Abuse, Neglect, Dependency

Subject Matter Jurisdiction

Sufficient Notice

In re M.M., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: DSS filed a petition alleging five children were abused and neglected based on circumstances that were created in part by the parents' high conflict separation. DSS filed a supplemental petition in August 2021 alleging Father sexually abused four of the five children. All five children were adjudicated abused and neglected. Father appeals, challenging the court's subject matter jurisdiction to find any of the children abused based on emotional abuse, arguing DSS had not alleged emotional abuse in either of the petitions.
- "Whether a trial court possesses subject matter jurisdiction is a question of law" and reviewed de novo. Sl. Op. at 4 (citation omitted).
- The petition is the pleading in an abuse, neglect, or dependency case. G.S. 7B-401. "The petition must contain 'allegations of facts sufficient to invoke jurisdiction over the juvenile.' " Sl. Op. at 4 (citation omitted). "[I]f the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." Sl. Op. at 4 (citation omitted).
- G.S. 7B-101(1)(e) defines an abused juvenile to include any juvenile whose parent, guardian, custodian, or caretaker "creates or allows to be created serious emotional damage to the juvenile."
- The trial court did not lack subject matter jurisdiction to adjudicate emotional abuse. Although DSS did not check the box under abused juvenile that stated that the parent "has created or allowed to be created serious emotional damage to the juvenile," DSS checked the box on both petitions to indicate it was alleging that the children were abused and attached additional pages to the juvenile petitions detailing the facts supporting the

allegations. These facts included concerns about the children's emotional well-being because of the custody fight and dad's coaching the children and making false reports about mother as well as stating the children seemed withdrawn, sad, depressed, and without affect. These allegations were "sufficient to put the respondent on notice as to each alleged ground for adjudication." Sl. Op. at 7 (citation omitted).

Appointment of Counsel

Ineffective Assistance of Counsel

In re M.M., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Father appeals the adjudication of his five children as abused and neglected. This summary focuses on Father's argument that he received ineffective assistance of counsel due to his court-appointed attorney's failure to object to DSS's testimonial evidence of his daughters' sexual abuse.
- "A party alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was so serious so as to deprive the party of a fair hearing." Sl. Op. at 8 (citation omitted).
- Challenged testimony was not improper, therefore Father's counsel was not deficient by failing to object to the evidence and Father did not receive ineffective assistance of counsel. Neither the forensic interviewer nor the nurse practitioner testified that sexual abuse had occurred, only that they had conducted forensic interviews and child medical evaluations, respectively, with determinations that it was highly concerning the children interviewed and examined had been sexually abused.

GAL for Child

Performance of Duties; Preserve Issue

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected. The circumstances were that the children were in the custody of their paternal grandmother and while living with their paternal grandmother and father, one of the children was sexually abused by their father. Grandmother appeals the permanency planning order that found she failed to make progress on her case plan within a reasonable period of time, eliminated reunification with her, and ceased reunification efforts including her visitation. Grandmother argues for the first time on appeal that the children's GAL failed to discharge their statutory duties.
- N.C. Rule of Appellate Procedure 10(a)(1) requires a party to timely request, object, or motion the trial court to preserve an issue for appellate review. However, appellate courts have held that when a trial court acts contrary to a statutory mandate that requires the trial judge to (1) take a specific act or (2) direct a courtroom proceeding, the right to appeal is automatically preserved. G.S. 7B-601(a) lists the duties of the GAL and do not mandate the judge to take a specific act other than to appoint the GAL or to direct a courtroom

proceeding, such that the issue of whether the GAL performed their duties is not automatically preserved.

- Failure by the GAL to fulfill their statutory duties may require reversal. The children's GAL adequately discharged their statutory duties. The GAL filed written reports at the adjudication hearing and each permanency planning hearing; made monthly visits with the children and monthly calls with the foster parents; and included in their reports detailed information about the children's health and well-being, educational development, relationships with their foster parents and amongst themselves, and their wishes about remaining in the foster home. The court rejects Grandmother's argument that the GAL did not maintain more communication with her once the children were removed from her home and the GAL failed to adequately investigate the children's wishes. G.S. 7B-601(a) provides little guidance as to what a sufficient investigation consists of. Here, over the course of the investigation regarding grandmother, the GAL interviewed grandmother more than once, conducted home visits at grandmother's house and reviewed DSS reports including visitation records for grandmother and the children. Grandmother was not prejudiced by a lack of additional communication between her and the GAL. Additionally, the GAL investigated the children's wishes, which includes that the two older children loved their foster home and family and the youngest child could not express her wishes. Distinguishing this case from *In re J.C.-B.*, 276 N.C. App. 180 (2021), the children were significantly younger and there were no conflicting recommendations from the children's service providers regarding their placement. Even if the children had expressed wishes to return to Grandmother, those wishes are not controlling "since the court must yield in all cases to what it considers to be the child's best interests[.]" Sl. Op. at 37.

Adjudication

Neglect

In re A.H., ___ N.C. ___ (March 22, 2024)

Held: Reversed in part, and remanded, affirmed in part (per curiam)
Dissent, Earls. J.

- Facts and procedural history: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up. Father pursued the child on foot until she reached a cross road and he turned back to return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father and called the police. Following a DSS investigation spanning a couple of hours that same afternoon, DSS filed a petition alleging neglect and dependency. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child who he determined was safe upon observing her with a crowd. Within an hour of dropping the other two minors

off with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appealed the adjudication and subsequent disposition order placing the child with DSS, contending that the findings were unsupported by the evidence and/or inadequate to support the adjudication. The court of appeals determined several findings were unsupported by the evidence and the remaining findings were insufficient to support a legal conclusion of neglect, ultimately reversing the trial court's neglect adjudication. Based on a dissent, the case was appealed to the supreme court.

- The supreme court reversed the court of appeals decision regarding the trial court's adjudication of the child as neglected for reasons stated in the dissenting opinion, 289 N.C. App. 501 (2023), and remanded to the court of appeals to further remand to the trial court for proceedings not inconsistent with this opinion. The dissent determined that there are sufficient challenged findings to support the conclusion of neglect. Father knew the child ran into a busy road, later left her on the side of the road, and did not attempt to check on her well-being. A child's treatment that falls below normative societal standards is considered neglectful but "not every act of negligence on the part of the parent results in a neglected juvenile." 289 N.C. App. at 519. There must be actual or substantial risk of mental, emotional, or physical harm to the juvenile. The question is not whether a single isolated incident can support a conclusion of neglect but rather whether the trial court findings support the conclusion under the totality of the evidence for this particular case. Here, the child was at substantial risk of harm and was left in a environment injurious to her welfare.
- Dissent, Earls. J.: The decision of the court of appeals should be affirmed as the trial court's findings that were supported by clear and convincing evidence do not support the adjudication of the child as neglected. "While a single act of negligence severe enough to cause significant harm to a child and indicative of the likelihood that future harm would result can constitute neglect, it is not the case that 'treatment of a child which falls below the normative standards imposed upon parents by our society' is sufficient to justify a finding that the child is neglected." Sl. Op. at 11. "[I]solated incidents of neglect, even if the potential for serious injury is present, do not meet the statutory threshold for a finding of neglect." Sl. Op. at 12. The dissent argues that the court of appeals dissenting opinion erroneously referred to the court's review of the totality of the evidence to determine whether the trial court's findings support the court's conclusion of neglect.

In re L.C., ___ N.C. App. ___ (Apr. 16, 2024)

Held: Vacated and Remanded; Stay granted 5/7/2024

- Facts: DSS filed a petition alleging the juvenile as neglected and dependent based on a history of substance use by Mother and Mother's live-in female partner. The petition alleged there were three prior CPS reports and resulting assessments based on the juvenile testing positive for substances at birth, Mother and her partner's reported substance use, and instances of the juvenile stepping on Mother's needle and imitating using a needle on her arm with a plastic children's syringe. The most recent CPS report and assessment resulting in the petition was based on Mother giving birth to twin siblings of the juvenile who tested positive for substances; Mother's and partner's denial of substance use; Mother's refusal to

permit drug testing for herself and the juvenile, and Mother's and partner's violation of the safety plan that provided for the juvenile to be placed in a temporary safety placement with the partner's mother. Note, Mother relinquished her rights to the twins; this action solely involves the older sibling. At the adjudication hearing, the DSS social worker testified Mother refused drug screening for herself and the juvenile but admitted to using substances and having a history of addiction; appeared agitated at DSS's involvement; threatened a relative; and discussed concerns regarding rats in the home. The juvenile was adjudicated neglected, and custody was ordered with DSS. Mother appeals the adjudication order, arguing eight findings are irrelevant and the court's conclusion of neglect is not supported by the findings. Mother's partner also appealed the adjudication order which the court of appeals dismissed for lack of standing under G.S. 7B-1002, finding the partner's status to be that of a caretaker under G.S. Chapter 7B.

- Adjudications are reviewed to determine whether the findings of fact are supported by clear and convincing evidence and whether the findings support the conclusion of law. The reviewing court must consider the totality of the evidence to determine whether the findings are sufficient to support the court's conclusion. "Only the trial court has the duty to evaluate the weight and credibility of the evidence and based up that evaluation, to make findings of fact." Sl. Op. at 25 (citation omitted). Conclusions of law are reviewed de novo.
- G.S. 7B-101(15) defines a neglected juvenile to include "[a]ny juvenile less than [eighteen] years of age. . . whose parent, guardian, custodian, or caretaker. . . [d]oes not provide proper care, supervision or discipline . . . [or c]reated a living environment that is injurious to the juvenile's welfare." Sl. Op. at 22, *quoting* G.S. 7B-101(15).
- For a neglect adjudication, appellate courts have required "that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" or "that the environment in which the child resided has resulted in harm to the child or substantial risk of harm to the child." Sl. Op. at 22-23 (citations omitted). The supreme court has stated there is no requirement that the trial court make a specific written finding of substantial risk but the trial court "must make written findings of fact sufficient to support its conclusion of law of neglect." Sl. Op. at 23 (citation omitted). When no ultimate finding is made to show impairment or substantial risk of impairment, appellate courts "have consistently reviewed the trial court's evidentiary findings, as opposed to reweighing the evidence, to determine whether the findings show impairment or a substantial risk of impairment." Sl. Op. at 33. "[A] parent's substance abuse problem alone [does] not support an adjudication of neglect." Sl. Op. at 28 (citation omitted).
- Five of the eight challenged findings are supported by clear and convincing evidence, including Mother's and social worker's testimonies, and determined to be relevant to the adjudication. But, some findings were recitations of evidence making it unclear on appellate review what the court determined about the evidence. Mother successfully challenged as irrelevant findings regarding post-petition evidence of Mother's mental state and substance use and Mother's refusal to provide her source for substances at the adjudication hearing. The court also disregarded the dispositional finding relating to the best interest of the juvenile in not returning home (though the court notes that including this finding and related conclusion in the adjudication order was not error since the finding supports the interim

dispositional ruling). The finding that the court had no knowledge of what "spore to spore" meant regarding why the child would test positive for substances was disregarded as unsupported due to both Mother and social worker testifying to the term's meaning.

- The findings are insufficient to support the conclusion that the juvenile was neglected because there are no evidentiary findings showing the juvenile suffered any physical, mental, or emotional impairment, or that there was a substantial risk of impairment, though evidence in the record could support such findings. Findings clearly establish Mother's prior history with DSS, Mother's obstinance in working with DSS, Mother's threatening behavior, and that there was a discussion with DSS of safety concerns in the home. However, DSS found in its previous assessments that the juvenile was healthy and well cared for by partner's mother in the home. The court made no findings about whether drugs were used in the presence of the juvenile or that the juvenile was exposed to substances, the impact of Mother's violation of the safety plan on the juvenile, the risk of harm to the juvenile of Mother's threatening behavior toward the relative, or that the home was unsuitable or unsafe for the juvenile.
- Having vacated and remanded the adjudication order on which the disposition order is based, the disposition order is also vacated and remanded.

Dependency

In re A.H., ___ N.C. ___ (March 22, 2024)

Held: Affirmed in part; reversed in part, remanded (per curiam)

- Facts and procedural history: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Father appealed the adjudication and subsequent disposition order placing the child with DSS. The court of appeals determined DSS failed to present evidence that Father did not have alternative child care arrangements, ultimately reversing the trial court's dependency adjudication. A summary of the court of appeals decision on the issue of dependency in this case can be found here. There was also a separate conclusion of neglect that was reversed by the court of appeals. This opinion also reverses and remands the court of appeals decision.
- The supreme court affirmed the court of appeals decision reversing the trial court's adjudication of the child as dependent, 289 N.C. App. 501 (2023), without precedential value as an equally divided court considered and decided the case with one justice abstaining.

Visitation

Findings; Minimum Outline; Denial

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: An infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the

child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appeals. This summary discusses Father's argument that the court failed to address his visitation rights.

- G.S. 7B-905.1(a) requires the court to provide for visitation that is in the best interest of the child consistent with the child's health and safety in an order that continues the child's placement outside of the home. The court must outline a visitation plan that includes the time, place, and conditions under which visitation may be exercised. Visitation may be denied if the court finds that "*the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation*." Sl. Op. at 9-10 (emphasis in original) (citation omitted).
- The order includes no findings that father forfeited his visitation rights or that denying visits was in the child's best interests. As a result, the court was required to order the minimum outline of visits. The visitation portion of the order is remanded for entry of an order that clearly defines Father's visitation. Based on its holding, Father's alternative argument that the trial court effectively denied his visitation and failed to make the required findings as to forfeiture of the right or the children's best interests was not addressed.

Delegation of Authority; Minimum Outline

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under ICWA. The child was adjudicated dependent. At initial disposition, custody was ordered to DSS with Mother granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. At the last permanency planning hearing, both DSS and EBCI submitted reports that recommended changing the primary plan to guardianship. The court ordered guardianship to the child's guardians, waived further permanency planning hearings, and provided for visitation at the discretion of the guardians. Mother appeals. This summary focuses on Mother's challenge to the visitation portion of the order.
- G.S. 7B-905.1 requires an order that continues the child's placement outside of the home to address visitation, and if visitation is ordered, to specify the minimum frequency and length of visits, and whether the visits must be supervised.
- The court improperly delegated its judicial function in determining visitation conditions by ordering that the child's visitation with Mother be at the discretion of the guardians and failing to provide the frequency, length, or supervision conditions for visitation.

Initial Disposition

Court Authority to Order Case Plan; No Contact between Parents

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: Infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appealed. This summary addresses Father's argument that the court exceeded its authority to order Father to have no contact with Mother.
- Dispositional orders are reviewed for an abuse of discretion.
- G.S. 7B-904(d1)(3) authorizes the court to order the parent of a child who has been adjudicated abused, neglected, or dependent to "[t]ake appropriate steps to remedy the conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.]" Sl. Op. at 11, *quoting* G.S. 7B-904(d1)(3). The court has the "'authority to order a parent to take any step reasonably required to alleviate any condition that *directly or indirectly* contributed to causing the juvenile's removal from the parental home,' *In re B.O.A.*, 372 N.C. 372, 381 (2019) (emphasis added), as long as there is 'a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication.' " *In re T.N.G.*, 244 N.C. App. 398, 408 (2015) (citation omitted). Sl. Op. at 11.
- The directive that Father have no contact with Mother was within the authority of the court under G.S. 7B-904(d1)(3) and was not an abuse of discretion. Several adjudicatory findings of fact describe domestic violence between Mother and Father, including initial reports to DSS about the family, a Military Protective Order that barred Father from contacting Mother or the child, and Mother's disclosures to DSS about Father's rough handling of the child and refusal to let the Mother take the child during those times. Father and Mother's domestic violence was a condition that was found to have contributed to the child's adjudication.
- Dissent: The majority's interpretation of G.S. 7B-904(d1)(3) is too expansive to protect Father's parental and marital rights. The legislature did not intend and the plain language of

G.S. 7B-904(d1)(3) does not allow the court sua sponte to enter a de facto domestic violence protective order and circumvent the statutory procedures in G.S. Chapters 50B and 50C.

Findings of Aggravating Circumstances; Reunification Efforts Not Required

In re B.L.M.-S., ___ N.C. App. ___ (May 21, 2024)

Held: Affirmed in Part, Remanded

Dissent in part: Tyson, J.

- Facts: Infant was adjudicated abused and neglected based on findings of two broken ribs that occurred on separate occasions while in the sole care of Father and Mother, Father's frequent shaking and squeezing the child when the child was crying, and the child's exposure to domestic violence between Father and Mother. The initial disposition order placed the child with their maternal grandparents. The order concluded that reasonable efforts to reunify the child with Father were not required based on aggravating circumstances of chronic physical abuse of the child, ordered Father not to contact Mother, and ordered supervised visitation for Mother with the child. Father appealed. This summary addresses Father's arguments that the court's findings were insufficient to conclude that reunification efforts were not required, and that the court misapprehended the law by including in the decretal portion of the order that reunification efforts with the child are "hereby ceased."
- Dispositional orders are reviewed for an abuse of discretion. "[T]he extent to which [a] trial court exercised its discretion on the basis of an incorrect understanding of the law raises an issue of law subject to de novo review on appeal." Sl. Op. at 12 (citation omitted).
- A court may direct at initial disposition that reasonable efforts toward reunification are not required upon a " 'determination that aggravating circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of,' *inter alia*, 'chronic physical abuse.' " Sl. Op. at 5, *quoting* G.S. 7B-901(c)(1)(b). The court must make written findings that explain the aggravating circumstances, not a " 'mere declaration' that such circumstances exist[.]" Sl. Op. at 6 (citation omitted). G.S. 7B-901(c) "does *not* authorize a court to order DSS to cease reunification efforts with a respondent." Sl. Op. at 13 (referencing S.L. 2015-135, sec. 7, 9, amending G.S. 7B-901(c) to remove the phrase "or shall cease"). The court used the proper statutory language in its finding and conclusion of law to order that reunification efforts are not required. The use of "hereby ceased" in the decretal portion of the order is "merely an instance of imprecise language[.]" Sl. Op. at 13. The order is remanded to clarify the wording to conform to the statutory language and the court's proper conclusion of law as to reunification efforts with Father.
  - *Author's Note*: Although this opinion addresses amendments made to the statutory language regarding "ceasing reunification efforts", it does not address the common practice of using that term when DSS is relieved of making reunification efforts at initial disposition or the case law that holds using the exact statutory language is not required so long as the substance of the statute is addressed.
- Findings support the conclusion that Father committed, encouraged or allowed the chronic physical abuse of the child. Findings supported by Father's and social worker's testimony include (1) Father on multiple occasions held the child tightly and squeezed and shook the child with force equal to that used to operate a vice grip and (2) the child suffered two rib

fractures on two different occasions. The court rejects Father's arguments that this pattern of abuse over the child's two months of life is not chronic, adding that Father's focus on the child's two rib fractures in two months misses the importance of his own admissions to the described pattern of physical abuse of the child. The court also dismisses Father's argument that DSS did not ask the court to find that reunification efforts with him were not required, as dispositional choices are left to the discretion of the trial court and the court is not required to adopt DSS's recommendations. The written findings of aggravating circumstances support the conclusion that reunification efforts with Father were not required. Father's argument is overruled.

- Dissent: The conclusion that reunification efforts with Father are not required is not supported by supported written findings.

Permanent Plan

Guardianship; Waive Constitutional Parental Rights

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under ICWA. The child was adjudicated dependent. At initial disposition, custody was ordered to DSS with Mother granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. DSS and EBCI submitted reports that recommended changing the child's primary plan to guardianship. The court ordered guardianship as the primary plan, ordered guardianship to the child's guardians, and provided for no further permanency planning hearings. Mother appealed, raising several issues. This summary focuses on Mother's arguments that the court failed to conclude she was unfit or acted inconsistently with her constitutionally protected status as a parent and that she did not have the opportunity to raise the issue at the hearing, or alternatively that her testimony and arguments requesting reunification preserved this issue.
- "Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." Sl. Op. at 11 (citation omitted). "Prior to granting guardianship of a child to a nonparent, a district court must clearly address whether the respondent is unfit as a parent or if his conduct has been inconsistent with his constitutionally protected status as a parent." Sl. Op. at 11 (citation omitted). A reviewing court must determine whether there is clear and convincing evidence to support the court's conclusion that the natural parent acted inconsistently with their constitutionally protected rights. The conclusion of law is reviewed de novo.
- Failure to raise the constitutional argument before the trial court waives the right to raise the issue on appeal. The supreme court has recently held that "where the respondent-parent has notice prior to the hearing that the trial court will be considering a recommendation to grant guardianship of the child, the respondent-parent must make a specific constitutional

argument regarding her parental rights before the trial court to preserve a constitutional argument on appeal." Sl. Op. at 15 (citing *In re J.N.*, 381 N.C. 131, 133-34 (2022); *In re J.M.*, 384 N.C. 584, 603-04 (2023)).

- Mother failed to preserve her argument as to her constitutionally protected status as a parent. Both DSS and EBCI presented summaries and reports prior to the hearing which recommended changing the child's primary plan to guardianship. At the hearing, Mother testified extensively, presented witnesses, and requested reunification. She had the opportunity to raise her constitutional argument but did not argue that guardianship would be improper on constitutional grounds or that she was fit and a proper parent, despite having notice of the recommendations DSS and EBCI submitted to the court.

ICPC; Relative Placement; Guardianship

In re K.B., ___ N.C. ___ (May 23, 2024)

Held: Affirmed

- Facts and procedural history: Mother appeals from the holding of the court of appeals affirming the trial court's order of guardianship of her three children to their great aunt prior to the completion of an ICPC home study of their grandmother, a Georgia resident. The three children were adjudicated neglected and dependent and were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Over the three years where the court held the initial disposition and permanency planning hearings, the children's placement continued to be with their great aunt. During this 3-year period, the court ordered an ICPC home study for the out-of-state grandmother so she could be considered for placement. Ultimately, the court granted guardianship of the children to the great aunt with whom the children had resided for years despite the ICPC home study not being completed for the grandmother.
- When a juvenile is adjudicated abused, neglected, or dependent and removal from the custody of their parents is determined to be in the child's best interest, G.S. 7B-903(a1) requires the court place the child with a relative if the court finds the relative "is willing and able to provide proper care and supervision in a safe home" and the placement is not contrary to the best interests of the child. Sl. Op. at 8, *quoting* G.S. 7B-903(a1). There is "no statutory preference between different relatives, even out-of-state relatives." Sl. Op. at 1. However, the court is required to consider whether keeping children in their community of residence is in their best interest. G.S. 7B-903(a1) requires that placement of children with relatives outside of North Carolina comply with the requirements of the Interstate Compact on the Placement of Children (ICPC), including completion of a home study by the receiving state approving the placement before a child can be placed with an out-of-state relative. The supreme court addresses prior court of appeals opinions and "make[s] clear that the ICPC does apply to an order granting guardianship to out-of-state grandparents." Sl. Op. at 12. *See In re J.D.M.-J.*, 260 N.C. App. 56 (2018) and cases cited therein.
- A timely evaluation of potential placements is "critical to expedite the permanency and stability for a child and to provide the court with the thorough information needed to evaluate whether the placement is in the best interest of the child." Sl. Op. at 2. DSS was ordered to complete an ICPC home study and failed to timely do so. The trial court has

discretion to hold parties accountable, including "requiring DSS to show cause for repeatedly ignoring a court order." Sl. Op. at 10.

- The determination of a child's best interests and ultimate placement decision lies with the trial court, notwithstanding the recommendations of DSS. "[W]hen a trial court considers a dispositional decision between relatives, that court is not required to wait on a completed ICPC home study to rule out an out-of-state relative when the trial court determines that an in-state relative can provide proper care and supervision in a safe home and the court is able to determine it is in the best interest of the child to be placed with that in-state relative before completion of that home study." Sl. Op. at 13. "The analysis of whether the trial court erred in placing a child with an in-state relative before the completion of a home study on an alternative relative is performed under an abuse of discretion standard of review." Sl. Op. at 7.
- The trial court's discretionary decision to place the children with their great aunt prior to the completion of the ordered ICPC home study was not an abuse of discretion. The trial court's findings regarding the great aunt's ability to care for and support the children support the court's conclusion that guardianship with the great aunt is in the best interest of the children. Findings include that the children had lived with the great aunt for three years and bonded with her; great aunt provided a safe, loving and stable home for the children; great aunt supported the children's educational and developmental needs; and great aunt had supported the children during that time with the help of family. Findings also show that the grandmother had not formed a bond with the children due to infrequent contact, and grandmother already had three other minor children living in the home.

ICWA; Standard of Proof; Waive Further Hearings

In re J.O., ___ N.C. App. ___ (May 7, 2024)

Held: Vacated and Remanded

- Facts: This case involves a child who is a member of the Eastern Band of Cherokee Indians (EBCI) and is an Indian child under the Indian Child Welfare Act (ICWA). The child was adjudicated dependent. At initial disposition, custody was ordered to DSS and Mother was granted unsupervised weekly visitation. Recurring issues heard at permanency planning hearings centered around Mother's failure to make progress in improving the safety and cleanliness concerns for her housing and vehicle, and Mother allowing her older son, who has a history of violent and inappropriate behavior, to have contact with the child despite the court ordering no contact. DSS and EBCI submitted reports that recommended changing the child's primary plan to guardianship. The court changed the child's primary plan to guardianship, granted guardianship to the child's guardians, and provided for no further permanency planning hearings for the child. Mother appeals the order raising several issues. This summary addresses mother's argument that the court failed to satisfy the higher

standard of proof for findings required by the ICWA prior to placing an Indian child in foster care.

- A de novo standard of review applies when determining whether the court followed a statutory mandate. ICWA is a federal law that establishes minimum standards the court must follow including any higher standard of protection than that provided by state law.
- ICWA requires a determination that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before foster placement may be ordered. The determination must be supported by clear and convincing evidence and include testimony of qualified expert witnesses. 25 U.S.C. § 1912(e).
- "The findings in a disposition order or permanency planning order may be based upon a preponderance of the evidence, *unless* the order waives additional hearings required by [G.S.] 7B-906.1 and if so, the trial court must make certain findings by 'clear, cogent, and convincing evidence.' " Sl. Op. at 8. G.S. 7B-906.1(n) allows waiver of permanency planning hearings if the court finds by clear, cogent, and convincing evidence, each of the five enumerated factors regarding the child's placement, best interests, and rights of the parties.
- The permanency planning order does not satisfy the standard of proof or written findings required by G.S. 7B-906.1(n). The order effectively waived future permanency planning hearings by stating "no further review shall be scheduled at this time[,]" thereby requiring that each of the five findings be made and supported by clear and convincing evidence pursuant to G.S. 7B-906.1(n). The court did not state the standard of proof applied by the court in its written order or in open court, other than the juvenile's best interest stated in one finding, and it is unclear if each of the five factors were addressed as required by G.S. 7B-906.1(n).The court of appeals did not review whether the ICWA standard of proof and findings were met since the order was found to not satisfy the requirements of G.S. 7B-906.1(n). The order is vacated and remanded for further proceedings, including holding a new hearing and entering a new order that satisfies both NC statutory and ICWA requirements.

Reasonable Efforts

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected, based on findings that one of the children was sexually abused by their Father while in the custody of their paternal Grandmother. The children were placed in DSS custody and Grandmother was ordered monthly visitation. Findings in permanency planning orders included Grandmother denying Father's sexual abuse of the child. Grandmother was ordered to comply with several components of her case plan, including receiving a new psychological evaluation and cooperating with the recommendations, which included Dialectical Behavioral Therapy (DBT). At the permanency planning hearing from which this appeal arises, Grandmother testified that she continued to believe her son had not harmed the child and that she was unable to pay for the ordered DBT therapy recommended by her psychological evaluation despite DSS offering payment assistance. Grandmother later attended two intake sessions with a therapist that

determined further services were not needed based solely on information provided by Grandmother. The court found Grandmother had failed to make progress within a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated reunification and visitation. Grandmother appeals. This summary discusses Grandmother's argument that DSS did not make reasonable efforts towards reunification.

- A reviewing court must determine whether findings support the conclusion that DSS has made reasonable efforts to eliminate the need for removal.
- G.S. 7B-906.2(c) requires the court to make findings and a conclusion at each permanency planning hearing as to whether DSS's reunification efforts were reasonable. Reasonable efforts is defined as the "diligent use of preventive or reunification services by a department of social services 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. at 28, *quoting* G.S. 7B-101(18). Reasonable efforts do not require exhaustive efforts.
- Findings support the conclusion that DSS made reasonable efforts toward reunification with Grandmother. Findings show DSS assessed the children's needs; counseled and supported the family; met with Grandmother to develop the case plan and visitation arrangements; provided monetary assistance for the children's care; and made referrals to service providers. Although failing to provide court-ordered visitation could impact reasonable efforts, here DSS provided the minimum visitation that was ordered even though it exercised its discretion granted by the court in declining to expand visitation due to concerns about Grandmother's behavior. The court also rejects Grandmother's argument that DSS's efforts to assist Grandmother in obtaining affordable DBT were insufficient, as findings show DSS contacted multiple DBT providers and offered to share the cost of services with Grandmother, which Grandmother rejected.

Eliminate Reunification; Findings of Fact; Burden of Proof

In re M.G.B., ___ N.C. App. ___ (May 7, 2024)

Held: Affirmed

- Facts: This case involves three siblings, two of whom were adjudicated neglected and one who was adjudicated abused and neglected, based on findings that one of the children was sexually abused by their Father while in the custody of their paternal Grandmother. During the dispositional stage, the children were placed in DSS custody and Grandmother was ordered monthly visitation. Grandmother denied father sexually abused his daughter despite evidence of both testing positive for gonorrhea. The court ordered Grandmother to attend classes or support groups for parenting a child who was sexually abused, which is separate from the sex abuse class she completed on her own; receive a new psychological evaluation where she shares information about the court's findings of the child's sexual abuse with the evaluator, and cooperate with the recommendations of the evaluations, which included Dialectical Behavioral Therapy (DBT). At the permanency planning hearing from which this appeal arises, the court found Grandmother had failed to make progress within a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated reunification and visitation.

Grandmother appeals on several issues. This summary addresses grandmother's challenge to the court's findings and the elimination of reunification and her argument that the trial court misapprehended the law by applying the neglect TPR ground to a finding and switched the burden of proof to her.

- Permanency planning orders are reviewed to examine whether the findings are supported by competent evidence and whether the findings support the conclusions of law. "The trial court's dispositional choices – including the decision to eliminate reunification from the permanent plan – are reviewed for abuse of discretion." Sl. Op. at 10-11 (citation omitted).
- The trial court must adopt concurrent primary and secondary permanent plans determined to be in the best interest of the child at each permanency planning hearing. G.S. 7B-906.2(a). "Accordingly, neither the parent nor [DSS] bears the burden of proof . . ." Sl. Op. at 26 (citation omitted). "Reunification must be the primary or secondary plan unless the permanent plan has been achieved or the trial court . . . as is this case, (3) makes written findings in the permanency planning order that 'reunification efforts would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " Sl. Op. at 9, *quoting* G.S. 7B-906.2(b). In finding that reunification efforts would be unsuccessful or inconsistent, G.S. 7B-906.2(d) lists four required written findings that must also be included in the court's order. Appellate courts have held that these findings do not have to "track the statutory language verbatim, but they 'must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.' " Sl. Op. at 9-10 (quoting *In re J.M.*, 385 N.C. 584, 594 (2023)). "The possibility that a neglected juvenile faces a substantial risk of future neglect upon reunification is a relevant consideration in determining whether reunification is appropriate." Sl. Op. at 24.
- Each of the five categories of challenged findings are supported by the evidence, including testimony of the DSS social worker, DSS supervisor, and Grandmother. Supported findings include Grandmother's ability and failure to obtain DBT; continued relationship with and priority to Father; failure to complete further ordered sex abuse parenting classes (though the finding that she completed no sex abuse education is stricken as she completed the course ordered at initial disposition); failure to acknowledge Father sexually abused the child; and inappropriate behavior at visits in violation of court orders.
- The court properly addressed the required considerations of G.S. 7B-906.2(d) to end reunification efforts, including that Grandmother remained available to the court, was not cooperating with DSS or making progress with the case plan, and was acting inconsistently with the safety of the children. The court did not err in considering the possibility of future neglect when determining the best interests of the children, rejecting Grandmother's argument that the court applied standards relevant to the termination of parental rights. "[J]ust because the likelihood of future neglect or abuse is relevant to the termination of parental rights does not render it *irrelevant* to a permanency planning ruling, nor does the trial court's consideration of such imply that the trial court is applying an improper standard to its analysis." Sl. Op. at 24 (emphasis in original).
- The court did not impermissibly place the burden of proof on Grandmother. Findings address the history of the case and Grandmother's progress (or lack thereof) in creating a safe

environment for the children, which support the court's conclusion that Grandmother has not made sufficient progress such that reunification is in the children's best interest.

- Findings support the court's conclusion that Grandmother failed to make reasonable progress; the court did not abuse its discretion in ordering that reunification efforts be ceased. "Whatever progress Grandmother has made on her case plan has not been sufficient to allow her to provide a safe home for the children," most significantly due to her refusal to "understand or admit the danger Father represents or the harm he has already caused." Sl. Op. at 30. "This standing alone could be enough to support the trial court's order ceasing reunification." Sl. Op. at 29. Additionally, although Grandmother engaged in largely positive visits with the children, maintained her pain management therapy sessions, completed one parenting course, and completed the DBT evaluation, she failed to obtain DBT and sexual assault education as ordered and recommended by psychological evaluations.

Terminate Jurisdiction

Rules 59-60; Writ of Certiorari

In re K.C., ___ N.C. App. ___ (February 6, 2024)

Held: Vacated

- Facts: DSS filed juvenile petitions alleging neglect of two children based on reports of domestic violence and improper discipline in the home. At the adjudication hearing DSS presented evidence including testimony of the social worker and child's forensic interviewer, and an hour-long videotape of the forensic interview with the older child. In the video, the child recounted arguments between Mother and Father in the home, injuries to Mother, and Father's discipline of the younger sibling. Father's testimony denied the events described in the video, and Mother did not testify. The court found DSS failed to provide clear, cogent and convincing evidence that the children were neglected, ordered the children reunited with their parents, and filed a written order dismissing the petitions. DSS filed a Rule 59-60 motion requesting that the trial court amend or grant relief from its judgment because of the difficulty in hearing the video. At the hearing on the motion, the court stated it had difficulty hearing the video at the adjudication hearing and requested a transcript of the video over Mother and Father's objections. The court granted the Rule 59-60 motion, reversed its earlier ruling, and adjudicated the children neglected, stating that the transcript of the video was clearer and more understandable than when the video was played at the adjudicatory hearing. After the adjudication and later initial dispositional orders were entered, Mother and Father appealed both orders for lack of subject-matter jurisdiction. Mother and father filed petitions for writ of certiorari to appeal the adjudication and dispositional orders since they argued the orders are void for lack of subject matter jurisdiction.
- Whether a trial court has subject matter jurisdiction is a question of law reviewed de novo. "Challenges to subject matter jurisdiction may be raised at any stage of proceedings, including for the first time" on appeal. Sl. Op. at 14 (citation omitted).
- "A judgment is void, when there is want of jurisdiction by the court over subject matter jurisdiction of the action, and a void judgment may be disregarded and treated as a nullity

everywhere. . . . A void judgment is, in legal effect, no judgment. . . . [A]ll proceedings founded upon it are worthless." Sl. Op. at 11 (citation omitted).

- After a court obtains jurisdiction by the filing of a petition, jurisdiction continues "*until terminated by order of the court* or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-201(a)). Once jurisdiction is terminated, "*the court thereafter shall not modify or enforce any order previously entered in the case*. . . *The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed*[.]" Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-201(b)). "If the court finds that the allegations have not been proven, the court *shall dismiss the petition with prejudice*, and if the juvenile is in nonsecure custody, the juvenile *shall be released to the parent, guardian, custodian, or caretaker*." Sl. Op. at 15 (emphasis in original) (quoting G.S. 7B-807(a)).
- The use of Rules 59 and 60 are not applicable when the court terminates its jurisdiction. The court did not have subject matter jurisdiction to grant the Rule 59-60 motion. The court's jurisdiction terminated when it entered its order dismissing the juvenile petitions for failure to prove the allegations of neglect contained in the petitions; any orders entered thereafter are *void ab initio* for want of jurisdiction (citing *In re T.R.P.*, 360 N.C. 588 (2006)). The court had several opportunities to "consider the allegations, weigh the credibility, and make findings of fact" regarding the videotape evidence at the initial adjudication hearing. The court's oral ruling demonstrates it weighed the child's credibility in making its adjudicatory findings, stating that DSS could have offered Mother's medical records or Father's criminal history to support the evidence presented. After concluding DSS did not prove its case by clear, cogent and convincing evidence, the court ordered the children reunited with Mother and Father and entered its order dismissing the petitions as required by G.S. 7B-807(a), thereby terminating jurisdiction under G.S. 7B-201(a). Rule 59-60 motions "cannot operate as a method to claw back jurisdiction and reconsider the evidence" and the court "cannot swap its initial adjudication decision after dismissal of the petition." Sl. Op. at 17-18.
- The opinion notes that DSS could have appealed the initial adjudication decision pursuant to G.S. 7B-1001(a)(2) as an involuntary dismissal of a petition, and that a Rule 59-60 motion cannot "be used as a substitute for an appeal." Sl. Op. at 17 n.3 (citation omitted).
- Because the orders are void, Mother and Father's notices of appeal from either void order are ineffective.
- G.S. 7A-32 authorizes the appellate courts to issue a writ of certiorari "in aid of its own jurisdiction . . . " pursuant to practice and procedure provided by statute or rule of the Supreme Court, or common law where those are silent. Sl. Op. at 12 (quoting G.S. 7A-32(c)). Rule 21 of the Rules of Appellate Procedure addresses writs of certiorari; however, the supreme court has held that "the decision to issue a writ is governed solely by statute and by common law." Sl. Op. at 12 (citation omitted). Rule 21 does not apply in this case because Mother and Father seek to appeal void orders, which are not addressed in Rule 21; therefore, common law applies.
- Appellate courts use a "two-factor test to determine whether a writ of certiorari should issue: (1) 'if the petitioner can show merit or that error was probably committed below' and

(2) 'if there are extraordinary circumstances to justify it,' including 'a showing of substantial harm.' Sl. Op. at 12-13 (citations omitted).

- PWC granted. Mother and Father's argument that the trial court erred has merit because the trial court did not have jurisdiction to enter orders in the matter after dismissing the juvenile petitions, and the parties have shown extraordinary circumstances because of the substantial harm from separation of a family due to a void order and lack of finality in the juvenile case.

Appeal

Appealable Order

In re R.G., ___ N.C. App. ___ (March 5, 2024)

Held: Appeal Dismissed

- Facts: The juvenile was adjudicated abused and neglected based on allegations of sexual abuse by a caretaker living with Mother and the child. The court found aggravating circumstances existed at initial disposition and ordered the cessation of reunification efforts with Mother after finding Mother was aware of the allegations of sexual abuse, did not act to protect the child, and had not taken any action to change the circumstances which led to the child's removal from the home. At the first permanency planning hearing, the court ordered the child's primary permanent plan of guardianship and concurrent secondary plans of custody with a relative and reunification with Father. At the second permanency planning hearing, the court awarded guardianship to the maternal grandmother, with whom the child was placed starting at nonsecure custody. Mother appeals both permanency planning orders; the first for eliminated reunification and the second for ordering guardianship. Mother's appeals were consolidated. The GAL sought to dismiss mother's appeal of the first permanency order, arguing it is not an order that eliminates reunification because the initial dispositional order did that when it ceased reunification efforts with mother.
- G.S. 7B-1001(a)(5) allows a parent to appeal "[a]n order under G.S. 7B-906.2(b) eliminating reunification. . . as a permanent plan" for the child. Sl. Op. at 7.
- Mother has no right of appeal from the initial permanency planning order under G.S. 7B-1001(a)(5) because the order did not eliminate reunification as a permanent plan for the child. The court made findings of aggravating circumstances under G.S. 7B-901(c)(1) and ceased reunification efforts with Mother in the initial disposition order. Therefore "reunification was excluded and omitted from the permanent plans . . . beginning at disposition and was never eliminated as a permanent plan at the first permanency planning hearing." Sl. Op. at 12. Mother had a right to appeal the adjudication and initial dispositional order under G.S. 7B-1001(a)(3). Allowing mother to appeal the initial dispositional order and first permanency planning order gives mother a second chance to appeal multiple orders raising the same argument.
- Based on statutory changes to G.S. 7B-906.2(b) made in 2019 and 2021, it is clear that the Legislature has clarified "that reunification efforts and reunification as a permanent plan are

not distinct, decoupled concepts; . . . [and] that the cessation of reunification efforts also eliminates reunification as permanent plan." Sl. Op. at 11. Contrary to the holding in *In re C.P.*, 258 N.C. App. 241 (2018), these legislative changes do not require reunification be an initial permanent plan.

- G.S. 7B-906.2(b) authorizes reunification to be excluded as a permanent plan if findings were made under G.S. 7B-901(c) at initial disposition. G.S. 7B-901(c) authorizes a court to cease reunification efforts at initial disposition if the court makes written findings that aggravating circumstances exist. Reading G.S. 7B-906.2 and 7B-901(c) together, if findings are made under G.S. 7B-901(c) trial courts may "omit reunification from the permanent plans for the juvenile" which occurred at disposition. Sl. Op. at 12.

Standing; Parentage

In re L.C., ___ N.C. App. ___ (Apr. 16, 2024)

Held: Vacated and Remanded; Stay Granted 5/7/2024

- Facts: Juvenile was adjudicated neglected based on a history of substance use by Mother and Mother's live-in female partner who is a caretaker to the juvenile. The petition alleged Mother's partner ("Caretaker") was identified as the juvenile's father on the juvenile's birth certificate, though the birth certificate was not presented at the hearings or in the record on appeal. The trial court treated Caretaker as the juvenile's legal father throughout the case, even appointing Caretaker counsel as a parent. Caretaker and Mother appeal the adjudication and disposition. This summary discusses the dismissal of the partner's appeal due to lack of standing. Mother's appeal proceeded and is summarized separately.
- "Standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." Sl. Op. at 6 (citation omitted). The appealing party invoking the court's jurisdiction has the burden of establishing standing.
- G.S. 7B-1001(a)(3) provides for the direct appeal of any initial disposition order and the adjudication order on which it is based. G.S. 7B-1002 limits the right to appeal under G.S. 7B-1001 to the juvenile; the juvenile's guardian ad litem (GAL); DSS; a nonprevailing parent, guardian, or custodian; or party that sought but failed to obtain a termination of parental rights.
- "[A] 'father' is the male parent of a child, whether as a biological parent, by adoption, by legitimation, or by adjudication of paternity." Sl. Op. at 9 (quoting the court's recent opinion, *Green v. Carter*, ___ N.C. App. ___ (March 19, 2024); interpreting the meaning of the terms "father" and "parent" in the context of G.S. Chapter 50). The court notes that the terms "father" and "parent" as used in G.S. Chapter 50 are indistinguishable from the terms as used in G.S. Chapter 7B, which does not define the terms.
- G.S. 130A-101 allows a mother who is unmarried at all times from conception to the child's birth and the person believed to be the child's natural father to execute an affidavit of parentage in order to list the declaring father on the child's birth certificate, creating a rebuttable presumption of paternity. "But there can be no presumption, rebuttable or

otherwise, of paternity for a woman." Sl. Op. at 12. Paternity does not apply to a woman; maternity does.

- In this situation, Caretaker would not be able to adopt the juvenile under North Carolina law and become a parent unless Mother and any potential biological father's parental rights were terminated (citing *Boseman v. Jarrell*, 365 N.C. 537 (2010)).
- Despite treating Caretaker as the child's father (including appointing counsel which is only authorized for parents), "the trial court had no authority to create a new method of establishing paternity or Respondent-Caretaker's status as a parent, without compliance with North Carolina's statutes." Sl. Op. at 8. Mother's female partner cannot become a "father" under North Carolina law by listing her name on the juvenile's birth certificate. Even had Mother and her partner falsely declared the partner as the juvenile's natural father, Mother testified at the adjudication hearing that her partner is not the juvenile's biological father and identified a potential natural father of the juvenile.
- A caretaker is "any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting[,]" including an adult member of the juvenile's household or an adult entrusted with the juvenile's care. Sl. Op. at 8, *quoting* G.S. 7B-101(3).
- Respondent's status is that of a caretaker and not a father or parent of the juvenile. There is also no evidence in the record that Mother's partner was appointed as the juvenile's legal guardian or custodian. Therefore, Caretaker does not have standing to appeal the orders.

Termination of Parental Rights

Subject Matter Jurisdiction

G.S. 7B Jurisdiction

In re M.A.C. & S.X.C., ___ N.C. App. ___ (October 17, 2023)

Held: Affirmed

Dissent, Hampson, J.

- Facts: Mother appeals order terminating her parental rights to her two minor children on the ground that the trial court lacked subject matter jurisdiction under G.S. 7B-1101. Mother's two children resided with their paternal Grandparents and their Father pursuant to a consent order from August 2017 until their father's death in March 2019. Mother moved out of state following entry of the consent order and ceased contact with the children. Following their Father's death, the children continued to live exclusively with their Grandparents in Columbus County. The Grandparents filed verified petitions to terminate Mother's parental rights to the two children in June 2021, later amended in August 2021. The petitions alleged that the two children resided with the Grandparents in Columbus County and that each child was "present in" Harnett County (a different judicial district than Columbus County) at the time of the filing of the petitions. Mother filed unverified answers motioning to dismiss the petition for lack of personal jurisdiction, insufficiency of service of process, and failure to state a claim. At the TPR hearing, Mother's motions were denied and the court concluded

that grounds to terminate Mother's parental rights had been established and that termination was in the juvenile's best interests.

- Whether a trial court possesses subject-matter jurisdiction is reviewed de novo. "Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child." Sl. Op. at 4 (citation omitted). A court's subject-matter jurisdiction can be challenged "at any stage of the proceedings, even for the first time on appeal." Sl. Op. at 4 (citation omitted).
- "A verified pleading containing factual allegations that satisfy the statutory requirements for invoking the trial court's subject matter jurisdiction is sufficient to raise 'the prima facie presumption of rightful jurisdiction.' " Sl. Op. at 7. The party challenging the court's jurisdiction has the burden to rebut the "prima facie presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." Sl. Op. at 4 (citation omitted).
- G.S. 7B-1101 grants a trial court exclusive original jurisdiction over any petition or motion relating to termination of parental rights to any juvenile who resides in or is found in the district at the time of filing of the petition or motion. Binding precedent of the court of appeals has interpreted "found in" to mean "physically present in[.]" Sl. Op. at 10 (citation omitted).
- Grandparent-petitioners invoked the prima facie presumption of rightful jurisdiction upon filing verified TPR petitions containing factual allegations that included the children were present in Harnett County at the time the petitions were filed. The allegation of the children's presence is sufficient to satisfy the jurisdictional requirement that the children be "found in" the judicial district where the action was filed, Harnett County.
- Mother did not carry her burden to rebut the prima facie presumption of rightful jurisdiction. The only competent evidence in the record regarding the physical presence of the two children at the time of the filing of the petition is the verified TPR petitions. "The allegations of a verified juvenile petition that support the trial court's subject-matter jurisdiction, and which remain uncontested by competent evidence throughout the proceedings, may sufficiently determine the threshold issue of the court's jurisdiction." Sl. Op. at 12. Though Mother's filed answers denying that the two children were present in Harnett County at the time of the filing of the petition, Mother's answers were unverified and therefore not competent evidence and not considered by the court. It is immaterial that there is no statutory requirement that an answer be verified. Mother also failed to dispute the allegation at the TPR hearing.
- The court confines this holding "to the sole issue of the sufficiency of competent record evidence to support the trial court's conclusion that it possessed subject-matter jurisdiction." Sl. Op. at 12.
- Dissent: The presumption of rightful jurisdiction only applies when it is not inconsistent with the record. In this case, Mother's answer denied the jurisdictional allegations in the petitions that the children were present in Harnett County at the time of the filing of the petitions. Beyond the "conclusory allegations in the petitions," the Grandparent-petitioners did not present any evidence to support the court's finding that the children were found in Harnett County at the time of the filing of the petitions. The record contains no evidence to support

the finding that the children were present in Harnett County when the petition was filed such that the court lacked subject matter jurisdiction.

Appointment of Counsel

Forfeiture of Counsel

In re D.T.P., ___ N.C. App. ___ (November 7, 2023)

Held: Affirmed

- Facts: Mother and Father appeal from orders terminating their parental rights, challenging the trial court's conclusion that each parent forfeited their right to court-appointed counsel requiring the parents to appear pro se at the TPR hearing. During the period between DSS filing neglect petitions in 2017 and 2018, through to the TPR in 2022, Father had five and Mother had six different court appointed attorneys. Mother and Father filed invalid appeals to the Court of Appeals and the U.S. Supreme Court. Mother and father used the procedure of having their attorneys withdraw right before the TPR hearing in order to obtain a continuance. Together, acting pro se, mother and father filed a civil action against their appointed counsel while the TPR proceedings were pending, resulting in a motion to withdraw. In the TPR order, the trial court made the above findings and concluded the parents' conduct was egregious, dilatory, and abusive; undermined the purposes of their right to counsel by making their representation impossible; and prevented the TPR proceedings from timely occurring.
- "A trial court's conclusion that a parent waived or forfeited [their] statutory right to counsel in a termination of parental rights proceeding is a question of law … reviewed de novo." Sl. Op. at 6 (citation omitted). A court's ruling is reviewed on appeal to determine whether the trial court's findings are supported by competent evidence, and if so, whether those findings support its conclusion that 'respondent parents each separately and together forfeited their right to court appointed counsel by their deliberate acts' ". Sl Op. at 7 (citation omitted).
- G.S. 7B-1101.1 provides the parent in a termination of parental rights proceeding the right to counsel, and appointed counsel in cases of indigency, unless the parent knowingly and voluntarily waives their right. G.S. 7B-1101.1(a), (a1).
- "The right to court-appointed counsel is not absolute; a party may forfeit the right 'by engaging in 'actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all' ' ". Sl. Op. at 8 (citations omitted). A conclusion of forfeiture is limited to when the parent's conduct is "egregious dilatory or abusive." Sl. Op. at 8 (citation omitted).
- The trial court's findings are supported by competent evidence, including Mother's invalid appeal from a memo of the trial court; Father's invalid appeal to the U.S. Supreme Court, which he testified that he did not expect the Court to accept; several motions and orders allowing for withdrawal and appointment of counsel; both Parents' testimony that they understood withdrawal and appointment of counsel would lead to a continuance; and the Parents' pro se civil suit against their appointed counsel and their acknowledgement of their intent to force the attorneys' withdrawal.

- The trial court's findings are sufficient to support the conclusion that the Parents' actions were egregious, dilatory, and abusive conduct that undermined the purpose of their right to appointed counsel, making their representation impossible to prevent the TPR trial from happening.

Adjudication

Neglect; Failure to Make Reasonable Progress; Findings

In re T.R.W., ___ N.C. App. ___ (May 21, 2024)

Held: Reversed

- Facts: Three children were adjudicated neglected and placed in foster care in 2015. Mother and Father were ordered to make progress on their case plan addressing hygiene and safety concerns in the home and the parents' ability to care for the children's medical needs. Following an unsuccessful trial placement the court ordered adoption be the children's primary plan with a secondary plan of reunification. Subsequently, father had a stroke and the parents moved to South Carolina to live with a relative to assist them with father's care. By February 2018 all three children were in foster placement together. The children's primary plan was changed to guardianship, which was ordered to the foster parents in January 2020. The court waived future hearings, relieved DSS of supervisory responsibility for the family, and released the GAL and parent attorneys. Mother and Father were granted quarterly visitation and weekly telephone calls with the children. In October 2021 the Guardians filed a petition to terminate the parental rights (TPR) of Mother and Father. The TPR was granted on the grounds of neglect and willfully leaving the children in placement outside the home for more than 12 months without making reasonable progress in correcting the conditions that led to the children's removal. Father appeals the TPR.
- G.S. 7B-1109 places the burden on the petitioner to prove the existence of one or more grounds for the termination of parental rights found in G.S. 7B-1111(a) by clear, cogent, and convincing evidence. The trial court must " 'take evidence [and] find the facts' necessary to support its determination of whether the alleged grounds for termination exist." Sl. Op. at 6, *quoting* G.S. 7B-1109(e). "The trial court's findings must be more than a recitation of allegations." Sl. Op. at 16 (quoting In re H.P., 278 N.C. App. 195, 204 (2021)).
- Appellate courts review a TPR adjudication order to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. Findings of fact that are effectively conclusions of law are treated as conclusions of law reviewable upon appeal. Conclusions of law are reviewed de novo.
- Several findings of fact are unsupported by clear, cogent, and convincing evidence. Other findings of fact are recitations of allegations in the petition of which the record is silent.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or creating an injurious environment to the child's welfare. When there has been a period of separation, there must be past neglect and

likelihood of future neglect by the parent. The court looks at the likelihood of future neglect based on circumstances between the past neglect and the time of the TPR hearing.
  - The remaining, supported findings do not support a conclusion that there is a likelihood Father will neglect the children in the future. The children have been removed from Father's custody for over six years with permanency achieved under guardianship for over four years at the time of the TPR hearing. Father was compliant with his case plan prior to the children achieving permanency, is employed, is in therapy, and benefitted from services. Father consistently calls the children weekly, pays child support, and sends the children gifts. South Carolina DSS determined the parents' home was safe and that they had custody of their youngest child.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves a child in foster care for 12 months and fails to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness is when a parent has an ability to make progress but is unwilling to make the effort. The trial court can consider evidence of progress up until the date of the TPR hearing.
  - The remaining, supported findings do not support the conclusion that Father failed to make reasonable progress under the circumstances to correct the conditions which led to the children's removal. Findings do not show current concerns about the children's hygiene, home conditions, and Father's ability to meet the children's medical needs, which were the conditions that led to the children's removal. Father complied with his case plan, even upon suffering a stroke, until permanency was achieved. Father has consistently called the children weekly in compliance with his ordered visitation; maintained employment; and provided child support and gifts for the children. This is reasonable progress under the circumstances of the guardianship for the children.
- The supreme court has held that "a permanency guardianship allows parents whose children cannot be returned to them to have a meaningful opportunity to maintain a legal relationship with their children." Sl. Op. at 31 (citations omitted).

Failure to Make Reasonable Progress

In re X.M., ___ N.C. App. ___ (March 19, 2024)

Held: Affirmed

- Facts: Four children were adjudicated neglected based on Mother's substance use issues and inability to provide a safe home. The court ordered primary custody of the children with Father, and five years later, the children were adjudicated neglected and dependent based on reports of Father leaving the children for long periods (e.g. six months) with a young relative incapable of caring for the children. The children were placed in DSS custody while both parents were ordered to comply with their case plans that included conditions of completing a clinical assessment and resulting service recommendations; drug testing; maintaining appropriate housing; and consistently visiting with the children. Mother made minimal efforts to comply with her case plan; testing positive on drug screens, refusing to tell DSS where she was (she worked in traveling carnivals); and rarely visiting with the children. DSS filed a TPR motion and the court terminated Mother's parental rights based on four grounds, one of which was willfully leaving the children in foster care for more than 12

months without showing reasonable progress to correct the circumstances of their removal. Mother appeals the ground.

- A trial court's adjudication of grounds to terminate parental rights are reviewed to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." Sl. Op. at 6 (citation omitted). An adjudication of a single ground is sufficient to support a TPR and the court need not address remaining grounds for termination once one ground is affirmed supporting the trial court's conclusion.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate parental rights after "the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." Sl. Op. at 7, *quoting* G.S. 7B-1111(a)(2). Termination under this ground requires a "two-step analysis" to determine both whether the parent willfully left the child in foster care for more than 12 months and the parent's failure to make reasonable progress in correcting the conditions that led to their child's removal. Sl. Op. at 7 (citation omitted). A parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . and will support a finding of lack of progress . . ." Sl. Op. at 8 (citation omitted). Noncompliance with case plan conditions are "relevant, 'provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.' " Sl. Op. at 8 (citation omitted).
- Mother failed to make reasonable progress in correcting the conditions that led to the children's removal, satisfying the second prong of the two-step analysis required under G.S.7B-1111(a)(2) at issue. At the time of the TPR hearing Mother had failed to address her substance use issues with only sporadic participation in substance use treatments and consistent refusal of drug tests or positive test results throughout the life of the case; had failed to create a safe home for the children as she had been homeless for months prior to the hearing and had refused cooperating with DSS regarding the children's living situation and her own whereabouts; and had failed to regularly visit the children while they were in DSS custody. Mother's "incapability to parent" was willful and would likely continue given Mother's substance use and failure to engage in meaningful treatment. Sl. Op. at 10. These components of Mother's case plan address the issues that contributed to the circumstances of the children's removal and support termination.

In re K.N., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Mother appeals the termination of her parental rights to two children based on the grounds of abuse, neglect, and willfully leaving the children in foster care for more than 12 months and her failure to make reasonable progress to correct the conditions which led to their removal. DSS became involved in 2018 and the children were ultimately adjudicated

abused, neglected, and dependent in 2019 based on circumstances involving Mother's inappropriate discipline resulting in criminal charges and convictions, and mother's mental health and failure to comply with in-home services. Throughout disposition, Mother failed to complete many of the ordered services and activities in her case plan, including demonstrating the ability to meet the basic and therapeutic needs of her children, including creating a stable home environment and engaging and cooperating in the treatment of one of the children's therapeutic treatment; and recommendations adopted by the court relating to her mental health and irrational behavior, including consistently taking her medication and participating in cognitive therapy and substance use treatment. DSS filed the TPR motion in June 2021, which was granted and entered on December 21, 2022. In its order, the court made findings based on witness testimony and from findings and conclusions in permanency planning orders.

- A trial court's adjudication of grounds to terminate parental rights are reviewed to determine "whether the findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law." Sl. Op. at 13 (citation omitted). Conclusions of law are reviewed de novo. Sl. Op. at 13.
- G.S. 7B-1111(a)(2) authorizes a trial court to terminate parental rights after "the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." Sl. Op. at 13, *quoting* G.S. 7B-1111(a)(2). Termination under this ground requires a "two-step analysis" to determine both whether the parent willfully left the child in foster care for more than 12 months and the parent's failure to make reasonable progress in correcting the conditions that led to their child's removal. Sl. Op. at 13 (citation omitted). A parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . and will support a finding of lack of progress . . ." Sl. Op. at 14 (citation omitted). Noncompliance with the case plan can only support termination if there is "a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." Sl. Op. at 14 (citation omitted).
- Mother challenges nine findings of fact as not supported by clear and convincing evidence, and further argues that several findings are improperly based upon judicially-noticed facts from prior court orders. The challenged findings were supported by the evidence, including witness testimony. "While a trial court 'may not rely *solely*' on judicially-noticed evidence from prior hearings or rely on evidence 'from prior dispositional orders, which have a lower standard of proof[,]' a trial court may use testimony from former hearings to corroborate additional testimony received at the current adjudicatory hearing." Sl. Op. at 12 (emphasis in original) (citation omitted). There must be some oral testimony at the TPR hearing and that testimony corroborated the judicially-noticed facts from the prior permanency planning orders resulting in the court making an independent determination of the new evidence presented at the TPR hearing.
- Unchallenged findings support that the children were placed in foster care from the time of their removal in November 2018 through the life of the case, satisfying the first requirement

of G.S. 7B-1111(a)(2) that the juvenile was willfully left in placement outside of the home for more than 12 months before the TPR motion was filed.

- Mother failed to make reasonable progress in correcting the conditions that led to the children's removal. Mother admitted she did not consistently take prescribed medication to manage her bipolar disorder and had ceased taking the medication altogether since becoming pregnant. Mother failed to create and maintain a stable living environment and to actively treat and manage her behaviors resulting from her mental health condition relating to violence and aggression toward her children, evidenced by Mother terminating her treatment with her therapist and bringing another child alleged to have participated in the over-discipline of the other two children back into her home. These components of her case plan address the issues that contributed to the circumstances of the children's removal from her home and Mother's noncompliance support termination.

In re A.N.R., ___ N.C. App. ___ (November 21, 2023)

Held: Affirmed

- Facts: Juvenile was placed in DSS custody upon filing of a dependency petition in September 2021. The juvenile was adjudicated in November 2021 and ordered to remain in DSS custody while Mother completed services and activities with the goal of reunification. DSS filed a TPR motion in October 2022 after Mother failed to complete many of the ordered services and activities, including supervised visits at DSS, substance abuse assessment and treatment, stable housing, and maintaining legal, verifiable income. The TPR was granted on the grounds of neglect and willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show reasonable progress had been made in correcting the conditions which led to removal of the juvenile. Mother appeals, challenging nine findings of fact relating to her progress as unsupported.
- A trial court's adjudication of grounds for termination are reviewed to determine "whether the trial court's findings of fact 'are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law' ". Sl. Op. at 6 (citation omitted). "[I]t is the responsibility of the trial court to weigh testimony, pass upon the credibility of witnesses, and draw reasonable inferences from the evidence[.]" Sl. Op. at 11 (citation omitted). Conclusions of law are reviewed de novo. Sl. Op. at 6.
- G.S. 7B-1111(a)(2) authorizes terminating a parent's rights when the parent willfully leaves the child in placement outside of the home for more than 12 months and fails to show that reasonable progress has been made in correcting the conditions which led to removal of the juvenile. The trial court may look to evidence up until the time of the TPR adjudicatory hearing to assess the parent's reasonable progress in correcting the conditions that led to the child's removal. Sl. Op. at 6. "A parent's 'prolonged inability to improve [their] situation,'. . . will support a finding of willfulness regardless of [their] good intentions[.]' " Sl. Op. at 6 (citation omitted).
- Unchallenged findings support that the child was placed in DSS custody in September 2021 and remained in DSS custody at the time the TPR motion was filed in October 2022, satisfying the first requirement of G.S. 7B-1111(a)(2) that the juvenile was willfully left in placement outside of the home for more than 12 months before the TPR motion was filed.

- Challenged findings, except the disregarded finding relating to the description of Mother's pending charges at the time of the hearing, are supported by clear, cogent, and convincing evidence, including mother's stipulation at adjudication, her certified criminal record, her admissions and testimony and DSS social worker testimony. Record evidence supports challenged findings of Mother's sporadic and minimal visits with the child; failure to appear for DSS supervised visits; history of substance abuse issues, criminal history related to possession, and periods of incarceration; failure to show for requested drug screens or obtain a substance abuse assessment or engage in treatment; and failure to fully complete parenting classes on her own. Although mother was incarcerated, which limited her ability to complete some components of her case plan, she was released for at least five months and did not address the issues required of her, such as obtaining stable housing. Together with the unchallenged findings relating to Mother's unstable housing, frequent incarceration, and failure to provide proof of income to support the child, these findings support the conclusion that Mother failed to make reasonable progress in correcting the conditions that led to the child's removal.

Conception Resulting from Sexually Related Criminal Offense

In re N.J.R.C., ___ N.C. App. ___ (November 7, 2023)

Held: Affirmed

- Facts: This is a private TPR initiated by Mother. Mother and Father engaged in sexual relations that resulted in the conception of the child at issue while Mother was 15 and Father was 21. Father was convicted of taking indecent liberties with a child. The trial court terminated Father's parental rights on several grounds including his conviction of a sexually related offense resulting in conception of the child. Father appeals and argues that his conviction of indecent liberties with a child is not a "sexually related offense" authorizing termination.
- TPR orders are reviewed to determine "whether the findings of fact are supported by clear, cogent, and convincing evidence and whether [the] findings . . . support the conclusions of law." Sl. Op. at 3 (citation omitted). Conclusions of law are reviewed de novo.
- G.S. 7B-1111(a)(11) authorizes termination of parental rights upon finding "the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile." G.S. 7B-1111(a)(11). This ground was "intentionally drafted in a manner broad enough to encompass not only acts and offenses which may explicitly involve sex, but also offenses associated with sex or that have some sexual component." Sl. Op. at 5.
- G.S. 14-201.1 defines the crime of taking indecent liberties with children, and while criminalizing certain actions "which are not explicitly required to be sexual acts," the crime "unequivocally contains a sexual component", which includes arousing or gratifying a sexual desire. Sl. Op. at 4, 5. Appellate precedent cites the offense as sexual in nature. The definition of "sexually violent offense" at G.S. 14-208.6(5) includes taking indecent liberties with children. As a result, the crime of taking indecent liberties with children constitutes a "sexually related offense" within the meaning of G.S. 7B-1111(a)(11). *See* Sl. Op. at 6-7.

Disposition

Best Interests Findings

In re K.N., ___ N.C. App. ___ (December 19, 2023)

Held: Affirmed

- Facts: Mother appeals the termination of her parental rights to two children based on the grounds of abuse, neglect, and willfully leaving the children in foster care for more than 12 months and her failure to make reasonable progress to correct the conditions which led to their removal. The Court affirmed the trial court's adjudication of the ground for termination in G.S. 7B-1111(a)(2). Mother challenges the trial court's dispositional determination that termination of her parental rights was in the best interest of both children.
- A trial court's dispositional findings of fact are reviewed to determine "whether they are supported by the evidence received during the termination hearing." Sl. Op. at 16 (citation omitted). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for [an] abuse of discretion." Sl. Op. at 16 (citation omitted).
- In determining whether termination is in the child's best interests, G.S. 7B-1110(a) lists factors a trial court must consider and make findings regarding those relevant, including the child's age, their likelihood of adoption, whether termination will aid in accomplishing the child's permanent plan, the parent-child bond, the child's bond with any proposed adoptive parent or other placement, and any other relevant considerations.
- The trial court did not abuse its discretion in determining termination of Mother's parental rights was in the best interests of both children. Findings included the age of the children and Mother's inability to provide a safe and stable home; the children's likelihood of adoption (one very likely and a possibility for the other following continued therapeutic treatment) and that termination would aid in accomplishing their primary plans of adoption; the children's bond with their Mother (both maintaining a desire not to live with their Mother); and the children's bond with proposed placements (finding one of the children has bonded with their foster parents who expressed a commitment to adoption).

Appeal

Inadequate or Unavailable Transcript

In re X.M., ___ N.C. App. ___ (March 19, 2024)

Held: Affirmed

- Facts: The court of appeals affirmed the termination of Mother's parental rights as to her four children based on the ground of willfully leaving her children in foster care for more than 12 months without showing reasonable progress to correct the circumstances that led to the children's removal. This summary focuses on Mother's argument that the available transcript of the TPR proceeding was inadequate to provide meaningful appellate review of the trial court's best interest determination as to three of the children.
- G.S. 7B-806 requires all adjudicatory and dispositional hearings to be recorded and reduced to written transcript only when timely notice of appeal has been given. The appellant "bears the burden to 'commence settlement of the record on appeal, including providing a verbatim

transcript if available.' " Sl. Op. at 10 (citation omitted). "[T]he unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." Sl. Op at 11 (citation omitted). Prejudice is required even when a statute requiring the hearing be recorded is violated. "[O]nly where a trial transcript is entirely inaccurate and inadequate, precluding formulation of an adequate record and thus preventing appropriate appellate review[,] would a new trial be required." Sl. Op. at 11 (citation omitted).

- Mother failed to demonstrate that the narrative of proceedings was entirely inaccurate or inadequate, or explain how the provided information prevented appellate review. The parties agreed on a narration of the TPR proceedings developed by Mother, DSS and the GAL due to missing testimonial evidence and statements in the transcript. Additionally, the trial court judicially noticed all prior juvenile orders and reports from previous permanency planning hearings. Mother failed to demonstrate prejudice from the narrative provided and judicially notices orders and reports. The information that was provided did not preclude appellate review.

UCCJEA

Subject Matter Jurisdiction

Modification Jurisdiction

In re R.G., ___ N.C. App. ___ (March 5, 2024)

Held: Affirmed

- Facts: This case involves an abuse and neglect adjudication based on allegations of sexual abuse by a caretaker living with Mother and the child. The child lived with Mother in NC from the time of the child's adoption in November 2018 until DSS filed a petition and obtained nonsecure custody of the child in December 2021. DSS placed the child with her maternal grandmother in NC. However, in 2019, a custody order for the child was entered in NY, where father resided. Prior to the adjudicatory hearing, Mother filed petitions to register and enforce the NY custody order and requested that the juvenile action be dismissed for lack of subject matter jurisdiction. The NC court asserted temporary emergency jurisdiction and requested a UCCJEA conference with the NY court. After the courts communicated, the NY court concluded NC was the most convenient forum for the proceedings and relinquished jurisdiction by written letter, signed by the NY judge, and filed in the NC juvenile proceeding. The NC court determined it had modification jurisdiction and adjudicated the juvenile abused and neglected. Ultimately, the court ceased reunification efforts with mother, eliminated reunification with mother as a permanent plan, and ordered guardianship to maternal grandmother. Mother appeals, arguing the court lacked subject matter jurisdiction and otherwise did not comply with the UCCJEA.
- Whether a trial court has subject matter jurisdiction under the UCCJEA is reviewed de novo.
- To obtain modification jurisdiction under G.S. 50A-203, a court must have " 'jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state] or G.S. 50A-201(a)(2)

[significant connection and substantial evidence]' and the other state's court must 'determine[] it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207[.]' " Sl. Op. at 15 (quoting G.S. 50A-203). There is no dispute that NC was this child's home state since the child lived with Mother in NC since her adoption in 2018, satisfying G.S. 50A-201(a)(1).

- G.S. 50A-203 requires the foreign state to make a jurisdictional "determination" before a NC court can modify that state's child custody determination. There is no express requirement under G.S. 50A-203 or NC appellate opinions that the foreign state must relinquish jurisdiction by a court order. Although a court order is contemplated by the official comment to the UCCJEA and by our appellate opinions, a court order is not the only method a foreign state can reqlinquish its jurisdiction. Appellate courts have "accepted a sufficiently trustworthy proxy for a court order relinquishing jurisdiction[,]" such as a docket entry that "possesse[d] all of the substantive attributes of a court order." Sl. Op. at 20 (citing and quoting *In re T.R.*, 250 N.C. App 386, 391 (2016)). NC cannot dictate how another state relinquishes its jurisdiction.
- The NY court's letter in this case was sufficient to relinquish jurisdiction over the child custody determination and allow the NC court to obtain modification jurisdiction under G.S. 50A-203. The letter contained the substantive attributes of a court order including concluding that NC is the more convenient forum for the proceedings along with supporting rationale based on facts that the child and Mother have lived in NC from the time the NY custody order was entered and there are no known connections between the allegations and the previous NY custody proceedings. The letter was signed by the trial judge, written on court letterhead and in response to the NC court's UCCJEA requested conference, and filed by the NC court upon receipt after the NC court concluded the letter was sufficiently trustworthy.
- The NC court had modification jurisdiction under the UCCJEA to enter the adjudication and disposition order and subsequent permanency planning orders.
- The opinion disregards Mother's remaining arguments regarding the trial court's compliance with the UCCJEA, noting that: (1) temporary emergency jurisdiction allows a court in this State to exercise jurisdiction pursuant to G.S. 50A-204 while another state has continuing exclusive jurisdiction when necessary to protect a child from mistreatment or abuse, and therefore the court was not required to stay its simultaneous proceeding due to the existence of the prior NY custody order; (2) Mother was given the opportunity to be heard on the question of jurisdiction at the pre-adjudication hearing and did not present arguments or evidence to contest jurisdiction, therefore the court did not violate G.S. 50A-110(b) regarding communication between the courts; and (3) Mother improperly challenges the NY court's application of the convenient forum factors, as the UCCJEA places the jurisdiction determination with the original decree state and does not require NC to review another state's jurisdiction determination; mother's remedy is in NY, not NC.

Adoption

Adoption Assistance

Judicial Review

White v. N.C. DHHS, ___ N.C. App. ___ (May 7, 2024)

Held: Reversed

Dissent: Tyson, J.

- Facts and procedural history: This case involves a child who was adopted at seven months of age in 2014. The child was placed with his adoptive parents through the Children's Home Society (CHS; a private adoption agency) after mother executed a relinquishment to CHS three days after the child's birth. The child was exposed to multiple substances while in utero and was born prematurely. In the years since the adoption, the child was diagnosed with ADHD and various ocular conditions and evaluated for possible autism spectrum disorder. In March 2021, the adoptive parents first discussed with CHS the possibility of receiving Title IV-E adoption assistance benefits for the child and applied for adoption assistance that May. DSS determined the child did not meet the Title IV-E eligibility criteria because the adoption was finalized before the adoption assistance agreement was executed. The adoptive parents appealed the decision through the various appellate stages including an appeal to superior court. The administrative agency decisions affirmed the denial of adoption assistance; however, the superior court reversed the decision, concluding that the denial of the request for adoption assistance was arbitrary, capricious, and an abuse of discretion based on the superior court's determination the child qualified for assistance in 2014 and thereafter. The superior court ordered that the adoptive parents receive adoption assistance retroactively to the date the adoption was finalized in 2014, in addition to awarding attorney's fees. DHHS, DSS, and CHS appeal the superior court order, pursuant to the procedure specified in G.S. 150B-52, arguing the court exceeded the authority granted for judicial review of administrative decisions.
- Appellate review of an order of the superior court reversing an administrative decision is "twofold and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." Sl. Op. at 11 (citation omitted).
- In reviewing a final agency decision, the superior court's scope of review is limited by the nature of the asserted error and the corresponding standard of review (either de novo or whole record) provided in G.S. 150B-51(b) and (c). Asserted errors of law are questions of law reviewed de novo, while assertions that an agency decision is arbitrary, capricious, or an abuse of discretion are reviewed using the whole record test. "Using the whole record standard of review, [a reviewing court] examine[s] the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." Sl. Op. at 10 (citation omitted).
- In order to qualify for adoption assistance benefits under Title IV-E of the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670 *et seq.*, a child must (1) meet eligibility criteria and (2) the State agency and prospective adoptive parents must enter into an adoption assistance agreement prior to the adoption being finalized. Eligibility criteria

includes the child meeting the federal definition of "a child with special needs" whereby the State must determine "that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section[.]" 42 U.S.C. § 673(c)(1)(B). The State must also determine that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" 42 U.S.C. § 673(c)(1)(B).

- G.S. 108A-25(a) grants DHHS and DSS authority to administer the adoption assistance program pursuant to federal law and Social Services Commission rules. At the time of the child's adoption in 2014, administrative rules enumerated eligibility requirements to include "[t]he child is, or was, the placement responsibility of a North Carolina agency authorized to place children for adoption at the time of adoptive placement"; that "[t]he child has special needs that create a financial barrier to adoption" (mirroring the statutory requirement in G.S. 108A-49(b), cited at Sl. Op. at 5); and that "[r]easonable but unsuccessful efforts have been made to place the child for adoption without the benefits of adoption assistance[.]" 10A N.C.A.C. 70M.0402(a)(2)–(4) (2014). Administrative rules at the time also included the requirement that "the adoptive parents must have entered into an agreement with the child's agency prior to entry of the Decree of Adoption." 10A N.C.A.C. 70M.0402(b)(4) (2014).
- Federal policy places an affirmative duty on adoption agencies to notify prospective adoptive parents of the availability of adoption assistance and deems any failure of the agency to do so an extenuating circumstance justifying a fair hearing and grant of assistance if the child is eligible for assistance. However, the policy provides that *"[i]t is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of [T]itle IV-E assistance for special needs children who are also unknown to the agency*." Sl. Op. at 17-18 (quoting U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYFCB-PA-01-01, at 12–13 (Jan. 23, 2001)) (emphasis in original). In those cases, the adoptive family must request adoption assistance.
- The superior court exceeded its limited judicial review authority and erred in determining DHHS's decision was without substantial justification, not supported by the whole record, and arbitrary, capricious, and an abuse of discretion. The court improperly weighed the evidence presented to DHHS and substituted its evaluation of the evidence for that of DHHS in concluding that the child met federal and State eligibility criteria for adoption assistance at the times of adoption and application, and also erred in concluding that the child's ineligibility was solely the result of the respondent agencies' failure to advise the adoptive parents about the adoption benefits program. The court of appeals found it "unreasonable to conclude that [the child] could not be placed with adoptive parents without adoption assistance when he *was*, in fact, placed with Petitioners without adoption assistance." Sl. Op. at 15 (emphasis in original). "North Carolina's appellate courts have never adopted or applied the 'extenuating circumstances' doctrine when interpreting Title IV-E[.]" Sl. Op. at 16. The superior court misapplied the policy. CHS was relieved of its duty to advise the adoptive parents of assistance requirements since the child did not meet eligibility

requirements in 2014, despite the child's Medicaid coverage since birth. DHHS and DSS were relieved of the duty to advise due to being unaware of the private adoption.

- Dissent: The superior court's findings are supported by the whole record and support the order determining the adoptive parents are entitled to retroactive adoption assistance benefits. The extenuating circumstances doctrine applies. CHS and DSS had custody and control over the child until he was adopted and had information about the child, his mother, his birth, and his medical history. They owed the duty to disclose potential available State and federal adoption assistance benefits to the prospective adoptive parents and failed to do so.

Father's Consent

In re B.M.T., ___ N.C. App. ___ (January 2, 2024)

Held: Affirmed

- Procedural history: This is an appeal of a district court order concluding Father's consent was required for adoption of the child. The court of appeals previously found no error in the district court's determination, concluding that the criteria of G.S. 48-3-601(2)b.4.II. had been met to require Father's consent. Father had provided reasonable and consistent payments for the support of the child and Mother in accordance with his financial means and had communicated with and visited with Mother while pregnant and the child after birth. The supreme court granted a PDR and issued an order that reversed and remanded to the court of appeals for "consideration of any outstanding issues on appeal." In this opinion, the court of appeals affirmed the district court's conclusion that father's consent was required on a different basis.
- Facts: Mother directly placed the child with the prospective adoptive parents without Father's knowledge or consent. Prior to the prospective adoptive parents filing a petition for adoption of the child in North Carolina, Father and Mother executed a Voluntary Acknowledgement of Paternity (VAP) with the State of Tennessee, which was the child's home state. In his Appellee's Brief, Father argues that the VAP executed prior to the filing of the adoption served as legitimation under TN law, requiring his consent to adoption of the child under G.S. 48-3-601(2)b.3.
- Under G.S. 48-3-601(2)b.3., "[i]n a direct placement, consent is required of a man who may or may not be the biological father but who '[b]efore the filing of the [adoption] petition, has legitimated the minor under the law of any state[.]' " Sl. Op. at 3. Tennessee law provides that (1) a legally executed VAP constitutes a legal finding of paternity on the individual named, and (2) that establishing paternity equates to establishing legitimation (unlike in NC).
- Unchallenged findings include that before the adoption petition was filed in NC, Father filed a VAP in Tennessee, which included notarized signatures of both Mother and Father; a certified copy of the VAP was an exhibit in the adoption proceeding; and that Tennessee was the home state of the child and under TN law a VAP requires a father's consent to adoption.
- Father's consent was required under G.S. 48-3-601(2)b.3. The VAP filed in TN constitutes legitimation under TN law, and this legitimation occurred prior to the filing of the adoption petition.