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Abuse, Neglect, Dependency

Parent Representation

Retained counsel; Rule 17 Guardian ad litem

[In re A.K.](#), ___ N.C. App. ___ (August 6, 2024)

Held: Vacated

- **Facts:** DSS filed a neglect petition and obtained nonsecure custody of two children. Mother was appointed provisional counsel. After the hearing on the need for continued nonsecure custody and before the scheduled pre-adjudication, adjudication, and disposition hearing, Mother retained counsel. Mother’s retained counsel filed a notice of appearance and served the notice on opposing counsel and the children’s GAL prior to the scheduled hearing. Both appointed and retained counsel appeared at the scheduled hearing. The court ordered the hearing to be continued and *sua sponte* appointed a Rule 17 GAL for Mother. The Rule 17 GAL appointment occurred without an evidentiary hearing and was based upon a review of the court file and attorney arguments. In the continuance order, a Rule 17 GAL was appointed to Mother because of allegations in the petition, Mother’s inability to understand the proceedings, and cultural barriers. Mother speaks Albanian, is Muslim, and the petition alleged in part that Mother suffered from mental health issues. The GAL Order (AOC-J-206) concluded mother is incompetent but did not include any findings of fact. At the later held pre-adjudication hearing, Mother and retained counsel requested that retained counsel, rather than appointed counsel, represent Mother. The trial court and counsel put on the record the court’s previous discussions regarding Mother’s representation. The trial court denied the request after determining retained counsel was not qualified under the local rules for appointed counsel to represent Mother. As a result, Mother was represented by her appointed counsel. The children were adjudicated neglected. Mother appeals, challenging the denial of her right to be represented by retained counsel on constitutional due process and statutory grounds, the Rule 17 GAL appointment, and the adjudication and disposition orders. The merits of the adjudication and disposition appeals were not addressed because this opinion vacates those orders as a result of mother’s inability to proceed with her retained counsel at hearing.
- **G.S. 7B-1001(a)(3)** allows for direct appeal of any initial order of disposition and the adjudication order upon which it is based. The ruling about Mother’s retained counsel is addressed in the pre-adjudication/adjudication order (a single order) and was properly noticed for appeal.
- **Standard of review:** Under *In re K.M.W.*, 376 N.C. 195 (2020) (concerning a parent’s waiver of their right to counsel), the appellate court applies a de novo review to conclusions of law addressing a parent’s right to counsel based on statutory criteria. Additionally, “de novo review is appropriate in cases where constitutional rights are implicated[.]” *Sl. Op.* at 12 (citation omitted). The issue in this case does not involve a substitution of *appointed counsel* or a motion to continue made by respondent so that retained counsel can be obtained in lieu of appointed counsel, both of which apply an abuse of discretion review.

- The parent of a child alleged in a juvenile petition to be abused, neglected, or dependent has a right to counsel, and to appointed counsel in cases of indigency. G.S. 7B-602(a). Under G.S. 7B-602(a)(3), the trial court “shall” dismiss provisional counsel at the first hearing if the respondent parent has retained counsel. This statutory language means that a parent has the right to be represented by retained counsel of the parent’s choosing. “The use of the word ‘shall’ by our Legislature has been held by this Court to be a mandate, and failure to comply with this mandate constitutes reversible error.” Sl. Op. at 15 (citation omitted).
- The court erred in not allowing mother to be represented by her retained counsel. Although the court relied on the local rules governing abuse, neglect, and dependency cases that establish standards for court appointed attorneys who represent indigent parents, those standards do not apply to privately retained attorneys. For a retained attorney, “[t]he only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina.” Sl. Op. at 19. The argument by DSS that trial courts have “the inherent authority or power to regulate the attorneys appearing before them” does not apply in this case as that inherent authority is when an attorney is “engaged in unethical or potentially unethical conduct”, neither of which is at issue in this case. Sl. Op. at 19.
- The record shows that retained counsel held a license to practice law in the State, filed and served a notice of appearance before the scheduled hearing, and appeared at both the scheduled hearing and the pre-adjudication hearing requesting to represent Mother. Findings at the pre-adjudication hearing include that the trial court made an inquiry into counsel’s experience representing parents in abuse, neglect, and dependency cases and found counsel did not have any requisite experience or knowledge in the subject area. After determining counsel’s representation would be detrimental to Mother, given the primary plan of reunification, the trial court erroneously found counsel was unqualified to represent Mother and released retained counsel without addressing the statutory mandate of G.S. 7B-602. The record shows retained counsel acted appropriately and there was no indication his representation of Mother would be unethical or violate the Rules of Professional Conduct regarding competence. Additionally, assuming the GAL order was proper, there are no findings in the GAL order to support the GAL’s argument that Mother lacked capacity to select counsel.
- Appointment of the Rule 17 GAL for Mother is not reviewable. While continuance orders and GAL orders are not appealable under G.S. 7B-1001(a), the court noted it would be “inclined to invoke Rule 2 [of the Rules of Appellate Procedure] to address Mother’s argument that the appointment of her [Rule 17] GAL” at the scheduled hearing was improper, given the apparent lack of notice and absence of findings of fact or evidence to support the appointment. Sl. Op. at 9. However, the appellate court was unable to review the issue without a transcript of the scheduled hearing to determine whether Mother objected to the GAL’s appointment. On remand the trial court is directed to hold a hearing upon request of any party to consider whether Mother is still in need of a Rule 17 GAL based on incompetence rather than mother’s language barriers and culture, and if it is determined Mother is still in need, to enter an order with findings of fact to support its conclusion.

Parties

Removal

In re E.E., ___ N.C. App. ___ (June 4, 2024)

Held: Affirmed

- Facts: In 2019, 4 siblings who were adjudicated neglected based on their parents' substance use and inability to provide proper care and supervision for the children. Ultimately, the court ordered custody to the children's Grandmother and her husband (Husband) at a permanency planning hearing. In 2021, a new petition was filed alleging Husband sexually abused two of the children. Those two children were adjudicated abused and neglected and the other two children were adjudicated neglected. The children remained with Grandmother and legal custody was ordered to DSS at disposition. Husband was no longer residing in the home. The disposition order was not appealed. Later, the children's GAL motioned to remove Husband as a party to the proceeding. The court held a hearing and ordered Husband discharged and removed as a party to the proceeding over DSS objections. Husband appeals the order of removal.
 - Author's Note: An order removing a party is not an appealable order under G.S. 7B-1001. This author believes a petition for writ of certiorari was filed although the opinion does not state that.
- Whether the trial court erred in removing a party from the proceeding is a conclusion of law that is reviewed de novo. The trial court's order is reviewed to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." Sl. Op. at 5 (citation omitted).
- "If a guardian, custodian, or caretaker is a party, the court may discharge that person from the proceeding, making the person no longer a party, if the court finds that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs." Sl. Op. at 4, *quoting* G.S. 7B-401.1(g). Custodian is defined as "[t]he person or agency that has been awarded legal custody of a juvenile by a court." Sl. Op. at 6, *quoting* G.S. 7B-101(8).
- The court made the two findings required under G.S. 7B-401.1(g) which are supported by the evidence. The findings support the court's conclusion to remove Husband as a party.
 - (1) The court found Husband did not have legal rights to the children that may be affected by the proceedings, rejecting Husband's argument that he had custodial rights to the children based on past legal custody. The adjudication and disposition orders are dispositive evidence that Husband was not a guardian, custodian, or caretaker at the time of his removal as a party. The disposition order concluded that legal custody with DSS was in the best interest of the children based on findings that included Husband's indictment for felony charges related to his sexual abuse of the children, Husband's sexual abuse of two of the children and their older sibling, and the court's conclusion that the conditions that led to Husband leaving the home continued to exist.
 - (2) The court found Husband's continuation as a party was not necessary to meet the juvenile's needs, based on findings of his prolonged sexual abuse of the two younger children and their older sibling; the resulting negative impacts of that abuse; his no longer living with Grandmother; his indictment for felony sexual assault charges and being in custody; domestic violence protection orders; and Grandmother's award of temporary possession of the home and vehicle. Husband's contention that Grandmother requires his financial support to maintain placement of the children is irrelevant as the children are in the legal custody of DSS, not Grandmother.

Adjudicatory Hearing

Collateral estoppel; Rule 12(b)(6) motion to dismiss

In re A. D. H., ___ N.C. App. ___ (September 3, 2024)

Held: Vacated and Remanded

- **Facts:** This action involves simultaneous proceedings of a civil custody dispute between Mother and Father where DSS intervened and a juvenile action alleging the child at issue abused, neglected, and dependent. The child made statements to classmates and her school counselor that Father sexually abused her. A report was made to DSS resulting in an assessment that included the child's interview at a child advocacy center and a child medical evaluation (CME). In the custody case, the trial court ultimately found that father did not sexually abuse his daughter and did not engage in any inappropriate activities with his daughter. The court entered a permanent child custody order (CCO) granting Father primary legal and physical custody because of concerns mother was coaching the child. The order also included a provision that no one but the child's current therapist could discuss past sexual abuse allegations with the child. During its assessment, DSS filed an interference petition alleging that Father was refusing to allow the child to participate in a subsequent recommended CME. The trial court dismissed the interference petition (IPO) with prejudice after finding that (1) counsel for DSS stated the investigation could be completed without the CME and (2) reiterating facts in the CCO. The child made subsequent disclosures of Father's sexual abuse. DSS filed a juvenile petition alleging the child abused, neglected, and dependent based on statements the child made both before and after entry of the CCO and IPO. Among various motions, Father filed a Rule 12(b)(6) motion to dismiss for failure to state a claim; a motion to dismiss pursuant to the doctrines of *res judicata* and collateral estoppel; and a motion *in limine* to be allowed to examine the social worker. The trial court granted the motion *in limine*, and after Father examined the social worker, granted the 12(b)(6) and preclusion motions, and dismissed the petition. DSS appeals.
- Whether a trial court is barred by collateral estoppel is a question of law reviewed de novo. "Collateral estoppel will apply when: (1) a prior suit resulted in a final judgment on the merits; (2) identical issues were involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." Sl. Op. at 11 (citation omitted). "Collateral estoppel cannot apply to a proposition proven in a prior action when the subsequent action involves a *higher* standard of proof." Sl. Op. at 13 (emphasis in original). "[W]here a party fails to establish a fact in a prior case under a lower burden of proof, collateral estoppel applies to preclude a subsequent finding that the same fact has been established under a higher standard of proof." Sl. Op. at 16-17.
- The trial court did not err in determining factual issues alleged in the juvenile petition which were determined in the PPO and IPO were collaterally estopped. The standard of proof in a child custody case is preponderance of the evidence, while the standard of proof for an interference order or an abuse, neglect, or dependency adjudication order under G.S. 7B-805 is clear and convincing evidence - a higher standard than preponderance of the evidence. In this case, the findings in the PPO and IPO that allegations of Father's sexual abuse made prior to those orders were unfounded prevent the juvenile court from making contrary findings of whether Father abused the child. In the CCO, allegations of Father's sexual abuse were not proven under a preponderance of the evidence standard during the child custody proceedings and therefore cannot be proven under the higher standard required in the juvenile proceedings. In the IPO, allegations of Father's sexual abuse of the child made prior to the order were not proven by

clear and convincing evidence and therefore cannot be proven under the same standard in the juvenile proceeding.

- Though most of the factual issues in the juvenile petition were correctly ruled estopped, the trial court erred in dismissing the entire petition based on the doctrine of collateral estoppel. The juvenile petition alleges further instances of abuse taking place after entry of the CCO and IPO, supported by evidence after entry of those orders, which are not estopped from the CCO and IPO orders.
- A trial court's ruling on a Rule 12(b)(6) motion to dismiss is reviewed de novo, without assessing the trial court's reasoning, to determine if the allegations in the complaint are sufficient to state a claim upon which relief may be granted. "[G.S.] Chapter 7B specifically provides that a valid petition must include 'allegations of facts sufficient to invoke jurisdiction over the juvenile[,] including allegations that the juvenile is abused, neglected, or dependent[,]'" as defined under G.S. 7B-701(1), (15), and (9). Sl. Op. at 19, *quoting* G.S. 7B-402.
- The juvenile petition contained sufficient allegations to state a claim that the child was abused, neglected, and dependent despite the findings of abuse precluded by the CCO and IPO. The remaining factual allegations include Father's more recent sexual abuse; a specific allegation of Father committing a criminal sex offense against the child that constitutes improper supervision and creating an injurious environment; and neither parent being appropriate caregivers due to allegations of Father's sexual abuse and accusations of Mother coaching the child to accuse Father of sexual abuse, and no other caregivers being available. The trial court erred in granting the Rule 12(b)(6) motion because of allegations related to events that occurred after the CCO and IPO.
- The court of appeals vacated the order dismissing the petition and remanded the matter to the trial court to resolve all of Father's unmooted and potentially relevant motions remaining and consider whether any allegations remain thereafter for purposes of Rule 12(b)(6).

Adjudication

Neglect; Dependency; Findings of fact; Appellate review

[In re A.J.](#), ___ N.C. ___ (August 23, 2024)

Held: Reversed Court of Appeals; Remanded

- Facts and procedural history: This appeal involves the adjudication of three children as neglected, and also the two older children as dependent, based on three incidents reported to DSS. The reported incidents involved interactions between Mother and one of the older children. The first incident alleged an altercation between Mother and the older child, where the child refused to exit the car; Mother attempted to remove the child from the car; the child locked herself in the car; Mother broke the car window to unlock the car, slapped and hit the child with a belt, and choked and threatened to kill the child. A second incident alleged Mother choked the child and threw her out of the car. The third incident alleged Mother locked the child out of the house following an argument; when a social worker arrived, law enforcement had handcuffed Mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the older child sought safety at a neighbor's. The trial court based some of its findings on inadmissible hearsay consisting of statements made by the child to the social workers. The trial court also made findings about mother's mental and emotional health, some of which was based on mother's behavior during the adjudicatory hearing. The court of appeals disregarded the trial court's findings of fact based on the inadmissible hearsay statements of the child and held the unsupported findings were insufficient to conclude the children neglected and the two older children dependent. The court of appeals reversed the order with instructions

to the trial court to dismiss the petitions. DSS and the Guardian ad litem jointly petitioned the supreme court for discretionary review.

- Appellate review: An adjudication order is reviewed to determine “whether the trial court’s conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence.” Sl. Op. at 4 (citation omitted). “Assuming an evidentiary objection is properly preserved, a party may argue on appeal that any findings supported solely by inadmissible evidence are infirm and cannot support the trial court’s conclusion of law.” Sl. Op. at 5. The reviewing court must disregard a finding that lacks sufficient support in the record and examine whether the remaining findings support the trial court’s determination. If the remaining findings are insufficient, the court must determine “whether there is sufficient evidence in the record that could support the necessary findings.” Sl. Op. at 5 (emphasis in original). If there is sufficient evidence in the record that could support the necessary findings, the reviewing court must vacate the order and remand the case for entry of a new order. “This permits the trial court, as fact finder, to decide whether to enter a new order with sufficient findings based on the record or to change the court’s conclusions because the court cannot make the necessary findings.” Sl. Op. at 2. “An appellate court may remand for entry of an order dismissing the matter only if the trial court’s findings are insufficient and the evidentiary record is so lacking that it cannot support any appropriate findings on remand.” Sl. Op. at 6.
- The court of appeals did not complete the full appellate analysis of the trial court’s findings before determining the findings did not support the adjudications and reversing and remanding the case for dismissal. After disregarding several findings as unsupported by clear, cogent, and convincing evidence (due to the findings being based on the inadmissible hearsay statements of the child), the court of appeals failed to determine whether the remaining findings of fact were sufficient to support either adjudication, and if not, whether there was sufficient evidence in the record that could support the necessary findings.
- “A neglected juvenile is one whose parent, guardian, custodian, or caretaker ‘does not provide proper care, supervision, or discipline’ or who ‘creates or allows to be created a living environment that is injurious to the juvenile’s welfare.’ ” Sl. Op. at 11, *quoting G.S. 7B-101(15)*. When the juvenile is not currently residing in the parent’s home, the trial court must determine “whether there is a substantial risk of future neglect based on the historical facts of the case.” Sl. Op. at 11. The supreme court rejected the court of appeals categorical statement that corporal punishment without physical marks or injury is not neglect and instead recognized the need for a case-specific analysis stating, “[t]here are scenarios where discipline of a child can constitute neglect when the discipline causes little or no physical injury.” Sl. Op. at 13, n. 5.
- “A dependent juvenile is one whose ‘parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.’ ” Sl. Op. at 11, *quoting G.S. 7B-101(19)*. The trial court “must consider the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent. . . when considering whether a juvenile is dependent.” Sl. Op. at 12 (citation omitted).
- Challenged findings supported solely by the child’s statements to social workers were properly disregarded as unsupported by clear, cogent, and convincing evidence, including that Mother used a shovel to smash the car window, choked the child, and threatened to kill the child during the first reported incident; that Mother choke-slammed the child and threw her out of the car in the second reported incident; and that Mother locked the child out of the house (as opposed to leaving the child outside) during the third reported incident. The remaining portions of the trial court’s findings relating to the first and third reported incidents are supported by clear, cogent,

and convincing evidence, including Mother’s own admissions and the testimony of social workers and law enforcement.

- Challenged findings regarding Mother’s mental health condition are unsupported by the evidence. The record does not include expert testimony from a qualified health professional or admissible documentary evidence of a past diagnosis typically required for a finding that a person suffers from a mental illness. Social worker testimony and the trial court’s observations of Mother’s behavior do not support a finding that Mother had been diagnosed with a mental health condition. Noting *In re L.N.H.*, 382 N.C. 536 (2022), the trial court considers the existence or nonexistence of the conditions in the petition, which “focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party.” Sl. Op. at 9, n. 4. The remaining finding that Mother exhibited extremely hostile and aggressive behavior and refused to follow the recommended case plan to address those issues is supported by the evidence.
- The remaining, properly supported findings are insufficient to support the trial court’s adjudication of the three children as neglected and the older two children as dependent. The remaining supported findings show Mother’s pattern of putting her child in situations that are potentially injurious to her welfare (leaving child outside and why child was locked in car); Mother exhibiting hostile and aggressive behavior during the reported incidents, acknowledging the need for a mental health assessment but later refusing to do so and denying having any mental health issues; and Mother lacking an alternative child care arrangement. These “bare findings” do not demonstrate “how these incidents established that the children were not receiving proper care, supervision, or discipline, or were living in an injurious environment . . . [but] [i]mportantly, there is clear, cogent, and convincing evidence in the record that *could* support the necessary findings.” Sl. Op. at 13 (emphasis in original). The proper disposition is to vacate and remand the order to the trial court to enter a new order on the existing record or conduct further necessary proceedings in its discretion.

Abuse and Neglect; Findings

In re E.H., ___ N.C. App. ___ (June 4, 2024)

**Held: Affirmed in part; Vacated in part; Remanded
Dissent in part, Stroud, J.**

- Facts: Mother and Father appeal the adjudication of their two children, one of whom was adjudicated abused and neglected and the other of whom was adjudicated neglected. DSS filed a petition and obtained nonsecure custody of the juveniles following Mother taking the three-week old infant to the ER for what she described as a pop in his arm while changing his diaper. Medical screenings showed the child suffered several acute bone fractures, including the humerus, ribs, and metaphysis. Mother and Father denied any abuse or events that would cause the infant’s injuries both at the hospital and when interviewed by DSS and stated the juvenile was always under mother’s supervision. During the adjudication hearing that spanned several months, DSS presented expert testimony to show the child’s injuries would have required significant force to inflict and are highly indicative of child abuse in a three-week old, nonambulatory child. Mother and Father challenge the findings as unsupported by the evidence and the conclusion that the infant is an abused and neglected juvenile. The court of appeals affirmed the infant’s adjudication. The older sibling was adjudicated neglected, and the parents’ appealed. That adjudication was vacated and remanded and is summarized separately.
- “In reviewing an adjudication order, this Court must determine “(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.” Sl. Op. at 8 (citation omitted). “[T]he trial court’s findings of

fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.” Sl. Op. at 8-9 (citation omitted).

- “An ‘[a]bused’ juvenile is one ‘whose parent, guardian, or caretaker’ either ‘[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means.’ Sl. Op. at 9, *quoting* G.S. 7B-101(1)(a).
- Challenged findings regarding Mother and Father being sole caretakers of the infant since birth and the child’s serious, nonaccidental injuries are supported by clear and convincing evidence, including social worker and expert testimony. The court weighed the conflicting expert testimony offered by Mother and Father regarding other possible medical explanations for the child’s serious injuries. The court found the expert witness testimony provided by the parents’ experts “were not based on ‘sound, scientific principles and methods’ and lacked ‘credibility.’ ” Sl. Op. at 13. The court exercised its discretion and found the evidence presented by DSS expert testimony more credible. The findings support the conclusion that the parents inflicted or allowed to be inflicted serious physical injury by nonaccidental means.
- “A ‘[n]eglected’ juvenile is one ‘whose parent, guardian, custodian, or caretaker’ engages in certain statutorily defined criteria, including failing to ‘provide proper care, supervision, or discipline’ or ‘[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile’s welfare.’ ” Sl. Op. at 14-15, *quoting* G.S. 7B101(15)(a), (e).
- The court made sufficient findings to support the conclusion that the infant is a neglected juvenile. In addition to the findings of the infant’s serious injuries suffered while in the sole care of Mother and Father for which neither parent has taken responsibility or given a plausible explanation, the court found that the home was an injurious environment and there are no reasonable means to protect a juvenile from similar injuries occurring until the perpetrator responsible for the injuries is established.

Neglect; Substantial risk of future neglect; Necessary medical care
[In re K.C.](#), ___ N.C. App. ___ (August 20, 2024)

Held: Affirmed

- Facts: Mother appeals the adjudication of her one-year-old child as neglected. DSS first became involved in this case due to the child’s meconium testing positive for amphetamines and methamphetamines at birth and Mother’s positive urine screen at the time of the child’s birth. During his first year of life, the child developed several serious health conditions that required medical care in addition to regular wellness visits including jaundice, an abscess, a hernia, and MRSA. DSS regularly communicated or attempted communication with Mother to engage Mother in substance use treatment and assist Mother in arranging transportation to some of the child’s necessary medical appointments. DSS filed a petition alleging the child neglected based on the child’s positive meconium test, unsuccessful attempts to engage Mother in substance use treatment, Mother’s failure to consistently communicate with DSS, and Mother’s failure to attend a substantial number of the child’s necessary medical appointments. The child was adjudicated neglected based on Mother’s failure to provide proper care, failure to provide or arrange necessary medical care, and allowing the creation of an injurious environment. Mother challenges the findings of fact relating to her attempts to obtain substance use and mental health assessments and her provision of necessary medical care, and argues the remaining findings do not support a conclusion of neglect.
- A neglect adjudication is reviewed “to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by

findings of fact.” Sl. Op. at 6 (citation omitted). The determination of whether a child is neglected is a conclusion of law reviewed de novo.

- “The Juvenile Code defines a neglected juvenile as “[a]ny juvenile less than 18 years of age . . . whose parent . . . does not provide proper care, supervision, or discipline[,] . . . has not provided or arranged for the provision of necessary medical or remedial care[,] . . . [or] created or allowed to be created a living environment that is injurious to the juvenile’s welfare.” Sl. Op. at 8-9, quoting G.S. 7B-101(15)a., c., and e. A court must find “some physical, mental, or emotional impairment of the juvenile or substantial risk of such impairment as a consequence of the failure to provide ‘proper care, supervision, or discipline.’ ” Sl. Op. at 9 (quoting In re Stumbo, 357 N.C. 279 (2003)). For newborns, “the decision of the court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” Sl. Op. at 9 (citation omitted). While the record must show clear and convincing evidence of “current circumstances that present a risk” to the child, the court has discretion in determining whether there is risk for a particular kind of harm given the child’s age and environment. “Health assessments of a parent can help the trial court determine the ‘current circumstances’ of a child’s environment.” Sl. Op. at 11. A parent’s mental health is a fixed and ongoing circumstance that is relevant in assessing the child’s environment and whether there is a substantial risk of harm to the child that may lead to an adjudication of neglect. “When an infant has substantial health concerns, sporadically attending necessary medical appointments and procedures can pose a ‘substantial risk’ of harm.” Sl. Op. at 13.
- The findings of fact are supported by clear and convincing evidence and the conclusion that the child was neglected is supported by the findings. The child was at substantial risk of harm based on Mother’s failure to provide proper care and arrange necessary medical care for the child, and the child living in an injurious environment. The evidence shows Mother never completed the requested substance use assessment and only completed a mental health assessment the week before the adjudication hearing, over a year since the child’s birth. Mother’s failure to complete a substance use assessment after the child and Mother tested positive for substances at the time of the child’s birth and her failure to timely complete the requested mental-health assessment impact her ability to provide adequate care for the child. The court determined that without these health assessments Mother cannot address her fixed and ongoing health issues and therefore poses a substantial risk of harm to the child. Additionally, the evidence shows that Mother cancelled or did not show up for 24 of the child’s 41 medical appointments within the child’s first year of life, including necessary surgical appointments to remove the child’s hernia, despite Mother qualifying for Medicaid and its transportation services and evidence that she was able to arrange transportation from family, a social worker, or EMS when necessary. Missing a substantial number of the child’s necessary medical appointments constitutes failure to provide necessary medical care. The combined evidence of the child’s positive meconium test, Mother’s failure to complete the substance use assessment or timely complete the mental health assessment, and Mother’s failure to ensure the child’s attendance for necessary medical appointments “fully convinces that [the child’s] environment was injurious to his welfare.” Sl. Op. at 14.

Neglect; Abuse of another child in the home

In re E.H., ___ N.C. App. ___ (June 4, 2024)

Held: Affirmed in part; Vacated in part; Remanded

Dissent in part, Stroud, J.

- **Facts:** Mother and Father appeal the adjudication of their two children, one of whom was adjudicated abused and neglected and the other of whom was adjudicated neglected. DSS filed a petition and obtained nonsecure custody of the juveniles following Mother taking the three-week old infant to the ER for what she described as a pop in his arm while changing his diaper. Medical screenings showed the child suffered several acute bone fractures, including the humerus, ribs, and metaphysis. Mother and Father denied any abuse or events that would cause the infant's injuries both at the hospital and when interviewed by DSS and stated the juvenile was always under mother's supervision. During the adjudication hearing that spanned several months, DSS presented expert testimony to show the child's injuries would have required significant force to inflict and are highly indicative of child abuse in a three-week old, nonambulatory child. Mother and Father argue that the court's findings do not support the adjudication of the sibling as neglected. The court of appeals affirmed the adjudication of the infant as an abused and neglected juvenile, summarized separately.
- "In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." Sl. Op. at 8 (citation omitted).
- "A '[n]eglected' juvenile is one 'whose parent, guardian, custodian, or caretaker' engages in certain statutorily defined criteria, including failing to 'provide proper care, supervision, or discipline' or '[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare.'" Sl. Op. at 14-15, *quoting* G.S. 7B101(15)(a), (e). G.S. 7B-805 mandates that DSS carry "the burden to overcome the presumption of fitness and parental rights to the care, custody, and control of their children and to prove by clear, cogent, and convincing evidence the existence of neglect . . ." Sl. Op. at 16. "In determining whether a juvenile is a neglected juvenile, it is *relevant* whether th[e] juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." Sl. Op. at 16, *quoting* G.S. 7B-101(15) (emphasis in original). Appellate courts have generally required that other factors beyond evidence of prior abuse are needed to conclude neglect or abuse will be repeated. "While the decision of the trial court regarding whether the other children present in the home are neglected, 'must of necessity be predictive in nature, [] the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.'" Sl. Op. at 17.
- The court did not make sufficient findings to conclude that the older sibling is a neglected juvenile. The court's findings regarding Mother and Father being the sole caretakers of the infant, the nonaccidental injuries to the infant sibling while under their care, and the absence of explanation for the injuries are insufficient to support the neglect adjudication of the older sibling without any further findings regarding abuse of the older child or the probability of future neglect. "The transcripts and record appear devoid of any clear and convincing evidence of neglect of [the older child], other than the *ipso facto* application of non-confessed and unexplained injuries to [the infant child] to overcome the presumption of fitness and primary parental rights by married parents, who have no prior history of either neglect or abuse, and with one facing a felony indictment for child abuse." Sl. Op. at 18. The portion of the order adjudicating the older sibling as neglected is remanded for the court to make further findings of

the probability of future neglect “in the absence of a compelled confession by either parent or violation of the marital privilege”. Sl. Op. at 20.

- Dissent: The court made sufficient supported findings to conclude the older sibling is a neglected juvenile. Thought the majority of the findings focus on the infant’s injuries, other findings provide for Mother and Father’s behavior with medical staff and social workers, Father’s absence from the ER visit, and both Mother and Father’s continued denial of abuse or proffer of any reasonable explanation for the infant’s injuries. Appellate courts have upheld neglect adjudications of another child in the home where parents cannot explain serious injury to an infant and there is no other person who might have caused the injuries. “[O]ther factors are not always required for a child who lives in the home with another child who has been abused and adjudicated as neglected. The trial court must evaluate the credibility and weight of all the evidence and has the discretion to make logical inferences which are reasonably based upon the facts in the case.” Dissent at 6. The majority seems to be barring the court from drawing logical inferences based on Mother and Father’s inability to explain the infant’s serious injuries, relying on their Fifth amendment right against self-incrimination and marital privilege to require the trial court to make further findings that may not exist. The marital privilege does not apply in these cases. See G.S. 7B-310, -1109(f). In a civil action, a party’s silence allows the court to draw a negative inference regarding the Fifth Amendment because the purpose of the proceeding is to protect the child’s best interests. “[H]ere the trial court was ‘[f]aced with the gravity of the abuse and the persistent unwillingness of either parent to admit responsibility or to fault the other’ and it concluded that the children could be protected only by removal from the home.” Dissent at 14 (citing and quoting *In re J.M.*, 384 N.C. 584, 604 (2023)).

Visitation

Appellate review; Standard of proof; Findings

In re A.J.L.H., ___ N.C. ___ (June 28, 2024)

Held: Reversed Court of Appeals (affirm trial court)

- Facts and procedural history: This action involves three children that share the same mother and separate fathers. DSS filed a petition based on mother and (step)father’s repeated use of corporal punishment that caused bruising and marks on the oldest child as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents admitted to their repeated use of this punishment and did not believe their disciplinary methods were cruel or unusual. The oldest child was adjudicated abused and neglected and the two younger siblings were adjudicated neglected. At initial disposition only the biological father of one of the younger children was granted visitation. The trial court determined that visitation with Mother, (step)father, and the third biological father was not in the children’s best interests while respondents were working on their case plans with DSS. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudication of neglect for the oldest juvenile, ordered the trial court to dismiss the adjudications of the siblings, and ordered on remand that if the older juvenile was adjudicated the trial court order general and increasing visitation with the mother. *In re A.J.L.H.*, [275 N.C. App. 11](#) (2020). The supreme court allowed discretionary review and reversed the court of appeals decision, thereby affirming the adjudication orders as to the three juveniles, and held the court of appeals instruction to the trial court regarding disposition improper. *In re A.J.L.H.*, [384 N.C. 45](#) (2023). On remand from the supreme court to address the respondents’ remaining arguments regarding the disposition order, the court of appeals vacated the dispositional portions of the order and remanded to the trial court to make the “required findings of fact and

conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child.*” In re A.J.L.H., [289 N.C. App. 644](#), 652 (2023) (emphasis in original). DSS and GAL petitioned the supreme court for discretionary review, amended to seek review as to the oldest child only, arguing the court of appeals erred in its review of the dispositional order by: (1) misstating the standard of proof required for dispositional findings; (2) using the wrong standard to review dispositional evidence; (3) requiring the trial court to find that the parents acted inconsistently with their constitutionally protected status in order to deny visitation (4) abrogating G.S. 7B-905.1 and creating a new constitutional rights analysis; (5) determining there was insufficient evidence to support the trial court’s findings of fact; and (6) reversing the trial court based on holding the trial court erred as to findings of fact related to non-appealing parties. Mother is the only respondent to this appeal.

- “[Appellate courts] review the trial court’s dispositional findings of fact to determine whether they are supported by competent evidence. The trial court’s assessment of a juvenile’s best interests at the dispositional stage is reviewed solely for abuse of discretion.” Sl. Op. at 7 (citation omitted). Appellate courts “ ‘defer to the trial court’s decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision[,]’ ” whereby “the remedy is to vacate the disposition order but to ‘express no opinion as to the ultimate result . . .’ ” Sl. Op. at 11 (citations omitted). G.S. 7B-901(a) authorizes trial courts to consider “any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” Sl. Op. at 8-9, *quoting* G.S. 7B-901(a). “[A] trial court’s ‘decisions as to the weight and credibility of the evidence, and inferences drawn from the evidence, are not subject to appellate review.’ ” Sl. Op. at 11 (citation omitted). The court of appeals erred in stating that, “Dispositional findings must be based on properly admitted and clear cogent and convincing evidence.” Sl. Op. at 8, *quoting* In re A.J.L.H., 289 N.C. App. at 650.
- An order removing custody from a parent or custodian or continuing placement outside of the home must “provide for visitation that is in the best interests of the juvenile consistent with the juvenile’s health and safety, including *no visitation*.” Sl. Op. at 10 (emphasis added in original), *quoting* G.S. 7B-905.1(a). The court of appeals erred in requiring the trial court to make findings of each parent’s fitness or conduct inconsistent with their parental rights before making a best interests determination regarding visitation, as this “two-step analysis” is not required under G.S. 7B-905.1. Sl. Op. at 9. Further, in its first opinion affirming the adjudication orders, the supreme court directed the court of appeals not to address the constitutional status of the parents on remand as the issue was not raised to the trial court nor briefed on appeal.
- The trial court did not abuse its discretion. Unchallenged findings of fact support the trial court’s dispositional order denying visitation, including that Mother has extensive CPS history involving inappropriate discipline and abuse of the children, to which she admitted, defended, and asserted plans to continue. Mother failed to understand that the discipline of the oldest child was inappropriate and subjected the child to trauma. Permissible dispositional evidence under G.S. 7B-901(a) also included a letter to the court from the older child stating her wishes to stay with her grandmother and not visit with mother due to mother and stepfather’s past abuse.
- The court of appeals erred in holding that the trial court must find and make conclusions addressing the factors applicable to visitation for each child with each parent. Two of the biological fathers were not parties to the appeal and “[t]here is no precedent which allows the [c]ourt of [a]ppeals to assert an appeal on behalf of a non-appealing party.” Sl. Op. at 13. The court of appeals erred in holding that the trial court must make findings differentiating visitation ordered between the parties. No statute or caselaw requires these findings.

Termination of Parental Rights

Pleading

Sufficiency; Ineffective assistance of counsel

[In re M.B.S.](#), ___ N.C. App. ___ (October 1, 2024)

Held: Reversed in part

- **Facts:** Mother appeals order terminating her parental rights. In this private TPR action, the paternal grandmother of the child filed a petition to terminate Mother and Father’s parental rights. Petitioner voluntarily dismissed the petition and filed an amended petition. The court adjudicated four TPR grounds and determined termination to be in the child’s best interest. Mother argues the amended petition was insufficient to put her on notice of the grounds alleged and that she received ineffective assistance of counsel based on her counsel’s failure to motion to dismiss the deficient petition.
- G.S. 7B-1104(6) requires that a TPR motion allege sufficient facts to warrant a determination that a ground exists. Although the factual allegations do not need to be “exhaustive or extensive, they must be sufficient to put a party on notice as to what acts, omission, and conditions are at issue.” Sl. Op. at 6 (citation omitted).
- The alleged failure to comply with G.S. 7B-1104(6) is an issue that must be preserved for appellate review by making a timely motion to the trial court to dismiss the deficient petition. Mother’s counsel failed to make a Rule 12(b)(6) motion prior to or during the TPR hearing and therefore the issue was not properly preserved for appeal.
- A claim of ineffective assistance of counsel (IAC) requires a respondent to show that (1) the counsel’s performance was deficient and (2) the deficiency deprived respondent of a fair hearing such that there is a reasonable probability that there would have been a different result in the proceeding but for counsel’s deficiency. Respondent Mother received IAC. Here, the TPR petition alleged five grounds: neglect; willfully leaving the child in placement outside the home for more than 12 months without showing reasonable progress; willfully failing to pay a reasonable portion of the cost of care, support, and education; dependency; and abandonment. G.S. 7B-1111(a)(1), (2), (4), (6), (7). The allegations consisted of bare recitations of the statutory grounds to TPR and did not incorporate any prior orders stating sufficient facts to support the grounds, distinguishing the case from *In re Quevedo*, 106 N.C. App. 574 (1992). The amended petition was insufficient to put respondent Mother on notice as to what acts, omissions, or conditions were at issue and the trial court would have erred in denying Mother’s motion to dismiss had her counsel made the motion. Adopting the reasoning stated in *In re A.X.M.*, 264 N.C. App. 637 (2019) (unpublished), the court of appeals determined that counsel’s failure to move to dismiss the petition prejudiced respondent as the trial court would have dismissed the petition or erred in failing to do so, clearly changing the result of the proceeding.

Adjudication

Neglect

[In re R.H.](#), ___ N.C. App. ___ (September 3, 2024)

Held: Affirmed

- **Facts:** DSS filed a neglect and dependency petition and obtained nonsecure custody of a newborn based on incidents of domestic violence between Mother and Father, including Father’s violent assault of Mother while the child was in utero. Mother’s four other children

were previously adjudicated neglected due to domestic violence, unstable housing, and inappropriate care and supervision; Mother's rights to three of the children were ultimately terminated (the fourth child, the only other previous child of both Mother and Father, passed away post-adjudication). The child at issue was adjudicated neglected and dependent and ordered to remain in DSS custody. The court ordered a safety plan to work towards unsupervised visitation with Mother. The first permanency planning order found Mother had made significant progress on her case plan, was engaging in services and cooperating with DSS and the GAL, and granted Mother a mix of supervised and unsupervised visitation. A later permanency planning order changed the primary plan to adoption, finding that while Mother was engaging in services and cooperating, Mother was acting inconsistently with the child's health and safety, failed to consistently attend visitation with the child, and that there had been domestic violence incidents with Father at Mother's home. The trial court ordered the GAL to file a termination petition. The GAL petitioned to terminate Mother and Father's parental rights on grounds of neglect; willfully leaving the child in foster care for more than 12 months without reasonable progress to correct the conditions that led to their removal; willful failure to pay a reasonable portion of the child's cost of care; and Mother's parental rights to another child had been involuntarily terminated and Mother lacks the ability or willingness to establish a safe home. The court adjudicated each ground and found termination in the child's best interest. Mother appeals, challenging the findings and the grounds adjudicated.

- The adjudication of termination grounds is reviewed to determine whether the conclusions of law are supported by adequate findings and whether the findings are supported by clear, cogent, and convincing evidence. Conclusions of law are reviewed de novo.
- G.S. 7B-1101(a)(1) allows for the termination of a parent's rights if the parent "neglects their child such that the child meets the statutory definition of a 'neglected juvenile.'" Sl. Op. at 6. G.S. 7B-101(15) defines a neglected juvenile to include a juvenile "whose parent '[d]oes not provide proper care, supervision, or discipline[,] or '[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare.'" Sl. Op. at 6, *quoting* G.S. 7B-101(15)(a), (e). When the child and parent have been separated for a period of time, neglect can be established by evidence of past neglect and the likelihood of future neglect by the parent if the child were to be returned to the parent's care. The trial court must consider "evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." Sl. Op. at 6 (citation omitted). The court may describe testimony but must "ultimately make its own findings, resolving any material disputes." Sl. Op. at 8 (citation omitted). "The trial court 'determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom.'" Sl. Op. at 10 (citation omitted).
- Portions of the trial court's findings are improper recitations of testimony with no indication the trial court evaluated witness credibility and are disregarded.
- Challenged findings regarding Mother's ongoing relationship with Father and intentionally meeting Father with the child prior to the TPR hearing are supported by the evidence. The trial court found Mother's claims that the meetings with Father prior to the TPR hearing were unplanned and unintentional were not credible based on findings that Mother had a long history of hiding information of domestic violence and prior orders questioned Mother's truthfulness; concerns for Mother's truthfulness at the TPR hearing; and Mother's own testimony regarding the meetings with Father prior to the TPR hearing. The trial court reasonably inferred Mother and Father's relationship was ongoing based on evidence including Mother giving birth to another child with Father after the child at issue; testimony of law enforcement responding to a domestic violence incident stating the belief Father lived in the home; testimony of the GAL stating Father's car had been seen at the residence over time

during the life of the case; and Mother admitting to taking the child on an out of state trip and to another outing where they met Father days before the TPR hearing.

- The trial court properly determined that Mother’s parental rights were subject to termination based on neglect in that the child was previously neglected and there was a likelihood of repetition of neglect if the child was returned to Mother’s care. Although Mother made progress on her case plan, she did not end the violent relationship with Father, which is the basis for why the child came into DSS. Mother refused to end the relationship with Father, the domestic violence continued, and Mother brought the child to meet with Father up until the time of the TPR hearing.

Neglect; Judicial Notice

In re B.A.J., ___ N.C. App. ___ (September 17, 2024)

Held: Affirmed

- **Facts:** Juvenile was adjudicated neglected based on the severe physical abuse and torture of an older half-sibling (juvenile’s half-siblings are not the subject of this TPR) for which Mother was charged with felony child abuse. The court ordered custody to DSS and did not order reunification efforts be made after finding Mother and Father (who is the father of the juvenile subject to this TPR) committed or encouraged chronic physical abuse and torture of the sibling which the juvenile observed. The trial court adopted a primary plan of adoption. Several permanency planning hearings were held with findings showing the parents were not making progress on their case plans, were not cooperating with DSS or the GAL, and refused to admit or acknowledge the abuse and neglect they imposed on the juveniles. Mother and Father had another child and continued to reside together. Father was later incarcerated following a severe domestic violence incident with Mother where she was struck on the head with a gun and choked, and the home was shot into at least eight times. Mother failed to file a DVPO, continued to engage in calls with Father from jail, and stated her intent to reunify the family. DSS filed a motion to terminate the parents’ rights based on neglect and willful failure to make reasonable progress to correct the conditions which led to the child’s removal. Mother appeals the adjudication, arguing seven adjudicatory findings are unsupported by the evidence and the remaining findings are insufficient to adjudicate the TPR grounds. Mother’s and Father’s appeal of the disposition is summarized separately.
- The adjudication of termination grounds is reviewed to determine whether the conclusions of law are supported by adequate findings and whether the findings are supported by clear, cogent, and convincing evidence. Conclusions of law are reviewed de novo.
- The trial court can take judicial notice of findings made in prior orders “even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence.” Sl. Op. at 8 (citation omitted). However, judicially noticed prior court orders and reports alone are insufficient to conclude a TPR ground exists. There must be some oral testimony at the hearing and an independent determination of the evidence presented. “[A]ppellate courts may not reweigh the underlying evidence presented at trial.” Sl. Op. at 11 (citation omitted).
- Challenged findings are supported by clear, cogent, and convincing evidence. In addition to taking judicial notice of findings of fact in the dispositional and permanency planning orders (without objection), the trial court received social worker testimony, the GAL report, and twenty exhibits at the TPR hearing regarding Mother’s progress and current circumstances which demonstrate that the court made an independent determination regarding the evidence

presented. The court properly admitted social worker testimony of the social worker's personal recollections of Mother's statements made in a previous permanency planning hearing. The social worker was present at the hearing and heard Mother's statements regarding her engagement and truthfulness in therapy. Mother conceded the statements were admissible as statements of a party. The weight given to this testimony cannot be re-examined by the appellate court. The social worker testimony is not the same as a court relying on its own personal memory of a prior proceeding, which is not evidence a court may consider. The social worker's testimony is competent evidence.

- A trial court may infer that a parent's answer would be damaging to their claims when the parent invokes their Fifth Amendment right in a civil proceeding. A parent may not use the right as "both a shield and a sword". Sl. Op. at 13 (citation omitted). The trial court was permitted to draw an adverse inference against Mother for invoking the Fifth Amendment and refusing to answer questions at prior hearings relating to the parents' acts of torture and physical abuse. Rejecting Mother's argument that the TPR was based solely on her refusal to testify, the court held that the unchallenged, binding findings on appeal show the trial court did not terminate Mother's parental rights solely because of her refusal to answer questions about the parents' torture and abuse at prior hearings.
- G.S. 7B-1101(a)(1) allows for the termination of a parent's rights if the parent has neglected juvenile as defined in the Juvenile Code. G.S. 7B-101(15) defines a neglected juvenile to include a juvenile whose parent " '[d]oes not provide proper care, supervision, or discipline[,] or '[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare.'" Sl. Op. at 14-15, *quoting* G.S. 7B-101(15)(a), (e). The circumstances of neglect "must exist at the time of the termination hearing." Sl. Op. at 15. When the child and parent have been separated for a period of time, neglect can be established by evidence of past neglect and the likelihood of future neglect by the parent. Failure to make progress on the case plan or to show behavioral changes necessary to ensure the safety of the juvenile can support a conclusion that there is a likelihood of future neglect.
- The findings support the conclusion that the juvenile was previously adjudicated neglected and there was a likelihood of future neglect if the child were returned to Mother's care. Though Mother completed components of her case plan, including DV services, mental health treatment, and parenting classes, and demonstrated that she had employment and housing at the time of the hearing, Mother did not admit or recognize her role in the juvenile and his siblings' abuse or neglect, acknowledge the impact of the abuse or neglect on her children, or show that she was able to rehabilitate herself from the circumstances that caused the juvenile's neglect. Mother continued to engage in a violent relationship with Father, chose not to file a DVPO after a severe domestic violence incident with Father, failed to be honest with her therapist about the parents' severe abusive and neglectful behavior that led to the juvenile's removal, and had expressed her intent to reunify the family in the home together with Father and their younger child despite the court concluding Father committed acts of physical and emotional abuse, including torture, on the children. At two years old and not yet potty-trained, there is a substantial risk that the juvenile's bed wetting could result in the parents' severe and torturous discipline used against the half-sibling that was the reason for the juvenile entering DSS. The trial court did not err in adjudicating the ground of neglect.

Dependency

[In re K.B.C.](#), ___ N.C. App. ___ (September 17, 2024)

Held: Affirmed

- **Facts:** Father appeals a TPR order to his three children, all of whom had been adjudicated neglected due to lack of proper care and supervision. The children were placed in DSS custody after staying in two different temporary safety placements that had been identified by Father but who were unwilling to care long term for the children. During the case, Father was arrested and sentenced as a habitual felon, with a release date in 2032. During his incarceration, Father proposed two other possible alternative placements for the three children. One proposed caretaker was not approved by DSS, and the other could not be located. DSS filed TPR petitions as to all three children. The court found grounds existed to terminate Father’s parental rights based on dependency and Father’s prior TPR and inability to establish a safe home. Father appeals arguing the court based the adjudication solely on Father’s incarceration.
- A court reviews the adjudication of termination grounds to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the court’s conclusion of law.
- G.S. 7B-1111(a)(6) allows for a court to terminate a parent’s rights upon finding a parent is incapable of providing proper care and supervision such that the child is dependent under G.S. 7B-101(9) and the incapability is likely to last for the foreseeable future. The incapability may result from substance use, mental illness, or other condition that renders the parent unable to parent the juvenile. The ground of dependency “must address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.” Sl. Op. at 12 (citation omitted). Appellate courts have “found extended periods of incarceration can render a parent incapable of providing sufficient care and supervision to a minor child.” Sl. Op. at 16.
- The findings support the conclusion that Father’s rights were subject to termination based on dependency. Incarceration alone is not a sword or shield in a TPR. Here, the findings show that the court considered more than Father’s incarceration; the court considered the substantial length of Father’s sentence, its effect on the children, the children’s physical and emotional well-being, and Father’s lack of alternative child care placements. The trial court noted that during this extensive period of incarceration, Father would not be able to provide and care for the children or have a personal relationship with the children that are integral to their well-being, which the court of appeals stated is consistent with appellate precedent (citing *In re A.L.S.*, 375 N.C. 708 (2020), e.g. *In re L.R.S.*, 237 N.C. App. 16 (2014)). The record shows that the children had been placed with two caretakers who were unwilling to provide long-term care, and Father’s more recent proposed placements were unable to be approved or located by DSS. Therefore, Father lacked an appropriate alternative child care arrangement.

Disposition

Best interest findings

In re B.A.J., ___ N.C. App. ___ (September 17, 2024)

Held: Affirmed

- Facts: Juvenile was adjudicated neglected based on the severe physical abuse and torture of an older half-sibling (the half-sibling was adjudicated abused and another half-sibling was adjudicated neglected; neither are the subject of this TPR). The trial court adopted a primary plan of adoption. Over several permanency planning hearings the court found the parents were not making progress on their case plans and refused to admit or acknowledge the abuse and neglect they imposed on the juveniles. Father of the juvenile who is the subject of this action was later incarcerated following a severe domestic violence incident with Mother for which Mother did not file a DVPO, engaged in calls with Father from jail, and stated her intent for reunification of the family with Father. Father proposed two possible relative placements that DSS ruled out due to safety concerns. DSS motioned for TPRs and the parents' rights were terminated based on the grounds of neglect and willful failure to make reasonable progress to correct the conditions which led to the child's removal. The court of appeals affirmed the adjudication of the ground of neglect. This summary discusses Mother's and Father's appeal of the trial court's determination that terminating their parental rights was in the juvenile's best interest. Mother challenges two dispositional findings as unsupported by competent evidence; Father argues the trial court abused its discretion by not making adequate findings about the two relatives he proposed for placement.
- Dispositional findings are reviewed to determine whether they are supported by competent evidence. A trial court's best interest determination is reviewed for abuse of discretion.
- At the dispositional stage of a TPR the trial court must consider whether termination is in the juvenile's best interest by considering factors listed in G.S. 7B-1110(a). The court must make written findings of the factors it considers relevant. The trial court determines the weight of each factor, and a reviewing court "may not substitute [its] preferred weighing of the relevant statutory criteria for that of the trial court." Sl. Op. at 23 (citation omitted). The "Supreme Court has consistently held that a trial court is not required to consider potential relative placements during the dispositional phase of a TPR proceeding." Sl. Op. at 23.
- Challenged findings are supported by competent evidence. Social worker testimony and the GAL report support the court's finding that there is a bond between the child and the parents and that no evidence was presented to describe the bond or show whether the child recognized Mother and Father as his parents. Unchallenged, binding adjudicatory findings incorporated by reference into the dispositional findings show the court weighed the testimony of Father's relatives and the social worker to determine the relatives were appropriately ruled out for possible placement and that no evidence presented at the hearing warranted reconsideration of Father's proposed relative placements.
- The trial court properly considered the relevant factors of G.S. 7B-1110 and did not abuse its discretion in determining termination of Mother's and Father's parental rights were in the juvenile's best interest. Written dispositional findings of relevant factors include that the juvenile was two years old and had been in DSS custody since he was one month old; termination would aid in accomplishing the primary permanent plan of adoption; the parents' insufficient progress in addressing the conditions of the child's removal make reunification unlikely and it is not in the child's best interest to stay in DSS custody to give the parents more time to show progress or find an appropriate alternative placement; the juvenile has a bond with the parents and no evidence was presented of the type of bond or whether the child

recognizes the respondents as his parents; Father missed all visits with the child during incarceration due to the DV incident with Mother; the juvenile has lived with his current foster family for 21 months and has a strong, loving bond with his foster parents and foster siblings; the foster parents have met all of the juvenile's physical, mental, emotional, and developmental needs and have expressed a desire and commitment to adopt the juvenile, making the likelihood of adoption very high.

Appeal

Notice of appeal; Invited error; Failure to preserve the issue

In re K.B.C., ___ N.C. App. ___ (September 17, 2024)

Held: Affirmed

- **Facts:** Father's parental rights for his three children were terminated. At the TPR hearing, Father called the children's GAL as a witness. The GAL testified that the GAL visited Father while incarcerated to inform Father that the children's foster family intended to adopt the children. Father signed a statement written by the GAL stating the children were well cared for by the foster family, remaining with the foster family was in their best interest, and that he had no intention to oppose a court order to achieve their adoption. Father's counsel was not present during the GAL's visit with Father nor contacted by the GAL. The signed statement was admitted as evidence without objection. After entry of the TPR orders, Father was not served for fourteen days. Father filed notice of appeal eighteen days after service. Father challenges admission of his signed statement, arguing his rights to counsel and fundamentally fair procedures were violated at the time he signed the statement. Father also filed a petition for writ of certiorari to address defects in his appeal, including designating the appeal to the NC Supreme Court and failing to include the correct statute providing his right to appeal.
- G.S. 7B-1001(b) requires notice of appeal to be made "within 30 days after entry *and service of an order* in accordance with G.S. 1A-1, Rule 58." Sl. Op. at 6, *quoting* G.S. 7B-1001(b) (emphasis added in original). Rule 58 of the Rules of Civil Procedure tolls the time periods within which other parties must act when a party fails to serve a copy of the judgment within three days of entry. The time period is tolled "for the duration of any period of noncompliance with this service requirement." N.C. R. Civ. P. 58. Father timely filed his notice of appeal. Father was served fourteen days after entry of the TPR order at which time the thirty-day period under G.S. 7B-1001(b) began, and filed his appeal within thirty days from the date of service.
- "[A] defendant's failure to designate [the court of appeals] in a notice of appeal does not warrant dismissal of the appeal where [the court of appeals] is the only court possessing jurisdiction to hear the matter and the [opposing party] has not suggested that it was misled by the defendant's flawed notice of appeals." Sl. Op. at 6-7 (citations omitted). The court of appeals has heard appeals despite a party's failure to include the correct statute providing their right to appeal. Father's defects in his notice of appeal are non-jurisdictional. The court determined it had jurisdiction to hear Father's appeal and dismissed Father's PWC.
- "A party is not entitled to seek relief on appeal from a trial court action the party invited." Sl. Op. at 8 (citation omitted). Father called the GAL to testify and elicited testimony showing that Father signed a statement that he would not oppose an order allowing for the children's adoption. Father is not entitled to relief on appeal, even if the evidence was admitted in error, as Father invited the error.

- Appellate Rule 10(a)(1) provides that “a party must have presented the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . [and] obtain a ruling upon the party’s request, objection, or motion.” Father failed to preserve his argument regarding the GAL’s testimony or the signed statement for appellate review. The transcript shows Father did not make an objection, motion, or request at the hearing as to the GAL’s testimony or the admission of the signed statement.

No Merit Brief

In re J.B., ___ N.C. App. ___ (June 18, 2024)

Held: Affirmed in part, Dismissed in part

- Facts: Mother’s parental rights were terminated following the adjudication of her six children as abused, neglected, and/or dependent. Mother’s counsel (counsel) filed a no-merit brief identifying two issues that arguably support the appeal; Mother did not file a pro se brief. Counsel also argues in the no-merit brief that the trial court prejudicially erred in terminating Mother’s rights to one of the children due to lack of subject matter jurisdiction.
- Rule 3.1(e) of the Rules of Appellate Procedure allows for counsel for an appellant to file a no-merit brief identifying “any issues in the record that arguably support the appeal and . . . why those issues lack merit or would not alter the ultimate result.” Sl. Op. at 3, *citing* N.C. R. App. P. 3.1(e). The appellate court must conduct an independent review of the issues identified in the brief to determine if any issue has potential merit. “[W]hile Rule 3.1(e) ‘requires that parents be advised by counsel of their opportunity to file a pro se brief, Rule 3.1[(e)] neither states nor implies that appellate review of the issues set out in the no-merit brief hinges on whether a pro se brief is actually filed by a parent.’ ” Sl. Op. at 5, *citing* In re L.E.M., 372 N.C. 396, 402 (2019). If the issues identified in the no-merit brief lack merit, the proper disposition is for the appellate court to affirm the order.
- In affirming the TPR order, the court of appeals conducted an independent review of the record and found no merit in either of counsel’s claims regarding the trial court’s determination of the existence of grounds to terminate Mother’s rights and that termination was in the children’s best interest.
- The court dismissed counsel’s argument that the trial court lacked subject matter jurisdiction to enter the TPR order with respect to one of Mother’s children. Since counsel argues the jurisdictional issue has merit, the court found the issue was improperly included in counsel’s Rule 3.1(e) no-merit brief and is outside the scope of the appeal and appellate review. Mother was not denied meaningful appellate review of the jurisdictional issue as Mother was properly informed of her right to file a pro se brief to supplement counsel’s no-merit brief, evidenced by the communication attached to counsel’s no-merit brief as required by Rule 3.1. Mother did not file a pro se brief, and no such right exists as to a meritorious brief under Rule 28.

UCCJEA

Subject Matter Jurisdiction

Modification jurisdiction

Harney v. Harney, ___ N.C. App. ___ (September 3, 2024)

Held: Affirmed

- Facts: In June 2019, the child was born in New York where Mother resides. Maternal Grandfather lives in North Carolina and traveled to be with Mother when the child was born.

Shortly after the child's birth, Grandfather sought and obtained temporary custody of the child due to concerns with Mother's home and mental health. A few days later, the New York court entered a stipulation agreement with consent of Mother and Grandfather that granted both parties joint custody; noted Grandfather lived in North Carolina and named Grandfather as the child's physical custodian. The stipulation gave Mother supervised visitation rights and included provisions Mother had to address. The child lived in North Carolina with Grandfather since entry of the stipulation order. In June 2020, Grandfather filed for custody of the child in North Carolina. In July 2020, Mother filed petitions to modify and enforce the custody order in New York and motioned to dismiss Grandfather's complaint in North Carolina for lack of subject matter jurisdiction, though admitting the child lived with Grandfather in North Carolina since June 2019. In October 2020, following a hearing conducted by the presiding New York judge and the North Carolina judge, at which both parties appeared in North Carolina, the New York court declined exclusive, continuing jurisdiction, naming North Carolina as the more appropriate forum, and directing the parties to appear and cooperate in further proceedings in North Carolina. In July 2021, the North Carolina court entered a temporary custody order and held custody hearings over several months. In 2022, the North Carolina court entered a permanent custody order granting Grandfather legal and physical custody. Mother appeals. This summary discusses the subject matter jurisdiction of the North Carolina court under the UCCJEA.

- An appellate court has a duty to address subject matter jurisdiction even if not raised by any party. The standard of review of whether a court possesses subject matter jurisdiction under the UCCJEA is de novo. Mother's only argument relating to the North Carolina trial court's subject matter jurisdiction is that the North Carolina court failed to rule on her motion to dismiss. Mother cited no supporting authorities and made no argument on the issue. The court of appeals noted its duty to address jurisdiction and addressed the issue on its own.
- Under the UCCJEA, "[e]xcept as otherwise provided in G.S. 50A-204 [temporary emergency jurisdiction], a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state jurisdiction] or G.S. 50A-201(a)(2) [significant connection jurisdiction] and: (1) The court of the other state determines 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 2, *quoting* G.S. 50A-203.
- North Carolina had subject matter jurisdiction to enter the custody order under the UCCJEA. The New York and North Carolina trial courts held a hearing on Mother's motions filed in New York. The New York court entered an order declining to exercise exclusive continuing jurisdiction in favor of the more appropriate forum of North Carolina in compliance with G.S. 50A-207. Mother did not appeal the New York order, and the order is binding upon North Carolina courts. North Carolina was the child's home state under G.S. 50A-201(a)(1) and the court had modification jurisdiction pursuant to G.S. 50A-203.

Civil Cases Related to Child Welfare

Appeal

Substantial violation of Appellate Rules; Sanction

[Harney v. Harney](#), ___ N.C. App. ___ (September 3, 2024)

Held: Affirmed

- **Facts:** Mother appeals custody order granting Grandfather custody of the child. Mother's appellate brief included three appendixes: one with a table listing challenged findings or

conclusions with analysis and arguments for each, singled spaced in sans serif font; one with portions of the transcript of the proceedings; and one of an unpublished opinion cited in her brief. Mother's brief with appendixes was 73 pages and about 17,000 words. Grandfather's reply brief with appendixes was 83 pages and about 14,000 words. The summary discusses the court's determination of Mother's substantial violation of the Rules of Appellate Procedure and discretionary sanctions imposed.

- An appellate court must consider whether a violation of the Rules of Appellate Procedure is a "substantial failure" or "gross violation" of the rules. Sl. Op. at 15 (citation omitted). "If so, our Supreme Court has instructed that in our discretion, we should 'fashion [] a remedy to encourage better compliance with the rules' " by conducting a "fact-specific inquiry." Sl. Op. at 15-16, 17. Appellate courts may impose sanctions for substantial failure to comply with the rules or gross violation of the rules that may include monetary damages, dismissal, or "any other sanction deemed just and proper." Sl. Op. at 16-17, quoting N.C. R. App. Proc. 34, 25.
- Rules of Appellate Procedure:
 - 26(g)(1) provides formatting requirements, including font and spacing, for documents filed with the court.
 - Rule 28(b) requires the appellant's brief to contain a non-argumentative statement of the material facts, the appellant's argument, a statement of the applicable standard of review, and analysis with appropriate references to the record, the transcript, or exhibits. Rule 28(d) requires appendixes in limited circumstances, including necessary portions of transcripts and proceedings, and establishes formatting requirements. "The purpose of the appendix is to include parts of the transcript, evidence, statutes, or other documents necessary or helpful to understand 'the issue[s] presented in the brief' or, for the appellee, to address an issue raised in the opposing brief." Sl. Op. at 13 (referencing N.C. R. App. P. 28(d)). The purpose of the appendix "is not to extend the body of the brief." Sl. Op. at 13.
 - Rule 28(j) establishes word limits for principal briefs and reply briefs, not including appendixes.
 - Rule 30(e) requires providing a copy of an unpublished opinions cited in a party's brief or argument.
- Mother violated Rules 28(j), 28(d), and 26(g) by using an appendix to make arguments required to be included in her principal brief, by greatly exceeding the word limit permitted for a principal brief by using the appendix as an extension of her brief, and by ignoring the formatting requirements for appendixes. Mother's violation is substantial and imposed a burden on Grandfather and the court. Grandfather incurred increased costs in responding to the brief and violated the rules by adding a similar table to his reply brief to address the arguments in Mother's appendix. If Grandfather had instead motioned to strike part of Mother's brief or requested another sanction, he'd still have incurred additional costs and created additional delay in the appeal. The court spent more time in reviewing improperly extended briefs, determining how to address the issues and rule violations, and the appropriate sanction for violations. The court used its discretion to sanction Mother by not addressing or considering Mother's arguments in the improper appendix, disregarding much of her challenge to the court's findings and conclusion that she acted inconsistently with her constitutionally protected status as a parent. The court notes Mother also violated Rule 28 by placing part of her argument in her statement of the facts. Mother's two other appendixes were proper under Rules 28 and 30. The court declined to sanction Grandfather as his violation of the rules was in response to Mother's violation and his brief otherwise complied with the rules. The court admonished both

counsel to comply with the rules and stated that “if an appellant violates a rule, this does not give the appellee license to violate the rules in response.” Sl. Op. at 22.

No-contact order

Workplace Violence Prevention Act; Free speech; Authority over non-parties

[Durham Cnty. Dept. of Soc. Servs. v. Wallace](#), ___ N.C. App. ___ (September 3, 2024)

Held: Vacated and Remanded

- **Facts:** Former DSS employee (Respondent) appeals from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA). Respondent founded Operation Stop Child Protective Services (Operation Stop CPS) and led rallies and protests against DSS policies, especially focused on abuse and neglect practices. DSS (Petitioner) filed a complaint for a civil no-contact order on behalf of DSS and its employees to enjoin Respondent and her “followers.” The complaint’s allegations included Respondent’s protests near the DSS office and at the Director’s residence, and social media posts and hundreds of text messages sent to an employee by Operation Stop CPS advocates which caused employees to feel fearful. The trial court granted a temporary ex-parte no-contact order and following a hearing, the court found that Respondent’s actions constituted harassment and issued a permanent no-contact order. The court concluded Respondent committed unlawful conduct but would still be allowed to peacefully protest and directed Respondent, among other things, to not visit or interfere with DSS, its employees, or its operations. The order further decreed that the Respondent and her “followers” must be allowed to peacefully protest so long as they are at least 25 feet from the DSS entrances while protesting, do not use amplification devices, and do not yell or chant when minor children are leaving the building when they appear to be exercising DSS supervised visitation (restrictions). Respondent appeals, arguing (1) the social media posts and text messages do not constitute harassment under the WVPA; (2) the no-contact order did not include a finding that Respondent acted with the intent to place an employee in reasonable fear of their safety as required by the WVPA; (3) the order’s restrictions violate Respondent’s freedom of speech under the federal and state constitutions; and (4) the WVPA does not grant the court authority to enjoin non-parties in the order.
- Appellate courts review the “trial court’s record for ‘competent evidence that supports the trial court’s findings of fact’ and the propriety of its ‘conclusions of law . . . in light of such facts.’” Sl. Op. at 5 (citation omitted). Conclusions of law are reviewed de novo.
- The WVPA authorizes a trial court to issue a civil no-contact order “upon finding that an ‘employee has suffered unlawful conduct committed by’ a respondent[,]” which includes “otherwise harassing [conduct], as defined in [N.C. Gen. Stat. §] 14-277.3A. . .” Sl. Op. at 6, quoting G.S. 95-264(a), 95-260(3)(b). Civil harassment has five statutory elements under G.S. 14-277.3A: (1) knowing conduct (2) directed at (3) a specific person (4) that torments, terrorizes, or terrifies, and (5) serves no legitimate purpose. “ ‘Direct at’ element also implicates Respondent’s direction of third parties towards a targeted employee.’ ” Sl. Op. at 9. Relying on Ramsey v. Harman, 191 N.C. 146 (2008), to apply the appellate courts’ interpretation of the identical statutory language and schema of G.S. Chapter 50C applicable to civil no-contact orders, for no-contact orders entered pursuant to the WVPA, the trial court must make findings of harassment “without legal purpose and with the intent to place the employee in reasonable fear for the employee’s safety” to determine the Respondent committed unlawful conduct. Sl. Op. at 12, quoting G.S. 95-260 (emphasis in original).
- Respondent’s social media posts and text messages meet the statutory definition of harassment. Respondent knowingly intended to advocate for certain causes and deliberately

took actions in furtherance of that objective. Respondent influenced and directed Operation Stop CPS advocates to target their efforts at specific DSS employees. The record shows the posts and texts were directed at two specific employees, the Director and a specific social worker, both named in the petition. The fourth element was not addressed by Respondent or the court. The acts may not serve a legitimate purpose based on the court's finding that Respondent intimidated the Director; the finding that numerous texts sent in a short time could also be considered an illegitimate purpose.

- Findings are insufficient to support the court's conclusion that DSS and its employees suffered unlawful conduct committed by Respondent. The court incorporated the facts alleged in the petition in its findings of fact, including protests at the main office and personal residence of an employee, intimidation of the director, and the receipt of numerous texts in a single evening by a social worker that made the social worker and their employees fearful. However the court did not make any findings concerning the content of the harassment or intimidation, or identify who sent the messages. Without these findings, the appellate court cannot review whether the conduct served a "legitimate purpose" or specific intent to "torment, terrorize, or terrify" DSS employees to constitute harassment under G.S. 14-277.3A(b)(2) and thereby conclude that Respondent engaged in unlawful conduct under the WVPA, G.S. 95-260(3)(b).
- To determine whether Respondent's constitutional right to free speech afforded by Article I of the N.C. Constitution were unconstitutionally restricted by the no-contact order, the appellate court relied on preexisting federal Free Speech Clause jurisprudence, citing *State v. Petersilie*, 334 N.C. 169 (1993) (expressly adopting federal free speech jurisprudence to interpret N.C. Const., Art. I, through its disposition). An analysis of "First Amendment free-speech rights and government fora requires four inquiries . . . : (1) whether the restriction affected protected speech or expressive conduct; (2) if so, whether the restriction is either content-based or content-neutral; (3) if content-neutral, which tier of judicial review below strict scrutiny applies to the restriction; and (4) which category of forum the restriction concerns." Sl. Op. at 16 (citations omitted and cleaned up). "Content-neutral restrictions of traditional and designated (collectively, 'unlimited') fora are subject to intermediate scrutiny[.]" Unlimited fora are "quintessential community venue[s], such as a public street, sidewalk, or park." Sl. Op. at 18 (citation omitted). Sl. Op. at 18. To satisfy intermediate scrutiny, "the restriction must be narrowly tailored to achieve an important or substantial government interest in a manner that allows for ample alternative channels of communication" but "need to be the least restrictive or least intrusive means [in achieving said interest]." Sl. Op. at 17-18 (citation omitted).
- The no-contact order satisfies intermediate scrutiny and does not violate Respondent's free speech rights. The effect of the WVPA through the no-contact order implicates Respondent's expressive conduct of protesting DSS's practices. Respondent challenges the WVPA and the order's restrictions as applied to her and therefore the restrictions are content-neutral. Due to the lack of precise findings in the no-contact order, the appellate court deferred determining the exact forum classification at issue here, presumed the forum to be a "quintessential community venue," and applied the most stringent applicable test – intermediate scrutiny. The content-neutral restrictions were aimed at achieving the significant public interests of protecting employee safety and preventing psychological harm to minor children visiting the DSS building. The restrictions were narrowly tailored because they promote this significant interest and would be achieved less effectively otherwise. Finally, the order left open ample alternative channels of communication by specifically allowing Respondent to protest subject to the order's narrow restrictions.
- Appellate courts void "injunctions 'affecting [the] vested rights' of non-parties who lack any identifiable relationship to the parties or any notice of the proceedings." Sl. Op. at 13 (citation

omitted). Here, the trial court did not identify any “followers” of Respondent to enjoin in the order. The portion of the order enjoining the undetermined and unnamed followers is vacated.

- N.C. R. App. P. 10(a)(1) requires Respondent to “present[] to the trial court a timely request, objection, or motion” stating “the specific grounds for the ruling the party desired the court to make.” Respondent did not preserve her constitutional right-to-petition claim for appellate review. Respondent did not raise this claim at any point during trial or as part of an expressed objection, separate from Respondent’s freedom of speech objection.