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## Abuse, Neglect, Dependency

### Adjudication

Evidence: Expert Testimony, Hearsay Evidence

[In re A.W.](#), 2022-NCCOA-282

#### **Held: Affirmed**

- **Facts:** Father appeals an adjudication of his two daughters based upon sexual abuse, arguing the court erred by admitting over his objection a child medical exam (CME) that contained hearsay and allowing an expert to testify over his objection that her diagnosis was the child was a victim of sexual abuse. DSS was contacted in 2019 after the two sisters reported sexual abuse by their father to father’s girlfriend. There were prior incidents of sexual abuse, with an earlier report made in 2013 which resulted in a CME. In the most recent disclosure, a second CME was conducted and consisted of forensic interviews and a physical exam. During the physical exam, the doctor found a tissue tag in one of the girl’s vagina’s and in determining whether it was

indicative a trauma compared the physical exam to that of the 2013 CME where no tag was noted.

- Expert Opinion regarding Child Sexual Abuse: Admissibility of expert testimony is reviewed for an abuse of discretion. Although the rules of evidence apply to adjudication hearings, the impact of improper expert testimony is distinguishable from criminal trials. Rather than a jury, the court hears the evidence and is presumed to disregard incompetent evidence. A reversal based on the admission of incompetent evidence results only if there is prejudice, which the appellant must show that the trial court improperly relied on the expert's assessment of the victim's credibility. Unlike the criminal opinions relied upon by father (State v. Stancil and State v. Grover), in this case the expert relied on physical evidence as well as the child's disclosure. The physical evidence of the tissue tag was consistent with the child's statements as to what occurred. Although the expert testified on cross-examination that she would have made the same diagnosis if the tissue tag was not present, which was an inadmissible bolstering of the victim's credibility, father cannot object to testimony his own counsel elicited on cross. There was no prejudice as father did not show the court improperly considered the expert's bolstering of credibility.
- Hearsay: The CME was admitted over father's objection after the court determined it met the hearsay exceptions for statements made for the purpose of diagnosis and treatment (Rule 803(4)) and a regularly kept business record (Rule 803(6)). Because father only challenged the admission under Rule 803(4), the unchallenged ground as a business record exception remains. The court did not err.

Neglect; Dependency: Findings, 5<sup>th</sup> Amendment

[In re K.W.](#), 2022-NCCOA-162

**Held: Vacated and remanded for further findings**

- Facts: DSS filed a petition alleging 3 children were neglected and dependent based on circumstances involving the parents' mental health, improper care and supervision, injurious environment, parenting skills, and housing instability. The children share the same mother but only 2 children share the same father. The children were adjudicated, and father appeals the adjudication of his 2 children.
- Evidence about mother's mental health and drug use was introduced and some showed her behavior adversely affected the children, but the findings did not address how these issues impacted the children. Evidence of improper care and supervision and an injurious environment relate to mother's treatment of her one child who is not subject to this appeal and did not address how the other children were affected. Unchallenged findings could be sufficient for the court to adjudicate neglect. Father focused on favorable findings only. The trial court did not sufficiently address in its findings the impact on father's children but focused more on mother's one child. The trial court must determine the credibility of witnesses and weight of the evidence. Further, housing instability without evidence that it impacts care and supervision or exposed the children to an injurious environment cannot support a conclusion of neglect.
- When questioned about her illegal drug use, mother invoked her 5<sup>th</sup> Amendment right. Because this is a civil proceeding, the court could infer her answers would be damaging. "The privilege against self-incrimination is intended to be a shield and not a sword." Sl. Op. ¶16. Mother

cannot use it as both when asserting the 5<sup>th</sup> amendment right to curtail DSS's ability to prove she was unfit.

## Neglect

[In re G.C.](#), 2022-NCCOA-452

### **Held: Vacated and Remanded**

#### **Dissent, Griffin, J.**

- **Facts:** The juvenile was adjudicated neglected based on stipulations that addressed the underlying facts related to mother's previous DSS cases with her two older children, and the death of the parents' infant, who was the younger sibling to the juvenile who is the subject of this action. Mother's older children had been adjudicated abused, neglected, and dependent and had been in DSS custody since 2017. In 2019, mother was convicted of misdemeanor child abuse related to these 2 older children. In 2020, mother placed the youngest juvenile in a pack and play with blankets and bottles and found him unresponsive. He died and the autopsy report could not rule of death by asphyxiation. The court adjudicated the juvenile neglected and father appeals, arguing mother's prior conviction and previous DSS cases involving her older children do not support current or future neglect regarding this juvenile.
- G.S. 7B-101(15) authorizes the court to consider whether the juvenile lives in a home where another juvenile has died because of suspected abuse or neglect or another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. The trial judge has discretion to determine how much weight to give that evidence, but an adjudication of neglect cannot be based solely on prior DSS involvement related to other children. There must be clear and convincing evidence that current circumstances present a risk of physical, mental, or emotional impairment to the juvenile. There must be other factors to suggest the neglect will be repeated.
- There were no findings of harm of substantial risk of harm to the juvenile as a result a lack of proper care, supervision, or discipline. There were no findings of other factors that indicated a risk of harm to this juvenile. Remanded to determine whether facts to support neglect adjudication can be found by clear and convincing evidence.
- **Dissent:** The other factors relied on were the circumstances of the death of this juvenile's younger sibling while under mother's supervision. Although there is not a specific finding of substantial risk of harm, it is not error since the record contains evidence on this issue.

## Initial Disposition

Reasonable Efforts; Visitation

[In re N.L.M.](#), 2022-NCCOA-335

### **Held: Affirmed**

- **Facts:** This case involves 4 children; one of whom was adjudicated abused and neglected, the other 3 neglected. The child who was abused was underweight and severely malnourished requiring hospitalization, had burn marks and scars on her body, and was reported to be left alone for hours on the toilet and limited to remaining in her room. The other children witnessed the mistreatment of their sibling. Domestic violence and illegal substance use occurred in the home. Pending the adjudication, the parents visitations were suspended. At the initial disposition, the court continued the children's custody with DSS, placement with a relative, and

no visits. Mother appeals arguing DSS failed to provide reasonable efforts and both parents appeal the visitation order.

- Reasonable Efforts is a conclusion of law. G.S. 7B-903(a3) requires the order to specify findings about whether DSS made reasonable efforts to prevent the need for placement. Reasonable efforts is defined at G.S. 7B-101(18) as the “diligent use of preventative or reunification services by [DSS] when a juvenile’s remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.” Sl.Op. ¶13. Federal regulations include a nonexhaustive list of reasonable efforts: “crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker....” *Id.*
  - The unchallenged findings are binding on appeal and support the court’s conclusion that reasonable efforts were made. They include placement in a court-approved kinship placement; a transitional living plan for the 14 year old; mental health treatment for a juvenile; referrals to services for parenting, mental health assessment and services; substance use assessment and services; random drug screens; domestic violence services and follow-up and records requests from the referred to service providers. Mother refused all services.
- Mother also argues the court denied her due process by holding the hearing. However, mother never requested a motion to continue and affirmatively stated she was ready to go forward.
- Mother argues the court was biased because of its commentary such that she was denied a fundamentally fair procedure. This argument was not preserved for trial and is waived. Even if not waived, the argument is without merit. “Trial courts have ‘broad discretionary power to supervise and control the trial’ which [the appellate court] will not disturb absent an abuse of discretion.” ¶21. The trial court’s remarks were made to all the parties and were based on the evidence it heard and were not biased against mother.
- Visitation: G.S. 7B-905.1 requires the court to address visitation when a juvenile’s placement continues. The court may order no visitation when it finds the parent has forfeited that right or it is in the child’s best interests. Both parents had pending criminal charges for the same incident resulting in the abuse adjudication. The court’s reference to the superior court criminal action was not a misapprehension of law regarding whether visits could be ordered. The court found DSS and the GAL did not recommend visits and the criminal charges were pending and being pursued. Previous opinions have affirmed a denial of visits when a parent has not complied with mental health treatment, substance use treatment, or have pending criminal charges arising from the abuse of the child. Father only complied with part of his case plan and had new drug charges. The court determined visitation was not in the children’s best interests. There was no abuse of discretion.
- Notice of right to review visitation: The court did not inform the parties of the right to review visitation but it scheduled a hearing 90 days later. This opinion recognized the General Assembly amended the statute, G.S. 7B-905.1(d), requiring notice when the court waives permanency planning hearings and retains jurisdiction (effective October 1, 2021). Although the court should have provided notice under the former statutory language, the error was harmless because of the scheduled hearing date.

## Visitation

### [In re R.J.P.](#), 2022-NCCOA-407

#### **Held: Affirmed in Part; Remanded in Part**

- Facts: In 2017, when working an in-home services plan, the juvenile was placed by parents with the Palmers. Eventually, the case was closed. In 2020, a new case was opened and the juvenile was placed with the Turners. The juvenile was adjudicated neglected and continued to be placed with the Turners. As part of disposition, visitation between the juvenile and the Palmers was ordered. Due to mother's incarceration and COVID-19 restrictions, there were no visits ordered with mother. Initially DSS and the GAL were recommending co-guardianship between the Turners and Palmers but subsequently changed their recommendation to guardianship with the Turners only, after concerns about the Palmers and the ability of the two proposed guardians to work cooperatively together arose. After a permanency planning hearing, the court ordered sole guardianship with the Turners, visits with the Palmers, and no visits with the mother. Mother appealed.
- G.S. 7B-905.1 requires the court to address visitation that is in the juvenile's best interests, and no visits may be ordered when the court finds the parent has forfeited their right to visitation or that visitation would be detrimental to the child's best interests and welfare. Mother was ordered no visits while incarcerated but the court did not address visitation and whether mother had any visitation rights upon her release, which was imminent. Remanded.

### [In re N.L.M.](#), 2022-NCCOA-335

#### **Held: Affirmed**

- Facts: This case involves 4 children; one of whom was adjudicated abused and neglected, the other 3 neglected. The child who was abused was underweight and severely malnourished requiring hospitalization, had burn marks and scars on her body, and was reported to be left alone for hours on the toilet and limited to remaining in her room. The other children witnessed the mistreatment of their sibling. Domestic violence and illegal substance use occurred in the home. Pending the adjudication, the parents visitations were suspended. At the initial disposition, the court continued the children's custody with DSS, placement with a relative, and no visits. Mother appeals arguing DSS failed to provide reasonable efforts and both parents appeal the visitation order.
- Visitation: G.S. 7B-905.1 requires the court to address visitation when a juvenile's placement continues. The court may order no visitation when it finds the parent has forfeited that right or it is in the child's best interests. Both parents had pending criminal charges for the same incident resulting in the abuse adjudication. The court's reference to the superior court criminal action was not a misapprehension of law regarding whether visits could be ordered. The court found DSS and the GAL did not recommend visits and the criminal charges were pending and being pursued. Previous opinions have affirmed a denial of visits when a parent has not complied with mental health treatment, substance use treatment, or have pending criminal charges arising from the abuse of the child. Father only complied with part of his case plan and had new drug charges. The court determined visitation was not in the children's best interests. There was no abuse of discretion.

- Notice of right to review visitation: The court did not inform the parties of the right to review visitation but it scheduled a hearing 90 days later. This opinion recognized the General Assembly amended the statute, G.S. 7B-905.1(d), requiring notice when the court waives permanency planning hearings and retains jurisdiction (effective October 1, 2021). Although the court should have provided notice under the former statutory language, the error was harmless because of the scheduled hearing date.

## Permanency Planning Order

### Parent's Constitutional Rights: Waive Issue

[In re J.N.](#), 2022-NCSC-52

**Held: Affirmed**

**Concurrence, Earls, J.**

- Facts: Two juveniles were adjudicated neglected and one was also adjudicated abused. At a permanency planning hearing, DSS recommended guardianship be ordered, while the father argued reunification should be the primary plan. The court ordered guardianship to maternal grandparents and father appealed, arguing there were no findings about him acting inconsistently with his constitutional rights to care, custody, and control or that he was unfit. At the hearing father did not raise his constitutional rights to parent. The court of appeals determined that the father waived his right to argue the court erred by not addressing his constitutional rights. The supreme court granted discretionary review.
- The constitutional protection afforded parents under *Petersen v. Rogers*, 337 N.C. 397 (1994) to care, custody, and control of their child(ren) “does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review.” Sl.Op. ¶ 7. A parent waives the issue regarding their paramount constitutional rights for review if they do not first raise the issue in the trial court.
- Respondent waived this issue by not raising it in the trial court. Respondent had notice that guardianship was being recommended by DSS and the GAL through their court reports and the GAL attorney explicitly requested guardianship be ordered in closing arguments. Father focused his arguments on why reunification was more appropriate but did not assert ordering guardianship would be inappropriate on constitutional grounds.
- Concurrence: When child already not in parent's custody through a court order as in an A/N/D action, a parent is on notice that the court may order permanent guardianship and must raise the objection regarding their constitutional rights. The parent waives the issue if they have an opportunity to make the argument in the trial court. There are no magic words to use. The parent must raise the issue even if DSS does not offer evidence that the parent is unfit or acted inconsistently with their constitutional rights.

### Acting Inconsistently with Protected Status as Parent

[In re B.R.W.](#), 2022-NCSC-50

**Held: Affirm court of appeals decision**

**Dissent, Earls, J.**

- Facts: At a permanency planning hearing, the court ordered guardianship to the paternal grandmother after determining mother was unfit and that she acted inconsistently with her parental rights. Mother appealed. In a divided opinion, the court of appeals affirmed in part

(acting inconsistently with parental rights; mother had left children in care of paternal grandmother for 3 years before DSS involvement and delayed seeking appropriate housing for the children during DSS case) and reversed in part (mother successfully completed her case plan, including exercising unsupervised overnight visits, and was not unfit). See summary [here](#). Mother appealed by right to the supreme court.

- The standard of review of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusion. A determination that a parent has acted inconsistently with their constitutionally protected rights is a conclusion of law and is reviewed de novo. The conclusion must be supported by clear and convincing evidence.
- There is no bright-line rule for determining whether a parent has acted inconsistently with their protected status. The conduct must be reviewed on a case-by-case basis, and the parent's conduct should be cumulatively viewed. As previously held, "a period of voluntary nonparent custody[] may constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child test.'" Sl.Op. ¶ 40 (quoting *Price v. Howard*, 346 N.C. 68, 79 (1997)). Similarly, "a parent's 'failure to maintain personal contact with the child or failure to resume custody when able' could amount to conduct inconsistent with their protected parental interests[.]" *Id.* (quoting *Owenby v. Young*, 357 N.C. 142, 146 (2003)). An important factor is whether the parent intended the nonparent custodial arrangement to be temporary or indefinite (no notice of it being temporary). "[P]ast circumstances or conduct which could impact either the present or future of the child is relevant, notwithstanding that such circumstances or conduct did not exist or was not being engaged in at the time of the custody proceeding." Sl. Op. ¶ 41 (quoting *Speagle v. Seitz*, 354 N.C. 525, 531 (2001)).
- The court's findings show that before DSS involvement, mother left the children with grandmother for 3 years and made no efforts to reunify with the children until DSS became involved. During the 3 years, mother visited the children on birthdays and holidays only. During the DSS case where the children were in care for 19 months, mother had a more active role, including regular visitation and paying child support, but she did not obtain suitable housing until right before the permanency planning hearing. Although mother completed her case plan, the children's strongest bond was with their grandmother, which was the existing family unit created by mother leaving children in grandmother's care. These finding supports the conclusion that mother acted inconsistently with her protected status by voluntarily giving the grandmother custody and care of the children for 3 years. Mother's minimal contact during the 3-year period show that she intended the custodial arrangement to be for an indefinite period.
- Mother's progress on her case plan is relevant to parental fitness; however, her compliance with her case plan "does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother...." Sl. Op. ¶ 48. This opinion should not be understood "to preclude any possibility that a parent who has taken affirmative steps, including compliance with the directives of a district court or social services agency, would be able to overcome the effects of past behavior that would be otherwise be inconsistent with his or her constitutionally protected right to parent his or her child...." *Id.*
- There was no error in applying the best interests of the child standard when awarding guardianship to the grandmother.



- Dissent: Not every parent who places their child with a nonparent acts inconsistently with their protected status. Without findings as to whether the custodial arrangement with grandmother was intended to be temporary, the case should be remanded. The message of the majority opinion is unfortunate for parents who are working toward reunification as their progress on their case plan should be a factor when the court is considering whether the parent can exercise their parental rights.

## Guardianship

### [In re R.J.P.](#), 2022-NCCOA-407

#### **Held: Affirmed in Part; Remanded in Part**

- Facts: In 2017, when working an in-home services plan, the juvenile was placed by parents with the Palmers. Eventually, the case was closed. In 2020, a new case was opened and the juvenile was placed with the Turners. The juvenile was adjudicated neglected and continued to be placed with the Turners. As part of disposition, visitation between the juvenile and the Palmers was ordered. Due to mother's incarceration and COVID-19 restrictions, there were no visits ordered with mother. Initially DSS and the GAL were recommending co-guardianship between the Turners and Palmers but subsequently changed their recommendation to guardianship with the Turners only, after concerns about the Palmers and the ability of the two proposed guardians to work cooperatively together arose. After a permanency planning hearing, the court ordered sole guardianship with the Turners, visits with the Palmers, and no visits with the mother. Mother appealed.
- "In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount." Sl.Op. ¶ 19 (citation omitted). The unchallenged findings, which are binding on appeal, support the court's conclusion that sole guardianship is in the juvenile's best interests. The one challenged finding is supported by competent evidence despite evidence that would support a contrary finding. Because competent evidence supports the challenged finding, the appellate court need not consider mother's alternative evidence. The findings support the conclusion of sole guardianship to the Turners and visitation with the Palmers.

## Eliminate Reunification; Appeal with TPR

### [In re C.H.](#), 2022-NCSC-84

#### **Held: Affirmed in part; Remanded in part**

- Facts: In 2019, the juveniles were adjudicated neglected. At disposition, father was ordered to comply with his case plan addressing mental health, domestic violence, parenting, housing, and employment. In 2019, at a permanency planning hearing, the court ceased reunification efforts but continued its decision about whether to remove reunification as a permanent plan to the next hearing. At the next hearing in 2020, the court eliminated reunification as a permanent plan. Respondent filed his notice to preserve appeal. DSS filed a TPR petition, which was granted. Father filed notice of appeal of the permanency planning order and referenced the TPR order without filing a separate notice of appeal. The GAL and DSS moved to dismiss the appeal because father did not follow the procedures of G.S. 7B-1001(a1)(2). Father filed a petition for writ of certiorari, which was granted. Father's appeal challenges the ceasing of reunification efforts while reunification was a permanent plan, and the permanency planning order (PPO)

that eliminated reunification due to insufficient findings. Father argued that because the PPO was deficient, the TPR must be vacated under G.S. 7B-1001(a2).

- The standard of review of a PPO is whether there is competent evidence to support the findings and whether the findings support the conclusions of law. The PPO is reviewed for an abuse of discretion about the child's best interests.
- The court ceased reunification efforts in a PPO while reunification remained a permanent plan until the court made a final determination on reunification at the next hearing. Relying on *In re C.S.L.B.*, 254 N.C. App. 395 (2017), father argued reasonable efforts must continue when reunification is a plan. *In re C.S.L.B.* is distinguishable as guardianship was ordered in that case and there were no findings about the parent being abusive to or uncooperative with DSS social workers – findings that were made in this appeal. “[I]t was permissible for the trial court in this case to cease reunification efforts while allowing respondent an additional opportunity to demonstrate that he could comply with treatment recommendations regarding his mental health and potentially be reunited with his children.” Sl.Op. ¶ 26.
  - Author's Note: Effective October 1, 2021, G.S. 7B-906.2(b) was amended to require reunification be eliminated as permanent plan when the court finds reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health or safety.
- Before eliminating reunification as a permanent plan, the court must make findings under G.S. 7B-906.2(b) and 7B-906.2(d). The 4 findings under G.S. 7B-906.2(d) the degree of the parent's success or failure toward reunification. The statutory language, although best practice, need not be used. When an appeal of an order eliminating reunification is made with an appeal of a TPR, the two orders are reviewed together. The findings of fact in the TPR are supported by the evidence: the social worker's testimony. The findings of fact do not address G.S. 7B-906.2(d)(3), whether the father remained available to the court, DSS, and GAL.
- Relying on *In re L.R.L.B.*, 377 N.C. 311 (2021), a failure to make findings under G.S. 7B-906.2(d) requires a remand for entry of additional findings and does not require the TPR order be vacated. “Unlike the specific finding that ‘reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety’ which is required by G.S. 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under N.C.G.S. 7B-906.2(d)(3) is required to support the trial court's decision.” Sl.Op. ¶ 42 (quoting *In re L.R.L.B.*).

## Termination of Parental Rights

### Jurisdiction

G.S. 7B-1101; Findings

[In re M.S.L.](#), 2022-NCSC-41

#### **Held: Affirmed**

- Facts: Father challenges the termination of his parental rights, arguing the court lacked subject matter jurisdiction because G.S. 7B-1101 requires the court make specific findings that it has jurisdiction. Father concedes that the record supports a conclusion that the district court has subject matter jurisdiction, and the TPR order states “[t]he Court has jurisdiction over the parties and subject matter of this action.” Sl.Op. ¶ 14.

- Although G.S. 7B-1101 states “the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204[,]” the finding does not need to explicitly mirror the statutory language. The general statement the court had personal and subject matter jurisdiction and the records supports that statement is sufficient.

[In re J.D.O.](#), 2022-NCSC-87

**Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected based on circumstances created by mother’s substance use. In 2020, DSS filed TPR petition, which was granted. Mother appeals, raising a lack of subject matter jurisdiction and challenging the grounds.
- G.S. 7B-1101 addresses jurisdiction in TPR actions. Mother argues the court lacked subject matter jurisdiction because the order did not include findings to establish it had jurisdiction under the UCCJEA. This argument has been rejected by the supreme court in *In re K.N.*, 378 N.C. 450 (2021), which was not incorrectly decided. As previously held, “[t]he trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction.” Sl.Op. ¶10 (citation omitted). The record shows NC was the children’s home state. The order’s statement that this court has jurisdiction over the parents and subject matter is sufficient.

Subject Matter vs. Personal Jurisdiction re: Nonresident Parent

[In re A.L.I.](#), 2022-NCSC-31

**Held: Affirmed**

- Facts: Mother filed a TPR petition against respondent father. Father is and has been incarcerated in New York since 2017. Father wrote letters to the court, was represented by court appointed counsel, and participated in the TPR remotely. The TPR was granted, and father appeals. The sole issue is whether the trial court had subject matter jurisdiction under G.S. 7B-1101 based on the service language that applies to nonresident parents. Father argues the record does not show he was served with a summons. The Supreme Court, for purposes of this appeal, assumed he was not properly served.
- G.S. 7B-1101 states “before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find ... that process was served on the nonresident parent.” This language relates to personal jurisdiction and not subject matter jurisdiction. “A parent’s status as a nonresident does not alter the fact that arguments of insufficient service of a summons pertain to personal jurisdiction rather than subject matter jurisdiction.” Sl.Op. ¶ 9.
- Citing two prior opinions – *In re K.J.L.*, 363 N.C. 343 (2009) and *In re J.T.*, 363 N.C. 1 (2009) – personal jurisdiction, not subject matter jurisdiction, is impacted by deficiencies in the issuance or service of a summons. A summons does not impact subject matter jurisdiction. Unlike subject matter jurisdiction, the defenses related to personal jurisdiction (e.g. insufficient service of process) can be waived. Father waived this defense when he made a general appearance through his letters to the court, remote participation, and representation by counsel, without objection.

## Standing

[In re A.A.](#), 2022-NCSC-66

### **Held: Affirmed**

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The TPR was granted and mother appeals. One of her challenges is that petitioner lacked standing because she did not specifically alleged the juvenile had lived with petitioner for 2 years immediately preceding the filing of the TPR petition and there were not findings of fact about how long the child lived with the petitioner.
- Standing implicates subject matter jurisdiction. When a person's standing is challenged, the record must include evidence that is sufficient to support a finding of standing.
- The Juvenile Code does not require specific language in a TPR petitioner regarding standing nor does it require specific findings of fact regarding standing. The record shows the juvenile resided continuously with petitioner for more than the requisite time period. Petitioner alleged she and the juvenile's father had primary custody of the child while they were married (2015-2019) and that the child continued to reside with petitioner after the marriage ended and up to the date of the TPR petition being filed. The court took judicial notice of several trial court orders (civil custody orders) which showed petitioner had standing. There was no evidence the juvenile did not live with petitioner at any time during the relevant time period.

## Motion to Continue; Due Process; COVID-19; Prison

[In re C.A.B.](#), 2022-NCSC-51

### **Held: Vacated and Remanded**

#### **Dissent, Newby J. joined by Berger, J. and Barringer, J.**

- Facts: Father was incarcerated during juvenile proceedings, where his son was adjudicated neglected and dependent. The primary permanent plan was identified as adoption, and DSS filed a TPR motion regarding father's parental rights in August 2020. The TPR hearing had been continued twice, first because father's counsel was not available and second because of the Emergency Directive from the Chief Justice responding to COVID-19. Father's counsel requested a third continuance of the January 2021 hearing for more than 5 days later as the case manager notified him that the federal prison was under lockdown until January 25, with no movement allowed, including no ability for father to call in, for the January 20 TPR hearing. The court heard the motion to continue and denied the motion after recognizing the statutory 90-day period to hold the hearing was exceeded, the prior continuances, the unpredictability of the COVID-19 pandemic and continuing restrictions, the ability of father's attorney to present evidence and cross-examine witnesses, and the agreement that father's report would be admitted into evidence such that due process would be satisfied. The hearing was held, and the TPR was granted. Father appeals.
- A motion to continue based on a constitutional right that is asserted before the trial court presents a question of law and is reviewed de novo. In his motion to continue, father raised his due process rights to be heard in a case that would impact his constitutionally protected

parental rights. Father must show the court's denial of the motion to continue was made in error and that he was prejudiced as a result of the error.

- Parents have a fundamental liberty interest in raising their children, and the state must provide fundamentally fair procedures when seeking to destroy weakened familial bonds. The denial of the motion to continue undermined the fairness of the hearing as father was denied the opportunity to testify and to work with his counsel to develop a strategy to oppose the TPR, and the substantive findings in the TPR order related to father's conduct in prison, which his testimony could have assisted the court in assessing.
- G.S. 7B-1109 allows for a continuance of a TPR beyond 90 days when there are "extraordinary circumstances." " 'Extraordinary circumstances' may occur both within and beyond ninety days after the filing of a termination motion or petition." Sl.Op. ¶ 19. The court determined the COVID-19 restrictions were an extraordinary circumstance when granting the second continuance, so logically, another disruption caused by COVID-19 was also an extraordinary circumstance. The existence of an " 'extraordinary circumstance' does not *require* a trial court to continue the hearing under N.C.G.S. 7B-1109(d)." Sl. Op. ¶ 21 (emphasis in original).
- In assessing due process, courts consider "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." Sl. Op. ¶22 (citation omitted). "Procedural due process 'is a flexible, not fixed, concept governed by the unique circumstances and characteristics of the interest sought to be protected.'" Sl. Op. ¶ 32 (citation omitted).
  - Regarding the first prong, father has a "commanding" interest in the proceeding. DSS also has an interest but that interest was not to quickly terminate father's rights so the child could be adopted but "was in protecting [the juvenile's] welfare through a proceeding that reaches 'a correct decision' regarding whether respondent-father's parental right rights could and should be terminated." Sl.Op. ¶24.
  - Regarding the second prong, although a parent who is incarcerated does not have an absolute right to be present at the hearing, the father's absence here "created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing." Sl. Op. ¶ 25. The factual basis for the TPR adjudication was father's conduct while he was incarcerated, yet father was denied the opportunity to address his first-hand knowledge of the limitations while in prison and with the COVID-19 restrictions on his ability to access services and comply with his case plan. The denial of the motion to continue "deprived the court of a crucial source of information about a topic central to the court's resolution of the termination motion." Sl. Op. ¶ 26. The presence of father's attorney did not extinguish the risk of error as counsel was not able to effectively communicate with father because of the COVID-19 restrictions. The father's report was made to address the father's wishes not to provide factual information about the grounds alleged. There was not another witness who could make up the informational deficiency created by father's absence. The denial of the request for a brief continuance undermined the fairness of the hearing and was error.
- Father was prejudiced by the denial of his motion to continue. When a parent's due process rights are violated by a motion to continue, "the challenged order must be overturned unless 'the error was harmless beyond a reasonable doubt.'" Sl.Op. ¶33 (citation omitted). DSS must prove the error was harmless. Regarding a parent's testimony at a TPR hearing, although it is not

an absolute right, it is a “vital source of information” and “is especially vital when it addresses facts that are central to the trial court’s adjudication of asserted grounds for termination and when no other witness is available who can accurately convey to the court the information the parent possesses.” Sl. Op. ¶135. DSS and the GAL failed to meet the burden of proof that the violation of father’s due process rights was harmless beyond a reasonable doubt.

- Dissent: Respondent father has not shown that but for his absence at the TPR hearing, the court would not have terminated his parental rights under any of the grounds alleged, specifically the ground that he willfully failed to pay the reasonable cost of the child’s care for the 6 months immediately preceding the TPR motion. Respondent paid zero despite being employed in the prison dining room and receiving money from his family. Respondent’s presence would not have changed the result of that ground. This ground does not require an examination of the father’s current conduct as it is focused on the six months immediately before the TPR motion is filed. There was no prejudice.

### Motion to Continue; Ineffective Assistance of Counsel

#### In re A.M.C., 2022-NCSC-82

**Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. On January 25, 2021, DSS filed a TPR motion. The TPR hearing was scheduled for April 8<sup>th</sup> but was continued to April 16<sup>th</sup>. At the TPR hearing, mother’s attorney requested a continuance that was denied. The TPR was granted, and mother appeals. Mother argues her attorney did not have an opportunity to adequately prepare for the hearing when the motion to continue was denied.
- Requesting a motion to continue to have more time to prepare does not equate to a motion based on a constitutional right. Because the motion to continue before the trial court was not based on a constitutional right, the standard of review is an abuse of discretion. Any argument the motion was based on a constitutional right is waived.
- In considering an abuse of discretion, the appellate court looks to the Juvenile Code, which allows for a continuance beyond 90 days when extraordinary circumstances exist and are necessary for the proper administration of justice. Mother did not show extraordinary circumstances existed to continue the hearing beyond 90 days (the hearing was scheduled on the 81<sup>st</sup> day). Although mother was incarcerated when the TPR was heard, her 35 days of incarceration out of the 81-day period from the motion being filed and the hearing being held are not extraordinary circumstances. Conjecture that jail staff interfered with her preparation with her attorney is insufficient; there must be direct evidence of interference.
- Mother has not proved ineffective assistance of counsel due to the denial of the motion to continue. Her attorney had been appointed to represent her in 2019, filed an answer to the TPR motion, made objections, and cross-examined a witness.

#### In re B.B., 2022-NCSC-67

**Held: Affirmed**

**Dissent, Earls, J. (IAC Claim)**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. Mother had been incarcerated was but released the day before the TPR

hearing. Mother did not appear at the TPR hearing. A motion to continue was requested by mother's counsel, which was denied. The TPR was granted. Respondent appealed.

- Continuances are disfavored. The party seeking the continuance has the burden of showing there are grounds to continue under G.S. 7B-1109, which requires extraordinary circumstances when a continuance goes beyond 90 days from when the petition is filed. A motion to continue is grounds for a new trial when (1) the denial was an error, and (2) the respondent was prejudiced by the denial. Mother did not show she was prejudiced as she did not show that she would have testified and that her testimony would have changed the outcome.
- Mother argues she received ineffective assistance of counsel because they did not ensure she was present at the TPR hearing. Mother must show (1) the counsel's performance was deficient such that she was denied a fair hearing, and (2) that there was a reasonable probability that there would have been a different outcome but for her attorney's deficient performance. The binding findings of fact show respondent mother did not meet her burden that there was a reasonable probability of a different result.

## Motion to Continue

[In re B.E., 2022-NCSC-83](#)

### **Held: Affirmed**

- Facts: In 2017, the juveniles were adjudicated neglected and dependent based on parents' domestic violence, substance use, homelessness, and failure to provide adequate supervision. Later in 2017, respondents were arrested on charges of drug trafficking. Ultimately, father was convicted and incarcerated. In 2019, DSS filed a TPR petition. The TPR hearing was continued 3 times based on father's request due to his attorney attempting to arrange for father to participate from prison. The attorney's efforts were unsuccessful. A 4<sup>th</sup> request for a continuance was made and denied. The hearing proceeded, and the court terminated both parents' right. Both parents appeal the grounds and father also appeals the denial of his motion to continue.
- A motion to continue is reviewed for an abuse of discretion. If the motion is based on a constitutional right, it is reviewed de novo.
- Father argues the denial of his motion to continue violated his due process rights; however, the motion at the trial court did not raise father's constitutional rights and as such it is waived this appellate argument. The denial is, therefore, reviewed for an abuse of discretion.
- G.S. 7B-1109 requires the hearing be held within 90 days absent extraordinary circumstances. Continuances are disfavored. Although the court found that father's attorney made various extensive efforts to ensure father's participation, those efforts went unanswered by the prison. The hearing had been continued 3 previous times and 8 months had passed since the TPR petition was filed. There was no indication another continuance would improve the chances of father's participation. Father did not meet his burden to show there were extraordinary circumstances warranting a further continuance.

[In re L.A.J., 2022-NCSC-54](#)

### **Held: Affirmed**

- Facts: This a private TPR brought in May 2020 by custodians who resided with the child in North Carolina. Respondents reside out of state. Mother was served in Ohio and did not file an answer.



Mother was appointed counsel. The TPR hearing was continued 3 times: July, October, and December. At the last continuance, the parties were notified the hearing would be in February and notice of a February 2021 hearing was served in late January. At the hearing, mother was not present, and her attorney moved for a continuance, which was denied. The TPR was granted and mother appeals, arguing the court abused its discretion in denying the motion to continue.

- The motion to continue is reviewed for an abuse of discretion as a constitutional basis for the continuance was not raised. The burden of showing extraordinary circumstances exist to continue a TPR hearing beyond 90 days is on the party seeking the continuance. Continuances are disfavored.
- Mother did not meet her burden. There was no specific explanation for why mother was not present. She had notice in December that a hearing would be the week of February 8<sup>th</sup> and she received a copy of the notice of hearing from her attorney days before the hearing. No abuse of discretion.

### Sufficient Notice Pleading

[In re D.R.J.](#), 2022-NCSC-69

#### **Held: Reversed**

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The motion incorporated prior orders from the underlying juvenile case. The court ordered the TPR on both grounds alleged, neglect, failure to make reasonable progress, and willful abandonment. Father appeals.
- G.S. 7B-1104(6) requires that a TPR motion allege sufficient facts to warrant a determination that a ground exists. Although the factual allegations do not need to be exhaustive or extensive, they must be sufficient to put a party on notice as to what acts, omission, and conditions are at issue.
- The motion does not adequately allege neglect or failure to make reasonable progress, rejecting the GAL's and DSS's arguments that the attached orders were sufficient notice. No statements in the motion allege the statutory language for neglect or failure to make reasonable progress. A TPR motion cannot be conformed to evidence presented at the hearing, which is what DSS and the GAL are attempting to do. The court erred in concluding neglect and failure to make reasonable progress existed. The court also erred in concluding father willfully abandoned the juvenile as that ground was alleged for mother only.
- Father did not waive appellate review by not objecting at trial since he did not have notice of the grounds that were decided until the written TPR order.

### Court Appointed-Counsel

[In re R.A.F.](#), 2022-NCCOA-754

#### **Held: Vacated and Remanded for new hearing**

#### **Dissent, Tyson, J.**

- Facts: In 2015, the juveniles were adjudicated neglected. In 2017, permanency was achieved when the court entered G.S. 7B-911 and Ch. 50 custody orders that terminated juvenile court jurisdiction and awarded permanent custody to the children's aunt and uncle. In 2021, aunt and



uncle filed a TPR petition. In April, mother was personally served and was appointed provisional counsel. Mother and provisional counsel spoke and mother asserted she wanted to contest the TPR. In May, provisional counsel requested an extension to file an answer, which was granted. No answer was filed. In June, notice of the July hearing was sent to mother's provisional counsel, father's provisional counsel, and father. In July, a pretrial hearing was held, which was immediately followed by the TPR hearing. Mother was not present, but her provisional counsel was. Counsel informed the court that she did have contact with mother earlier when mother reported she was in a treatment facility. Counsel contacted the treatment facility and learned mother had successfully graduated but did not have contact with mother since the last phone call in April. The court released provisional counsel, on its own motion, and determined all service and notice requirements were satisfied. The TPR hearing followed, and the TPR was granted. Mother appeals arguing the court erred in releasing her counsel.

- TPR proceedings require that parents be provided with fundamentally fair procedures and include a parent's right to counsel and adequate notice.
- When an attorney makes an appearance in a case, the attorney may not withdraw without justifiable cause, reasonable notice to the client, and the court's permission. The court's decision is discretionary. The general rule regarding withdrawal "presupposes that an attorney's withdrawal has been properly investigated and authorized by the court." Sl. Op. ¶ 20 (citation omitted). "[W]hen the parent is absent from a [TPR] hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *Id.* Because mother's attorney filed motions for extensions of time, petitioner's attorney presumed mother's attorney made an appearance. "This presumption provides a possible explanation for why Petitioners' attorney did not service Mother with notice of the TPR hearing" and served only Mother's attorney. Sl. Op. ¶ 21.
- G.S. 7B-1101.1 requires the court to dismiss provisional counsel if at the first hearing after service the respondent does not appear. The statute presumes respondent was given notice of the hearing and decides whether to participate.
- G.S. 7B-1108.1 requires the court at a pretrial hearing to consider retaining or releasing provisional counsel and whether all summons, service of process, and notice requirements have been met.
- The trial court should have inquired into the efforts mother's attorney made to contact mother to ensure mother's rights were adequately protected and that she knew about the hearing. No inquiries about whether mother received notice of the hearing were made. There is no evidence in the record that mother knew of the hearing. The court's findings that the notice requirements were met were not supported by competent evidence. A violation of a right to counsel does not require mother to prove prejudice to obtain appellate relief.
- Concur in result. Acknowledging the tension between the parent's due process rights and the best interests of a child who has lived with a foster parent for more than 4 years and the limbo the children and foster parents experience.
- Dissent: The unchallenged findings are that mother's provisional counsel tried to engage mother to participate in the proceeding. Unchallenged findings are binding. Mother was served with the summons, failed to keep her appointments and update her address. There is no abuse of discretion.

## GAL for Parent

### [In re J.A.J.](#), 2022-NCSC-85

#### **Held: Affirmed**

- **Facts:** In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother's substance use and mental health issues. Mother's psychological evaluation showed her prognosis for significant and lasting behavior change as poor. Mother's contact with the children was ceased due to her behaviors. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals. One of mother's challenges is that the court erred in not appointing mother a Rule 17 GAL.
- **G.S. 7B-1101.1(c)** allows the court to appoint a Rule 17 GAL for a parent who is incompetent. An incompetent adult lacks the ability to manage their own affairs or communicate important decisions. When there is a substantial question as to whether a parent is incompetent, the court must make a proper inquiry in a hearing. The court may consider the nature and extent of the parent's diagnosis made by mental health professionals and how the parent behaves in the courtroom. The standard of review is an abuse of discretion and "except in the most extreme instances," the trial court should not "be held to have abused its discretion by failing to inquire into that litigant's competence." Sl.Op. ¶ 23 (citation omitted).
- **Mother participated in the hearings:** she entered stipulations; denied allegations; made progress on her case plan; engaged in a psychological evaluation; and although making extemporaneous interjections during witness testimony at the hearing, those interjections demonstrated her understanding of the issues being addressed. The court did not abuse its discretion in not holding a hearing to determine mother's competency.

## Collateral Attack on Underlying A/N/D Custody Order

### [In re D.R.J.](#), 2022-NCSC-69

#### **Held: Reversed**

- **Facts:** In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion that was granted. Father appeals. One of his arguments is that he was "unfairly denied custody" as the juvenile should have been placed with him since there was no finding of his unfitness or acting inconsistently with his parental rights and the circumstances regarding the neglect resulted from mother's substance use.
- Father stipulated to facts resulting in the juvenile's adjudication and did not appeal the adjudication and dispositional orders. A "failure to appeal 'generally serves to preclude a subsequent collateral attack . . . during an appeal of a later order terminating the parent's parental rights[.]'" Sl.Op. ¶ 10 (citation omitted). Because the underlying juvenile orders are not void for lack of subject matter jurisdiction, father is precluded for making a collateral attack on those orders.

## Denial of TPR

### [In re N.W.](#), 2022-NCSC-91

#### **Held: Affirmed**

- Facts: Mother filed a TPR petition against father alleging willful abandonment. In 2016, mother obtained a DVPO in Kentucky that prohibited father from contacting mother and children, which mother had extended until October 2020. Also in 2016, the parties agreed to a custody and visitation order in Kentucky with mother having sole custody and father being allowed to seek a review for visits and contact with the children one year later after he completed recommendations. Father was ordered to pay \$1500/month in child support. In 2018, mother and children moved to NC. Father filed a motion to seek to have supervised visits but the Kentucky court declined to exercise jurisdiction. In 2020, father moved to NC and filed a petition to have the KY order registered in NC. One month later, mother filed the TPR petition. Father filed an answer, and after a hearing, the court dismissed the TPR for failure to prove willful abandonment. Mother appeals.
- The burden of proof is on the petitioner and the evidentiary standard is clear, cogent, and convincing evidence. G.S. 7B-1109.
- G.S. 7B-1111(a)((7) authorizes a TPR when a parent has willfully abandoned their child for the 6 months immediately preceding the filing of the TPR petition. Abandonment involves a parent's conduct that "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." Sl. Op. ¶ 15. Willfulness is a question of fact. The determinative period is the 6 months immediately preceding the filing of the petition, but the court may consider conduct outside this window to determine credibility and intentions.
- During the 6-month period, father paid child support through a wage withholding and sought to have the KY custody order registered in NC. These actions alone are not definitive indicators of a parent's intent to stay in their child's life, but the court's findings of father's actions outside of the determinative period show father's attempt to become involved with his children. Father was prohibited from having contact with the mother and children, complied with the recommendations of the KY custody order, and attempted to have the ability to have contact with his children.

### [In re B.F.N.](#), 2022-NCSC-68

#### **Held: Vacated and Remanded**

- Facts: In 2015, mother-petitioner obtained a DVPO against father and an order awarding primary custody to mother and secondary joint custody with visitation to the father. In 2017, father assaulted mother in the children's presence. Mother obtained a new DVPO and a modified custody order that granted exclusive care, custody, and control of the children to mother. The custody prohibited contact with petitioner or the children and imposed several conditions father had to complete before he could file a motion to modify based on a substantial change in circumstances. In 2020, mother filed a TPR petition alleging neglect by abandonment and willful abandonment. The court denied the TPR based on insufficient evidence. Mother appeals.
- "[T]he trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the trial court's denial of the termination petition." Sl.Op. ¶ 13. G.S. 7B-1110(c) requires the court to make appropriate findings of fact and conclusions of law when

denying a TPR. Fact finding requirements are crucial to allow for an effective appellate review. When a TPR is denied, there must be the ability to conduct an appellate for each and very ground alleged.

- G.S. 7B-1111(a)(7) authorizes a TPR when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. The findings about father's actions, which included completing conditions imposed by the custody order, were outside of the determinative 6-month period. There were no findings about what actions father took during the 6-month period and whether father could have filed a motion to modify during the 6-month period, which would be relevant to determine his willfulness. The court is unable to conduct an appellate review of this ground.
- G.S. 7B-1111(a)(1) authorizes a TPR based on neglect by abandonment. There is no determinative time period. Although the court made findings about father's current circumstances such that there was not a likelihood of repetition of neglect, the order does not address whether there was neglect by abandonment.

[In re S.R.](#), 2022-NCCOA-285

**Held: Affirmed**

- Facts: This is a private TPR where mother petitioned to terminate father's parental rights on the grounds of neglect, failure to pay child support, and willful abandonment. Findings addressed mother's agenda of setting father up to not pay child support so that the ground to TPR was available. The TPR was denied and petitioner appeals arguing that some findings were not supported by clear and convincing evidence and the conclusion that no grounds existed was not supported by the findings.
- A finding that is supported by clear and convincing evidence is conclusive even if there is other evidence in the record that would support a contrary finding. The trial court considers the evidence and determines its credibility and weight. When there is conflicting evidence, the appellate court will not assign weight or credibility to that evidence. Findings that are not supported by clear and convincing evidence are disregarded.
- G.S. 7B-1111(a)(4) authorizes a TPR based on a parent's willful failure to pay child support for one year or more immediately preceding the TPR petition when a parent has been awarded custody of the child and a support order is in place. The TPR order does not include findings that there was a child support order requiring father to pay child support but instead finds father paid child support until mother elected to no longer have an income garnishment for father's wages to pay child support. There was evidence to show there was a child support order, but "the trial court acted within its discretion in electing to not terminate [father's] parental rights" such that any error of not including a finding about the child support order was harmless. There was no error in concluding the grounds of neglect and abandonment were not proved.

## Adjudication

### Standard of Proof; Appellate Remedy

#### In re J.C., 2022-NCSC-37

##### **Held: Reversed and Remanded**

- **Facts:** As part of an underlying neglect action, DSS filed a TPR petition naming both parents as respondents. At the TPR hearing, DSS asked the court to find the alleged grounds existed “beyond a reasonable doubt.” After hearing, the court announced it was finding two of the three alleged grounds and directed DSS to make findings of fact “based on the evidence presented.” The court did not announce the standard of proof it was applying. The TPR order stated the findings of fact were made “by a preponderance of the evidence.” Both parents appealed, challenging the standard of proof and arguing what the remedy should be.
- G.S. 7B-1109(f) requires that adjudicatory findings in a TPR be made by clear, cogent, and convincing evidence. The U.S. Supreme Court determined this standard protects a parents’ constitutional due process in a TPR proceeding. *Santosky v. Kramer*, 455 U.S. 745 (1982). However, there is no reversible error when the TPR order fails to state the standard of proof if it explicitly announced the standard of proof at the TPR hearing; the court must *either* announce the standard in open court or state the standard in its written order. *In re B.L.H.*, 376 N.C. 118 (2020).
  - Here, the order “overtly states the wrong standard of proof – a standard which is not only less than that required by statute but one which has also been held to be constitutionally insufficient to support the permanent severance of the parent-child relationship.” Sl.Op. ¶ 9. That distinguishes this case from *In re M.R.F.*, 378 N.C. 638 (2021), where the order was silent as to the standard of proof applied. The application of the wrong standard is statutory error.
- In determining the appropriate corrective measure, the supreme court considered (1) respondents’ argument that under *Santosky*, the TPR should be vacated, ending the case and (2) DSS’s and the GAL’s argument that the case should be remanded for the court to enter findings of fact under the correct standard.
  - *Santosky* is not controlling because the U.S. Supreme Court did not discuss the evidence before the N.Y. trial court, and this case falls under N.C. precedent addressing G.S. 7B-1109(f) “regarding the pivotal impact that the record evidence under appellate review has in the resolution of an appeal where a trial court has committed error regarding a standard of proof.” Sl.Op. ¶ 14. Remand is appropriate unless “the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.” Sl.Op. ¶ 16 (emphasis in original) quoting *In re M.R.F.*, 378 N.C. 638, ¶ 26. The supreme court cannot conclude the record meets the exception for remand; therefore, the case is reversed and remanded for “consideration of the record before it in order to determine whether DSS has demonstrated by clear, cogent, and convincing evidence that one or more statutory grounds exit to permit termination of parental rights.” Sl.Op. ¶ 16.

## Circumstances at Time of Hearing

[In re S.O.C.](#), 2022-NCCOA-378

### **Held: Vacated and Remanded**

- **Facts:** In 2018, the juvenile was adjudicated neglected. Part of the adjudication involved the family's long history of DSS involvement. Mother has an Intellectual Disability, and one of the previous orders (in a prior case) required that her care of her children be supervised. After 3 years, DSS filed a TPR petition, which was granted on all 3 grounds alleged: neglect, failure to make reasonable progress, and dependency. Mother appeals.
- The TPR grounds for neglect (G.S. 7B-1111(a)(1)), failure to make reasonable progress (G.S. 7B-1111(a)(2)) and dependency (G.S. 7B-1111(a)(6)) all require the court to look at the circumstances for the parent at the time of the TPR hearing.
- The findings do not evaluate the mother's current circumstances at the time of the TPR hearing but focus on the years prior to the TPR hearing – the child's neglect adjudication (2018), the 2018 evaluations of mother, and the prior history with DSS (2008-2017). Extensively *quoting In re Z.G.J.*, 378 N.C. 500 (2021), the findings are insufficient to support the conclusion when those findings are based solely on evidence of circumstances that were months before the TPR hearing. There were no findings addressing a likelihood of repetition of neglect, mother's progress to correct the conditions resulting in the juvenile's removal, or mother's ability to care for and supervise her child at the time of the TPR hearing.

## Neglect: Judicial Notice of Prior File; Findings

[In re J.D.O.](#), 2022-NCSC-87

### **Held: Affirmed**

- **Facts:** In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use. In 2020, DSS filed TPR petition, which was granted. The court took judicial notice of the underlying file. Mother appeals, raising a lack of subject matter jurisdiction and challenging the grounds, arguing the facts were not supported by the evidence and do not support the conclusion of neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions of the parent's fitness and the child's best interests at the time of the TPR hearing.
- “[A] trial court may take judicial notice of the underlying juvenile case file at a hearing on a termination of parental rights petition.” Sl.Op. ¶ 16. However, the trial court cannot rely solely on prior order and court reports. There must be some oral testimony and an independent determination of the evidence presented. The court stated it would take judicial notice of the adjudication order and later stated it was taking judicial notice of the entire file. The written TPR order finds the court took judicial notice of the entire file. The court's oral statement of what it was taking judicial notice of was superseded by its written findings in the order, which was all the documents in the underlying file. In challenging the consideration of exhibits, Mother did

not show the court relied on inadmissible evidence rather than witness testimony when making its findings of fact.

- Many of the court's findings are not findings but are recitations of testimony. Those non-findings are disregarded. In assessing the entire order, the adjudicatory findings support the conclusion. Other challenged findings are supported by the evidence – social worker testimony. Although some favorable factors for mother were not included, “[t]he trial court is not ... ‘required to make findings of fact on all the evidence presented, nor state every option it considered.’ ” Sl.Op. ¶ 28 (citation omitted).
- Regarding prior neglect, there is no merit to mother’s argument that an adjudication is about the child’s status and does not satisfy G.S. 7B-1111(a)(1). Case law has established a prior adjudication of neglect is sufficient to establish prior neglect in a TPR based on G.S. 7B-1111(a)(1), and there is no requirement that the parent whose parental rights are at issue be responsible for the prior neglect adjudication. Having not appealed the underlying adjudication order, mother is bound by collateral estoppel.
- Regarding the likelihood of future neglect, a parent’s failure to make progress on their case plan is indicative of a likelihood of future neglect, while their compliance with a case plan does not preclude a finding of neglect. The inquiry is not an inventory of what components of the case plan the parent achieved. Although mother was engaging in treatment, she did not resolve her issues with substance use such that the children could return to her care.
- Cumulative error is applied rarely in a review of a criminal conviction. “[C]umulative errors lead to reversal when ‘taken as a whole’ they ‘deprived [the] defendant of his due process right to a fair trial free from prejudicial error.’ ” Sl. Op. ¶ 47 (citation omitted). Cumulative error has not been recognized in a TPR or in civil cases generally and will not be expanded to this TPR appeal.

## Neglect

### [In re M.R.](#), 2022-NCSC-90

#### **Held: Affirmed**

- Facts: In 2017, two juveniles were adjudicated neglected based on circumstances involving unstable housing and mother’s substance use. In 2018, mother gave birth to a baby who tested positive for substances and that baby was ultimately adjudicated neglected. DSS filed motions to TPR both parents’ rights, which were granted. Mother appeals, challenging the ground of neglect and the best interests determination. Father appeals the best interests determination.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect (such as an adjudication) and the likelihood of future neglect based on the changed conditions of the parent’s fitness and the child’s best interests at the time of the TPR hearing.
- Unchallenged findings support the court’s conclusion of a likelihood of future neglect. Those findings address mother’s history with DSS, unstable housing, the children’s irregular school attendance and grade retention, mother’s arrests for new drug-related offenses and subsequent incarceration, mother’s illegal drug use including during pregnancy, and mother’s lack of prenatal care. Although mother did enroll in a substance use treatment program (TROSAs) and was compliant with the program, she was not scheduled to complete that program until after



the TPR hearing and would only be eligible for day visits with the children. The progress mother was making with her case plan (which started 21 months after the children were placed in DSS custody) does not preclude a finding of neglect. At the time of the TPR hearing, mother did not have the ability to provide proper care, supervision, and discipline.

[In re B.E.](#), 2022-NCSC-83

**Held: Affirmed**

- **Facts:** In 2017, the juveniles were adjudicated neglected and dependent based on parents' domestic violence, substance use, homelessness, and failure to provide adequate supervision. Later in 2017, respondents were arrested on charges of drug trafficking. Ultimately, father was convicted and incarcerated. In 2019, DSS filed a TPR petition. The court terminated both parents' right. Both parents appeal the grounds and argue the court erred in determining there was a likelihood of future neglect.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing.
- Father argues the court erred in not considering his ability to participate in services while he was incarcerated and challenges findings of fact. The findings are supported by clear, cogent, and convincing evidence – the social workers' testimony. The one unsupported finding is disregarded. Incarceration, although not by itself a basis to TPR, is relevant, and "the extent to which a parent's incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration." Sl.Op. ¶ 26 (citation omitted). The court considered father's incarceration as a relevant factor after finding facts about father's behavior over the course of the case which includes times when he was not incarcerated. This includes father's actions resulting in his arrest, his domestic violence against mother when he had been released from prison, his minimal progress on his case plan when he was released, and his not seeing or speaking with his children since 2017. The court also found it was likely the parents would reunite after father was released and their history of domestic violence and drug dealing made them unsafe to parent.
- Mother challenges findings of fact that are supported by clear, cogent, and convincing evidence – social workers' testimony. Mother also argues she made significant progress so that there was no longer a likelihood of repetition of neglect. Although mother made progress, both social workers and the GAL had concerns about mother's ability to parent all her children as she would get overwhelmed. Mother's progress was insufficient to show there was not a likelihood of repetition of neglect. Mother does not challenge the finding regarding the likelihood the parents would reunite when father was released from prison and that there drug dealing and domestic violence makes them unsafe to parent.

[In re R.L.R.](#), 2022-NCSC-92

**Held: Affirmed**

- **Facts:** In 2019, the juvenile was adjudicated neglected and dependent due to circumstances resulting from mother's substance use, improper supervision, and an injurious environment. After mother failed to make progress on her case plan and the child's relative with whom she



was placed expressed a desire to adopt, the primary permanent plan was identified as adoption. In 2020 DSS filed a TPR motion. While the TPR was pending, the relative changed her mind about adoption, and the child was moved to a foster home. The TPR was granted. Mother appeals, challenging the grounds and best interests determination.

- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing. Regarding the likelihood of future neglect, a parent's failure to make progress on their case plan or visit with their child is indicative of a likelihood of future neglect, while compliance with a case plan does not preclude a finding of neglect.
- The challenged findings of fact are supported by clear and convincing evidence – social worker testimony. One challenged finding that is not supported by the evidence is disregarded. The findings support the determination of a likelihood of future neglect.
- Although mother made progress after the TPR was filed, which the trial court considered, that progress was insufficient to show mother's behavior changed in a way that ensured the child's safety and welfare and that any change would be sustained. " [A] 'case plan is not just a checklist,' " but rather the parents must "demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors." Sl. Op. ¶ 23 (citation omitted). For example, being compliant with drug testing for the last 3 months after being noncompliant for 19 months is insufficient progress. Mother argued she was unable to demonstrate her changed behaviors because her visits were suspended. The suspension of visits was based on mother's failure to consistently visit with their child and the negative impact those missed visits had on the child. In addition to these findings, her failure to maintain suitable housing, stable employment, and transportation support the court's determination.

[In re B.B.](#), 2022-NCSC-67

**Held: Affirmed**

**Dissent, Earls, J. (IAC)**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. Mother had been incarcerated was but released the day before the TPR hearing. The TPR was granted on the grounds of neglect. Respondent appealed, arguing the court did not consider the limitations her incarceration imposed on her regarding her ability to work her case plan or provide support.
- Incarceration is neither a sword nor a shield in a TPR proceeding. The findings, which are supported by clear and convincing evidence, show the court considered mother's actions when she was not incarcerated during times when her children were in DSS custody. Mother did not complete any part of her case plan or send letters, notes, gifts, necessities, or support to the children. Her case plan required she refrain from engaging in criminal activity yet she was arrested and had new criminal charges. These findings support the determination of a likelihood of future neglect.

[In re M.K.](#), 2022-NCSC-71

**Held: Affirmed**

- Facts: In 2019 the juvenile was adjudicated neglected due to circumstances involving mother's mental health, substance use, domestic violence/anger management, unstable housing and employment. Mother was ordered to comply with her case plan. After several permanency planning hearings where the court found mother was not making progress on her case plan, DSS filed a TPR petition. The TPR was granted and mother appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect based on the changed conditions at the time of the TPR hearing. Regarding the likelihood of future neglect, a parent's failure to make progress on their case plan is indicative of a likelihood of future neglect, while compliance with a case plan does not preclude a finding of neglect.
- Mother challenges several findings – some of which are unsupported and are disregarded for appellate reviews, others of which are supported by the record, including permanency planning orders the trial court took judicial notice of.
- The evidence and findings support the determination of a likelihood of future neglect. Mother was not participating in medication management or therapy as ordered and failed to maintain stable housing and submit to random drug screens as ordered. Although mother was not ordered to address domestic violence, the court did not err in considering mother's continued violence. "Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child." Sl.Op. ¶ 39. The court considers all the evidence of relevant circumstances that occurred before or after the prior neglect adjudication. Mother's continued domestic violence was appropriately considered when determining if the juvenile was likely to suffer a repetition of neglect. Further, part of the neglect adjudication was due to mother's domestic violence. During the visits mother attended, she did not demonstrate appropriate parenting.

[In re A.N.S.](#), 2022-NCCOA-521

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and at initial disposition, DSS was relieved of providing reunification efforts to father. Father shot and killed mother in front of the children. Father was arrested and awaiting trial for first-degree murder. DSS did not engage with father and provide a service plan. DSS filed a TPR petition, which was granted, and father appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect. When there is a period of separation between the child and parent, there must be past neglect and a likelihood of future neglect based on the circumstances at the time of the TPR hearing.
- Although father argues that the court relied on the 2018 shooting event as the ground for TPR, the trial court considered father's conviction of first-degree murder with a sentence of life (which occurred after the TPR was filed) and the fact that DSS has not and will not provide services to father to help remedy the conditions that led to the child's adjudication to determine neglect existed. Further, father cannot provide proper care, supervision, or discipline to his child if he is in prison for life without the possibility of parole.

[In re D.I.L.](#), 2022-NCSC-35

**Held: Affirmed**

- Facts: In 2016, the juvenile was adjudicated neglected based on circumstances created by parent's illegal drug activity. Also in 2016, petitioners obtained a Chapter 50 custody order awarding the primary legal and physical custody of the juvenile. Father had monthly supervised visits. Father's last visit was in 2017 and he has not contacted petitioners since 2017 or sent card or letters to the juvenile since 2015. In 2018, father filed a motion to modify the custody order, and petitioners filed a TPR. The TPR was granted and father appeals, arguing the court cannot find a likelihood of future neglect because of the Chapter 50 custody order and a need for him to show a substantial change in circumstances to regain custody.
- Father's argument is without merit. A parent's fitness to regain custody of the child at the time of the TPR hearing is not required under G.S. 7B-1111(a)(1). Instead, the determinative factors are the best interests of the child and fitness of the parent to care for their child at the time of the TPR hearing.

[In re T.B.](#), 2022-NCSC-43

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent based on circumstances involving her parents' domestic violence and substance use. The parents did not make progress on their case plans, which resulted in DSS filing a TPR motion. The TPR was granted, and mother appeals (father files a no-merit appeal which is not summarized).
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing of a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent's failure to make progress on a case plan. The court looks at the best interests of the child and the parent's fitness to care for the child at the time of the TPR hearing.
- Findings support the conclusion of neglect – mother continued in relationship with father where there was ongoing domestic violence and lacked insight to end the relationship even after attending a program addressing domestic violence; mother did not request visits she was ordered to have or send cards or gifts to her daughter or contact the foster parents to check on her daughter; mother resided in an overcrowded apartment she acknowledged was not suitable for her daughter but had no plans to relocate. An indication of a likelihood of future neglect is "a parent's 'pattern of inconsistent contact and lack of interest' in a child[.]" Sl.Op. ¶ 27.
- The findings are supported by clear and convincing evidence. Although mother denied her ongoing relationship with father, the social worker's and father's testimony supported the finding that the relationship continued. The trial court determines the credibility and weight of the evidence and inferences to draw therefrom. Mother's denial of domestic violence incidence is relevant to a finding of likelihood of future neglect.
- The presence of favorable findings re: mother's progress with substance use services does not undermine the neglect adjudication based on other findings regarding a likelihood of future neglect due to domestic violence.

[In re V.S.](#), 2022-NCSC-44

**Held: Affirmed**

- Facts: The children had been adjudicated neglected due to circumstances created by mother, including exposure to pornography, domestic violence, unstable housing, unsafe housing, and poor hygiene. Mother has cognitive delays and was determined to be incompetent and appointed a Rule 17 GAL. Ultimately, DSS filed a TPR motion, which was granted. Mother appeals arguing the court did not address whether mother could be assisted by family members when determining the likelihood of future neglect.
- Although the findings that are challenged address the suitability of family members as caregivers, the unchallenged findings, which are binding on appeal, give the court overwhelming support for its determination of a likelihood of future neglect. The findings include mother's inability to function independently or parent the children or to understand basic information, the children's diagnoses and needs, and the reasons why the children came into care. "Certainly, there may be situations where a parent's reliance in part on others to assist her in caring for her children supports a determination that there is not a likelihood of repetition of neglect if the children are returned to her care." Sl.Op. ¶ 12. But the trial court assesses the best interests of the child and fitness of the parent, not others, to care for the child at the time of the TPR hearing since the parent has ultimately authority over their child. "Accordingly, a parent must be able to understand the past neglect her children suffered while in her care; comprehend how to keep them safe from harm through proper care, supervision, discipline, and provision of a living environment not injurious to their welfare; and demonstrate an ability to do so." *Id.*

[In re A.E.S.H.](#), 2022-NCSC-30

**Held: Affirmed**

- Facts: In 2019, the juvenile was adjudicated neglected based on circumstances involving unsanitary living conditions and father's substance use and parenting skills. Father was convicted of felony cruelty to animals (the family dog), felony domestic neglect of a disabled or elder person (his wife who ultimately died), and misdemeanor child abuse (the juvenile). Father did not make progress on his case plan, and DSS filed a TPR motion, which was granted. Father appeals.
- The findings are supported by clear and convincing evidence and support the conclusion of neglect, which includes past neglect and a likelihood of repetition of neglect. A parent's lack of progress in completing a case plan is an indication of a likelihood of future neglect. Evidence showed the father did not avail himself of parenting classes while he was incarcerated and did not attend parenting classes he was referred to after his incarceration. Father did not follow up with the DSS social worker regarding his parenting classes or a setting up a home visit.

[In re B.R.L.](#), 2022-NCSC-49

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected. During the first year of the neglect case, mother did not work on her case plan. DSS filed a TPR petition, which was granted. Mother appeals the grounds, arguing the findings do not support the conclusion of neglect based on a likelihood of future neglect.

- The challenged findings were supported by clear and convincing evidence: therapist testimony. The unchallenged findings support the determination that a likelihood of future neglect existed. Mother was not capable of parenting the child at the time of the TPR hearing and that shows there is a substantial likelihood of future neglect. A parent's lack of progress on her case plan is indicative of the likelihood of future neglect. mother did not complete many aspects of her case plan addressing DV, substance use, mental health, parenting, and safe housing such that the reasons for the juvenile's removal remained.

[In re K.Q.](#), 2022-NCSC-53

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent due to circumstances related to domestic violence between his parents. While the underlying action was pending, father participated in services under his case plan but was arrested for another domestic violence incident involving mother. When the primary permanent plan was identified as adoption, DSS filed a TPR motion, which was granted. Father appeals, challenging the grounds and arguing the court erred in determining there was a likelihood of future neglect.
- Although father challenges some findings, those findings were not reviewed because the unchallenged findings were sufficient to support the court's determination that there was a likelihood of future neglect. Those findings describe chronic domestic violence between the parents; document father's violence, including at visitation resulting in a suspension of his visitation; address the incident that resulted in the new criminal charges against father; and mother's most recent DVPO filing. The findings also show father engaged in his case plan requirements but that he did not show he could apply what he learned. Father also denied the domestic violence and any impact it had on the juvenile and blamed mother for the domestic violence. Compliance with a case plan does not preclude a conclusion of neglect. The court did not error in determining there was a likelihood of future neglect.

Past Neglect as Factor in Neglect

[In re M.S.L.](#), 2022-NCSC-41

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected based on circumstances related to mother's substance use. Respondent father contacted DSS because he believed he was the juvenile's father, which he was later determined to be. Ultimately, DSS sought to terminate father's rights. Father admitted to the allegations in the petition, which the court accepted as stipulations, but asked to be heard on the child's best interests. After hearing, the TPR was granted. Father appeals arguing the findings of fact do not support the conclusion of neglect as the ground to TPR because father was not responsible for the initial neglect adjudication.
- Relying on prior opinions that rejected similar arguments, a neglect adjudication is about the circumstances and conditions surrounding the child and not the fault or culpability of the parent. Failure to make progress on a case plan is indicative of a likelihood of future neglect. Father admitted to the allegations in the TPR petition, and the court made findings and conclusions from those stipulations, which included father's substance use, failure to comply with his case plan regarding substance use treatment and a parenting capacity evaluation, and delayed taking a paternity test. Although the findings were limited to father's factual

stipulations, there are sufficient to conclude neglect existed. Father stipulated the juvenile was previously adjudicated neglected based on the juvenile testing positive for substances at birth. Father used controlled substances.

[In re C.S.](#), 2022-NCSC-33

**Held: Affirmed**

- Facts: A neglect and dependency petition was filed by DSS based on circumstances created by the mother. Mother identified father, and paternity was determined. The juvenile was adjudicated neglected and dependent based on a consent order, which father agreed to. After the primary permanent plan was identified as adoption, DSS filed a TPR motion. The TPR was granted and father appeals, challenging the ground of neglect and the best interests determination.
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent's failure to make progress on a case plan.
- Although there was no evidence father had custody of his child in the past or had caused the child to be neglected, "[i]t is ...not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect." Sl.Op. ¶ 16 (citation omitted). An adjudication of neglect is admissible, and here, father did not object to the original adjudication nor its admission into evidence at the TPR.

Neglect; Failure to Make Reasonable Progress

[In re M.B.](#), 2022-NCSC-96

**Held: Vacated and Remanded**

**Dissent, Berger, J., joined by Newby, J.**

- In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use, unsanitary home conditions, and improper supervision. Mother was ordered to comply with her case plan, which included a substance use assessment and follow up with recommendations including drug screening, parenting classes, obtaining and maintaining suitable housing, and maintaining employment. Mother was not following the case plan recommendations or regularly attending visits. The primary permanent plan was changed to adoption, and DSS filed a TPR motion in 2020. The motion alleged the grounds of neglect and failure to make reasonable progress. After the TPR was granted on both grounds, mother appealed.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect. The court looks to past and present factors, including changed circumstances and the parent's progress toward eliminating the conditions that caused the children's removal. "[T]he factors alone does not amount to making the determination itself" of a likelihood of future neglect. Sl.Op. ¶ 14. The court must "distinctly determine a parent's likelihood of neglecting a child in the future." *Id.* "Even when 'competent evidence in the

record exists to support such a finding, . . . the absence of this necessary finding [still] requires reversal.’ ” *Id.*

- Although the court found the relevant factors, the court did not make the ultimate determination by clear and convincing evidence of the likelihood of a repetition of neglect.
- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the juvenile in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile’s removal. Willfulness of a parent’s failure to make reasonable progress is when the parent has the ability to make the progress but is unwilling to make the effort to do so. There must be adequate findings that the parent acted willfully.
  - The order does not address whether mother acted willfully when leaving the children in foster care without making reasonable progress.
- Dissent: Unchallenged findings were sufficient to show neglect and failure to make reasonable progress. The majority places form over substance.

In re A.N.H., 2022-NCSC-47

**Held: Vacated and remanded**

- Facts: The juvenile was adjudicated neglected based on circumstances related to mother’s substance use, mental health, and lack of income. Father’s paternity was established prior to the adjudication and concerns regarding his domestic violence and substance use were raised in an amended neglect petition. Father entered into a case plan with DSS and was participating in the services. Father did test positive on some drug screens. DSS filed a TPR motion, alleging neglect and failure to make reasonable progress to correct the conditions. The court granted the TPR on both grounds. Father appeals, arguing the findings are not supported by clear and convincing evidence and that the findings do not support the conclusions for the grounds.
- Neglect involves a juvenile whose parent does not provide proper care and supervision or who creates an injurious living environment. When there is a long period of separation between a child and parent, there must be a showing a past neglect and a likelihood of future neglect. An indication of a likelihood of future neglect is a parent’s failure to make progress on a case plan. The court looks at the best interests of the child and the parent’s fitness to care for the child at the time of the TPR hearing.
- Failure to make reasonable progress does not require a complete remediation of all the conditions that led to the child’s removal. There does have to be a nexus between the components of the case plan and the reasons for the child’s removal.
- The findings show that father completed the CCA and substance use assessment; completed a substance use program, a domestic violence program, and a parenting program. Father tested positive for cocaine and other illegal substances and denied illegal drug use. Father admitted to drug use in the adjudication order of a neglected juvenile. Ten of father’s drug screens showed negative results. Father paid child support and attended 78 of 80 visits with his mother always in attendance such that he is unable to care for the child on his own. Father has sporadic employment but was employed at the time of the TPR hearing. Father resides with his aunt, which is an appropriate and safe home. Father did not participate in intensive outpatient substance use treatment as recommended. Father did not complete individual therapy.



- There was no evidence to support some of the findings including the father's denial of drug use. The GAL report that was admitted at the dispositional stage cannot be considered at adjudication. Although father had unsupervised visits at one point does not preclude the court from finding he has not demonstrated an ability to provide appropriate care to his child. However, the evidence does not support the court's determination that he lacks the ability to provide appropriate care. The finding that father did not complete individual therapy is not supported by the evidence.
- Respondent complied with most of his case plan requirements and at the time of the TPR had regularly visited with the child, paid child support, and an appropriate and stable home, completed substance use, domestic violence, and parenting programs, and addressed the conditions that led to the child's placement in DSS custody. Although substance use was a concern and father tested positive on drug screens, he completed substance abuse treatment. There are no findings about whether his drug use creates or substantial risk of harm to the child. Similarly, given the completion of most of his case plan, the findings do not support a conclusion that he failed to make reasonable progress.
- Remand is appropriate because the court must address whether the erroneous factual findings were central or incidental to the conclusions of neglect and failure to make reasonable progress.

#### Failure to Make Reasonable Progress

[In re A.D.](#), 2022-NCCOA-551

##### **Held: Reversed**

- Facts: In 2019, the juvenile was adjudicated neglected based on circumstances created by mother's substance use. In 2020, putative father was identified and paternity was established. Father agreed to a case plan with DSS. Father had transportation issues due to a lack of driver's license, some criminal involvement, but was working sporadically, seeking housing closer to his daughter but moved frequently, maintaining contact with DSS, and working within COVID-19 restrictions. In 2020, DSS filed a TPR petition after the primary permanent plan was changed to adoption. At the time of the TPR hearing, father had complied with much of his case plan, including obtaining subsidized housing, employment, completing parenting classes, completing a substance use assessment, seeking treatment for mental health and substance use, maintaining some contact with DSS, and attending the majority of his visits. The TPR was granted after the court determined father complied with the minimal requirements of his case plan. Father appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves their child in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. Willfulness may be found even when a parent makes some efforts to regain custody. Reasonable progress must be made regardless of whose fault it was that caused the child to be placed in foster care. Compliance with a case plan is relevant in determining whether a parent has made reasonable progress up to the time of the TPR hearing. "[A] parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of reasonable progress." Sl.Op. ¶ 66.



- Challenged findings regarding father not seeking paternity or custody and not making progress with his case plan are unsupported. Other challenged findings are supported by the evidence. The court is not required to make findings on all the evidence presented.
- The findings do not support the conclusion that father failed to make reasonable progress to correct the conditions that led to the juvenile's removal. "While Father has not fully satisfied all elements of his case plan, he has not shown 'a prolonged inability to improve [his] situation,' which would warrant terminating his parental rights..." Sl.Op. ¶167.

[In re A.H.G.](#), 2022-NCCOA-451

**Held: Affirmed**

- Facts: In 2020, the juveniles were adjudicated neglected and dependent. In 2021, DSS filed a TPR petition, which was granted. Mother appeals, arguing she made reasonable progress, the findings were unsupported, and the court abused its discretion when determining TPR was in the children's best interests.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully fails to make reasonable progress under the circumstances. "Perfection is not required." Sl.Op. ¶12. "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *Id.* Poverty cannot be the sole basis for termination of parental rights under this ground.
- The challenged findings are supported by clear and convincing evidence. "The 'trial court need not make a finding as to every fact which arises from the evidence; rather the [trial] court need only find those facts which are material to the resolution of the dispute.'" Sl.Op. ¶26 (citation omitted). The trial court made material findings.
- Mother argues her lack of progress on parenting education resulted from a lack of services available in her native language, but mother's therapist attempted to work on parenting in mother's individual sessions. Although mother maintained a 2-bedroom home that was clean and tidy, the court found the size was inadequate because 2 of the 3 children had been sexually abused and inappropriately touched each other. Although recognizing mother had financial difficulties, poverty was not the sole reason for the TPR. Mother failed to make progress on appropriate discipline for the children, an inability to manage their sexualized behaviors, and her inconsistently attending her own therapy. TPR affirmed even though mother made some effort to improve her situation and made some progress on her case plan.

[In re H.B.](#), 2022-NCCOA-453

**Held: Affirmed**

**Dissent, Woods, J.**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother's substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2020, mother's parental rights to one of the juveniles was terminated. In 2021, DSS filed a TPR petition to terminate mother's parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves their child in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal.

- “A trial court may take judicial notice of findings of fact made in prior orders.” Sl.Op. ¶ 37. But, the court may not rely solely on those prior orders. The court must take some oral testimony at the hearing and make an independent determination of the evidence that is presented at hearing. The court took judicial notice of the underlying neglect and dependency file and accepted a DSS Timeline into evidence at the TPR hearing. The witness testimony corroborated the evidence and prior orders regarding the history with mother and mother’s failure to follow through and comply with her case plan. The order’s finding, although minimal and unartfully drafted, are sufficient.
- Dissent: The findings are insufficient. The oral findings, which were more substantial, are not included in the written order. The order should be vacated and remanded for additional findings to support the conclusion of law.

[In re D.D.M.](#), 2022-NCSC-34

**Held: Affirmed**

- Facts: The juvenile, who is medically fragile, was adjudicated neglected in 2018, based on circumstances created by mother’s lack of proper care and untreated mental health issues that impacted her parenting. Undisputed findings are that mother did not obtain treatment for her mental health issues which negatively impacted her ability to parent. Mother appeals TPR arguing the court did not consider the impact of mother’s poverty on her ability to care for the child.
- G.S. 7B-1111(a)(2) prohibits the termination of parental rights on the sole reason that the parents cannot care for their child because of their poverty. Here, the court did not terminate mother’s rights because of poverty but rather because she failed to make reasonable efforts to complete her case plan. Mother refused DSS’s offers to assist with transportation to her son’s medical appointments and visits and to participate in virtual visits if in-person became infeasible. Mother quit one job and left another. “On balance, the trial court’s findings demonstrate that respondent-mother could have sought to comply with the requirements of her case plan even while experiencing otherwise insufficient monetary transactions.” Sl. Op. ¶ 14.

[In re L.D.](#), 2022-NCSC-40

**Held: Affirmed**

- This opinion affirms the TPR. It discusses how the challenged findings were supported by the evidence and how the findings support the conclusion that the children were in care for 12 or more months before the TPR petition was filed by DSS and that mother failed to make reasonable progress to correct the conditions that led to the children’s removal. Mother’s issues included substance use, lack of employment and housing, failure to remain in contact with DSS, and attendance at only a few parenting classes.

### Failure to Pay Reasonable Cost of Care

#### [In re M.C.](#), 2022-NCSC-89

**Held: Affirmed**

- Facts: The juveniles were adjudicated neglected in 2017. In July 2019, DSS filed a TPR motion, which was granted. Father appeals.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent’s rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile’s care despite having the physical and financial ability to do so. The cost of care is the cost to DSS, and a parent should pay the portion that is just, fair, and equitable based on the parent’s ability. The “ ‘cost of care’ under N.C.G.S. 7B-1111(a)(3) contemplates the monetary cost of foster care that DSS is required to pay for the care of the children.” Sl.Op. ¶ 16.
- The determinative 6-month period is Jan. 17 – July 17, 2019. The children were in foster care and the room and board was more than \$14K. Father was incarcerated until mid-February and after June. Father was employed while he was not incarcerated and made zero although he had the ability to pay more. Father did pay for a birthday party, where he brought toys, shoes and clothing for the juveniles. “[T]his sporadic provision of gifts, food, and clothing does not preclude a finding by the trial court that respondent-father failed to provide a reasonable portion of the cost of care for the children when he made no payments to DSS or the foster parents during the relevant six-month period.” Sl.Op. ¶ 15.

#### [In re J.C.J.](#), 2022-NCSC-86

**Held: Affirmed**

- Facts: In 2018, the juveniles were adjudicated neglected. In 2020, DSS filed a TPR motion that was granted. Parents appeal, challenging the grounds and best interests determination.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent’s rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile’s care despite having the physical and financial ability to do so. The cost of care is the cost to DSS, and a parent should pay the portion that is just, fair, and equitable based on the parent’s ability.
- “[T]he sporadic provision of gifts for the benefit of the [juveniles] by respondent-mother does not preclude a determination that respondent-mother had failed to pay a reasonable portion of the cost of the care that the [juveniles] had received following their removal from the family home given that respondent-mother made no payment to DSS or the foster parents during the pendency of the case, including the determinative six-month period....” Sl. Op. ¶ 15.
- The absence of a court order or notice of the need to pay support is not a defense to this TPR ground because a parent has an inherent duty to support their children. The challenge that this ground violates the Fourteenth Amendment of the Constitution is raised as she did not raise this issue at the trial court.
- The findings that father has paid zero and had been employed throughout the pendency of the case shows he was continuously employed from the start of the case up to the TPR hearing, which necessarily includes the 6-month determinative time period.

[In re D.R.J.](#), 2022-NCSC-69

**Held: Reversed**

- **Facts:** In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(3) authorizes the court to terminate a parent's rights when the juvenile has been placed in DSS custody or a foster home and the parent has willfully failed to pay for the 6 months immediately preceding the filing of the TPR petition or motion a reasonable cost of the juvenile's care despite having the physical and financial ability to do so.
- The findings are insufficient to support the conclusion the ground exists. There is one finding related to this ground, which is that the parent paid nothing toward the cost of care despite have in the physical and financial ability to do so. There were no findings about the cost of care or the father's ability to pay. No evidence on those issues were introduced at the hearing. The evidence does not support the finding.

[In re L.M.B.](#), 2022-NCCOA-406

**Held: Affirmed**

- **Facts:** The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds; father also challenges the best interests finding and the validity of the order.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay for a reasonable portion of the child's cost of care for the six months immediately preceding the filing of the TPR when the parent is financially and physically able to do so.
- Here the relevant time period is July 29, 2020 to January 29, 2021. Although parents selectively challenged some findings, the remaining 245 unchallenged findings (which are binding on appeal) support the court's conclusion that parents failed to pay a reasonable portion of the cost of care. Mother was employed or receiving unemployment benefits throughout the life of the case and father received disability benefits, yet the parents paid zero in child support.
- Although the parents provided clothes, diapers, and toys at visits, there is nothing in *In re J.A.E.W.*, 375 N.C. 112 (2020) that requires the trial court to consider "in kind" contributions as a form of support. Although the court acknowledged these gifts, the court did not err when determining that the gifts did not qualify as court-ordered financial support payments. In this case, the parents had been ordered to provide child support and the court found there was no agreement between DSS and the parents that the contributions would offset the support obligation.

[In re A.C.](#), 2022-NCCOA-552

**Held: Affirmed**

- **Facts:** In 2019, the juveniles were adjudicated neglected. The court found that father failed to comply with his case plan. In 2020, father was incarcerated for different periods of time for probation violations. A TPR motion was also filed in 2020, which was granted. Father appeals.

- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay for a reasonable portion of the child's cost of care for the six months immediately preceding the filing of the TPR when the parent is financially and physically able to do so.
- The court had clear, cogent, and convincing evidence of father's employment and income during the relevant six month period from the testimony of the DSS employee that did not include the GAL report, which father challenges should not have been considered because it was not admitted or offered in evidence. The issue regarding the GAL report is not considered by the appellate court.
- Evidence shows father was employed at some point during the relevant statutory six month period when he was not incarcerated and that he paid nothing toward the cost of care. These findings are sufficient to address the statutory time period.
- Although the amount of the father's specific earnings during the relevant time period were not in evidence, the evidence showed he was earning some money through employment, he paid zero toward the cost of care. The finding he had the ability to pay something more than zero in that 6-month period is sufficient.

#### Dependency

##### [In re D.R.J.](#), 2022-NCSC-69

###### **Held: Reversed**

- Facts: In 2018, the juvenile was adjudicated neglected and placed in DSS custody. Reunification was eliminated as a permanent plan. In 2020, DSS filed a TPR motion alleging failure to pay the reasonable cost of care and dependency as the grounds. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(6) authorizes the court to terminate a parent's rights when the parent is incapable of providing for proper care and supervision and lacks an appropriate alternative child care arrangement.
- The findings are insufficient to support the conclusion the ground exists. There is one finding related to this ground, which addresses the parent's inability to provide proper care and supervision. There is no finding about whether there was an appropriate alternative child care arrangement. The findings must address both prongs of the ground. No evidence on the issue of an appropriate alternative child care arrangement introduced at the hearing.

##### [In re J.I.G.](#), 2022-NCSC-38

###### **Held: Affirmed**

- Facts: The juveniles were adjudicated neglected and dependent, and the youngest juvenile was also adjudicated abused. Father made progress on his case plan but was later arrested and charged with 4 counts of felony child abuse related to the youngest juvenile. Father was incarcerated and awaiting trial. DSS filed a TPR motion, which was granted. Father appeals, challenging the grounds by arguing the evidence does not support the findings and the findings do not support the conclusion about his incapability to parent.
- G.S. 7B-1111(a)(6) authorizes a TPR when (1) a parent lacks the capacity to provide proper care and supervision such that the juvenile is a dependent juvenile (G.S. 7B-101(9)), (2) there is a

reasonable probability the parent's incapacity will continue for the foreseeable future, and (3) the parent lacks an appropriate child care arrangement.

- Father challenges the court's assessment of the social worker and GAL's testimony, but it is the trial court's responsibility to assign the proper weight and credibility of the evidence. The findings are supported by clear and convincing evidence even though there is evidence to the contrary. Adjudicatory findings based on mother's testimony are disregarded as mother left the hearing before cross-examination by father's attorney. Unchallenged findings support the dependency ground: father has an intellectual disability that negatively affects his ability to reason, plan, exercise judgment, and problem solve such that he was incapable of providing proper care and supervision to the juveniles, that he lacked an alternative appropriate child care arrangement, and his incapability was expected to continue.

### Abandonment

[In re A.A.](#), 2022-NCSC-66

#### **Held: Affirmed**

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The TPR was granted and mother appeals. One of her challenges is that the evidence does not support the findings and the findings do not support the conclusion of willful abandonment.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. A parent's conduct implies the parent's willful determination to forego all parental duties and relinquish all parental claims.
- The findings of fact are supported by the evidence and support the conclusion. Although mother did have some contact with the child, it was outside the determinative time period. Although mother had a child support wage garnishment, she was aware that garnishment was going to father after father while he was incarcerated, father and petitioner had separated, and the child remained with petitioner.

[In re J.A.J.](#), 2022-NCSC-85

#### **Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother's substance use and mental health issues and father's incarceration. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights when a parent willfully abandons their child for the 6 months immediately preceding the filing of the TPR petition. A parent's conduct implies the parent's willful determination to forego all parental duties and relinquish all parental claims.
- Incarceration limits a parent's ability to show an interest in their child but does not excuse a parent from showing that interest by the means that are available. Father had the ability to phone or write letters to his child but never did. The social worker testimony and prior permanency planning orders that were admitted in evidence showed that father had not

contacted or sent mail to his child. Evidence father points to regarding his actions fall outside the determinative 6 month window.

#### In re B.E.V.B., 2022-NCSC-48

**Held: Affirmed**

- Facts: This is a private TPR initiated by mother against father for willful abandonment. The relevant 6-month period is November 7, 2019 – May 7, 2020. The parties lived together with their child until 2017. Mother obtained a DVPO in 2017 that expired in 2018. Mother married her current husband in 2017. There has been no contact between father and child or mother since 2017. In 2017, when mother asked father for child support, he responded he would not pay. The TPR was granted, and father appeals the ground.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment for the six months immediately preceding the filing of the TPR. Willfulness is a question of fact. Abandonment involves the parent's withholding of love, care, presence, the opportunity to display filial affection and willfully neglecting to provide support and maintenance. The determinative time period is the 6 months immediately preceding the filing of the TPR petition, but the court may consider events that occurred outside that time period when determining the parent's credibility and intentions.
- Although father argues he had no way to contact mother, he had access to her and her husband's Facebook accounts and knew the mother's family. Respondent did not reach out to mother, her husband, or her family. He did not file a Chapter 50 custody action. He did not look at public records for her address. He did not attempt to reach her via Snapchat, which is how they had communicated in 2017. These findings support the court's determination that he acted willfully, and the ground existed.

### Best Interests of the Child

#### Factors

#### In re M.R., 2022-NCSC-90

**Held: Affirmed**

- Facts: In 2017, two juveniles were adjudicated neglected based on circumstances involving unstable housing and mother's substance use. In 2018, mother gave birth to a baby who tested positive for substances and that baby was ultimately adjudicated neglected. DSS filed motions to TPR both parents' rights, which were granted. Mother appeals, challenging the ground of neglect and the best interests determination. Father appeals the best interests determination.
- The challenged findings are supported by competent evidence: social worker testimony.
- The trial court has discretion to determine the weight to give completing G.S. 7B-1110(a) factors. There was no abuse of discretion. The parent-child bond is one of many factors considered by the court. A child's wishes are not controlling on the trial court since the best interests of the child is the "polar star."
- The need for child adoptee who is 12 or older to consent to the adoption does not preclude a TPR. Consent to adoption is governed by G.S. Chapter 48 and not the Juvenile Code. G.S. Chapter 48 allows the minor's consent to be waived when the court finds it is not the child's best interests to consent.



[In re R.L.R.](#), 2022-NCSC-92

**Held: Affirmed**

- Facts: In 2019, the juvenile was adjudicated neglected and dependent due to circumstances resulting from mother's substance use, improper supervision, and an injurious environment. After mother failed to make progress on her case plan and the child's relative with whom she was placed expressed a desire to adopt, the primary permanent plan was identified as adoption. In 2020 DSS filed a TPR motion. While the TPR was pending, the relative changed her mind about adoption, and the child was moved to a foster home. The TPR was granted. Mother appeals, challenging the grounds and best interests determination.
- In considering the child's best interests the court looks to the factors at G.S. 7B-1110(a). The court considered the factors and the findings were supported by the evidence that there was no bond between the child and parent. The absence of an adoptive placement is not a barrier to TPR and the findings, based on evidence, show she has a high likelihood of adoption. The appellate court will not reweight the evidence. Mother argues additional criteria that are codified in other states should be considered. This is an argument for the General Assembly. Further the catch-all, "any relevant consideration," allows for other information to be considered, which in this case was the impact of adoption on this child. A trial court is not required to consider non-TPR related dispositional alternatives in the dispositional stage of the TPR because its focus is on the child's best interests.

[In re L.M.B.](#), 2022-NCCOA-406

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds and the validity of the order. Father also challenges the best interests determination.
- The "trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial judges alone determines the credibility of the witnesses and which inferences to draw and which to reject." Sl. Op. ¶ 26 (citation omitted). The court did not abuse its discretion in determining the TPR was in the child's best interests. The court considered all the factors in G.S. 7B-1110(a) and made findings addressing the relevant factors. The findings were supported by competent evidence.

[In re A.H.G.](#), 2022-NCCOA-451

**Held: Affirmed**

- Facts: In 2020, the juveniles were adjudicated neglected and dependent. In 2021, DSS filed a TPR petition, which was granted. Mother appeals, arguing she made reasonable progress, the findings were unsupported, and the court abused its discretion when determining TPR was in the children's best interests.
- G.S. 7B-1110(a) requires the court consider the enumerated factors and made written findings of those that are relevant. One factor is a catchall, "any relevant consideration." Mother argues



the court was required to make findings about the lack of Spanish-language services for mother and the impact of a TPR on the children’s culture. “Assuming language and culture are included in the catchall[,]” the court considered and made findings about those issues.

[In re H.B.](#), 2022-NCCOA-453

**Held: Affirmed**

**Dissent, Woods, J.**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother’s substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2020, mother’s parental rights to one of the juveniles was terminated. In 2021, DSS filed a TPR petition to terminate mother’s parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition.
- A disposition is reviewed for an abuse of discretion. The trial court considers all the factors enumerated in G.S. 7B-1110(a) and must make written findings of those that are relevant. A factor is relevant when there is conflicting evidence on that factor.
- The parent-child bond is not a dispositive factor at disposition. The court did not abuse its discretion when considering all the factors in G.S. 7B-1110(a). The court found there was no parent-child bond, which mother challenges.
- Dissent: there is no evidence to support the finding to show no parent-child bond.

[In re S.M.](#), 2022-NCSC-42

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and dependent. Respondent parents did not engage in services resulting in a primary permanent plan of adoption. DSS filed a TPR motion, which was granted. Respondent parents appeal, challenging the best interests determination of the TPR order. They argue the facts are not supported by the evidence and the court abused its discretion when making the best interests of the child determination.
- The standard of review of a dispositional order is an abuse of discretion. The findings must be supported by competent evidence, which under G.S. 7B-1110 includes any evidence, including hearsay evidence, that is relevant, reliable and necessary to determine the most appropriate disposition. The court must consider factors in G.S. 7B-1110(a) and make written findings of those that are relevant. Relevant factors are those where there is conflicting evidence making the factor an issue for the district court.
- The majority of the challenged findings are supported by the evidence, including social worker testimony, a letter from the juvenile’s physician’s assistant, and DSS and GAL reports. Mother’s argument that the DSS report is incompetent evidence because its sources were not identified is without merit. There was no objection to the report and there was the opportunity to cross-examine the social worker. The court did not abuse its discretion in relying on the reports since hearsay evidence is admissible at disposition.
- In reviewing each factor of G.S. 7B-1110(a), the findings were supported by the evidence. The child’s age of 11 and her potential need to consent to adoption can be waived and would not preclude the adoption. A TPR was necessary to achieve the permanent plan of adoption; the trial court is not required to address the secondary plan (in this case guardianship). Although the juvenile has significant behavioral issues and experienced multiple placements, the evidence

supported the court's finding that she was likely to be adopted given her recent attachment to her foster parent and reduction in behaviors and the ability to provide more resources for an adoption once she was free to be adopted. Regarding the parent-child bond, the evidence supported the finding that the relationship hindered the juvenile's emotional development and well-being.

- There was no abuse of discretion in determining TPR was in the child's best interests when there was no adoptive placement for the child. This case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004). Here, the juvenile showed improvement and respondents made no progress in correcting the conditions that led to the juvenile's removal. The appellate court will not reweigh the evidence. The trial court considered the relevant statutory criteria and made a reasoned decision.

#### [In re C.S.](#), 2022-NCSC-33

##### **Held: Affirmed**

- Facts: Father appeals TPR, arguing in part that the court erred in determining it was in the child's best interests by not making findings about the parent-child bond as required by G.S. 7B-1110(a)(4).
- The court explicitly found that the father loves his child, which demonstrates the court considered the parent-child bond. The court further found that father is not in a position to provide his child with a stable, safe, and nurturing environment and the child has a strong bond with his foster parents. As previously held, the parent-child bond factor is properly addressed by findings "that any previous bond or relationship with the [respondent parent i]s outweighed by [the child's] need for permanence." Sl. Op. ¶ 21 (citation omitted). There as no abuse of discretion.

#### Relative Consideration

#### [In re H.R.S.](#), 2022-NCSC-36

##### **Held: Affirmed**

- Facts: The juvenile was adjudicated neglected and had some short-term placements with relatives. Eventually, the juvenile was placed with her foster mother. Ultimately, DSS sought the termination of father's parental rights, which was granted. Father appeals, challenging the court's determination that the child's best interests supported the TPR. Father argues the court should have instead prioritized placement with available relatives.
- There was no abuse of discretion in determining the TPR was in the child's best interests. The court considered the factors in G.S. 7B-1110(a), including a high likelihood of adoption based on the very strong and high-quality bond between the child and foster parent, and the foster parent's desire to adopt. The court also considered as a relevant factor the availability of relatives who lived outside of North Carolina and were determined to be suitable as a placement. Those relatives never met with or requested to visit with the juvenile, and father delayed communicating the relatives' interest in being a placement option. Unlike an A/N/D case where the court is required to consider relative placement, there is no such requirement in a TPR. Instead, relative placement may be a relevant consideration under G.S. 7B-1110(a)(6). An available relative placement is not determinative on the court in a TPR. The court properly balanced the competing interests of preserving the child's ties with her biological family and achieving permanency for the child that is offered by her prospective adoptive family.

### Any Other Relevant Factor

#### [In re A.N.D.](#), 2022-NCSC-32

**Held: Affirmed**

- Facts: Father appeals the termination of his parental rights, challenging the best interests determination only.
- The court did not abuse its discretion when it properly considered the factors in G.S. 7B-1110(a) and determined the TPR was in the children’s best interests. Although father argued the court should have considered the impact of COVID-19 restrictions on his housing and employment as a relevant factor, father did not have suitable housing before or after the 2019 motion for TPR was filed. For his employment, although he was laid off, father had more income after his lay off and chose not to work.
- The challenged finding of fact regarding father’s criminal history has a portion that is unsupported by competent evidence and is disregarded and a larger portion that is supported by competent evidence that is considered.

#### [In re S.D.C.](#), 2022-NCSC-55

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected in 2019 due to circumstances related to mother’s substance use. After mother missed several visits and was arrested for alcohol-related charges, the primary permanent plan was changed to adoption. DSS filed a TPR motion, which was granted. Mother appeals, challenging the findings of fact and the court abused its discretion in determining TPR was in the child’s best interests.
- Under Rule 58 of the Rules of Civil Procedure, an order is entered when it is reduced to writing, signed by the judge, and filed by the clerk. A court may change the finding in its written order from what was orally rendered. There is no error when there is a difference between the findings rendered and those entered in the written order.
- The finding is supported by the DSS social workers’ testimony and the DSS court report. The one challenged finding of fact that is not supported by evidence is disregarded.
- The trial court properly considered the G.S. 7B-1110(a) factors and did not abuse its discretion. Although mother argues the court should have considered guardianship as an alternative since it orally praised mother for her case plan efforts, the court considers the child’s best interests as paramount over the interests of the parent. The court’s statement acknowledging mother’s efforts does not preclude the court from determining TPR is in the child’s best interests.

### Continued Contact with Parents

#### [In re J.C.J.](#), 2022-NCSC-86

**Held: Affirmed**

- Facts: In 2018, the juveniles were adjudicated neglected. In 2020, DSS filed a TPR motion that was granted. Parents appeal, challenging the grounds and best interests determination. In this case, the foster parents and parents engaged in shared parenting. Respondents argue the court should consider the continuation of contact with eh children and birth family, including the parents, as a factor.
- Although citing other states’ dispositional standards that include continued contact between parents and the children, those statutes do not apply to TPR proceedings but instead apply to

dispositions in abuse, neglect, dependency, children in need of services, and placements in residential treatment programs. One of the purposes of TPRs in NC is to place the child's needs and best interests above the parents so the juvenile can have a permanent plan of care as early as possible. G.S. 7B-1100(3). "[T]here is no basis for the use of a 'least restrictive disposition' test in this Court's termination of parental rights jurisprudence." Sl.Op. ¶ 28. The court considered the proper dispositional factors and did not abuse its discretion.

### GAL Recommendations, Other Parent's Rights

#### In re A.A., 2022-NCSC-66

##### **Held: Affirmed**

- Facts: In 2013, petitioner married father and resided with him and his daughter. In 2017, petitioner and father separated. In 2018, petitioner obtained a custody order awarding her exclusive legal and physical custody. In 2019, Petitioner filed a TPR petition against mother. The TPR was granted and mother appeals. One of her challenges is to the best interests determination as the GAL did not recommend TPR, the child did not want a TPR, and the father's rights were not terminated.
- A court is not bound by the recommendations made by the GAL. The GAL's recommendations are important evidence, but the court has the authority to weight all the evidence. Not following the GAL's recommendations is not an abuse of discretion.
- The evidence does not support mother's argument that the child did not want mother's rights terminated.
- The trial court's focus at the dispositional phase of the TPR is the child's best interests and not equity between the parents. There was no abuse of discretion in terminating mother's rights when the father's rights were not terminated.
- Concur: The majority should have recognized as favorable that mother complied with her court ordered child support and did not have an affirmative duty to make sure it was paid to petitioner/child. However, as previously determined, child support payments do not bar a conclusion of abandonment.

### Juvenile's Mental Health

#### In re J.A.J., 2022-NCSC-85

##### **Held: Affirmed**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent in part due to circumstances involving mother's substance use and mental health issues and father's incarceration. DSS filed TPR petitions in 2020. The TPR was granted, and each parent appeals. The parents argue that the court abused its discretion in determining the TPR was in the juvenile's best interests. They argue that due to his mental health need, he was not a candidate for adoption as he had 17 placements in 28 months and was in a psychiatric hospital at the time of the TPR hearing.
- The evidence at the hearing, including social worker testimony, was that the juvenile was doing well at the hospital and had had 2 previous placement that lasted for several months. The evidence also showed that once the juvenile was cleared for adoption, he would be eligible for more resources (e.g., registered on NC KIDS) to find an adoptive placement.

- This case is distinguishable from *In re J.A.O.*, 166 N.C. App. 222 (2004) as this child was 9, was making progress on his therapeutic goals, had long-lasting placements showing he could maintain a long-term placement, and does not have a relationship with father.

## Challenged Findings

### In re K.N.L.P., 2022-NCSC-39

#### **Held: Affirmed**

- Facts: Father appeals the termination of his parental rights, challenging the best interests determination. He argues several findings of fact are not supported by the evidence.
- Noting because competent evidence is admissible evidence from the Rules of Evidence and because the Rules of Evidence do not apply to the dispositional stage of a TPR but instead relevant, reliable, and necessary evidence is considered by the court, for clarity the term “competent evidence” is being avoided when addressing the best interests of TPR orders for the language of the statute, “evidence.”
- The challenged findings are supported by the evidence, including the social worker’s testimony. Findings that are supported by the evidence are binding. The trial court determines the weight, credibility, and inferences to draw from the evidence. When some evidence supports the finding, the finding is binding even when a finding to the contrary could be supported.
- A sub silentio finding is an unexpressed finding. Two of those challenged findings are not dispositional findings for the appellate court to review.
- The court did not abuse its discretion in determining TPR was in the best interests of the child.

## Order

### Rules 52 and 63

### In re K.N., 2022-NCSC-88

#### **Held: Vacated and Remanded for new hearing**

- Facts: This is the second appeal of a TPR order. In the first appeal, the order was vacated and remanded so the court could make sufficient findings of fact to support the conclusion that the TPR ground existed. In the remand, the trial court had discretion to determine whether to take additional evidence. The judge who originally heard the TPR died prior to the remand. The chief district court judge acted as the substitute judge under Rule 63 of the Rules of Civil Procedure. A new TPR order was entered based on the substitute judge reviewing the record, trial transcripts, and proposed findings of fact submitted by the parties. No new evidence was taken. The order included new more detailed findings of fact to support the conclusion that the TPR ground was proved. Father appealed, arguing the order was void as the substitute judge did not have the authority to make new findings of fact under Rule 52 of the Rules of Civil Procedure.
- Statutory interpretation is a question of law that is reviewed de novo. Rules 52 and 63 impose statutory mandates, and when a court acts contrary to a statutory mandate and a defendant is prejudiced by it, the issue is preserved for appeal even if an objection is not made at trial. Defendant was prejudiced by the fact finder not holding a hearing to have personal knowledge of the facts made.

- Rule 52 requires the court hearing an action without a jury to find the facts, state the conclusions, and direct the entry of judgment. Rule 63 authorizes the chief district court judge to act as a substitute judge when by reason of death the judge who heard the hearing is unable to perform their duties, including entering a judgment. If the substitute judge cannot perform those duties because they did not preside at the hearing, the judge may grant a new hearing.
- “[A] substitute judge who did not preside over the matter lacks the power to find facts or state conclusions of law.” Sl.Op. ¶17. Here, the substitute judge did not hold a hearing and acted contrary to Rules 52 and 63, such that the order is a nullity. Additionally, the order on the first appeal was vacated making it a nullity. By finding facts and making conclusions of law without hearing evidence, the substitute judge “engaged in distinctly judicial and not ministerial action.” Sl.Op. ¶20. With the original order vacated, the substitute judge should have ordered a new hearing.

[In re E.D.H.](#), 2022-NCSC-70

**Held: Affirmed**

**Dissent, Hudson, J. joined by Earls, J. and Morgan, J.**

- Facts: At the conclusion of the adjudication hearing, the judge found grounds existed and moved to disposition. At the end of the disposition, the judge took the matters under advisement. An in-chambers conference with the attorneys was later held. The judge retired. Weeks later, a TPR order was entered that was signed by a substitute judge. The order states “Findings of fact, conclusions of law, and decretal announced in chambers on the 28<sup>th</sup> day of August by the Honorable [judge] . . . [a]dministratively and ministerial[ly] signed by the Chief District Court Judge on this [date].” Sl. Op. ¶ 8. Respondents appeal, challenging the validity of the order.
- Interpreting the Rules of Civil Procedure is a statutory interpretation that is reviewed de novo.
- Rule 52 requires the court hearing an action without a jury to find the facts, state the conclusions, and direct the entry of judgment. Rule 63 authorizes the chief district court judge to act as a substitute judge when by reason of retirement the judge who heard the hearing is unable to perform their duties, including entering a judgment. If the substitute judge cannot perform those duties because they did not preside at the hearing, the judge may grant a new hearing. “[A] substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside.” Sl.Op. ¶13.
- “[T]he presumption of regularity applies to the specific action of a Chief Judge signing and entering an order with findings of fact and conclusions made by a retired judge....” The party challenging the order has the burden of proving it was improperly entered and overcoming the presumption of regularity. Respondent would have to show that the chief judge violated Rules 52 and 63 by signing the order when not knowing whether the presiding judge made findings of fact and conclusions of law that were included in the order. Respondent did not meet their burden as the in chambers conference was held off the record and respondent did not in off-the-record evidence in the record on appeal as allowed for by App. Rule 9(c)(1). The finding that the judge who presided over the hearing made findings of fact and conclusions of law is unchallenged and, therefore, binding.
- Dissent: The presumption of regularity should not apply. There should be a de novo review of whether the chief judge’s actions were ministerial or judicial, which is a conclusion of law. The

finding in the order was challenged and is not binding since the entire appeal challenges this fact. Remedy should be to vacate and remand.

[In re L.M.B.](#), 2022-NCCOA-406

**Held: Affirmed**

- Facts: The juvenile was adjudicated neglected in 2019 and was placed with relatives. After the primary permanent plan was changed to adoption, DSS filed a TPR motion in 2021, which was granted. The dispositional portion of the TPR order was signed by the chief district court judge for the judge who presided over the hearing. The parents appeal challenging the grounds; father also challenges the best interests finding and the validity of the order.
- Rule 52 of the Rules of Civil Procedure requires the court to find facts, make conclusions, and “enter judgment accordingly.” Sl. Op. ¶30. Although the presiding judge did not sign the order, Rule 63 authorizes entry of judgment when the judge is unavailable for “other reason.” Sl. Op. ¶31. The substitute judge performs a ministerial rather than judicial task. Here the chief district court judge signed on behalf of the presiding judge rather than in his own name. The written order is consistent with the oral rendition of the presiding judge, and there is no indication any substantive determinations were made by the signing (substitute) judge. The signing of the order was ministerial in nature and proper under Rule 63.

Jurisdiction Pending Appeal

[In re B.B.](#), 2022-NCSC-67

**Held: Affirmed**

**Dissent, Earls, J. (IAC)**

- Facts: In 2019, the juveniles were adjudicated neglected and dependent. Later that year, DSS filed a TPR motion. The TPR was granted. Respondent’s appealed. The trial court entered an amended TPR order that added findings of fact. On appeal, respondents argued that the trial court lacked jurisdiction to amend the order as it was more than a clerical amendment.
- The trial court did not have jurisdiction to amend the TPR order after the notice of appeal was filed. Although G.S. 7B-1003 authorizes the trial court to have jurisdiction while an appeal is pending, it prohibits the trial court from exercising jurisdiction in a TPR when an appeal is pending. The trial court made substantive changes to the order after the appeal was pending. That amended order is void, and the original order is reviewed for the appeal.

Appellate Jurisdiction; Notice of Appeal

[In re R.A.F.](#), 2022-NCCOA-754

**Held: Vacated and Remanded**

**Dissent, Tyson, J.**

- Facts: Mother appeals a TPR through a written notice addressed to the North Carolina Supreme Court. There is no notice of appeal to the NC Court of Appeals.
- Appellate Procedure Rule 3(d) governs notices of appeal and requires that the notice designate the court to which the appeal is taken. Failure to follow Rule 3 requires a dismissal of the appeal. However, “[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal.” Sl. Op. ¶ 14 (citations omitted). By filing her



record of appeal and brief with the court of appeals, it is reasonably inferred that mother sought relief from the court of appeals. There was no prejudice to the other party as they could also infer the appeal was meant to be heard by the court of appeals and filed their brief with the court of appeals. Dismissal is not warranted. Further, Appellate Rule 21(a)(1) allows the court of appeals to treat the appeal as a petition for writ of certiorari, which in its discretion was granted.

- Dissent: The failure to follow Rule 3(d) is jurisdictional and warrants dismissal. There is no petition for writ of certiorari pending before the court and the defective notice of appeal and brief do not meet the requirements Rule 21(c) requires for a petition for writ of certiorari. To correct the deficiencies with the purported petition for writ of certiorari, the court would have to invoke Appellate Rule 2, which it did not do. This court lacks jurisdiction to hear the appeal.

## Adoption

### Consent: As Applied Constitutional Challenge

#### In re Adoption of C.H.M., 2022-NCCOA-126

**Held: Affirmed**

**Dissent in part**

- Facts: There are 3 prior appellate opinions in this case, which has lasted over 8 years. The issue involves father's right to consent to the adoption and motion to dismiss the adoption petition. This opinion addresses a remand from the NC Supreme Court to address father's due process arguments that his consent is required under G.S. 48-3-601(2)(b)(4)(II), which requires father to have provided consistent support to the mother and/or child. The trial court denied father's motion to dismiss. This is an interlocutory appeal that impacts a substantial right – father's parental rights since an adoption would sever those rights – and is immediately appealable. Father challenges the constitutionality of G.S. 48-3-601 as it applies to him, arguing that he grasped the opportunity to establish a relationship with his child, as required by the *Lehr v. Robertson* standard of the U.S. Supreme Court, such that his consent is required.
- Like *In re Adoption of B.J.R.*, 238 N.C. App. 308 (2014), father remained passive in establishing a relationship with his child once he learned (after the mother's deceit) that the child was his. Respondent was aware of the adoption petitioners' and the adoption agency's contact information yet sent no cards or gifts. There was no evidence that the petitioners or agency prevented father from doing so. Father delayed sending support payments from cash he had saved in a lockbox or from contacting petitioners until after a TPR was filed. "Respondent's later conduct, while laudable, does not remove or excuse his non-actions for nine months in 2014, where 'for all intents and purposes [he]...walked away from his responsibilities,' after visiting his child in Petitioners' home." Sl.Op. ¶ 34. Father's later conduct "failed to preserve his entitlement to the constitutional 'protection of the family unit' guaranteed by the Due Process Clause." and has no right to give or withhold his consent to the adoption. *Id.*
- Dissent: Father attempted to assert his rights before child was born but was hindered by mother's blatant deceit. Petitioners for a period of time preventing father from interacting with the child and during that time, father took steps to who he was wanting to grasp the opportunity to parent his child.