

Child Welfare Case Update

Dec. 31, 2020 – April 30, 2021 (COA Opinions)

March – April 2021 (Supreme Court Opinions)

Social Services Attorneys' Virtual Conference May 2021 Update

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Abuse, Neglect, Dependency

Adjudication

Motion to Continue

[In re L.G.A.](#), ___ N.C. App. ___ (April 20, 2021)

Held: Affirm in part; vacate in part

- **Facts:** The juvenile was adjudicated neglected due to domestic violence between the parents and the case continued through dispositional hearings. During the course of the case, the

mother had been represented by multiple attorneys and had been convicted of misdemeanor communicating threats against a previous DSS social worker. She was also banned from contacting that social worker or from entering the DSS office. In 2019, father filed a motion for review seeking custody of the juvenile, alleging positive changes to his situation. Mother requested a continuance which was denied. The court awarded full legal and physical custody of the juvenile to father and provided supervised visitation to mother upon her release from jail. Mother appealed. One issue is focused on whether the court erred in denying her continuance based on constitutional rights.

- Standard of review for a motion to continue is an abuse of discretion unless the motion is based on a constitutional right, which presents a question of law. A new trial is required when there is a showing that both (1) the denial was erroneous and (2) the party suffered prejudice as a result.
- G.S. 7B-803 addresses motions to continue, which requires mother meet the burden of showing good cause regarding the need additional evidence requested by the court or other information addressing the best interests of the juvenile or the completion of expeditious discovery. Mother did not allege this type of information, such that mother had the burden of proving extraordinary circumstances for the proper administration of justice or the child's best interests. Mother's request is based on her constitutional right against self-incrimination while she had a pending criminal charge for communicating threats. G.S. 7B-803 does not support her argument since a pending criminal charge arising out of the same incident as the juvenile case shall not be the sole extraordinary circumstance. She was not statutorily entitled to a continuance. Additionally, mother's criminal charges did not arise from the same incident; they were based on her actions after the petition was filed. The parties indicated they had no intention of questioning her if she chose to testify. The trial court offered to act as a gatekeeper. Mother did not testify. "The trial court provided adequate safeguards to protect Mother's due process rights." Sl.Op. ¶14.

Neglect

In re S.R.J.T., ___ N.C. App. ___ (April 6, 2021)

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

There is a concur in part/dissent in part

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

- The findings are supported by evidence and support the conclusion. There is evidence that the child is suffering with PTSD. “We affirm the trial court’s adjudication of neglect on this basis and need not address the other adjudicatory grounds in the court’s order.” Sl.Op. ¶11.

Neglect & Dependency; Newborn; Death of Sibling

Disposition: Cease Reunification Efforts/Reunification

Consolidate TPR with Neglect Action

In re A.W., ___ N.C. ___ (April 23, 2021)

Held: Affirmed

- Facts: In 2017, the respondent’s 2-month-old infant died of blunt force injuries while in respondents’ care. Her death was ruled a homicide, and father was incarcerated on charges related to her death. In 2018, the juvenile in this action was born to respondent parents and DSS filed a petition alleging neglect and dependency that stated her sibling died while in the respondents’ care as a result of suspected abuse and neglect. Also in 2018, DSS filed a motion to terminate both parents’ parental rights on the grounds of neglect and dependency. The court adjudicated the juvenile neglected and dependent, ceased reunification efforts, and eliminated reunification as a permanent plan. A separate order terminated mother’s rights on both alleged grounds. Mother appealed the adjudication and disposition orders in the court of appeals and the TPR order in the supreme court. The NC Supreme Court granted a motion to consolidate the actions on appeal.
- G.S. 7B-101(15) defines a neglected juvenile in part as a juvenile whose parent does not provide proper care, supervision, or discipline, or who lives in an environment injurious to their welfare and states, “In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect.” Sl.Op.¶10. Neglect also requires that there be harm (physical, mental, or emotional) or substantial risk of harm to the juvenile. An adjudication of neglect cannot be based solely on previous DSS involvement but must address current circumstances that present a risk to the juvenile. Regarding newborns, the trial court’s determination must be predictive in nature when assessing substantial risk of future of abuse or neglect based on historical facts in the case.
 - The adjudication was not based solely on the basis of the death of this juvenile’s sibling. Other factors of risk included mother’s continuation of providing an implausible explanation (the family dog, a great dane) for the injuries causing the infant’s death; her failure to explain the other injuries to that child; her continued relationship with the father; and the respondents’ colluding to deceive the court of the nature of their relationship such that the risk of impairment to this juvenile existed.
 - The challenged findings of fact that respondents colluded and worked together on their statements about how the injuries that caused the sibling’s death occurred are supported by clear and convincing evidence. Based on the evidence, the court made a reasonable inference that the parents worked together to provide an explanation that concealed the truth.

- G.S. 7B-101(9) defines a dependent juvenile as one whose parent, guardian, or custodian (1) is unable to provide care and supervision and (2) lacks an appropriate alternative child care arrangement. Both prongs must be addressed by the court.
 - The court reasonably inferred mother was unable to properly care for and supervise this juvenile due to the death of her other child by nonaccidental means and her continuing relationship with the father while he was charged in that child's death.
 - There was not an appropriate alternative child care arrangement. Although several individuals were suggested by mother, none of them believed the sibling's injuries resulting in her death were anything but accidental. From that evidence, the trial court reasonably inferred that these individuals would not be appropriate as they would not follow a safety plan and provide a safe environment.
- G.S. 7B-1102(c) authorizes the trial court on its own motion or motion of a party to consolidate a TPR and A/N/D action that is filed in the same judicial district and involves the same juvenile.
 - Mother had notice that a permanent plan was at issue through the notice and motion of the TPR, where a permanent plan of adoption was recommended, and "in a hearing where a parents' rights in their child are subject to termination, the parent has necessarily been informed that the child's permanent plan is at issue." Sl.Op. ¶129.
- G.S. 7B-901(c) includes an aggravating factor to cease reunification efforts when the parent's conduct increases the enormity and adds to the consequences of neglect. The court's determination this factor existed was supported by the evidence that mother failed to acknowledge her child died from abuse, colluded with father to provide an explanation, and maintained her relationship with the father.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When there is a period of separation between the juvenile and the parent, the court must find past neglect (which may include an adjudication of neglect) and a likelihood of future neglect based on evidence of any changed conditions at the time of the TPR hearing.
 - The determination that there is past and a likelihood of future neglect with mother, even though father is incarcerated, is supported by the evidence. Mother did not acknowledge the intentional injuries to her child resulting in her death, did not provide a plausible explanation for those injuries, continued her relationship with father, and without acknowledging the cause of death, DSS could not provide a plan to address the safety concerns in the home.

Disposition of Guardianship; Waive Further Hearings

In re S.R.J.T., ___ N.C. App. ___ (April 6, 2021)

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

There is a concur in part/dissent in part

- Facts: In 2017, the child was adjudicated neglected and dependent due to circumstances of drug abuse and domestic violence in the home. The dispositional order ceased reunification efforts, granted guardianship to the aunt, and suspended visitation and further hearings. Mother appeals both the adjudication and disposition.

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

Permanency Planning

Eliminate Reunification; Reasonable Efforts; Parent's Constitutional Rights

In re J.M., ___ N.C. App. ___ (April 6, 2021)

Held: reversed and remanded

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

plan services, which contradict a conclusion that reunification would be unsuccessful or inconsistent with the children's health or safety.

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

[In re S.D.](#), ___ N.C. App. ___ (April 6, 2021)

Held: reversed and remanded

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

guardianship, the court determined that permanency was achieved for this child and ceased further hearings. Mother appealed, arguing the evidence did not support the findings and that DSS did not make reasonable efforts.

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

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

Eliminate Reunification, Insufficient Findings, Impact on TPR
In re L.R.L.B., ___ N.C. ___ (April 23, 2021)

Held Remanded

- Facts: In an underlying neglect action, at a permanency planning hearing, reunification efforts/reunification was eliminated as a permanent plan. Mother preserved her right to appeal. DSS filed a TPR petition, and the TPR was granted on the grounds of neglect and failure to make reasonable progress. Mother appealed the permanency planning order (PPO) and TPR order. Mother challenges the PPO only and argues the errors in the PPO require the TPR to be vacated under G.S. 7B-1001(a2).
- G.S. 7B-1001(a2) requires the appellate court to review the two orders “together” and states, “If the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated.” Sl.Op. ¶10.
- The challenged findings of the PPO are supported by competent evidence, including social worker testimony, and are binding on appeal. However, the findings are insufficient to eliminate reunification as they do not include all four required findings under G.S. 7B-906.2(d). The trial court is not required to use the exact language of the statute but must address the statute’s concerns. Here, the court made findings as to the substance and concerns raised by G.S. 7B-906.2(d)(1), (2), and (4). The order does not address G.S. 7B-906.2(d)(3) – “whether the parent remains available to the court, the department, and the guardian ad litem of the juvenile.” Sl.Op. ¶120.
- There is a difference between a fatally defective PPO and an incomplete order with insufficient findings of fact. An order with insufficient findings of fact may be cured by findings in the TPR. A PPO eliminating reunification is reviewed together with a TPR order, and “incomplete findings of fact in the [PPO] may be cured by findings of fact in the termination order.” *In re L.M.T.*, 367 N.C. 165, 170 (2013); Sl.Op. ¶122. The 2017 amendments made to G.S. 7B-1001 have not abrogated the holding in *In re L.M.T.* since the two orders continue to be reviewed together. Here, the court made the ultimate finding required by G.S. 7B-906.2(b) to eliminate reunification as a permanent plan. The failure to address G.S. 7B-906.2(d)(3) warrants a remand for the trial court to correct this deficiency. The DSS and GAL reports address the issue, but the court must make findings of mother’s availability.
- The language of G.S. 7B-1001 – when a PPO is vacated or reversed the TPR must be vacated – became is new.
 - The error in the PPO is not moot. The statutory language precludes a finding that harmless error in the PPO can be mooted by a TPR order (*cf. In re H.N.D.*, 265 N.C. App. 10 (2019) not applying the new language).
 - Vacating the PPO and the TPR is not required. The appropriate remedy is remand. This court’s precedent in *In re L.M.T.* allowing the PPO to be cured by the TPR authorizes this remedy. The court of appeals opinions offered by mother to support vacating the PPO are not binding or instructive. Further, “[w]e do not discern that the Legislature enacted

N.C.G.S. § 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under N.C.G.S. § 7B-906.2(d)(1)-(4) from its trial court order which eliminates reunification from a child's permanent plan." Sl.Op. ¶135. Unlike G.S. 7B-906.2(b), which addresses whether reunification efforts would clearly be unsuccessful or clearly inconsistent with the juvenile's health or safety, no particular finding in G.S. 7B-906.2(d) is required to support the court's conclusion to eliminate reunification but instead "merely requires the trial court to make 'written findings as to each of the' issues enumerated." *Id.* A finding that the parent made herself available to the court, GAL, and DSS does not preclude the trial court from eliminating reunification based on the other factors. The failure to include this one finding is not material and prejudicial warranting a vacating and reversal of the PPO resulting in the TPR being vacated.

Eliminate Reunification; Notice and Findings

In re H.A.J., ___ N.C. ___ (March 19, 2021)

Held: Affirmed

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

reunification would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time’ ” Sl.Op. ¶16.

Eliminate Reunification; Custody

[In re J.C.-B.](#), ___ N.C. App. ___ (March 16, 2021)

Held: Vacated and Remanded

- Facts: This is the second appeal of a permanency planning order. This case started in 2017, when the juvenile was 13 years old and was adjudicated neglected and dependent due to his mother’s mental health and its impact on her parenting. He is now 17. Since the start of the case, he has been placed with his grandmother. In the first appeal, the permanent plan of custody with grandmother and transfer of the action to a Chapter 50 civil custody action pursuant to G.S. 7B-911 was vacated and remanded. While that first appeal was pending, mother and son started emailing one another and mother was ordered to not have contact with her son. On remand, the court ordered custody to grandmother, eliminated reunification as a permanent plan, and ordered no contact between mother and juvenile until recommended by the juvenile’s therapist. Mother appeals.
- Standard of review for whether a parent has acted inconsistently with their parental rights is de novo, which is when the appellate court “considers the matter anew and freely substitutes judgment for that of the lower tribunal.” Sl.Op. ¶15.
 - A permanent custody order that awards custody to a non-parent must be vacated when the order does not find by clear and convincing evidence that a parent is unfit or has acted inconsistently with their constitutionally protected rights.
 - There was no evidence or findings to conclude mother was unfit or acted inconsistently with her parental rights. The evidence showed mother responded to emails from her son, attended counseling appointments with him, complied with her case plan requirements, filed a motion for contempt against grandmother when visits were withheld, and was working as a teacher.
- G.S. 7B-906.1(j) requires the court verify the proposed custodian’s understanding of the legal significance of the custody placement. An order without that verification must be vacated and remanded.
 - G.S. 7B-906.1(j) states that “the fact that the prospective custodian or guardian has provided stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.” Sl.Op. ¶30. This evidence does not per se compel the conclusion that the custodian understands the legal significance of the placement.
- The standard of review of an order eliminating reunification is whether the findings are supported by credible evidence, whether the findings support the conclusion, and whether the court abused its discretion.
 - The findings are unsupported by the evidence and do not support the conclusion to eliminate reunification efforts and reunification.
 - G.S. 7B-906.2(c) requires the court to make findings about whether DSS’s reunification efforts were reasonable. Under G.S. 7B-101(18), reasonable efforts are required to be

“diligent.” The efforts in this case “were not aimed at reunifying [the juvenile] with his mother.” Sl.Op. ¶41. Efforts to assess the juvenile’s well-being, although an important part of monitoring progress toward reunification, are not “concrete action steps” for reunification. DSS never requested an assessment of mother’s home in her new state. DSS moved to have the court discontinue all contact between mother and her son. The reunification efforts “were arguably non-existent.” Sl.Op. ¶45.

Eliminate Reunification: Clerical Error

[In re A.S.](#), ___ N.C. App. ___ (Dec. 31, 2020)

Held: Vacated and Remanded

- **Facts:** The juveniles were adjudicated neglected. Starting with nonsecure custody and continuing through two permanency planning hearings, the juveniles were placed with their paternal grandparents. Based on the grandparents’ request prompting a motion for review by DSS, one of the juveniles was placed in a different home. The permanent plans were primary of reunification and secondary of guardianship. Throughout the case, mother complied with her case plan and made progress. At the last permanency planning hearing, DSS and the GAL recommended reunification continue to be a permanent plan for both juveniles. The court ordered reunification with mother continue as a permanent plan for the one juvenile who was no longer placed with paternal grandparents and awarded custody of the other juvenile to the grandparents and eliminated reunification as a secondary plan as permanency had been achieved. Mother appeals.
- **Standard of review** is whether competent evidence supports the findings and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- DSS characterizes one challenged **finding of fact as a clerical error** – the finding states mother has not remained available to the court, DSS, or GAL when other findings of fact contradict that challenged finding, and no evidence supports that finding. “A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” Sl.Op. at 8. Using the word “not” changes the entire meaning, making it unclear as to whether it is a clerical error. The finding is unsupported by the evidence.
- **Findings** that mother delayed participating in her case plan and services are unsupported by the evidence. The record shows mother started engaging in her services before the adjudication and continued to engage in the services. Further the finding that mother has not alleviated the conditions leading to the children’s removal is unsupported as the evidence shows the opposite.
- **The conclusion that mother was unfit and acted inconsistently with her constitutionally protected status** is based on the findings of her delaying engaging in services and not alleviating the conditions that led to the children’s removal – both of which are unsupported by the evidence. Employing a de novo review, the conclusion of law is error.

Custody to Father; Judicial Notice

[In re L.G.A.](#), ___ N.C. App. ___ (April 20, 2021)

Held: Affirm in part; vacate in part

- Facts: The juvenile was adjudicated neglected due to domestic violence between the parents and the case continued through dispositional hearings. In 2019, father filed a motion for review seeking custody of the juvenile, alleging positive changes to his situation. The court awarded full legal and physical custody of the juvenile to father and provided supervised visitation to mother upon her release from jail. Mother appealed. One issue challenges the court's award of custody to father as mother argued father's past conduct should have been considered.
- Standard of review of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusions. The best interests determination is for an abuse of discretion.
- The findings address father's progress since the last disposition in the action, and other findings are based on competent evidence. The trial court has the discretion as the finder of fact to determine the credibility and weight of the evidence. The findings support the court's conclusion to award custody to father and is not an abuse of discretion.
- Judicial notice is governed Rule 201 of the Rules of Evidence. A judicially noticed fact must be one that is not subject to reasonable dispute because it is either generally known within the court's jurisdictional territory or is capable of accurate and ready determination from sources whose accuracy cannot be reasonably questioned. Here, the trial court took judicial notice of the widely known benefits of the service program father participated in. This fact is based on the judge's personal experience and is not an indisputable matter or a matter of common knowledge as such it is not appropriate for judicial notice. Further, mother did not waive appellate review of this issue by not objecting to this finding when the court rendered it at the conclusion of the hearing. The rendition by the judge is not an order under Rule 58 of the N.C. Civ.P. Rules and is not required to occur at the conclusion of a hearing. There is no legal basis for an objection to the rendered ruling.

Visitation

Notice of Right to Review

In re J.M., ___ N.C. App. ___ (April 6, 2021)

Held: reversed and remanded

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

visitation plan “is limited to instances to instances where the trial court retains jurisdiction but is not otherwise mandated to conduct such reviews.” Sl.Op. ¶42.

Cost of Supervision

[In re L.G.A.](#), ___ N.C. App. ___ (April 20, 2021)

Held: Affirm in part; vacate in part

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

Juvenile’s Preference

[In re J.C.-B.](#), ___ N.C. App. ___ (March 16, 2021)

Held: Vacated and Remanded

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

enough to seek emancipation, was not called to testify. As a 17 year old, “his opinion carries great weight.” Sl.Op. ¶159. Violations of these two statutory provisions requires reversal and remand.

Rule 63: Substitute Judge

Judge Resigns; Stipulations

In re R.P., ___ N.C. App. ___ (March 16, 2021)

Held: Vacated and remanded for new adjudication and disposition hearing

- Facts: Due to circumstances created by parents’ substance use, DSS filed a petition alleging Juvenile 1 (J1) was neglected and Juvenile 2 (J2) was neglected and abused. At the adjudication hearing, the parties stipulated to 13 statements of fact including that J1 was neglected and J2 was neglected and abused. The stipulations were introduced as evidence and no other evidence was offered at the hearing. The judge indicated he would make findings of fact consistent with those in the stipulation and would enter a neglect adjudication for J1 and neglect and abuse adjudications for J2. Disposition followed where the evidence consisted of DSS and GAL court reports. The judge stated he would make findings consistent with the stipulations and the GAL and DSS reports, that DSS made reasonable efforts, and that the best interests of the children were to remain in DSS custody. The DSS attorney was asked to draft the order. The judge hearing the adjudication and disposition resigned before the orders were signed. The chief district court judge signed the orders. Respondent parents appeal arguing the orders are void or alternatively the stipulations alone do not support the adjudications.
- Rule 63 of the N.C. Rules of Civ. Pro. authorizes the chief district court judge to sign orders when a district court judge resigns. The first judge did not recite, render, or sign the order and he did not adjudicate the evidence and state the conclusions of law. “Rendering and entering judgment was more than a ministerial task,” such that the chief district court judge was “without authority to sign the adjudication and disposition orders” making them a nullity. Sl.Op. ¶127.
 - Adjudication orders: Neither the record nor hearing transcript show that the judge presiding over the adjudicatory hearing rendered or made his final findings of fact and conclusions of law in the unfiled and unsigned orders but instead stated he would enter the adjudication “as is admitted to.” Sl.Op. ¶123. As a result, any action of the chief district court judge to cause the orders to be entered was not solely a ministerial duty. *See In re Whisnant*, 71 N.C. App. 439 (1984).
 - At disposition, a judge must consider competent evidence that is necessary to determine the juvenile’s needs and most appropriate disposition. The signing of the order was not a ministerial act. The findings in the written order exceeded the four rendered findings by the first judge.
- Stipulations of fact are permitted by G.S. 7B-807(a). The parties stipulated to underlying facts of the adjudications, and those stipulated facts could properly have been included in the adjudication order. Stipulations to conclusions of law are generally invalid and are not binding on the trial or appellate courts. Here, the parties agreed to stipulations of fact, not a consent adjudication order under G.S. 7B-801(b1). The judge could not have relied solely on the

stipulated conclusion of abuse and neglect for the juvenile's adjudications. No other evidence was admitted.

Remand

[In re J.M.](#), ___ N.C. App. ___ (Dec. 31, 2020)

Held: Affirmed

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

- The focus on the credibility of mother in this appeal is misguided because the determinative factors for a neglect adjudication are “the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” Sl.Op. at 15. An appeal reviews findings and conclusions about the child’s status and “should not be morphed ...into a question of culpability regarding the conduct of an individual parent.” *Id.*

Termination of Parental Rights

Subject Matter Jurisdiction

Pending Appeal of A/N/D Order

[In re J.M.](#), ___ N.C. ___ (April 23, 2021)

Held: Vacated in part; affirmed in part

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

G.S. 7B-1101 and the UCCJEA; Out-of-State Parents; Minor Parent
In re N.P., ___ N.C. ___ (March 12, 2021)

Held: Affirmed

- Facts: In 2017, when respondent mother and father were visiting North Carolina, from their home in Virginia, mother went into premature labor. The baby was born in New Hanover County 23 weeks prematurely and remained in the hospital due to all her medical needs. DSS become involved and filed a petition, where the infant was adjudicated neglected and dependent. In that matter, the trial court determined it had temporary emergency jurisdiction under the UCCJEA. Mother and father returned to their homes in Virginia after they entered into a case plan with DSS. The parents remained in Virginia while the child remained in NC in foster care. In October 2018, DSS filed a TPR petition which was granted. Mother appeals, raising the district court's lack of subject matter jurisdiction.
- Subject matter jurisdiction cannot be conferred by consent or through waiver and may be raised at any time, including on appeal. A court has no authority to act without subject matter jurisdiction and any orders entered are void. If the lower court lacks subject matter jurisdiction, the appropriate action for the appellate court is to vacate orders that were entered without authority.
- Subject matter jurisdiction is established by the Juvenile Code. G.S. 7B-1101 states the district court has exclusive original jurisdiction in TPR cases for any juvenile who resides in, is found in, or is in the legal or actual custody of a county DSS in the judicial district at the time the TPR petition/motion is filed. It further provides that there must be jurisdiction under the UCCJEA and that a nonresident parent's rights may be terminated when the court has jurisdiction under initial or modification jurisdiction under the UCCJEA and the parent has been served pursuant to G.S. 7B-1106. The question of subject matter jurisdiction in a TPR under G.S. 7B-1101 focuses on the custody, location, or residence of the *child* in a TPR, not the *parents*. (emphasis at Sl.Op. at 10). At the time the TPR petition was filed the conditions of G.S. 7B-1101 were satisfied: the juvenile resided in New Hanover County and was in the legal custody of New Hanover County DSS; NC was the juvenile's home state; and mother was served pursuant to G.S. 7B-1106 (there is no dispute on this last factor).
- The UCCJEA is an overarching jurisdictional scheme that applies to abuse, neglect, dependency and TPR proceedings. Initially, in the neglect/dependency action, the NC district court exercised temporary emergency jurisdiction in the underlying neglect and dependency action. Mother argues temporary jurisdiction should have expired given the parents' residence in Virginia. In assuming arguendo that temporary emergency jurisdiction expired before the TPR petition was filed (as mother argues), "We are not required to determine with exactness the junction at which the temporary emergency regarding the child's well-being may have ended." Sl.Op. at 10. At the time the TPR was commenced, NC was the child's home state – child lived with a person acting as a parent (the foster parents) for at least 6 consecutive months immediately preceding the commencement of the TPR action. See G.S. 50-102(7).
- Although mother argues the court should have applied the dispositional alternative G.S. 7B-903(a)(6) in the neglect/dependency case to transfer custody of the juvenile to the responsible

authorities in her home state, Virginia, North Carolina was the juvenile's home state such that G.S. 7B-903(a)(6) was not an option.

- Although mother argues she was a minor, G.S. 7B-1101 explicitly states "The court shall have jurisdiction to terminate the parental rights of any parent *irrespective of the age of the parent.*" Sl.Op. at 14 (emphasis in opinion). This language is unambiguous.

7B Statutory Time Limits

Delay in Hearing: Writ of Mandamus, Not Appeal

In re C.R.L., ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- **Facts:** In 2015, an underlying neglect action was commenced by DSS. Arising from that action, DSS filed TPR petitions on March 22, 2017. Although the court ordered DSS to notice the TPR cases for hearing in orders dated between Oct. 4, 2017 and July 25, 2019, the TPR was not heard until Dec. 9-10, 2019, almost 33 months after the petitions were filed. The TPR was granted, and the order found the TPR was hearing more than 90 days after the petition was filed. Father appeals, raising the delay in holding the hearing with the statutory time period as his sole challenge. The parties agree the TPR hearing occurred well outside the statutory time limit and that there were no continues for extraordinary circumstances.
- G.S. 7B-1109(a) states the TPR hearing shall be held no later than 90 days from the filing of a TPR petition/motion unless the court continues the hearing under subsection (d). G.S. 7B-1109(d) allows the court to continue the hearing for up to 90 days based on good cause to receive additional evidence including conducting discovery, receiving reports/assessments the court requested, or other information needed for the best interests of the child. Continuances beyond 90 days from the filing of the petition/motion "shall be granted only in extraordinary circumstances when necessary for the proper administration of justice..." Sl.Op. ¶7.
- Applying a previous holding in *In re T.H.T.*, 362 N.C. 446 (2009) addressing the delay in entering an adjudication and disposition order, "this statutory violation should have been remedied while it was occurring by the filing of a petition for writ of mandamus." *Id.* As previously stated in *In re T.H.T.*, "the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not 'sit back' and rely upon an appeal to cure all wrongs." Sl.Op. ¶8. Granting an appeal would "compound the delay in obtaining permanence for the child." Sl.Op. ¶9. Here, father did not file a writ of mandamus at any point in the 33-month delay or offer any explanation. By failing to file a petition for a writ of mandamus, father "missed his opportunity to remedy the violation of N.C.G.S. § 7B-1109." Sl.Op. ¶11.

Indian Child Welfare Act (ICWA): Mandatory Inquiry

In re M.L.B., ___ N.C. ___ (April 23, 2021)

Held: Reversed and remanded

- **Facts:** In 2015 the juvenile was adjudicated neglected. In 2019, DSS filed a TPR petition alleging several grounds. The TPR was granted, and both parents appeal challenging the findings. This

opinion determines the evidence (witness testimony) is not clear, cogent, and convincing evidence that supports the challenged findings that are necessary to support the conclusion of law for any of the alleged TPR grounds. Additionally, an issue regarding ICWA was raised.

- Under ICWA regulations, the trial must ask participants in a TPR hearing, on the record, whether they know or have reason to know the child is an Indian child. 25 C.F.R. 23.107. By not complying with the mandatory inquiry the trial court could not determine whether it had reason to know that the juvenile was an Indian child. Remanded for the court to make the inquiry and receive the participants' responses on the record. The court must also "instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." Sl.Op. ¶19. The supreme court notes that "All participants should become familiar with the Indian Child Welfare Act of 1978, codified at 25 U.S.C. ch. 12, and the corresponding regulations, including but not limited to the regulations codified at 25 C.F.R. §§ 23.101 - .144, to ensure compliance with the ICWA and to assert objections on the record if compliance in a proceeding has not occurred." Sl.Op. at fn 3.

Motion to Continue

In re J.E., ___ N.C. ___ (April 23, 2021)

Held: Affirmed

- Facts: Father appeals a TPR, arguing the court erred in denying his motion to continue, depriving him of a fair hearing and his right to due process. The TPR petition was filed on July 2, 2019, and respondent was served and in court on July 11, 2019. The hearing was continued twice upon motion of the parents – September 2019 and November 2019. At the last hearing, the respondents' attorneys agreed to a special setting of the TPR hearing in December. At that December hearing, counsel for each parent were present but the parents were absent.
- Standard of review of a motion to continue is an abused of discretion unless it is based on a constitutional right, which if fully reviewable as a question of law.
- "A parent's absence from a termination proceeding does not itself amount to a violation of due process." Sl.Op. ¶14. Father waived the argument that the denial of his motion to continue violated his constitutional rights when the reason for the motion to continue did not assert father's constitutional rights or lack of notice to preserve due process.
- G.S. 7B-1109 governs motions to continue a TPR and requires extraordinary circumstances when necessary for the administration of justice for any continuance going beyond 90 days after the initial petition is filed. Continuances are disfavored, and the burden of showing sufficient grounds is on the party seeking the continuance. "The chief consideration is whether granting or denying a continuance will further substantial justice." Sl.Op. ¶15. Five months had passed from the filing of the TPR petition. Father did not explain his absence or lack of contact with his attorney or DSS knowing the TPR was pending. Father did not show extraordinary circumstances. There was no abuse of discretion. Father did not argue how he was prejudiced, and such prejudice seems unlikely given his attorney's advocacy at trial and the unchallenged findings of fact supporting the TPR.

TPR Adjudication

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

Incarceration

Neglect

In re N.B., ___ N.C. ___ (April 23, 2021)

Held: Affirmed

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

[In re J.E.](#), ___ N.C. ___ (April 23, 2021)

Held: Affirmed

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

[In re J.S.](#), ___ N.C. ___ (March 19, 2021)

Held: Affirmed

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

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

Failure to Make Reasonable Progress

[In re G.B.](#), ___ N.C. ___ (April 16, 2021)

Held: Affirmed

Dissent, Earls, J.

- **Facts:** In 2017, the juveniles were adjudicated neglected and one juvenile was also adjudicated abused. The circumstances for the children involved exposure to domestic violence, substance use, poor supervision, failure to attend to medical needs, inappropriate discipline, and housing instability. Respondent father was incarcerated. Both parents entered into case plans with DSS. In 2019, DSS filed motions to terminate both parents' rights. The court granted both motions, and the parents appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal.
- The court properly considered father's ability to complete his case plan while incarcerated as well as his actions and decisions while incarcerated when determining whether he failed to make reasonable progress under the circumstances. The court's determination that father failed to make reasonable progress is supported by the findings. Initially father made progress on his case plan by attending NA and having negative drug screens. Father then engaged in behaviors that impacted his ability to complete his case plan. He had multiple infractions that resulted in his transfer to various different correctional facilities and significantly limited his access to services as well as delayed his release date. Father created his own barriers by his choices to engaged in prohibited activities and created the barriers he is now complaining about.
- **Dissent:** North Carolina law does not authorize a TPR based on incarceration.

Abandonment

[In re M.S.A.](#), ___ N.C. ___ (April 23, 2021)

Held: Affirmed

- **Facts:** This is a private TPR initiated by the maternal great-great aunt who the child had been living with continuously since 2010. The TPR petition was filed in 2018 and alleged father was incarcerated and had not visited with the child since 2011 or provided financial support or sent any card or gifts for at least 5 years. TPR was granted and father appeals.
- **Issue Raised by Father:** "Whether an incarcerated parent who has not had contact with his child for eight years and does not know how to contact his child may lose his parental rights on the ground of abandonment" Sl.Op. ¶3. This raises the question of willfulness.
- G.S. 7B-1111(a)(7) authorized a TPR on the ground of willful abandonment for the six months immediately preceding the filing of the petition. "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child," which is evidence by a parent withholding their presence, love,

care, and opportunity to display filial affection and neglecting to provide support or maintenance for the child. Sl.Op. ¶17. The court may look outside the 6-month determinative window to determine a parent’s credibility and intentions.

- The findings show that since father was incarcerated in 2012, he has never written letters, sent gifts or cards, contacted petitioner to learn about his child’s well-being, or provided financial support for the child. Father claims that his not asking family members with whom he contact about the child is not the equivalent of willful abandonment. Father is seeking to use his incarceration as a shield, and “incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” Sl.Op. ¶11. It is undisputed that father had the ability to seek contact information from his relatives but did not do so for years. His actions were willful.

Neglect

In re H.A.J., ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- Facts: In 2018, the juveniles were adjudicated neglected based on circumstances related to mother’s substance use and the children’s exposure to domestic violence. At a 2019 permanency planning hearing, DSS and the children’s GAL recommended that reunification be eliminated as a permanent plan. Mother objected due to lack of notice of that recommendation and due process concerns. The court proceeded with the hearing and ordered concurrent plans of adoption and guardianship, eliminating reunification as a permanent plan. Mother preserved her right to appeal. DSS filed a TPR petition, which was granted on the ground of neglect. Mother appeals both orders and challenges both the ground and best interests of the child determination in the TPR.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect as defined by G.S. 7B-101(15). Neglect may be currently occurring at the time of the TPR hearing or when a child and parent have been separated for a significant time, neglect before the parent loses custody of the child and the likelihood of future neglect by the parent based on evidence of changed circumstances that may have occurred between the time of the past neglect and the TPR hearing.
 - There is evidence of past neglect based on the juvenile’s prior adjudication of neglect and mother’s admission to substance use and domestic violence when she first interviewed with DSS.
 - The court found mother failed to comply with her case plan, and these findings support the determination of a likelihood of future neglect. Although the court placed heavy emphasis on mother’s actions before the TPR petition was filed, it did consider her recent participation (post TPR filing) in substance abuse treatment. “The trial court ultimately determined, however, that respondent-mother’s last-minute progress was insufficient to outweigh her long-standing history of alcohol and substance abuse and domestic violence, as well as the impact these behaviors had on [the juveniles].” Sl.Op. ¶23. There was no error in the determination that there likely would be a repetition of neglect.
- The court did not abuse its discretion in determining the TPR was in the children’s best interests. A bond between a parent and child is one of many factors the court considers. A pre-adoptive

placement is not required for a TPR to be granted. The facts regarding the juveniles and their needs in this case are distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004).

[In re B.T.J.](#), ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- **Facts:** The juvenile was adjudicated neglected and dependent based on circumstances created in part by mother's substance use. DSS filed a TPR petition, which was granted on the grounds of neglect and failure to make reasonable progress to correct the conditions leading to the juvenile's removal. Mother appeals, challenging the grounds.
- G.S. 7B-1111(a)(1) authorizes the termination of parental rights on the ground of neglect, defined by G.S. 7B-101(15). The ground of neglect may be based on (1) neglect that is currently occurring at the time of the TPR hearing, or (2) if there has been a long period of separation between the juvenile and parent, prior neglect (which may include an adjudication of neglect) and the likelihood of future neglect based on evidence of changed conditions at the time of the TPR hearing. "Evidence of changed conditions must be considered in light of the history of neglect by the parents and likelihood of a repetition of neglect." Sl.Op. ¶18.
- This case involves the second basis for neglect: prior neglect and likelihood of future neglect. Here, the juvenile was adjudicated neglected based on witnessing his mother's overdose on heroin while in the motel room they lived in. Mother was ordered to participate in treatment and stabilize her housing situation. There are numerous unchallenged, and therefore, binding findings showing mother's limited progress. The findings include months of mother testing positive for controlled substances after completing her inpatient treatment program even though she had no positive results in the 4 months before the TPR hearing; her inadequate housing (the lease limited the number of residents so the child could not reside there), and her unstable employment history. Her limited progress occurred immediately before the TPR hearing but were just first steps to address her issues, which were not enough to rectify the issues such that there would not be a likelihood of future neglect.

Failure to Make Reasonable Progress

Reasonable Progress Made

[In re D.A.A.R.](#), ___ N.C. ___ (April 23, 2021)

Held: Reversed

- **Facts:** In 2017, the juveniles were adjudicated neglected and dependent based on the parents' domestic violence, substance use, housing instability, and mental health issues. In 2018, mother entered into a case plan with DSS to address these issues and her parenting skills. Mother's visitation was suspended with both children at one point but was reinstated with supervised visits with one child. Mother entered a 6-month residential treatment program, followed by outpatient treatment, and filed motions to have her visitation reinstated and the filing of the TPR stayed based on positive changes she had made. DSS filed the TPR petition before mother's motions were heard. The GAL filed a motion to cease contact between mother and her one child after that child ran away from a group home with other children and mother failed to notify DSS, the group home, or law enforcement when her daughter reached out to her and she

arranged to meet her daughter. Mother's visitation was again suspended. She continued to file motions to review the plan to show her progress. In 2019, the TPR was heard, and the court granted the TPR on the ground of failure to make reasonable progress but denied the ground of neglect. The court denied the TPR for the child mother had been visited after determining it was not in that child's best interests but granted the TPR for the child with whom mother had no visitation. Mother appealed.

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

Poverty

[In re T.M.L.](#), ___ N.C. ___ (April 23, 2021)

Held: Affirmed

- **Facts:** In January 2018, the juveniles were adjudicated neglected and dependent based on a history of domestic violence and substance use by the parents. Father did not sign his case plan until July 2018, which addressed substance use, domestic violence, parenting skills, housing, and employment. In November 2019, DSS filed TPR petitions regarding father’s rights, which was granted. Father appeals.
- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. The reasonableness of the parent’s progress is evaluated up to the time of the TPR hearing. Failure to complete the case plan services, when they address the issues that contributed to the circumstances leading to the juvenile’s removal, is probative of the parent’s progress or lack thereof.
- When examining father’s progress, the trial court applied the incorrect standard (time period) by focusing on the one-year period before the TPR was filed. “An appellant must not only show error; he must show that the error was prejudicial.” Sl.Op. ¶13. The court also included findings that examined the father’s progress up to the date of the TPR hearing. Regardless of why the trial court made these later findings, they are sufficient to support the determination that the ground existed when looking at the totality of the father’s progress at the time of the TPR hearing. Father had not made reasonable progress with domestic violence services, finding appropriate housing or stable employment, or testing positive on drug screens. Father’s partial steps to make progress after the TPR was filed are insufficient.
- G.S. 7B-1111(a)(2) prohibits the TPR on this ground “for the sole reason that the parents are unable to care for the juvenile on account of their poverty.” Sl.Op. ¶33. This statutory language is not an element of the ground but instead establishes what is not a willful failure to make reasonable progress. The trial court does not have to make an affirmative finding that poverty is not the sole reason for the parent’s inability to care of the child. Similarly, a parent’s poverty does not have to be raised as an affirmative defense. The trial court’s findings reflect the evidence, which did not include poverty, and support the finding that his actions were willful.

Domestic Violence/Substance Use

[In re A.M.](#), ___ N.C. ___ (April 23, 2021)

Held: Affirmed

- **Facts:** In 2017, the children were adjudicated neglected. The parents were ordered to comply with a case plan to address issues involving substance use, housing, income, domestic violence, mental health, and criminal activity. DSS filed a motion to terminate the parents’ rights. At permanency planning hearings the court found that progress made by either parent was short-lived. The TPR hearing was held in 2020, and the parents’ rights were terminated. Mother appeals, challenging the grounds and best interests.

- G.S. 7B-1111(a)(2) authorizes a TPR on the ground of willfully leaving the juvenile in foster care for 12 or more months and failing to make reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. The reasonableness of the parent's progress is evaluated up to the time of the TPR hearing. A parent's compliance with a court ordered case plan is relevant in the determination. Progress must be reasonable; extremely limited progress will support this ground.
- Mother's progress was not reasonable. Although mother obtained a structurally safe and appropriate residence, unchallenged findings show mother continued to struggle with substance use and that there were repeated acts of domestic violence. These issues led to the removal of the children from her care.

[In re L.N.G.](#), ___ N.C. ___ (March 19, 2021)

Held: Affirmed

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

[In re A.M.L.](#), ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- Facts: in 2018, the juveniles were adjudicated neglected based in part on conditions resulting from mother's substance use. Mother was ordered to comply with a case plan addressing her substance use, parenting skills, and mental health. DSS filed a TPR petition, which was granted. Mother appeals arguing she substantially complied with her case plan and made reasonable progress to correct the conditions that led to the children's removal.
- G.S. 7B-1111(a)(2) authorizes a termination of a parent's rights when two prongs exist: (1) the parent has willfully left the child in foster care or other placement outside the home for 12 or more months and (2) has failed to show reasonable progress under the circumstances to correct

the conditions that led to the child’s removal. Although all aspects of a case plan do not have to be fully satisfied, there must be more than extremely limited progress. Willfulness is a finding of fact and does not require fault by the parent – “It simply requires respondent-mother’s “prolonged inability to improve her situation, despite some efforts in that direction.” Sl.Op. ¶29.

- The findings support the conclusion. (Note, there is no dispute the children were in foster care for 16 months).
 - Although mother argued her delay in receiving a written copy of the case plan harmed her, the delay was 62 days at most and a year before the TPR hearing, giving her sufficient time to make progress. Further she was aware of what she needed to do based on her prior DSS involvement.
 - When a parent’s noncompliance with a case plan supports a TPR on this ground, there must be a nexus between the court-approved case plan and the conditions that led to the children’s removal. The nexus existed here, as the case plan was tailored to help mother with her substance use, parenting, and mental health issues. Although mother made progress on the parenting skills portion of the case plan, “the trial court’s findings focused on the true gravamen of her case— her substance abuse—as well as her mental health struggles.” Sl.Op. ¶21. Mother missed and failed drug screens; did not attend a recovery group; and although asserted she completed an assessment and engaged in treatment, she never reported that to DSS and the records showed primarily drug test results. Mother did not complete any of the mental health components of her case plan.
 - Mother completed a case plan for her infant who DSS did not seek custody off. Her ability to complete that case plan shows mother’s willfulness.

Minor Parent Aging Out of Foster Care

In re Q.P.W., ___ N.C. ___ (March 12, 2021)

Held: Affirmed

Dissent, Earls, J.

- Facts: This TPR involves an underlying dependency action for the juvenile, when her own mother was also a minor in DSS custody. While the mother was a juvenile in DSS custody, both she and her child (the juvenile in this case) were placed together from 2014-2017. Based on mother’s behaviors, there were some disruptions in the joint placement. When mother turned 18 (in 2017), she was no longer eligible to remain in the placement with her child. For the next year she had minimal contact with her child and failed to comply with her case plan addressing employment, parenting, housing, mental health and substance abuse issues, and consistent visits with her child. Ultimately DSS filed a TPR petition, which was granted on several grounds. Mother appeals – arguing the findings of fact (which were not challenged by mother) do not support the conclusion of law. This appeal focuses on the ground of failure to make reasonable progress to correct the conditions.
- Standard of review is whether the findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed de novo.

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

Willful Abandonment

In re G.G.M., ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- Facts: The children have resided with the petitioners, maternal grandparents, since 2011. In 2013, father was shot several times and the perpetrators were never identified. Father had no contact with the children from 2013 until 2019 when he appeared at the grandparents’ home, unannounced, with law enforcement. He briefly saw his son but did not see his daughter. Afterwards, the grandparents obtained an ex parte G.S. Chapter 50 custody order. A week later,

father went to grandparents' home with a police officer to take custody of his children but did not do so based on the ex parte custody order the grandparents obtained. Shortly thereafter, the grandparents filed a TPR petition. The TPR was granted, and father appeals the grounds and best interests determination.

- G.S. 7B-1111(a)(7) authorizes a TPR based on willful abandonment for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment implies conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child through the withholding of the parent's presence, love, care, opportunity to display filial affection, and failure to provide support and maintenance. Willfulness is a question of fact. The court may consider the parent's conduct outside of the determinative 6-month period when evaluating a parent's credibility and intentions.
- The trial court determines the credibility of the witnesses, the weight of evidence, and the inferences to be drawn from that evidence. Although father testified he did not intend to abandon his children but instead chose to keep them safe as he feared his shooting was instigated by the children's mother, the court ultimately determined the father willfully intended to abandon the children during the determinative time period. The court's findings of father's 5-year period of failing to contact and support the children support the conclusion of willful abandonment.

In re I.R.M.B., ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- Facts: In 2014, mother obtained a multi-year order of protection against father in California where they lived. Father was prohibited from having contact with mother and child. Mother and child moved to NC. In 2015, father filed a custody action in California that he never pursued and was removed from the calendar. In 2016, mother filed a TPR petition in NC against father. After jurisdictional issues were resolved, the TPR was heard and granted on the ground of abandonment. Father appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR based on willful abandonment for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment implies conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willfulness is an integral part of abandonment. The court may consider the parent's conduct outside of the determinative 6-month period when evaluating a parent's credibility and intentions. Willfulness is a question of fact.
- Unchallenged findings of fact support the court's conclusion such that the appellate court does not need to consider the respondent father's challenged findings of fact. Although father had a restraining order prohibiting contact, he was aware of his ability to seek legal custody and visitation even with the limitations in the restraining order. Although he filed for custody in 2015, he took no further action in that case. Further, his actions of domestic violence against mother support a reasonable inference of willfulness for this TPR ground.

Abandonment and Neglect: Findings

In re Z.J.W., ___ N.C. ___ (March 12, 2021)

Held: Reversed in part; Vacate and Remanded in part

- **Facts:** Mother and father had two children and initially lived together in Buncombe County. There was a history of domestic violence in the home, and in 2010 or 2011, mother relocated with the daughter to Nash County. Father and son remained in Buncombe County. In 2018, DSS in Nash County filed a petition regarding the daughter, who was adjudicated abused and neglected. As part of that DSS case, father was contacted. He did not have a relationship with his daughter after she moved with mother to Nash County but expressed a desire to be involved. At the same time, Buncombe County DSS filed a petition regarding the son, who was adjudicated neglected. Father complied with his case plan. In the Nash County case, father was ordered to comply with the Buncombe case plan. Father was not ordered visitation with his daughter in part due to a misunderstanding as to whether the child's therapist was making recommendations about visitation, which she did not do. Father participated in the Nash County court proceedings and DSS CFT meetings by telephone, although he did miss some. In 2019, DSS filed a TPR motion, which was granted on the grounds of neglect and willful abandonment. Father appeals both grounds.
- **RE: findings.** Challenged findings of fact that are not supported by the evidence are disregarded. Additionally, findings for adjudication that are supported by evidence from the dispositional phase of the TPR are not considered. As the Court of Appeals has held, dispositional evidence should not be considered for adjudicatory findings. See *In re Mashburn*, 162 N.C. pp. 396 (2004). Findings of fact that are conclusions of law will be treated as such on appeal.
- G.S. 7B-1111(a)(7) authorizes a TPR on willful abandonment in the immediately preceding 6 months prior to the filing of the TPR motion. Abandonment requires conduct that demonstrates a willful intent to forego all parental duties and relinquish all parental claims.
 - During the determinative 6-month period, unchallenged findings show father made one child support payment, sent 4 emails to the child's placement provider (maternal aunt) to ask about her well-being, attended a CFT meeting, and satisfied his case plan. The father's failure to visit his daughter was not voluntary but was due to the restriction in the court order and confusion about the therapist's role in making recommendations and should not be considered in determining whether the father willfully abandoned his daughter.
 - Although father could have done more, the steps he did take are sufficient to preclude an adjudication of the ground of willful abandonment. The findings do not support the conclusion.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes abandonment. Based on father's actions, the findings do not support a neglect by abandonment theory.
- G.S. 7B-1111(a)(1) also authorized a TPR on the ground of neglect. When the child and parent have been separated for a long period of time, the court looks to a showing of past neglect and the likelihood of future neglect. The trial court considers the parent's conduct over an extended period of time including up to the time of the TPR hearing. Here, the juvenile was previously adjudicated neglected. When looking at the likelihood of repetition of neglect, the court appears

to have focuses on father's absence from his daughter's life prior to the filing of the TPR motion and did not consider any evidence about events occurring after the TPR motion was filed such that the findings do not support a TPR on neglect. However, the record contains evidence that could support findings of future neglect. Vacated and remanded.

Disposition

Standard of Review

[In re G.B.](#), ___ N.C. ___ (April 16, 2021)

Held: Affirmed

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

- **Facts:** In 2017, the juveniles were adjudicated neglected and one juvenile was also adjudicated abused. In 2019, DSS filed motions to terminate both parents' rights. The court granted both motions, and the parents appealed. Mother challenges the best interests determination and the standard of review arguing it should be de novo.
- "We again reaffirm our application of the abuse of discretion standard when reviewing the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest' under N.C.G.S. §7B-1111(a)." Sl.Op. ¶30. This standard was recognized by this Court in *In re Montgomery*, 311 N.C. 101 (1984) and has not changed. There have been no amendments to the statutes, including a 2011 amendment to the Juvenile Code, that alters the holding. We have heard and rejected this argument.

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

[In re A.M.](#), ___ N.C. ___ (April 23, 2021)

Held: Affirmed

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

[In re G.G.M.](#), ___ N.C. ___ (March 19, 2021)

Held: Affirmed

- Facts: The children have resided with the petitioners, maternal grandparents, since 2011. In 2013, father was shot several times and the perpetrators were never identified. Father had no contact with the children from 2013 until 2019 when he appeared at the grandparents' home, unannounced, with law enforcement. He briefly saw his son but did not see his daughter. Afterwards, the grandparents obtained an ex parte G.S. Chapter 50 custody order. A week later, father went to grandparents' home with a police officer to take custody of his children but did not do so based on the ex parte custody order the grandparents obtained. Shortly thereafter, the grandparents filed a TPR petition. The TPR was granted, and father appeals the grounds and best interests determination.
- Standard of review is an abuse of discretion. Findings must be based on competent evidence. G.S. 7B-1110(a) specifically allows for the consideration of hearsay evidence when determining a child's best interests.
- At disposition, the court must consider the factors of G.S. 7B-1110(a). Written findings are required for factors that have conflicting evidence, such that it is placed at issue before the court.
- A likelihood of adoption is not required for a TPR to be determined to be in the child's best interests and therefore granted. Here, the court found the petitioners were seeking custody of the children via a Chapter 50 action, which is not an adoption.
- The trial court determines the weight and credibility of the evidence. Father challenges the GAL's basis for her testimony and credibility, but the court found the testimony to be credible.
- There is a discussion about how this case is distinguishable from *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). Here, the court's findings do not solely focus on how well the children were doing with the petitioners; the father did not show any desire to be part of the children's lives for years, until 2 weeks before the TPR petition was filed; and the children's GAL recommended the TPR be granted.
- There was not ineffective assistance of counsel. Respondent has not shown how his attorney's failure to object or introduce evidence that grandparents' retaliated by seeking a Ch. 50 custody order would have resulted in a different outcome.