

District Court Judges 2017 Fall Conference  
Child Welfare Case Update  
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## Abuse/Neglect/Dependency

### Subject Matter Jurisdiction: New Report after Reunification with Parent, G.S. 7B-401(b)

In re T.P., \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

#### Held: Vacated

- **Facts:** In 2015, three siblings were adjudicated abused and placed in DSS custody. In 2016, the children were reunified with their mother by an order that granted legal and physical custody to the mother, retained jurisdiction, scheduled no further review hearings, and relieved DSS, the GAL, and the parents' attorneys. One week later, DSS received a new report of domestic violence in the mother's home. DSS investigated the report, entered into a safety plan with the mother, and filed a motion for review based on a "change in situation." The court held a permanency planning review hearing and ordered custody of two of the children to DSS and of one child to her father. Respondent mother appealed arguing a lack of subject matter jurisdiction and/or failure to conduct an adjudicatory hearing under G.S. 7B-401(b).
- The jurisdictional analysis is based on G.S. 7B-401(b), which applies when four requirements are met:
  1. The court retained jurisdiction over a juvenile whose custody was granted to a parent;
  2. The court is not conducting periodic judicial reviews of the juvenile's placement;
  3. A new report of abuse, neglect, or dependency is received by DSS after reviews have been discontinued; and
  4. The DSS director determined, based on a 7B-302 assessment, that court action was needed.

When the criteria of G.S. 7B-401(b) are satisfied, the provisions of Article 8 of the Juvenile Code apply.

- Subject matter jurisdiction involves the court's power to deal with the kind of action in question and is conferred by statute or the N.C. Constitution. A trial court's general jurisdiction over the type of proceeding (e.g., a juvenile proceeding) does not confer jurisdiction over the specific action sought. There must be a controversy that is presented in the *form of a proper pleading*. For the court to have subject matter jurisdiction under G.S. 7B-401(b), DSS cannot file a motion for review; it must file in the existing case a verified petition alleging the newly reported and assessed abuse, neglect, or dependency. The provisions of Article 8 refer to a *petition* -- the adjudication determines the existence of nonexistence of conditions alleged in the *petition* (G.S. 7B-802) and the allegations in a *petition* must be proved by clear and convincing evidence (G.S. 7B-805, 7B-807). A petition ensures the parent's due process rights are protected by requiring DSS to make specific allegations of abuse, neglect, or dependency and set out the relief sought, providing a parent with an understanding of what's alleged and a full and fair opportunity to rebut the allegations.
- When a new petition is filed in the existing action, the court is then required to conduct a new adjudicatory hearing under Article 8, and if the child is adjudicated to then conduct a dispositional hearing.

## Subject-Matter Jurisdiction: Verification

**In re N.X.A.**, \_\_\_ N.C. App. \_\_\_ (August 1, 2017)

**Held: No Error** (Note: PDR filed 9/5/17)

- **Facts:** Three petitions alleging dependency and neglect were verified upon information and belief by the DSS attorney. The children were adjudicated and placed in DSS custody. Two years later, DSS filed verified petitions to terminate respondent parents' rights, and both petitions were granted. Respondents appeal on the basis of a lack of subject matter jurisdiction due to the improper verification made by the DSS attorney of the underlying dependency and neglect petitions.
- "A trial court's subject matter over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593 (2006). The verification was effective pursuant to Rule 11(d) of the N.C. Rules of Civ. P.
- Rule 11 addresses verification requirements. Rule 11(b) governs verification by a party and Rule 11(c) governs verification by an agent or attorney, and both provisions require the person completing the verification to have personal knowledge of the facts. But, Rule 11(d) applies to corporations and state officers. *Citing to Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683 (1979) and G.S. 108A-14(a)(5), with respect to certain issues including the provision of foster care, a county DSS director is an agent of the state, specifically the Social Services Commission and NC DHHS. When implementing the provisions of the Juvenile Code, DSS is acting as an agent of the state agency that oversees the laws in the Juvenile Code. As such, Rule 11(d) regarding verification by the State and not Rule 11(b) or (c) applies.
- Rule 11(d) states "when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts." The DSS attorney was acquainted with the facts of the case. The application of Rule 11(d) is reinforced in practice because DSS, and not the person with personal knowledge who made the initial report, has standing to file a petition. It is not feasible to assume one person from DSS has complete personal knowledge of a case but rather it can be assumed that anyone verifying an affidavit does so having reviewed the materials compiled by several DSS employees and representatives and is therefore "acquainted with the facts" as required by Rule 11(d).

## Adjudication: Hearsay Evidence and Findings

**In re J.M.**, \_\_\_ N.C. App. \_\_\_ (Sept. 19, 2017)

**Held: Affirmed in part**

- The findings supporting the court's adjudication of abuse were supported by competent evidence.
- The grandmother's testimony about a phone call and text from respondent mother that disclosed respondent father's physical abuse of her (respondent mother) when the children were present and physical discipline of the child was properly admitted as an admission by a party opponent exception to hearsay. G.S. 8C-801. Although the statements made to the grandmother were not the respondent father's, the respondent mother is also a party to the abuse and neglect action. Relying on *In re Hayden*, 96 N.C. App. 77 (1989), a respondent mother's statements about the respondent father's conduct is an admission by respondent mother that the child was subjected to conduct in her presence, which relates to the court's

determination of the child's abuse or neglect. The adjudication is about the child's circumstances and conditions not the parent's culpability.

- The physicians' testimony of respondent mother's statements made during the child's well-child visit and emergency room visit were properly admitted as statements made for the purpose of medical diagnosis and treatment exception to hearsay. G.S. 8C-803(4). The statements satisfied both parts of the *Hinnant* requirements: (1) they were made for the purposes of medical diagnosis and treatment and (2) they were reasonably pertinent to diagnosis or treatment. *State v. Hinnant*, 351 N.C. 277 (2000). The statements made by the respondent mother of the respondent father's actions toward the child were made at the medical settings and were part of the providers' attempts to diagnosis the child's injuries. The mother made the statements when discussing her concerns about the child and when the pediatrician observed marks on the child's body and bloodshot eyes, which resulted in the pediatrician sending the child to the ER. This hearsay exception does not require that the declarant be the patient and applies to statements made by the parent of a child patient when the parent is giving information to assist in the diagnosis and treatment of the child.

### Adjudication: Abuse

**In re R.S.**, \_\_\_ N.C. App. \_\_\_ (August 1, 2017)

**Held: Affirmed**

- Facts: A one-month-old infant was brought to the hospital with a torn lingual frenulum (tissue connecting tongue to the floor of the mouth). Respondents denied any knowledge of the cause of the injury but confirmed they were the infant's only caregivers. Two skeletal surveys were performed, and one showed healing fractures on 3 ribs and the right tibia. Respondents had no explanation for the injuries. DSS filed a petition alleging abuse and neglect and the child was adjudicated abused and neglected. Respondent father appealed on the ground that the court improperly shifted the burden of proof from DSS to respondents.
- The findings of fact are supported by competent evidence and support a conclusion that the child was abused as defined by G.S. 7B-101(1). The court found the DSS experts were more credible than the respondent's expert, and the expert testimony addressed the nature and causes of the injuries. The court found the injuries were inflicted by other than accidental means as they required significant force, could not be self-inflicted, and were not the result of a medical condition. The court further found these serious injuries occurred while the child was in respondents' care, as respondents were the only caretakers for the child; that the respondents had no explanation for the injuries; and that each respondent was jointly and individually responsible.
- There was no improper shifting of the burden of proof. Where different inferences may be drawn from the evidence, the court determines which inference to draw. The findings support a reasonable inference that the child was injured by the respondents who were his only caretakers. The court's finding that the parents were responsible by either directly causing or failing to prevent and thereby indirectly causing the injuries to the child is appropriate when the evidence showed the respondents were the sole caretakers of a pre-mobile infant who suffered serious and unexplained injuries.

## Adjudication: Neglect vs. Serious Neglect

**In re J.M.**, \_\_\_ N.C. App. \_\_\_ (Sept. 19, 2017)

**Held: reverse and remand in part**

- A juvenile may be adjudicated as “neglected”, as defined by G.S. 7B-101(15). “Serious neglect” is defined at G.S. 7B-101(19a) and “pertains solely to placement of an individual of the responsible individuals’ list [RIL] and is not included as an option for adjudication in an abuse, neglect, or dependency action.” A child’s adjudication of “serious neglect” is a misapprehension of the law.

## Visitation: Not Delegate Judicial Function

**In re C.S.L.B.**, \_\_\_ N.C. App. \_\_\_ (July 18, 2017) (originally unpublished)

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

- G.S. 7B-905.1 requires that the court order that continues a child’s placement outside of the home (in this case a guardianship order) provide for an appropriate visitation plan that is in the child’s best interests and consistent with the child’s health and safety; the order may specify the conditions under which visitation may be suspended. A court may not delegate its judicial function of awarding visitation to the child’s guardian. Here, the order delegated the court’s judicial function to the guardian because it unilaterally allows the guardian to modify the visitation based upon the guardian’s concerns. The order stated that visits shall occur so long as there is *no concern* the mother is using drugs and may be supervised or suspended if there is *concern* the mother is using drugs or there is discord between the mother and father during the visits. Emphasis in original.

## Cease Reunification Efforts: Initial Disposition with Permanency Planning Hearing

**In re J.M.**, \_\_\_ N.C. App. \_\_\_ (Sept. 19, 2017)

**Held: Vacate in part**

- Procedural Facts: The adjudicatory hearing and a combined initial disposition under G.S. 7B-901 and a permanency planning hearing under G.S. 7B-906.1 were held on the same day. Following the hearing, the court entered a combined adjudication, initial disposition, and permanency planning order. The disposition placed the children in DSS custody. Reasonable efforts for reunification were determined not to be required under the findings of G.S. 7B-906.2(b) (permanency planning). Concurrent permanent plans of guardianship and adoption were ordered.
- G.S. 7B-901(c) applies to initial dispositions and authorizes the trial court to eliminate reunification efforts when it finds a court of competent jurisdiction has previously determined that a parent committed or allowed one of the enumerated statutory aggravating factors. *See In re G.T.*, 791 S.E.2d 274 (2016) (currently pending before the NC Supreme Court based on a dissent). An order that follows an initial disposition hearing implicates G.S. 7B-901(c) and requires the court to make one of those findings before ordering reunification efforts are not required. Findings from the permanency planning statute, G.S. 7B-906.2(b), are insufficient to cease reunification efforts at an initial dispositional hearing, and G.S. 7B-901(c) factors cannot

be “eluded in favor of the more lenient requirements of G.S. 7B-906.2(b) simply by combining dispositional and permanency planning matters in a single order.” The G.S. 7B-901(c) requirements were not met in the combined initial disposition and permanency planning order.

## Permanency Planning Hearing: Reasonable Efforts, Reunification, Evidence, Findings

**In re C.S.L.B.,** \_\_\_ N.C. App. \_\_\_ (July 18, 2017) (originally unpublished)

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

- A court is not required to make findings under G.S. 7B-906.2(b) when it does not eliminate reunification as a concurrent permanent plan. The court did not eliminate reunification as a permanent plan when the permanency planning order was a primary plan of guardianship with a relative, which was ordered, and secondary plan of reunification.

**In re K.L.,** \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

**Held: Reversed in part, vacated in part, remanded**

- Procedural History and Facts: This is a second appeal by respondent mother in this neglect action challenging a permanency planning order of custody to the children’s adult sibling and the elimination of reasonable efforts for reunification. In the first appeal, the court of appeals affirmed the January 2015 permanency planning order and found it was not an order ceasing reunification efforts as the order specifically directed DSS to continue efforts to eliminate the need for the child’s placement outside of the home and continue efforts to reunify the child with the respondent mother. The case was remanded to the trial court for a specific visitation schedule. No permanency planning hearings were held after the December 2014 hearing that resulted in the January 2015 order. Reasonable efforts were not provided by DSS after the January 2015 order. On remand, after a permanency planning hearing, a permanency planning order was entered in May 2016. That 2016 order included a visitation schedule as required by the remand and findings that reasonable efforts to reunify the family would be futile and that the permanent plan was previously achieved, and it continued custody with the child’s adult sibling. This 2016 order is the subject of this second appeal.
- The trial court must comply with statutory requirements set forth in the Juvenile Code. For permanency planning, several statutes in G.S. 7B apply that require the court to make certain inquiries and findings that would support the conclusion to eliminate reunification as a permanent plan: G.S. 7B-906.1(d), (e), (i) and 7B-906.2(b), (c), (d). “The court’s findings do not satisfy the multiple layers of inquiry and conclusions as are required by the Juvenile Code.”
  - To remove reunification as a concurrent permanent plan, there must be evidence to support the findings of fact to allow the court’s conclusion to eliminate reunification efforts. The court found reasonable efforts would be futile or inconsistent with the juvenile’s health and safety [G.S. 7B-906.1(d)(3); 7B-906.2(b)] but there was no evidence in the record to support the finding. Incorporating by reference findings contained in previous orders are not sufficient findings of fact. A finding of fact (1) requires a specific statement on which the rights of parties are determined, (2) must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment, (3) must show that the trial court has reviewed the evidence and made the finding through a process of logical reasoning, and (4) must consist of more than a

- recitation of allegations in the petition. Without evidence or proper findings, the conclusion to cease reunification efforts does not satisfy the statutory requirements.
- The court found there was no substantial change in circumstances since the January 2015 order. A substantial change in circumstances is the legal test to review a modification of custody in a chapter 50 civil custody action between two parties and may be required in a motion to modify or vacate an order under G.S. 7B-1000. It is an unnecessary and improper test at a G.S. 7B-906.1 permanency planning hearing. G.S. 7B-906.1(i) authorizes the court at a permanency planning hearing to maintain or order a different placement for the child, appoint a guardian, or order any disposition authorized by G.S. 7B-903 that is found to be in the child's best interests.
  - G.S. 7B-906.2(d) requires the court to make specific findings to each of the four enumerated factors that demonstrate a parent's lack of success. One finding that was made prior to the first appeal was that the mother completed many court ordered services. There were no other statutorily required findings about the mother's progress or lack thereof with respect to the permanent plan or cooperation (or lack thereof) with DSS.
  - G.S. 7B-906.2(c) requires in every subsequent [to the first] permanency planning hearing that the court make written findings about the efforts DSS has made toward achieving the primary and secondary permanent plans. No findings were made on whether DSS made reasonable efforts to reunify the children with their mother, which was one of the permanent plans. The evidence showed no efforts were provided since the January 2015 order and appeal and that DSS "disregarded its statutory duty to 'finalize primary and secondary' plans until relieved by the trial court."

### **Permanent Plan: Acting Inconsistently with Parental Rights**

**In re K.L.**, \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

**Held: Reversed in part, vacated in part, remanded**

- To award custody or guardianship to a nonparent, the court must address whether respondent is unfit as a parent or acted inconsistently with her parental rights, and those findings must be supported by clear and convincing evidence. The court's conclusion that the respondent mother was unfit and acted inconsistently with her parental rights is unsupported by any finding of fact.

### **Guardianship: Verification of Adequate Resources**

**In re N.H.**, \_\_\_ N.C. App. \_\_\_ (Sept. 19, 2017)

**Held: Affirmed (there is a dissent and a concurring opinion)**

- G.S. 7B-600(c) and -906.1(j) require that before the court appoints a guardian to the juvenile, it must verify that the person being appointed as the guardian understands the legal significance of the appointment and will have adequate resources to appropriately care for the juvenile. The court is not required to make detailed findings of evidentiary facts, but there must be some evidence of the guardian's resources for the court to make its determination of adequacy. The

court may consider any evidence that it finds to be relevant, reliable, and necessary to determine the juvenile's needs and the most appropriate disposition. G.S. 7B-906.1(c).

- In its opinion, the court of appeals “acknowledge that our case law addresses this situation from numerous angles, none of them directly on point” and cites to several different cases with different holdings.”
- Evidence of Resources: There were 2 GAL reports that stated the proposed guardian was employed with the school district, and one report specified her job as a bus driver and stated she was without income during the summer. There was 1 DSS report that stated respondent mother provided \$30 to the proposed guardian and DSS provided gift cards of \$30 per month to assist with purchasing food and gas when the proposed guardian was experiencing financial difficulties. The proposed guardian provided sworn testimony that she was employed at the school district, that she had money to cover her household bills, that she had been unable to work the past summer because of the child's intensive in-home therapy but that she was able to get through almost all of the summer because she had saved money, and that her plan for next summer was to save money and she had family and was aware of community resources she could to turn to for financial help if needed. There was no evidence of the proposed guardian's actual income.
- Opinion: The sworn testimony from the proposed guardian that she was willing to care for the child and has the financial resources to do so was competent evidence that supported the court's determination that the proposed guardian has adequate resources to appropriately care for the juvenile. The opinion distinguishes the sworn testimony from *In re P.A.*, 241 N.C. App. 53 (2015), which involved unsworn testimony from the proposed guardian, and *In re J.H.*, 780 S.E. 2d 228 (2015) in which there was no testimony from the proposed guardians.
- Concurrence: G.S. 7B-906.1(j) requires the court to find the proposed guardian *will have* adequate resources to appropriately care for the juvenile. The issue is whether there is sufficient evidence before the trial court to determine if the proposed guardian *will have* adequate resources to care for the child *in the future*. Although the sufficiency of the evidence in this case is a “close question”, there was evidence that the proposed guardian's current income was adequate to care for the child moving forward. The proposed guardian testified that she was employed, that her income was sufficient to cover her expenses in caring for the child, and there was some money left for savings. Similar to *In re J.E.*, 182 N.C. App. 612 (2007), the testimony about her job and income (although there were no specifics about the income) were more than the proposed guardian's conclusory statement about whether her resources were adequate. Distinguishing the 3 cases cited by the dissent that involved evidence about the past without any evidence of current resources to care for the child and a conclusory statement about the proposed guardian's financial ability to care for the child.
- Dissent: The GAL and DSS reports and testimony from the proposed guardian support the conclusion that she lacked the financial resources to care for the child, which is the opposite conclusion reached by the trial court. The evidence unambiguously showed she struggled financially while caring for the child. The proposed guardian's own opinion without more was insufficient to support the court's conclusion. *See In re P.A.*, 241 N.C. App. 53 (2015).

## Permanency Planning Hearing: Waive Reviews

**In re C.S.L.B.,** \_\_\_ N.C. App. \_\_\_ (July 18, 2017) (originally unpublished)

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

- The court may waive further permanency planning review hearings when it finds by clear and convincing evidence the five factors enumerated in G.S. 7B-906.1(n). The court erred in ceasing further review hearings as the order was silent as to one required factor: that the parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.
- The court further erred in waiving review hearings and relieving DSS and the child's GAL of further responsibilities when reunification was a secondary plan. When reunification is a secondary plan, respondent-mother continued to have the right to have DSS provide reasonable efforts toward reunification and for the court to evaluate those efforts. See G.S. 7B-906.1(d)-(e) and 7B-906.2(b).

**In re K.L.,** \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

- **Held: Reversed in part, vacated in part, remanded**
- G.S. 7B-906.1(n) authorizes the court to waive permanency planning hearings when each of the five enumerated factors are found by clear, cogent, and convincing evidence. Failure to find all five criteria is reversible error. Here criteria 3 and 4 were not found.

## Termination of Parental Rights (TPR)

### Motion to Continue

**In re C.M.P.,** \_\_\_ N.C. App. \_\_\_ (August 1, 2017)

**Held: Affirmed**

- Facts: Respondent mother received notice of the TPR hearing but was not present for the hearing. Her attorney, who had been representing the mother for three years and expected her to be present for the hearing, sought a motion to continue, which was denied.
- A trial court's decision regarding a motion to continue is discretionary. Continuances are generally disfavored; the burden is on the party seeking the continuance; and G.S. 7B-803 sets forth the standard to continue.
  - Author's Note: Although not cited, G.S. 7B-1109(d) explicitly addresses the standard to continue a TPR.
- If a motion to continue is based on a constitutional right, the motion raises a question of law that is reviewable on appeal. In this case, respondent argues her constitutional right to due process and effective assistance of a counsel were affected. The reasons presented for a continuance are important when considering whether the request implicates a constitutional right. Here, only one ground was raised as a reason to continue the hearing, which was respondent's unexplained absence. Respondent did not preserve the issue of whether the motion to continue violated her constitutional right to effective assistance of counsel.
- Previous court holdings have held that a parent's due process rights are not violated at a TPR hearing where the parent is not present. As such, the motion to continue was not based on a

constitutional right. There was no abuse of discretion in denying the motion. The court conducted a full hearing, where respondent's attorney participated fully, including objecting, cross examining witnesses, and presenting a closing argument. The hearing was recorded. Respondent was not prejudiced.

## Indian Child Welfare Act (ICWA)

**In re L.W.S.**, \_\_\_ N.C. App. \_\_\_ (Sept. 5, 2017)

**Held: Affirmed**

- **Issue:** Respondent father appeals an order terminating his parental rights that was entered on November 28, 2016, arguing the trial court failed to address whether the child was an "Indian child" and whether the Indian Child Welfare Act (ICWA) applied.
- ICWA applies when the proceeding is a "child custody proceeding" and the child is an "Indian child" as both terms are defined under ICWA. A termination of parental rights is an involuntary child custody proceeding. An "Indian child" is defined as any unmarried person under 18-years-old who is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. 1903(4).
- Citing a previous case, *In re C.P.*, 181 N.C. App. 698 (2007), the burden to show ICWA applies is on the party seeking to invoke it. Respondent did not raise ICWA before the trial court, and he failed to meet his burden to show that ICWA applied. Although the TPR does not refer to ICWA, the underlying abuse, neglect, and dependency case found in its orders that ICWA does not apply.
- **Legislative Note:** 25 C.F.R. Part 23 are new Department of Interior federal regulations implementing ICWA, effective December 12, 2016. The new regulations are inapplicable to this case as the TPR order was entered before the effective date of the regulations. In footnote 4, the court refers to the new federal regulations effective after the TPR order was entered in this case, 25 C.F.R. 23.107, and notes "it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child, and if so, the state court must confirm that the agency used due diligence to identify and work with the Tribe and treat the child as an Indian child unless and until it is determined otherwise."

## Ground: Neglect

**In re M.A.W.**, \_\_\_ N.C. \_\_\_ (Sept. 29, 2017)

**Held:** Reverse court of appeals decision ([In re M.A.W.](#), \_\_\_ N.C. App. \_\_\_ 787 S.E.2d 461 (2016)) and reinstating trial court order to TPR

- The findings were sufficient to support a TPR on the ground of neglect. Neglect is based on the definition at G.S. 7B-101(15), and "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by a parent" (citations omitted). When there is past neglect, the court must also consider evidence of changed circumstances.
- In the underlying neglect case, the child was adjudicated neglected based on the mother's actions, which were a result of her substance abuse and mental health issues. The adjudication occurred while the respondent father was incarcerated. Incarceration, standing alone, is not

sword or a shield in a TPR decision. The court considers evidence of relevant circumstances which exists before or after the prior adjudication of neglect. The prior adjudication of neglect is relevant evidence at the TPR hearing. The court found past neglect based on the respondent's long history of criminal activity, substance abuse, and awareness of mother's substance abuse such that he knew DSS would try to take the child. The court further found respondent father initially indicated a desire to be involved in the child's life and during his incarceration accessed services available to him, including parenting courses, substance abuse treatment, and a GED program. But, the court found a likelihood of repetition of neglect based on father's actions after he was released from incarceration, where he failed to regularly visit with the child as ordered, denied DSS requests to access his mother's home where he purported to live, and failed to complete an ordered clinical assessment.

**In re C.M.P.**, \_\_\_ N.C. App. \_\_\_ (August 1, 2017)

**Held: Affirmed**

- G.S. 7B-1111(a)(1) authorizes the termination of parental rights upon a finding that the parent has neglected the child as defined by G.S. 7B-101(15). The ground is based upon evidence showing neglect at the time of the termination hearing. When a child has been removed from his/her parent's custody, the court may consider prior neglect by that parent and any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect if the child were returned to his or her parent. "Neglect exists where the parent has failed in the past to meet the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time." *In re J.H.K.*, 215 N.C. App. 364, 369 (2011). Failure to make progress on a case plan is indicative of a likelihood of future neglect.
- The findings of fact, based on competent evidence, support the conclusion of law that neglect (including the likelihood of a repetition of neglect) exists. The findings include (1) the children's removal based on domestic violence, unstable housing and employment, and inappropriate supervision; (2) the children's adjudication as neglected and dependent; (3) respondent's case plan requiring parenting education, safe and stable housing and employment, and completion of domestic violence classes resulting in a change in respondent's behaviors; and (4) respondent's lack of progress in her case plan as demonstrated by continuing domestic violence incidents, inconsistent attendance at the domestic violence program and ultimate discharge from that program, unstable housing, and although employed, no stable employment.
- Although the court found respondent acted inconsistently with her constitutional parental rights, this finding is not required to terminate parental rights on the ground of neglect.
- *Concurrence, Murphy, J.*: An unchallenged finding of fact is conclusive and binding on appeal. The finding of fact that the children remain in foster care and that there is a high probability of a repetition of neglect due to the respondent's ongoing struggles is unchallenged and therefore binding on appeal.

## Willful Failure to Pay Reasonable Cost of Care

**In re N.X.A.**, \_\_\_ N.C. App. \_\_\_ (August 1, 2017)

### **Held: No Error**

- G.S. 7B-1111(a)(3) allows for parental rights to be terminated when the juvenile has been placed in DSS custody or a foster home and the parent for a continuous period of 6 months next preceding the filing of the TPR petition has willfully failed for such period to pay a reasonable portion of the cost of the juvenile's care although financially and physically able to do so. This ground requires that the court make specific findings that a parent was able to pay some amount greater than the amount the parent paid during the relevant time period, but the court is not required to make a finding as to the specific amount of support that would have constituted a "reasonable portion" of the cost of care under the circumstances.
- The findings support the court's conclusion that the ground existed as they make clear the mother had an ability to pay some amount greater than zero, which is what she paid. The findings included mother's annual income of \$10,000 - \$13,000, her declaring the children as dependents for tax purposes resulting in a significant tax refund, and her failure to pay any support.

## Ground: Dependency

**In re A.L.L.**, \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

### **Held: Affirmed**

- Clear, cogent, and convincing evidence supported the court's findings and conclusion of dependency. A mental health evaluation conducted a year before the TPR hearing can support a TPR where the "persistence of her personality problems" characterized in the evaluation is "not easily amenable to change" and there is a lack of mental health treatment. In this case, a 2 year old and then 1 year old evaluation that showed the respondent (1) had recurring severe depression and PTSD, which are longstanding mental health conditions, and (2) failed to follow through with treatment recommendations necessary to care for her children safely constitute clear and convincing evidence.

## Ground: Willful Abandonment

**In re D.E.M.**, \_\_\_ N.C. App. \_\_\_ (July 18, 2017)

### **Held: Affirmed; there is a dissent (notice of appeal filed 8/17/17)**

- Procedural History and Facts: In 2013, the paternal grandparents (petitioners in the TPR) were awarded primary legal and physical custody of the child through a Chapter 50 civil custody order. Respondent mother was awarded visitation in that custody order. In 2014, petitioners filed and obtained a TPR, which was vacated in 2016 by a court of appeals decision that held the petitioners lacked standing. During the pendency of that appeal, the TPR order was not stayed, and respondent mother did not visit with the child. In 2016, a new TPR petition was filed as the child had continuously resided with the petitioners for two years preceding this TPR petition. The TPR was granted, and respondent mother appeals.

- G.S. 7B-1111(a)(7) authorizes a termination of parental rights on the ground that the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition or motion. The relevant six month time period is September 2015 to March 2016. Abandonment implies conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child, and a parent's willful intent is a question of fact.
- Although there was a termination of mother's parental rights on appeal during the relevant time period, that order did not prohibit respondent from contacting the child. The order limited her options but did not prevent her from taking whatever measures possible to show an interest in her child. Respondent mother did not seek a stay of the TPR order that was on appeal, seek visitation with the child, send gifts or letters, or pay support. Similar to an incarcerated parent with limited options, mother's failure to attempt to show affection to her child is evidence of abandonment.
- The court may consider respondent mother's conduct outside the relevant 6 month time period when evaluating the respondent's credibility and intentions. Mother demonstrated almost no interest in the child since she lost custody of him in 2013. She did not contact the petitioners to schedule visitation after her single visit in December 2013 or send any gifts or support for the child despite being employed. Considering this history, the evidence of respondent's ongoing failure to visit, contact, or provide for the child during the relevant time period allows the court to reasonably infer that she acted willfully.

## Best Interests

**In re D.E.M.**, \_\_\_ N.C. App. \_\_\_ (July 18, 2017)

**Held: Affirmed; there is a dissent regarding grounds (notice of appeal filed 8/17/17)**

- G.S. 7B-1110(a) requires the court to consider and making findings of relevant best interests of the child factors when determining whether to TPR after a ground has been proved by clear and convincing evidence. One factor is the likelihood of the child's adoption. In this case, the child was placed with petitioners as a result of a Chapter 50 civil custody order and not a pre-adoptive placement pursuant to G.S. Chapter 48. However, G.S. 48-2-301(a) allows for the placement requirement set forth in G.S. Chapter 48 to be waived for cause, such that the petitioners would have standing to file a petition to adopt the child. Additionally, the TPR petitioners are the child's legal custodians and wish to adopt him. The court did not err in determining it was likely that petitioners will adopt the child.

**In re A.L.L.**, \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

**Held: Affirmed**

- A trial court is not required to make findings of fact on all the evidence that is presented or state every option it considered as part of the best interest factor, "any relevant consideration", set forth at G.S. 7B-1110(a)(6).

## Appeal: Lack of Transcript, Findings

In re A.L.L., \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

**Held: Deny petition for writ of certiorari**

- Respondent father petitioned for writ of certiorari to challenge permanency planning orders he argued lacked statutorily required findings of fact. He did not provide a transcript or portion of the transcript. In the absence of transcripts, the court of appeals is obligated to consider the trial court's findings supported by competent evidence. See *Stone v. Stone*, 181 N.C. App. 688 (2007).

## UCCJEA

### Jurisdiction: Notice and Due Process

In re A.L.L., \_\_\_ N.C. App. \_\_\_ (July 5, 2017)

**Held: Affirmed**

- Timeline and Facts
  - Sept. 2013: Michigan custody order awards sole custody to mother
  - "Shortly after" Michigan order, mother and children move to NC
  - Oct. 2013: father files motion to modify custody order in MI
  - April 2014: Michigan order modifies custody regarding visitation in NC
  - Sept. 2014: DSS files petition in NC alleging abuse, neglect, and dependency; nonsecure custody granted
  - Nov. 2014: NC and MI judges talk; MI will relinquish jurisdiction; adjudicatory hearing in NC continued to allow time to obtain an order from MI relinquishing jurisdiction
  - Dec. 2014: order from MI relinquishing jurisdiction to NC; the pre-adjudication, adjudication, and disposition hearing held; mother was present; father was not yet served but provisional counsel for father was present
  - Jan. 2015: adjudication order entered
  - Sept. 2015: DSS locates father in MI; attorney appointed to represent him
  - March 2016: DSS files petition to terminate mother's and father's parental rights
  - April 2016: respondent mother and father served with TPR petitions
  - Aug. 2016: hearing on TPRs
  - Nov. 2016: NC orders terminating parental rights of both parents; father appeals claiming lack of subject matter jurisdiction under the UCCJEA
- The UCCJEA applies to A/N/D actions. The court had **temporary emergency jurisdiction** to enter nonsecure custody orders as the criteria of G.S. 50A-204(a) were satisfied. The court is not required to make findings of fact to exercise temporary emergency jurisdiction. But, it is required to communicate with another state after it learns that there is a custody determination that was made in that other state [and a parent continues to reside in that other state].
- The NC court has subject matter jurisdiction to proceed with the action if the criteria for **modification jurisdiction** under G.S. 50A-203 is satisfied.
  - NC was the children's home state. A court determines home state jurisdiction based on the physical location of a child and their parent. The children and their mother lived in

NC for more than a year before the hearing on the pre-adjudication, adjudication, and disposition.

- The Michigan court determined NC was a more convenient forum. There was a facially valid order from Michigan ceding jurisdiction to NC. The NC court is not required to collaterally review a facially valid order from another state before exercising modification jurisdiction.
- Father argues that he was denied **due process** under the UCCJEA for not receiving notice of and a meaningful opportunity to participate in the jurisdictional decision. His argument is misplaced. The Michigan court as the original decree state is the sole determinant of whether it will relinquish jurisdiction, and any alleged due process denial occurred in Michigan, not NC. In regard to other due process arguments, the lack of service on a respondent in an earlier proceeding does not defeat valid service and notice provided in the TPR action.