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Child Welfare Case Update

Cases Decided from October 21, 2014 – June 2, 2015

Contents

Abuse/Neglect/Dependency

Hearing Procedures: Fairness and Objections

In re P.A., ___ N.C. App. ___ (May 5, 2015)

- The cross-examination of the respondent about a neglect adjudication of one of her other children was not objected to. Although the adjudication was reversed, the cross-examination was not fundamentally unfair as it was used to demonstrate respondent's prior history with DSS rather than the adjudication determination.
- Because respondent did not object to unsworn testimony of one witness, the issue may not be argued on appeal.

Adjudication: Hearing/Evidence Required

In re I.D., ___ N.C. App. ___ (February 3, 2015)

Held: reversed and remanded

- An adjudication cannot be ordered as a judgment on the pleadings but instead requires a hearing where evidence beyond the verified petition is required.

Adjudication: Abuse – Physical Discipline

In re H.H., ___ N.C.App. ___, 767 S.E. 2d 347 (December 2, 2014)

Held: Affirmed in part (abuse & neglect adjudications)

- G.S. 7B-101(1)c. defines abuse as using or allowing to be used cruel or grossly inappropriate procedures or devices to modify a child's behavior. The court's conclusion that striking the child five times on his leg with a belt that resulted in multiple bruises that were present the next day along with the child's description of "a beating" supported the adjudication of abuse.
- A child is not dependent if placed with his nonremoval parent, who the court finds is able to properly care for the child.
- G.S. 7B-904 limits a court's authority to order a parent to take specific actions to those actions that would correct conditions the court found contributed to the juvenile's removal and adjudication.
- Incorporation by reference of reports admitted without objection is not the equivalent of a finding. An order containing findings of fact would have further supported the adjudication of neglect and the reasons for removal, which would impact the court's authority to order parents to take certain actions at disposition.

Adjudication: Neglect Findings

In re J.W. and K.M., ___ N.C. App. ___ (May 5, 2015)

Held: Affirmed

- Recognizing the common practice that district court orders are drafted by counsel for a party, "it is not per se reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." A review of the record (in this case, a four day hearing) demonstrated the findings were based on evidence presented to the court, the court used logical reasoning , and the court found the ultimate facts necessary to adjudicate the juveniles neglected. This case distinguishes earlier decisions: In re Anderson found as fact "the grounds *alleged*" rather than the (non)existence of the facts so alleged, and In re O.W. recited testimony rather than find facts.
- A juvenile who does not receive proper care, supervision, or discipline, or who is not provided necessary remedial care, or who lives in an environment injurious to his/her welfare, which results in some physical, mental, or emotional impairment, or substantial risk of such impairment is "neglected." A court's finding of neglect is supported by evidence that respondent mother was a victim of domestic violence and had contact with and allowed the children to have contact with the abuser after a DVPO was entered, had a history of DSS involvement due to domestic violence, substance abuse and mental health issues, communicated with the DSS social worker that she did not want to participate in the case plan, behaved inappropriately during visits with her children, and stated she could not care for her children.

In re J.D.R., ___ N.C. App. ___, 768 S.E. 2d 172 (January 20, 2015)

Held: Affirm in part

- Despite findings that mother provided for her child financially, medically, and educationally, other findings of mother's (1) past and present use of drugs, (2) past and present actions of injuring child, (3) refusal to cooperate with DSS' attempts to assess the child's safety, and (4) friend-like relationship with child that contributed to the child's defiant behavior were sufficient to conclude child was neglected. Child did not receive proper care and supervision and lived in an environment injurious to his welfare.

Adjudication: Dependency, Findings, and Paternity

In re V.B., ___ N.C. App. ___, 768 S.E.2d 867 (February 17, 2015)

Held: Reversed

- Facts: Three days after child's birth and while the child is still in the hospital, a petition alleging dependency is filed and nonsecure custody is ordered. The teen mother is in department custody herself and ultimately stipulated to factual allegations in petition. The teen father was named as a party, but the petition alleged his paternity was not established. Three weeks after the petition was filed, DNA testing confirmed his paternity. At the adjudication hearing, paternity is established, and the father contests the petition as no allegations regarding his inability to care for the child were included. After a hearing, the child is adjudicated dependent, and respondent father appeals.
- For an adjudication of dependency, both prongs of G.S. 7B-101(9) must be proved by clear and convincing evidence:
    - The juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision, and
    - The parent, guardian, or custodian lacks an appropriate alternative child care arrangement.
- Although the statute is in the singular ("parent"), case law has held that a child is not dependent when at least one parent can provide or arrange for adequate care and supervision.
- Although post-petition evidence is generally not admissible in an adjudicatory hearing for abuse, neglect, or dependency, paternity is an exception as it is relevant to whether a child has a parent who is capable of providing or arranging for appropriate care and supervision of a child.
- There were no allegations, evidence, or findings that the father was unable to provide or arrange for the child's care and supervision.

Adjudication: Dependency

In re J.D.R., ___ N.C. App. ___ , 768 S.E. 2d 172 (January 20, 2015)

Held: Reversed

- A dependency adjudication requires findings of both the parent's inability to provide for the juvenile's care and supervision and the lack of an appropriate alternative child care arrangement. Without any evidence or findings regarding the availability of an alternative child care arrangement, the child is not dependent.

In re H.H., ___ N.C.App. ___, 767 S.E. 2d 347 (December 2, 2014)

Held: reversed in part (dependency adjudication)

- A child is not dependent if placed with his nonremoval parent, who the court finds is able to properly care for the child.

Disposition: Visitation

In re J.W. and K.M., ___ N.C. App. ___ (May 5, 2015)

Held: Affirmed

- G.S. 7B-905.1 requires the court order include the minimum frequency and length of visits and whether the visits shall be supervised. An order that provides for "weekly supervised visits…, supervised by a social worker" and states "all prior orders of the Court should remain in full force and effect, unless specifically modified by this order" was sufficient when read with the previous orders. The previous order for J.W. stated two hours supervised visitation per week and for K.M. stated a maximum of one hour of supervised visitation to be supervised by the Department or another appropriate adult.

In re N.B. and L.B., ___ N.C. App. ___ , 771 S.E.2d 562 (April 7, 2015)

Held: Affirmed

- G.S. 7B-905.1, effective Oct. 1, 2013, requires the court order to contain "the minimum frequency and length of visits and whether the visits shall be supervised" and abrogates the holding in *In re E.C.*, 174 N.C. App. 517 (2005) that the court also include in its order the time and place for the visits.
- An order that sets forth visitation of at least one visit per month for a minimum of one hour to be supervised by the family therapist with the respondent mother to coordinate the schedule with the family therapist meets the minimum requirements of G.S. 7B-905.1.

In re J.D.R., ___ N.C. App. ___ , 768 S.E. 2d 172 (January 20, 2015)

Held: Remand

- G.S. 7B-905.1 requires the court to "specify the minimum frequency and length of the visit and whether the visits shall be supervised." Although the court ordered supervised visitation at set times (9 a.m. – 5 p.m. three Saturdays a month and a minimum of 4 hours on Mother's Day, Christmas Eve or Day, Easter day or the day before or after, and Thanksgiving or the day before or after), other parts of the visitation schedule did not comply with G.S. 7B-905.1. A court cannot delegate its judicial function of awarding visitation to the child's custodian, such as allowing the

father to determine if the mother has lunch with the child at school and if the mother complies with the court's order for conditional expansions of her visitation rights (e.g. complete drug treatment and have negative drug tests to move toward unsupervised visits from Friday afterschool until Sunday at 5:00 p.m., divide school holidays, and two weeks in the summer).

Disposition: Non-Secure Custody

In re J.W. and K.M., ___ N.C. App. ___ (May 5, 2015)

Held: Affirmed

- The term "non-secure" custody distinguishes it from "secure custody" in a detention facility and may be used when a juvenile is placed in DSS custody as a disposition pursuant to G.S. 7B-903(a)(2)(c).
    - *Author's Note*: This opinion does not address how this differs from the use of the term "nonsecure custody" provided for in Article 5 of G.S. Chapter 7B.

Disposition: Court Authority to Order Parents to Take Certain Actions (G.S. 7B-904)

In re H.H., ___ N.C.App. ___, 767 S.E. 2d 347 (December 2, 2014)

Held: Vacated in part (disposition)

- G.S. 7B-904 limits a court's authority to order a parent to take specific actions to those actions that would correct conditions the court found contributed to the juvenile's removal and adjudication.
- Incorporation by reference of reports admitted without objection is not the equivalent of a finding. An order containing findings of fact would have further supported the adjudication of neglect and the reasons for removal, which would impact the court's authority to order parents to take certain actions at disposition.

Disposition: Reunification and Case Plan

In re J.W. and K.M., ___ N.C. App. ___ (May 5, 2015)

Held: Affirmed

- The court did not abuse its discretion when ordering the children remain in DSS custody despite their mother completing her case plan. The court enters a disposition based upon the best interests of the children, and here the court made

findings, based on competent evidence, that the mother behaved inappropriately at visits, and the conditions that resulted in the children's removal continued to exist.

In re L.M., ___ N.C. App., ___ , 767 S.E. 2d 430 (December 31, 2014)

Held: Affirmed

- A parent's progress and/or a child's preference is not conclusive on a court's best interests determination. Instead, a trial court exercises its discretion in weighing competent evidence before it when determining a juvenile's best interests. It is not an abuse of discretion to find that while mother improved her life and child wanted to return home the court found mother could not adequately meet child's needs and therefore reunification would not be in the child's best interests.

Disposition: Guardianship

In re P.A., ___ N.C. App. ___ (May 5, 2015)

Held: Vacated and Remanded

- G.S. 7B-600(c), and -906.1(j) require the court to verify the proposed guardian (1) understands the legal significance of the guardianship and (2) has adequate resources. These are separate inquiries. The court must make an independent determination based on competent evidence that adequate resources exist. The guardian's own subjective testimony that she has the financial ability to support the child and provide for his needs without any further information regarding what she consider adequate or what the resources are is insufficient.
- Citing In re B.G., the court must address whether a respondent parent is unfit or has acted inconsistently with her parental rights when granting custody or guardianship to a nonparent in a permanent plan.
    - *Author's Note: Both of these cases are specific to permanency planning orders and do not address a disposition that orders custody to a nonparent when it is not the child's permanent plan.*

In re N.B. and L.B., ___ N.C. App. ___, 771 S.E.2d 562 (April 7, 2015)

Held: Affirmed

- Reciting a holding in *In re J.E.*, "the Juvenile Code does not 'require that the court make any specific findings in order to make the verification' prescribed by N.C. Gen.Stat. 7B-906.1(j)."
- It is sufficient for the court to consider evidence that the guardians understand the legal significance of the guardianship, and findings regarding the paternal grandparents' understanding of and ability to fulfill their financial responsibilities

and willingness to be responsible for the children's well-being until each child turns 18 is sufficient.

In re L.M., ___ N.C. App., ___, 767 S.E. 2d 430 (December 31, 2014)

Held: Affirm in part

- The appointment of a guardian of a juvenile pursuant to G.S. 7B-600 requires the court verify the person so appointed understands the legal significance of the appointment and accepts the responsibilities of being a guardian. This verification need not be a finding but may be based upon evidence presented to the court.
- The testimony of both the DSS case worker and the foster father who was appointed as the juvenile's guardian as well as an executed form by foster father acknowledging he accepted responsibility of the juvenile was sufficient to meet the court's required verification. Appointment of foster father as guardian affirmed.

Held: Vacate and remand in part

- The foster mother's understanding and acceptance of responsibilities of her appointment as legal guardian for a juvenile cannot be properly verified in the absence of any evidence regarding the foster mother. As such, foster mother's appointment as legal guardian is vacated and remanded.

Disposition: Waive Review Hearing

In re P.A. , ___ N.C. App. ___ (May 5, 2015)

Held: Vacated

- G.S. 7B-906.1(n) requires the court to make written findings of fact of each for the five enumerated factors. Failure to do so is reversible error. In this case, the court would not be able to find G.S. 7B-906.1(n)(1), which requires the juvenile resided in the placement for at least one year.

Disposition: Civil Custody Order (G.S. 7B-911)

In re J.D.R., ___ N.C. App. ___ (January 20, 2015)

Held: Affirm in part

- G.S. 7B-911 requires the court to make findings and conclusions that support the entry of a custody order under G.S. Chapter 50, and G.S. 50-13.2(a) requires findings and conclusions that "best promote the interest and welfare of the child." Findings of mother's opiate use, late arrivals for and erratic behavior at visits, and father's testing negative for drugs and having an appropriate residence and sufficient

financial resources supported court's conclusion that custody to the father was in the child's best interests.
Held: Reverse in part and remand

- G.S. 911(c)(2) requires the court make findings that continued state intervention on behalf of the child is not necessary. Without such a finding, the court cannot terminate its jurisdiction.

Cease Reunification

GAL for Respondent Parent

In re A.R., ___ N.C.App. ___ , 767 S.E.2d 427 (Dec. 31, 2014)

Held: Affirm in part

- Under statute in effect at the time a GAL of assistance was appointed to Respondent Mother (RM), the trial court did not abuse its discretion in determining the RM had diminished capacity but was not incompetent. Evidence showed RM understood the proceedings, was reasonable, graduated from high school, managed her daily affairs including paying her bills, and was capable of making her own decisions.

De Facto Order

In re N.B. and L.B., ___ N.C. App. ___, 771 S.E.2d 562 (April 7, 2015)

Held: Affirmed

- Selected Timeline:
  - September 2013, permanent plan of reunification concurrent with guardianship
  - August 2014, order changed permanent plan to guardianship and appointed paternal grandparents as G.S. 7B-600 guardians
- An order that eliminates reunification as a permanent plan and orders custody from the department to the children's legal guardians, with guardianship as the permanent plan is a de facto cease reunification order.

In re H.D and K.R.., ___ N.C. App. ___ , 768 S.E.2d 860 (February 17, 2015)

Held: Affirmed

- Applying the holding of In re L.M.T., 367 N.C. 165 (2013), the permanency planning order was a cease reunification order based upon the findings of mother's (1) failure to attend visits and complete her case plan (2) pending criminal charges and failure to participate in drug screens, and (3) as a result, the inability of the children's return home within six months. The order "embraces the substance of the statutory

provisions requiring findings of fact that further reunification efforts 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" as required in G.S. 7B-507(b)(1).

In re A.E.C., ___ N.C. App. ___ , 768 S.E. 2d 166 (January 20, 2015)
Stay granted by NC Supreme Court on 2/25/15 pending decision on Petition for Discretionary Review filed by DSS

- A permanency planning order that does not explicitly cease reunification efforts but has a permanent plan of adoption and orders DSS to file a TPR is a cease reunification order.

Findings

In re N.B. and L.B., ___ N.C. App. ___, 771 S.E.2d 562 (April 7, 2015)

Held: Affirmed

- The findings in a cease reunification order need not quote the exact language of the statute but instead must make clear that the trial court considered the substance of the statutorily required findings.

In re A.E.C., ___ N.C. App. ___ , 768 S.E. 2d 166 (January 20, 2015)

Held: Vacated and remanded

**Stay granted by NC Supreme Court on 2/25/15 pending decision on Petition for Discretionary Review filed by DSS

- Although order of paternity was entered and father became a party to the A/N/D action after the entry of a cease reunification order that included a permanent plan of adoption and ordered DSS to file a TPR, the trial court is required to make G.S.7B-507(a) findings regarding "whether DSS made reasonable efforts to reunite father with" his child.
- The trial court is required to make ultimate findings of the applicable statutory factor set forth in G.S. 7B-507(b) (in this case – 507(b)(1): reunification efforts would be futile or inconsistent with the juvenile's health, safety and need for a safe, permanent home") before ordering cease reunification. The ultimate finding of fact regarding reunification efforts being futile cannot be inferred from findings of fact in the order.
- Relying on In re Eckard, 148 N.C. App. 541 (2002), an order that does not return a child home must include findings regarding reunification despite the father's late appearance in the case.

Appeal: Timing

In re A.R., ___ N.C.App. ___ , 767 S.E.2d 427 (Dec. 31, 2014)

Held: Dismiss in part

- When the right to appeal a cease reunification order is timely preserved, the appeal may be heard if a TPR is not commenced within 180 days of the cease reunification order. The appeal of the cease reunification order must be made after the expiration of that 180 day time period, for the 180 day time period acts as a delay for the filing of a notice of appeal. Once the 180 days elapses, the 30 day time limit to appeal the cease reunification order applies. Appeal is untimely when filed more than 210 days after the entry of a cease reunification order.

Appeal via TRP

In re A.E.C., ___ N.C. App. ___, 768 S.E. 2d 166 (January 20, 2015)

Held: Vacate and remand
** Stay granted by NC Supreme Court on 2/25/15 pending decision on Petition for Discretionary Review filed by DSS

- Relying on the reasoning in an unpublished case, In re J.R., ___N.C. App. ___; 759 S.E. 2d 712 (2014), a proper and timely appeal of a termination of parental rights order that includes a cease reunification order as an issue for appeal properly raises the cease reunification order for appeal pursuant to G.S. 7B-1001(a)(5)a. A writ of certiorari is moot.

In re H.D and K.R.., ___ N.C. App. ___ , 768 S.E.2d 860 (February 17, 2015)

Held: Dismiss DSS motion to dismiss and Respondent Mother's Petition for Writ of Certiorari

- Although respondent mother did not include the cease reunification order in her notice of appeal, it was identified as a "proposed issue" in the timely and properly filed termination of parental rights appeal. Relying on In re L.M.T., 367 N.C. 165 (2013), which held that G.S. 7B-1001(a)(5)(a) combines the appeal of a cease reunification order and TPR order., mother's appeal of the cease reunification order could be considered.

Termination of Parental Rights

Subject Matter Jurisdiction: Verification of Petition

In re N.T., ___ N.C. App. ___, 769 S.E. 2d 658 (March 17, 2015)

Held: vacated, stay granted by NC Supreme Court, 4/1/2015

- Relying on *Fansler V. Honeycutt* , a petition is not properly verified when the verification itself does not indicate the person performing the verification has the authority to administer oaths or verify pleadings. In this case, the signature of the person performing the verification of the initial petition alleging the child was neglected was illegible, no title was given for the person, and there was no competent evidence in record showing the petition was properly verified.
- Without a proper verification of an A/N/D petition, the court does not have subject matter jurisdiction, and all orders in the action are void ab initio. Because DSS never had custody of the child due to the lack of subject matter jurisdiction, DSS did not have standing to file a motion to terminate parental rights. As a result, the court lacked subject matter jurisdiction in the TPR.

Subject Matter Jurisdiction: Pending Appeal of Adoption Decree; Mootness

In re Costin, ___ N.C. App. ___ (December 31, 2014)

Held: Affirmed

- Facts and procedural history: Mother executed relinquishment of her newborn with an adoption agency. The agency placed the child with appellee parents, who petitioned for adoption. Mother challenged the validity of her relinquishment, and the district court determined the relinquishment void and dismissed the adoption petition. Appellee parents and the adoption agency appealed the district court order, and the COA reversed. See *In re Adoption Baby Boy* (April 15, 2014). Pending that appeal, appellee parents filed for termination of the mother's parental rights, which was granted. Respondent mother appeals the TPR on the grounds that there was no subject matter jurisdiction because an appeal in the adoption proceeding was pending.
- Although mother's relinquishment was determined to be valid, the appeal of the TPR was not moot because of future collateral legal consequences for the mother. Specifically, G.S. 7B-1111(a)(9) makes the involuntary termination of parental rights combined with a parent's inability or unwillingness to establish a safe home a ground for terminating her rights to any other child she has or may have.

- G.S. 7B-1003 limits a district court's jurisdiction to hear a termination of parental rights action pending an appeal of an order entered under the Juvenile Code. It does not limit the court's jurisdiction to hear a TPR pending an appeal of an order entered in non-7B action, such as an adoption proceeding brought pursuant to G.S. Chapter 48.

Preliminary Hearing

In re A.N.S., ___ N.C. App. ___ (January 20, 2015)

Held: Affirmed

- The preliminary hearing set forth at G.S. 7B-1105 applies "only when the TPR petition demonstrated the petitioner is unaware of the name or identity of a parent. " Naming a putative father indicates the parent's identity is known, and naming "John Doe" in the alternative as a contingency does not negate petitioner's knowledge of the putative father. A preliminary hearing was not required as the father's identity was known.

Continuance

In re C.J.H., ___ N.C. App. ___ (April 21, 2015)

Held: Affirmed

- There is no abuse of discretion in denying a continuance request made by respondent parent's attorney on the day of the TPR hearing due to the respondent's absence when the court found respondent received written notice of the hearing date, the respondent contacted the court the week before to request a continuance, the GAL confirmed that the week before respondent was aware of the hearing date, and respondent's decision to start a new job the week of the hearing did not rise to extraordinary circumstances for a continuance pursuant to G.S. 7B-1109(d).
- There is no abuse of discretion in allowing direct examination of petitioner's witnesses when respondent is absent and after court learns respondent called the court during the hearing to inquire as to the time for the hearing on the next day when respondent's counsel was present during direct examination, the court continued cross-examination until the next day, the court allowed time for respondent and his attorney to confer prior to starting the second day of hearing, and the respondent knew the correct date of the hearing.

Ineffective Assistance of Counsel (Incarcerated Parent)

In re B.L.H., ___ N.C. App. ___, 767 S.E.2d 905 (January 20, 2015)

Held: Vacated and remanded in part

- Relying on Dunkley v. Shoemate, 350 N.C. 573 (1999), which held "a lawyer cannot properly represent a client with whom he has no contact," counsel in this case was unable to present evidence or make substantive arguments on his client's behalf such that this father was denied fundamental fairness in the termination of parental rights action.
- Counsel is required to make sufficient efforts to communicate with his client, which includes attempts to call, write, and/or email the client.

Withdrawal of Attorney

In re M.J.G., Jr. & H.C.G., ___ N.C. App. ___, 767 S.E. 2d 436 (January 20, 2015)

Held: Vacated and remanded
*** stay was granted by NC Supreme Court on 2/23/2015, not yet argued before NC Supreme Court

- After appearing in an action, an attorney may only withdraw if all three prongs are satisfied: 1) justifiable cause, 2) reasonable notice to the client, and 3) permission of the court. Without any evidence that counsel notified or attempted to notify her client of her intent to withdraw, it is an abuse of discretion for a court to grant the attorney's motion to withdraw.
- Reaffirming In re D.E.G., 747 S.E. 2d 285 (2013), a parent who is represented by an attorney in an underlying A/N/D action continues to be represented by that attorney in the TPR action, and therefore, the attorney is not provisionally appointed in the TPR.

Waive Counsel

In re J.K.P., ___ N.C. App. ___ , 767 S.E.2d 119 (December 31, 2014)

Held: Affirmed

- When a respondent mother (RM) agrees to her court appointed counsel's motion to withdraw; engages in an exchange with the court where the court explains the nature of a TPR proceeding, consequences of moving forward, and need to know the law and court procedure, and RM asserts she will represent herself; and where RM

reads and signs a waiver of counsel form, the waiver of counsel is knowing and voluntary.

GAL for Respondent Parent: Inquiry on Incompetency

- The court of appeals published two decisions addressing when a court must inquire as to a respondent parent's competency in a termination of parental rights proceeding such that a GAL of substitution may be appointed to the respondent parent pursuant to G.S. 7B-1101 as amended by S.L. 2013-129, effective October 1, 2013. Both cases rely on In re J.A.A, 175 N.C. App. 66 (2005), which held a court is required to properly inquire into a litigant's competency when circumstances that raise a substantial question of whether the litigant is incompetent is brought to a judge's attention. Failure to make a proper inquiry is an abuse of discretion.

In re T.L.H., ___ N.C. App. ___, 765 S.E.2d 88 (November 18, 2014)

Held: Reversed and Remanded for hearing on parent's competency
** Appeal pending before NC Supreme Court based on dissent, argued 4/21/15

- A substantial question requiring the court to make a proper inquiry into a respondent parent's competency and need for the appointment of a GAL of substitution pursuant to G.S. 7B-1101.1(c) is raised when there is evidence that a request for an inquiry has been made, allegations in the petition include multiple serious mental health conditions and the parent's noncompliance with treatment, the parent's absence from the court hearings, and an alleged ground of dependency. (NOTE: a ground of dependency alone does not automatically require the inquiry).
- Failure to conduct that inquiry when a substantial question is presented to the court is an abuse of discretion.
- **Facts:** In 2013 in the underlying abuse, neglect, dependency action, a GAL was appointed to respondent mother, but the appointment did not specify if the GAL was in a role of assistance or substitution. Subsequent to the child's adjudication of dependency, DSS filed a petition to terminate parental rights, which included a request to inquire as to the mother's competency based upon her mental health diagnoses and lack of compliance with treatment (mother had schizophrenia, bipolar disorder, and narcolepsy and had been hospitalized multiple times in the last year). At a pretrial hearing in November 2013, the court released the GAL for Respondent Mother after determining, without conducting a hearing, the GAL was in a role of assistance, which was no longer authorized by G.S. 7B-1101.1. Respondent mother did not appear for the January 2014 TPR hearing. Her rights were terminated on all the alleged grounds, one of which was the child's dependency. Respondent mother appealed contending the court abused its

discretion by not inquiring into her competency and need for a GAL of substitution.

In re J.R.W., ___ N.C. App. ___, 765 S.E.2d 116 (November 18, 2014)

Held: Affirmed

- A respondent parent's mental health diagnosis is not per se evidence of incompetence, which is defined at G.S. 35A-1101(7).
- There is not a substantial question of a respondent parent's competence requiring a proper inquiry by the court when evidence shows DSS alleged and respondent mother admitted there is no evidence to show she is incompetent, and mother's condition was not disabling as she participated in court hearings, visited with her child, attended educational programs, transitioned to living on her own in an apartment, and completed a parenting program.
- There is no right to appeal an order releasing a GAL of assistance for a respondent parent, as appellate review is limited by G.S. 7B-1001.
- **Facts:** In an underlying abuse, neglect, and dependency case, where her child was adjudicated dependent, respondent mother had been appointed a GAL of assistance. Based on a statutory amendment eliminating GALs of assistance, the GAL filed a motion to withdraw, which was granted. DSS filed a motion to terminate respondent mother's parental rights, alleging five grounds, one of which was dependency. The court terminated respondent mother's rights on all five grounds. Respondent mother appealed contending the court abused its discretion by not conducting on its own motion an inquiry as to her competence and need for a GAL of substitution.

Grounds: Abandonment

In re C.J.H., ___ N.C. App. ___ (April 21, 2015)

Held: Affirmed

- The ground of wilfull abandonment does not require a continuous absence of the parent for the six requisite months prior to the filing of the petition or motion. Wilfullness is a question of fact for the court, and the court's findings that the father made untimely and inconsistent child support payments, had no contact with the child, and lacked a *good faith effort* to maintain or re-establish a relationship supports the court's conclusion of abandonment.
- Although the relevant time period for abandonment is the six months immediately preceding the filing of the petition or the motion, the court may look at the respondent's conduct prior to that period when evaluating the respondent's credibility and intention regarding good faith efforts to maintain a parental relationship with the child via contact and support. Last minute efforts not made in good faith will not negate a court's' conclusion of abandonment.

Grounds: Neglect

In re D.L.W, D.L.N.W., V.A.W.,___ N.C. App. ___ (May 19, 2015)

Held: Reversed as to mother

- The findings regarding domestic violence relates to the mother's relationship with the father and DSS and not the mother's relationship her children. As such, the findings do not support a conclusion of neglect warranting termination of parental rights.

In re O.J.R., ___N.C. App. ___, 769 S.E.2d 631 (February 17, 2015)

Held: reversed and remanded; new termination hearing

- Petitioner alleged respondent had no contact with child and provided no support and included two grounds for TPR: willful abandonment and dependency. One finding of fact suggests the court is proceeding on the ground of neglect but does not make an ultimate finding or conclusion of neglect and is therefore insufficient.
- Neglect is defined by G.S. 7B-101(15), which includes abandonment. Applying the definition of abandonment from In re Adoption of Searle, 82 N.C. App. 273 (1986), "the findings do not support a conclusion that the respondent father manifested 'a willful determination to forego all parental duties and relinquish all parental claims to the child.'"
- Citing In re L.O.K. et seq, 174 N.C. App 426 (2005), "the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding,'" and cannot be based solely on past conditions that no longer exist. The court must consider changes in respondent's behavior leading up to the hearing and consider those changes in light of the history of neglect and probability of repetition of neglect by that parent.

Grounds: Willfully Leave in Foster Care for 12+months w/o Making Reasonable Progress to Correct Conditions

In re D.L.W, D.L.N.W., V.A.W.,___ N.C. App. ___ (May 19, 2015)

Held: Reversed as to mother

- Adjudication of neglect was based on homelessness, lack of basic necessities, and domestic violence.
    - Failure to obtain mental health treatment for subsequently diagnosed "social phobia" is unrelated to conditions of removal or adjudication such that the court was without authority to order her to participate in such services

under G.S.7B-904. As a result, the court may not rely on her noncompliance of this part of her case plan to find a lack of reasonable progress to correct conditions as a ground for termination of parental rights.
    - Failure to create a budget was not a basis for the children's adjudication or removal, such that a court may not rely on that failure to show a lack of reasonable progress or neglect warranting termination of parental rights.
    - Loss of employment due to weather and incarceration is not a willful failure to make reasonable progress to correct conditions leading to the child's removal. Poverty and incarceration alone are not sufficient to terminate parental rights.

In re H.D and K.R., ___ N.C. App. ___ , 768 S.E.2d 860 (February 17, 2015)

Held: Affirmed

- G.S.7B-1111(a)(2) requires the court conduct a two-part analysis and determine by clear, cogent and convincing evidence that both:
    1. The child has been willfully left by the parent in foster care or placement outside the home for over 12 months, and
    2. The parent has not made reasonable progress under the circumstances to correct the conditions which led to the child's removal.
- Willfulness does not require fault but instead requires evidence that parent had the ability to show reasonable progress but was unwilling to make the effort.
- The 12-month time period is not limited to the 12 months immediately preceding the filing of the petition or motion to terminate parental rights.
- Unchallenged findings of fact "are deemed supported by sufficient evidence and are binding on appeal." The unchallenged findings that children were in DSS custody for over 3 years, and during that time respondent mother never completed her case plan, was incarcerated on new criminal convictions, required inpatient substance abuse treatment, had a failed trial placement, had her visits with the children terminated, never completed her case plan, and was evicted were sufficient to support the adjudication of this ground.

In re A.W., ___ N.C. App. ___, 765 S.E.2d 111 (November 18, 2014)

Held: Affirmed

- It is not a prerequisite for a termination of parental rights that the parent whose rights are at issue caused the conditions that resulted in a child's placement in a county department of social services. A parent's rights may be terminated for wilfully leaving a child in a county department of social services custody for more than 12 months and not making progress to correct the conditions that led to his child being placed in dss custody regardless of who was at fault for the child coming into care.

- **Facts:** After a child was adjudicated dependent in February 2011, paternity of the child was established in December 2011. Despite being notified of steps he needed to take in January 2012, respondent father took no action until December 2012, and did not appear in court until January 2013 at a permanency planning hearing. His participation in court was sporadic. The father visited with his child 7 times from July 2013- December 2013. Although he was employed, he did not provide financial support for his child. In August 2013, the department filed a petition to terminate respondent father's parental rights. The Court terminated his rights on all five grounds alleged. Respondent father appealed.

Grounds: Dependency and Incarceration

In re L.R.S., ___ N.C. App ___, 764 S.E.2d 908 (October 21, 2014)

Held: Affirmed

- A parent's incapability to provide care or supervision to her child may be due to any cause or condition, which includes an extended incarceration.
- The court must find that there is a reasonable probability that a parent's incapability to provide care or supervision to her child will continue for the foreseeable future, which may be less than the duration of the child's minority.
- Without evidence that a parent's proposed alternate child care arrangement is viable, the court may find a parent did not propose an alternate child care arrangement.
- **Facts:** Child was taken into nonsecure custody at 2 months old due to father's incarceration and mother's arrest and detention in a pre-trial facility. Child was adjudicated neglected and dependent. Respondent mother visited with her child for one year while awaiting her criminal trial. Respondent mother was convicted and sentenced to 38 months to a federal prison in Connecticut. The court ordered cease reunification efforts, and dss filed a motion to terminate respondent's parental rights, which was granted on both neglect and dependency grounds. RM appeals.

Best Interests

In re D.L.W, D.L.N.W., V.A.W.,___ N.C. App. ___ (May 19, 2015)

Held: Affirmed as to father

- The court made the best interests of the child findings pursuant to G.S. 7B-1110(a)(1)-(5)* and is not required to make a finding on all the evidence that was presented under G.S. 7B-1110(a)(6), "any relevant consideration."

Author's Note: the opinion states G.S. 7B-1111(a)(1)-(5) and G.S. 7B-1111(a)(6) but later refers to G.S. 7B-1110. The statute for a disposition in a TPR is G.S. 7B-1110.

In re H.D and K.R., ___ N.C. App. ___ , 768 S.E.2d 860 (February 17, 2015)

Held: Affirmed

- Despite respondent mother's argument on appeal, the court did make findings addressing the likelihood of the children's adoption.

Rule 60(a): Clerical Mistake

In re J.K.P., ___ N.C. App. ___, 767 S.E.2d 119 (December 31, 2014)

Held: Affirmed

- Pursuant to Rule 60(a) of the NC Rules of Civil Procedure, a court has jurisdiction to correct a clerical mistake in its Order so long as the correction occurs before an appeal is docketed, and therefore, may include the time after a notice of appeal is filed but before it is docketed. A clerical mistake includes "inadvertent checking of boxes on forms."

Findings and Conclusions - Internally Inconsistent Order

In re A.B. and J.B., ___ N.C. App. ___, 768 S.E.2d 573 (February 3, 2015)

Held: reverse and remand for entry of new order

- An order is the trial court's responsibility even when a mistake is made by the counsel who prepared it.
- When findings of facts are inconsistent and contrary to the conclusions of law, a determination of whether the conclusion of law is supported by the findings cannot be made.
- It is contradictory to find:
    - the mother has not consistently engaged in therapy or made progress in meeting treatment goals, and withdrew from treatment against clinical recommendations, and
    - in therapy, mother acknowledged the negative impact her anger had on her life and parenting, that she consistently participated in outpatient therapy and been able to maintain employment and academic study, has cooperated with medication management, and voluntarily participated in a psychological evaluation that concluded mother did not have a significant pathology and her symptoms could be alleviated by consistent ongoing therapy.

- It is contrary to find mother:
    - did not complete domestic violence batterer's program and was discharged 3 times due to excessive absences and
    - successfully completed group anger management, takes responsibility for her role in the violence in her relationship, shows insight as to the impact on her children, and has demonstrated for over a year the ability to manage her mood and peacefully resolve conflicts.
- These inconsistent findings regarding mother's mental health and domestic violence were contrary to the conclusion that mother had not made progress in alleviating the conditions that led to the children's removal as the child's adjudication of neglect was based on the conditions arising from the mother's mental health and domestic violence issues.
- Findings of fact were contrary to the conclusion of law that termination was not in the child's best interests; specifically, giving greater weight to financial benefits available in an adoption (as opposed to guardianship or custody) over the close emotional bonds between the mother and child and the mother's efforts to regain custody of her children is internally inconsistent.
- A motion to reopen an action to admit additional evidence after the close of a hearing, and not a Rule 60 motion, is the appropriate procedure for a party to take when the court has not yet entered a judgment.

Insufficient Findings of Fact and Conclusions of Law

In re O.J.R, ___N.C. App. ___, 769 S.E.2d 631 (February 17, 2015)

Held: reversed and remanded

- There must be adequate findings of fact to support the court's ultimate finding or a conclusion of law. Findings that are not supported by competent evidence are insufficient. For example, a find that "Respondent father has engaged in no level of communication and effort as the father of this child" is not supported by evidence that he was present at the child's birth, lived with the mother and child and provided support before he was incarcerated, sent letters and a gift to the child, and had a fact to face meeting with the child early in his incarceration, and that the mother/petitioner intentionally withheld her contact information and threw away cards and letters he wrote.
- An order that concludes "that by clear, cogent and convincing evidence grounds exist to terminate parent rights of the Respondent Father" is insufficient as it does not specify any ground on which the termination of parental rights was granted.

UCCJEA

Modification Jurisdiction (G.S. 50A-203): A/N/D

In re N.B. and L.B., ___ N.C. App. ___, 771 S.E.2d 562 (April 7, 2015)

Held: Affirmed

- Selected Timeline:
  - March 2006, child protective petition filed in New York. Sometime afterwards, court adjudicated children neglected and ordered custody to the father
  - March 2010, father and children move to North Carolina
  - August 2010, NY exercised jurisdiction in a custody hearing and found no parties resided in NY and relinquished jurisdiction to NC
  - October 2010, NY Court enters order "relinquishing jurisdiction to the State of NC"
  - February 2013, A/N/D petition filed in NC
  - July 2013, children adjudicated neglected and dependent and placed with paternal grandparents
- Pursuant to G.S. 50A-102(7), NC is the children's "home state" as they have resided in NC with their father since March 2010.
- Pursuant to G.S. 50A-203, NC had jurisdiction to modify the NY custody order since a NY order relinquished its jurisdiction and "the original decree State is the sole determinant of whether jurisdiction continues."
- Although respondent mother argued that the NY order relinquishing jurisdiction did not contain required findings under NY law, the UCCJEA does not require a NC court to collaterally review a facially valid order from the original decree state before exercising jurisdiction pursuant to G.S. 50A-203.

Subject Matter Jurisdiction: TPR

In re B.L.H., ___ N.C. App. ___ , 767 S.E.2d 905 (January 20, 2015)

Held: Affirmed in part

- Facts: VA was home state when initial custody action commenced in VA, although mother and child resided in NC but father remained in VA at the time the initial custody order was entered in 2004. In 2006, VA modified its custody order (father remained in VA; child and mother remained in NC). Based on a 2007 conviction, the father was incarcerated in federal prison in TX with a projected release date of 2017. Father claims his domicile continues to be VA, and therefore, NC does not

have subject matter jurisdiction to modify the VA custody decree in a NC TPR filed in 2013.

- "G.S. 50A-203 does not require that the parties no longer be domiciled in the state which initially exercised jurisdiction" but instead requires that neither parent nor the child "presently reside" in the state that initially exercised jurisdiction. Presently reside differs from domicile in that residence is "a person's actual place of abode, whether permanent or temporary." No parties presently resided in VA such that VA no longer possessed exclusive continuing jurisdiction. NC properly assumed jurisdiction.

Gerhauser v. Van Bourgondien, ___ N.C.App. ___ , 767 S.E. 2d 378 (December 31, 2014)

Held: Vacated due to lack of subject matter jurisdiction; *There is a dissent*

- Timeline:
  - Parties married in 1998 and had a child in 1998 and in 1999.
  - 2002, action for custody filed in NC
  - 2003, consent order entered in NC
  - Sept. 2004, motion filed in NC
  - Oct. 2004, mother and children move out of NC (to Hawaii and eventually Utah)
  - Dec. 2004, consent order in NC
  - Aug. 2009, Father moves to FL
  - Oct. 2009, motion to modify filed in NC
  - 2010 NC order, acknowledges mother and children living in Utah for several years and father living in FL
  - Feb. 2012, mother and children move to Germany due to military deployment of mother's new husband
  - Mar. 2012, father files motion in NC
  - 2013, order issued in NC
- Pursuant to G.S. 50A-202, because neither party nor the children have resided in NC for several years, NC does not have exclusive continuing jurisdiction of the child custody proceeding and may only modify its order if it has jurisdiction to make an initial custody determination pursuant to G.S. 50A-201.
- When there is no "home state" at the time an action is commenced, the court must determine if it has significant connection jurisdiction to make an initial child custody proceeding pursuant to G.S. 50A-201(a)(2).
- NC did not have significant connection jurisdiction as the children and mother moved away from NC in 2004 and the father moved away in 2009. The parties cannot consent to subject matter jurisdiction, and past custody proceedings themselves are insufficient to establish significant connection jurisdiction pursuant to G.S. 50A-201(a)(2).
- Because the children lived in Utah for 5.5 years prior to the filing of the action, and because the children regularly visited their father in Florida and he had joint

custody and resided in Florida, both Utah and Florida have significant connection jurisdiction. NC need not decide which state has the most significant connection, but instead cannot exercise jurisdiction of necessity under G.S. 50A-201(a)(4) since at least one other state had significant connection jurisdiction.

Adoption

Consent of Unmarried Father

For the Adoption of: Robinson, ___ N.C. App. ___, 767 S.E.2d 395 (December 31, 2014)

Held: Affirmed

- Timeline:
  - Jan. 7, 2013, child born
  - Jan. 13, 2013, unwed father files action for genetic testing, custody, and child support
  - Feb. 13, 2013, petition for adoption filed
  - Feb. 21, 2013 unwed father files objection to adoption proceeding asserting his consent is required
  - July 2013 genetic testing confirms he is the father
  - August 26, 2013 trial court denies father's motion to dismiss concluding his consent was not required
- G.S. 48-3-601 requires the consent of a man who prior to the filing of the adoption petition or hearing completes three acts: (1) acknowledge paternity, (2) communicate or attempt to communicate with the mother regularly, and (3) make reasonable and consistent support payments within his financial means for the mother, child, or both. Father failed to meet the 3rd prong, therefore, his consent was not required pursuant to both the statute and holding in *In re Byrd*.
- Statute is not unconstitutional as it applies to father when relying on the reasoning in *Lehr* and *In re S.D.W.* Plaintiff did not grasp the opportunities within his control to develop a relationship with the child after the child's birth. In the child's first 6 months, plaintiff's actions were limited to filing for custody, visiting once despite more times being offered to him, and purchasing diapers once but never delivering them. Awaiting genetic testing results prior to paying support or taking further steps to develop a relationship with the child is not a valid excuse for a delay in father's action.

Related Civil Case

Readmission of Juvenile Voluntary Commitment of Juvenile in DSS Custody

In re M.B., ___ N.C. App. ___, 771 S.E.2d 615 (April 7, 2015)

Held: Affirmed

- **Facts**: M.B. was taken into Durham County DSS custody when he was 8 years old. At the age of 11, he was voluntarily admitted to a Level IV PRTF in Mecklenburg County by DSS, his legal custodian. There were six district court hearings held in Mecklenburg County that addressed his initial admission and readmission, none of which included Durham County DSS as a party. M.B. contested his readmission at an October 2013 hearing, and his attorney subpoenaed the DSS case worker after communicating with the DSS attorney. At the hearing, the DSS worker testified by phone. The DSS attorney was permitted to cross-examine witnesses. There was conflicting evidence regarding the recommendations for M.B.'s level of need: his therapist recommended a Level III PRTF, and the doctor who completed the psychosexual evaluation recommended a Level IV PRTF. M.B. has sexualized behaviors and a low IQ. The DSS social worker focused exclusively on finding a Level IV PRTF without there having been a Care Review to resolve the different recommendations regarding M.B.'s level of need. The court ordered M.B.'s readmission for 30 days while a Care Review could be held and ordered that an appropriate Level III facility be explored first, before considering a transfer to a different Level IV facility. M.B. appealed the 30-day readmission order.

- **Role of DSS as Party-** DSS filed a motion to dismiss the appeal for failing to be served as a necessary party or in the alternative be served with the appellate filings. The motion to dismiss was denied but the alternative relief was granted because the COA determined the trial court treated DSS as a party during the readmission hearing when it allowed the DSS attorney to admit evidence, cross-examine witnesses, and make arguments. . M.B. was not prejudiced by DSS' participation in the hearing, and by subpoenaing the DSS social worker, M.S. "opened the door" for adverse testimony. M.B. did not timely preserve an appeal of the issue of DSS' party status.

- **Subject Matter Jurisdiction** – The provision in G.S. 7B-200 that automatically stays the issue of custody in a civil action does not apply to an admission of the juvenile in a PRTF located in a county that is different from the county of the 7B action. Relying on the holding in In re Phillips, 99 N.C. App. 159 (1990), the district court in the

county where the PRTF is located has jurisdiction over the admission so long as it does not conflict with the order of the prior court.

- **Placement Options**- G.S. 122C-224.3(f) requires for a readmission order to a PRTF that the court find by clear, cogent, and convincing evidence that the minor is (1) mentally ill or a substance abuser and (2) in need for further treatment at the 24-hour facility to which he has been admitted. In addition, readmission should only occur when "lesser measures will be insufficient." Those least restrictive therapeutical settings must be *available*. At the time of M.B.'s readmission hearing, "the court was essentially faced with the option of either readmitting… or else allowing a 12-year-old boy with a history of unmanaged sexual deviance problems and a newly discovered intellectual disability to be sent to a non-existent Level III placement or to an emergency placement that neither [the therapist] nor DSS believed would provide sufficient supervision and support for his needs." The court's order of readmission was in keeping with the legislative intent regarding available resources. However, the juvenile's constitutionally protected liberty interests were compromised by the "lackluster performance" of DSS in failing to take timely action to secure post-discharge placements.

RELATED CRIMINAL

Felony Child Abuse, Esp. Heinous, Atrocious or Cruel Offense (EHAC)

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (February 17, 2015)

Held: no plain error
Defendant was convicted of felony child abuse on his 3-year old stepdaughter where he inflicted serious bodily injury and the jury found two aggravating factors: EHAC & victim was very young.

- Officer Testimony: The officer's testimony that: a photograph taken of the home on the day that the 3-year-old was injured showed a hole in the sheetrock wall with a blonde hair in the hole, that the girl had blonde hair, that the hair in the sheetrock was not consistent with the defendant's version of how the hole was created; and that the picture led to the officers asking for consent from the girl's mother to go back to the home was not expert opinion testimony or a comment on the defendant's truthfulness. Instead, it was an explanation of the investigative process that caused the officers to return to the home and collect the hair sample. andthe holwthat explained the investigative process that led to the officers returning to the home to collect hair samples of blond hair that was embedded in the wall.

- Instruction as to EHAC: Although the court did not use the pattern jury instruction on EHAC, Defendant did not prove that absent that error, the jury probably would have reached a different result or that the error was so fundamental it cause a miscarriage of justice. The state proving all four factors set forth in Blackwelder, 309 N.C. at 413-14: excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in the offense.

Expert Testimony, Sexual Abuse

State v. Walton, ___ N.C.App. ___, 765 S.E.2d 54 (October 21, 2014)

Held: No Error

- Both an emergency room nurse and a doctor testified as expert witnesses in a criminal trial resulting in a conviction of second degree kidnapping and first degree sexual offense. Testimony describing physical evidence observed by the treating experts was consistent with allegations of abuse is not opinion testimony regarding the victim's credibility but is instead testimony of the experts' diagnosis based on the experts' examination.
- Although the victim in this action was not a child, this opinion discusses expert testimony in child sexual abuse prosecutions, which upon a proper foundation, allows expert testimony regarding characteristics of sexually abused children and whether the child victim exhibits symptoms consistent with those characteristics is admissible.