



UNC  
SCHOOL OF GOVERNMENT

## **2019 Parent Attorney Conference Session I**

August 13, 2020 / Chapel Hill, NC

Sponsored by the

The University of North Carolina School of Government and  
Office of Indigent Defense Services

# **ELECTRONIC COURSE MATERIALS**



## 2020 Parent Attorney Conference

### SESSION I

Thursday, August 13, 2020

8:30 to 8:45	Check-in
8:45 to 9:00	<b>Welcome</b> <i>Timothy Heinle, Civil Defender Educator</i> UNC School of Government, Chapel Hill, NC
9:00 to 10:30	<b>Case Law Update [90 min]</b> <i>Sara DePasquale, Associate Professor of Public Law and Government</i> UNC School of Government, Chapel Hill, NC
10:30 to 10:45	Break
10:45 to 11:15	<b>Legislative Update [30 min]</b> <i>Wendy Sotolongo, Parent Defender</i> Office of Indigent Defense Services, Durham, NC
11:15 to 12:15	<b>Ethics: Zealous Advocacy During a Pandemic [60 min]</b> <i>Timothy Heinle, Civil Defender Educator</i> UNC School of Government, Chapel Hill, NC

### SESSION II

Monday, August 24, 2020

8:30 to 8:45	Check-in
8:45 to 9:00	<b>Welcome</b> <i>Timothy Heinle, Civil Defender Educator</i> UNC School of Government, Chapel Hill, NC
9:00 to 10:00	<b>Bonding and the Importance of In-Person Visits [60 min]</b> <i>Dr. Jennifer Sapia, Psychologist</i> Sapia Psychological Associates, Southport, NC
10:00 to 11:00	<b>Child/Family Evaluations: What Parent Attorneys Need to Know [60 min]</b> <i>Dr. Kristy Matala, Psychologist</i> Raleigh, NC
11:00 to 11:15	Break
11:15 to 12:15	<b>Being an Effective Advocate, Even During a Pandemic [60 min]</b> <i>Dorothy Hairston Mitchell, Clinical Associate Professor</i> <i>&amp; Supervising Attorney</i> Juvenile Law Clinic, North Carolina Central University School of Law

Child Welfare Case Update  
Parent Attorneys 2020 Conference

By: Sara DePasquale,

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Search...

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Doing

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Child Welfare Case Compendium

New Search

Print Results

The most efficient way to conduct a search is to use the pre-existing drop down menus, which start with one of the six main Categories of annotations. (See the drop down menu for "All Categories"). Within each Category, additional filters have been created to allow a user to conduct a more focused search. When you select a Category, a new "Stage" drop down menu will appear. When you select a Stage, a "Topic" drop down menu will appear. A search may also be conducted by typing a keyword in the "Search Term" box below. If your search phrase is composed of more than one word, please use quotation marks. If the drop down menu is not used, the search based on a word or phrase will apply to all the annotations contained in the CWC.

Search Terms

All Categories

All Topics

Results: 208

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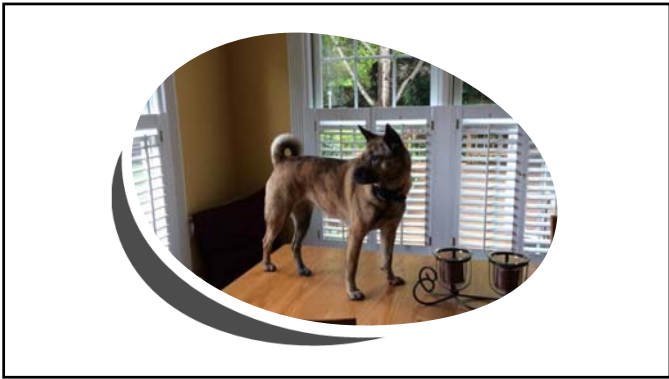
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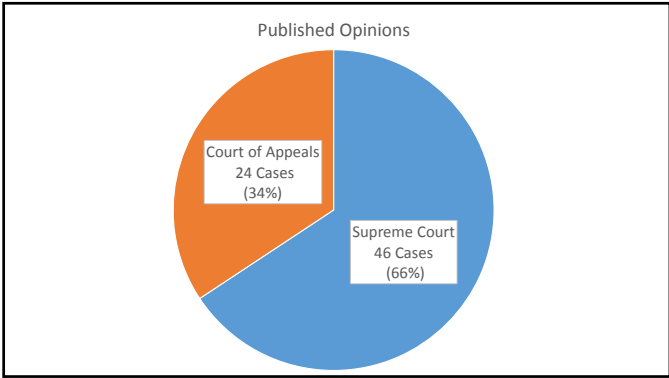
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Themes for Today

JurisdictionEvidenceFirst ImpressionTPRAppeals

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1<sup>st</sup> Theme

Jurisdiction

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Take my  
online poll.



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Identify all the procedures and laws that impact subject matter jurisdiction



UCCJEA



Filing a petition



Notice Pleading



I have no idea

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### Post Relinquishment Permanency Planning In re E.B. (p. 30, 61)

- Child born
- Mom relinquish

2016

- Paternity established
- Out of home services
- Child in foster care

6 Permanency Planning Hearings

May 2016 – Jan 2018

TPR

2018

8

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Petition

7B-402; -405  
A/N/D

7B-909(c)  
(Post Relinq)

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Could the TPR Action Go Forward?



YES



NO

Standing: 7B-1103(a)(4) (Relinquishment)  
G.S. 48-3-705 (Vests legal and physical custody)

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## Sufficiency of Notice Pleading In re K.L. (p. 9)

STATE OF NORTH CAROLINA		File No.	
County		In The General Court Of Justice District Court Division	
IN THE MATTER OF		JUVENILE PETITION (ABUSE/NEGLECT/DEPENDENCY)	
Name And Address Of Juvenile		G.S. 7B-101-.400-.402	
Baby with unexplained fractures + Sibling			
Juvenile's Date Of Birth	Age	Race	Sex
Name Of Petitioner	Condition Alleged		
	<input checked="" type="checkbox"/> Abused <input type="checkbox"/> Neglected <input type="checkbox"/> Dependent		

"allegations of facts sufficient to invoke jurisdiction over the juvenile"

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### UCCJEA - Initial

In re S.E. (p. 33)



**Presumption Burden**  
50A-209

STATE OF NORTH CAROLINA

County

Court File No.

In The General Court Of Justice  
District Court Division

Name And Address Of Plaintiff

VERSUS

Name And Address Of Defendant

AFFIDAVIT AS TO  
STATUS OF MINOR CHILD

G.S. 50A-209

Name Of Minor Child

Date Of Birth


Birthplace

I, the undersigned affiant, being first duly sworn, say that during the past five (5) years the above named minor child has lived as follows:

13

### UCCJEA - Modification

In re L.T. (p. 32)



**Presumption Findings vs. Record**

- Continuance
- Adjudication

Initial Custody Order

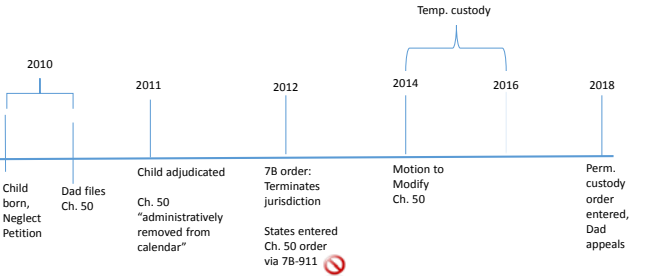
Mom

Dad and Child: Sept. 2016  
N/D – March 2017

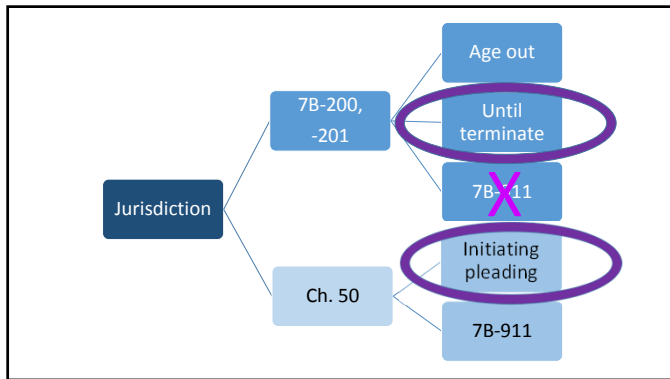
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### Termination of Jurisdiction

McMillan v. McMillan (p. 7)



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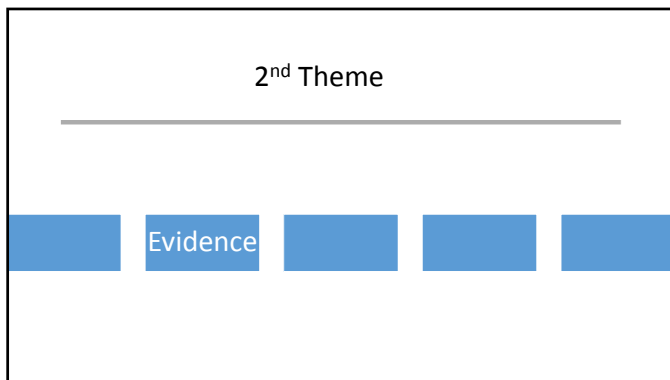
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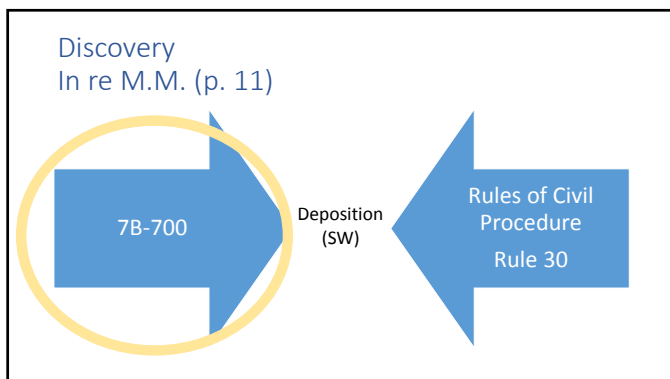
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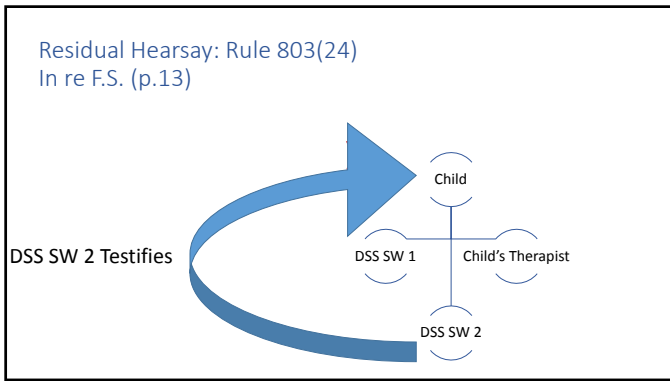
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Assume written notice was given, should this testimony be admitted under Rule 803(24)



YES



NO

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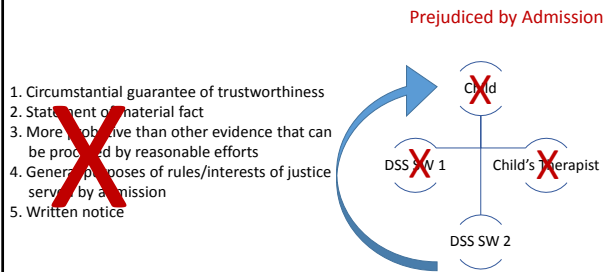
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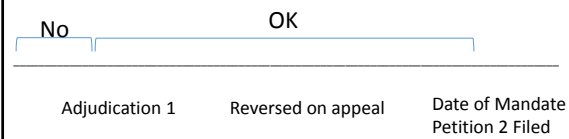
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## Residual Hearsay: Rule 803(24)



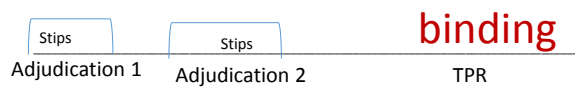
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## Collateral Estoppel In re F.S.



23

## Collateral Estoppel In re T.N.H. (p. 64)



24

## Evidence – Prior Proceedings

In re T.N.H. (p. 64)

- Neglect Adjudications (2015 stips; 2018 hearing)
- Trial court's reliance in part on evidence/findings from prior orders is proper and appropriate
  - Presumed to have disregarded incompetent evidence
  - Adjudicatory order relied on primarily
- Also need testimony and findings re: evidence presented
  - Here SW testified



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In re J.M.J.-J. (p. 39)

### Judicial Notice

- All prior N/D orders
  - PPO: + drug test
- Lower evidentiary standard
  - Court presumed to have disregarded any incompetent evidence and relied on competent evidence

### Collateral Estoppel

- Lack of appropriate alternative childcare
  - N/D Adjudication - Not Appealed
- Follow case plan
  - Initial dispo order

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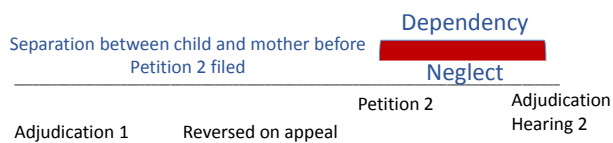
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## Post Petition Evidence

In re F.S. (p. 13)



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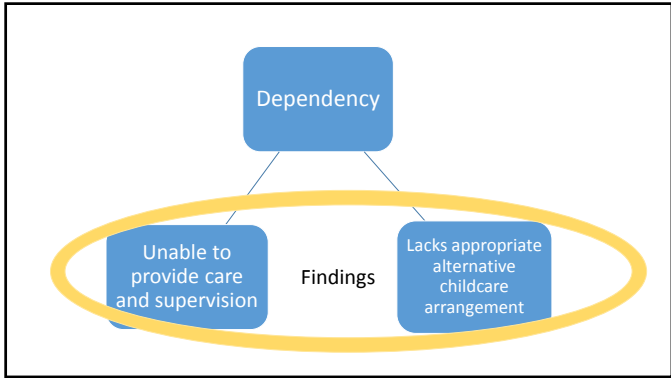
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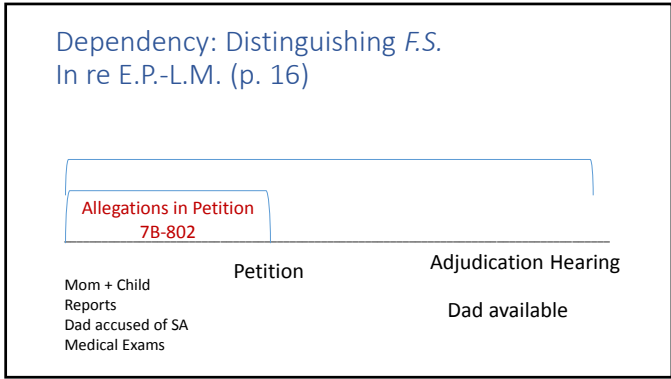
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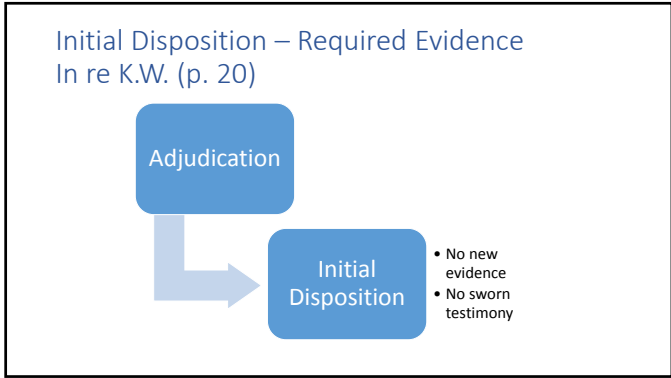
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graph TD; A[Adjudication] --> B[Initial Disposition];
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Initial Disposition: 7B-901(a)  
In re K.W.

**Adjudication**

- Formal - Rules of Evidence
- Adversarial to determine truth/falsity
- Clear and convincing

**Initial Disposition**

- Informal – Inquisitive - Best Interests
- Rely on written reports and findings in adjudication order; additional testimony not required

- Informal – Inquisitive - Best Interests
- Rely on written reports and findings in adjudication order; additional testimony not required

[illegible]

PPH: What Is Competent Evidence: 7B-906.1(c)  
In re S.P. (p. 21)

DSS & GAL Reports

No Testimony

Statement by Attorney


Findings of Fact

Conclusions of Law

[illegible]

### 3<sup>rd</sup> Theme

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First Impression

33

[illegible]

G.S. 7B-906.1(n)(1)  
In re J.T.S. (p. 28)

- “has resided in the placement for a **period of at least one year**”



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“period of at least one year”

- Continuous uninterrupted period
  - Purpose of Code:
    - Best evidence of stability and permanency
    - Commitment of permanent custodian or guardian
    - Opportunity for parent to demonstrate progress at 2 review hearings
- May hold differently from T.P. (2011)

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Personal Jurisdiction: Nonresident Parent  
In re F.S.T.Y. (p. 33)



First Impression  
Due Process  
Minimum Contacts  
Status Exception  
Overrule

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## 4<sup>th</sup> Theme

TPR

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**Take my  
online poll.**



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7B Opinions



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A judge has authority/discretion to do the following



- Determine witness credibility  
(In re M.C.; In re S.D.; In re D.W.P.; In re A.R.A.)
- Determine reasonable inferences to be drawn from testimony  
(In re J.M.J.-J.; In re D.W.P.; In re A.R.A.)
- Decide what weight to give to the evidence  
(In re D.W.P.; In re A.R.A.; In re Z.A.M.; In re K.L.T.)
- Question witnesses (In re N.D.A.)
- Determine if a substantial question exists re: a parent's incompetency & need for a hearing (In re Z.V.A.)

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### Failure to Make Reasonable Progress on *Conditions that led to the child's removal*

In re B.O.A. (p. 49) PDR granted



- Address DV
- ~~X~~H assessment and Rx as prescribed
- ~~X~~ug free; random drug tests; SA therapy
- Parenting classes
- No criminal activity
- ~~X~~able income for 3 months

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### *Conditions that led to the child's removal*

NOT LIMITED TO PETITION OR ADJUDICATION

- "trial judge... 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."
- 7B-904 authorizes court who gains a better understanding of relevant family dynamic to **modify and update case plan in subsequent review hearings**
- **ONGOING EXAMINATION** of circumstances

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BUT



Judge does **not** have unlimited authority:

e.g. drug screen

Reasonable compliance is relevant in determining ground

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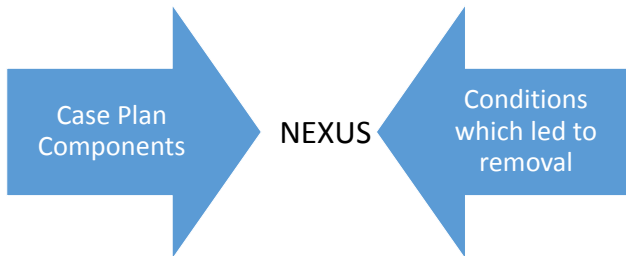
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Applying In re B.O.A. - In re C.J. (p. 50)



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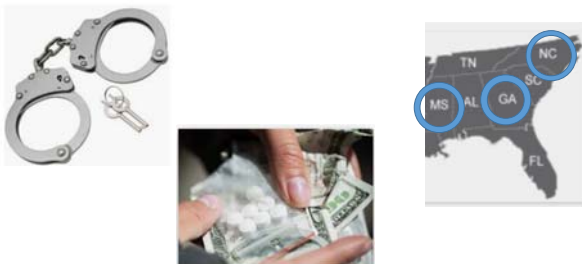
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Demeanor at dispositional hearing



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Which of the following have a nexus to the conditions of removal?

- SA Ax and follow recs
- Diagnostic Ax and follow all recs
- Drug screens
- Obtain/maintain verifiable employment and stable housing
- Communicate with DSS



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In re S.G. (p. 22)

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Case Plan:  
?  
Nexus b/t step  
ordered and  
condition  
found/alleged  
to led or  
contributed to  
adjudication

SA and MH Ax and follow all recs

Random drug screens

Parenting classes and demonstrate skills at visits

Visits 1x/month

Obtain and maintain safe/stable housing

49

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Applying  
B.O.A. –  
Nexus

Not limited to services directly addressing  
reason's for removal

Could be services that aid in both understanding  
and resolving possible underlying causes

Reports of using illegal  
substances

Assist in understanding whether  
MH or SA were underlying  
causes of abuse/neglect

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### Nexus - Housing

- May impose any conditions it believe relevant to address issues that led to child's removal at any time based on new or existing evidence so long as does not abuse its discretion
  - Overrule H.H. and W.V.
  - DSS report addressed refusal to disclose physical address
  - Findings in order

51

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## Best Interests of the Child

Standard of Review  
In re C.V.D.C. (p. 66)  
In re Z.A.M. (p. 65)

“without regard to  
competing interests of  
respondent”  
In re K.N.K., (p. 59)



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De Novo  
Statutory interpretation of complying with  
required findings  
(In re C.V.D.C., p. 66)

G.S. 7B-1110(a)

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## BIC Findings: Relevant Factor (In re C.J.C., p. 72)

Although the trial court must consider all of the factors in N.C.G.S. § 7B-1110(a), it “is only required to make written findings regarding those factors that are relevant.” *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424. “[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [district] court[.]” *Id.* (citation and internal quotation marks omitted) (second and third alteration in original).

Based on competent evidence (In re K.N.K., p. 59)

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## In re S.D.C. (p. 73)

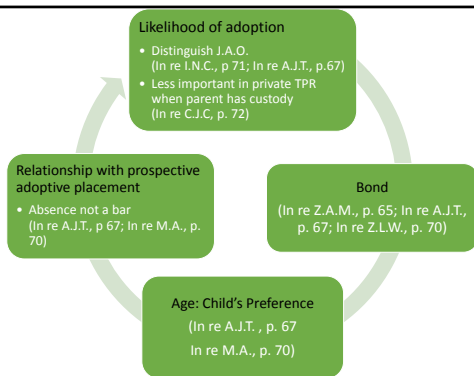


### Relative Placement Consideration

- Not like A/N/D, instead -1110(a)(6)
- Relevancy: Is the placement available?
  - Is there conflicting evidence about availability
  - If so, court considers balance of preserving family ties & achieving permanency

55

## Weighing Relevant Factors



56

## In re J.H. (p. 73)

### Likelihood of adoption

- 4 children with special needs
- General truths about difficulty in placing children with behavioral challenges, developmental delays, foster care, cannot overcome particularized evidence



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5<sup>th</sup> Theme

Appeals

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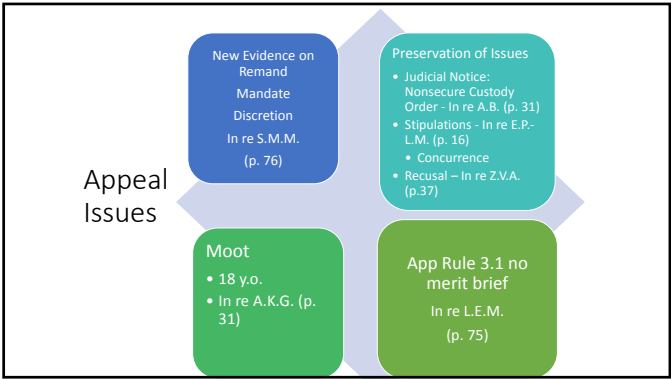
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## Child Welfare Case Update

August 6, 2019 – August 4, 2020  
Parent Attorneys' Annual Conference (Virtual, Summer 2020)

To view these and other summaries of opinions published on or after January 1, 2014 by the NC Appellate Courts, go to the [Child Welfare Case Compendium](#) on the School of Government's website

### Table of Contents

Abuse, Neglect, Dependency .....	6
Jurisdiction: 7B and UCCJEA.....	6
In re C.M.B. ....	6
Termination of Juvenile Court Jurisdiction .....	7
McMillan v. McMillan .....	7
Indian Child Welfare Act: Notice Requirements.....	8
In re K.G.....	8
Abuse Adjudication: Status of Juvenile; Findings .....	9
In re A.B.....	9
Abuse/Neglect Adjudication: Unexplained Injuries; Sufficiency of Notice; Sibling .....	9
In re K.L. ....	9
Abuse/Neglect Adjudication: Discovery; Expert Witness; Emotional Damage, Due Process.....	11
In re M.M .....	11
Neglect Adjudication: Findings & Judicial Notice.....	12
In re J.C.M.J.C., .....	12
Neglect/Dependency Adjudication: Residual Hearsay Exception, Collateral Estoppel, Substance Abuse .....	13
In re F.S.....	13
Neglect/Abuse Adjudication .....	15
In re S.G.....	15
Emotional Abuse, Neglect, Dependency Adjudications: Evidence and Findings.....	16
In re E.P.-L.M.....	16
Emotional Abuse Adjudication.....	18
In re K.W.....	18
Neglect Adjudication.....	18

In re S.M.L., .....	18
Dependency Adjudication: Findings .....	19
In re M.H. ....	19
Initial Disposition: Evidentiary Requirements.....	20
In re K.W.....	20
Permanency Planning Hearing: Competent Evidence Requires Testimony .....	21
In re S.P. ....	21
Disposition: Visitation .....	21
In re K.W.....	21
In re S.G.....	22
Visitation: Cost of Supervised Visitation .....	24
In re E.P.-L.M.....	24
In re J.T.S. ....	24
Achievement of Permanent Plan: Guardianship, Findings and Evidence.....	24
In re S.B. ....	24
Permanency Planning Order: Eliminate Reunification.....	25
In re J.H. ....	25
Permanency Planning Order: Guardianship; Relative Priority.....	26
In re A.N.T. ....	26
Permanency Planning: Guardianship Verification, Parent’s Constitutional Rights, Eliminate Reunification, Waive Reviews.....	27
In re J.M.....	27
Permanency Planning: Waiving Further Reviews and “Period of At Least One Year” .....	28
In re J.T.S., .....	28
Disposition: GS 7B-911.....	28
In re E.P.-L.M.....	28
In re S.M.L. ....	29
Post-Relinquishment Subject Matter Jurisdiction re: Permanency Planning Hearings .....	30
In re E.B. ....	30
Appellate Rule 2.....	30
In re K.W.....	30
Appeal: Insufficient Record on Appeal .....	30



In re J.C.M.J.C. ....	30
Appeal: Preserve Issue .....	31
In re A.B. ....	31
Appeal: Moot .....	31
In re A.K.G. ....	31
Termination of Parental Rights .....	32
UCCJEA: Subject Matter Jurisdiction.....	32
In re L.T. ....	32
In re S.E. ....	33
Personal Jurisdiction: Nonresident Parent; Minimum Contacts Not Required .....	33
In re F.S.T.Y. ....	33
Personal Jurisdiction: Summons .....	34
In re W.I.M. ....	34
Child’s GAL: Attorney Advocate in GAL Role.....	35
In re C.J.C. ....	35
GAL for Parent: Hearing re: Incompetency .....	35
In re Z.V.A. ....	35
Motion to Continue .....	36
In re A.L.S. ....	36
Denial of TPR: Findings and Conclusions Required.....	36
In re K.R.C., ....	36
Neglect; Recusal.....	37
In re Z.V.A. ....	37
Neglect: Insufficient Findings; Incarceration, Domestic Violence, Substance Use, DV .....	38
In re K.N. ....	38
Neglect: Findings; Collateral Estoppel, Judicial Notice; Inferences; Incarceration.....	39
In re J.M.J.-J., ....	39
Neglect: Sufficiency of Evidence and Findings.....	40
In re J.O.D. ....	40
In re M.A. ....	41
In re M.C. ....	41
In re J.C.L., ....	42

In re S.D.....	42
In re N.P.....	43
In re D.W.P. ....	44
Neglect & Failure to Make Reasonable Progress: Findings .....	45
In re Z.A.M.....	45
In re C.N. ....	46
In re C.N.....	46
Neglect and Dependency: Findings of Fact; Conclusion of Law .....	47
In re K.L.T. ....	47
Failure to Make Reasonable Progress: Conditions that Led to Removal.....	49
In re B.O.A. ....	49
In re C.J.....	50
Failure to Make Reasonable Progress: Findings .....	51
In re A.B.C.....	51
In re J.S. ....	52
In re I.G.C.....	53
In re A.R.A. ....	53
Dependency: Alternative Child Care Arrangement; Child’s Mental Health Needs in PRTF.....	55
In re N.N.B.....	55
Abandonment/Neglect: Insufficient Findings, Willfulness, Court Questioning of Witnesses .....	55
In re N.D.A.....	55
Abandonment: Sufficiency of Notice; Findings.....	57
In re B.C.B.....	57
Abandonment .....	57
In re A.L.S. ....	57
In re A.G.D.....	58
In re K.N.K. ....	59
In re C.B.C.....	59
In re E.H.P.....	60
In re E.B. ....	61
Failure to Pay Portion of Care .....	62
In re J.M.....	62

In re S.E. ....	63
Prior TPR and No Safe Home .....	63
In re N.G. ....	63
In re T.N.H. ....	64
Best Interests: Standard of Review.....	65
In re Z.A.M.....	65
Best Interests: Factors .....	65
In re J.S.....	65
In re N.G. ....	66
In re C.V.D.C., .....	66
In re A.J.T.....	67
In re A.U.D.....	68
Best Interests: Bond with Parent .....	69
In re A.B.C.....	69
In re J.J.B .....	69
In re Z.L.W. ....	70
Best Interests Likelihood of Adoption.....	70
In re M.A .....	70
In re J.C.L.....	71
In re S.M.M.....	71
In re I.N.C. ....	71
In re C.J.C.....	72
In re J.H .....	73
Best Interests: Other Relevant Considerations.....	73
In re S.D.C.....	73
Appealable Order.....	74
In re A.B.C.....	74
Proper Order and Appeal.....	75
In re C.M.C.,.....	75
Appeal: No-Merit Briefs .....	75
In re L.E.M .....	75
Complying with the Mandate .....	76

In re S.M.M.....	76
Civil Cases Related to Child Welfare .....	76
UCCJEA: Inconvenient Forum .....	76
Harter v. Eggleston.....	76
Parent’s Constitutional Rights.....	77
Routten v. Routten.....	77

## Abuse, Neglect, Dependency

### Jurisdiction: 7B and UCCJEA

In re C.M.B., \_\_\_ N.C. App. \_\_\_ (Aug. 6, 2019)

**Held: reverse and remand for new hearing under UCCJEA**

- Facts and Timeline
  - 2009: Neglect petition filed and child adjudicated neglected in NC
  - 2011: permanent plan of guardianship achieved; mother’s attorney relieved; DSS relieved of reunification efforts; child’s GAL discharged; further review hearings waived
  - 2014: upon mother’s motion to review, consent order entered addressing mother’s visitation; noted that guardians and child had moved to Tennessee; DSS continued to be relieved of reunification efforts and GAL continued to be discharged.
  - Nov. 2017: guardians file motion in TN to register NC custody order and request modification of order to suspend mother’s visitation
  - Dec. 2017–Jan. 2018: mother files 3 pro se motions in NC including that NC invoke jurisdiction under the UCCJEA as the more appropriate forum
  - Jan 2018:
    - TN order determining TN has jurisdiction because guardians, child, and mother no longer reside in NC and grants the motion to modify limiting mother’s visitation
    - Guardians file unverified motion in NC to stay mother’s pending motions or transfer jurisdiction to TN as NC is an inconvenient forum.
  - 2018: NC court appoints attorney for mother, continues hearing, and determines it needs to discuss jurisdiction with TN judge; email then sent to guardians’ attorney and court clerk (not to mother and/or her counsel) that NC judge spoke with TN judge and agreed jurisdiction is in TN so no need for hearing; order entered allowing guardians’ stay and “transferring” jurisdiction to TN based on NC being an inconvenient forum. Mother appeals.
- Distinction between 7B and Chapter 50 Proceedings: Although the trial courts, mother, and guardians started treating this case as a Ch. 50 custody proceeding, it is a juvenile neglect proceeding under Ch. 7B, initiated by DSS in 2009 even though DSS has not been directly

involved since 2011. The action was not transferred to a Ch. 50 custody matter under G.S. 7B-911.

- Juvenile Court's Continuing Jurisdiction: The trial court has not terminated its jurisdiction "thus, the juvenile court's jurisdiction continues 'until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.'" G.S. 7B-201(a). Sl. Op. at 11. "Only North Carolina can terminate its own juvenile court jurisdiction; a court in Tennessee cannot." *Id.* The TN order that transferred jurisdiction from NC to TN "has no effect on North Carolina's jurisdiction under Chapter 7B..." Sl. Op. at 17. Except for a transfer to Ch. 50 under G.S. 7B-911, "Chapter 7B does not provide an option for 'transfer' but instead provides for the trial court to ... terminate the juvenile court jurisdiction and return the parents to their pre-petition status..." Sl. Op. at 14. If the juvenile court determines TN is a more appropriate forum under the UCCJEA, it may terminate its jurisdiction under G.S. 7B-201 to allow for TN to address the custody issues.
- UCCJEA Inconvenient Forum: G.S. 50A-207 provides for the procedures and factors a court must consider when determining whether it is an inconvenient forum. G.S. 50A-110 establishes the procedure for communications between the states' courts. It includes a provision where the court may allow the parties to participate in the communication and if not, the court must give the parties an opportunity to present facts and legal arguments before a jurisdiction decision is made. Additionally, a record of the communication between the courts must be made and the parties must be granted access to the record. In this case, the record was the email from the NC judicial assistant, but it was only sent to the guardians' attorney rather than simultaneously to both parties' counsel. At a hearing that consisted of attorney arguments, unverified motions, and no sworn testimony, the court received no evidence regarding the facts of the case. Without an evidentiary hearing upon which to base findings of fact and a decision, the order determining NC is an inconvenient forum is unsupported. Remanded for an evidentiary hearing.

### Termination of Juvenile Court Jurisdiction

McMillan v. McMillan, \_\_\_ N.C. App. \_\_\_ (Oct. 1, 2019)

#### **Held: Affirmed**

- Facts: This case involves two jurisdictional issues one of which challenges whether the district court had subject matter jurisdiction in a Chapter 50 custody action based on whether the jurisdiction of a prior juvenile neglect action had been terminated.
  - In 2010, shortly after the child's birth, DSS initiated a neglect proceeding. After DSS filed the neglect petition but before the child's adjudication, mother filed a complaint for custody.
  - After the child's adjudication in 2011, the Chapter 50 custody action was "administratively removed from the active court calendar and ordered closed by the Forsyth County District Court..." Sl. Op. at 2.
  - In 2012, a juvenile court order was entered that stated it " 'entered an order pursuant to N.C.G.S. 50-13.1, 50-13, 50-13.5 and 50-13.7, as provided in G.S. 7B-911, awarding joint custody of the child' to Plaintiff and Defendant" (Sl. Op. at 3), and "the Court terminates juvenile court jurisdiction and there shall be no further scheduled Court

reviews” (Sl. Op. at 4). The record does not show a civil custody order was in fact entered.

- In 2014, father (plaintiff) filed a motion to modify the Ch. 50 custody order. From 2014-2016, the parties operated under various memoranda of judgment/orders addressing temporary custody.
- In 2018, the court entered an order awarding permanent primary legal and physical custody to mother (defendant) and secondary custody to father. Father appeals raising subject matter jurisdiction.
- Subject matter jurisdiction may be raised at any time and is a question of law that is reviewed de novo.
- Juvenile Court Jurisdiction: Pursuant to G.S. 7B-200 and -201, the district court had exclusive original jurisdiction over the juvenile neglect proceeding until terminated by court order or the juvenile turns 18 or is emancipated, whichever occurs first. G.S. 7B-911 specifically authorizes the court to transfer a juvenile proceeding to a Chapter 50 custody action and establishes a detailed procedure for how that is accomplished. In this case, the 2012 juvenile order was insufficient to transfer the action to a civil custody action; “[h]owever, a court presiding over a Chapter 7B abuse, neglect, and/or dependency proceeding may terminate jurisdiction under Section 7B-201 without having to comply with the transfer requirements of Section 7B-911.” Sl.Op. at 13. The juvenile court order expressly stated it was terminating its jurisdiction, ended DSS and the child’s GAL involvement, and returned the parents to pre-petition status. See G.S. 7B-201. The trial court, therefore, had subject matter jurisdiction to hear the child custody case under G.S. Chapter 50.

### Indian Child Welfare Act: Notice Requirements

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

#### **Held: remand**

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

## Abuse Adjudication: Status of Juvenile; Findings

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

### **Held: Affirmed**

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

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

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

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

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

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

- Standard of review of an adjudication is whether clear and convincing evidence supports the findings and whether the findings support the conclusion of law. An abuse or neglect adjudication is a conclusion of law that is reviewed de novo. A de novo review is when the appellate “[c]ourt ‘considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.’ ” Sl.Op. at 10.
- Findings: Of the 4 challenged findings, 2 were not supported by the evidence.
  - The court’s finding that the infant was in the respondent parents’ exclusive care during a 4-day period was not supported by the evidence, which showed the infant was with a babysitter and was held by various family members during that time.
  - Clear and convincing evidence supports the court’s finding that the infant suffered non-accidental trauma that did not result from a fall but does not support the finding that the infant’s fractures occurred when he was in the exclusive care of his parents.
- G.S. 7B-101(1) defines an abused juvenile as one whose parent, guardian, custodian, or caretaker inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means.
- Circumstances Surrounding the Child: “While ‘the determinative factors [in a neglect proceeding] are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. . . , the same is not true in an abuse proceeding.’ ” Adjudications of abuse have been upheld when the cause of the injuries was unclear but the clear and convincing evidence and resulting findings “supported the inference that the respondent-parents were responsible for the unexplained injury.” Sl.Op. at 16. These findings can “support the conclusion that the respondent-parents inflicted or allowed the infliction of the injury at issue.” *Id.* Although the trial court was appropriately concerned that the parents could not explain their child’s injuries, “that alone, as a matter of law, cannot support the trial court’s conclusion that Respondents were responsible for [the] injuries. There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that Respondents inflicted them....” Sl.Op. at 24.
  - *Author’s Note*: This opinion does not discuss the holding in *In re J.S.*, 182 N.C. App. 79 (2007), which was relied upon in *In re A.B.*, \_\_\_ N.C. App. \_\_\_ (June 16, 2020); both of which state abuse, neglect, and dependency is about the child’s status and not the culpability of the parents.
- Sufficiency of Notice regarding Neglect: The petition alleging abuse, neglect, or dependency must contain “allegations of facts sufficient to invoke jurisdiction over the juvenile.” G.S. 7B-402(a). “If the allegations are insufficient to put the party on notice as to which alleged grounds are at issue, then the trial court lacks subject matter jurisdiction over the action.” Sl.Op. at 26. But, the petition is adequate if it contains factual allegations that are sufficient to put the party on notice as to each alleged ground for adjudication, even if DSS forgets to check the box on the form petition of the ground. In this case, DSS alleged abuse, both by checking the abuse box, by its allegations, and by tracking the language of the abuse statute. There was no separate claim for or reference to neglect or the statutory language of the definition of neglect in the petition. Respondents did not have notice of the neglect ground for the infant.



- Neglect of Sibling: The definition of neglect under G.S. 7B-101(15) states it is relevant whether the juvenile lives in the home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. Although the trial judge has discretion in determining the weight to give to that factor, prior abuse in and of itself is insufficient to support a neglect adjudication. Other factors are required – factors that suggest the abuse or neglect will be repeated, such as domestic violence or substance abuse issues, an unwillingness to engage in services or work with DSS about the prior abuse or neglect; or the failure to accept responsibility for the prior adjudications. Here, the sibling’s adjudication as neglected is based on the abuse adjudication without any of the additional factors. The findings do not support the conclusion of neglect.

### Abuse/Neglect Adjudication: Discovery; Expert Witness; Emotional Damage, Due Process

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

#### **Held: Affirmed**

- Facts: Since the juvenile’s birth in 2010, there has been an extensive litigation history involving custody of the juvenile, including a previous DSS action in which the juvenile was adjudicated neglected and a Chapter 50 custody action with multiple orders entered. There is significant animosity and conflict between the parents regarding the child’s custody, and the child is often exposed to that and father’s poor boundaries about his anger toward mother. In 2018, DSS filed a new petition. The child was adjudicated abused due to serious emotional damage and neglected due to injurious environment. An initial dispositional order was entered that granted physical and legal custody to mother and visitation to father as well as individual and parent counseling for each parent. Respondent father appeals arguing the court abused its discretion in not allowing him to depose the social worker and that the court erred in allowing a witness to testify as an expert in psychology and child and family evaluations and in adjudicating the juvenile abused and neglected.
- Discovery: Rulings on discovery matters are reviewed for an abuse of discretion. Discovery in an abuse, neglect, or dependency action is governed by G.S. 7B-700. The social worker was noticed and subpoenaed for a deposition by the father’s attorney pursuant to Rule 30 of the Rules of Civil Procedure. A motion for discovery under G.S. 7B-700, which did not have a request for a deposition, was filed with the court on the same day. DSS opposed the noticed deposition, arguing the provisions of G.S. 7B-700(a) and (c) must be followed, which requires information sharing and, if necessary, a motion for discovery requesting the deposition. The trial court instructed father to first seek information under G.S. 7B-700(a) (information sharing) and if needed to file a motion for deposition under G.S. 7B-700(c). This instruction by the trial court was not a denial of the discovery request, as such there was no abuse of discretion. Further, the court did not err when it did not permit the deposition under Rule 30 because “the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code.” Sl.Op. at 11 (citation omitted).
- Expert Witness: “Whether a witness has the requisite knowledge or training to testify as an expert is within the exclusive province of the trial court, and its decision will not be overturned absent an abuse of discretion.” Sl.Op. at 13 (citation omitted). Rule 702 of the Rules of Evidence

governs expert testimony and has 3 parts that must be met: 1) the proposed testimony is based on scientific, technical, or other specialized knowledge that will assist the fact finder in understanding the evidence or determining a fact in issue; 2) the witness is qualified as an expert by knowledge, skill, experience, training, or education, and 3) the testimony must meet the 3-prong reliability test in Rule 702(a)(1)-(3). Father challenges the third criterion. The court has discretion in determining how to address the 3-prong reliability text as it will vary from case by case. The court conducted a voir dire of the witness to address each of the prongs: (a) the facts and data used to form his opinion and the clinical protocol he used showing that his testimony was (b) the product of reliable principles and methods and (c) that those methods and principles were applied reliably to the facts of the case. There was no abuse of discretion.

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

### Neglect Adjudication: Findings & Judicial Notice

In re J.C.M.J.C., 834 S.E.2d 670 (N.C. Ct. App. 2019)

#### **Held: Reversed**

- Facts: DSS filed a petition alleging neglect after (1) receiving reports of children being unattended outside, father smoking marijuana, suspected domestic violence, and an unclean home and (2) needing to file an interference petition due to parents refusal to cooperate with the DSS assessment. At the adjudicatory hearing, one witness was called – the DSS social worker. The children were adjudicated neglected based on the brief social worker testimony and judicial notice of the findings in the nonsecure custody order. Respondents appeal, challenging the findings of fact and conclusion of law.
- Standard of review: Are the findings of fact based on clear and convincing competent evidence, and do the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Judicial Notice: Although a trial court may take judicial notice of its own proceedings, "it is problematic to allow the trial court's findings of fact in the [nonsecure custody order] to serve as the sole evidentiary support for the great majority of the adjudicatory findings...." Sl. Op. at 13.

Although the same standard of proof applies to a hearing on the need for continued nonsecure custody and the adjudicatory hearing – clear, cogent, and convincing evidence – the rules of evidence do not apply to a nonsecure custody hearing. There is no way to know if the findings for the nonsecure custody order were based on evidence that would be admissible at an adjudicatory hearing where the rules of evidence apply.

- Findings: Many of the findings are recitations of allegations or reports and are not really findings of fact. They are not affirmative findings that would support a conclusion of neglect. Other findings are not supported by clear and convincing evidence. The affirmative findings that were made focus mostly on the respondents' obstruction with the DSS assessment and do not support a conclusion of neglect based on a lack of proper care, supervision, or discipline or that the children lived in an injurious environment.
- The smell of marijuana alone does not support an adjudication of neglect as there is no evidence of harm or substantial risk of harm to the juveniles (see Sl. Op. FN 5)
- Multiple absences from school without findings contextualizing those absences – the reason, whether they were unexcused, the degree to which the children were academically behind – are insufficient to show the children were denied an education such that they were neglected. See *In re McMillan*, 30 N.C. App. 235 (1976); *In re R.L.G.*, 816 S.E.2d 914 (2018).

### Neglect/Dependency Adjudication: Residual Hearsay Exception, Collateral Estoppel, Substance Abuse

*In re F.S.*, 835 S.E. 2d 465 (N.C. Ct. App. 2019)

#### **Held: Reversed**

- Facts and Procedural History: DSS filed its first petition alleging neglect and dependency in 2016. In 2017, the child was adjudicated neglected and dependent based mother's on substance use. Respondent mother appealed, and in 2018 the court of appeals unanimously reversed the adjudication (unpublished opinion) because the facts did not establish harm or risk of harm to the juvenile. During the pendency of the appeal, mother entered into a case plan with DSS. During that period, mother was hospitalized at least 8 times for alcohol addiction and symptoms of withdrawal. On the date of the COA mandate, DSS filed a second petition alleging (1) neglect based on a lack of proper care, supervision, and discipline by a parent and living in an injurious environment and (2) dependency. At hearing, residual hearsay involving the child's statements about mother's drinking was admitted over objection. The DSS social worker (who was the second social worker assigned to the case) testified to statements the child purportedly made to other individuals (including the prior DSS social worker and child's therapist). There was also testimony from the DSS supervisor about mother's need for hospitalizations prior to the filing of the second petition due to mother's use of impairing substances and her current participation in and compliance with the case plan. Respondent mother offered no evidence at the hearing. The child was adjudicated neglected and dependent and placed in DSS custody. Respondent mother appealed.
- Residual Hearsay Exception: The child's hearsay statements were admitted under Rule of Evidence 803(24) – the residual hearsay exception. For admission, the proponent must give written notice of its intention to offer the statement and the particulars of the statement. The court must find all three factors of Rule 803(24): the statement (1) is offered as evidence of a

material fact; (2) is more probative on the point than any other evidence the proponent can procure through reasonable efforts, and (3) admission of the statement serves the general purposes of the rules of evidence and interests of justice.

- The standard of review is an abuse of discretion; respondent mother must show she was prejudiced and a different result would likely have occurred had the statement not been admitted.
- There was no testimony, arguments, or findings required by Rule 803(24).
  - The former social worker, the therapist, and the child were not called to testify and there were no findings by the court about their unavailability. The argument that availability of the child should consider mother's failure to subpoena the child is rejected since DSS and not respondent mother has the burden of proof in an adjudicatory hearing.
  - There were no findings of the circumstantial guarantee of trustworthiness of the child's statements. The statements testified to by the current social worker were double hearsay as there were a summary of meeting notes taken by the former social worker and the therapist and were not heard by the social worker who was testifying. There were no findings of the conditions, situation, and motivation to be truthful under which the purported statements were made.
- Without the child's hearsay statements, the record does not support the court's conclusion. Respondent mother was prejudiced by the admission.
- Collateral estoppel precludes DSS from retrying the fully litigated issues that were decided in the first adjudication but does not preclude an adjudication based on new allegations and events which occurred after the first adjudication.
- Neglect requires that there be some physical, mental, or emotional harm or substantial risk of such harm as a result of the failure to provide proper care, supervision, or discipline. At the time of the second adjudication, the juvenile was not in mother's care such that the court must assess whether there is a likelihood of future neglect. The court considers "the risk for a particular kind of harm given [the juvenile's] age and the environment in which they reside." Sl.Op. at 14 (citation omitted). The appellate court looks to the totality of the evidence to determine whether the findings support the conclusion of neglect. Although mother had 8 hospitalizations between the first and second adjudication, "the trial court must consider 'the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to the parent.' " Sl. Op. at 16 (*citing In re B.P.*, 809 S.E.2d 914, 920 (2018)). A parent's substance abuse in and of itself is not clear and convincing evidence of a substantial risk of harm to the child. The child was not in mother's care during the period of her hospitalizations and DSS supervisor testimony showed that since the petition was filed, mother was meeting with DSS regularly, participating in and compliant with her treatment services (including therapy, NA, and AA), and had several negative drug screens. There is no evidence that current circumstances of a likelihood of neglect exists.
- Dependency requires that the court makes findings of both the parent (1) is unable to provide for the child's care or supervision and (2) lacks and an appropriate alternative child care arrangement. Mother challenges the first prong. Although chronic alcoholism may impair a parent's ability to parent, the order did not include findings of mother's present inability to

supervise her child. The evidence shows mother had been in treatment since the petition was filed and her previous relapses were prior to the filing of the petition. The evidence of mother's present compliance with her treatment "tends to show an ability or capability of Respondent-mother to parent" her child. Sl.Op at 19.

### Neglect/Abuse Adjudication

In re S.G., 835 S.E.2d 479 (N.C. Ct. App. 2019)

**Held: Affirm adjudication order**

**Affirmed in part and vacate in part disposition/permanency planning order,**

**Remand for new visitation order**

- Facts: DSS responded to a report of a 3 year old with a black eye. The 3-year-old child has two older siblings. All three children have the same mother, and the older children have the same respondent father. Initially, the parents evaded the DSS social worker and ultimately explained the youngest child's bruise as him falling when running and hitting his head on the table. DSS sought mother's agreement to keep the children from respondent father while an assessment was being completed, but respondent mother would not agree. DSS filed a petition and obtained adjudications that the 3-year-old child was abused, neglected, and dependent and the two older siblings were neglected and dependent. At the disposition and permanency planning hearing, the court ordered respondents to complete and follow recommendations of substance abuse and mental health assessments, participate in parenting classes, obtain and maintain safe and stable housing, and submit to random drug screens. The order set forth a visitation plan of one visit per month and further designated that contact between the 3 year old and respondent father (who is not the father of the 3 year old) was to be based on the child's therapist's recommendation.
- Abuse Adjudication: An abused juvenile under G.S. 7B-101(1) includes a juvenile whose parent inflicts or allows to be inflicted serious physical injury, or substantial risk of such injury, upon the juvenile by non-accidental means. The determination of whether there is a "serious physical injury" is dependent on the facts of each case; there is no minimum threshold. The findings that the 3 year old had significant patterned bruising on his forehead and upper eyelid that was visible for at least 4 days after the incident causing the bruise is sufficient to support the conclusion that the child suffered a serious injury. Although there was no medical testimony that the injuries occurred through non-accidental means, there was medical evidence via unobjected to testimony from two medical professionals, the bruising was consistent with a being hit by a belt buckle and was not consistent with the child hitting his head on a table. This medical evidence supports the court's determination that the injuries were non-accidental.
- Neglect Adjudication: The definition of neglected juvenile under G.S. 7B-101(15) includes a child who lives with a person who neglected or abused another child. The trial court has discretion to determine how much weight to give that evidence. Neglect also requires that there be some physical, mental, or emotional impairment or substantial risk of such impairment from the lack of proper care, supervision, or discipline. The court made findings of fact that (1) the mother would not agree to keep the children from their father and preferred to be with the father and have the children stay elsewhere, did not believe the child's reports of what happened, did not believe she could protect the children from the father, and had no other placement options, and

(2) both respondents denied responsibility for the youngest child's injuries. The neglect adjudications of the two older children were supported by these findings and were not based solely by the finding that the older children lived in the same home as their 3-year-old sibling who was abused and neglected by respondent father.

### Emotional Abuse, Neglect, Dependency Adjudications: Evidence and Findings

In re E.P.-L.M., \_\_\_ N.C. App. \_\_\_ (August 4, 2020)

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

- Facts: Prior to DSS involvement, there was a Chapter 50 civil custody order that awarded joint physical custody to both parents, with the juvenile primarily living with mother as father had moved to Georgia. Mother and juvenile resided with maternal grandmother. DSS became involved when mother and grandmother made multiple reports of sexual abuse of the juvenile by the father. After multiple medical assessments and DSS and law enforcement investigations, none of the reports of sexual abuse were substantiated. During in-home services with DSS, mother refused to agree to a placement of the juvenile with paternal relatives. DSS filed a petition alleging abuse, neglect, and dependency based on mother's substance abuse, housing, and repeated unsubstantiated reports of sexual abuse by the father. At hearing, DSS, the GAL, and father provided stipulations to the court; mother did not stipulate resulting in a hearing where the stipulations were admitted as well as testimony from the social worker, mother, and mother's substance abuse counselor. The child was adjudicated all three alleged conditions. The court entered a dispositional order that awarded custody to father and supervised visitation both electronically and in person for mother through a modification of the Chapter 50 custody order based on a substantial change in circumstances and terminated its jurisdiction in the juvenile action through G.S. 7B-911. Mother appeals, challenging the adjudications based on stipulations, the 7B-911 order, and the visitation order.
- Stipulations and Burden of Proof – Preservation of Issue of Appeal: Mother argues the stipulations were not competent evidence and the trial court erroneously shifted the burden of proof to mother to refute the stipulations. Mother did not preserve the issues raised on appeal as she did not object to the admission of the stipulations or the use of those stipulations as competent evidence. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal," and this rule applies to evidentiary arguments in abuse, neglect, and dependency proceedings. Sl.Op. at 9. "*Evidence admitted without objection is properly considered by the court* and, on appeal, the question of its competency cannot be presented for the first time." Sl.Op. at 10-11 (emphasis in opinion).
  - Concurrence (Murphy): Addressing the use of stipulations even though mother did not preserve the argument for appeal. The trial court improperly relied on the stipulation against mother since she was not a party to the stipulation stating "[s]tipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either." Concurrence at 2. The trial court improperly shifted the burden to mother when it stated "mother's evidence did not convince the [trial c]ourt that any of these stipulations were in fact accurate." Concurrent at 6. DSS, as petitioner, has the burden of proof.



- Standard of Review for adjudications is whether the findings are supported by clear and convincing evidence and whether those findings support the conclusions of law. Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal.
- Emotional abuse under G.S. 7B-101(1)e. exists when a parent allows serious emotional damage to the juvenile as evidenced by the juvenile's severe anxiety, depression, withdrawal, or aggressive behaviors. The findings that are unchallenged and supported by the stipulations which were not objected to are binding, and those findings support the adjudication of abuse. The findings include the child being subjected to multiple unnecessary and harmful medical procedures prior to her turning 4 years old and that those procedures were harmful and inflicted by mother's actions.
- Neglect involves a juvenile whose parent does not provide proper care, supervision or discipline, who is not provided necessary medical care, and who lives in an injurious environment. G.S. 7B-101(15). It also requires that there be some physical, emotional or mental harm, or substantial risk of such harm, as a result. The trial court has discretion in determining the risk a child is at for a particular type of harm given the child's age and living environment. The unchallenged findings, which include subjecting the child to multiple unnecessary invasive medical procedures, are sufficient to show the existence or risk of harm to the juvenile when she is in mother's care and support the adjudication of neglect.
- Dependency under G.S. 7B-101(9) requires findings for both prongs of the definition: that the parent (1) is unable to provide care and supervision and (2) lacks an appropriate alternative child care arrangement. Dependency does not exist when one parent is capable of providing care and supervision. Mother erroneously argues father was available to provide care and supervision to the juvenile at the time of the adjudicatory hearing.
  - Post-petition evidence: G.S. 7B-802 states "the adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in the petition.*" Sl.Op. at 19 (emphasis in opinion). "Absent exceptional circumstances, the trial court may only look to the circumstances before the court at the time the petition was filed when considering whether a juvenile is dependent at the adjudication stage." Sl.Op. at 19. Exceptions include evidence discovered after the petition is filed that reflects "a 'fixed and ongoing circumstance' rather than a 'discreet event or one-time occurrence' " (e.g. paternity). Sl.Op at 19. Distinguishing this case from *In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App., 2019), which reversed a dependency adjudication because of a lack of evidence about mother's ability to care for the juvenile at the time of the adjudication hearing, the juvenile in this case was in mother's care (vs. the parent and child having a long period of separation prior to the petition being filed as was the case in *F.S.*) up until and including the time DSS filed its petition.
  - When the petition was filed, neither parent was available to provide care and supervision to the child – mother because of her emotional abuse and father because of the allegations of sexual abuse by him, rendering father unavailable.

## Emotional Abuse Adjudication

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

### **Held: Affirmed and Remanded**

- **Facts:** DSS became involved after mother reported to the child's therapist that the children were abused and neglected by their father when there were in his care (joint custody had been ordered under a G.S. Chapter 50 order). Mother made numerous reports of the children's mistreatment by father to various professionals, including medical providers who were assessing the children for abuse, and law enforcement. All of mother's allegations were false. The children would repeat mother's false disclosures and the older child was fearful and anxious about seeing her father and was diagnosed with Generalized Anxiety Disorder. DSS filed a petition and obtained a nonsecure custody order where the children were placed with their father. Based on several inappropriate incidents involving mother and visitation, the court limited her visitation to electronic only. The court adjudicated the older juvenile abused and neglected and the younger juvenile neglected. At disposition, no new evidence was taken; mother was self-represented (with standby counsel), and after arguments were made the court ordered mother visitation remain the same but authorized DSS to allow for in-person visitation when she made progress on her case plan. Mother appeals the abuse adjudication and disposition.
- **Abuse under G.S. 7B-101(1)e.** occurs when a parent has created or allows to be created serious emotional damage to the juvenile including severe anxiety. A formal diagnosis is not required. The evidence showed the juvenile had severe anxiety from the "high level of acrimony and vilification of Respondent/father by Respondent/mother." Sl.Op. at 8. The findings of fact support the abuse adjudication. The identification of the mother as the parent who created the emotional damage provided clarity in the order and is not reversible error even though "the adjudication of the child was abused concerns only the status of the child, not the fault or culpability of the parent." *Id.*

## Neglect Adjudication

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

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

- **Facts:** At the time DSS filed its petition, there was an existing Ch. 50 custody order regarding the 2 children that awarded mother primary physical custody and father visitation and child support. DSS became involved when the older child disclosed sexual abuse by mother's boyfriend. As a safety plan, the children were temporarily placed with father but were allowed to return to mother upon the assurance that her boyfriend would have no contact with the juveniles. Mother initiated believed her child but then began to doubt the juvenile's disclosure, started having contact with her boyfriend, and inquired of DSS what the ramifications would be if she were to marry him. Father remained appropriate and supportive of the juvenile's account of her abuse. DSS recommended father file a motion to modify the Ch. 50 order, which he filed but his request for ex parte relief was denied due to DSS involvement. DSS filed an abuse and neglect petition for one juvenile and a neglect petition for the other. The court adjudicated the juveniles neglected and entered a disposition that awarded custody to father and referred to an order that needed to be drafted for modification of the Ch. 50 order and termination of the 7B



action under G.S. 7B-911. That order was never entered. Mother appeals the adjudications and disposition.

- Neglect requires a finding that there be some physical, mental, or emotional impairment or substantial risk of such impairment as the result of the lack of proper care, supervision or discipline.
- Regarding the older juvenile, the findings of fact support the conclusion of neglect. Although the words in one of the challenged findings of fact were not supported by the evidence, the omission of those words has no effect on the other details in the finding of what occurred, and the remaining findings were supported by clear and convincing evidence. Mother's argument goes to the credibility and weight of the evidence, which is not reviewed on appeal. The court determined mother's testimony about ending her relationship and being supportive of her child was not credible.
- When there has been a period of separation between the parent and child, prior neglect alone is insufficient. Here the court did not adjudicate neglect solely on the finding of sexual abuse but considered what occurred after the child's disclosure, which included mother discrediting the juvenile's sexual abuse disclosure and prioritizing her relationship with her boyfriend. The court properly considered mother's ability to care for the juvenile at the time of the adjudication hearing and determined there was a risk of physical, emotional, or mental impairment to the juvenile.
- Under G.S. 7B-101(15), it is relevant if a juvenile lives in the home of another juvenile who has been abused or neglected by an adult who regularly lives in the home. The trial court has discretion to determine how much weight to give such evidence, but there must be other factors that suggest the abuse or neglect will be repeated. Regarding the younger child, there were only 2 findings, neither of which address the impact of the other's juvenile's abuse on this juvenile, that there was any reason to believe this juvenile would be abused in the future, or that there was a risk of any impairment for this juvenile. The findings do not support the conclusion of neglect. There is evidence that could support such findings but that is not the role of the appellate court; the case is remanded to the trial court to make such findings.

### Dependency Adjudication: Findings

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

#### **Held: Reversed**

- Facts: One month prior to the juvenile's birth, mother contacted her friend about providing an alternative childcare arrangement for her baby if DSS were to become involved. Mother inquired because of her history with DSS, who currently had 2 of her children in its custody. Her friend agreed and volunteered to share her home with mother and the infant. Mother and the infant moved in with her friend, and although mother was not on the lease, the friend was willing to have her added to it. Twelve days after the child was born, DSS filed a petition because mother failed to correct the conditions regarding her other children's adjudication of neglect related a lack of stable housing and employment. The juvenile was adjudicated dependent, and respondent mother appeals.

- Standard of review of an adjudication is whether there is clear and convincing competent evidence to support the findings of fact and whether the findings support the conclusions of law. Whether a juvenile is dependent is a conclusion of law that is reviewed de novo.
- Dependency under G.S. 7B-101(9) is a two-prong definition: the parent (1) is unable to provide care of supervision and (2) lacks an appropriate available alternative childcare arrangement. Findings as to both prongs are required, and a failure to make both findings is reversible error. A juvenile cannot be adjudicated dependent when the findings indicate they are living with a parent who is willing and able to provide care and supervision. Mother also took the requisite action to identify a viable alternative childcare arrangement.
- The findings indicate the court's primary basis for adjudicating the juvenile dependent is mother's lack of suitable and stable housing and secondarily her lack of employment. There were no findings about mother and the infant living in mother's friend's home. The lack of findings about the alternative childcare arrangement is reversible error. Remand is not necessary in this case because the findings related to mother's lack of employment and unstable housing (that she was not on the lease) does not establish that mother is unable to provide care or supervision to her child. The evidence and findings about a lack of concern for the child's safety while in mother's care indicate the child is living with a parent who is willing and able to provide care and supervision.

### Initial Disposition: Evidentiary Requirements

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

#### **Held: Affirmed and Remanded**

- Facts: DSS became involved after mother reported to the child's therapist that the children were abused and neglected by their father when there were in his care (joint custody had been ordered under a G.S. Chapter 50 order). Mother made numerous reports of the children's mistreatment by father to various professionals, including medical providers who were assessing the children for abuse, and law enforcement. All of mother's allegations were false. The children would repeat mother's false disclosures and the older child was fearful and anxious about seeing her father and was diagnosed with Generalized Anxiety Disorder. DSS filed a petition and obtained a nonsecure custody order where the children were placed with their father. Based on several inappropriate incidents involving mother and visitation, the court limited her visitation to electronic only. The court adjudicated the older juvenile abused and neglected and the younger juvenile neglected. At disposition, no new evidence was taken; mother was self-represented (with standby counsel), and after arguments were made the court ordered mother visitation remain the same but authorized DSS to allow for in-person visitation when she made progress on her case plan. Mother appeals the abuse adjudication and disposition.
- Testimony at Initial Disposition: Mother challenges the disposition based on the court not taking sworn testimony at the initial dispositional hearing. "Mother overstates the formal requirements of an initial disposition hearing." Sl.Op. at 9. There is a statutory two-step: adjudication and disposition. Although the adjudication hearing has heightened requirements to protect the rights and due process of the parent and applies the Rules of Evidence and a standard of clear and convincing evidence, the initial dispositional hearing may be informal,

consider evidence that is not barred by the Rules of Evidence, and incorporate into its findings information from written reports and adjudicatory findings. The dispositional hearing is inquisitive and is based on the best interests of the child as opposed to the adjudication which is a formal, adversarial process designed to determine the truth or falsity of the allegations in the petition. G.S. 7B-901(a) allows for the court to rely on written reports and incorporate findings from the adjudication, and if these findings are sufficient to support the disposition, “there is no need for the court to hear additional testimony.” Sl.Op. at 10. Sworn testimony is required when the order relies on information from individuals who address the court at the dispositional hearing. Here, no new information was provided such that the lack of sworn testimony was not improper.

- Author’s note: This holding differs from the need to have sworn testimony at a review/permanent planning hearing. The language in G.S. 7B-906.1(c) that applies to those hearing differs from G.S. 7B-901(c), which applies to the initial dispositional hearing, and there are published opinions that address the need for sworn testimony at these types of hearings.

### Permanency Planning Hearing: Competent Evidence Requires Testimony

In re S.P., \_\_\_ N.C. App. \_\_\_ (Oct. 1, 2019)

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

- Facts: This case involves an appeal by respondent father of a permanency planning order that (1) awarded guardianship to a nonparent and (2) included a visitation plan that authorized the guardian in her discretion to expand the visitation beyond the ordered minimum of one 2-hour supervised visit per month. At the permanency planning hearing, the court accepted court reports by DSS and the child’s GAL and heard arguments by counsel.
- Standard of review: Whether there is competent evidence to support the findings and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Holding: There must be testimony at a permanency planning hearing to support a permanency planning order. This case refers to previously published opinions making the same holding – *In re J.T.*, 252 N.C. App. 19 (2017); *In re D.Y.*, 202 N.C. App. 140 (2010); *In re D.L.*, 166 N.C. App. 574 (2004). This case is indistinguishable. The evidentiary portion of the hearing consisted solely of court reports and counsel’s arguments. Court reports alone are insufficient to support findings of fact.

### Disposition: Visitation

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

#### **Held: Affirmed and Remanded**

- Facts: DSS became involved after mother reported to the child’s therapist that the children were abused and neglected by their father when there were in his care (joint custody had been ordered under a G.S. Chapter 50 order). Mother made numerous reports of the children’s mistreatment by father to various professionals, including medical providers who were assessing the children for abuse, and law enforcement. All of mother’s allegations were false. The children would repeat mother’s false disclosures and the older child was fearful and anxious about

seeing her father and was diagnosed with Generalized Anxiety Disorder. DSS filed a petition and obtained a nonsecure custody order where the children were placed with their father. Based on several inappropriate incidents involving mother and visitation, the court limited her visitation to electronic only. The court adjudicated the older juvenile abused and neglected and the younger juvenile neglected. At disposition, no new evidence was taken; mother was self-represented (with standby counsel), and after arguments were made the court ordered mother visitation remain the same but authorized DSS to allow for in-person visitation when she made progress on her case plan. Mother appeals the abuse adjudication and disposition.

- G.S. 7B-905.1 allows the court to order no visitation to a parent if no visitation is in the child's best interests. The standard of review is an abuse of discretion. The court found that the safety of the children required electronic visitation and only and relied on the findings in the adjudication order about mother causing distress for the children. FN 2 refers to *In re T.R.T.*, 225 N.C. App. 567 (2013) that held electronic visitation is not visitation.
- A visitation order that establishes a plan and allows DSS to expand visitation is not an abuse of discretion. Although the court may not delegate its authority to a custodian, here the discretion was not granted to a custodian but to DSS, which has been given significant discretion by the legislature under G.S. 7B-905.1(b) to manage visits. The order allows DSS to expand visits, not reduce it below the minimum visitation the court established in its order, and is not an impermissible delegation of its authority.
- G.S. 7B-905.1(d) requires the court notify the parties of their right to motion for review of the visitation plan. No such notification was provided at hearing (after reviewing the transcript) or in the order. Remanded for compliance with G.S. 7B-905.1(d).

*In re S.G.*, 835 S.E.2d 479 (N.C. Ct. App. 2019)

**Held: Affirm adjudication order**

**Affirmed in part and vacate in part disposition/permanency planning order,**

**Remand for new visitation order**

- Facts: DSS responded to a report of a 3 year old with a black eye. The 3-year-old child has two older siblings. All three children have the same mother, and the older children have the same respondent father. Initially, the parents evaded the DSS social worker and ultimately explained the youngest child's bruise as him falling when running and hitting his head on the table. DSS sought mother's agreement to keep the children from respondent father while an assessment was being completed, but respondent mother would not agree. DSS filed a petition and obtained adjudications that the 3-year-old child was abused, neglected, and dependent and the two older siblings were neglected and dependent. At the disposition and permanency planning hearing, the court ordered respondents to complete and follow recommendations of substance abuse and mental health assessments, participate in parenting classes, obtain and maintain safe and stable housing, and submit to random drug screens. The order set forth a visitation plan of one visit per month and further designated that contact between the 3 year old and respondent father (who is not the father of the 3 year old) was to be based on the child's therapist's recommendation.
- Disposition and Court's Authority to Order Case Plan: Applying the NC Supreme Court's holding in *In re B.O.A.*, 831 S.E.2d 305 (2019) (a TPR case) to an A/N/D disposition order, a trial court has

authority under G.S. 7B-904 to order a parent to ‘take appropriate steps’ to achieve reunification but “is not limited to ordering services which directly address the reasons for the children’s removal from a parent’s custody.” Sl.Op. at 12. The trial court may order services that aids in understanding and resolving the possible underlying causes of what contributed to the court’s removal, including those conditions that directly or indirectly contributed to the juvenile’s removal and allows for the court to modify and update a parent’s case plan in subsequent review proceedings based on new or existing evidence. *In re B.O.A. overruled previous holdings* from the court of appeals that applied a narrow application of G.S. 7B-904 (see *In re H.H.*, 237 N.C. App. 431 (2014); *In re W.V.*, 204 N.C. App. 290 (2010)).

- Although the removal of the children in this case was based primarily on the nonaccidental injuries to the youngest children, the court did not abuse its discretion when ordering the parents to complete substance abuse and mental health assessments and follow all recommendations and to submit to random drug screens, and obtain and maintain safe and stable housing. At a minimum these directives will assist in understanding whether substance abuse or mental health issues were the underlying causes for the abuse and neglect. Given the parents attempts to keep their residence hidden from DSS and believed housing instability (multiple moves), the court did not abuse its discretion when requiring the parents to obtain and maintain safe and stable housing.
- Visitation: G.S. 7B-905.1 sets forth the visitation requirements, and an order of visitation is reviewed for an abuse of discretion.
  - The portion of the order that limited contact between the three year old and respondent father, who is not that child’s father (*note, this author believes he is a caretaker*) as recommended by the child’s therapist is an order of no visitation. Visitation was not required as G.S. 7B-905.1 “only requires the setting of a visitation plan between a child and his or her ‘parent, guardian, or custodian.’ ” Sl.Op. at 22. Because visitation was not required, an order of no visitation was not error.
    - Author’s Note: The language of G.S. 7B-905.1(a) states “an order that removes custody of a juvenile from a parent, guardian, or custodian or that the continues the juvenile’s placement outside of the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile’s health and safety.”
  - An order of one visit per month between respondent mother and her children (all three children) and respondent father and his children (the older two) is not an abuse of discretion as there were findings that respondents have frequently missed visits, many of which were not cancelled beforehand.
  - The order did not specify the duration of the visits as required by G.S. 7B-905.1 and therefore this portion is remanded for a minimum duration time.

## Visitation: Cost of Supervised Visitation

*In re E.P.-L.M.*, \_\_\_ N.C. App. \_\_\_ (August 4, 2020)

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

- Supervised Visitation at a center requires that the court make findings as to who pays and that the party has an ability to pay. No such findings were made. The appellate court is unable to review whether the trial court abused its discretion in ordering mother to pay for visitation. Vacated and remanded for additional findings regarding mother's ability to pay.

*In re J.T.S.*, 834 S.E.2d 637 (N.C. Ct. App. 2019)

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

- Facts: The trial court ordered weekly supervised visitation but made no findings about the costs of supervised visitation. Respondent mother appeals.
- The court erred in ordering supervised visitation without addressing costs; who would pay; and if the respondent mother, her mother's ability to pay those costs. *See In re J.C.*, 368 N.C. 89 (2015); *In re Y.I.*, 822 S.E.2d 501 (2018).
- Appellate preservation:
  - To preserve the issue of costs associated with supervised visitation for appellate review, the respondent is not required to object at the hearing. The costs were neither discussed or consented to at the hearing.
  - Respondent agreed to conditions that were recommended by DSS that addressed the terms of visitation (e.g., obtain assessments and treatment, submit to drug screens, not miss visits). These terms were provided in writing, read by a social worker in court, and addressed by the court with respondent's attorney. Respondent did not properly preserve the issue for appellate review.

## Achievement of Permanent Plan: Guardianship, Findings and Evidence

*In re S.B.*, 834 S.E.2d 683 (N.C. Ct. App. 2019)

**Held: Affirmed**

- Facts: Two children were adjudicated neglected and dependent. They were placed in the care of their maternal aunt. Initial concurrent permanent plans were guardianship with the aunt and reunification with mother. At the last permanency planning hearing held, the court ordered guardianship to the aunt, removed the concurrent plan of reunification since a permanent plan had been achieved. Respondent mother appealed arguing the court did not make the required findings to eliminate reunification as a permanent plan and relied on insufficient evidence to support the findings that the aunt understood the legal significance of the guardianship and had adequate resources to care for the children.
- Standard of review: whether there is competent evidence to support the findings of fact and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.
- A court's determination that reunification efforts will be unsuccessful or inconsistent with children's health and safety is a conclusion of law that must be supported by findings of fact. When relevant, findings of fact that efforts to reunite the child with either parent would clearly

be unsuccessful or inconsistent with the child's health and safety and need for a permanent safe home within a reasonable period of time are required under G.S. 7B-906.1(d)(3). Additionally, G.S. 7B-906.1(e) requires findings about whether it is possible for the child to be placed with the parent within the next six months. A court is not required to quote the exact language of the statute but instead must address the statute's concerns (citing *In re L.M.T.*, 367 N.C. 165 (2013)). "Pursuant to *In re L.M.T.*, we see no reason why the trial court's findings of fact, taken as a whole, cannot sufficiently address the concerns of multiple statutory criteria without more explicit reference to each." Sl.Op. at 8. The findings addressing mother continuing to struggle with substance abuse, failing to acknowledge her problem, and lack of progress such that the children's future health and safety are threatened and further efforts toward reunification would be unsuccessful fulfill the statutory requirement of G.S. 7B-906.1(d)(3).

- Reunification as a permanent plan was removed as a concurrent plan when the court ordered guardianship, which achieved the child's permanent plan. A secondary permanent plan is not required with a permanent plan has been achieved. G.S. 7B-906.2(a1). The court made all four findings required under G.S. 7B-906.2(d) and fulfilled the requirements of G.S. 7B-906.2(b) & (d).
- The court must verify that the guardian understands the legal significance of the appointment and will have adequate resources to care for the juveniles. There is sufficient evidence to support the findings of both requirements. Although the aunt did not testify, the DSS social worker did and the DSS summary was admitted. That evidence included that the aunt was informed of the legal significance of the guardianship, understands what it means and is aware that the role is permanent. The aunt's testimony was not required for the court to find she understand the legal significance of the appointment. The social worker testimony and summary are relevant and reliable evidence the court may consider under G.S. 7B-906.1(c). Additionally, the evidence that the aunt had provided for the children well over the past year and had financial support from her family (including respondent mother), worked part-time, and the children were eligible for Medicaid were sufficient to support the finding that the aunt had adequate financial resources to care for the children.

### Permanency Planning Order: Eliminate Reunification

*In re J.H.*, \_\_\_ N.C. \_\_\_ (Jan. 24, 2020)

#### **Held: Affirmed**

- Facts: Four children were adjudicated abused and neglected. The court ordered respondent mother to engage in a case plan – complete a mental health assessment and follow all recommendations, maintain employment and appropriate and safe housing for a minimum of 6 months, participate in parent coaching and implement the skills during visits, and sign necessary release forms for the court and DSS to monitor her progress. At a permanency planning hearing, the court ordered concurrent plans of adoption and reunification with the children's fathers. Respondent mother preserved the right to appeal this permanency planning order (PPO). Mother's rights were subsequently terminated, and she appealed both the PPO and TPR. The TPR appeal is limited to the dispositional determination that TPR was in the children's best interests.



- Standard of review: Appellate review of an order that eliminates reunification as a permanent plan “is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusion of law” and “to determine . . . whether the trial court abused its discretion with respect to disposition.” Sl.Op. at 5. At disposition, the trial court considers the child’s best interests.
- Reunification must be a primary or secondary plan unless findings are made under G.S. 7B-906.2(b) and (d). The court made findings the mother made some progress on her case plan but was not in compliance with other requirements of her case plan and was unable to safely parent her children. The evidence, including reports from the parenting coach, supported the court’s finding that respondent mother only made “some progress.” Based on the extensive findings and underlying evidence, there was no abuse of discretion when the trial court eliminated reunification with the mother because that was in the children’s best interests.

### Permanency Planning Order: Guardianship; Relative Priority

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

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

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



## Permanency Planning: Guardianship Verification, Parent's Constitutional Rights, Eliminate Reunification, Waive Reviews

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

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

- Facts: In March 2016, four children were adjudicated neglected. Over several years, the court ordered reunification as one of the concurrent permanent plans and ordered that respondent mother comply with her case plan. In January 2019, the court entered an order of guardianship of one of the children to her foster parents and waived further review hearings. Respondent mother appeals, raising several issues.
- Waiving further review hearings: G.S. 7B-906.1(n) allows the trial court to waive future review hearings if it finds by clear, cogent, and convincing evidence, each of the five enumerated factors. Respondent argues there was insufficient evidence to support some of the findings. Social worker testimony of mother's inability to adequately care for the child without supervision and direction is clear, cogent, and convincing evidence for the finding that neither the juvenile's best interests nor the best interests of any party require a review hearing every 6 months (factor (3)). The hearing transcript shows that the trial court informed all parties and their attorneys who were present that the case could be brought for a review at any time through a motion by a party or by the court (factor (4)).
- Constitutional Rights and Parent's Unfitness: A parent may lose her paramount rights to care, custody, and control of her child if there is a finding based on a clear, cogent, and convincing evidence that the parent is unfit or has acted inconsistently with her constitutionally protected status. In awarding guardianship to the foster parents, the court found "both parents are acting inconsistently with the health and safety of the child and are unfit to have custody." Sl.Op. at 10. Specific findings included mother not being able to adequately demonstrate her ability to parent, need for significant monitoring, and need to move back to supervised visits from unsupervised visits. The findings were supported by social worker testimony. Regarding mother's challenge to the weight given to evidence of mother's progress by the trial court, "it is not the function of [the appellate court] to reweigh evidence on appeal." Sl.Op. at 11-12.
- Verification of guardianship: Before a court may order guardianship, it must verify the person(s) being appointed understand the legal significance of the appointment. Although the court must receive evidence of these factors, there are no specific findings that are required. The testimony of both foster parents about their understanding, the social worker testimony that the foster parents understood their responsibilities, and the court's findings that the foster parents are committed to providing for the child to and past the age of majority and are willing to be parties to the action was sufficient verification by the trial court.
- Eliminating Reunification (*Author's Note: The opinion refers to ceasing reunification efforts*):
  - The standard of review is whether the court made appropriate findings, whether the findings are based on credible evidence, whether the findings support the conclusions, and whether the trial court abused its discretion in the disposition.
  - Findings under G.S. 7B-906.2(b) and (d) are required. The order had limited findings addressing only a portion of what was required. There was no finding under G.S. 7B-

906.2(d)(3) as to whether the parent remains available to the court, DSS, or child's GAL.  
Remanded to make the required statutory findings.

### Permanency Planning: Waiving Further Reviews and "Period of At Least One Year"

*In re J.T.S.*, 834 S.E.2d 637 (N.C. Ct. App. 2019)

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

- **Facts:** Respondent mother appeals from an August 17, 2018 permanency planning order that awards guardianship to the maternal grandparents and waives review hearings under G.S. 7B-906.1(n), arguing the children had not resided with the grandparents for a continuous period of at least one year. The court made a finding that the children were placed with their maternal grandparents since Oct. 2017, and before that the children had previously resided with their grandparents.
- **Standard of review:** Questions of statutory interpretation are questions of law that are reviewed de novo.
- **Holding & Rationale:** G.S. 7B-906.1(n) allows the court to waive further reviews if the court finds by clear, cogent, and convincing evidence each of the 5 factors, the first of which is "the juvenile has resided in the placement for a period of at least one year." Because "a period of at least one year" is ambiguous, the court looks to the purposes of the Juvenile Code to determine the intent of G.S. 7B-906.1(n). Given the purpose of achieving a safe permanent home within a reasonable period of time and the required findings of G.S. 7B-906.1(n) that address a stable and continuing placement with a permanent guardian or custodian, a period of at least one year means "a continuous, uninterrupted period of at least 12 months" and not an aggregation of interrupted, sporadic placements. Sl. Op. at 14. This opinion is distinguished from *In re T.P.*, 217 N.C. App. 181 (2011), which allowed for the 12-month period to span over different relatives. In *In re T.P.*, the language of G.S. 7B-906.1(n) differed and referred to a juvenile who had resided with a relative or custodian versus today's language that the juvenile resided in the placement. Here, the findings do not support the conclusion of law; this portion of the permanency planning order is vacated.
- **Preserve for appeal:** Although respondent did not object to this issue at trial, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved notwithstanding [the] defendant's failure to object at trial." Sl. Op. at 9 (citation omitted). Failure to make written findings of each of the enumerated criteria in G.S. 7B-906.1(n) is reversible error.

### Disposition: GS 7B-911

*In re E.P.-L.M.*, \_\_\_ N.C. App. \_\_\_ (August 4, 2020)

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

- **Facts:** Prior to DSS involvement, there was a Chapter 50 civil custody order that awarded joint physical custody to both parents, with the juvenile primarily living with mother as father had moved to Georgia. Mother and juvenile resided with maternal grandmother. DSS became involved when mother and grandmother made multiple reports of sexual abuse of the juvenile

by the father. After multiple medical assessments and DSS and law enforcement investigations, none of the reports of sexual abuse were substantiated. During in-home services with DSS, mother refused to agree to a placement of the juvenile with paternal relatives. DSS filed a petition alleging abuse, neglect, and dependency based on mother's substance abuse, housing, and repeated unsubstantiated reports of sexual abuse by the father. At hearing, DSS, the GAL, and father provided stipulations to the court; mother did not stipulate resulting in a hearing where the stipulations were admitted as well as testimony from the social worker, mother, and mother's substance abuse counselor. The child was adjudicated all three alleged conditions. The court entered a dispositional order that awarded custody to father and supervised visitation both electronically and in person for mother through a modification of the Chapter 50 custody order based on a substantial change in circumstances and terminated its jurisdiction in the juvenile action through G.S. 7B-911. Mother appeals, challenging the adjudications based on stipulations, the 7B-911 order, and the visitation order.

- Standard of review at disposition is an abuse of discretion. "No party 'bears the burden of proof in [dispositional] hearings, and the findings of fact need only be supported by sufficient competent evidence.'" Sl.Op. at 26 (quoting *In re L.M.T.*, 367 N.C. 165, 180 (2013)).
- G.S. 7B-911 and Modification of Ch. 50 Custody Order: When determining whether a substantial change in circumstances exists warranting a modification of an existing Ch. 50 custody order, the trial court is not required to literally examine the previous custody order. The trial court considers only those "*events which occurred after the entry of the previous order... [which] prevent[s] relitigation of conduct and circumstances that antedate the prior custody order.*" Sl.Op. at 24 (emphasis in opinion). Here, the trial court considered the events, specifically the child's adjudications, after the most recent custody order. The evidence and findings of the juvenile's adjudications based on mother's actions are sufficient to support the conclusion that there was a substantial change in circumstances.

*In re S.M.L.*, \_\_\_ N.C. App. \_\_\_ (July 21, 2020)

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

- Facts: At the time DSS filed its petition, there was an existing Ch. 50 custody order regarding the 2 children that awarded mother primary physical custody and father visitation and child support. DSS became involved when the older child disclosed sexual abuse by mother's boyfriend. As a safety plan, the children were temporarily placed with father but were allowed to return to mother upon the assurance that her boyfriend would have no contact with the juveniles. Mother initiated believed her child but then began to doubt the juvenile's disclosure, started having contact with her boyfriend, and inquired of DSS what the ramifications would be if she were to marry him. Father remained appropriate and supportive of the juvenile's account of her abuse. DSS recommended father file a motion to modify the Ch. 50 order, which he filed but his request for ex parte relief was denied due to DSS involvement. DSS filed an abuse and neglect petition for one juvenile and a neglect petition for the other. The court adjudicated the juveniles neglected and entered a disposition that awarded custody to father and referred to an order that needed to be drafted for modification of the Ch. 50 order and termination of the 7B action under G.S. 7B-911. That order was never entered. Mother appeals the adjudications and disposition.

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

## Post-Relinquishment Subject Matter Jurisdiction re: Permanency Planning Hearings

In re E.B., 824 S.E.2d 169 (N.C. Ct. App. 2019)

**Held: Affirmed, Dissent in part**

- Facts: In 2016, mother executed a relinquishment to DSS the day after the child was born. A putative father was named and paternity testing confirmed he is the child's father. Father entered into an out-of-home family services agreement with DSS. Child was placed in foster care and from 2016–Jan. 2018, the court held 6 permanency planning and review hearings resulting in 6 orders placing requirements on father. In April 2018, DSS filed a TPR petition, which was granted. Father timely appealed. Father also filed a petition for writ of certiorari, which was granted, for a review of the 6 permanency planning orders arguing lack of subject matter jurisdiction.
- Subject matter jurisdiction and permanency planning orders: Father argues and DSS concedes the trial court lacked subject matter jurisdiction to conduct review and permanency planning hearings because a petition alleging abuse, neglect, or dependency pursuant to G.S. 7B-402 and -403 was never filed with the court. Without the filing of an abuse, neglect, or dependency petition, no action was commenced and therefore the court lacked subject matter jurisdiction. As a result, each of the 6 permanency planning orders is void, and the requirements that those orders placed on the father must be disregarded.
  - Author's note: This opinion does not address G.S. 7B-909 hearings, "review of agency's plan for placement," when there has been a relinquishment and a child has not been adopted within 6 months. That statute does require a petition be filed but it is not a petition alleging abuse, neglect, or dependency.

## Appellate Rule 2

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

**Held: Affirmed and Remanded**

- Appellate court jurisdiction: Generally, arguments not made before the trial court are not reviewable on appeal. App. Rule 2 gives the appellate court discretion to review arguments not made at trial, which occurred here given that mother is indigent and was self-represented at trial. Mother's notice of appeal was filed after the disposition was rendered but before it was entered. The appellate court granted mother's writ for certiorari to proceed with the appeal.

## Appeal: Insufficient Record on Appeal

In re J.C.M.J.C., 834 S.E.2d 670 (N.C. Ct. App. 2019)

**Held: Dismissed**

- A trial court has subject matter jurisdiction in an abuse, neglect, or dependency action when a properly verified petition is filed with the district court. Because the record on appeal did not include copies of the petition for each child filed by DSS that alleged each juvenile was neglected, the record failed to show the trial court had subject matter jurisdiction over the matter. Because the appellate court cannot determine whether the trial court had jurisdiction, the appeal is dismissed. *See State v. Petersilie*, 334 N.C. 169 (1993). However, the court granted an appeal by writ of certiorari.

### Appeal: Preserve Issue

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

#### **Held: Affirmed**

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

### Appeal: Moot

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

#### **Held: dismissed**

- Facts: Respondent father appeals a permanency planning order that eliminated reunification as a permanent plan. During the pendency of the appeal the juvenile turned 18.
- Moot:
  - Under G.S. 7B-201(a), the trial court's subject matter jurisdiction over the juvenile proceeding terminates when the juvenile reaches the age of majority. The permanent plan is no longer in effect. Any order by the court of appeals would have no practical effect as the trial court has no jurisdiction.
  - None of the exceptions to the mootness doctrine apply in this case. Unlike an adjudication order or a termination of parental rights order, there are no collateral consequences from a permanency planning order that has unfavorable findings of fact. Contrary to respondent's assertion, "[f]indings of fact in a court order from an unrelated legal proceeding are not proper subjects of judicial notice" in a civil custody proceeding for another child. Sl.Op. at 5. The limited exception based on clear and significant public interest issues is not triggered by a fact-bound order involving a permanent plan for a specific juvenile. The capable of repetition yet evading review exception does not apply to this case, where the challenge is to findings of fact and legal conclusions that are specific to the case.

- Noting that the “State’s appellate system goes to rather extraordinary lengths to expedite these juvenile cases, and it is, and should be, rare for a juvenile case to be rendered moot in this way.” Sl.Op. at 2.

## Termination of Parental Rights

### UCCJEA: Subject Matter Jurisdiction

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

**Held: Affirmed**

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

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

**Held: Affirmed**

- Relevant Facts: In an appeal of a TPR, respondent mother argues the court lacked subject matter jurisdiction over one of the four children, Sara, because the initial A/N/D petition, which was the underlying action before this TPR, stated that the children had been placed out of the home by child protective services in Oklahoma. Mother argues this statement put the NC district court on notice that there was a prior custody determination made in another state.
- Burden on respondent mother: “Where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . [and] the burden is on the party asserting want of jurisdiction to show such want.” Sl. Op. at 6-7 (citations omitted). Respondent mother did not meet her burden when (1) relying on allegations and inferences and (2) failing to mention that the district court found as fact a child other than Sara was removed from mother’s custody in Oklahoma. Additionally, mother stipulated to the district court that the child protective matter in Oklahoma was closed, as was her duty under G.S. 50A-209(a). Given the record, it was reasonable for the district court to infer that Oklahoma did not have continuing jurisdiction. NC had initial custody determination jurisdiction based on NC being Sara’s home state.

### Personal Jurisdiction: Nonresident Parent; Minimum Contacts Not Required

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

**Held: Affirmed**

- This is a case of first impression.
- Facts: The children were born in South Carolina and moved with their mother to North Carolina when they were around 3 years old. The father remained in South Carolina. Years later, DSS in NC became involved, and the juveniles were adjudicated neglected. Respondent father continued to reside in South Carolina. He was represented by counsel at some of the hearings in the NC neglect action. After reunification efforts were ceased, DSS filed a TPR petition. Father filed a motion to dismiss for lack of personal jurisdiction based on lack of minimum contacts with North Carolina, which was denied. Father’s parental rights were terminated, and he appeals on the grounds of constitutional due process requirements.
- “Due process requires that a nonresident against whom relief is sought be provided adequate notice of the suit and be subject to the personal jurisdiction of the court.” Sl. Op. at 4 (citations omitted). Generally, due process requires a nonresident to have “...sufficient ‘minimum contacts’ with the forum state so ‘that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’ ” *Id.* (quoting *Int’l Shoe Co.* 326 U.S. 310, 316 (1945)). However, “due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings. Sl. Op. at 15.
- North Carolina’s long-arm statute provides that personal jurisdiction over nonresidents exists in actions that are brought under North Carolina statutes that specifically confer grounds for personal jurisdiction. G.S. 1-75.4(2). The UCCJEA, which applies to TPR proceedings, states



physical presence of or personal jurisdiction over a party or child is not necessary to make a child-custody determination. G.S. 50A-201(c).

- The status exception to minimum contacts has been recognized by the U.S. Supreme Court and “implies that minimum contacts are not required in status cases (e.g., divorce) because jurisdiction is established by the status of the plaintiff, rather than the location of the defendant. Some state courts have concluded the status exception applies to TPR proceedings as the child’s status to their parent is at issue, while other state courts have determined the exception does not apply to a TPR. In North Carolina, the best interests of the child are the paramount consideration in TPR cases, and when there is a conflict between the interests of children and parent, the child’s best interests prevail. In a TPR, a parent who does not adequately care for their child is involved, and “fairness requires that the State have the power to provide permanence for children living within its borders[,]” which is a matter of state concern. Sl.Op. at 13. The principle of acting in the child’s best interests is contradicted by not favoring the child’s home state when determining jurisdiction. Although minimum contacts are not required due to the status exception related to the child in TPR proceedings, the respondent parent continues to have a right to actively participate in the TPR proceeding. Any burden imposed on the respondent parent is mitigated by the appointment of counsel and right to seek participation through remote technology.
- The Court of Appeals’ opinions in *In re Finnican*, 104 N.C. app 157 (1991) and *In re Trueman*, 99 N.C. App. 579 (1990) are overruled.

### Personal Jurisdiction: Summons

*In re W.I.M.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

#### **Held: Affirmed**

- Facts: On September 18, 2018, DSS filed a petition to terminate parental rights. A summons was issued on September 21<sup>st</sup> and served on respondent father on October 3<sup>rd</sup>. Father timely filed a motion to dismiss raising lack of subject matter jurisdiction due to a lack of proper verification of the petition, which was signed by an authorized representative for the former DSS director. DSS filed a motion to amend the TPR petition to verify by an authorized agent of the current DSS director. The motion to amend was granted, and the trial court ordered DSS to file the amended petition and serve it on father. On November 27<sup>th</sup>, a new summons issued, and father was served with new summons and amended petition on December 4<sup>th</sup>. Father filed a motion to quash the November 27<sup>th</sup> successive summons since it was not an alias and pluries summons and did not contain an endorsement under Rule 4(d)(1)-(2) of the N.C. Civ. Pro. The motion was denied as the trial court found the amended summons and petition were not a successive summons warranting an alias and pluries summons but were new filings that were permitted by the court. The TPR was granted, and father appeals.
- The purpose of an endorsement or issuance of an alias and pluries summons is to maintain an original action to toll the applicable period of the statute of limitations. “No such consideration is invoked in this case.” Sl.Op. at 7. The trial court permitted the filing of the amended petition and issuance of new summons and referred to it as “new filings”, and father did not contend that the TPR filing would be time-barred.



- Father waived any objection to the court's personal jurisdiction over him as he never raised the issue of personal jurisdiction in his answer or motion to quash. Instead he raised subject matter jurisdiction.

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

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

**Held: Affirmed**

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

### GAL for Parent: Hearing re: Incompetency

In re Z.V.A., 835 S.E.2d 425 (N.C. S.Ct. 2019)

**Held: Affirmed**

- Facts: There is an underlying neglect action with a permanency planning order (PPO) of adoption and reunification. The PPO ordered DSS to proceed with a termination of parental rights for the parents. A week after the TPR was filed by DSS, the child was placed with the maternal aunt in New Jersey. After a TPR hearing, the court concluded neglect existed as to each parent and the TPR was in the child's best interests. Both parents appealed the TPR order.
- GAL appointment for mother: G.S. 7B-1101.1(c) authorizes the court to appoint a GAL for a respondent parent who is incompetent upon the court's own motion or the motion of a party. G.S. 7B-1101.1(c). Failure to appoint a GAL is reviewed for an abuse of discretion, which is when a court's ruling is so arbitrary or manifestly unsupported by reason. Substantial deference is given to the district court regarding decisions involving a party's competence (defined at G.S. 35A-1101(7)) because it interacts with the litigant and is able to form a better assessment of the litigant's mental condition than an appellate court that is limited to reviewing the cold, written record. "When the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [district] court should not,

*except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence." Sl.Op. at 5 quoting *In re T.L.H.*, 368 N.C. 101, 456 (2015) (emphasis in Sl.Op.). There is no extreme instance in this case, and the court did not abuse its discretion in not conducting an inquiry to mother's competency when despite an indication that mother has a mental disability based upon an IQ of 64, findings showed mother was able to work, attend school, and complete domestic violence classes that were part of her case plan.

## Motion to Continue

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

### **Held: Affirmed**

- **Facts:** In 2016, petitioners obtained a G.S. Chapter 50 custody order awarding them sole legal and physical custody of the child after determining both parents had acted inconsistently with their parental rights. In 2018, petitioners filed a TPR against both parents. Respondent mother requested a continuance, which was granted, so that her minor son could testify. When the TPR hearing resumed, respondent mother requested another continuance because her son was not present although he was subpoenaed through the adult he was living with. The court denied the second motion to continue. The TPR was granted, and respondent mother appeals challenging the court's denial of her motion to continue and the ground of abandonment.
- **The standard of a review for a ruling on a motion to continue** is reviewed for an abuse of discretion, unless the motion is based on a constitutional right that presents a question of law for the appellate court. "[R]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." Sl.Op. at 3 (citation omitted). This case does not raise a constitutional issue and is reviewed for an abuse of discretion.
  - **There was no abuse of discretion** in denying the motion to continue the resumed the TPR hearing, which was scheduled one month after the first motion to continue was granted. G.S. 7B-1109(d) allows for continuances beyond 90 days after the petition is filed "only in extraordinary circumstances when necessary for the proper administration of justice." The TPR petition was filed on August 28, 2018, and the continued TPR hearing was scheduled to be heard on March 27, 2019, Mother made no showing of extraordinary circumstances. With only a vague description of the expected testimony and no affidavit of offer of proof, respondent mother failed to demonstrate any prejudice from the denial of her motion to continue.

## Denial of TPR: Findings and Conclusions Required

*In re K.R.C.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

### **Held: Vacate and Remand**

- **Facts:** This is an appeal of a private TPR that was denied. Petitioner is the mother, who obtained sole legal and physical custody of the juvenile as a permanent plan in a neglect action. The court retained jurisdiction in the 7B action and waived reviews. Petitioner mother filed a TPR petition

against father 26 months after obtaining custody of the juvenile. The petition was denied when the court concluded “the grounds” were not proved by clear, cogent, and convincing evidence.

- Grounds and ground are used interchangeably. Although mother argues the court mistakenly believed she had to prove grounds to TPR rather than one ground, the use of the term “grounds” was not error as “ground” or “grounds” can be used to denote one basis or reason.
- G.S. 7B-1109 and -1110(c) when read together require the trial court make “appropriate findings of fact and conclusions of law” of the existence of nonexistence of the alleged grounds. This applies to both the granting and denial of a TPR. Further Rule 52 of the Rules of Civil Procedure requires the court to find facts specially and separately state conclusions of law. This allows the appellate court to review the record and order. There must be evidence to support findings, findings to support conclusions, and each step must be taken in logical sequence and appear in the order; otherwise, the appellate court cannot determine if the trial court acted correctly. The order does not include ultimate facts, which are the final effect of logical reasoning based on evidentiary facts, that is dispositive of any of the 4 grounds petitioner alleged, and the general conclusion of law does not provide an analysis of the legal standards the trial court applied. The issue here is not a lack of evidence but a lack of adequate findings and conclusions that makes the basis for the order clear.
- Although the failure to address an alleged ground in a TPR order granted under a different alleged ground amounts to a non-adjudication of that ground, this principle does not apply to the denial of TPR. A denial of a TPR at the adjudicatory phase requires the trial court’s evaluation of each and every ground so that an appellate review may take place.
- One of the 4 alleged grounds was dependency under G.S. 7B-1111(a)(6). Petitioner’s lack of argument on this issue suggest that she recognizes this ground does not exist. A dependent juvenile was in the custody of her mother (petitioner) and therefore is not dependent as she has a parent who is providing care and supervision. See G.S. 7B-101(9).

## Neglect; Recusal

*In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019)

### **Held: Affirmed**

- Facts: There is an underlying neglect action with a permanency planning order (PPO) of adoption and reunification. The PPO ordered DSS to proceed with a termination of parental rights for the parents. A week after the TPR was filed by DSS, the child was placed with the maternal aunt in New Jersey. After a TPR hearing, the court concluded neglect existed as to each parent and the TPR was in the child’s best interests. Both parents appealed the TPR order.
- Neglect: When a child and parent have been separated for a long period of time, neglect under G.S. 7B-1111(a)(1) requires a showing of past neglect and the likelihood of future neglect. To determine the likelihood of future neglect, the court must consider evidence of changed circumstances between the period of past neglect and the time of the TPR hearing. Clear, cogent, and convincing evidence supports the district court’s findings that father was willing to leave the child alone with mother despite her not being fit to care for the child, that respondents displayed constant marital discord during supervised visits with the child, and respondents intended to remain together. These findings support the conclusion of neglect based on prior neglect and the likelihood of future neglect.

- **Recusal:** “A court is not required to recuse itself absent a motion from a party, and when no such motion is made, the issue is not preserved for appellate review.” Sl.Op. at 11. Applying Rule of Appellate Procedure 2, the supreme court exercised its discretion to address parent’s argument for recusal, which was based on a statement made by the trial judge that at the previous permanency planning hearing he was willing to send the child to the care of the maternal aunt in New Jersey as he did not think the child could be with her parents and as such it was in the child’s best interests to TPR. This statement by the district court judge was merely an explanation that the court had taken that earlier step when determining the child’s best interests at the time that decision was made and was not a reflection that the court had reached a conclusion to terminate the parents’ rights prior to the TPR hearing. A determination that this statement was judicial bias would have the illogical consequence of a district court judge never being able to preside over a TPR after ordering a permanent plan that is compatible with the need for a TPR.

### Neglect: Insufficient Findings; Incarceration, Domestic Violence, Substance Use, DV

In re K.N., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

#### **Held: Vacated and remanded for further proceedings**

- **Facts:** Child was adjudicated neglected and dependent in an underlying juvenile action. Respondent father’s case plan included complete anger management and substance abuse evaluations and follow all recommendations, successfully complete parenting education, participate in a domestic violence intervention program, secure and maintain appropriate housing, comply with probation, and do not incur any new criminal charges. The trial court ultimately ordered concurrent permanent plans of adoption (primary) and reunification (secondary). DSS was ordered to initiate a TPR. The TPR was granted on the ground of neglect. Respondent father appeals, arguing the findings were not supported by the evidence, and the findings do not support the conclusion of neglect.
- **Neglect Standard:** When a child has been separated from a parent for a long period of time, the neglect ground requires a showing of both past neglect and a likelihood of future neglect by that parent. In determining the likelihood of future neglect, “the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect,” and “the determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.” Sl.Op. at 11 (emphasis in original; citations omitted).
- **Findings:** The trial court’s findings were insufficient to support the conclusion of neglect. There were very few findings that directly related to the respondent’s ability to care for his child or the extent to which his behavior affected his child’s welfare. The court could have made additional findings based on evidence in the record that may have been sufficient, such as respondent’s long history of drug abuse and extensive criminal record, the effect of the current criminal charges and the impact those charges would have on respondent’s ability to care for his child, respondent’s slow pace in completing his case plan and hostility towards people managing some of those services in which he refused to participate, and an additional domestic violence incident.

- Although one finding that did address the respondent's ability to care for his child is that respondent was currently incarcerated and awaiting trial on a number of criminal charges, incarceration in and of itself is not a sword or a shield in a TPR. The findings should include an analysis of the relevant facts and circumstances, including the length, of the parent's incarceration. Other findings do not establish that respondent failed to comply with the portions of his case plan that address domestic violence or substance abuse components of his case plan. There was no explanation about the finding that respondent provided diluted drug screens, how the court viewed those diluted screens, or the nature or extent of any earlier substance abuse issues of the respondent.

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

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

#### **Held: Affirmed**

- Facts: In 2017, the juvenile was adjudicated neglected and dependent. Respondent father did not contest the allegations in the petition that included mother's substance abuse and mental health issues and father's knowledge of those issues as well as his own extensive criminal history involving domestic violence and controlled substances. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition, which was granted on the grounds of neglect and abandonment. Respondent father appeals, arguing the evidence does not support the findings, and the findings do not support the conclusion that grounds existed.
- The standard of review is whether the findings are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusion of law.
- Under G.S. 7B-1111(a)(1) and 7B-101(15), neglect involves a lack of a parent's proper care, supervision, or discipline or when a juvenile lives in an injurious environment. When a parent and child have been separated for a long period of time, the TPR petitioner must show past neglect and a likelihood of future neglect. The trial court considers evidence of changed circumstances between the past neglect and the time of the TPR hearing. Because the determinative factors for whether a child is neglected are the circumstances and conditions surrounding the child and not the fault or culpability of the parent, it is "not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect." Sl.Op. at 20.
- Collateral estoppel applies to father in his challenge to findings that the mother lacked an appropriate child care arrangement at the time the juvenile petition alleging neglect and dependency was filed. The prior adjudication order made that finding and respondent-father, who did not appeal that order, is bound that finding. Collateral estoppel also applies to father's argument about his case plan requirements when the initial dispositional order in the N/D action stated he was required to follow a case plan that identified the services and steps he was to take.
- Judicial notice of all prior orders in the N/D action was taken by the trial court in the TPR. There were findings of fact in a permanency planning order about father's positive test for controlled substances. "Although the permanency planning order is subject to a lower standard of evidentiary proof than a termination of parental rights determination, this [Supreme] Court has acknowledged that '[a] trial court may take judicial notice of findings of fact made in prior

orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence.’ ” Sl.Op. at 9 *quoting In re T.N.H.*, 372 N.C. 403, 410 (2019). Further, the NC Supreme Court “agree[s] with the Court of Appeals that ‘[i]t is well-established that a trial court may take judicial notice of its own proceedings.’ ” Sl.Op. at 13 (citation omitted).

- The trial court determines the reasonable inferences to be drawn from competent evidence, which the trial court did in making its findings regarding respondent’s substance abuse and the circumstances for his missed drug screens.
- Incarceration in and of itself is neither a sword nor a shield in a TPR; “the extent to which a parent’s incarceration ... support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent’s incarceration.” Sl.Op. at 20 (citation omitted). Prior to father’s incarceration, he made no attempts to comply with his case plan and continued to test positive for controlled substances supporting the courts findings that past neglect existed and future neglect was likely since father’s circumstances had not changed at the time of the TPR hearing.

### Neglect: Sufficiency of Evidence and Findings

*In re J.O.D.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

#### **Held: Affirmed**

- Facts: In 2018, the juvenile was adjudicated neglected due primarily to issues of substance use as well as domestic violence. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition alleging neglect. The court granted the TPR, respondent mother filed a no merit appeal. Respondent father appealed arguing there was no likelihood of repetition of neglect.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent’s lack of proper care, supervision, or discipline or an environment that is injurious to a child’s welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child’s best interests and the fitness of the parent at the time of the adjudicatory hearing to TPR. “The trial court must consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the adjudication of neglect.” Sl.Op. at 7 (emphasis in opinion).
- The findings are supported by clear, cogent, and convincing evidence and support the conclusion of neglect.
  - The findings showed that father has a history of struggling with opiate addiction as well as use of other drugs. His case plan required he participate in substance abuse treatment. The evidence and findings showed that after initially complying with his case plan, he was discharged from treatment, repeatedly tested positive on his drug screens, and was abusing alcohol such that he did not make meaningful progress at the time of the TPR hearing. The conclusion that a likelihood of future neglect existed was appropriate given father’s history of substance use, failure to follow treatment recommendations, relapse, and alcohol abuse. There was domestic violence in the

relationship with mother as well. Respondent father did not complete a domestic violence program and continued to remain in a relationship with discord with mother. Based on social worker testimony, the trial court's inference that respondents continued to live together was reasonable. Record evidence that would have supported a contrary conclusion will not be reweighed by the appellate court. The trial court is also entitled to not give credit to father's testimony that he would separate from mother.

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

**Held: Affirmed**

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

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

**Held: Affirmed**

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



court was not required to credit her testimony given other testimony that was admitted. Father was in jail pending felony and misdemeanor charges at the time of the TPR hearing. Mother's testimony and father's incarceration, given the historical facts of the case, do not support different inferences the trial court should have made about the likelihood of repetition of neglect. The challenged findings are proved by clear and convincing evidence, and the findings as a whole support the conclusion that the neglect ground exists.

*In re J.C.L.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

**Held: Affirmed**

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

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

**Held: Affirmed**

- Facts: The child was adjudicated neglected and dependent in part based on father not having established paternity and never having seen or provided any financial or emotional support for the child. In a review order, father's paternity was established and he was permitted to send mail or gifts to the child through DSS and could call about her well-being. He was also required to contact DSS once he was released from prison so he could begin working a case plan. After he was released from prison, father did not make significant progress on his case plan, and DSS was ordered to initiate a TPR. After the TPR motion was filed, father was arrested on drug charges and violating parole and remained incarcerated until he pled guilty 4 months later. The TPR hearing was held after father's incarceration ended. The TPR was granted on the ground of neglect and failure to make reasonable progress. Father appeals. This opinion focuses on neglect.
- Neglect: G.S. 7B-1111(a)(1) authorizes a TPR when the parent has neglected the juvenile, which includes when a parent does not provide proper care, supervision, or discipline. When a parent and child have been separated for a long period, the petitioner/movant must show past neglect and a likelihood of future neglect by the parent. Factors include the best interests of the child and the fitness of the parent at the time of the TPR hearing. A TPR on the ground of neglect does not require that the respondent parent in the TPR be responsible for the child's prior neglect adjudication. An adjudication that a juvenile is neglected is based on "...the



circumstances and conditions surrounding the child, not the fault or culpability of the parent.” Sl.Op. at 13-14 quoting In re M.A.W., 370 N.C. 149, 154 (2017).

- **Incarceration:** Father was incarcerated for 14 months of the 2-year period that the juvenile was in DSS custody. As previously held, “incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. at 14-15. Although incarceration limits a parent’s ability to show affection, incarceration is not an excuse for a parent to fail to use whatever means are available to show an interest in his child. Father made minimal efforts to show an interest in his child – he sent a single birthday card. His minimal progress on his case plan was a result of his own conduct, including his later incarceration for his continued criminal activity, his missing or cancelling several meetings with DSS, and his not engaging in recommended services. All of these actions limited DSS’s ability to assist him and are not because of DSS’s failure to make reasonable efforts to assist him as he proposes.
- **Evidence and Findings:** The evidence at the TPR hearing including social worker testimony, the father’s testimony, and underlying review orders from the neglect and dependency action. In considering the father’s testimony, the trial court determined it was not credible, and a trial court is entitled to make a witness credibility determination “without fear of appellate reversal in light of the applicable standard of review.” Sl.Op. at 30. The evidence supports the court’s findings that father did not make adequate progress on his case plan or toward reunification, and the findings support the court’s conclusion of neglect.

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

**Held: Affirmed**

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

reasonably infer from the evidence that respondent could not maintain safe housing... and lacked the ability to do so in the future.” Sl.Op. at 7.

- The role of an appellate court is not to substitute its judgment for the trier of fact. The district court had repeated opportunities to observe respondent when determining whether his behaviors (addressed in the findings) impacted his ability to parent such that the child would be placed in an injurious environment.

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

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

- Facts: In an underlying abuse and neglect action, D.W.P. was adjudicated abused and neglected based on multiple serious injuries (bone fractures) that were in various stages of healing and were caused by nonaccidental means. His sister was adjudicated neglected. No plausible explanation for the injuries was provided by respondent mother or her fiancé at the time. Respondent mother entered an Alford plea to misdemeanor child abuse, which arose from the injuries to D.W.P. At a permanency planning hearing, the court eliminated reunification and directed DSS to file a TPR petition, which DSS did. The TPR was granted based on neglect and failure to make reasonable progress. Respondent mother appeals on the basis that the findings are not supported by clear, cogent, and convincing evidence. The opinion focuses on neglect.
- Standard of review is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusion of law.
- Findings and Role of Trial Judge: A trial judge’s duty is to determine a witness’s credibility and how much weight to give that testimony and to draw reasonable inferences from that testimony. These determinations are not subject to appellate review. Findings of fact must be “sufficiently specific” to allow for appellate review of the judgment and are made through processes of logical reasoning based on the evidence presented. Sl.Op. at 6. (citations omitted).
- Findings were supported by clear, cogent, and convincing evidence despite mother’s challenge to findings involving (1) her credibility based on the various explanations she provided for how the child may have been injured and her lack of insight about the injuries and failure to make reasonable progress; (2) her probation violation for not obtaining a psychiatric evaluation; (3) her working on reestablishing her relationship, which involved domestic violence, with her now ex-fiance; and (4) her getting married to a different man and withholding that information from the DSS social worker which resulted in a background check on him not being conducted.
- Likelihood of neglect: Because of the period of separation between mother and her child, the court must determine whether there was prior neglect and a likelihood of future neglect, with the determinative factors being the child’s best interests and the parent’s fitness to care for the child at the time of the TPR hearing. Although respondent mother has made some progress, including completing parenting classes, attending therapy, and regularly visiting with the children, she continued to fail to acknowledge the likely cause of her child’s injuries. In a TPR, the child’s best interests are paramount and are meant to ensure the child’s safety and well-being and to not be punitive against the parent. The findings that mother did not try to understand how her child was injured or how her relationships affect the children’s wellbeing support the conclusion that neglect is likely to reoccur.

- Dissent (Earls, J): The findings are not supported by the evidence. Mother was compliant with her case plan. Further, the evidence shows mother (1) was consistent throughout the case that she did not injure her child and did not know how he was injured and (2) acknowledged her responsibility to protect her children as their primary caregiver. Regarding the injured child's sister, the findings of fact relate to her living in the home where another child was abused. That alone is insufficient when there is no evidence that current circumstances present a risk of harm or neglect to her.

## Neglect & Failure to Make Reasonable Progress: Findings

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

### **Held: Affirmed**

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

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

**Held: Reversed and Remanded**

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

*In re C.N.*, \_\_\_ N.C. App. \_\_\_ (Aug. 6, 2019)

**Held: reversed**

- Facts: In 2016 DSS filed a petition after law enforcement and EMTs responded to an incident involving injuries to an infant who spilled Mr. Clean on herself. They observed a dirty home that had needles in it, mother's reported use of marijuana, past incidents of domestic violence, and concerns about mother's mental health. Based on mother's stipulations, the children were adjudicated neglected due to improper care, supervision, or discipline and living in an environment injurious to the children's welfare. Mother's court ordered case plan included obtain and maintain stable income and housing, complete a mental health assessment and comply with all recommendations, sign releases for DSS and the GAL, submit to random drug screens, and successfully complete parenting classes and substance abuse treatment. The court ordered weekly supervised visitation for mother. In 2018, the court ultimately changed the permanent plans to a primary plan of adoption and concurrent plan of reunification. DSS filed a TPR petition alleging neglect and willful failure to make reasonable progress under G.S. 7B-1111(a)(1) & (2). The court ordered the TPR based on both grounds and mother appealed. DSS did not file a response or brief in the appeal.
- Standard of review: Whether clear, cogent, and convincing evidence exists to support the court's findings of fact and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Neglect: Where the juvenile has been removed from the parent's custody, the court must consider evidence of changed conditions in light of the prior neglect and the probability of the repetition of neglect. The court made specific findings that included mother completed the assessments but has not been consistent with treatment, is not compliant with her case plan,

lives with and is dependent on her boyfriend, was late to some and did not attend some visits with the children but when she did visit she was appropriate, took 13 of 38 drug screens with mixed results, and just started to re-engage with services on the day of the TPR hearing. DSS has the burden of overcoming the presumption of parental fitness by clear, cogent, and convincing evidence that a ground exists to terminate parental rights. Failure to make reasonable progress on a case plan may indicate a likelihood of future neglect but such failure must be viewed by considering the abilities and means of the parent including their resources and priority for securing basic life necessities. Mother made some progress on her case plan to reduce the likelihood of future neglect by completing parenting classes, the assessments, re-engaging in services, recently submitting to drug testing, being employed, and obtaining stable housing and transportation. "Here, the juveniles were removed from Respondent-mother's care after the youngest child spilled Mr. Clean onto herself and Respondent-mother called for medical assistance. No evidence shows and the trial court made no findings indicated such actions were likely to be repeated." Sl. Op. at 10.

- Failure to Make Reasonable Progress: Mother completed her assessment and sought mental health services. "While evidence tending to show missed therapy sessions may support the trial court's finding that her attending treatment was inconsistent, a parent's inconsistent attendance at therapy sessions does not alone show a lack of reasonable progress, particularly when a parent is working or seeking to comply with other provisions of her plan to meet her and her children's needs." Sl. Op. 12. Reasonable progress does not require perfection but does require more than extremely limited progress. Undisputed evidence shows mother made reasonable progress by reenrolling in substance abuse treatment, continuing therapy, taking medication for her mental health issues, completed parenting classes, improved her housing and transportation, was employed, and maintained better contact with DSS. Although mother's stable housing and transportation were partly attributable to her boyfriend, her "case plan does not and cannot require that she alone be responsible for providing her housing and transportation." Sl. Op. at 14. Additionally, housing and transportation do not relate to the causes or conditions for the children's removal. See G.S. 7B-904 (court's authority). DSS has not met its burden against the parental presumption of fitness.

### Neglect and Dependency: Findings of Fact; Conclusion of Law

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

#### **Held: Reversed**

- Facts: In 2016, the juvenile (along with his siblings) was adjudicated neglected and dependent due to a lack of proper care and supervision and an environment injurious to his welfare. Mother had a long history with CPS. The marriage between mother and the juvenile's father was mother's third and domestic violence was present. Throughout the case, mother was awarded supervised visitation. Mother was also ordered to comply with her case plan, which required her to engage in services to address domestic violence, her emotional and mental health, parenting skills, and stable housing. After the primary permanent plan was changed to adoption, with a secondary plan of reunification with mother, DSS was ordered to and did file a TPR. After a

hearing, the TPR was granted on the grounds of neglect and dependency. Mother appeals, challenging the court's findings.

- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. The neglect must result in some physical, mental, or emotional impairment or a substantial risk of such impairment to the juvenile. When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child's best interests and the fitness of the parent at the time of the adjudicatory hearing to TPR. "A termination of parental rights for neglect cannot be based solely on past conditions that no longer exist." SI.Op. at 29.
- Findings regarding the likelihood of future neglect are unsupported by the evidence and the remaining findings are insufficient to support the ground of neglect.
  - Despite the finding that mother did not fully comply with her case plan, the evidence shows otherwise. Mother completed her domestic violence support group, completed parenting classes, completed outpatient therapy after accomplishing her treatment goals with no further treatment recommended, separated and divorced the juvenile's father and obtained and extended a DVPO against him, maintained stable income with disability benefits and a part-time job, moved into a 3-bedroom home, consistently attended her supervised visitation, and paid monthly child support.
  - The finding about mother's new online relationship that created a red flag that caused the court to question mother's judgment is unsupported by the evidence. The evidence about mother's online communications does not indicate any risk to the juvenile. Without any legitimate basis for believing mother's relationship was likely to cause harm to the juvenile, DSS lacks authority to prohibit mother from engaging in her social interaction.
  - Regarding domestic violence and her past history with DSS, mother's therapists did not believe she needed additional treatment to avoid abusive relationships or to understand why her child was removed by DSS. She also divorced her husband and obtained a DVPO against him. Past cases supporting a finding of likelihood of neglect based on domestic violence involve a parent continuing to participate in domestic violence, failing to engage in therapy, or refusing to end the abusive relationship. The evidence also showed she developed a detailed safety plan for her son, which acknowledged her role in failing to protect her children, in anticipation of reunification.
  - Although mother never had unsupervised visits, the record shows she was not permitted to do so.
  - Regarding her housing, the findings focused on the environment and management of the household as two of her other children, who were adults, resided with her. Although the trial court, as fact finder, may make reasonable inferences from the evidence, it "cannot rest on conjecture or surmise.... [and] the appellant court may review the reasonableness of the inferences drawn by the trial court from the evidence." SI.Op. at 26. Here, the majority of the findings were based on conjecture and were not reasonable inferences that mother would be unable to maintain a safe and stable environment for the juvenile such that he would be at risk of harm.

- Dependency as a ground to TPR under G.S. 7B-1111(a)(6) requires findings that establish (1) the parent's inability to provide care or supervision and (2) the parent lacking an alternative child care arrangement. The finding that mother was incapable of providing care and supervision was unsupported by the evidence as explained above.

### Failure to Make Reasonable Progress: Conditions that Led to Removal

In re B.O.A., \_\_\_ N.C. \_\_\_ (Aug. 16, 2019)

#### **Held: Reverse COA decision**

- Facts and Procedural History: DSS received a report after law enforcement responded to a domestic violence call where both parents were arrested and the infant child presented with a bruise on her arm. A petition alleging neglect was filed by DSS. Mother and DSS entered into a case plan where mother agreed to compete DV counseling and avoid DV situations; complete a mental health assessment and take medication as prescribed; complete parenting classes and utilize the skills during her visits; remain drug-free, submit to random drug screens, and participate in weekly substance abuse therapy; refrain from criminal activity; and maintain stable income for 3 months. The child was adjudicated neglected based on an injurious environment, and at disposition, mother was ordered to comply with the provisions of the case plan that she agreed to. Ultimately, DSS initiated a TPR, which was granted based upon mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from mother's home. Mother appealed, and the court of appeals reversed the TPR based on a lack of evidence to support some findings and the trial court's reliance on portions of her case plan (substance abuse, mental health, and income) that were not relevant to the conditions that led to the child's removal – domestic violence and a bruise on the infant's arm. The supreme court granted discretionary review.
- Standard of review: whether the findings of fact are supported by clear, cogent, and convincing evidence and whether those finding support the conclusions of law. A finding of fact that is supported by clear, cogent, and convincing evidence is conclusive even if the record contains evidence that would support a contrary finding.
- Statutory interpretation of conditions that led to the removal of the juvenile: "It is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.... Legislative intent controls the meaning of the statute." Sl. Op. at 13 (citations omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." Sl. Op. at 14 (citations omitted). There is nothing in the language of G.S. 7B-1111(a)(2) that suggests the only "conditions of removal" that are relevant "are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile." *Id.* In looking at other related statutes, G.S. 7B-904(d1)(3), a more expansive reading of the language in G.S. 7B-1111(a)(2) is appropriate. "[T]he trial judge in an abuse, neglect, or 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. In addition, G.S. 7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, to modify



and update a parent's case plan in subsequent review proceedings.... Thus the relevant statutory provisions appears to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and indirect underlying causes of the juvenile's removal...." Sl. Op. at 15-16.

- "Parental compliance with a judicially adopted case plan is relevant in determining whether grounds exist pursuant to G.S. 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." Sl. Op. at 20-21. A more restrictive interpretation would fail to recognize the complex issues that must be resolved in an abuse, neglect, or dependency case and "would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency." Sl. Op. at 21. "[A] child's removal is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation." *Id.* A judge's authority, however, is not unlimited. Reasonable progress does not require full compliance with all the elements of a case plan. The extent to which a parent has reasonably complied with a case plan provision that addresses an issue that directly or indirectly contributed to the child's removal is relevant for a determination of whether the parent failed to make reasonable progress under G.S. 7B-1111(a)(2). In this case, "the necessary nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [Bev's] removal' from the parental home exists." Sl. Op. at 22. Mother's progress was limited and not reasonable as she abused and/or did not take her prescriptions, did not submit to her drug tests and failed some of them, did not demonstrate parenting skills she learned during visits, and did not complete the mental health evaluation and attend therapy.

In re C.J., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

Held: Affirmed

- Facts: Child was adjudicated dependent. Respondent mother was ordered to complete a diagnostic therapeutic assessment and substance abuse assessment and follow all recommendations; complete drug screens; obtain and maintain verifiable employment and stable housing suitable for the child; and communicate with DSS. After failing to make progress on her case plan, the court ordered a primary permanent plan of adoption. DSS filed a TPR, which was granted in part on the ground of failing to make reasonable progress to correct the conditions that led to the child's removal (G.S. 7B-1111(a)(2)). Respondent mother appeals.
- Review of challenged findings: Findings of fact that respondent mother challenged as unsupported by clear, cogent, and convincing evidence were not necessary to support the court's conclusion of a TPR ground and were not addressed on appeal. The appellate court reviews only those findings that are necessary to support a determination that TPR grounds existed.



- Case Plan Nexus to Conditions Leading to Removal: Quoting *In re B.O.A.*, 831 S.E.2d 305, 314 (N.C. S.Ct. 2019), “a trial court’s conclusion on this ground [G.S. 7B-1111(a)(2)] is supported when there exists ‘a nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the ‘conditions which led to [the juvenile’s] removal from the parental home.’ ” Sl.Op at 5. The adjudication and dispositional orders found the child’s removal was based on mother leaving the child with her (mother’s) boyfriend after she was arrested and extradited to Mississippi because of drug-trafficking and stolen weapons charges. Mother had an extensive history with the Mississippi child protective agency, which had an open case because of allegations mother used the child to obtain drugs. Mother’s demeanor at the hearing raised concerns by the court that she was under the influence or suffering from a mental health condition. These findings established the required nexus. The findings that mother did not address any part of her case plan or visit with her child was supported by clear, cogent, and convincing evidence and support the court’s conclusion that G.S. 7B-1111(a)(2) existed for TPR.

### Failure to Make Reasonable Progress: Findings

*In re A.B.C.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

**Held: Affirmed (4-3 decision)**

- Facts: In 2015, the juvenile was adjudicated dependent primarily due to the parents’ substance use. Reunification efforts with mother were ceased in 2016. In 2017, DSS filed a TPR petition, which was granted on the ground of failure to make reasonable progress (G.S. 7B-1111(a)(2)), and mother appealed. On appeal, the court of appeals vacated and remanded the case for findings after concluding there was tension in the findings such that the appellate court could not conduct a meaningful review. On remand, the trial court did not take additional evidence and entered an amended adjudication order with additional findings of fact and granted the TPR. Mother appealed the ground and best interests determination (the best interests portion of this appeal is discussed in the section below).
- G.S. 7B-1111(a)(2) authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. A trial court should not find a parent has failed to make reasonable progress when that parent has not fully satisfied all the case plan requirements but does have the authority to determine that a parent’s “extremely limited progress” supports the ground. Mother’s case plan included substance use treatment and stable housing.
- The findings establish mother made marginal progress because she did not continue the recommended substance abuse treatment after completing a 6-month program. The court found that respondent chose to participate in a methadone program without counseling or a plan to wean herself off the methadone and that mother’s testimony that she was in AA or NA was not credible. “[T]he fact that respondent decided to address her substance abuse in this manner – without counseling, all the while having the available option to continue with another residential rehabilitation program that would have allowed her to reside with her child – after she completed the program at Our house is of great significance.” Sl.Op. at 14. The court’s

findings support the conclusion that mother failed to make reasonable progress to address the core reason for the child's removal.

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

*In re J.S.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

**Held: Affirmed**

- Facts: In 2016, the children were adjudicated neglected due to filthy and unsafe conditions in the home and mother's failure to follow the safety plan. Two years later, DSS filed TPR petitions, which were granted. Respondent mother appealed, challenging the grounds and disposition (disposition discussed in section below).
- G.S. 7B-1111(a)(2) authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. This requires that the child be left in foster care/other placement pursuant to a court order. The reasonable progress by a parent is evaluated for the period of time up to the TPR hearing. (agreeing with *In re A.C.F.*, 176 N.C. App. 520 (2006)). There is no requirement that a parent be in the position to regain custody of the children at the time of the TPR hearing. Willfulness is a question of fact; it does not require fault by the parent. Regardless of some efforts and good intentions, a prolonged inability to improve the situation will support a finding of willfulness and lack of progress. A parent's compliance with a court ordered case plan is relevant when there is a nexus between the case plan components that the parent failed to comply with and the conditions that led to the child's removal.
- Findings were sufficient
  - Mother complied with several case plan provisions including parenting classes, regular contact with DSS, passing drug screens, and visiting with the children. However, she did not make meaningful progress in improving the housing conditions, which were the primary reason for the children's removal.
  - Although mother had cognitive limitations and personality issues, she did not lack the ability to show reasonable progress. There was no indication that mother could not clean and maintain her home and she failed to do so when she was not responsible for providing child-rearing responsibilities to her children. She refused to cooperate with

the in-home aide provided by DSS and did not correct the conditions over a 3-year period. The court did not err in determining her actions were willful.

- There is no internal inconsistency in the order that determined mother willfully failed to make reasonable progress and that she was incapable of providing proper care and supervision to the children as part of the ground to TPR for dependency. Whether mother could regain custody of the children at the time of the TPR hearing is irrelevant for the ground under G.S. 7B-1111(a)(2).

*In re I.G.C.*, 835 S.E.2d 432 (2019)

**Held: Affirmed**

- Facts: The children were adjudicated dependent juveniles due to drug use and domestic violence involving both parents. Case plans were ordered to address parenting, substance abuse, mental health, domestic violence, stable housing, employment, no further criminal charges, visitation, and attendance at team meetings with DSS. DSS filed a motion to terminate parental rights after concurrent permanent plans of adoption and guardianship were ordered. The parents' rights were terminated on the grounds of neglect and failure to make reasonable progress to correct the conditions that led to the children's removal. Respondent parents' appeal. Respondent father's appeal was by a no merit brief and is affirmed after an appellate court review.
- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The mother's limited progress is well documented in the findings of fact as she never completed the substance abuse treatment or domestic violence program, missed multiple drug screens and tested positive on two, and had two DWI offenses after agreeing to the case plan. Although mother completed parenting courses and participated in some substance abuse and domestic violence treatment and had three negative drug screens, these services were of a lesser duration and intensity than recommended and were not approved by the court. The evidence supports the findings that mother did not maintain stable employment for at least six months, had not resided in the same residence for at least six months, and had frequent moves constituting housing instability. Although she was making some progress on her case plan, mother waited too long before working on her case plan to make reasonable progress to correct the conditions leading to the children's removal by the time of the TPR hearing.

*In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019)

**Held: Affirmed**

- Facts: The family has an extensive history with DSS based on substance abuse and domestic violence by father against the children and respondent mother. The children initially came into care through a voluntary placement by mother so that she and father could live together. DSS filed a petition and the children were adjudicated neglected. Throughout the 2-year action, mother and father continued to reside together and denied the impact that the domestic

violence and substance abuse history had on the children. After making limited progress, the court ordered a primary permanent plan of adoption, and DSS filed a TPR petition which was granted on the grounds of neglect and willful failure to make reasonable progress. Respondent mother appeals the TPR order, challenging the grounds and best interests determination.

- The standard of review of a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Unchallenged findings are deemed to be supported by competent evidence and are binding on appeal.
- G.S. 7B-1111(a)(2) is a ground to TPR when the parent has willfully left the child in a foster care or placement outside the home for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal. The findings that respondent mother lacked an understanding or did not accept responsibility for the circumstances leading to the children's removal is supported by clear, cogent, and convincing evidence as she continued to live with father who did not comply with his case plan, blamed the children and other people for his return home, and defended father throughout the TPR hearing. Mother did not make reasonable progress in her case plan that included providing a safe and stable home environment for the children.
- The trial court determines the credibility of witnesses, the weight to give the testimony, and the reasonable inferences made from that testimony. It was reasonable for the court to infer that the social worker was prevented from having access to the home when respondent parents repeatedly cancelled home visits. Evidence, through social worker testimony, supported the finding that mother either refused or failed to provide a new address (after being evicted) to DSS and made it difficult for the social worker to conduct home visits to assess whether there was safe and stable housing for the children. Respondent mother did not rebut the clear, cogent, and convincing evidence by DSS, and her failure to do so is not a shifting of the burden of proof on to respondent mother. The court reasonably inferred mother placed her relationship with the father over the children's safety even though there was no evidence of domestic violence occurring after the children's removal.
- The standard of review of a best interests determination at disposition is an abuse of discretion. Agreeing with the court of appeals, G.S. 7B-1110(a) requires the court to consider all the factors designated therein but is only required to make written findings of relevant facts. When there is conflicting evidence of a factor, placing it at issue before the district court, that factor is relevant. Here, the hearing transcript shows the court considered all the factors and made the necessary findings, which addressed the child's age (9 years old), likelihood of adoption (via social worker testimony), that any bond between the child and parent was outweighed by the need for the child's permanence, and "other" factors addressing the child's attachment and success in the foster home as well as his therapy. The quality of the relationship between the child and prospective adoptive parent or other permanent placement was not relevant as there was not a potential adoptive placement at the time of the TPR hearing.

## Dependency: Alternative Child Care Arrangement; Child's Mental Health Needs in PRTF

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

### **Held: Affirmed**

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

## Abandonment/Neglect: Insufficient Findings, Willfulness, Court Questioning of Witnesses

In re N.D.A., 833 S.E.2d 768 (N.C. S.Ct. 2019)

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

- Facts: This is a private TPR that was granted based on willful abandonment and neglect from which respondent father appeals, challenging the sufficiency of the facts to support the conclusions of law.
- Standard of Review for TPR adjudication is based on whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Findings of fact
  - Recitation of a witness's testimony is not a finding of fact. The "finding" in the TPR order that father "testified that he attempted to set up visits with the child but could not get any assistance in doing so" without a determination of his credibility is not a finding of fact and must be disregarded. Sl.Op. at 6.
  - The finding that father "had significant problems with substance abuse for many years" was supported by the evidence, specifically father's testimony. Sl.Op. at 6.
  - An ultimate finding of fact " ' is a conclusion of law or at least a determination of a mixed question of law and fact' and should be 'distinguished from the findings of primary, evidentiary, or circumstantial facts.' " Sl.Op. at 8-9 (citation omitted). The

findings that (1) the child has been neglected by the father and (2) the father has willfully abandoned the child do not involve the exercise of judgment and are not findings. Their classification as such do not alter the need for the trial court to make factual findings sufficient to support a TPR ground.

- Abandonment implies conduct on the part of a parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child and is demonstrated by a parent withholding his presence, love, care, opportunity to display filial affection, and willful neglect to provide support and maintenance to the child. Willful intent is a question of fact.
  - Under G.S. 7B-1111(a)(7) the determinative time period is the immediate six months preceding the filing of the petition although a court may consider a parent's conduct outside that time period to evaluate a parent's credibility and intentions. The court findings did not adequately address the willfulness of the father's actions. The father's unchallenged testimony showed he unsuccessfully attempted to make arrangements to visit the child and there was no determination regarding father's credibility or findings about whether father, who was incarcerated, had the ability to contact the child or petitioner or pay financial support during the relevant period. The lack of findings addressing father's ability, which goes to intent/willfulness, do not support the ultimate determination that father willfully abandoned the child.
  - Under G.S. 7B-1111(a)(1), abandonment is included in the definition of neglect. Here, the TPR was based on current neglect (vs. past neglect and a likelihood of future neglect). The time period is not limited to the six months immediately preceding the filing of the petition, allowing the court to look at a more extended period of time. Abandonment based on neglect involves a parent's conduct that demonstrates "willful neglect and refusal to perform the natural and legal obligations of parental care and support." Sl.Op. at 16. The findings do not adequately address father's willfulness. There were no findings that addressed whether father, who was incarcerated, had the ability to contact the child or petitioner, exercise visitation, or pay support.
- Burden and court questioning of witnesses: At the adjudicatory stage of a TPR, the petitioner bears the burden of proof by clear, cogent, and convincing evidence that one or more alleged grounds exists. Under N.C.R. Evid. 614(b), the court "may interrogate witnesses, whether called by itself or by a party." Sl.Op. at 20. "It is proper for the judge to propound competent questions to a witness [during a trial] in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked." (citation omitted). Sl.Op. at 20. There was no bias against respondent or in favor of petitioner from the trial court's questioning of witnesses regarding work schedules, reason for method of contacting respondent, nature and extent of contact between petitioner and respondent, dates and length of incarceration, and the number of attempted contacts with petitioner. Each question was relevant to the issue to be determined.

## Abandonment: Sufficiency of Notice; Findings

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

### **Held: Affirmed**

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

## Abandonment

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

### **Held: Affirmed**

- **Facts:** In 2016, petitioners obtained a G.S. Chapter 50 custody order awarding them sole legal and physical custody of the child after determining both parents had acted inconsistently with their parental rights. In 2018, petitioners filed a TPR against both parents. Respondent mother requested a continuance, which was granted, so that her minor son could testify. When the TPR hearing resumed, respondent mother requested another continuance because her son was not present although he was subpoenaed through the adult he was living with. The court denied the second motion to continue. The TPR was granted, and respondent mother appeals challenging the court's denial of her motion to continue and the ground of abandonment.
- **The standard of review for an adjudication** is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusion of law. Conclusions of law are reviewed de novo.



- Abandonment under G.S. 7B-1111(a)(7) has a determinate period of six months immediately preceding the filing of the TPR petition, but the parent's actions outside of that time period may be considered to evaluate a parent's credibility and intentions during the determinative 6-month period. Abandonment involves "conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." Sl.Op. at 7 (citation omitted). Whether a parent acted willfully is a question of fact.
- The appellate court is bound by the unchallenged findings of fact, which support the adjudication of abandonment. Although there was ill will between petitioner and respondent-mother, "a parent *will not be excused from showing interest in [the] child's welfare by whatever means available.*" Sl.Op. at 10 (emphasis in opinion) (citation omitted). Mother made no effort to communicate with or contact the child for 2 years, including the 6-month determinative period, even though she knew the petitioner's location. The Chapter 50 order, although providing no visitation to mother, did not prohibit contact. Mother never sought to modify the Ch. 50 order.

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

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

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



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

**Held: Affirmed**

- Facts: In 2017, mother filed a petition to terminate father's parental rights on the ground of willful abandonment. Prior to the TPR petition, in 2015, a child custody order awarded mother sole care, custody, and control of the child and twice monthly supervised visitation with father. Mother had a DVPO against father from 2014 – 2018. From 2015- 2018, the DVPO included the child but allowed for supervised visitation. The court ordered the TPR and father appealed both the ground and best interests determinations.
- Abandonment under G.S. 7B-1111(a)(7) looks to a determinative 6 consecutive month period immediately before the TPR petition or motion is filed. Abandonment involves a parent's conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.
- Willfulness is a question of fact. Because it is an emotion, it is typically proved by circumstances that may be inferred. The court may look outside the determinative 6-month period when evaluating a parent's credibility and intentions.
- The findings show that from 2014 to the date the TPR was filed, respondent father had no contact or communication with the child even after he was awarded visitation twice a month in the 2016 custody order, did not provide financial support for the child, did not attempt to attend any medical appointments or school/extracurricular activities for the child, and did not seek a modification of the child custody order. These findings support the ultimate findings that respondent acted willfully, with the intent of foregoing his parental responsibilities.
- At disposition, the court applies the best interests of the child standard, "without regard to any competing interests of respondent. "An adjudication of grounds for terminating parental rights under N.C.G.S. 7B-111(a) constitutes a determination by the trial court that the respondent-parent is unfit or has acted inconsistently with his constitutionally protected status with regard to the subject juvenile." Sl.Op. at 15.
- A best interests determination is reviewed for an abuse of discretion. Dispositional findings are reviewed on a competent evidence standard. There were detailed findings for each of the factors set forth in G.S. 7B-1110 based on the evidence. In one challenged finding that there was no bond between the child and respondent, the evidence supports there is no child-parent bond. Regarding the father's testimony about his prior conduct to his child, the court determined the father's testimony was not credible. There is no abuse of discretion.

In re C.B.C., \_\_\_ N.C. \_\_\_ (Sept. 27, 2019)

**Held: Affirmed**

- Facts: This is a private TPR initiated by maternal grandparents against respondent father. After mother's death in 2012, a custody dispute between maternal grandparents and father was initiated, with maternal grandparents ultimately obtaining permanent custody in 2015. Respondent father was granted no visitation but was specifically authorized by the court order to petition for visitation after he was released from prison upon demonstrating his addressing his ongoing substance abuse and mental health issues. Respondent father was also permitted the right to write to his daughter. A first TPR was brought and denied. This is a second TPR,

where the court concluded there were grounds to TPR based on neglect and willful abandonment and that the TPR was in the child's best interests. Respondent father appeals.

- Standard: A TPR involves a two-stage process: adjudication and disposition. At adjudication, the petitioner has the burden of proving a ground by clear, cogent, and convincing evidence. The court reviews the adjudication by determining whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. If there is an adjudication, the court proceeds to the disposition stage, which considers the best interests of the child.
- "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims." Sl. Op. at 5 (citations omitted). Willful is a question of fact. "[I]f a parent withholds [that parent's] presence, [] love, [] care, the opportunity to display filial affection and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." Sl. Op. at 5-6 (citations omitted).
- Under G.S. 7B-1111(a)(7) the relevant time period to determine abandonment is the 6-month period preceding the filing of the TPR petition. Respondent was incarcerated half that time, yet "incarceration, standing alone, is neither a sword nor a shield" in a TPR. Respondent, although having limited options to show affection, "*will not be excused from showing interest in [the] child's welfare by whatever means available.*" Sl. Op. at 6 (emphasis added by supreme court, citing quoting In re D.E.M., 810 S.E.2d 375, 378 (N.C. Ct. App. 2018).
- The findings included respondent had regular income during part of the relevant period but did not provide any support for the child, made no effort to communicate with the child except for one birthday card that was sent after he was served with the TPR, made no effort to contact the custodians about the child's well-being despite having their contact information, and made no efforts to modify the existing custody order. These findings support the conclusion of willful abandonment.
- The father's participation in the first TPR hearing "does not preclude the trial court from later finding that he has willfully withheld his love, care, and affection during the determinative six-month period." Sl. Op at 8-9. Although a court may consider a parent's conduct outside of the determinative 6-month period, that goes to evaluating a parent's credibility and intentions and does not preclude a finding of willful abandonment during the determinative 6-month period.

In re E.H.P., \_\_\_ N.C. \_\_\_ (Aug. 16, 2019)

**Held: Affirmed**

- Facts: In 2013, a temporary custody order was entered awarding mother sole temporary custody and providing that father shall have no contact with the children until allowed by further order of the court. No motions were filed to seek a change in that temporary custody order. In 2018, mother petitioned for and obtained a TPR against respondent father. Father appealed on both the grounds (willful abandonment under G.S. 7B-1111(a)(7) and failure to pay child support) and disposition that is was in the children's best interests.
- The standard of review for a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and the finding support the conclusions of law. The disposition is reviewed for an abuse of discretion.

- “Abandonment implies conduct on the part of a parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” Sl. Op. at 7 (citations omitted). “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” Sl. Op. at 8 (citations omitted). Here, respondent concedes he had no contact with the children during the determinative 6-month time period under G.S. 7B-1111(a)(7). Although there was a temporary custody order forbidding contact between him and the children, father made no effort to modify the terms of the temporary order to allow contact between him and the children. “A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order.” Sl. Op. at 9-10. Although father was incarcerated during the relevant time period, he was aware of his ability to seek relief from trial court orders as he filed a motion to suspend his child support. Father’s conduct is sufficient to meet the standard of willful abandonment.
- An adjudication of a single ground under G.S. 7B-1111(a) is sufficient to support a TPR. Having affirmed one ground, the court need not address the appeal on the ground of willful failure to pay child support.
- At disposition, the court made detailed findings addressing the criteria of G.S. 7B-1110(a) include the bond with and strong likelihood of adoption by their stepfather and the lack of bond with their father. There was no abuse of discretion in determining the TPR is in the children’s best interests.

In re E.B., 824 S.E.2d 169 (N.C. Ct. App. 2019)

**Held: Affirmed, Dissent in part**

- Facts: In 2016, mother executed a relinquishment to DSS the day after the child was born. A putative father was named and paternity testing confirmed he is the child’s father. Father entered into an out-of-home family services agreement with DSS. Child was placed in foster care and from 2016–Jan. 2018, the court held 6 permanency planning and review hearings resulting in 6 orders placing requirements on father. In April 2018, DSS filed a TPR petition, which was granted. Father timely appealed. Father also filed a petition for writ of certiorari, which was granted, for a review of the 6 permanency planning orders arguing lack of subject matter jurisdiction.
- Subject matter jurisdiction and permanency planning orders: Father argues and DSS concedes the trial court lacked subject matter jurisdiction to conduct review and permanency planning hearings because a petition alleging abuse, neglect, or dependency pursuant to G.S. 7B-402 and -403 was never filed with the court. Without the filing of an abuse, neglect, or dependency petition, no action was commenced and therefore the court lacked subject matter jurisdiction. As a result, each of the 6 permanency planning orders is void, and the requirements that those orders placed on the father must be disregarded.
  - Author’s note: This opinion does not address G.S. 7B-909 hearings, “review of agency’s plan for placement,” when there has been a relinquishment and a child has not been adopted within 6 months. That statute does require a petition be filed but it is not a petition alleging abuse, neglect, or dependency.

- **TPR - Abandonment:** G.S. 7B-1111(a)(7) consists of a ground to TPR based on willful abandonment. Willfulness is a question of fact that must be supported by clear, cogent, and convincing evidence that shows “conduct on the part of the parent which manifests a willful determination to [forego] all parental duties and relinquish all parental claims to the child.” Sl.Op. at 9. Relevant factors include financial support and emotional contributions displaying love, care, and affection. The determinative period is the 6 months preceding the filing of the petition, which in this case was Oct. 10, 2017 – April 10, 2018. The unchallenged findings support the trial court’s conclusion of abandonment. Father allowed his sister to handle the child’s care and placement, moved out of state without telling DSS, failed to attend the permanency planning hearings and a child support hearing, did not request visits despite being authorized to do so, and did not make any Skype calls to the child despite having that opportunity.
- **Dissent:** “because the ground for termination alleged by DSS and adjudged by the trial court are inextricable intertwined with the invalid review hearing process, I would conclude the trial court erred in adjudicating grounds upon which to terminate Respondent-Father’s parental rights.” Sl.Op. at 1 (dissent)

### Failure to Pay Portion of Care

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

#### **Held: Affirmed**

- **Facts:** In 2016, respondent mother stipulated to facts that established the children were neglected based on a lack of proper care and supervision and an injurious environment. In 2017, a permanency planning order identified adoption as the primary plan and custody as a secondary plan. The trial court ordered that DSS not pursue a TPR so a home study for a possible kinship placement could be pursued. In 2018, after the possible placement was not approved, DSS filed a TPR petition, and the TPR was granted on four different grounds. Respondent mother appeals. This opinion focuses on the ground of failure to pay a reasonable portion of the cost of care while the children were in DSS custody. The children were in foster care from January 8, 2016 through the relevant 6-month period ending on July 10, 2018. The cost of care for each child was more than \$400,000. In 2016, mother was ordered to pay \$50/month in child support.
- G.S. 1111(a)(3) authorizes a TPR when a parent has willfully failed for a continuous period of 6 months preceding the filing of a TPR to pay a reasonable portion of the care of their child’s care when the child has been placed in DSS custody and the parent has a physical and financial ability to pay. Cost of care is the amount it costs DSS to pay for the child’s care (e.g. foster care), and the parent pays the portion that is “fair, just and equitable based upon the parent’s ability or means to pay.” Sl.Op. at 8 (Citation omitted).
- **Findings support conclusion:** During the determinative 6-month period, respondent mother paid nothing toward the children’s cost of care although she had an ability to pay more than zero as she was capable of working. Respondent mother was working at the start of the determinative time period prior to quitting her job, and although the person responsible for managing her Rx to address her mental health issues was unavailable during this period, there is nothing that indicates she could not have found an alternative provider. Her lapse in Rx is based on her own

conduct. Mother was also subject to a valid court order for child support and made no efforts to modify or set aside that order.

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

**Held: Affirmed**

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

**Prior TPR and No Safe Home**

*In re N.G.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

**Held: Affirmed**

- **Facts:** In 2017, the juvenile was adjudicated dependent. Ultimately DSS filed a petition to TPR, which was granted on multiple grounds. Respondent father appeals the grounds (mother appealed the best interests determination, which is discussed below).
- **G.S. 7B-1111(a)(9)** authorizes the ground for TPR when a parent's rights with regards to another child of the parent have been involuntarily terminated by a court and the parent lacks the ability or willingness to establish a safe home for the child who is the subject of the current TPR action.
- **The challenged findings of fact are supported by clear and convincing evidence**, which includes father's stipulations at the underlying adjudicatory hearing in the dependency action about the prior TPR and that his mental health did not allow him to provide a safe home, social worker testimony, father's testimony, and evaluations of experts and their testimony about father's mental health. The findings show that father has (1) a diagnosis of antisocial personality disorder, which is characterized by extensive lying and a disregard for social or moral standards and is difficult to treat, (2) acted in a consistent way with that diagnosis by lying to DSS about his

identity and failing to disclose a complete and accurate copy of an evaluation to a second evaluator, and (3) no interest in treatment or in changing. The findings support the court's conclusion that there was a prior TPR and father lacked the ability to provide a safe home.

In re T.N.H., \_\_\_ N.C. \_\_\_ (Aug. 16, 2019)

**Held: Affirmed**

- Facts: Respondent mother appeals a TPR based on G.S. 7B-1111(a)(9) (prior involuntary TPR and lack of ability or willingness to establish a safe home). Mother has an extensive DSS history dating back to 2000 that resulted in several of her children being removed from her care and not returned to her. Regarding T.N.H., a neglect petition was filed by DSS in 2015 due to domestic violence and threats to the juvenile by the juvenile's father. In 2015, T.N.H. was adjudicated neglected based on stipulations made by the parties, including mother. In 2017, guardianship was awarded with supervised visitation ordered with mother and father. In 2018, a new neglect petition was filed. T.N.H. was adjudicated neglected based on a lack of proper care and supervision. He had been permitted to stay with his parents unsupervised in a motel room, where he left the room and met a man who sexually abused him. His parents never reported the abuse, and his parents (and the man) were charged with felony child abuse. Mom is incarcerated. DSS initiated this TPR, which was granted. The appeal asserts that there was insufficient evidence and insufficient findings of fact for the TPR.
- The court must take evidence, find facts, and adjudicated the (non)existence of a ground under G.S. 7B-1111(a). "While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions, and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." Sl. Op. at 8 quoting *Quick v. Quick*, 305 N.C. 446, 451-52 (1982) (emphasis in original).
- Here, the trial court's reliance in part on evidence from prior proceedings and findings in earlier orders is proper and appropriate. Respondent is collaterally estopped from re-litigating the findings of fact in the 2015 and 2018 neglect adjudications that were based on her stipulations and were not appealed. "We agree with the Court of Appeals' precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." Sl. Op. at 12. The trial court took judicial notice of the record. Several of the findings about respondent's lack of progress were from the 2018 adjudicatory order which applies the clear and convincing evidence standard. The trial court also heard testimony from the social worker about the history and current lack of progress and based its finding in part of that testimony and demonstrates the court's independent determination of the evidence.
- Regarding G.S. 7B-1111(a)(9), respondent's rights to another child were terminated by court order. The record supports the court's finding that respondent lacks the ability or willingness to provide a safe home given her current incarceration with unknown release date, lack of stable home upon her release from prison and history of unstable housing, failure to satisfactorily complete her case plan, sexual abuse of T.N.H. while in her care and failure to believe his disclosure or to report the abuse, and lack of understanding of his trauma and mental health needs.

### Best Interests: Standard of Review

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

**Held: Affirmed**

- Facts: In 2017, the children were adjudicated neglected and dependent. In 2018, the permanency planning order identified adoption and guardianship as the concurrent permanent plans. DSS filed a motion to terminate the parents' rights on the grounds of neglect and failure to make reasonable progress to correct the conditions. After finding both grounds existed, the court determined it was in the children's best interests to terminate parental rights to allow the grandparents, who were the children's placement provider, to adopt the children. Respondents appeal. Mother argues the standard of review should be de novo.
- The standard of review of a best interests determination is an abuse of discretion. In response to mother's argument that the review should be de novo, the supreme court reaffirmed the abuse of discretion standard. The appellate court looks to whether the trial court's decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." Sl.Op. at 17. The trial court, which hears the evidence, is in the best position to assess and weigh that evidence, make findings, and reach conclusions based on that evidence.
- There was no abuse of discretion. The trial court considered the dispositional factors in G.S. 7B-1110 and performed a reasoned analysis in weighing those factors. Although finding there was a strong bond between the children and respondent parents, that factor was outweighed by the findings addressing the primary plan of adoption, the children's relationship with their grandmother, and likelihood of adoption by the grandmother.

### Best Interests: Factors

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

**Held: Affirmed**

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



the children's behaviors had improved and they needed an appropriate adoptive home that provided structure. The evidence supported the finding.

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

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

**Held: Affirmed**

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

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

**Held: Affirmed**

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



strong bond with the foster parents who wished to adopt them. There was no reversible error in not making a finding about the children's bond with their mother when there was no evidence offered about that bond.

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

**Held: Affirmed**

- Facts: In 2016, the juvenile was adjudicated neglected and dependent. For 2 years, the juvenile was placed in various therapeutic foster homes to address his problematic behaviors. After being placed in a group home, the court found his behaviors and academics had greatly improved. He was subsequently placed in a therapeutic foster home where he was doing well and was bonded with the foster parents. DSS filed a TPR petition. The juvenile was then placed in a Level II group home due to unsafe and defiant behaviors. At a permanency planning hearing, the court found the juvenile was improving. The TPR was heard and granted. Respondents appeal, challenging the best interests determination by asserting the findings do not support the conclusion, which is an abuse of discretion by the trial court.
- Standard of review is an abuse of discretion, and "[t]he trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." Sl.Op. at 8 (citation omitted). The appellate court does not reweigh the evidence to reach a different conclusion from the trial court.
- The trial court made findings of fact for each factor under G.S. 7B-1110(a) and did not abuse its discretion.
  - Age: The juvenile was 14 at the time of the TPR hearing.
    - Although mother argued the child's preference should have been considered as it was in *Mintz v. Mintz*, 64 N.C. App. 338 (1983), the supreme court is not bound by *Mintz*, and that case was a divorce case addressing visitation and not a best interests determination in a TPR. Additionally, *Mintz* affirmed that the trial judge's duty is to determine the weight to be given to the child's preference and to find and conclude what is in the child's best interests. Relying on *In re J.A.M.*, 372 N.C. 1 (2019), the supreme court stated that it is solely for the trial court to draw any reasonable inferences based on the child's age, demeanor, or attitude, and the weight to give those inferences.
    - In response to father's argument that a juvenile 12 and older is required to consent to his adoption, G.S. 48-3-603(b)(2) authorizes the court to waive that requirement when it is in the child's best interests to do so.
  - The likelihood of adoption given the juvenile's psychiatric issues requiring multiple placements over 4 years was supported by the evidence and is binding on appeal. The GAL testified the juvenile was likely to be adopted if he finds the right family and that he engages easily with adults.
  - TPR will aid in the adoption. The TPR was a prerequisite to achieve the permanent plan of adoption.
  - Bond between parent and child is one factor to be considered under G.S. 7B-1110(a), and the trial court may give greater weight to other factors.

- Relationship with prospective adoptive placement. “[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.” Sl.Op. at 13-14.
- The supreme court is not bound by *In re J.A.O.*, 166 N.C. App. 222 (2004), and this case is distinguishable. In *J.A.O.*, the juvenile had been foster care since he was 18 months and was placed in 19 different treatment centers over 14 years for his significant mental health issues; mother made reasonable progress; and the GAL believed the child’s best interests would not be served by a TPR and that he was unlikely to be adopted. In contrast, in this case, the GAL testified it was likely the juvenile would be adopted and recommended TPR, and the respondents failed to make reasonable progress.

In re A.U.D., \_\_\_ N.C. \_\_\_ (Sept. 27, 2019)

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

- Facts: This a private TPR initiated by a child-placing agency, BCS, against respondent father. After the twins’ birth, mother placed children in the care of her aunt. Subsequently, she executed a relinquishment to BCS. BCS removed the children from aunt’s home and placed the children with a prospective adoptive family where they continued to reside. BCS filed a TPR petition. In the TPR, respondent father’s paternity was established and after a hearing, the court denied the TPR after determining that although the ground of failure to legitimate/establish paternity existed, the TPR was not in the children’s best interests. BCS appeals. The issue on appeal is the best interests of the children determination.
- Standard of review: The court’s dispositional determination regarding a child’s best interests is reviewed for an abuse of discretion. An “abuse of discretion results where 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. at 5 (citations omitted).
- G.S. 7B-1110(a) sets forth the statutory criteria for best interests of the children. The trial court must consider all the factors, which the record demonstrates the trial court did. However, written findings are not required of each factor, although a better practice would have been to make written findings of those factors identified by BCS. Under the circumstances of this case, the failure to do so is not reversible error. There was no conflict in the evidence regarding the likelihood of adoption; it was undisputed that no bond existed between the children and father; and because this was a private TPR, there was no permanent plan for the children.
- Although the GAL recommended TPR, the trial court is not bound by that recommendation; instead the trial court has the authority to weigh all the evidence.
- A stated purpose of the Juvenile Code is to prevent “the unnecessary or inappropriate separation of juveniles from their parents” (G.S. 7B-100(4)) and to place the best interests of the juvenile who is not to be returned home as the paramount consideration for the court (G.S. 7B-1000(5)). Here, the trial court considered the competing purposes of the Juvenile Code and the dispositional factors in G.S. 7B-1110(a). Those considerations also included other relevant circumstances that the mother solely relinquished the children to BCS; father was not afforded an opportunity to care for the children before the relinquishment; he proactively attempted (unsuccessfully) to establish paternity; he sought to have the aunt, who had provided appropriate care for the children, obtain custody of the children until his release from prison

when he could care for them; and he engaged in services that would result in self-improvement while he was incarcerated. Although evidence would support a contrary finding, the appellate court lacks authority to reweigh the evidence.

- Rule 58 establishes that a judgement is entered when it is reduced to writing, signed by the judge, and filed with the clerk. As held by the court of appeals, oral findings made by the trial court may change before the final written order is entered. Any differences between the oral findings rendered at the hearing and those established in the written order is not an error.
- Dissent: The adjudicatory stage focuses on the fairness to the parent and safeguards the parent's interests. The dispositional stage requires that the best interests of the children control and safeguards the children's best interests. The trial court misapplied the law and abused its discretion when it improperly weighed factors related to the father's interest at disposition under the catchall provision of G.S. 7B-1110(a)(6). The five specific enumerated factors in G.S. 7B-1111(a)(1)-(5) are all relevant and directed the trial court's discretion down a specific path which would have been to TPR.

### Best Interests: Bond with Parent

*In re A.B.C.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

#### **Held: Affirmed (4-3 decision)**

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

*In re J.J.B.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

#### **Held: Affirmed**

- Facts: Respondent parents appeal the disposition portion of a TPR.
- The court made a reasonable inference from the testimony at hearing that the children were bonded to their foster parents.
- Although the court found there was a strong bond between the children and their parents, that bond is just one factor to be considered under G.S. 7B-1110(a). The trial court may give greater weight to other factors. The findings and need for permanence within a reasonable amount of time for the juveniles supported the TPR over a guardianship since the child's best interests are the paramount consideration for the court. See G.S. 7B-100(4), (5). Although the trial court stated that the foster parents should honor the relationship between the children and

respondents, that statement was not part of the order, is not a repudiation of the best interests ruling it rendered and entered, and is not an abuse of discretion.

*In re Z.L.W.*, \_\_\_ N.C. \_\_\_ (Aug. 16, 2019)

**Held: Affirmed**

- Respondent father's rights to his 2 children were terminated; both children had previously been adjudicated neglected and had a primary permanent plan of adoption. Father appeals the TPR, arguing the court abused its discretion when determining the TPR was in the children's best interests despite finding there was a strong bond between the respondent and children.
- After a ground to TPR has been found, the court proceeds to the dispositional phase which considers factors under G.S. 7B-1110(a) when determining if the TPR is in the child's best interests. The standard of review 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. at 5-6.
- The court made findings about the children's ages, likelihood of adoption, need to achieve the permanent plan of adoption, bond with the respondent father, quality of relationship with the prospective adoptive parents, and other factors, none of which were challenged and are therefore binding on appeal.
- Although the court made a finding that the children had a strong bond with respondent father, that factor is just one that must be considered under G.S. 7B-1110(a). The court may give more weight to the other factors, and the "court's determination that other factors outweighed respondent's strong bond with [the children] was not manifestly unsupported by reason." Sl. Op. at 9. In response to father's argument that other dispositional alternatives should have been considered so that a relationship with father could be maintained, G.S. 7B-100(5) states "the best interests of the juvenile are of paramount consideration by the court and ... when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time.*" (emphasis in opinion).

### Best Interests Likelihood of Adoption

*In re M.A.*, \_\_\_ N.C. \_\_\_ (July 17, 2020)

**Held: Affirmed**

- Facts: The children were adjudicated neglected based on lack of proper care and supervision and an injurious environment due to domestic violence and substance use in the home. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition. The TPR was granted and mother appealed, arguing the court abused its discretion when determining the TPR was in the children's best interests. Father also appealed the neglect ground (discussed in section above).
- Findings of fact were made for each of the relevant statutory factors enumerated in G.S. 7B-1110(a).
  - The court's findings that there was a likelihood of adoption was supported by testimony from the adoption recruiter even though there were no prospective adoptive families that had been identified at the time of the TPR hearing. The lack of an adoptive

placement or the possibility that the adoption process would be lengthy do not preclude a TPR. The testimony included the adoption recruiter's belief that the children were likely to be adopted given that they had an ability to form bonds with their caregivers, had no special needs, and were doing well in school and therapy. Additionally, the TPR would make the children eligible to list with adoption service agencies to help identify an adoptive family. The GAL also testified that he was not concerned about the children's ability to bond with an adoptive family and recommended that TPR was in the children's best interests given the duration of their time in foster care and need for a safe, permanent home.

- While a court may consider a child's wishes, their preference is not controlling because the best interests of the child is the "polar star" of the Juvenile Code. Although G.S. 48-3-601(1) requires a child who is 12 or older to consent to their adoption, that requirement may be waived when the court finds it is not in the child's best interests. G.S. 48-3-603(b)(2). As such any refusal by a child to consent does not necessarily preclude adoption.

[In re J.C.L., \\_\\_\\_ N.C. \\_\\_\\_](#) (July 17, 2020)

**Held: Affirmed**

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

[In re S.M.M., \\_\\_\\_ N.C. \\_\\_\\_](#) (July 17, 2020)

**Held: Affirmed**

- Facts: In its disposition the court findings included that the juvenile needs more stability given her history of trauma before she can be adopted. Mother argues the likelihood of adoption is unknown unless the court addressed what constitutes stability and whether the juvenile could obtain it before she turned 18.
- The trial court is required to make findings addressing the likelihood of the child's adoption and is not required to find that the juvenile will achieve the necessary stability for adoption or establish benchmarks a child who has experienced trauma must meet. The findings show the juvenile has a likelihood of adoption if she obtains stability, which requires in part the termination of her mother's parental rights. Although the trial court recognized the necessary stability may not be achieved, "it is well established that a likelihood of adoption is not necessary for a court to conclude termination of parental rights is in the child's best interests." Sl.Op at 16. The court made the appropriate findings and did not abuse its discretion.

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

**Held: Affirmed**

- Facts: In 2014, the children were adjudicated neglected. In 2016, DSS filed a TPR petition, After a hearing, although the grounds were proved by DSS, the TPR was dismissed because the trial court determined it was not in the children's best interests due to there not being a strong

likelihood of adoption. In 2018, the parent's rights to visitation were suspended due to their inappropriate behavior and the children's ongoing behavioral problems being attributed in part to the long-term uncertainties they were experiencing. DSS filed a second TPR petition, which was granted. Respondent mother and respondent father appeal, challenging the court's disposition that concluded the TPR was in the children's best interests.

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

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

**Held: Affirmed**

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

regarding likelihood of adoption at G.S. 7B-1110(a)(2) “becomes more relevant in a TPR case in which a child is in the custody of a Department of Social Services agency and termination of the parent’s rights leaves the child as a ward of the State.” Sl.Op. at 12. Because the child was in the full custody of the mother/petitioner at the time of the TPR, the likelihood of the child’s potential adoption is not a sufficiently relevant factor.

In re J.H., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

**Held: Affirmed**

- Facts: Four children were adjudicated abused and neglected. The court ordered respondent mother to engage in a case plan – complete a mental health assessment and follow all recommendations, maintain employment and appropriate and safe housing for a minimum of 6 months, participate in parent coaching and implement the skills during visits, and sign necessary release forms for the court and DSS to monitor her progress. At a permanency planning hearing, the court ordered concurrent plans of adoption and reunification with the children’s fathers. Respondent mother preserved the right to appeal this permanency planning order (PPO). Mother’s rights were subsequently terminated, and she appealed both the PPO and TPR. The TPR appeal is limited to the dispositional determination that TPR was in the children’s best interests.
- Likelihood of Adoption: The trial court did not abuse its discretion when determining the TPR was in each of the 4 children’s best interests. The trial court made findings of each factor in G.S. 7B-1110(a) and specifically addressed the likelihood of each child’s adoption. Each child has significant development delays, but “general truths” about the difficulty of placing children with behavior challenges and/or developmental delays and children in foster care with adoptive families “cannot overcome the particularized evidence ... supporting the trial court’s factual findings that each of these children had a high probability of being adopted.” Sl.Op. at 14-15. The court found that one child was placed with his biological father and there was a strong likelihood of a stepparent adoption by the father’s wife. One child was placed in a specialized facility and the grandmother had expressed an interest in adopting him. One child was placed in his prospective adoptive home and has a good relationship with the prospective adoptive parent. One child had multiple families who were interested in adopting her. All of the children were thriving in their placements and were benefitting from not being in their mother’s custody.

**Best Interests: Other Relevant Considerations**

In re S.D.C., \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Jan. 24, 2020)

**Held: Affirmed**

- Facts: This TPR results from an underlying neglect and dependency action. In that action, the child’s paternal grandmother had been identified as a potential relative placement, was not recommended by DSS, and was not ordered as a placement. The child remained in DSS custody. After a year, the concurrent permanent plans were changed to a primary plan of adoption and secondary plan of reunification with respondent father, and DSS was ordered to initiate a TPR. After a hearing, respondent father’s parental rights were terminated. He appeals, raising as the sole issue that the trial court abused its discretion when concluding the TPR was in the child’s



best interests arguing that the trial court did not adequately consider whether the child could be placed with a relative.

- Standard of review: At the dispositional stage of a TPR, the court determines whether the TPR is in the child's best interests and looks to G.S. 7B-1110(a). The standard of review is abuse of discretion, which is when the trial "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. at 8.
- Availability of Relative Placement: Unlike an abuse, neglect, or dependency action where the trial court is required to consider the availability of a relative placement, the trial court is not expressly directed to consider the availability of a relative placement in a TPR. The trial court may treat that issue as a "relevant consideration" when determining best interests, which will depend on the particular proceeding and the extent to which the record contains evidence that tends to show whether a relative placement is, in fact, available. *See* G.S. 7B-1110(a)(6).
- Evidence and Relevant Factor: If at the TPR hearing, conflicting evidence about the availability of a potential relative placement is presented, "the trial court should make findings of fact addressing 'the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanency for the children as offered by their prospective adoptive family.'" Sl.Op. at 9. If "the record does not contain any evidence tending to show the availability of a potential relative placement, the trial court need not consider or make findings of fact considering that issue." *Id.*
- Evidence and Findings: The record of the TPR did not contain evidence tending to show that a potential relative placement was available for the child. Although the underlying neglect and dependency adjudication order and initial dispositional order that identified the grandmother as a potential relative placement option was admitted, that dispositional order and subsequent permanency planning orders had determined that the child's best interests were served by remaining in DSS custody versus being placed with the relative. "Thus, we have no hesitation in concluding that [the child's] potential placement with a relative was not a fact that the trial court was required to consider or make findings about during the dispositional phase of this termination of parental rights proceeding." Sl.Op. at 10.

## Appealable Order

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

### **Held: Affirmed (4-3 decision)**

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



## Proper Order and Appeal

In re C.M.C., \_\_\_ N.C. \_\_\_ (Sept. 27, 2019)

### **Held: Affirmed**

- Facts: Infant was adjudicated abused, neglected, and dependent and at initial disposition, reunification efforts with both parents were ceased. At a permanency planning hearing, the court adopted a primary plan of adoption and secondary plan of guardianship. DSS filed a petition to terminate parental rights. At the end of the TPR hearing, the court rendered a decision, noting findings and conclusions, and asking DSS counsel to draft the order. The order was signed by Judge Leslie, who was not the presiding trial judge. The respondent mother appealed. Two days later, DSS filed a Rule 60 motion seeking that the orders be vacated and the trial court sign a new TPR order. The motion was granted and a new order was signed by the trial court. Respondent mother appealed the new TPR order.
- Issue: Did the trial court lack authority to vacate the first TPR order after mother had noted an appeal of that order?
- Rule 60(b)(4) & (6) allows the trial judge to grant relief from any order that was entered by mistake or inadvertence or any other reason justifying relief. Adopting reasoning by prior opinions published by the court of appeals, the TPR order signed by Judge Leslie was nullity because Rule 52 requires the judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions based on the facts, and (3) enter judgment. Rule 58 provides that “a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk.” Sl. op. at 7- (emphasis added by supreme court). “A party may not properly appeal from a judgment until it has been entered.” Sl. Op. at 8. Since the first TPR order was not a viable order that was entered, the appeal by respondent mother did not divest the trial court of jurisdiction to make the necessary correction.

## Appeal: No-Merit Briefs

In re L.E.M., \_\_\_ N.C. \_\_\_ (August 16, 2019)

### **Held: Vacate court of appeals order of dismissal; affirmed district court TPR order**

- Procedural history: Respondent father appealed an order terminating his parental rights. Pursuant to Rule 3.1(d) (now Rule 3.1(e), which is substantially similar), Respondent’s attorney filed a no-merit brief and raised 3 issues for review. Respondent did not file a pro se brief. The court of appeals dismissed the appeal based on a previously published opinion, *In re L.V.*, 814 S.E.2d 928 (2018), that held the court lacked authority to consider the appeal because there were no issues raised for review since the respondent had not filed a pro se brief. There was a dissent and a concurrence in result only that both addressed the erroneous holding of *In re L.V.* An appeal by right was made to the NC Supreme Court.
- Holding: Appellate “Rule 3.1 mandates an independent review on appeal of the issues contained in a no-merit brief...” Sl. Op. at 1. *In re L.V. is overruled.*
- The origin of the no merit brief stems from the U.S. Supreme Court rule that allows for an *Anders* review in criminal cases. After the court of appeals previously held such a review does not apply to termination of parental rights cases, the N.C. Supreme Court adopted Appellate Rule 3.1(d), which authorizes a no-merit brief for appeals of TPR and abuse, neglect, or

dependency orders. In interpreting Rule 3.1(d), the court is “mindful of the fundamental interests implicated in a proceeding involving a termination of parental rights. The United States Court has recognized that ‘[w]hen the State initiates a parental rights termination proceeding.... [a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is .... a commanding one.’ ” Sl. Op. at 8. (citations omitted). Rule 3.1 suggests that briefs will be considered and an independent review will be conducted without stating or implying that the review is contingent on whether a pro se brief is actually filed.

- Rather than remand for an independent review, in the furtherance of the goals of the Juvenile Code to expeditiously resolve cases and obtain permanency for the juvenile, the supreme court conducted its own review of the issues raised in the no-merit brief. After considering those issues and the record, the supreme court affirmed the trial court’s order as being supported by competent evidence and based on proper legal grounds.

***Note: Opinions affirming TPR orders based on a no-merit brief are not summarized in this document or the child welfare case compendium.***

### Complying with the Mandate

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

**Held: Affirmed**

- **Facts:** DSS obtained an order terminating respondent mother’s rights. She appealed, and the court of appeals affirmed the ground but concluded the disposition did not address the juvenile’s likelihood of adoption. The case was remanded to the trial court to make findings of this statutory factor. On remand, respondent filed a motion to reopen evidence to show a change in circumstances. The motion was denied and the court entered an amended order with new findings of fact. Mother appeals arguing the trial court could comply with the mandate without reopening the evidence.
- A trial court must strictly follow the mandate. The mandate was for additional findings not for a new dispositional hearing. The appellate decision was silent as to whether the trial court should take new evidence when the case was remanded for additional findings. As such, the trial court had discretion to determine whether it should take new evidence on remand, and it was not required to do so. There was nothing in mother’s motion that identified specific changes that would impact the issue of the likelihood of the juvenile’s adoption. Speculation of changed facts over an 18-month period is insufficient to show the trial court abused its discretion. The trial court was able to make the required findings from the evidence presented at the original hearing and thus the trial court complied with the mandate.

## Civil Cases Related to Child Welfare

### UCCJEA: Inconvenient Forum

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

**Held: Affirmed**

- **Facts:**
  - 2012, custody action commenced in NC

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

## Parent's Constitutional Rights

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

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

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

- *Moore v. Moore* misapplied the presumption that applies to a parent in an action with a non-parent to an action involving two parents and is overruled.