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Abuse, Neglect, Dependency

Subject Matter Jurisdiction: Standing

In re A.P., ___ N.C. ___, 812 S.E.2d 840 (May 11, 2018)

Held: reversed decision of Court of Appeals; remanded to Court of Appeals for mother's remaining arguments (challenging adjudication and factual inquiry regarding the applicability of the Indian Child Welfare Act)

- Facts: This case involves three counties. Mother and child, A.P., (at time of A.P.'s birth) resided in Cabarrus County. Cabarrus County DSS opened a child protective case, and mother agreed to a safety plan. Under the safety plan, A.P. lived with a safety placement resource in Rowan County while mother received residential mental health treatment. Upon discharge from her treatment, mother and A.P moved in with mother's grandfather in Mecklenburg County. The case was transferred from Cabarrus County DSS to Mecklenburg County DSS. Later, a new report was made to Mecklenburg County DSS and mother's sister (A.P.'s aunt) brought A.P. back to the placement in Rowan County. Mother agreed A.P. would temporarily remain in the placement in Rowan County while she went to South Carolina, was back in Mecklenburg County when she was in jail and later inpatient treatment, and finally informed Mecklenburg County DSS that she was living in Cabarrus County. The placement resource in Rowan County notified Mecklenburg County DSS that she could no longer care for A.P. Mecklenburg County DSS requested Cabarrus County DSS accept a transfer of the case back, but Cabarrus County DSS declined the transfer. Mecklenburg County DSS filed a neglect and dependency petition. The district court in Mecklenburg County denied mother's motion to dismiss for lack of subject matter jurisdiction due to Mecklenburg County DSS not having standing to file the petition. A.P. was adjudicated neglected and dependent. Mother appealed.
- Court of Appeals Opinion: Mecklenburg County DSS lacked standing under G.S. 7B-401.1(a) as G.S. 7B-101(10) defines director as the director of the DSS in the county where the juvenile resides or is found.
- "Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly before it…. [without which] a court has no power to act…. " Sl. Op. at 5 quoting *In re T.R.P.*, 360 N.C. 588, 590 (2006). The Juvenile Code (G.S. Chapter 7B) governs subject matter jurisdiction over abuse, neglect, or dependency (A/N/D) actions. Jurisdiction over all stages of an A/N/D action is established by the filing of a properly verified petition. *In re T.R.P.* Here, the neglect and dependency petition was properly verified and filed by an authorized representative of "a county director of social services." G.S. 7B-401.1(a).
- Judicial interpretation must consider the entire statutory text, read holistically, with consideration of the logical relation of its many parts rather than by a rigid interpretation of isolated provisions in the Juvenile Code. The rigid interpretation of the statutory text creates jurisdictional requirements that exceed legislative intent. Dismissal of the juvenile petition is not mandated by G.S. 7B-401.1 (parties) and 7B-400 (venue) when the Juvenile Code is read holistically.
    - There is no requirement in G.S. 7B-401.1(a) that only one county DSS director has standing since (1) the statute uses "*a* county director," which is an indefinite article, and (2) the introductory clause to the definitions statute, G.S. 7B-101, states "unless the

context clearly requires otherwise." The context does require otherwise. This opinion compares different statutes in the Juvenile Code that show how "the legislature intentionally differentiates between references to *a* director of a department of social services [generally] and *a particular director* of a department of social services." Sl. Op. at 8. There is no reference in the party statute, G.S. 7B-401.1(a), to "the" DSS director, which would single out a particular director, but instead uses "a" director.

- "Other provisions in the Juvenile Code [G.S. 7B-400(b), 7B-302(a2), 7B-402(d)] suggest that there may be instances when the party filing the juvenile petition is the director of a department of social services for a county that is not the juvenile's county of residence." Sl. Op. at 10.

- A fundamental principle in cases involving child abuse, neglect, or dependency is that the best interests of the child is the polar star. *See* G.S. 7B-100(5); *In re M.A.W.*, 370 N.C. 149 (2017) quoting *In re Montgomery*, 311 N.C. 101, 109 (1984). Respondent's interpretation of G.S. 7B-101(10) and 7B-401.1(a) that ties subject matter jurisdiction with the child's residence or physical location at the time the petition is filed would (1) prevent a district court from exercising subject matter jurisdiction by allowing a parent or caretaker to move between counties with the child and/or (2) " 'subject countless judgments [in juvenile cases] across North Carolina to attack for want of subject matter jurisdiction,' … and needlessly delay permanency for juveniles alleged to be abused, neglected, or dependent." Sl. Op. at 12 quoting *In re T.R.P.* at 595.

Adjudication: Consent v. Stipulations, Findings, Neglect, Invited Error

In re R.L.G., ___ N.C. App. ___ (June 19, 2018)

Held: vacate and remand for further proceedings

- Facts: At the adjudication hearing, DSS read respondent mother's (RM) admission into the record, and mother agreed to the truth of the admission under oath. RM admitted that the juvenile is neglected in that she did not provide proper care and supervision, ensure regular school attendance, the child had 25 absences and 37 tardies in one school year and did not pass 3 core classes, and RM did not take her child to medical well child visits. The court accepted the admission, adjudicated neglect based solely on the admission, and moved on to the disposition hearing. Separate adjudication and initial disposition orders were entered, which RM appealed.
- Procedurally, an adjudication occurs through a hearing or a consent. A consent "is an agreement of the parties, their decree, entered upon the record with the sanction of the court", and requires the 3 elements of G.S. 7B-801(b1) be satisfied, one of which is that the court makes sufficient findings of fact. Sl. Op. at 4 (citation omitted). There is separate statute, G.S. 7B-807, that addresses procedures for factual stipulations, one of which allows for the facts to be read into the record, followed by an oral statement of agreement from each party stipulating to the facts. The procedure used here was a stipulation to certain facts by RM under G.S. 7B-807 and not a valid consent order under G.S. 7B-801(b1). *See In re L.G.I.*, 227 N.C. App. 512 (2013); *In re K.P.*, 790 S.E.2d 744 (2016) (both holding there was no consent order).
- The findings of fact do not support the conclusion that the juvenile is neglected. RM's admission that the child is "neglected" is a conclusion of law, and "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." Sl. Op. at 9-10 (citation omitted). No findings were made as to the reasons for the child's poor

attendance, whether the absences were excused, or whether the failure to pass 3 classes was a result of poor attendance or lack of proper care, supervision, or discipline. The finding that well child checks were missed do not support an adjudication of neglect based on not receiving necessary medical care. The findings do not address the frequency or reasons for the missed visits, the medical conditions requiring the visits, or the adverse effect of missing the visits on the child's health. A finding incorporating by reference the findings of the pre-adjudication order in full does not support an adjudication of neglect. The adjudication order did not indicate it was relying on any finding in the pre-adjudication order when making the neglect determination; the pre-adjudication order is described as addressing jurisdictional issues; and the finding referenced on appeal by DSS is not a finding as it states "DSS made the finding" and "the trial court may not delegate its fact finding duty by relying wholly on DSS reports and prior court orders." Sl. Op. at 15-16.

- The doctrine of invited error, which "applies to 'a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining' " does not apply to RM. Sl. Op. at 12 (citation omitted). RM stipulated to facts about the child's school attendance, grades, and missed medical visits and did not request the trial court adjudicate neglect or remove her child from her care.

Neglect Adjudication

In re C.C., ___ N.C. App. ___ (July 3, 2018)

Held: Affirmed

- Facts: The respondent father (who is the appellant) was incarcerated at all relevant times in the case. This appeal focuses on the circumstances of neglect created by mother. DSS became involved because of reports related to the mother's substance abuse, mental health issues, unstable housing, prostitution, and inappropriate supervision of the child. At the time of the report to DSS, the child had been living with mother's former foster mother for a significant period of time. About one month after the DSS report, the child moved to maternal grandmother's (GM) home. Mother agreed to enter a residential drug treatment program with her infant (not subject of this appeal) while her other daughter (who is the subject of this appeal) remained with GM. Mother was discharged from the program due to her continued use of illegal drugs and breaking the program's curfew. DSS informed mother it intended to file a petition seeking custody of the children. Mother requested that her children be placed with her for former foster mother, which occurred after DSS approved this kinship placement. DSS filed the petition alleging neglect. Subsequently, mother contacted the DSS social worker to inquire about moving to New Jersey and having the children placed with a relative there. DSS filed a supplemental neglect petition and sought a nonsecure custody order based on mother's intent to move with the children to New Jersey. After a hearing, the child was adjudicated neglected, and a subsequent dispositional order was entered. Respondent father appeals, arguing there was no finding or evidence supporting a finding of a substantial risk of harm to the child and that the child was not a neglected juvenile because her needs were being met in the voluntary kinship placement.
- Neglect: G.S. 7B-101(15) defines neglected juvenile as "a juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker." Case law has established that as a result of that improper care, supervision, or discipline, there

must be some physical, mental, or emotional impairment or substantial risk of such impairment to the child. Where there is no such finding, there is no error if the evidence supports such a finding.

- When a child has been voluntarily removed from the parent's home before a neglect petition is filed, the court should consider evidence of changed conditions in light of the evidence of prior neglect and the probability of repetition of neglect and consider the best interests of the child and fitness of the parent to care for the child at the time of the adjudication hearing. *Quoting In re H.L*, 807 S.E.2d 685 (2017).
- This case is similar to *In re H.L.* and *In re K.J.D*., 203 N.C. App. 653 (2010), which affirmed the neglect adjudications when the parents failed to remedy the conditions that required the voluntary safety placement, and differs from *In re B.P.*, 809 S.E.2d 914 (2018), which reversed the neglect adjudication when mother, by the time of the adjudication hearing, had made significant improvements to correct the conditions that led to the safety placement. Here, the child was in a kinship placement because of father's inability to provide care due to his incarceration and mother's inability to care for the child because of issues related to substance abuse, mental health, unstable housing, prostitution, and inappropriate supervision. Although the ultimate finding of a substantial risk of harm to the child was not made, the evidence supports that finding: "[t]he trial court's findings make it abundantly clear that conditions leading to the placement of [the child] outside of the home had not been corrected. At the time of the adjudication hearing, [father] was still incarcerated, and [mother] had not (1) successfully engaged in substance abuse treatment; (2) enrolled in mental health treatment or parenting classes; or (3) obtained employment."

In re J.A.M., ___ N.C. ___, 809 S.E.2d 579 (March 2, 2018)

Held: Reverse and remand to court of appeals for reconsideration and proper application of standard of review regarding findings

- Procedural History: The court of appeals reversed a neglect adjudication, after holding the findings of fact did not support the conclusion of law that the child was a neglected juvenile. In reviewing one challenged finding of fact -- that the mother did not acknowledge her role in the termination of her parental rights to her other children -- the court of appeals held that the finding was unsupported by clear and convincing evidence after it looked to the mother's testimony and determined that her testimony contradicted the trial court's finding.
- In an appeal of an abuse, neglect, or dependency adjudication, the standard of review requires the appellate court to "deem conclusive" a trial court's findings of fact that are supported by clear and convincing competent evidence even when some evidence supports a contrary finding. Although respondent mother's testimony "vaguely acknowledged 'making bad decisions' and 'bad choices' in the past," she also testified that she did not have a role in another one of her children's injuries and that she felt that her rights to her other children were unjustly terminated. The trial court's finding that respondent mother failed to acknowledge her role in her other children's placement in DSS custody and subsequent termination of her parental rights to those children was supported by clear and convincing evidence.

In re J.A.M., ___ N.C. App. ___ (June 5, 2018)

Held: Affirmed. There is a dissent.

- Procedural History: The trial court adjudicated J.A.M. neglected based upon an injurious environment. The circumstances of neglect related to the parents' lack of progress to remedy conditions arising from each parent's history of domestic violence with other partners that resulted in the prior involvement of DSS with their other children, including respondent mother's rights being terminated to six of her other children. Respondent mother appealed. The court of appeals reversed the neglect adjudication holding that the findings (1) were not supported by clear, cogent, and convincing evidence and (2) did not support the conclusion of neglect. *See In re J.A.M.*, 795 S.E.2d 262 (2016). The N.C. Supreme Court granted discretionary review, determined the court of appeals misapplied the standard of review, and reversed and remanded the appeal back to the court of appeals for reconsideration with the proper standard of review applied. *See In re J.A.M.*, 809 S.E.2d 579 (2018).
- Standard of Review: "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." Sl. Op. at 6 quoting *In re J.A.M.*, 809 S.E.2d at 580. Conclusions of law are reviewable de novo.
- Under G.S. 7B-101(15), evidence of the abuse of another child in the home is relevant in a neglect adjudication. The trial judge has discretion to determine the weight to give that evidence. The trial court's decision is "predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." Sl. Op. at 7 quoting *In re McLean*, 135 N.C. App. 387, 396 (1999). In a case involving a newborn, the court may consider the parents' failure to correct conditions resulting in their other children's neglect or abuse as evidence of future neglect.
- The trial court found, based on the evidence admitted (including the prior adjudications for the other children and a DSS supervisor's and respondent mother's testimony), that the respondent-mother failed to acknowledge her role in the termination of parental rights to her other six children, refused to work with DSS and engage in services in the current case, and became involved with J.A.M.'s father who had been convicted of domestic violence even though domestic violence was one of the reasons her other children had been removed. The evidence supporting these findings "is consistent with a substantial risk of future injury in the home." Sl. Op. at 11. The weight of the trial court's findings support the neglect adjudication, and the court of appeals may not reweigh the underlying evidence.

Adjudication/Disposition/Permanency Planning: Reunification & Reunification Efforts

In re C.P., ___ N.C. App. ___, 812 S.E.2d 188 (March 6, 2018)

Held: reverse in part, affirm in part, vacate in part, and remanded

- Procedural History: This case originally involved two children who were adjudicated neglected and dependent and that adjudication and following disposition were appealed. The adjudication was reversed and remanded in the published opinion In re K.P., 790 S.E.2d 744 (2016). Since that first appeal, one child (K.P.) reached the age of majority, and the case proceeded for C.P., a juvenile. On remand, the trial court held an "adjudication/disposition and permanency planning hearing" where the child was adjudicated neglected and dependent and guardianship was awarded to the child's adult sibling. The adjudication, dispositional, and permanency planning

order was appealed. That appeal was heard and decided in an unpublished opinion dated January 2, 2018. This published opinion results from a petition for rehearing pursuant to Rule 31 of the N.C. Appellate Rules and replaces the unpublished January 2, 2018 opinion.

- An adjudication of dependency under G.S. 7B-101(9) requires the trial court to address both prongs of the definition regarding (1) the parent's ability to provide proper care or supervision and (2) the availability to the parent of alternative child care arrangements. DSS concedes the second prong was not satisfied. Adjudication of dependency reversed.
- The trial court did not err in holding the adjudication, initial dispositional, and permanency planning hearings on the same day as it is not forbidden by the Juvenile Code.
- The court of appeals distinguished reunification as a permanent plan from reunification efforts. In interpreting the language of G.S. 7B-906.2(b) that "reunification shall remain" a primary or secondary plan absent certain findings, the *initial permanency planning order* must include reunification as one of the concurrent permanent plans. Although the trial court found that "reunification efforts… would be futile" and that the mother "presents a risk to the health and safety of the juvenile," which are findings under G.S. 7B-906.2(b) that authorize the elimination of reunification as a concurrent plan, the statutory language "shall remain" requires the trial court include reunification as part of the *initial* permanent plan. Vacate portion of order that fails to include reunification as a permanent plan. However, recognizing that it is bound by a prior published opinion of the court of appeals, *In re H.L.*, 807 S.E.2d 685 (2017), reunification efforts may be ceased at the first permanency planning hearing if certain findings are made. The findings in this case support the trial court's conclusion that reunification efforts may be ceased. Affirm portion of order ceasing reunification efforts.
    - Author's Note: This opinion does not discuss how to apply the language in G.S. 7B-906.2(b) that requires the trial court to order DSS to make efforts toward finalizing the primary and secondary permanent plans when reunification efforts have been ceased but reunification must be a permanent plan at the initial permanency planning hearing.
- In awarding a permanent plan of guardianship, the GAL and DSS concede the order did not contain a relevant finding under G.S. 7B-906.1(e)(1) of whether it is possible for the child to be returned to the mother within 6 months and if not why placement with the mother is not in the child's best interests. Vacate guardianship order.
- The mother waived her right to appellate review of the guardianship order that did not include findings that she was unfit or acted inconsistently with her constitutionally protected parental rights by failing to raise it when she had the opportunity to do so at the hearing.

Dispositional Order: Parent's Constitutional Rights

In re S.J.T.H., ___ N.C. App. ___, 811 S.E.2d 723 (March 6, 2018)

Held: reversed and remanded as to actions involving respondent father and custody to DSS

- Facts: Child born Feb. 2017 and mother identifies one man as the father. DSS becomes involved because of mother's prior child protective history and drug abuse and putative father's failure to appear at child's discharge from the hospital. In March, a second putative father, Sam, contacts DSS and offers to care for the child. In April, DSS files a petition alleging neglect and dependency and names both putative fathers. In June 2017, Sam is adjudicated the child's father, the child is adjudicated neglected based on circumstances created by mother, and the dispositional order places the child in DSS custody and orders Sam to comply with the same 11 requirements as

mother. Evidence regarding Sam is limited to his identity and paternity. Sam appeals, challenging the dispositional order as it applies to him.

- There is no evidence or findings of fact about respondent father other than establishing his paternity. A best interests determination requires evidence about the named respondent father, such as evidence about his ability to parent or provide for the child, his home life, or why the parent cannot care for his child, so that a court may consider whether a respondent parent is unfit or has acted inconsistently with his parental rights when determining custody. Citing In re D.M., 157 N.C. App. 382 (2011), which applied to a permanency planning order awarding permanent custody to a non-parent, there must be clear, cogent, and convincing evidence to demonstrate a parent is unfit or has acted inconsistently with his parental rights to support a disposition that does not grant a parent custody.

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for a new hearing

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. Criminal charges against respondent father are dismissed. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent father appeals, challenging findings and conclusion that he acted inconsistently with his constitutionally protected status as a parent.
- Before ordering custody to a non-parent, there must be clear and convincing evidence and a finding that a parent is unfit or has acted inconsistently with his or constitutionally protected status as a parent. This finding applies to a permanent custody order, even when custody is transferred from a non-parent (in this case DSS) to a different non-parent (in this case the foster parents).
- The appellate court reviews de novo whether conduct is inconsistent with the parent's constitutionally protected status. The trial court's findings were insufficient to support the conclusion that respondent father acted inconsistently with his protected status as a parent as the findings do not address how the father is unfit or acted inconsistently with his parental rights. Distinguishing the case from *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010), there were no findings that the child's injuries were non-accidental or that the mother and father were the sole caregivers when the non-accidental injuries were sustained and were jointly and individually responsible. The findings suggest the trial court intended to hold both parents responsible or that mother caused the injuries and do not explain how father was culpable for the injuries, unfit, or acted inconsistently with his constitutionally protected status.

Permanent Plan: Guardianship/Custody; Relative Preference; ICPC

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green

had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.

- G.S. 7B-903(a1) addresses the out-of-home placement of a juvenile. This statute mandates (through the use of the word "shall") that the court (1) first consider whether a relative is willing and able to provide proper care and supervision to the child in a safe home, and (2) if so, place the child with that relative unless there is a finding that the placement is not in the child's best interests. "Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." Sl. Op. at 4 (citation omitted). There have never been the required findings or conclusions of law resolving the issue of relative placement and the child's best interests.

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- Facts: Respondent mother appeals from a permanency planning order that awarded custody of her two children, who had been previously adjudicated neglected, to relatives who reside in Arizona. An ICPC home study was requested but not completed. Mother also appeals the termination of the juvenile court's jurisdiction and entry of a Chapter 50 custody order pursuant to G.S. 7B-911.
- ICPC: Regarding out-of-home care, G.S. 7B-903(a1) requires that a child's placement with a relative comply with the Interstate Compact on the Placement of Children (ICPC). One requirement of the ICPC is that the receiving state (where the child is going to) notify in writing the sending agency that the proposed out-of-state placement does not appear to be contrary to the child's best interests. The ICPC applies to a placement in foster care or as a preliminary to a possible adoption. G.S. 7B-3800. Looking at (1) the definition of "foster care" under AAICPC Regulation 3(4)(26), which includes the home of a relative, and (2) the holding in *In re V.A.,* 221 N.C. App. 637 (2012) , which looked to *In re L.L.*, 172 N.C. App. 689 (2005), that determined the ICPC applied to the out-of-state placement with a relative, placement with an out-of-state relative is a foster care placement requiring compliance with the ICPC. To the extent there is a later opinion, *In re J.E.*, 182 N.C. App. 612 (2007), that held placement with the out-of-state relative is not a foster care placement or preliminary placement to adoption triggering the ICPC and conflicts with the *In re V.A.* (2012)/*In re L.L.* (2005) holdings, the court is bound by the older cases. Because there was no written notification from the receiving state, the trial court "was not authorized to award custody" to the out-of-state relatives.
- Verification: Before ordering custody (or guardianship) to someone other than a parent, the court must verify the person (1) understands the legal significance of the placement and (2) will have adequate resources to appropriately care for the child. G.S. 7B-906.1(j). Although there are no specific findings that must be made, the record must show the court received and considered reliable evidence of those two factors. The evidence, which was a DSS report and social worker

testimony about the source but not amount of income and that there were no concerns about the financial affidavit the proposed custodians completed, lacked specificity and was insufficient to support the findings that the resources were adequate. There was no evidence, such as testimony from the prospective custodians or social worker or a signed statement by the prospective custodians, showing the custodians' understanding of the legal relationship.

Visitation

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- The visitation order between respondent mother and the child who is placed in Arizona that establishes a weekly visit for a minimum of two hours if the mother moves to Arizona does not comply with G.S. 7B-905.1(c). The court must specify the minimum frequency and length of visits and whether the visits shall be supervised. The order does not address the frequency or length of visits if the mother does not move to Arizona, and it does not address supervision at all.

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- If on remand, the custodians remain parties, the court must consider appropriate visitation as may be in the children's best interests pursuant to G.S. 7B-905.1 (which applies when an order removes custody of a child from a parent, guardian, or custodian, or continues the child's placement outside the home).

Reunification w/Custodian: Findings

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively

removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.

- There were no findings to support the conclusion that it was not in the children's best interests to be returned to the grandparent custodians. The one applicable finding adopted and incorporated the DSS and GAL reports and is insufficient. "The trial court 'should not broadly incorporate written reports from outside sources as its findings of fact' [and] … delegate its fact-finding duty" (*quoting In re J.S.*, 165 N.C. App. 509, 511 (2004)).

Cease Reunification Efforts: G.S. 7B-906.2(b) and (d) Findings

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for further proceedings

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent mother appeals, challenging that the findings to cease reunification efforts were not support by clear, cogent, and convincing evidence.
- Standard of review of an order ceasing reunification efforts is whether the trial court made appropriate findings, whether the findings are based on credible evidence and support the conclusions of law, and whether the trial court abused its discretion when ordering the disposition.
- An order effectively ceases reunification efforts when it awards permanent custody to a non-parent (in this case foster parent), eliminates reunification as a permanent plan, waives further review hearings, and releases the attorneys for the parties and the child's GAL.
- The court may cease reunification efforts at permanency planning after making findings under
    - G.S. 7B-906.2(b) that those efforts clearly would be unsuccessful or inconsistent with the child's health and safety and
    - G.S. 7B-906.2(d)(1)–(4), which demonstrate lack of success.
- Here the court failed to make the G.S. 7B-906.2(d)(4) and G.S. 7B-906.2(b) findings. A finding that "the home remains an injurious environment" and "a return home would be contrary to the best interests of the juvenile" are not a finding that reunification efforts would be unsuccessful or inconsistent with the child's health and safety.
- "All findings must be supported by clear, cogent, and convincing evidence."
    - Author's Note: It is unclear to this author whether this statement applies to the findings required under G.S. 7B-906.2(b) and (d) as no statutory or case citation was referenced and *In re L.M.T.,* 367 N.C. 165, 180 (2013) states there is no burden of proof in a permanency planning hearing and "the trial court's findings of fact need only be supported by sufficient competent evidence." This appeal does involve a separate challenge by respondent father on the issue of whether he was unfit or acted inconsistently with his constitutionally protected parental rights such that custody could be awarded to a non-parent. Father's appeal was remanded for findings on that issue, and case law has established clear and convincing evidence as the standard when determining whether a parent's conduct is inconsistent with his/her constitutionally protected status.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- In an appeal of a permanency planning order that eliminated reunification as a permanent plan, the transcript was not included in the appellate record. It is the appellant's burden to settle the record on appeal by providing a transcript if available or a narrative of the hearing. Without a transcript or narrative, findings of fact are deemed conclusive on appeal, and the review is limited to whether the findings support the decision to cease reunification with the father.
    - Procedural Note: Respondent was ordered to provide the transcript by August 2017 but failed to do so or request an extension. A late transcript was provided in November 2017, and a motion to amend the record was filed in December 2017. That motion was denied, and there is a dissent on the denial of that motion. In a footnote, the court of appeals stated this dissent may provide an appeal of right to the N.C. Supreme Court from the decision to deny that motion. The dissent is included in this published opinion.
- The ultimate finding under G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety were supported by findings that respondent father had not progressed on his case plan regarding visitation and appropriate housing, which had been concerns for more than a year; missed a CFT meeting; and did not cooperate with DSS.

Removal as Party: Custodian

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- G.S. 7B-401.1 sets forth who must be parties to an abuse, neglect, or dependency proceeding, which includes parents, guardians, custodians, and caretakers. Pursuant to G.S. 7B-401.1(d) regarding custodians, the grandparents were named as respondent parties. Before removing the custodians [guardian or caretaker] as parties, the trial court must comply with G.S. 7B-401.1(g), which requires "the court finds (1) that the person does not have legal rights that may be affected by the action and (2) that the person's continuation as a party is not necessary to meet the juvenile's needs." Neither finding was made. The opinion comments that on remand, the trial court may be prevented from making the first finding given the chapter 50 custody order.

Termination Jurisdiction: 7B-911

In re J.D.M.-J., ___ N.C. App. ____ (June 19, 2018)

Held: Vacated and Remanded

- G.S. 7B-911: The trial court must make the findings required by G.S. 7B-911(c) before terminating its jurisdiction in the juvenile proceeding. Here, it is undisputed that the order contained no findings that addressed either section of G.S. 7B-911(c)(2): there was no need for continued state intervention on behalf of the child through a juvenile court proceeding, and at least 6 months have passed since the court determined placement with the relatives who are being awarded custody is the permanent plan. The findings in the permanency planning order are internally inconsistent as they require DSS to remain involved with reunification efforts, placement, and care of the child while also "closing" and releasing DSS from the matter.

Appeal: Order Eliminating Reunification

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1001(a) sets forth which final orders may be appealed in an abuse, neglect, or dependency action. A G.S. 7B-906.2 permanency planning order that includes adoption and reunification as the concurrent permanent plans is not an appealable order under G.S. 7B-1001(a)(5), even when a TPR has been commenced by DSS, as reunification has not been eliminated as a permanent plan.
- "G.S. 7B-906.2(b) clearly contemplates the use of multiple, concurrent plans including reunification and adoption. During concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan" as the trial court is required to order DSS to make efforts toward finalizing the primary and secondary plans. The permanency planning order that identified adoption and reunification as the concurrent plans and required DSS to file a TPR petition did not implicitly or explicitly cease reunification. This opinion distinguishes appellate opinions decided before G.S. 7B-906.2 (e.g, *In re A.E.C.*, 239 N.C. App. 36 (2015)), which held a trial court's order that DSS file a TPR petition implicitly ceased reunification efforts.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part; dismiss in part

- Facts: Respondent father appeals a TPR order, the prior April 2016 permanency planning order (PPO) that ceased reunification efforts with father and eliminated reunification as a concurrent permanent plan, and the October 2016 PPO that continued the April 2016 PPO.
- G.S. 7B-1001(a) allows for appeal of a TPR order and any prior order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) if all of the criteria under G.S. 7B-1001(a)(5)(a) apply. Written notice preserving the right to appeal the G.S. 7B-906.2(b) order is not required (as it was under the former G.S. 7B-507(c)). The language in G.S. 7B-1001(b) requiring notice to preserve the right to appeal be in writing is surplusage because G.S. 7B-906.2(b) does not require a notice to preserve the appeal (distinguishing it from the former G.S. 7B-507(c) which did require such notice).

- Legislative Note: Effective January 1, 2019, G.S. 7B-1001(a)(5)a. and 7B-1001(a1)(2) are amended and require that the right to appeal be preserved in writing within 30 days after entry and service of the G.S. 7B-906.2(b) order.

- G.S. 7B-1001 does not authorize an appeal of an order that continues the permanent plan. Respondent has no statutory right to appeal the October PPO; appeal of that order dismissed.

Appellate Issues (Standing, Vacated Order, Mootness)

In re D.S., ___ N.C. App. ___ (July 3, 2018)

Held: vacated and remanded for a new permanency planning hearing

- Facts & Procedural History: Sometime after the 2015 neglect and dependency petition, the child was adjudicated neglected and dependent and was placed in DSS custody. In December 2016, a permanency planning order awarded guardianship of the child to Ms. Green, a non-relative. Respondent father appealed. The appellate opinion determined that the findings that Ms. Green had adequate resources to appropriately care for the child was not supported by evidence, vacated the permanency planning order, and remanded the case for further proceedings. On remand, the trial court limited the hearing to the issue of whether Ms. Green had adequate resources. The trial court entered a supplementary order that incorporated the December 2016 permanency planning and guardianship order, made findings that Ms. Green had adequate resources, and ordered guardianship as the permanent plan. Respondent father appeals, arguing the trial court erred in appointing Ms. Green as guardian without first finding that it properly considered and rejected the paternal grandmother (a relative) as a placement.
- Respondent father has standing to appeal. He is not asserting the interests of the relative but is asserting his own interest to have the court consider a potentially viable relative placement. Because the relative was not a party in this action with a right to appeal, this case is distinguished from *In re C.A.D.*, 786 S.E.2d 745 (2016), which held the respondent mother was not aggrieved by the permanency planning order and lacked standing to present an argument that affected the grandparents when the grandparents were parties to the proceeding (as former custodians) and could have but did not appeal the order.
- "When an order of a lower court is vacated, those portions that are vacated become void and of no effect." Sl. Op. at 7 (citation omitted). The previous permanency planning order was vacated in its entirety and the case was remanded for further proceedings. The case returned to the prior review and permanency planning orders, which was custody to DSS. After remand, the new order from the trial court, which re-incorporated findings and conclusions from the voided order, is a new single order from which respondents could raise any argument on appeal.
- A 2017 guardianship review order that ceased all contact between the child and grandmother does not moot this appeal. The trial court has not addressed the question of whether the relative should have been given priority placement as required by G.S. 7B-903(a1).

Termination of Parental Rights

Law of the Case Doctrine

In re K.C., ___ N.C. App. ___, 812 S.E.2d 873 (March 6, 2018)

Held: Affirm

- Procedural History: In 2014, father petitioned to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The 2014 petition was granted in a 2015 TPR order. Respondent appealed, and the TPR was reversed (*In re K.C.*, 805 S.E.2d 299 (2016)). Later in 2016, approximately 6 months after the appellate decision, father filed a new petition seeking to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The TPR was granted in July 2017. Respondent mother appeals, arguing the law of the case prevented the trial court from concluding respondent abandoned the child.
- "The law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal," which in this case is the six months next preceding the filing of the second (2016) petition. (*Quoting Bank of America, N.A., v. Rice*, 780 S.E.2d 873, 880 (2015)). "The prior opinion … does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority even if [respondent] never seeks to see [the child] or communicate with him again."
- Although some findings related to events that took place prior to the first petition in 2014, the order on appeal included several unchallenged findings of fact about events occurring after the filing of the 2014 petition and made its decision based on the period of at least six consecutive months immediately preceding the filing of the 2016 petition. The unchallenged findings are that respondent did not have even minimal contact with the child after the 2015 TPR order was reversed even though she had a way to contact petitioner and his family, and she failed to appear at the hearing resulting in the 2017 TPR order on appeal.

Due Process; Motions to Continue and Re-open Evidence

In re S.G.V.S. ___ N.C. App. ___, 811 S.E.2d 718 (Feb. 20, 2018)

Held: reversed and remanded

- Facts: DSS filed petitions to terminate respondent mother's parental rights to her two children, who had been adjudicated neglected and dependent. The TPR hearing started on December 13, 2016 and was continued to January 18 and 19, 2017. Respondent mother was previously scheduled to be in a different court in a different county for a pending criminal charge on January 18, 2017. At the start of the January 18, 2017 TPR hearing, counsel for respondent mother requested a continuance to January 19 as respondent was present in the other county court for her criminal matter. The court denied the motion to continue. At the conclusion of the TPR hearing, respondent's counsel requested that matter be left open to allow her client to appear and testify. The court denied the motion. Before a written order was entered, respondent's attorney filed a Rule 59 motion to re-open the evidence, which was denied after finding that respondent had been advised to continue her criminal matter and that she chose to attend the criminal action rather than the TPR hearing. Respondent mother's rights were terminated.

- Due process applies to a parent's liberty interest to care, custody and control of their child. Due process insures fundamental fairness in a judicial proceeding that may adversely affect the individual's protected rights. Although "due process does not provide a parent with an absolute right to be present at a termination hearing… the magnitude of 'the private interests affected by the proceeding, clearly weighs in favor of a parent's presence at the hearing.' " (*citing In re Murphy*, 105 N.C. App. 651, 654 (1992); *In re Quevedo*, 106 N.C. App. 574, 580 (1992)).
- Rule 59 of the N.C. Rules of Civil Procedure allows for a new trial due to "any irregularity by which any party was prevented from having a fair trial," and a trial court has discretion to re-open a case to admit additional testimony after the conclusion of the hearing. An appellant court may disturb an order made under the discretionary power of Rule 59 when the appellate court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487 (1982). No evidence supports the finding that respondent chose to attend her previously scheduled criminal matter instead of the TPR hearing. In North Carolina, the district attorney controls the calendaring of cases in criminal court, and there was no showing that a motion to continue would have been permitted. Respondent's choice was to attend her previously scheduled criminal matter or attend the TPR hearing and face a new criminal charge of failing to appear at the criminal hearing.
- Based on the record and magnitude of the interests at stake in a TPR, the denial of the motion to continue the hearing and to re-open the evidence to allow respondent mother to participate "results from a misapprehension of the law and is an unreasonable and substantial miscarriage of justice."

Adjudication: Findings

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1111(a)(2) authorizes the termination of parental rights when (1) a child has been willfully left by the parent in foster care or placement outside of the home for more than 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- Willfulness requires that the parent had the ability to show reasonable progress but was unwilling to make the effort and is not precluded when a parent has made some efforts to regain custody of his or her child. It does not require a showing of fault.
- Although respondent mother made "sporadic efforts," the findings of fact regarding her failed and diluted drug screens, inability to engage in safe and appropriate visits, and lack of progress supported the court's determination that the mother willfully left the children in foster care for more than 12 months and failed to make reasonable progress regarding two of her children.
- Regarding her third child, the findings are supported by clear, cogent, and convincing evidence that there was prior neglect (the child was adjudicated neglected) and a likelihood of repetition of neglect. G.S. 7B-1111(a)(1). Specifically, the court found the mother needed an additional support person to assist her in safely parenting but was unable to identify any such support person, she repeatedly failed drug screens, DSS had to intervene during supervised visitations because of her inappropriate behavior, and she had not complied with her case plan.

- Findings about whether DSS made reasonable efforts toward reunification are required at permanency planning hearings and are not required at a TPR. Even though they are not required, DSS provided reasonable efforts for reunification through the creation and implementation of a case plan, the provision of bus passes, supervising visitation, and arranging for drug screens. Such efforts are not required to be exhaustive.

In re Z.D., ___ N.C. App. ___, 812 S.E.2d 668 (March 20, 2018)

Held: reversed

- Facts: In 2011, the child was adjudicated dependent based on circumstances related to respondent mother's mental health issues, drug use, unsafe home, and choice of unsafe childcare arrangements. Child was placed petitioners in the TPR, as a kinship placement in the underlying dependency action in 2011, and custody was ordered to the petitioners in 2012. Respondent mother has court ordered visitation. Respondent mother is diagnosed with bipolar disorder and has had multiple psychiatric hospitalizations and involuntary commitments from 2010 – 2015. Respondent mother engages in outpatient treatment. Petitioners filed the TPR in June 2016, and the TPR was granted in May 2017 on the grounds of neglect, failure to make reasonable progress to correct the conditions that led to the child's removal, and dependency. G.S. 7B-1111(a)(1), (2), and (6). Respondent mother appeals.
- Standard of Review is whether the clear, cogent, and convincing evidence supports the findings of fact and whether the findings of fact support the conclusion that a ground exists to terminate parental rights. The appellate court reviews the de novo whether the findings support the conclusions.
- Quoting *Quick v. Quick*, 305 N.C. 446, 452 (1982), "the trial court must make '*specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached" (emphasis in original). There must be adequate evidentiary findings to support the ultimate finding.
- The evidentiary findings of fact are insufficient to support the ultimate finding required for each ground alleged and the conclusion that any of the alleged grounds under G.S. 7B-1111(a)(1), (2), and (6) existed. The evidentiary findings lacked specificity.
    - G.S. 7B-1111(a)(2) requires a 2-part analysis: (1) the child has been willfully left in foster care placement or placement outside the home for over 12 months and (2) at the time of the TPR hearing, the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. There were no findings regarding mother's conduct or circumstances over the 15 months prior to the TPR hearing regarding her mental health, and no findings at all regarding her progress (or lack thereof) in correcting her drug use or the condition of her home at the time of the TPR hearing. Regarding her mental health, the findings of fact lack detail is describing what an "episode" is, how frequently respondent had such episodes, and how the episodes "left her incapable of properly caring for her son." The finding of fact describing respondent's behavior during visits as "consistently concerning" and "disturbing" lacked any particularity in what behavior it was referring to and how that behavior impacted respondent's ability to care for her son. The findings do not address respondent's progress or lack of progress to correct the conditions the resulted in her

son's removal. Evidence, through her psychiatrist's testimony, tended to show she made significant progress in addressing her mental health issues, and other evidence showed she had stable housing and income and was not using drugs.

- A TPR on the ground of neglect under G.S. 7B-1111(a)(1) requires the court to consider evidence of past neglect, changed conditions related to the past neglect, and the probability of the repetition of neglect in those cases where the child has not been in the parent's custody for a significant period of time before the TPR hearing. The findings addressing the likelihood of repetition of neglect that used the terms "concerning" and "disturbing" are subjective and ambiguous and are not sufficiently specific to determine the behaviors exhibited by respondent and how those behaviors negatively impacted her son or her ability to provide proper care and supervision to her son. The likelihood of repetition of neglect is also not shown by clear, cogent, and convincing evidence and lacked temporal proximity to the TPR hearing as it focused on conduct that occurred at least 6 months before the hearing.
- Dependency under G.S. 7B-1111(a)(6) requires the court to address (1) the parent's ability to provide care or supervision and (2) the availability to the parent of an alternative child care arrangement. The evidentiary findings are insufficient to support the ultimate finding that respondent was incapable of providing care or supervision and that such incapability would continue for the foreseeable future. The findings relate to respondent's history rather than her progress (or lack thereof) for the 15 months before and up to the TPR hearing and fail to address her mental health and alleged incapability at the time of the hearing. Petitioners failed to present clear, cogent, and convincing evidence of respondent's current incapability and that it would continue for the foreseeable future.

Adjudication: Willfully leaving in foster care without making reasonable progress

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- G.S. 7B-1111(a)(2) authorizes a termination of parental rights when the parent willfully leaves the child in foster care for over 12 months and has not made reasonable progress to correct the conditions that led to the child's removal from home.
- The relevant 12 month period starts when the trial court enters a court order requiring that the child be removed from the home, which in this case was the nonsecure custody order, and ends when the TPR petition or motion is filed. This 12-month time period applies even when a respondent in the TPR was the "non-removal parent" and did not appear in the underlying abuse, neglect, or dependency action until after the child's adjudication and almost one year after the nonsecure custody order was issued.
- Willfulness exists when the respondent has an ability to show reasonable progress but was unwilling to make the effort; it does not require a showing of fault. Willfulness may be found even when the respondent has made some efforts to regain custody of his child as limited progress is not reasonable progress.
- The trial court determines the weight to give to evidence and the reasonable inferences to draw and reject from the evidence. The findings made by the trial court are supported by the

evidence and are sufficient to support the TPR based on G.S. 7B-1111(a)(2). The findings show the father made limited progress by completing parenting classes but failed to make progress on a major component of his case plan, which was to obtain independent and appropriate housing.

Adjudication: Abandonment and Best Interests Disposition

In re D.E.M., ___N.C. App. ___, 802 S.E.2d 766 (2017), *aff'd per curiam,* ___ N.C. ___, 809 N.C. 567 (March, 2, 2018)

Summary of Court of Appeals decision

Held: Affirmed

- 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.
- 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. The child is 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, they 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.

Appeal: No Merit Brief; Rule 3.1

In re L.V., ___ N.C. App. ___ (July 3, 2018)

Held: Dismissed

Stay of mandate granted 7/17/18 (motion for en banc rehearing filed)

- Pursuant to N.C. App. Rule 3.1(d), a no-merit brief was filed by respondent mother's attorney. Although advised by her attorney that she has a right to file a pro se brief, respondent mother failed to do so. No issues were argued or preserved for review.
- In a footnote, the opinion quotes *State v. Velesquez-Cardenas*, ___ N.C. App. ___ (sl. op. concurrence at 3 filed 4/18/2018), "Rule 3.1(d) does *not* grant indigent parents the right to receive an *Anders*-type review of the record by our Court, to consider issues not properly raised."

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- Pursuant to Appellate Rule 3.1(d), respondent father's counsel filed a no-merit brief, notified his client of the right to file a pro se brief within 30 days, and requested that the court of appeals perform an independent review of the record for possible error. Counsel identified two issues: (1) whether the trial court erred in concluding a ground existed to terminate father's rights, and (2) whether the trial court abused its discretion in determining TPR was in the children's best interests.
- The TPR order includes (1) sufficient findings of fact that are supported by clear, cogent, and convincing evidence to conclude at least one ground, specifically G.S. 7B-1111(a)(1) neglect, existed, and (2) appropriate findings on each of the relevant G.S. 7B-1110(a) dispositional factors regarding bests interests.

Adoption

Consent: Unwed Father

In re Adoption of C.H.M., ___ N.C. ___, 812 S.E.2d 804 (May 11, 2018)

Held: reversed court of appeals decision that affirmed trial court's order requiring father's consent

- Facts: Respondent and child's biological mother were in a relationship that ended in November 2012. In January, 2013, mother marries another man. In February she notifies respondent that she is pregnant with his child but wants it kept a secret. Respondent states he intends to set aside money for the child but doesn't provide any support or details of his savings plan. Respondent and mother communicate for several months by Facebook message. Mother refuses respondent's offers of support. In one communication, mother tells respondent that she was sexually assaulted and the child may not be his even though mother was never sexually assaulted. In June, mother stops communicating with respondent and gives birth to the child.

Mother and her husband execute relinquishments for the child's adoption, where mother fails to provide information about respondent and states her pregnancy resulted from a sexual assault. Child is placed with prospective adoptive parents who file the adoption petition on July 9, 2013. Respondent contacts mother at the end of July and learns mother gave birth to the child but is not told the child is an adoptive placement until November. The adoption agency is also informed in November of respondent's existence. Paternity testing indicates respondent is the father, and he files an objection to the adoption in December, 2013. At a hearing determining whether respondent's consent is required under G.S. 48-3-601(a)(2)(b)(4)(II), respondent testified he set aside money from ATM withdrawals and cashback purchases from WalMart, which he kept in a lockbox in his room. The lockbox was produced at the 2014 hearing, and it had $3,260. In his testimony, respondent estimated he placed $100-$140/month in the lockbox although he had no receipts or records indicating when or what amounts were placed in the lockbox. The trial court found respondent credible and that his payments were regular and consistent and a reasonable method of providing support for the minor child and mother, based on his $32,000/year income. The trial court ordered his consent was required, and the Court of Appeals affirmed that order. The Supreme Court granted discretionary review.

- Standard of Review: Conclusions of law, which involve a determination that requires the exercise of judgment or application of legal principles, are reviewable de novo on appeal. "[D]etermining whether sufficient evidence supports a judgment is a conclusion of law and will be reviewed as such." Sl. Op. at 10.
- "To protect the significant interests of the child, biological parents, and adoption parents, Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, establishes clear, objective tests to determine whose consent is required before a court may grant an adoption petition." Sl. Op. at 1. G.S. 48-3-601 enables a putative father to unilaterally protect his parental rights if he complies with the requirements of that statute. One of those requirements is that the putative father has provided, within his financial means, reasonable and consistent payments for the support of the mother and/or child before the adoption petition is filed. G.S. 48-3-601(2)(b)(4)(II).
- At issue in this case is whether respondent (1) provided payments that are real and tangible for the support of the mother and/or child, (2) whether the payments were reasonable in light of respondent's financial means, and (3) whether the payments were made consistently *as shown by an objectively verifiable record*. His consent will not be required if he fails to prove all of the statutory requirements. The relevant time period is before the adoption petition was filed. Any evidence of actions taken after the filing of the petition is irrelevant, and consideration of such evidence is an error of law.
- Respondent has the burden to prove through competent evidence that he complied with each statutory requirement. Looking to *In re Anderson*, 360 N.C. 271 (2006), the Court "emphasized the importance of a *verifiable payment record* to establish that a putative father made reasonable and consistent payments." Sl. Op. at 15 (emphasis added). As a matter of law, respondent's evidence was insufficient to show he made payments during the relevant time period (before the petition was filed) or that each payment was reasonable and consistent with his financial means during the relevant statutory time period. Respondent's testimony was uncorroborated. He conceded that he did not keep records and did not really know how much money was placed in the lockbox during the relevant time period. General bank statements and

the lump sum amount presented at the trial in 2014 do not provide an objectively verifiable record showing consistently reasonable payments made during the relevant time period (before the petition was filed). Because respondent failed to prove he complied with the objective statutory requirements, his consent is not required.

- Dissent: Disagreeing with the standard of review employed by the majority, the Court should have deferred to the trial court's findings of fact when those findings of fact are supported by competent evidence. The evidence was sufficient to support the extensive trial court findings, which supported the conclusion of law that the respondent's consent was required. The majority's decision to require record-keeping or a formal accounting of payments is not supported by statute or case law.
- Note: This opinion does not address whether the method of placing money in a special location in respondent's home is a "payment" under the statute. It also does not address the additional statutory requirements of acknowledging paternity and visiting or communicating (or attempting to) with the mother and/or child.

Criminal Case with Application to Child Welfare

Felony Obstruction of Justice by Parent; Accessory After the Fact; Failing to Report

State v. Ditenhafer, ___ N.C. App. ___, 812 S.E.2d 896 (March 20, 2018)

Held: No Error in part and reversed in part

There is a dissent re: accessory after the fact

- "The elements of felony obstruction of justice are (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud." A person obstructs justice when he or she "deliberately acts to subvert an adverse party's investigation of wrongdoing."
- The court's denial of defendant's motion to dismiss the obstruction of justice charge related to pressuring her daughter to recant was proper. When viewing the evidence in the light most favorable to the state, there was sufficient evidence, including her daughter's testimony, of the defendant's actions that pressured her daughter to recant the daughter's allegation of repeated sexual abuse by her adoptive father/defendant's husband with the willful intent to hinder the investigation of the abuse. Defendant directed her daughter to state she was not sexually abused and coached her daughter as to what to say. When her daughter did not recant, Defendant punished her, verbally abused her, and turned her family against her.
- On the second charge of obstruction of justice alleging defendant denied DSS (child protection) and law enforcement access to her daughter, the state presented no evidence that defendant denied a request by either agency to interview her daughter. Several interviews with the daughter occurred, and although Defendant was present during many of those interviews, there was no request for Defendant to leave. If defendant would have refused any such request, DSS or law enforcement could have sought a court order to compel defendant's nonattendance at the daughter's interview. *See* G.S. 7B-303 regarding DSS petition for obstruction/interference. As a parent, she had the right to attend the interviews and unilaterally end the one interview she did end. The court erred in denying the motion to dismiss for insufficient evidence; conviction on this charge vacated.

- The elements of accessory after the fact are "(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." The Defendant's failure to report the crime, which is a mere act of omission and not an affirmative act, does not render her an accessory after the fact under G.S. 14-7. There were no allegations in the indictment about defendant's affirmative acts, which would support an accessory charge, that involved defendant's destruction of physical evidence and telling the investigators her daughter was lying. The opinion recognizes that defendant could have been but was not charged with a misdemeanor for failing to report suspected abuse as provided for in G.S. 7B-301.

Hearsay Exceptions – Child's Statements

State v. Blankenship, ___ N.C. App. ___ (April 17, 2018)

Held: No reversible error in admitting hearsay statements
temporary stay allowed May 3, 2018; PDR filed

- Facts: Defendant was convicted of rape of a child by an adult offender, taking indecent liberties with a child, and sexual offense with a child by an adult offender. He appealed on various issues, one of which challenges the admission of the child victim's hearsay statements.
- The Child's Hearsay Statements: The state filed an opposed motion to admit the child victim's hearsay statements through the other exceptions clauses of Rules of Evidence 803 and 804. The parties stipulated to the child's unavailability due to lack of memory for the purposes of the hearsay exceptions. The child was picked up from defendant's home by her grandparents. As she was being placed in her car seat, she stated to her grandparents "Daddy put his weiner on my coochie," and when asked what a coochie was, she pointed to her vagina. The child was acting normally when she made the statement, and her grandmother was not concerned about the child's mental or physical condition when she picked her up from the home. The court determined the statements were admissible as a present sense impression, excited utterance, and a residential exception. Rules 803(1), (2) and 804(b)(5). The child was taken to the emergency department, where she made a similar statement to the nurse and added "nothing hurt." Those statements were admitted as statements made for the purpose of medical diagnosis or treatment. Rule 803(4). The child again made a similar statement and stated "I bleed. I have blood" to a victim advocate/forensic interviewer who interviewed her 12 days later. That statement was admitted under the residual exception in Rule 804(b)(5). Approximately one month later, the child made similar statements to a relative whenever the relative changed her diaper. These statement were admitted as a present sense impression and statement of then existing mental, emotional, or physical condition and the residual exception. Rules 803(1), (3) and 804(b)(5).
- Standard of Review: The appellate court reviews de novo the trial court's determination as to whether an out-of-court statement constitutes hearsay. The statement's admission under any hearsay exception other than the residual exception is reviewed for plain error if no objection was made at trial and for prejudicial error if an objection was made at trial. Admission under the residual exception is reviewed for an abuse of discretion.
- Exited Utterance (Rule 803(2)) are statements related to a startling event or condition made when the declarant was under the stress of the excitement caused by the event or condition

and must be spontaneous. Although the statement was spontaneous, there was no evidence that showed the declarant child was under stress when she made the statement. Instead, she was described as "normal" and "happy" when she made the statements. The court erred in admitting the statements.

- Present Sense Impression (Rule 803(1)) is a statement describing an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Immediately thereafter is not defined by a rigid rule regarding the amount of time that has passed. There was no evidence of exactly when the sexual misconduct occurred but instead the state alleged the acts occurred during the month (versus day the child was picked up and made the statement). Without evidence of the time of the event, the court erred in admitting the statement as a present sense impression.
- Statement of Purpose of Medical Diagnosis or Treatment (Rule 803(4)) involves a two-part inquiry: (1) were the statements made for the purpose of medical diagnosis and treatment and (2) were they reasonably pertinent to diagnosis or treatment. When determining the declarant's intent in making the statements, the trial court must consider all the objective circumstances surrounding those statements *State v. Hinnant*, 351 N.C. 277 (2000). Given the child's young age, it is a close call as to her intent. Rather than address whether there was error in admitting the statement, the defendant did not show prejudicial, reversible error given the proper admission of substantially identical statements under the residual hearsay exception.
- Residual Exception (Rule 804(b)(5)) allows for hearsay and requires a six-part test: "(1) has proper notice been given; (2) is the hearsay covered by any of the exceptions listed in Rule 804(b)(1)-(4); (3) is the hearsay statement trustworthy; (4)is the statement material; (5) is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) will the interests of justice be best served by admission." *State v. Triplett*, 316 N.C. 1, 9 (1986). The trial court erred in failing to include the factors (2) (whether the statement was admissible under another exception). When determining trustworthiness (the 3rd factor), the court should consider four factors: "(1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Nichols*, 321 N.C. 616, 624 (1988). Although the court concluded that statement possessed an equivalent circumstantial guarantee of trustworthiness, it failed to include any of the four findings. When the trial court fails to make the proper findings regarding the statement's trustworthiness, the appellate court "can 'review the record and make our own determination.' " State v. Valentine, 357 N.C. 512, 518 (2003). After considering the four factors, the appellate court concluded the statements do have a sufficient guarantee of trustworthiness. There was no abuse of discretion in admitting the statements.

Rule of Evidence 412; STDs

State v. Jacobs, __ N.C. ___, 811 S.E.2d 579 (April 6, 2018)

Held: reverse decision of court of appeals and remand for new trial (there is a dissent)

- Facts: Defendant appeals conviction for first-degree sex offense with a child (Defendant is the father of the 13-year-old victim). The state filed motions in limine under G.S. 8C-1, Rule 412 to prohibit the defense from referencing two STDs that were diagnosed in the victim but were not diagnosed in the defendant. The evidence was ruled inadmissible. During his case-in-chief,

Defendant submitted an offer of proof pursuant to Rule 412, which was a medical expert report that previewed potential expert testimony of the implications of the STD evidence. After considering the offer of proof, the trial court reaffirmed its earlier decision to exclude the evidence.

- Rule 412 of the NC Rules of Evidence, referred to as the Rape Shield Statute, makes the complainant's sexual behavior irrelevant because of its low probative value and high prejudicial effect except in four narrow situations, one of which is "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." Rule 412(b)(2).
- The excluded STD evidence addressed in Defendant's offer of proof fell within the Rule 412(b)(2) exception. The results and report by a proposed expert who is a certified specialist in infectious diseases "affirmatively permit an inference that defendant did not commit the charged crime [and]… diminishes the likelihood of a three-year period of sexual relations between defendant and [the child]." The state's argument that the defendant offered the evidence that inferred sexual activity by the victim so as to unnecessarily embarrass and humiliate her was rejected by the supreme court, which found the purpose of the evidence appears to be what the defendant purports it to be: support for his claim that he did not commit the crime.