of N.C.G.S. § 7B-1109(f) so long as it announces the ‘clear, cogent, and convincing’ standard of proof either in making findings of fact in the written termination order or in making such findings in open court.” Sl.Op. at 14.
- Here, at the close of the TPR hearing, the court stated it makes the following findings of fact by clear, cogent and convincing evidence, reciting the facts, and concludes TPR grounds existed. The order does not state that standard and does not indicate a different standard was applied.
- Statutory construction involves ascertaining and effectuating the intent of the legislature by looking at the language of the statute, the spirit of the act, and what the act seeks to accomplish. A statute must be considered as a whole so that none of the provisions are rendered useless or redundant, if possible, since it is presumed mere surplusage was not intended. Statutes addressing the same subject matter should be construed *in pari materia* and reconciled, if possible, to give effect to each.
- G.S. 7B-1109(f) specifies that all findings shall be based on clear, cogent, and convincing evidence without providing whether the trial court must announce that standard. We hold “the statute implicitly includes a requirement that the trial court announce the standard of proof it is applying in making findings of fact in a termination proceeding.” Sl.Op.at 9. This enables the appellate court to determine whether the proper heightened standard was applied and gives effect to the language by making it enforceable rather than have it be mere surplusage. G.S. 7B-1109(f) advances the purpose of Article 11, Termination of Parental Rights (G.S. 7B-1100) to provide judicial procedures that adequately protect the rights of parents and to protect juveniles from the unnecessary severance of the parental relationship. In looking at G.S. 7B-807

and -2411, those statutes require the court find the allegations in the petition be proved by clear and convincing evidence and “the court shall so state.” Sl.Op. at 12. When construed together, we conclude the Legislature intended the same requirement for TPR actions.

## Incarceration

### Neglect

In re N.B., 377 N.C. 349 (2021)

#### **Held: Affirmed**

- Facts: DSS filed a petition in 2017 and in March 2018, the juveniles were adjudicated neglected and dependent in an underlying juvenile action due to mother’s frequent incarceration; housing instability; substance abuse; domestic violence; and being left with inappropriate caretakers who exposed the children to inappropriate discipline, illegal drugs, and inappropriate sexual touching. Father was incarcerated and remained so throughout the case. DSS filed motions to TPR both parents rights, which was granted. Both parents appeal.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When a parent has been separated from the child for a long period of time, there must be a showing a past neglect and likelihood of future neglect by considering evidence of changed circumstances between the time of the past neglect and the TPR hearing. Evidence of a parent’s neglect before they lose custody of the child, including an adjudication of neglect, is admissible to show prior neglect in a TPR.
- Likelihood of future neglect:
  - Mother did not enter a case plan until more than one year after the children were placed in DSS custody. Findings show that mother made some progress on her case plan, including successfully completing her conditions of parole, obtaining employment, but some progress does not preclude a neglect determination. The findings also showed mother did not establish a safe, stable, drug-free home; did not comply with the drug screen requirements of her case plan; had little contact with the children after she was no longer incarcerated; and had a limited understanding of the children’s mental health issues resulting from their trauma. Based on these findings the court could reasonably determine a likelihood of repetition of neglect.
  - The court did not make findings based solely on father’s incarceration. It considered the limitation on father to develop and maintain a relationship with his daughter due to his incarceration. The court made findings of father’s prior neglect when the juvenile was in his custody in 2007, along with her neglect while father was incarcerated. Findings of father’s inconsistent contact with DSS and his lack of regular contact with the juvenile (one letter was sent to her through DSS) support a likelihood of repetition of neglect finding by the court. (Father also raised an ineffective assistance of counsel claim which was determined to have no merit).

[In re J.E.](#), 377 N.C. 285 (2021)

**Held: Affirmed**

- Facts: There is an underlying neglect case to this TPR. The TPR was granted on the ground of neglect, and respondent father appeals arguing the findings do not address his circumstances at the time of the TPR and do not support the likelihood of repetition of neglect if the children were returned to his care.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When a parent has been separated from the child for a long period of time, there must be a showing a past neglect and likelihood of future neglect by considering evidence of changed circumstances between the time of the past neglect and the TPR hearing.
- The findings include the juveniles' past adjudication of neglect; the history of DSS involvement due to substance use, mental health issues, parenting deficits, and incarceration; the requirements of father's case plan and his failure to comply with that case plan; his instability with housing and visitation with the children; and his failure to maintain contact with DSS. The findings are clear that incarceration alone was not the sole evidence but was considered along with the other evidence. The lack of changed circumstances support the court's determination of a high probability of repetition of neglect.

[In re J.S.](#), 377 N.C. 73 (2021)

**Held: Affirmed**

- Facts: The children were adjudicated neglected in part due to circumstances created by father's substance use and criminal activity related to trafficking drugs. As part of that neglect action, DSS file a TPR motion. At the time of the TPR hearing, father was incarcerated with a sentence of 28 years. The TPR was granted on the grounds of neglect and failure to make reasonable progress. Father appeals, and this opinion addresses the neglect ground. Father challenges the court's determination that there is a likelihood of future neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when there is current neglect or "in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent." Sl.Op. ¶18.
- "Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." Sl.Op. ¶21. However, it may be relevant and "depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration." *Id.* (emphasis in opinion). Here, without evidence or findings that father's circumstances might change, it was reasonable for the court to expect his incarceration would last past the children reaching the age of majority. His lengthy incarceration "implicates a future likelihood of neglect, as respondent cannot provide 'proper care, supervision, or discipline' while he is incarcerated." Sl.Op. ¶22. This opinion recognizes that during a parent's incarceration "constructive and positive parenting can occur, and parent/child bonds can be meaningful." Sl.Op. ¶23. However, here the trial court's unchallenged findings about father's use of illegal substance and acts of domestic violence while in the children's presence, lack of care to the children when he wasn't

incarcerated, lack of progress on his case plan, inappropriate and/or lack of phone calls to the children when he was incarcerated support the determination of a likelihood of future neglect.

[In re K.D.C.](#), 375 N.C. 784 (2020)

**Held: Reversed**

- Facts: The juveniles were adjudicated neglected in an underlying action due to circumstances created by father and mother’s incarceration. Mother was ordered to comply with a case plan. Mother was incarcerated throughout the neglect proceeding. Ultimately, DSS filed a TPR petition alleging the grounds of neglect, failure to make reasonable progress, and dependency. The TPR was granted, and mother appeals the grounds.
- Incarceration, standing alone, is neither a sword nor a shield in a TPR decision. In determining neglect, an analysis of the relevant facts and circumstances, including the length of a parent’s incarceration, must be considered. The findings of fact about mother’s failure to complete her mental health and substance abuse requirements despite having the ability to do so are not supported by clear and convincing evidence. DSS as the petitioner and not the respondent has the burden to prove mother’s non-compliance with her case plan, and the evidence presented by DSS was insufficient. Mother did complete a “mothering class,” anger management, and grief recovery classes which appear to be her attempt to comply with the component of her case plan to improve her parenting skills. Mother’s failure/inability to secure stable housing and employment so far in advance (15 months) of her release from incarceration “is difficult to consider justly as a failure to comply with her case plan.” Sl.Op.at 13. Mother maintained regular contact with her children.
- The court erred in determining there was a likelihood of repetition of future neglect.

[In re A.S.T.](#), 375 N.C. 547 (2020)

**Held: Affirmed**

- Facts: The juvenile had been adjudicated neglected based on conditions related to his parents’ substance use. During the underlying neglect case, respondent father made some progress on his case plan but continued to struggle with alcoholism and substance use. Due to criminal activity during the underlying case, respondent father entered an Alford plea to the charges and was incarcerated. DSS filed the TPR action on the grounds of neglect and failure to make reasonable progress. The TPR was granted and father appeals. This opinion focuses on the ground of neglect.
- In challenging the court’s findings, respondent “overly emphasized his successes and minimized his failings” regarding progress on his case plan. Sl.Op. at 10. The court findings that father inconsistency with complying with his case plan prior to his incarceration are supported by clear and convincing evidence, including the social worker’s testimony.
- “[A]n Alford plea is not the saving grace for defendants who wish to maintain their complete innocence...” Sl.Op. at 10. “By entering the Alford plea, respondent ‘agreed to be treated as . . . guilty whether or not he admitted guilt.’ ” Sl.Op. at 11. Here, the respondent’s Alford plea that resulted in his 2+ year incarceration supports the finding that he “voluntarily made himself unavailable to care for [the juvenile] for a substantial portion of [the juvenile’s] life.” *Id.*

- The conclusion of law is reviewed de novo, which allows the appellate court to consider the matter anew and substitute its judgment for that of the trial court. The appellate court is not limited to the trial court's statements. In concluding neglect exists, the court's findings show the juvenile was adjudicated neglected due to his parents' substance abuse issues and that respondent father failed to appreciably address the issues and that during his incarceration, respondent failed to contact the juvenile and had limited contact with the social worker. These findings support the conclusion that respondent previously neglected the juvenile and that there is a likelihood of future neglect if the juvenile were returned to his care.

[In re O.W.D.A.](#), 375 N.C. 645 (2020)

**Held: Affirmed**

- Facts: Child was adjudicated neglected and father was ordered to comply with a case plan that addressed his substance use, criminal activity, lack of stable housing and income, need for parenting classes, and cooperation with DSS. After adoption was designated as the primary permanent plan, DSS filed a petition to terminate father's parental rights. Father's rights were terminated on the ground of neglect, and respondent father appeals.
- Father is collaterally estopped from arguing the basis for the underlying neglect adjudication was his incarceration. For the underlying neglect adjudication to which father consented, he stipulated that he used drugs, was on probation, which was violated, has an extensive criminal history, was unemployed, and had no stable income or housing. Father did not appeal that order.
- The court's finding of past neglect and the likelihood of future neglect was based on his failure to comply with his case plan, which included a period of time where he was not incarcerated. The court also considered evidence of the father's changed circumstances, which was his incarceration. Although father made minimal progress (he started taking parenting classes), the court is "within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements while not incarcerated, and to conclude that there was a probability of neglect...." Sl.Op. at 13.

Failure to Make Reasonable Progress

[In re G.B.](#), 377 N.C. 106 (2021)

**Held: Affirmed**

**Dissent, Earls, J.**

- Facts: In 2017, the juveniles were adjudicated neglected and one juvenile was also adjudicated abused. The circumstances for the children involved exposure to domestic violence, substance use, poor supervision, failure to attend to medical needs, inappropriate discipline, and housing instability. Respondent father was incarcerated. Both parents entered into case plans with DSS. In 2019, DSS filed motions to terminate both parents' rights. The court granted both motions, and the parents appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal.

- The court properly considered father’s ability to complete his case plan while incarcerated as well as his actions and decisions while incarcerated when determining whether he failed to make reasonable progress under the circumstances. The court’s determination that father failed to make reasonable progress is supported by the findings. Initially father made progress on his case plan by attending NA and having negative drug screens. Father then engaged in behaviors that impacted his ability to complete his case plan. He had multiple infractions that resulted in his transfer to various different correctional facilities and significantly limited his access to services as well as delayed his release date. Father created his own barriers by his choices to engaged in prohibited activities and created the barriers he is now complaining about.
- Dissent: North Carolina law does not authorize a TPR based on incarceration.

[In re K.D.C.](#), 375 N.C. 784 (2020)

**Held: Reversed**

- Facts: The juveniles were adjudicated neglected in an underlying action due to circumstances created by father and mother’s incarceration. Mother was ordered to comply with a case plan. Mother was incarcerated throughout the neglect proceeding. Ultimately, DSS filed a TPR petition alleging the grounds of neglect, failure to make reasonable progress, and dependency. The TPR was granted, and mother appeals the grounds.
- The court must consider whether mother had the ability to make reasonable progress while she was incarcerated. Mother’s inability to obtain housing or employment 15 months in advance of her release date from prison is not her failure to comply with these case plan requirements. The 15 month gap “is too remote in time to be fairly evaluated as a case plan violation.” Sl.Op. at 17.
- Reasonable progress does not require full satisfaction of all the elements of the case plan but does require more than extremely limited progress. The “mothering” class respondent took while incarcerated is worthy of acknowledgement when considering whether she complied with the parenting classes requirement of her case plan and is a sufficient attempt by mother to comply with the case plan given her circumstances.
- The findings of fact about mother’s failure to complete her mental health and substance abuse requirements despite having the ability to do so are not supported by clear and convincing evidence.
- DSS did not meet its burden of proof that this ground existed.

Dependency

[In re A.L.S.](#), 375 N.C. 708 (2020)

**Held: Affirmed**

- Facts: The juveniles were adjudicated neglected and dependent based on circumstances created by mother’s substance use, criminal activity and pending charges, and problems regarding the appropriateness of the safety placement mother identified. During the underlying neglect and dependency action, mother was incarcerated with a term of 32 to 56 months imprisonment. DSS filed a petition to terminate mother’s parental rights on several grounds, which was granted. Mother appeals, challenging the grounds. This opinion focuses on the ground of dependency.

- The findings included mother's incarceration during most of the case including at the time of the TPR hearing and her projected release date of May 2022. The possible placements mother proposed were either rejected as inappropriate or failed to complete the necessary paperwork. Based on these findings, the court concluded the ground of dependency existed.
- The appeal focuses on mother's incapability to provide care and supervision and that the incapability would continue for the foreseeable future. Although the mother could have been released sooner than the projected May 2022, any error in the court's finding of that date did not prejudice mother because the earlier possible date was at least 22 months after the TPR hearing. An extended period of incarceration regardless of an exact release date provides ample support for a determination that mother was incapable of providing care and supervision and there was a reasonable probability that the incapability would continue for the foreseeable future.
- Based on the statutory language of G.S. 7B-1111(a)(6), the trial court is not required to find the basis for the respondent's incapability of providing for the children's care based on a statutorily enumerated condition or other similar cause. The statute was amended since the court of appeals determined *In re Clark*, 151 N.C. App. 286 (2002), which was relied on in *In re J.K.C.*, 218 N.C. App. 22 (2012), that limited the condition to certain mental or physical impairments or other similar cause or condition. The current statutory language is broader and states "any other cause or condition," rather than limit it to a "similar" cause or condition. Mother's extended continued incarceration is a cause or condition.

## Abandonment

In re M.S.A., 377 N.C. 343 (2021)

### **Held: Affirmed**

- Facts: This is a private TPR initiated by the maternal great-great aunt who the child had been living with continuously since 2010. The TPR petition was filed in 2018 and alleged father was incarcerated and had not visited with the child since 2011 or provided financial support or sent any card or gifts for at least 5 years. TPR was granted and father appeals.
- Issue Raised by Father: "Whether an incarcerated parent who has not had contact with his child for eight years and does not know how to contact his child may lose his parental rights on the ground of abandonment" Sl.Op. ¶3. This raises the question of willfulness.
- G.S. 7B-1111(a)(7) authorized a TPR on the ground of willful abandonment for the six months immediately preceding the filing of the petition. "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child," which is evidence by a parent withholding their presence, love, care, and opportunity to display filial affection and neglecting to provide support or maintenance for the child. Sl.Op. ¶7. The court may look outside the 6-month determinative window to determine a parent's credibility and intentions.
- The findings show that since father was incarcerated in 2012, he has never written letters, sent gifts or cards, contacted petitioner to learn about his child's well-being, or provided financial support for the child. Father claims that his not asking family members with whom he contact

about the child is not the equivalent of willful abandonment. Father is seeking to use his incarceration as a shield, and “incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. ¶11. It is undisputed that father had the ability to seek contact information from his relatives but did not do so for years. His actions were willful.

[In re A.J.P.](#), 375 N.C. 516 (2020)

**Held: Affirmed**

**Dissent: Earls, J.**

- **Facts:** The juvenile was adjudicated a dependent juvenile based on circumstances due to mother’s substance use and criminal activity and putative father’s criminal activity and inability to care for their infant and lack of an appropriate alternative child care arrangement. Mother and putative father executed a relinquishment. It was later discovered putative father was not the biological father and a TPR on unknown fathers was initiated. Respondent father contacted DSS to indicate he might be the father, and he was determined to be so. Father was incarcerated but entered into a family services plan and the dependency case continued to hold permanency planning hearings. Eventually DSS filed a TPR alleging father had willfully left the juvenile in foster care and failed to make reasonable progress and willfully abandoned the juvenile. The TPR was granted on both grounds, and father appeals.
- Incarceration greatly limits a parent’s options for showing affection but does not excuse a parent from showing interest in his child’s welfare by whatever means are available. Court must recognize the limitations on a parent when requiring them to do what they can to show appropriate concern for their child’s welfare.
- The relevant 6-month period is April 30, 2018 to October 31, 2018 when respondent parent was incarcerated. Although outside of this time period, the court properly considered father’s conduct in not contacting or providing care for his child from her birth until his incarceration for determining father’s credibility and intentions.
- The findings support the conclusion.
- **Dissent:** The trial court failed to analyze how incarceration affected the respondent’s capacity to comply with his case plan before concluding he willfully abandoned the juvenile. Undue weight was given to the period of time before the 6-month determinative time period. Since the record could support the conclusion that grounds existed, the remedy should be vacate and remand.

Neglect: [G.S. 7B-1111\(a\)\(1\)](#)

Neglect requires a showing of neglect as defined by G.S. 7B-101(15) at the time of the TPR hearing (current neglect) or if the child has been separated from the parent for a long period of time, a TPR for neglect must be based on a showing of past neglect and a likelihood of future neglect by considering the evidence of changed circumstances given the history of neglect by the parents between the time of the past neglect and the TPR hearing.

- A showing of past neglect is not necessary in every case. G.S. 7B-1111(a)(1) does not require a showing of past neglect if the petition can show current neglect. Any interpretation of *In re D.L.W.*, 368 N.C. 835 (2016) to create such a requirement is

disavowed. *In re R.L.D.*, 375 N.C. 838, fn 3 (2020); *see also In re K.P.-S.T.*, 375 N.C. 797, fn 5(2020); *In re W.K.*, 376 N.C. 269, fn 5 (2020).

## Findings

### [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, and 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, 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.'" Sl.Op. ¶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.

### [In re N.K.](#), 375 N.C. 805 (2020)

#### **Held: Remanded (ICWA issue)**

- **Facts:** There is an underlying neglect and dependency case. This TPR was granted on the grounds of neglect. Respondent mother appeals, raising as one argument that the findings in the TPR order resemble the language of findings in other orders and reports that were subject to lower evidentiary standards than the TPR adjudication standard of clear, cogent, and convincing evidence and were admitted into evidence at the TPR hearing but should not have been used to support the findings in the TPR.

- Quoting *In re T.N.H.*, 372 N.C. 403, 410 (2019), the “trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because[,] where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence.” The court must also receive some oral testimony and make an independent determination about the evidence presented. *Id.* Here, the court took judicial notice of the reports and orders and heard live testimony from the DSS social worker. After reviewing the record (the reports, orders, and live testimony), the findings have adequate evidentiary support and are in the proper form.
- Although mother had financial difficulties, the record shows her rights were not terminated solely on the basis of poverty. There was a combination of factors including her substance abuse, mental health, and domestic violence issues and her failure to complete treatment to address those issues or follow through on referrals to assist her with her financial difficulties.
- Willfulness is not required for a showing of neglect. Mother’s mental health issues do not preclude a neglect determination. A parent’s inability to adequately provide for their child may be “*by reason of mental infirmity or by reason of willful conduct on the part of the parent....*” Sl.Op.at 19.
- The unchallenged findings support the conclusion of neglect.

[In re S.R.F.](#), 376 N.C. 647 (2021)

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent based on circumstances involving domestic violence and substance use. Eventually DSS filed for a TPR, which was ordered. Mother appeals the TPR order challenging the findings as unsupported by the evidence and the adjudication of the grounds as unsupported by the findings. This opinion focuses on the ground of neglect.
- Uncontested findings are binding on appeal. Some of the findings that mother challenges are unsupported by the evidence, but the errors are harmless given the related findings and supporting evidence (e.g. the dispositional order did not have an express directive for mother to address domestic violence as the finding states but other findings state respondent mother signed a case plan that required her to engage in domestic violence treatment which she did not do). When disregarding improper findings, full credit is given to proper findings.
- The findings support the conclusion of past neglect and a likelihood of repetition of neglect. Failure to make progress on a case plan is indicative of a likelihood of future neglect. Mother did not meaningfully engage in her case plan that included domestic violence and substance abuse services, parenting classes, obtaining stable housing and employment, visiting with the juvenile, and failure to provide financial support. Attendance at a substance abuse program with a brief period of sobriety is insufficient to negate the court’s determination of a likelihood of future neglect.

## Likelihood of Future Neglect

### [In re C.L.H.](#), 376 N.C. 614 (2021)

**Held: Reverse in part, vacate and remand in part**

**Dissent, Barringer, J. joined by Newby, J. and Berger, J.**

- **Facts:** This is a private TPR where mother is petitioner and father is respondent parent. In 2011, the parties entered into a consent order for child support, where respondent father was required to pay a set amount. In 2018, after father overdosed during a visit with the child, mother obtained a modified Ch. 50 custody order granting her sole physical and legal custody. The TPR was granted on the grounds of neglect, willful failure to pay child support, and dependency. Father appeals, challenging the grounds.
- The **finding** that the child was not cared for during father's medical incident related to a drug overdose or other condition was not supported by the evidence and is disregarded. The evidence shows the child went to his grandfather who called for help. Even if supported by the evidence, the finding does not indicate how the incident impacted the juvenile (e.g., harm or substantial risk of harm), other than the absence of care. Assuming *arguendo* that incident constituted prior neglect, there was no findings showing the likelihood of future neglect. Reversed.

### [In re B.E.](#), 375 N.C. 730 (2020)

**Held: Affirmed**

- **Facts:** The three children were adjudicated neglected and dependent in an underlying juvenile action. Mother and father were ordered to comply with their case plans. Eventually, DSS filed a TPR motion, and the TPR was granted on the grounds of neglect, failure to make reasonable progress, and dependency. Respondent mother challenges the grounds. This opinion focuses on the ground of neglect.
- The findings support the determination that there is a high likelihood of repetition of neglect if returned to respondent mother. Despite being ordered to not discuss the case with the children, mother has continued to do so in a way that has impeded their ability to make emotional progress. She does not have insight into the effects of father's severe alcohol abuse and physical abuse on the children. Mother needs counseling for mental health issues but will not continue with counseling. The evidence (mother's and social worker's testimony) supports the findings. To the extent a portion of a finding is not supported, it is disregarded on review. There is a nexus between mother's childhood trauma and her own parenting such that addressing her earlier trauma in mental health counseling was recommended, and the court's consideration of her failure to do so as a factor in determining the likelihood of future neglect was not error. The court's consideration of the failed trial home placement with mother that occurred before the TPR was not error. Although mother made progress on the cleanliness of the home and completed parenting classes, she did not resolve the primary risk to the children – father's continued presence in the home.

[In re K.C.T.](#), 375 N.C. 592 (2020)

**Held: Reversed in part; Reversed and remanded in part**

**Dissent, Newby J.**

- **Facts:** After a voluntary kinship placement, petitioners in this TPR obtained a Ch. 50 civil custody order giving them sole legal and physical custody of the juvenile and no visitation with mother. More than 3 years later, petitioners filed this TPR, alleging neglect, failure to make reasonable progress, dependency, and willful abandonment. The TPR was granted on all 4 grounds, and mother appeals.
- The finding addressing the likelihood of repetition of neglect with respondent mother is unsupported by the evidence. Mother testified her disability would not make it impossible for her to care for the juvenile. Other witness testimony about mother's disability and how it could impact mother's parenting was mere supposition. Although mother has a disability, she resides with family who assist her. "[I]t is unclear how respondent-mother's disabilities, standing alone, would place [the juvenile] at risk of neglect if she returned to respondent-mother's care." Sl.Op. at 10.
- Neglect may also occur by abandonment. When deciding if the ground exists, the trial court looks to the parent's conduct over an extended time period including up to and including the date of the TPR hearing. Although mother did not seek a modification of the Ch. 50 custody order, she did send gifts, contacted the juvenile and custodians over time showing her intent to be part of her child's life.
- TPR on neglect ground must be reversed.
- **Dissent:** The findings support the conclusion of neglect. The court found mother currently was unable to function without assistance from others due to her diagnosed disabilities and does not have the ability to provide proper care and supervision to the child. The majority applied the wrong standard of review.

[In re J.J.H.](#), 376 N.C. 161 (2020)

**Held: Affirmed**

**Dissent, Earls, J.**

- **Facts:** The juveniles were adjudicated neglected in an underlying juvenile action. Mother was ordered to comply with her case plan to address employment/income, housing, substance abuse, parenting skills, mental health, domestic violence, visitation, and child support. Although After the situation with mother deteriorated, including her assaulting the DSS social worker, the primary permanent plan was changed to adoption. DSS filed a motion to TPR, which was granted on the ground of neglect. Mother appeals the ground arguing the evidence does not support the findings and the disposition to TPR.
- The court found past neglect, current neglect, and the likelihood of repetition of neglect. "A parent's compliance with his or her case plan does not preclude a finding of neglect." Sl.Op. at 37. Although the court found mother made substantial efforts in complying with her case plan and loves her children, she lacked a substantial capacity for analyzing and forecasting problems and problem-solving issues when they arise and that presents a substantial obstacle to her ability to provide appropriate care to her children such that there is a high likelihood of

repetition of neglect. Additionally, many of the conditions that led to the children's removal continued to exist.

- This 54 page opinion discusses the evidence and the findings to support the likelihood of repetition of neglect based on mother's income and her budgeting abilities; her difficulties in locating new housing to accommodate all the children and their needs while being within her budget; concern about her dogs, who are intimidating, and the children's exposure to them as part of her housing situation; her refusal to participate in drug screens, which were a reflection of her inability to effectively respond to being frustrated in difficult situations; her parenting skills; her resistance to mental health treatment; her improper responses to stressful situations despite completing anger management counseling and a domestic violence victims program; and her parenting skills including her inability to provide adequate care and discipline and manage the children's complex schedules involving multiple medical and school appointments to address their special needs.
- "The combination of respondent-mother's weaknesses coupled with the challenges created by the children's conditions provides compelling justification for a determination that a decision to return the children to respondent-mother's care would almost certainly end in future neglect and that respondent-mother had been provided more than sufficient time to overcome the obstacles that she faced in attempting to provide adequate care for the children. SI.Op. at 39.
- Dissent: The findings do not provide clear, cogent, and convincing support for the conclusion of neglect – the evidence does not show it is likely she will provide inadequate care. A mere possibility of future neglect is not sufficient to permanently sever the parent-child relationship. By minimizing the importance of mother's substantial progress in her case plan, the majority devalues the efforts parents across the state are making to improve the parenting abilities for reunification. Poverty is a factor here (e.g., her housing is small) and is not in itself evidence of a likelihood of future neglect.

[In re R.L.D.](#), 375 N.C. 838 (2020)

**Held: Affirmed**

- Facts: The juvenile was not in respondent mother's care since 2012 but was instead in the care of relatives. There was no department of social services involvement. The relatives with whom the child had been living continuously for more than 2 years immediately preceding the filing of the petition initiated the TPR action on several grounds including neglect. The TPR was granted, and respondent mother appeals.
- The trial court's order includes unchallenged findings of mother's drug use and concerns regarding the child when in mother's care based on the child's injuries, a lack of food, and domestic violence; a lack of contact between the mother and child for several years; mother's agreement that petitioners would be guardians for the child indefinitely; the absence of any financial support from mother; intermittent text and phone contact between mother and child, some of which has been inappropriate by mother; mother's current housing situation; the child's mental health and trauma issues; and mother's failure to create a support system for the child if in her care show that the juvenile was placed in an injurious environment to her welfare and that the risks continue.

- These findings support the conclusion of a substantial risk of harm to the juvenile and the likelihood of future neglect if the juvenile was removed from the petitioners and placed with mother.

In re K.P-S.T., 375 N.C. 797 (2020)

**Held: Affirmed**

- Facts: The juveniles were adjudicated neglected in an underlying case. Father was ordered to comply with a case plan that addressed issues related to substance use, domestic violence, housing, basic physical needs for his children, parenting, employment/income, visitation and child support. Eventually, DSS filed a TPR petition, which was granted on several grounds. Respondent father appeals, arguing the findings of fact do not support the conclusions of law. This opinion focuses on the ground of neglect.
- “A parent’s failure to make progress in completing a case plan is indicative of a likelihood of future neglect.” Sl.Op.at 7.
- The court found that father delayed signing a case plan for more than one year and had not complied in an adequate and consistent manner. The findings described the deficiencies including his (1) failure to comply with recommendations of his substance abuse assessment, submit to random drug screens, take the necessary steps to regain his driver’s license which had been suspended, work with a therapist to learn about the effects of domestic violence on children, update his social worker on his living situation, cooperate so the social worker could conduct a home visit, and pay court ordered child support; (2) delay of 2 years in obtaining a parenting evaluation and failure to complete the parenting program; and (3) sporadic visitation with the children and sporadic contact with the DSS social worker. These findings support the conclusion of neglect.
- Father’s seeking consideration of his compliance is a request to reweigh the evidence, which the appellate court lacks the authority to do.

In re D.L.A.D., 375 N.C. 565 (2020)

**Held: Affirmed**

**Dissent, Earls, J.**

- Facts: In 2015, father was granted custody of the juvenile in a civil custody order, after the child came for visits to father with soiled, torn, and improperly fitting clothes and excessive earwax in his ears. Mother had also tested positive for drugs. Supervised visits with mother stopped. Father initiated this TPR against respondent mother, which was granted. Respondent mother appeals, challenging the ground of neglect. Mother does not challenge the court finding of past neglect but does challenge the likelihood of future neglect.
- The findings of fact are supported by clear and convincing evidence. A finding that there was no evidence that the conditions of mother’s home had changed did not shift the burden of proof to mother. This finding is the court’s expression that mother did not rebut the petitioner’s clear and convincing evidence that conditions of mother’s home had not changed.
- The findings support the conclusion that neglect would likely continue. Although the trial court based its conclusion on the findings about there being no change in mother’s home, conclusions

of law are reviewed de novo. The appellate court is not limited to that finding but may look at the totality of the trial court's findings to determine if the conclusion is supported. Mother's statements to father that she wanted her parental rights terminated and an extended period where a parent does not attempt to visit their child "indicate a future propensity to be inattentive to the child." Sl.Op. at 11. An untreated substance abuse problem "could inhibit a parent's capability or willingness to consistently provide adequate care to a child." Sl.Op. at 12. Mother's recent desire to visit with the child and not have her rights terminated do not outweigh the abundant evidence that demonstrates her lack of capability or willingness to adequately care for the child.

- Dissent: The findings do not support the conclusion of the likelihood of future neglect. The findings are based on mother's past conduct and do not consider evidence of changed circumstances at the time of the termination hearing. The dissent discusses past drug use as well as the mere existence of a substance abuse problem and how that alone is insufficient to support a determination of the likelihood of neglect.

In re D.M., 375 N.C. 761 (2020)

**Held: Affirmed**

- Facts: The children were adjudicated neglected juveniles due to circumstances involving their parents' substance use and domestic violence, and improper supervision. The case plan requirements for the parents addressed these issues as well as mental health services, parenting classes, and obtaining appropriate housing. Eventually, DSS filed a TPR motion. The TPR was granted on the grounds of neglect and failure to make reasonable progress. This opinion focuses on the ground of neglect and has an extensive discussion about evidence and findings regarding progress (or lack thereof) addressing substance abuse and domestic violence.
- The findings support the court's determination that there was a likelihood of neglect. Portions of challenged findings that were not supported by the evidence were disregarded by the appellate court. The unchallenged findings include father's extensive history of substance abuse which he did not start treatment for until after the TPR was filed and the hearings had begun. The findings of the extensive history of domestic violence and that father never started the recommended therapy is adequate evidence that father lacked an awareness of the effect of domestic violence on children. His own admission or expert witness testimony was not required.
- The findings addressing mother's failure to adequately address her extensive substance abuse and domestic violence issues were supported by the evidence, and those findings support the determination of a likelihood of neglect. Although there is some evidence that might support a contrary decision, the appellate courts "lack the authority to reweigh the evidence that was before the trial court." Sl.Op. at 29.
- The findings for each parent that address the central reasons for DSS intervention – substance abuse and domestic violence – are sufficient to support the determination of the likelihood of repetition of neglect. As such, the supreme court did not review challenges to the findings about the trial court not adequately addressing their mental health and housing issues.

In re H.A.J., 377 N.C. 43 (2021)

**Held: Affirmed**

- Facts: In 2018, the juveniles were adjudicated neglected based on circumstances related to mother's substance use and the children's exposure to domestic violence. At a 2019 permanency planning hearing, DSS and the children's GAL recommended that reunification be eliminated as a permanent plan. Mother objected due to lack of notice of that recommendation and due process concerns. The court proceeded with the hearing and ordered concurrent plans of adoption and guardianship, eliminating reunification as a permanent plan. Mother preserved her right to appeal. DSS filed a TPR petition, which was granted on the ground of neglect. Mother appeals both orders and challenges both the ground and best interests of the child determination in the TPR.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect as defined by G.S. 7B-101(15). Neglect may be currently occurring at the time of the TPR hearing or when a child and parent have been separated for a significant time, neglect before the parent loses custody of the child and the likelihood of future neglect by the parent based on evidence of changed circumstances that may have occurred between the time of the past neglect and the TPR hearing.
  - There is evidence of past neglect based on the juvenile's prior adjudication of neglect and mother's admission to substance use and domestic violence when she first interviewed with DSS.
  - The court found mother failed to comply with her case plan, and these findings support the determination of a likelihood of future neglect. Although the court placed heavy emphasis on mother's actions before the TPR petition was filed, it did consider her recent participation (post TPR filing) in substance abuse treatment. "The trial court ultimately determined, however, that respondent-mother's last-minute progress was insufficient to outweigh her long-standing history of alcohol and substance abuse and domestic violence, as well as the impact these behaviors had on [the juveniles]." Sl.Op. ¶123. There was no error in the determination that there likely would be a repetition of neglect.
- The court did not abuse its discretion in determining the TPR was in the children's best interests. A bond between a parent and child is one of many factors the court considers. A pre-adoptive placement is not required for a TPR to be granted. The facts regarding the juveniles and their needs in this case are distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004).

In re B.T.J., 377 N.C. 18 (2021)

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent based on circumstances created in part by mother's substance use. DSS filed a TPR petition, which was granted on the grounds of neglect and failure to make reasonable progress to correct the conditions leading to the juvenile's removal. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(1) authorizes the termination of parental rights on the ground of neglect, defined by G.S. 7B-101(15). The ground of neglect may be based on (1) neglect that is currently occurring at the time of the TPR hearing, or (2) if there has been a long period of separation

between the juvenile and parent, prior neglect (which may include an adjudication of neglect) and the likelihood of future neglect based on evidence of changed conditions at the time of the TPR hearing. “Evidence of changed conditions must be considered in light of the history of neglect by the parents and likelihood of a repetition of neglect.” Sl.Op. ¶18.

- This case involves the second basis for neglect: prior neglect and likelihood of future neglect. Here, the juvenile was adjudicated neglected based on witnessing his mother’s overdose on heroin while in the motel room they lived in. Mother was ordered to participate in treatment and stabilize her housing situation. There are numerous unchallenged, and therefore, binding findings showing mother’s limited progress. The findings include months of mother testing positive for controlled substances after completing her inpatient treatment program even though she had no positive results in the 4 months before the TPR hearing; her inadequate housing (the lease limited the number of residents so the child could not reside there), and her unstable employment history. Her limited progress occurred immediately before the TPR hearing but were just first steps to address her issues, which were not enough to rectify the issues such that there would not be a likelihood of future neglect.

[In re M.J.B. III](#), 377 N.C. 328 (2021)

**Held: Affirmed**

- Facts: The children were adjudicated neglected due to circumstances related to mother’s failure to properly feed, bathe and clothe her children as well as protect them from harm by her husband. DSS filed a motion to TPR which was granted on the grounds of neglect and dependency. Mother appeals the grounds. This opinion focuses on the neglect ground.
- This opinion addresses only those challenged findings that were necessary to determine neglect. It reviews the evidence and findings (both challenged and unchallenged) and determines the trial court was correct in finding the mother did not make substantial progress in her parenting skills and that there was a likelihood of future neglect based on the children’s trauma when in mother’s care, mother not believing the children were abused, and mother marrying one of the children’s abusers.

### Failure to Make Reasonable Progress

G.S. 7B-1111(a)(2) requires a two-step analysis: (1) that the child has been willfully left by the parent in foster care or placement outside the home for more than 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child’s removal.

## Willfully Left in Foster Care for One Year

In re K.H., 375 N.C. 610 (2020)

**Held: Reversed**

**Dissent, Newby, J.**

**Concur in part/Dissent in part, Ervin, J. and Davis, J.**

- **Facts:** A 16-year-old parent and her 9-month-old baby were placed in nonsecure custody with DSS. Initially, mother and infant were separated (April 5, 2017 through June 9, 2017) but then were placed in a foster home together from December 19, 2017 until August 8, 2018 when they were separated again. The infant was adjudicated neglected and dependent (the opinion does not address respondent minor mother's status as an abused, neglected, or dependent juvenile but does make reference to her also being in DSS custody). After respondent minor mother made minimal progress, DSS filed a TPR motion on August 8, 2018. The TPR was granted on three grounds: failure to make reasonable progress (7B-1111(a)(2)), failure to pay the reasonable cost of care (7B-1111(a)(3)), and dependency (7B-1111(a)(6)). Respondent mother appeals all three grounds.
- G.S. 7B-1111(a)(2) requires a two-step analysis: (1) that the child has been willfully left by the parent in foster care or placement outside the home for more than 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- The time period for the first prong – willfully left in foster care or placement outside the home for 12 months – is based on the time from the court order placing the child outside the home to the time that the TPR petition/motion is filed. There is a finding that the juvenile has been in care for approximately 13 months, but it is unclear whether the court was including the months between the filing of the TPR motion and the TPR hearing, which should not have been considered.
- The plain meaning of foster care and placement outside the home presumes the child and parent have been physically separated. See G.S. 131D-10.2(9) (definition of "foster care"). The period of time the minor parent and juvenile were placed in the same foster home does not count toward the determinative time period since the juvenile has not actually lived apart from the parent. This interpretation supports the purpose of G.S. 7B-1111(a)(2) to provide parents with at least 12 months' notice that they must correct the conditions that led to their child's removal before having to respond to a termination of parental rights. Here, the period of time the juvenile and minor parent were separated was 10 months before the TPR motion was filed and is insufficient to support a TPR on this ground.
- **Dissent:** Although the application of the time period is tricky in this situation, the juvenile was placed in foster care and outside mother's home for more than 12 months. During the time the juvenile and minor parent were in the same foster home, the juvenile was not in mother's custody and no evidence shows mother had responsibility for caring for the juvenile during that time, and the juvenile was not in her mother's home but was in the home of a foster family and children's home.

[In re K.C.T.](#), 375 N.C. 592 (2020)

**Held: Reversed in part; Reversed and remanded in part**

**Dissent, Newby J.**

- **Facts:** After a voluntary kinship placement, petitioners in this TPR obtained a Ch. 50 civil custody order giving them sole legal and physical custody of the juvenile and no visitation with mother. More than 3 years later, petitioners filed this TPR, alleging neglect, failure to make reasonable progress, dependency, and willful abandonment. The TPR was granted on all 4 grounds, and mother appeals.
- **Applying the reasoning of *In re A.C.F.*, 176 N.C. App. 520 (2006), G.S. 1111(a)(2) requires a court order that removes the juvenile and does not cover circumstances where parents leave their children in the care of another without involvement of the juvenile court. There are many reasons a parent will entrust the care of their child to others, oftentimes without implicating child welfare concerns of the State. The order here was entered under Ch. 50 and not under G.S. Chapter 7B. “A Chapter 50 civil custody order does not provide sufficient notice to a parent that their parental rights would be imperiled by their loss of custody or inform the parent what steps would be necessary to make reasonable progress and avoid termination.” Sl.Op. at 4-5. TPR on this ground reversed.**

[In re M.J.R.B.](#), 2021-NCSC-62

**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. 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, and 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.

Reasonable Progress Made

[In re D.A.A.R.](#), 377 N.C. 258 (2021)

**Held: Reversed**

- **Facts:** In 2017, the juveniles were adjudicated neglected and dependent based on the parents’ domestic violence, substance use, housing instability, and mental health issues. In 2018, mother entered into a case plan with DSS to address these issues and her parenting skills. Mother’s

visitation was suspended with both children at one point but was reinstated with supervised visits with one child. Mother entered a 6-month residential treatment program, followed by outpatient treatment, and filed motions to have her visitation reinstated and the filing of the TPR stayed based on positive changes she had made. DSS filed the TPR petition before mother's motions were heard. The GAL filed a motion to cease contact between mother and her one child after that child ran away from a group home with other children and mother failed to notify DSS, the group home, or law enforcement when her daughter reached out to her and she arranged to meet her daughter. Mother's visitation was again suspended. She continued to file motions to review the plan to show her progress. In 2019, the TPR was heard, and the court granted the TPR on the ground of failure to make reasonable progress but denied the ground of neglect. The court denied the TPR for the child mother had been visited after determining it was not in that child's best interests but granted the TPR for the child with whom mother had no visitation. Mother appealed.

- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. The reasonableness of the parent's progress is determined as of the date of the TPR hearing. Although compliance with a judicially adopted case plan is relevant, reasonable progress does not require the parent to fully satisfy all the elements of the goals of the case plan. The issue is not whether the parent can regain custody at the time of the TPR hearing but whether there has been reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal.
- The findings are that mother was in compliance with 4 of the 5 case plan goals: she completed inpatient and outpatient substance use treatment, continues with treatment, and has negative drug screens; she relocated out of North Carolina to extricate herself from the abusive relationship with the children's father, completed domestic violence courses, and was not involved in other instances of domestic violence; she is actively engaged in therapy; and she obtained housing and was in the residence for a year. Findings regarding lack of progress included that Mother was not approved by an ICPC home study, although this was due to an error by that state's agency, which should not have denied a parent ICPC approval due to criminal history. The court was not willing to wait for second ICPC study to be completed where the proper standard would have been applied to mother. Additionally, the court considered mother's delay in entering into a case plan in 2018. There were findings about mother's handling of the child's run-away incident, which must be viewed in context of mother's overall success in addressing the causes for the children's removal.
  - The findings show mother's significant, sustained, and reasonable progress to correct the conditions that led to the children's removal do not support the conclusion of the ground.
- "We hold that a parent's delay in signing a case plan or attempting to address the conditions leading to a child's removal from the home has indisputable relevance to an evaluation of the willfulness of a parent's conduct and the reasonableness of that parent's progress in correcting the conditions that had led to a child's removal from the family home for purposes of N.C.G.S. § 7B-1111(a)(2)." Sl.Op. ¶136. The court "should also evaluate the reasonableness of any progress

that the parent has made in light of the amount of time that the parent had been given to make that progress.” *Id.* This case does not involve last-minute, limited steps a parent attempts to make when facing a TPR. Mother was making sustained progress over time.

- The court may consider parenting decisions made with respect to one child while evaluating the reasonableness of that parent’s progress with regard to the other child. The conditions for removal and case plan were not child specific. The interactions with one child sheds light on mother’s parenting skills and the court’s evaluation of whether her progress was reasonable.

## Poverty

In re T.M.L., 377 N.C. 369 (2021)

### **Held: Affirmed**

- Facts: In January 2018, the juveniles were adjudicated neglected and dependent based on a history of domestic violence and substance use by the parents. Father did not sign his case plan until July 2018, which addressed substance use, domestic violence, parenting skills, housing, and employment. In November 2019, DSS filed TPR petitions regarding father’s rights, which was granted. Father appeals.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. The reasonableness of the parent’s progress is evaluated up to the time of the TPR hearing. Failure to complete the case plan services, when they address the issues that contributed to the circumstances leading to the juvenile’s removal, is probative of the parent’s progress or lack thereof.
- When examining father’s progress, the trial court applied the incorrect standard (time period) by focusing on the one-year period before the TPR was filed. “An appellant must not only show error; he must show that the error was prejudicial.” Sl.Op. ¶13. The court also included findings that examined the father’s progress up to the date of the TPR hearing. Regardless of why the trial court made these later findings, they are sufficient to support the determination that the ground existed when looking at the totality of the father’s progress at the time of the TPR hearing. Father had not made reasonable progress with domestic violence services, finding appropriate housing or stable employment, or testing positive on drug screens. Father’s partial steps to make progress after the TPR was filed are insufficient.
- G.S. 7B-1111(a)(2) prohibits the TPR on this ground “for the sole reason that the parents are unable to care for the juvenile on account of their poverty.” Sl.Op. ¶13. This statutory language is not an element of the ground but instead establishes what is not a willful failure to make reasonable progress. The trial court does not have to make an affirmative finding that poverty is not the sole reason for the parent’s inability to care of the child. Similarly, a parent’s poverty does not have to be raised as an affirmative defense. The trial court’s findings reflect the evidence, which did not include poverty, and support the finding that his actions were willful.

## Domestic Violence/Substance Use

### In re A.M., 377 N.C. 220 (2021)

#### **Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected. The parents were ordered to comply with a case plan to address issues involving substance use, housing, income, domestic violence, mental health, and criminal activity. DSS filed a motion to terminate the parents' rights. At permanency planning hearings the court found that progress made by either parent was short-lived. The TPR hearing was held in 2020, and the parents' rights were terminated. Mother appeals, challenging the grounds and best interests.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. The reasonableness of the parent's progress is evaluated up to the time of the TPR hearing. A parent's compliance with a court ordered case plan is relevant in the determination. Progress must be reasonable; extremely limited progress will support this ground.
- Mother's progress was not reasonable. Although mother obtained a structurally safe and appropriate residence, unchallenged findings show mother continued to struggle with substance use and that there were repeated acts of domestic violence. These issues led to the removal of the children from her care.

### In re L.N.G., 377 N.C. 81 (2021)

#### **Held: Affirmed**

- Facts: In an underlying 2016 action, the juveniles were adjudicated neglected and dependent. The circumstances creating the children's conditions were domestic violence. DSS filed a TPR petition in 2019, which was granted on the grounds of neglect and failure to make reasonable progress. The appeal addresses the ground of failure to make reasonable progress.
- G.S. 7B-1111(a)(2) authorizes a termination of a parent's rights when the parent has willfully left the child in foster care or other placement outside the home for 12 or more months and has failed to show reasonable progress under the circumstances to correct the conditions that led to the child's removal. A parent's extremely limited progress to correct the conditions supports termination of parental rights under this ground.
- Mother was ordered to address the issues of domestic violence. The findings that mother maintained her relationship with her abuser and did not engage in all the domestic violence therapy she was required to complete were supported by the evidence. Although she completed a domestic violence counseling program, she did not modify her behavior as she maintained her relationship with her abuser when he continued to commit acts of domestic violence against her. The court found her testimony that she was not in relationship with her abuser was not credible and was her attempt to mislead the court and DSS. The appellate court gives deference to the trial court's determination of witness credibility. The court found she had the means and ability to comply with the additional counseling but was unwilling to do so.

## Mental Health/Substance Use

In re A.M.L., 377 N.C. 1 (2021)

### **Held: Affirmed**

- Facts: in 2018, the juveniles were adjudicated neglected based in part on conditions resulting from mother's substance use. Mother was ordered to comply with a case plan addressing her substance use, parenting skills, and mental health. DSS filed a TPR petition, which was granted. Mother appeals arguing she substantially complied with her case plan and made reasonable progress to correct the conditions that led to the children's removal.
- G.S. 7B-1111(a)(2) authorizes a termination of a parent's rights when two prongs exist: (1) the parent has willfully left the child in foster care or other placement outside the home for 12 or more months and (2) has failed to show reasonable progress under the circumstances to correct the conditions that led to the child's removal. Although all aspects of a case plan do not have to be fully satisfied, there must be more than extremely limited progress. Willfulness is a finding of fact and does not require fault by the parent – "It simply requires respondent-mother's "prolonged inability to improve her situation, despite some efforts in that direction." Sl.Op. ¶29.
- The findings support the conclusion. (Note, there is no dispute the children were in foster care for 16 months).
  - Although mother argued her delay in receiving a written copy of the case plan harmed her, the delay was 62 days at most and a year before the TPR hearing, giving her sufficient time to make progress. Further she was aware of what she needed to do based on her prior DSS involvement.
  - When a parent's noncompliance with a case plan supports a TPR on this ground, there must be a nexus between the court-approved case plan and the conditions that led to the children's removal. The nexus existed here, as the case plan was tailored to help mother with her substance use, parenting, and mental health issues. Although mother made progress on the parenting skills portion of the case plan, "the trial court's findings focused on the true gravamen of her case— her substance abuse—as well as her mental health struggles." Sl.Op. ¶21. Mother missed and failed drug screens; did not attend a recovery group; and although asserted she completed an assessment and engaged in treatment, she never reported that to DSS and the records showed primarily drug test results. Mother did not complete any of the mental health components of her case plan.
  - Mother completed a case plan for her infant who DSS did not seek custody of. Her ability to complete that case plan shows mother's willfulness.
- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the juvenile in a foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness involves a parent's ability to show reasonable progress but an unwillingness to make the effort. Compliance with a case plan is relevant; satisfaction of all the elements of the plan is not required, but extremely limited progress supports this ground.

[In re A.J.P.](#), 375 N.C. 516 (2020)

**Held: Affirmed**

**Dissent: Earls, J.**

- **Facts:** The juvenile was adjudicated a dependent juvenile based on circumstances due to mother's substance use and criminal activity and putative father's criminal activity and inability to care for their infant and lack of an appropriate alternative child care arrangement. Mother and putative father executed a relinquishment. It was later discovered putative father was not the biological father and a TPR on unknown fathers was initiated. Respondent father contacted DSS to indicate he might be the father, and he was determined to be so. Father was incarcerated but entered into a family services plan and the dependency case continued to hold permanency planning hearings. Eventually DSS filed a TPR alleging father had willfully left the juvenile in foster care and failed to make reasonable progress and willfully abandoned the juvenile. The TPR was granted on both grounds, and father appeals.
- The challenged findings are supported by clear and convincing evidence.
- Although the juvenile was removed from mother's home, the court found mother and father's relationship involved the use of controlled substances, father supplied mother with those substances even throughout her pregnancy, and father was incarcerated for drug-related criminal activity. The components of father's case plan addressing substance abuse and mental health issues relate to identifying and correcting underlying traumas that cause the behaviors so a safe and secure environment for the juvenile can be created. Father contributed to the circumstances leading to the juvenile's removal such that there is a sufficient nexus between the conditions that led to her removal and the mental health and substance abuse components of father's case plan. See *In re B.O.A.*, 372 N.C. 372 (2019).
- The court considered the limitations to his completing his case plan due to his incarceration when determining his willfulness in not making reasonable progress. Although father was incarcerated, he could have completed the substance abuse portion of his case plan. He failed to provide proof that he did so. Additionally, father knew mother was pregnant but made no effort to contact her or the child after the child was born and during a period of time where he was not incarcerated. Since his involvement in the case, he has not sent cards, made calls, or requested the opportunity to see his child. He did not reach out to the child's GAL despite having contact information for the GAL.
- **Dissent:** The trial court failed to analyze how incarceration affected the respondent's capacity to comply with his case plan before concluding his failure to make reasonable progress was willful. Since the record could support the conclusion that grounds existed, the remedy should be vacate and remand.

Minor Parent Aging Out of Foster Care

[In re Q.P.W.](#), 376 N.C. 738 (2021)

**Held: Affirmed**

**Dissent, Earls, J.**

- **Facts:** This TPR involves an underlying dependency action for the juvenile, when her own mother was also a minor in DSS custody. While the mother was a juvenile in DSS custody, both she and

her child (the juvenile in this case) were placed together from 2014-2017. Based on mother's behaviors, there were some disruptions in the joint placement. When mother turned 18 (in 2017), she was no longer eligible to remain in the placement with her child. For the next year she had minimal contact with her child and failed to comply with her case plan addressing employment, parenting, housing, mental health and substance abuse issues, and consistent visits with her child. Ultimately DSS filed a TPR petition, which was granted on several grounds. Mother appeals – arguing the findings of fact (which were not challenged by mother) do not support the conclusion of law. This appeal focuses on the ground of failure to make reasonable progress to correct the conditions.

- Standard of review is whether the findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.
- G.S. 7B-1111(a)(2) requires a 2-step analysis:
  - did the parent willfully leave the child in foster care or other placement for 12 or more months; the time period starts with the juvenile's placement pursuant to a court order and ends with the date the TPR petition/motion is filed, and
  - has the parent failed to make reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- The relevant time period for the first prong is April 2018-April 2019. The findings show that mother stopped sharing a placement with the juvenile in December 2017, more than 12 months before the TPR petition was filed. The findings also show mother's actions in not complying with her case plan after she turned 18 support the conclusion that she willfully left the juvenile in foster care/placement outside the home for more than 12 months.
- Compliance with a case plan is relevant when determining whether the second prong of G.S. 7B-1111(a)(2) has been satisfied. Relying on *In re B.O.A.*, 372 N.C. 372 (2019), the objectives in mother's case plan addressed the issues that led to the juvenile's removal and included factors that become apparent as more information came to light about the barriers to reunification. Although mother was a minor when her child was removed from her care, the modifications to her case plan were tied to her need to demonstrate maturity and stability - e.g, parenting skills, housing, employment – and had a nexus to the conditions that directly or indirectly contributed to the circumstances of mother's immaturity and instability resulting in the child's removal. The unchallenged findings about mother's lack of progress (failure to maintain stable housing, attending parenting classes, cooperate with drug screen, and consistently visit with the juvenile) since she turned 18 support the conclusion.
- Dissent: In assessing mother's willfulness in leaving her child in foster care, the majority should have considered mother's own experiences in foster care and aging out of foster care. As a 14-year-old mother in foster care (her pregnancy resulting from a sexual assault), she made progress while in foster care and the realities of her difficult transition from foster care to independent living as well as her own adolescent development should have been considered. Additionally, her voluntary participation in the NC LINKS program should have been considered. Failing to consider these factors does not apply the "under the circumstances" component of G.S. 7B-1111(a)(2) when looking at whether mother made reasonable progress. In examining

the other grounds to TPR, the conclusions are not supported by clear, cogent, and convincing evidence.

#### Failure to Make Reasonable Progress

##### In re A.H.F.S., 375 N.C. 503 (2020)

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

- **Facts:** The juveniles had been adjudicated neglected in two separate actions (one in 2016 where the juveniles remained in the home and one in 2017 where the juveniles were removed) due to substance use, mental health issues, and conditions of the home. DSS initiated a TPR, which was granted. Respondent parents appeal, challenging the grounds. This appeal focuses on failure to make reasonable progress under the circumstances to correct the conditions that led to the juveniles' removal, the second prong of G.S. 7B-1111(a)(2).
- Regarding the conditions of removal, respondent mother is collaterally estopped from relitigating issues determined by the underlying neglect adjudication order, which included findings addressing the conditions of removal, from which she did not appeal.
- Findings that mother failed to complete her substance abuse therapy, demonstrate skills learned in parenting classes, attend the majority of the children's medical appointments, have a safe and appropriate home, and submit to the majority of her drug screens; had positive drug tests; was convicted for drug offenses, and had untreated mental health issues support the conclusion that mother failed to make reasonable progress. Challenged findings were supported by evidence. The determination of willfulness by the court is supported by clear and convincing evidence and sufficient evidentiary findings of fact.
- Although respondent father made some progress, it was not reasonable progress. The court found the home and yard were cluttered with safety hazards; the home has been broken into; the condition of the home is inappropriate for the children; father has not demonstrated how he has benefitted from the parenting classes; and father did not attend the majority of the children's medical appointments. The findings are supported by clear and convincing evidence. Although father made some progress including completing individual therapy and attending visitation, the primary condition leading to the children's removal were not remedied and are not based solely on father's continued relationship with mother.

##### In re E.C., 375 N.C. 581 (2020)

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

- **Facts:** In 2016, three children were adjudicated dependent, due to mother's incarceration, which led to an eviction and other financial disruptions for the family at a time when no relative or caretaker could provide for the children. Mother, after her release from prison, entered into a family services agreement with DSS, which included obtaining safe and stable housing and participate in mental health treatment and parenting classes. Ultimately, DSS filed a TPR alleging 3 grounds, and in 2019, the TPR was granted on all 3 grounds. Mother appeals. This appeal focuses on G.S. 7B-1111(a)(2).
- As held in *In re B.O.A.*, 372 N.C. 372 (2019), the conditions which led to the child's removal are not limited to what was stated in the petition or an adjudication order. "The trial court in an

abuse, neglect, and dependency proceeding ‘has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile’s removal from the parental home.’ “ Sl.Op. at 8. There was a nexus between the mother’s case plan, which she failed to comply with, and the conditions of removal. Although mother, at the time of the TPR hearing, had suitable housing, her progress on that component of her plan was limited and delayed as she did not obtain suitable housing until one month before the TPR hearing, more than 3 years after the children had been placed in DSS custody. Further, the unchallenged findings of fact establish she did not address the mental health and parenting concerns.

[In re S.M.](#), 375 N.C. 673 (2020)

**Held: Affirmed**

- Facts: The six children had been adjudicated neglected based on dirty conditions in the home, poor hygiene, lack of schooling, domestic violence, and substance abuse. A case plan addressing these issues, the need for a mental health assessment, and a psychosexual evaluation by father due to allegations of sexual abuse of one of the children was ordered. After the parents noncompliance with the case plan, DSS filed TPR petitions alleging neglect and failure to correct the conditions. The TPR was granted, and both parents appeal challenging the best interests determination. Father also challenges the court’s denial of his motion to continue the hearing. Mother challenges the grounds as well.
- The challenged findings of fact are supported by clear and convincing evidence, including the social worker’s uncontroverted testimony. To the extent that a portion of one finding was not supported by the evidence, it is disregarded.
- Mother’s progress on her case plan was not reasonable. “Having presented no evidence of her own during the hearing, respondent-mother’s completion of parenting classes and the registration of a single negative drug screen stand alone as affirmative attainments by her toward the successful fulfillment of her case plan, while the remainder of the record illustrates respondent-mother’s lack of reasonable progress in correcting the conditions which led to the removal of the children from the home.” Sl.Op.at 20.
- Regarding willfulness, there is no evidence in the record identifying any barriers that impacted mother’s ability to comply with her case plan. An inability to improve her situation despite some efforts and good intentions will support a finding of lack of reasonable progress under G.S. 7B-1111(a)(2). The findings addressing her failures to comply with her case plan demonstrate mother’s willfulness.

[In re Z.O.G.I.](#), 375 N.C. 858 (2020)

**Held: Affirmed in part; Vacate and remand**

- Facts: The juvenile was adjudicated dependent in an underlying action based on circumstances created by mother and father’s incarceration and lack of appropriate alternative child care arrangements. After his incarceration, father entered in a case plan, which included obtaining stable housing and income, learning appropriate parenting skills, and addressing his substance abuse issue. The court ordered father to comply with the case plan. Eventually, DSS filed a TPR

petition on the grounds of neglect and failure to make reasonable progress. The TPR was granted and father challenges the grounds and the determination that TPR was in the juvenile's best interests. This opinion focuses on the ground of failure to make reasonable progress (affirmed) and the best interests determination (vacated and remanded).

- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the juvenile in a foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the child's removal. Compliance with a case plan is relevant. G.S. 7B-904(d1)(3) authorizes the court to order a parent to take appropriate steps to remedy the conditions that led to the juvenile's removal or adjudication.
- Father had notice from the court of what he was required to do to show a change of conditions that led to the juvenile's removal when the court, in its permanency planning orders, consistently ordered him to comply with his case plan.
- Although father argues he made reasonable progress on his case plan by obtaining housing with his girlfriend, having the vast majority of his drug screens test negative, engaging in co-parenting with the foster parents, and consistently visiting with the juvenile, the unchallenged findings show father waited over a year after his incarceration and after the filing of the TPR petition before consistently attending visits, quit his job for an injury he never verified such that he did not have sufficient income, failed to comply with therapy recommendations regarding his parenting, and failed to address his substance use issues with his admission of his use of marijuana, support the conclusion that he failed to make reasonable progress to correct the conditions.
- The trial court determines credibility and weighs the evidence and ultimately determined the progress by father to provide adequate care and supervision in a safe home was minimal.

In re L.E.W., 375 N.C. 124 (2020)

**Held: Affirmed**

- Facts: Child was adjudicated neglected and dependent. DSS filed a petition to TPR and before that petition was heard, a permanency planning hearing was held that eliminated reunification as a permanent plan. Respondent mother preserved her right to appeal the permanency planning order (PPO), and after the TPR was granted, she appealed both the PPO and TPR.
- TPR: Failure to Make Reasonable Progress
  - G.S. 7B-1111(a)(2) authorizes a termination of parental rights when a parent has willfully left the child in foster care or placement outside of the home for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the child's removal. Although fully satisfying each condition of a case plan is not required, there must be more than extremely limited progress. A parent must have an ability to show reasonable progress but be unwilling to make the effort. The court made findings of fact about mother's partial progress with trauma group sessions, missed group and individual sessions, inconsistent visitation with the child, inconsistent participation with CDSA, failure to maintain stable housing and employment, and continued involvement with father that involved incidents of

domestic violence. Although there was some progress, it was not reasonable progress for which mother had an ability to make. The findings support the court's conclusion that this ground exists.

### Failure to Pay Reasonable Cost of Care: G.S. 7B-1111(a)(3)

[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.

[In re K.H.](#), 375 N.C. 610 (2020)

**Held: Reversed**

**Dissent, Newby, J.**

**Concur in part/Dissent in part, Ervin, J. and Davis, J.**

- **Facts:** A 16-year-old parent and her 9-month-old baby were placed in nonsecure custody with DSS. Initially, mother and infant were separated (April 5, 2017 through June 9, 2017) but then were placed in a foster home together from December 19, 2017 until August 8, 2018 when they were separated again. The infant was adjudicated neglected and dependent (the opinion does not address respondent minor mother's status as an abused, neglected, or dependent juvenile but does make reference to her also being in DSS custody). After respondent minor mother made minimal progress, DSS filed a TPR motion on August 8, 2018. The TPR was granted on three grounds: failure to make reasonable progress (7B-1111(a)(2)), failure to pay the reasonable cost of care (7B-1111(a)(3)), and dependency (7B-1111(a)(6)). Respondent mother appeals all three grounds.
- **G.S. 7B-1111(a)(3)** authorizes a TPR when the juvenile has been placed in DSS custody or foster home and the parent has for a period of 6 months immediately preceding the filing of the TPR petition/motion willfully failed to pay a reasonable portion of the cost of the juvenile's care although the parent is physically and financially able to do so.

- The relevant 6-month period is February 8, 2018 to August 8, 2018. The findings included mother worked at Show Shoe and Cook Out in 2018, was employed part-time at various points in time, is physically and financially able to pay more than zero, and had not paid anything toward the cost of the juvenile's care. Because the findings did not address the specific determinative 6-month period, the findings are insufficient to support the ground.
- Dissent in part: The proper remedy is remand and not reverse. A reversal is proper when "the record evidence is 'too scant' to support the trial court's decision, . . . , while a remand is appropriate in the event that, even if the trial court's required findings of fact are defective, the record contains sufficient evidence to permit the trial court to have reached the result that it deemed appropriate in the event that proper findings had been made." Concur in part, dissent in part at 2 (citations omitted). In reviewing the record, a complete reversal is unwarranted as the trial court may be able to make the necessary findings for a termination based on G.S. 7B-1111(a)(3).
- Dissent: The findings regarding mother's employment in 2018 and failure to pay anything toward the cost of the juvenile's care is a broad reference to the year and includes the determinative 6-month period.

In re J.A.E.W., 375 N.C. 112 (2020)

**Held: Affirmed**

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

## Willful Failure to Pay Child Support: G.S. 7B-1111(a)(4)

In re C.L.H., 376 N.C. 614 (2021)

**Held: Reverse in part, vacate and remand in part**

**Dissent, Barringer, J. joined by Newby, J. and Berger, J.**

- **Facts:** This is a private TPR where mother is petitioner and father is respondent parent. In 2011, the parties entered into a consent order for child support, where respondent father was required to pay a set amount. In 2018, after father overdosed during a visit with the child, mother obtained a modified Ch. 50 custody order granting her sole physical and legal custody. The TPR was granted on the grounds of neglect, willful failure to pay child support, and dependency. Father appeals, challenging the grounds.
- G.S. 7B-1111(a)(4) authorizes the court to terminate parental rights for willfully failing to pay for the child's care, support, and education as required by a court decree or custody agreement for a period of one year or more before the filing of the TPR petition.
- Agreeing with the Court of Appeals, the petitioner must prove there was an enforceable support order during the year before the TPR was filed. When there are no findings indicating either a child support order existed or the respondent failed to pay support as required by the child support order during the year before the TPR, the findings will be insufficient to support the conclusion of this ground. The source of the evidence of that order (e.g., testimony vs the order itself) is not relevant as long as it is clear, cogent, and convincing evidence.
- It is the role of the appellate court to review "the trial court's *factual findings* to determine whether they support the trial court's conclusions of law." ¶ 18 (emphasis in opinion). The appellate court does not make findings of fact. Quoting previous NC Supreme Court opinions, "The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.'" *Id.* There are no findings of fact a child support order existed during the year before the TPR was filed. The record appears to have evidence that might support a conclusion under this ground (allegations and admission in the pleadings, testimony). Vacate and remand for findings and conclusion as to whether there was an enforceable child support order the year before the TPR petition was filed and whether the failure to pay was willful.
- **Dissent:** Addressing G.S. 7B-1111(a)(4), father failed to preserve the issue of the child support order's existence for appeal. Additionally, the findings are sufficient. Father admitted in his answer there was a child support consent order. An admission binds the party such that the fact is uncontested. Findings show that father had not paid support since 2015 (4 years) although he was employed.

## Dependency: G.S. 7B-1111(a)(6)

G.S. 7B-1111(a)(6) authorizes a TPR when the parent is incapable of providing proper care and supervision for the juvenile such that juvenile is dependent as defined by G.S. 7B-101(9) and that there is a reasonable probability the incapability will continue for the foreseeable future. The court must address both prongs of the definition of juvenile based on (1) the juvenile not

having a parent, guardian, or custodian who is able to provide for the juvenile's care and supervision and (2) the parent, guardian, or custodian lacks an appropriate alternative child care arrangement.

[In re M.J.R.B.](#), 2021-NCSC-62

**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. 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.

Unable to Provide Care or Supervision

[In re C.L.H.](#), 376 N.C. 614 (2021)

**Held: Reverse in part, vacate and remand in part**

**Dissent, Barringer, J. joined by Newby, J. and Berger, J.**

- **Facts:** This is a private TPR where mother is petitioner and father is respondent parent. In 2011, the parties entered into a consent order for child support, where respondent father was required to pay a set amount. In 2018, after father overdosed during a visit with the child, mother obtained a modified Ch. 50 custody order granting her sole physical and legal custody. The TPR was granted on the grounds of neglect, willful failure to pay child support, and dependency. Father appeals, challenging the grounds.
- Regarding the dependency ground under G.S. 7B-1111(a)(6), there was no evidence or findings that at the time of the termination hearing the father had a condition that made him incapable of providing proper care or supervision. Reversed.

Lack of Appropriate Alternative Child Care Arrangement

[In re A.L.L.](#), 376 N.C. 99 (2020)

**Held: Reversed**

**Concur in part, Dissent in Part, Newby, J.**

- **Facts:** The juvenile was adjudicated dependent in an underlying juvenile action based on circumstances related to mother's mental health issues. During the course of the underlying dependency action, mother was ordered to comply with her case plan, which she did but she was still engaging in inappropriate behaviors and had parenting deficits. Ultimately the court appointed permanent guardians for the juvenile under G.S. 7B-600, achieving a permanent plan.

The guardians filed the TPR petition so they could adopt. The TPR was granted on the grounds of dependency and willful abandonment. Mother appeals both grounds and argues the court lacked subject matter jurisdiction.

- There were no findings about the second prong of dependency – lack of an appropriate alternative child care arrangement.
- A legal permanent guardian is an appropriate alternative child care arrangement under G.S. 7B-1111(a)(6), even when the parent did not identify that person. Differing from prior Court of Appeals opinions, G.S. 7B-1111(a)(6) does not require that the parent must locate and secure the appropriate alternative child care arrangement; the issue centers on “the availability or unavailability of an appropriate alternative child care arrangement, not the parent’s success or failure in identifying one....” Sl.Op. at 12. This interpretation of the statute comports with the purpose of the Juvenile Code. “[W]hen a parent is unable to provide appropriate care, but the child is residing with another appropriate permanent caretaker, then the parent’s incapability does not itself supply a reason for the state to intervene to dissolve the constitutionally protected parent-child relationship. In this circumstance, requiring the parent to affirmatively identify an alternative child care arrangement threatens the parent’s constitutional status without serving the state’s *parens patriae* interest in the child’s safety.” Sl.Op. at 14.
- “Permanent guardianship, which provides a child with stability and the opportunity to develop durable, healthy, dependent bonds with adult caregivers, is distinct from a temporary custodial arrangement which leaves a juvenile in a state of ongoing uncertainty.” Sl.Op. at 15. “Requiring the identification of an alternative child care arrangement serves a child’s interest in permanency when the child is in the custody of an incapable parent or a temporary caregiver. But when the child resides with a permanent legal guardian, the parent’s ability to identify an alternative child care arrangement is extraneous to the concerns animating our Juvenile Code.” *Id.* Footnote 3 states: “Until a legal permanent guardianship has been established, a parent will still have reason to identify and propose an alternative child care arrangement.”
- Dissent: The majority advances its own policy preference for permanent guardianship over adoption and overrules a 10-year precedent by the Court of Appeals that the parent must have taken some action to identify an appropriate alternative child care arrangement. If that court’s interpretation was wrong, the legislature would have acted to correct it. DSS is in a catch-22 situation, by identifying an appropriate alternative placement for the child, they will be precluded from bringing a TPR on dependency grounds at a later date.

In re K.D.C., 375 N.C. 784 (2020)

**Held: Reversed**

- Facts: The juveniles were adjudicated neglected in an underlying action due to circumstances created by father and mother’s incarceration. Mother was ordered to comply with a case plan. Mother was incarcerated throughout the neglect proceeding. Ultimately, DSS filed a TPR petition alleging the grounds of neglect, failure to make reasonable progress, and dependency. The TPR was granted, and mother appeals the grounds.
- The second prong of dependency – lack of an appropriate alternative child care arrangement – was not alleged in the petition nor found by the trial court. A trial court’s failure to make both

findings of dependency (defined in G.S. 7B-101(9)) will result in reversal. Even though it was undisputed that mother lacked an alternative child care arrangement (as argued by DSS and the child's GAL), there was no evidence at the TPR hearing addressing an appropriate alternative child care arrangement. With a lack of evidence and finding about this prong, the dependency ground was not established.

[In re K.C.T.](#), 375 N.C. 592 (2020)

**Held: Reversed in part; Reversed and remanded in part**

**Dissent, Newby J.**

- **Facts:** After a voluntary kinship placement, petitioners in this TPR obtained a Ch. 50 civil custody order giving them sole legal and physical custody of the juvenile and no visitation with mother. More than 3 years later, petitioners filed this TPR, alleging neglect, failure to make reasonable progress, dependency, and willful abandonment. The TPR was granted on all 4 grounds, and mother appeals.
- **The court did not make findings about the second prong of the dependency requirement** – that the parent lacked an appropriate alternative child care arrangement. The burden is on petitioners to show mother lacked an appropriate alternative child care arrangement and they provided no such evidence. TPR on this ground reversed.
- **Dissent:** The burden does not rest solely on petitioners to show that respondent mother did not offer an appropriate alternative child care arrangement. Respondent's failure to show an alternative child care arrangement should be considered. As such, remand is appropriate.

[In re K.H.](#), 375 N.C. 610 (2020)

**Held: Reversed**

**Dissent, Newby, J.**

**Concur in part/Dissent in part, Ervin, J. and Davis, J.**

- **Facts:** A 16-year-old parent and her 9-month-old baby were placed in nonsecure custody with DSS. Initially, mother and infant were separated (April 5, 2017 through June 9, 2017) but then were placed in a foster home together from December 19, 2017 until August 8, 2018 when they were separated again. The infant was adjudicated neglected and dependent (the opinion does not address respondent minor mother's status as an abused, neglected, or dependent juvenile but does make reference to her also being in DSS custody). After respondent minor mother made minimal progress, DSS filed a TPR motion on August 8, 2018. The TPR was granted on three grounds: failure to make reasonable progress (7B-1111(a)(2)), failure to pay the reasonable cost of care (7B-1111(a)(3)), and dependency (7B-1111(a)(6)). Respondent mother appeals all three grounds.
- **There were no findings on the second prong:** lack of an appropriate alternative child care arrangement. The findings are insufficient to support the ground.
- **Dissent in part:** The proper remedy is remand and not reverse. A reversal is proper when "the record evidence is 'too scant' to support the trial court's decision, . . . , while a remand is appropriate in the event that, even if the trial court's required findings of fact are defective, the record contains sufficient evidence to permit the trial court to have reached the result that it

deemed appropriate in the event that proper findings had been made.” Concur in part, dissent in part at 2 (citations omitted). In reviewing the record, a complete reversal is unwarranted as the trial court may be able to make the necessary findings for a termination based on G.S. 7B-1111(a)(6). At a minimum, the record shows a genuine issue of material fact about whether mother had an adequate alternative child care arrangement.

- Dissent: Agrees with dissent in part.

## Willful Abandonment

G.S. 7B-1111(a)(7) authorizes a TPR when the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition or motion. Abandonment implies conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child, which is demonstrated by withholding his presence, love, care, and opportunity to display filial affection and failure to pay support and maintenance. Willfulness is a question of fact. The court may consider the parent’s conduct outside of the determinative 6-month period when evaluating the parent’s credibility and intentions.

## 6-Month Determinative Time Period

In re I.J.W., 2021-NCSC-73

### **Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent 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.

[In re C.A.H.](#), 375 N.C. 750 (2020)

**Held: Affirmed**

- Facts: Mother filed a TPR petition against respondent father alleging three grounds. The TPR was granted, and respondent father appeals challenging the conclusion that grounds existed. This opinion focuses on the ground of willful abandonment.
- The determinative 6-month period is Oct. 25, 2018 to April 25, 2019. The court's findings address a longer period that includes the child's birth and the parties living together; their separation and mother's obtaining a 1-year DVPO against respondent; a civil custody order awarding mother sole custody; father's incarceration but upon his release date, the right to visit with the child and to pay a child support order; mother's marriage and relocation to California with the child; father's requesting visitation and not showing up in California for the scheduled visits; mother and child's return to NC; father's child support arrearages and need for a show cause order; father's failure to seek a modification of the visitation; and after the TPR was filed, two partial payments of child support and no attempts by respondent to communicate with petitioner about the child. During the 6-month period, the findings address father's partial payment of one child support payment; failure to send money, gifts, cards, or other assistance; failure to contact mother or her husband despite have their phone numbers; and lack of contact with the child.
- The findings support the conclusion of willful abandonment. The trial court determines credibility and the weight to give the evidence. The court determined respondent's conduct during the determinative period was willful abandonment.

Willful

[In re N.M.H.](#), 375 N.C. 637 (2020)

**Held: Affirmed**

- Facts: This TPR, which was initiated by mother against respondent father, was granted on the grounds of willful abandonment and neglect. Respondent father appeals, and the opinion focuses on the ground of willful abandonment.
- Although the trial court should have but did not use the word "willful" when addressing respondent's conduct, when read in context and in evaluating the findings together, the order makes clear that the court applied the proper willfulness standard. The findings addressed the father's lack of contact with petitioner and the child for 3 years before the filing of the petition despite having petitioner's contact information as well as his failure to pursue court-ordered visitation, attempt to arrange for visitation, and failure to provide any tangible or financial support despite paying child support for his other children. The findings were supported by clear and convincing evidence and those findings support the conclusion of abandonment.

[In re A.L.L.](#), 376 N.C. 99 (2020)

**Held: Reversed**

**Concur in part, Dissent in Part, Newby, J.**

- Facts: The juvenile was adjudicated dependent in an underlying juvenile action based on circumstances related to mother's mental health issues. During the course of the underlying dependency action, mother was ordered to comply with her case plan, which she did but she

was still engaging in inappropriate behaviors and had parenting deficits. Ultimately the court appointed permanent guardians for the juvenile under G.S. 7B-600, achieving a permanent plan. The guardians filed the TPR petition so they could adopt. The TPR was granted on the grounds of dependency and willful abandonment. Mother appeals both grounds and argues the court lacked subject matter jurisdiction.

- The order does not include findings addressing the determinative 6-month period of time or stating whether respondent acted willfully. The evidence in the record does not support a willfulness finding as mother’s conduct was largely based on her severe mental illnesses. The court found mother was unable to care for her child even though she desires to do so. Her actions, although misguided, showed her attempts to demonstrate her love and affection. Her behavior must show willful intent and not just symptoms of her diagnosed mental illness. Her refusal to take prescribed medications does not make her conduct rational or volitional conduct when there was no evidence that her refusal was willful or that taking her medication would have resulted in her ability to appropriately parent.
- Like incarceration, mental illness, standing alone, is neither a sword nor a shield in a TPR action. “Our reasoning should in no way be taken to suggest that every parent who struggles with a mental health condition lacks the capacity to make choices signifying an intent to abandon one’s child.” Sl.Op. at 20. The trial court must analyze the relevant facts and circumstances including the severity of the parent’s condition and the extent that the parent’s behaviors are consistent with the symptoms of their illness.
- Dissent: The ground exists. The majority’s opinion is policy driven and relies on social science articles that were not presented to the trial court and cases from other states to address mother’s mental illness and willfulness. The result will be legal limbo for children who will be unable to be adopted when their parent suffers from significant mental illness. This is contrary to the legislative goals of permanency for a child at the earliest possible age and to facilitate and promote the integrity of adoptions.

[In re K.C.T.](#), 375 N.C. 592 (2020)

**Held: Reversed in part; Reversed and remanded in part**

**Dissent, Newby J.**

- Facts: After a voluntary kinship placement, petitioners in this TPR obtained a Ch. 50 civil custody order giving them sole legal and physical custody of the juvenile and no visitation with mother. More than 3 years later, petitioners filed this TPR, alleging neglect, failure to make reasonable progress, dependency, and willful abandonment. The TPR was granted on all 4 grounds, and mother appeals.
- Willful abandonment under G.S. 7B-1111(a)(7) requires the court to focus on the parent’s actions in the 6 months immediately preceding the filing of the TPR petition (unlike abandonment by neglect). The relevant period is Sept. 12, 2018 to March 12, 2019. Mother took one action during this time period: sending 3 Christmas gifts to her child. The court does not address whether mother’s failure to take any other action was willful. The court’s findings identify multiple possible barriers to mother’s ability to contact and support her child, including

her disability, receipt of SSI, lack of driver's license. The evidence may support the ground, warranting reversal and remand for further proceedings not inconsistent with this opinion.

- Dissent: The majority applies the wrong standard of review. The findings support the conclusion of abandonment when examining the determinative 6-month period.

[In re G.G.M.](#), 377 N.C. 29 (2021)

**Held: Affirmed**

- Facts: The children have resided with the petitioners, maternal grandparents, since 2011. In 2013, father was shot several times and the perpetrators were never identified. Father had no contact with the children from 2013 until 2019 when he appeared at the grandparents' home, unannounced, with law enforcement. He briefly saw his son but did not see his daughter. Afterwards, the grandparents obtained an ex parte G.S. Chapter 50 custody order. A week later, father went to grandparents' home with a police officer to take custody of his children but did not do so based on the ex parte custody order the grandparents obtained. Shortly thereafter, the grandparents filed a TPR petition. The TPR was granted, and father appeals the grounds and best interests determination.
- G.S. 7B-1111(a)(7) authorizes a TPR based on willful abandonment for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment implies conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child through the withholding of the parent's presence, love, care, opportunity to display filial affection, and failure to provide support and maintenance. Willfulness is a question of fact. The court may consider the parent's conduct outside of the determinative 6-month period when evaluating a parent's credibility and intentions.
- The trial court determines the credibility of the witnesses, the weight of evidence, and the inferences to be drawn from that evidence. Although father testified he did not intend to abandon his children but instead chose to keep them safe as he feared his shooting was instigated by the children's mother, the court ultimately determined the father willfully intended to abandon the children during the determinative time period. The court's findings of father's 5-year period of failing to contact and support the children support the conclusion of willful abandonment.

[In re I.R.M.B.](#), 377 N.C. 64 (2021)

**Held: Affirmed**

- Facts: In 2014, mother obtained a multi-year order of protection against father in California where they lived. Father was prohibited from having contact with mother and child. Mother and child moved to NC. In 2015, father filed a custody action in California that he never pursued and was removed from the calendar. In 2016, mother filed a TPR petition in NC against father. After jurisdictional issues were resolved, the TPR was heard and granted on the ground of abandonment. Father appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR based on willful abandonment for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment implies conduct that

manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willfulness is an integral part of abandonment. The court may consider the parent's conduct outside of the determinative 6-month period when evaluating a parent's credibility and intentions. Willfulness is a question of fact.

- Unchallenged findings of fact support the court's conclusion such that the appellate court does not need to consider the respondent father's challenged findings of fact. Although father had a restraining order prohibiting contact, he was aware of his ability to seek legal custody and visitation even with the limitations in the restraining order. Although he filed for custody in 2015, he took no further action in that case. Further, his actions of domestic violence against mother support a reasonable inference of willfulness for this TPR ground.

### Single Act

In re J.D.C.H., 375 N.C. 335 (2020)

#### **Held: Affirmed**

- Facts: This case involves a private TPR (mother as petitioner, father as respondent). The parties have 2 children together. Father's last contact with the children was September 2016. Mother remarried. Father was incarcerated from Oct. – Dec. 2018 and upon his release, he contacted mother to ask about seeing the children. Mother denied his request and filed a TPR petition, including willful abandonment as one ground. The court granted the TPR and father appeals, challenging the findings and conclusion of the ground of abandonment.
- G.S. 7B-1111(a)(7) authorizes the termination of parental rights when the parent has willfully abandoned the child for at least 6 months immediately preceding the filing of the TPR petition. Abandonment involves a parent's conduct that manifests a willful determination to forego all parental duties and claims and includes withholding his presence, love, care, opportunity to display filial affection, and support/maintenance.
- Although the determinative time period is those 6 months before the petition is filed, a trial court may consider the parent's conduct outside of that 6-month period to evaluate the parent's credibility and intentions. That includes the parent's conduct after the filing of the TPR petition.
- One single act during the determinative time period, the father's phone call in December 2018, does not preclude a finding that a parent willfully abandoned his children by withholding his love and affection. The findings that father did not send any letters to or call the children and did not provide any emotional, material, or financial support over a 2-year period when he had the ability to do so support the court's conclusion. Although he made the one phone call during the 6-month period, "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest." Sl.Op. at 15 (quotation omitted).

## Evidence and Findings

In re L.M.M., 375 N.C. 346 (2020)

**Held: Affirmed; Dissent**

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

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

## Abandonment and Neglect

### Evidence and Findings

#### In re Z.J.W., 376 N.C. 760 (2021)

##### **Held: Reversed in part; Vacate and Remanded in part**

- **Facts:** Mother and father had two children and initially lived together in Buncombe County. There was a history of domestic violence in the home, and in 2010 or 2011, mother relocated with the daughter to Nash County. Father and son remained in Buncombe County. In 2018, DSS in Nash County filed a petition regarding the daughter, who was adjudicated abused and neglected. As part of that DSS case, father was contacted. He did not have a relationship with his daughter after she moved with mother to Nash County but expressed a desire to be involved. At the same time, Buncombe County DSS filed a petition regarding the son, who was adjudicated neglected. Father complied with his case plan. In the Nash County case, father was ordered to comply with the Buncombe case plan. Father was not ordered visitation with his daughter in part due to a misunderstanding as to whether the child's therapist was making recommendations about visitation, which she did not do. Father participated in the Nash County court proceedings and DSS CFT meetings by telephone, although he did miss some. In 2019, DSS filed a TPR motion, which was granted on the grounds of neglect and willful abandonment. Father appeals both grounds.
- **RE: findings.** Challenged findings of fact that are not supported by the evidence are disregarded. Additionally, findings for adjudication that are supported by evidence from the dispositional phase of the TPR are not considered. As the Court of Appeals has held, dispositional evidence should not be considered for adjudicatory findings. See *In re Mashburn*, 162 N.C. pp. 396 (2004). Findings of fact that are conclusions of law will be treated as such on appeal.
- **G.S. 7B-1111(a)(7) authorizes a TPR on willful abandonment** in the immediately preceding 6 months prior to the filing of the TPR motion. Abandonment requires conduct that demonstrates a willful intent to forego all parental duties and relinquish all parental claims.
  - During the determinative 6-month period, unchallenged findings show father made one child support payment, sent 4 emails to the child's placement provider (maternal aunt) to ask about her well-being, attended a CFT meeting, and satisfied his case plan. The father's failure to visit his daughter was not voluntary but was due to the restriction in the court order and confusion about the therapist's role in making recommendations and should not be considered in determining whether the father willfully abandoned his daughter.

- Although father could have done more, the steps he did take are sufficient to preclude an adjudication of the ground of willful abandonment. The findings do not support the conclusion.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes abandonment. Based on father's actions, the findings do not support a neglect by abandonment theory.
- G.S. 7B-1111(a)(1) also authorized a TPR on the ground of neglect. When the child and parent have been separated for a long period of time, the court looks to a showing of past neglect and the likelihood of future neglect. The trial court considers the parent's conduct over an extended period of time including up to the time of the TPR hearing. Here, the juvenile was previously adjudicated neglected. When looking at the likelihood of repetition of neglect, the court appears to have focuses on father's absence from his daughter's life prior to the filing of the TPR motion and did not consider any evidence about events occurring after the TPR motion was filed such that the findings do not support a TPR on neglect. However, the record contains evidence that could support findings of future neglect. Vacated and remanded.

#### Abandonment; Best Interests

In re J.T.C., 273 N.C. App. 66 (2020)

**Held: Affirmed (There is a dissent)**

- Facts: Respondent father appeals this 2018 private TPR order granted on the grounds of neglect and willful abandonment (G.S. 7B-1111(a)(1), (7)). This appeal was before the court of appeals as the appeal was filed prior to Jan. 1, 2019 when appeals of TPRs are before the NC Supreme Court).
- The findings are supported by clear and convincing evidence and the findings support the conclusion that the respondent father willfully abandoned the juvenile during the determinative 6-month period. Efforts made by father's relatives and wife do not preclude an adjudication of abandonment by father when he has the means to take efforts to maintain his relationship with his child and take on parental responsibilities and fails to do so.
- G.S. 7B-1110(a) sets forth the best interests factors for the court to consider. Although a permanent plan is not part of this private TPR, the brief mention of a permanent plan in the findings is not an abuse of discretion. Relevant considerations under G.S. 7B-1110(a)(6) included father's history of domestic violence, criminal record, and ongoing use of substances.
- Dissent based on best interests findings being erroneous resulting in an abuse of discretion.

#### Disposition

Standard of Review

In re G.B., 377 N.C. 106 (2021)

**Held: Affirmed**

**Dissent, Earls, J. (on father's appeal)**

- Facts: In 2017, the juveniles were adjudicated neglected and one juvenile was also adjudicated abused. In 2019, DSS filed motions to terminate both parents' rights. The court granted both

motions, and the parents appealed. Mother challenges the best interests determination and the standard of review arguing it should be de novo.

- “We again reaffirm our application of the abuse of discretion standard when reviewing the trial court’s determination of ‘whether terminating the parent’s rights is in the juvenile’s best interest’ under N.C.G.S. §7B-1111(a).” Sl.Op. ¶130. This standard was recognized by this Court in *In re Montgomery*, 311 N.C. 101 (1984) and has not changed. There have been no amendments to the statutes, including a 2011 amendment to the Juvenile Code, that alters the holding. We have heard and rejected this argument.

[In re A.M.O.](#), 375 N.C. 717 (2020)

**Held: Affirmed**

- Facts: Because of a permanent plan of adoption in an underlying neglect action, DSS initiated a TPR against respondent mother. The TPR was granted on 3 grounds, and respondent mother appeals, challenging the court’s determination that TPR is in the child’s best interests and that a de novo review should be applied and that guardianship instead of adoption requiring a TPR should have been considered by the trial court.
- Standard of review of best interests is not de novo as respondent argues. This court has “unanimously ‘reaffirm[ed] our application of an abuse of discretion standard of review to the trial court’s determination of ‘whether terminating the parent’s rights is in the juvenile’s best interest[s.]’ ” Sl.Op.at 7 (quotations omitted).
- “Given respondent’s tactical choice to disregard what she acknowledges to be the existing standard of review in favor of an argument based entirely on this Court’s adoption of a new standard, we conclude our analysis here.” Sl.Op. at 8. Nevertheless, in reviewing the evidence and order, there was no abuse of discretion.
- Despite a strong bond between the parent and child, that is only one factor the court considers under G.S. 7B-1110, and the trial court may give greater weight to other factors. In this case, as with other cases with a similar argument, the court made detailed dispositional findings of the G.S. 7B-1110(a) factors and gave a reasoned basis for its conclusion of law that TPR was in the child’s best interests to be adopted.

[In re K.S.-D.F.](#), 375 N.C. 626 (2020)

**Held: Affirmed**

- Facts: DSS initiated a juvenile action in 2008 when it filed a petition alleging the juveniles were neglected. In 2009, the juveniles were adjudicated neglected and ultimately a permanent plan of guardianship was achieved in 2010. The court retained jurisdiction but waived further reviews. In 2016, DSS filed a motion for review due to the children being returned to their mother by the guardians. DSS obtained an order for nonsecure custody. Permanency planning hearings were conducted, and in 2018 DSS filed a motion to terminate parental rights. The TPR was granted, and respondents appeal, arguing DSS lacked standing to file the TPR and the court abused its discretion in determining TPR was in the child’s best interests.
- Standard of review of best interests is not de novo as respondent argues. “We again reaffirm our application of the abuse of discretion standard when reviewing the trial court’s

determination of ‘whether terminating the parent’s rights is in the juvenile’s best interest’ under N.C.G.S. § 7B-1110(a).” Sl.Op. at 15 (quotations omitted). There was no abuse of discretion.

- The finding that the children are likely to be adopted is supported by the evidence, including social worker and GAL testimony. This case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004) as the social worker and GAL both recommend TPR and state adoption is likely.

Role of Child’s GAL when Same Person; Prof. Resp. Rule 3.7; Evidence  
[In re R.D.](#), 376 N.C. 244 (2020)

**Held: Affirm in part, vacate in part, remand in part**

**Dissent: Earls, J. joined by Beasley, J. and Hudson, J.**

- **Facts:** This case involves a private TPR against respondent father by an agency to whom an infant was relinquished by the mother. The court appointed a GAL for the infant. The same individual served in the role of the fact gatherer to make a best interests recommendation and attorney to protect the juvenile’s legal rights. After the adjudication of the ground for TPR was determined, the case proceeded to the dispositional phase. The GAL was called to testify about her report, and respondent objected on the basis that requiring her to act as a lawyer and witness violates Rule 3.7 of the Rules of Professional Conduct. The court gave the GAL/Attorney the option to testify and withdraw as the attorney advocate or admit her report without testifying and act as the juvenile’s attorney. The GAL chose the latter. The agency objected because they could not cross-examine the GAL. The TPR was dismissed after the court determined it was not the juvenile’s best interests. The agency appealed.
- G.S. 7B-1108(b)-(c) governs the appointment of a GAL in a TPR proceeding, and G.S. 7B-601 describes the duties of a GAL. One of those duties is to assist the court in its determination of the child’s best interests. In some cases, a GAL is appointed to serve in a dual role: one as the juvenile’s GAL and one as the juvenile’s attorney advocate.
- At disposition, the court has significantly more discretion in admitting evidence than at the adjudicatory hearing because the Rules of Evidence apply at adjudicatory hearings but at the dispositional hearing, the court “may admit any evidence that it considers to be relevant, reliable, and necessary in its inquiry into the child’s best interests—even if such evidence would be inadmissible under the Rules of Evidence.” Sl.Op. at 9. The trial court did not abuse its discretion in admitting the GAL report as it was relevant, reliable, and necessary. G.S. 7B-1110(a) does not require the court to make explicit findings as to why it found the GAL’s report to be “relevant, reliable, and necessary.”
- Regarding the inability to cross-examine the GAL, the agency did not raise a constitutional due process argument before the trial court and waived that issue as a result. “[T]he dispositional stage of a termination proceeding is not adversarial” because the focus is on determining the child’s best interests through evidence the trial court believes is relevant, reliable, and necessary. Sl.Op. at 13. Based on the facts, the court did not abuse its discretion. Given the language in G.S. 7B-1110(a) that explicitly allows for hearsay evidence, which is not subject to cross-examination, “our legislature has made clear that no absolute right to cross-examination exists during the dispositional stage.” Sl.Op. at 14. Further, the holding in *In re J.H.K.*, 365 N.C. 171 (2011) that the GAL team representation did not mandate that the GAL attend the hearing

when the attorney advocate was present at the hearing demonstrates there is no absolute right to cross-examination of a the GAL. By considering the ethical conflict under Rule 3.7 of the Rules of Professional Conduct, the court acted within its authority to resolve the issue that was presented.

- No party bears the burden of proof at the dispositional stage of a TPR proceeding.
- The trial court considered the criteria of G.S. 7B-1110(a), made written findings of the relevant factors, and gave significant weight to the catch-all factor (any other relevant consideration). The trial court determines how much weight to give to the factors. The court also determines witness credibility and determined the respondent father was more credible than respondent mother regarding his lack of knowledge of her pregnancy. The court may draw reasonable inferences from the evidence, which it did when finding the teen mom acted to hide her pregnancy from the teen dad.
- The finding that children who are adopted face harm as they try to understand who they are, where they came from, and why they are not raised by their biological parents is not supported by the evidence. Judicial notice is not appropriate as it is not well-settled or authoritatively settled. The Legislature and this Court have found adoption to advance the welfare of minors. Further, the finding is prejudicial as it may have influenced the court's ultimate best interests determination. Remand.
- Dissent: Because evidence in the record supports the best interests conclusion based on the G.S. 7B-1110(a) criteria, the conclusion does not rest on the unsupported factual finding about "harm," and the court did not abuse its discretion. The order should be affirmed rather than remanded for a new dispositional order.

#### Competent Evidence; Findings

In re S.M., 375 N.C. 673 (2020)

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

- Facts: The six children had been adjudicated neglected based on dirty conditions in the home, poor hygiene, lack of schooling, domestic violence, and substance abuse. A case plan addressing these issues, the need for a mental health assessment, and a psychosexual evaluation by father due to allegations of sexual abuse of one of the children was ordered. After the parents' noncompliance with the case plan, DSS filed TPR petitions alleging neglect and failure to correct the conditions. The TPR was granted, and both parents appeal challenging the best interests determination regarding one of the children. Father also challenges the court's denial of his motion to continue the hearing. Mother challenges the grounds as well.
- Some of the challenged finding of fact is not supported by evidence and those portions are disregarded. The GAL report was not admitted into evidence but was instead distributed to the parties and the court, and the GAL did not testify. There is no competent evidence to support the court's consideration of the GAL recommendations.
- G.S. 7B-1110(a) requires the court to consider all the factors but make written findings of only those factors where there is conflicting evidence such that it is an issue that is presented to the trial court. The exact language of the statute is not required. The court made the appropriate findings.

- Although the juvenile has mental health issues, this case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004). This juvenile's issues were less severe; mother in this case did not make reasonable progress; and there is a pre-adoptive family will to adopt all six children, including this juvenile. There was no abuse of discretion.

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

##### 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 is 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 alternatives (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.

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. 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 J.J.H., 376 N.C. 161 (2020)

**Held: Affirmed**

**Dissent, Earls, J.**

- Facts: The juveniles were adjudicated neglected in an underlying juvenile action. After the primary permanent plan was changed to adoption, DSS filed a motion to TPR, which was granted on the ground of neglect. Mother appeals the ground and the disposition to TPR.
- At a TPR disposition, "the trial court must determine the best interests of each child based upon his or her individual circumstances." Sl.Op.at 41. Here, the court made findings with respect to each child and weighed those findings when determining whether TPR was in the best interests of each juvenile. The court considered the bonds of each child with her as well as with each other. Although some of the children were not in a pre-adoptive placement, the absence of such a placement does not bar a TPR.
- There as no abuse of discretion.

[In re A.M.](#), 377 N.C. 220 (2021)

**Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected. The parents were ordered to comply with a case plan to address issues involving substance use, housing, income, domestic violence, mental health, and criminal activity. DSS filed a motion to terminate the parents' rights. The TPR hearing was held in 2020, and the parents' rights were terminated. Mother appeals, challenging the grounds and best interests. She argues the court disregarded the finding about the bond between her and the child.
- G.S. 7B-1110(a) set forth the criteria the court must consider at the dispositional phase when addressing whether the TPR is in the best interests of the juvenile. Written findings are required for those factors that are relevant.
- The trial court made findings of fact for each of the six factors. Mother does not challenge the findings but rather the weight given to the bond between the parent and child. The trial court determines how much weight to give the factors. The court weighed the evidence, recognized the parent-child bond, but gave greater weight to the other factors listed in G.S. 7B-1110(a) and concluded the TPR would be in the juveniles' best interests. The court did not abuse its discretion in weighing the factors.

[In re G.G.M.](#), 377 N.C. 29 (2021)

**Held: Affirmed**

- Facts: The children have resided with the petitioners, maternal grandparents, since 2011. In 2013, father was shot several times and the perpetrators were never identified. Father had no contact with the children from 2013 until 2019 when he appeared at the grandparents' home, unannounced, with law enforcement. He briefly saw his son but did not see his daughter. Afterwards, the grandparents obtained an ex parte G.S. Chapter 50 custody order. A week later, father went to grandparents' home with a police officer to take custody of his children but did not do so based on the ex parte custody order the grandparents obtained. Shortly thereafter, the grandparents filed a TPR petition. The TPR was granted, and father appeals the grounds and best interests determination.
- Standard of review is an abuse of discretion. Findings must be based on competent evidence. G.S. 7B-1110(a) specifically allows for the consideration of hearsay evidence when determining a child's best interests.
- At disposition, the court must consider the factors of G.S. 7B-1110(a). Written findings are required for factors that have conflicting evidence, such that it is placed at issue before the court.
- A likelihood of adoption is not required for a TPR to be determined to be in the child's best interests and therefore granted. Here, the court found the petitioners were seeking custody of the children via a Chapter 50 action, which is not an adoption.
- The trial court determines the weight and credibility of the evidence. Father challenges the GAL's basis for her testimony and credibility, but the court found the testimony to be credible.
- There is a discussion about how this case is distinguishable from *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). Here, the court's findings do not solely focus on how well the children were doing

with the petitioners; the father did not show any desire to be part of the children's lives for years, until 2 weeks before the TPR petition was filed; and the children's GAL recommended the TPR be granted.

- There was not ineffective assistance of counsel. Respondent has not shown how his attorney's failure to object or introduce evidence that grandparents' retaliated by seeking a Ch. 50 custody order would have resulted in a different outcome.

[In re C.B.](#), 375 N.C. 556 (2020)

**Held: Affirmed**

- Facts: The district court entered an order that terminated respondent mother's parental rights to her five children. This is an appeal by respondent mother, challenging the termination of her parental rights to her oldest child by arguing the court failed to make the necessary findings of fact under G.S. 7B-1110(a) to support its conclusion that termination was in that child's best interests.
- The court addressed the finding of the child's likelihood of adoption when it found that the child's likelihood of adoption was unknown. The court does not need to find the child is likely to be adopted to terminate parental rights.
- Although the child had significant mental health issues, the trial court's finding that there were no barriers to adoption other than TPR was supported by competent evidence including the social worker's testimony that the child was improving and was likely to step down from a therapeutic foster home to a traditional foster care setting which DSS would seek to make a foster-to-adopt placement. Further, a lack of a proposed adoptive placement does not bar a TPR.
- The 12-year-old child's consent to adoption as required by G.S. 48-3-601 may be waived by the trial court such "that the trial court was not required to make findings and conclusions concerning the extent, if any, to which [the child was] likely to consent to any adoption that might eventually be proposed." Sl.Op. at 9.
- Regarding the bond between the child and parent, "[t]here is no requirement that the trial court make a specific finding that the parent's relationship with the child was detrimental before it can terminate parental rights." Sl.Op. at 10.
- This case is distinguishable from In re J.A.O., which reversed a TPR for a child with significant mental health needs. In this case, unlike *J.A.O.*, the GAL recommended adoption, the mother did not make reasonable progress, and the child's condition was improving. Further the appellate court will not reweigh the evidence and substitute its judgment for that of the trial court. Here the court made a reasoned decision, after considering the relevant statutory criteria, to terminate mother's parental rights. That decision was supported by competent evidence and is not an abuse of discretion.

[In re A.H.F.S.](#), 375 N.C. 503 (2020)

**Held: Affirmed**

- Facts: The juveniles had been adjudicated neglected in two separate actions (one in 2016 where the juveniles remained in the home and one in 2017 where the juveniles were removed) due to

substance use, mental health issues, and conditions of the home. DSS initiated a TPR, which was granted. Respondent parents appeal, challenging the grounds and best interests determination. One argument is that the DSS should have waited for the results of an ICPC home study before proceeding with the TPR.

- Although “consideration of placement alternatives and preserving family integrity is an appropriate consideration in the dispositional portion of the termination hearing, the best interests of the juvenile remain paramount.” Sl.Op. at 19. The court appropriately considered the dispositional factors and did not abuse its discretion in determining the TPR was in the juveniles’ best interests.
- The bond between a parent and the juvenile is just one factor the court must consider under G.S. 7B-1110(a). The trial court may give greater weight to other factors. The court giving greater weight to other factors in this case is not an abuse of discretion.

[In re N.K.](#), 375 N.C. 805 (2020)

**Held: Remanded (ICWA issue)**

- Facts: Mother appeals a TPR, arguing in part the court erred by determining the TPR was in the child’s best interests.
- The court made findings about each factor enumerated in G.S. 7B-1110(a). The court was not required to consider mother’s poverty and mental health issues even though those issues contributed to the neglect ground of the TPR. Mother has not explained how those issues related to the disposition.
- The court does not commit error at the dispositional stage of a TPR when it does not consider non-TPR-related dispositional alternatives, such as guardianship or custody. The child’s best interests are of paramount consideration. When the juvenile cannot be returned home, the juvenile needs a safe permanent home within a reasonable amount of time. The court determined this juvenile needed a safe stable home and permanent plan of care at the earliest possible stage which could be obtained by a TPR.
- The court did not abuse its discretion.

[In re E.F.](#), 375 N.C. 88 (2020)

**Held: Affirmed**

- Facts: Respondent mother appeals the best interests determination of the TPR arguing the court abused its discretion.
- Although G.S. 7B-1110(a) requires the court to consider each of the enumerated statutory factors at disposition, written findings are only required for those factors that have conflicting evidence. Competent evidence (testimony and reports) supported the findings, and of the challenged findings, there was no evidentiary conflict requiring written findings.
  - Regarding the factor that the TPR would aid in achieving the permanent plan, the TPR was a necessary precondition for the adoption.
  - Regarding the factor addressing the child’s likelihood of adoption, it does not require a certainty of adoption.

- A “trial court may – and should – consider evidence introduced at the adjudicatory stage of a termination hearing in determining the children’s best interests during the disposition stage.” Sl.Op. at 8. Although the availability of the maternal grandmother as a placement option was raised once at the adjudication stage, there was no reference to her or any other alternative placement at the disposition phase other than the undisputed evidence that the current placement provider (who was not the maternal grandmother) was appropriate and desired to adopt the children. As such, written findings about the maternal grandmother were not required.

In re S.J.B., 375 N.C. 362 (2020)

**Held: Affirmed**

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

In re K.L.M., 375 N.C. 118 (2020)

**Held: Affirmed**

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

## Juvenile Participation

[In re B.E.](#), 375 N.C. 730 (2020)

### **Held: Affirmed**

- **Facts:** The three children were adjudicated neglected and dependent in an underlying juvenile action. Mother and father were ordered to comply with their case plans. Eventually, DSS filed a TPR motion, and the TPR was granted on the grounds of neglect, failure to make reasonable progress, and dependency. The court found it was in 2 of the 3 children’s best interests to TPR (resulting in the TPR of the one child to be dismissed). Respondent father challenges the best interests determination at disposition for his 15-year-old son who expressed a desire to not be adopted.
- Father argues the court failed to protect the juvenile’s statutory due process rights by not providing the juvenile with notice of the hearing and giving him an opportunity to attend the hearing and testify. “Assuming arguendo that respondent-father has standing to assert Billy’s procedural rights on appeal, we conclude he has failed to preserve this issue for our review.” Sl.Op. at 25. By characterizing the claim as “statutory due process,” father concedes the statute does not explicitly grant all the due process rights he is arguing. As such, the issue must have been preserved at trial. Some statutes governing abuse, neglect, and dependency proceedings give certain procedural rights to juvenile’s 12 and older, in addition to the right to GAL representation. G.S. 7B-1110 does not provide for notice of and the right to attend and testify at the dispositional hearing even though it expressly provides for the juvenile who is 12 or older the right to be served with a copy of the TPR order.
- A child who is 12 or older must consent to their adoption unless the court waives the consent based on a finding that it is not in the child’s best interests. G.S. 48-3-601(1); 48-3-603(b)(2). The trial court in the TPR waived the consent requirement. By considering the GAL’s and DSS social worker’s testimony about the juvenile’s preference and understanding and by finding it was not in the juvenile’s best interest to consent to his adoption, the court considered the juvenile’s preference for guardianship. The court has the authority to determine the proper weight to give the evidence.
- There was no abuse of discretion.

## Juvenile Preference; Mistake of Law

[In re A.K.O.](#), 375 N.C. 698 (2020)

### **Held: Affirmed in part; vacate in part, remand**

- **Facts:** The two juveniles were adjudicated neglected and dependent. As part of achieving a permanent plan in that underlying action, DSS filed a TPR petition that was granted. Respondents appeal, challenging the best interests of the child determination. At the time of the appellate opinion, the juveniles were 17 and 9, and the analysis differs based on the age of the juveniles. For the older juvenile, the GAL recommended guardianship over adoption.
- G.S. 7B-1110(a) identifies factors the court must consider at disposition but does not require written findings of each factor, “particularly when there was no conflict in the evidence regarding those factors.” Sl.Op. at 10. Because the evidence that the older juvenile was bonded with his parents, did not wish to be adopted, and would not give his consent to adoption making

it unlikely for him to be adopted was uncontested such that no written findings of those factors were required. Additionally, some findings considered those factors and the failure to use the exact statutory language is not error.

- One factor is whether the TPR will aid in the achieving the permanent plan. The concurrent plans here were adoption and guardianship. Although TPR aids in achieving adoption, it is not legally necessary for a plan of guardianship. A finding that TPR was necessary to achieve the permanent plan of by legally freeing the juvenile for adoption or guardianship was incorrect. This appears to be a mistake of law. The proper remedy is remand for reconsideration of guardianship as a dispositional alternative.
- While a TPR would aid in achieving the plan of adoption, “the trial court should not place undue emphasis on this statutory factor when [the juvenile] will not consent to adoption and is a much older juvenile.” Sl.Op. at 11. Here, the juvenile provided a well-reasoned objection to adoption in favor of guardianship, and he is approaching the age of majority. “As a juvenile ages, the trial court should afford more weight to his wishes.” Sl.Op. at 12.
- For the sibling who is significantly younger, the same considerations are not applicable. Her consent is not required for adoption and she is in need of a permanent plan at the earliest age possible.
- Although a written finding on the undisputed evidence about the younger siblings bond with her parents was not required, “even assuming arguendo, however, that this trial court erred by failing to make a finding regarding this dispositional factor, we would decline to find reversible error because it would only delay permanence for [the juvenile].” Sl.Op. at 14.

#### Effect of TPR Order; Misapprehension of Law In re Z.O.G.I., 375 N.C. 858 (2020)

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

- Facts: Respondent father appeals the grounds and best interests determination of an order terminating his parental rights. This opinion focuses on the ground of failure to make reasonable progress (affirmed) and the best interests determination. In a TPR proceeding, initiated by DSS as a result of an underlying dependency action, the 13-year-old juvenile testified at the best interests phase. The juvenile stated that he had a wonderful relationship with his foster parents but that he did not want to be adopted and that he needed his father in his life. The court found a strong bond between the father and child but that the likelihood of adoption was high. The court determined the TPR was in the child’s best interests. In its order, the Court “decreed that ‘[DHHS] shall ensure that [respondent] is allowed continued co-parenting of [the juvenile]’ and that ‘it hereby honors the request of [the juvenile] not [to] be adopted pursuant to N.C.G.S. § 48-3-603(b).’ ” Sl.Op. at 16. (*Author’s Note*: The statute cited waives the requirement the juvenile who is 12 or older consent to the adoption).
- G.S. 7B-1112 addresses the effect of a TPR order, which completely and permanently terminates all the rights and obligations of the parent to the juvenile and the juvenile to the parent except for the juvenile’s right to inherit from that parent until a final order of adoption is issued. The biological parent becomes a legal stranger to the juvenile.

- An order that a biological parent be allowed to continue to co-parent is contrary to a determination that it is in the child's best interests to completely and permanently sever that parent's parental rights. This suggests the court had a misapprehension of the law regarding the legal effects of a TPR. The trial court may have had a guardianship in mind, which does not require a TPR.
- When there is a misapprehension of law, remand for the application of the correct legal standard is the appropriate remedy.

## Mandate

In re R.L.O., 375 N.C. 655 (2020)

### **Held: Affirmed**

- Facts: DSS filed a petition alleging the juvenile was neglected and dependent. The child's GAL filed a TPR petition. The court consolidated the proceedings. The children were adjudicated neglected and dependent and the court terminated the parents' rights on all 3 grounds that were alleged in the TPR petition. The parents appealed, and the court of appeals vacated father's TPR on the ground of neglect and remanded for additional findings about the probability of repetition of neglect and authorized the trial court to receive additional evidence in its discretion. On remand, the trial court did not receive additional evidence but did make additional findings, concluded grounds existed, and granted the TPR. Father appealed arguing the court erred by not taking additional evidence for both the grounds and disposition and that the findings do not support a likelihood of future neglect.
- Remand: "Whether or not to receive additional evidence on remand is a determination within the trial court's discretion so long as the reviewing court's mandate does not specify otherwise." Sl.Op.at 5. The remand in this case stated, "the court may receive additional evidence as it deems appropriate," which explicitly left that decision to the trial court. Sl.Op.at 6.
- Respondent stipulated the court could enter an order without taking additional evidence. Father argues the court abused its discretion by accepting the stipulation because it did not consider the children's current circumstances when determining best interests. The court was not bound by that stipulation and could have taken new evidence in its discretion. Father did not demonstrate a need for new evidence beyond speculation, which is insufficient to show an abuse of discretion by the trial court. Respondent did not forecast evidence concerning the current circumstances.
- The findings support the conclusion. There was no abuse of discretion.

## Civil Case Related to Child Welfare

Paternity for Sperm Donor, Choice of Law

Warren County DSS ex rel Glenn v. Garrelts, 2021-NCCOA-275

### **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.