375 N.C.—No. 3 Pages 503-697

CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY; RESPONSE TO ORDER ESTABLISHING COMMISSION ON FAIRNESS AND EQUITY; BUSINESS COURT RULES; RULES OF APPELLATE PROCEDURE; RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS; RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT; RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY 26, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

CHERI BEASLEY

Associate Justices

PAUL MARTIN NEWBY
ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS
MARK A. DAVIS

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
SARAH PARKER
MARK D. MARTIN

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.
BARBARA A. JACKSON

Clerk

AMY L. FUNDERBURK

Librarian

THOMAS P. DAVIS

Marshal

WILLIAM BOWMAN

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 20 NOVEMBER 2020

HEADNOTE INDEX

APPEAL AND ERROR

Preservation of issues—constitutional rights—continuance—termination of parental rights hearing—A father in a termination of parental rights case waived his argument that a continuance was necessary to protect his constitutional rights where he failed to make his constitutional arguments before the trial court. **In re S.M., 673.**

PROCESS AND SERVICE

Termination of parental rights case—personal jurisdiction—service of process by publication—affidavit requirement—The trial court's order terminating a father's parental rights to his daughter was void where the court lacked personal jurisdiction over the father because the mother (who filed the termination petition) failed to properly serve the father with process by publication, pursuant to Civil Procedure Rule 4(j1), by neglecting to file an affidavit showing the circumstances warranting service by publication. Moreover, where the mother filed a motion seeking leave to serve process by publication, her trial counsel's signature on the motion—certifying the facts therein pursuant to Civil Procedure Rule 11(a)—did not satisfy the affidavit requirement under Rule 4(j1). **In re S.E.T., 665.**

TERMINATION OF PARENTAL RIGHTS

Best interest of the child—likelihood of adoption—sufficiency of evidence—The trial court did not abuse its discretion by determining that termination of a mother's and father's parental rights was in their children's best interest where, although no potential adoptive placement had been identified at the time of the termination hearing, the evidence showed a high likelihood of the children being adopted and of more resources for recruiting potential adoptive families becoming available once the parents' rights were terminated. **In re K.S.D-F., 626.**

Best interest of the child—statutory factors—lack of proposed adoptive placement—The trial court's findings supported its conclusion that termination of a mother's parental rights was in the best interests of her child, an eleven-year-old with

behavioral issues. There was no abuse of discretion where the trial court properly considered the relevant statutory criteria in N.C.G.S. § 7B-1110(a); further, the lack of a proposed adoptive placement at the time of the hearing was not a bar to termination. **In re C.B., 556.**

Best interest of the child—statutory factors—likelihood of adoption—behavioral issues—The trial court did not abuse its discretion by concluding that termination of a mother and father's parental rights served their twelve-year-old child's best interests where a family was interested in adopting all six of their children (including the twelve-year-old) and the trial court did not find that the child's behavioral issues made adoption unlikely. **In re S.M., 673.**

Best interest of the child—sufficiency of findings—likelihood of adoption—bond between parent and child—In a termination of parental rights case, the Supreme Court rejected the mother's challenges to the trial court's dispositional findings regarding her eleven-year-old child who had behavioral issues. The challenged findings on achievement of permanence and likelihood of adoption were supported by competent evidence, and the trial court was not required to make findings about the child's attitude toward adoption or whether the mother's relationship with the child was detrimental to his well-being. **In re C.B., 556.**

Best interests of child—findings—basis—The trial court's conclusion that termination of respondents' parental rights to their three children was in the children's best interests was supported by unchallenged findings of fact addressing the statutory factors in N.C.G.S. § 7B-1110(a). Although respondent-father had a strong bond with the oldest child, and the three children would not be able to live together as a family unit after termination, the trial court did not abuse its discretion by weighing certain factors more than others in determining that termination was in the best interests of the children. **In re A.H.F.S., 503.**

Best interests of the child—current circumstances—speculation—On remand from an earlier appeal, respondent-father failed to show the trial court abused its discretion by concluding that termination of his parental rights was in the best interests of his three children on the existing record without taking additional evidence. The trial court properly relied on evidence from the original termination hearing, and respondent's argument that the trial court failed to take into account changes in the children's circumstances was based on speculation and not supported by a forecast of evidence. **In re R.L.O., 655.**

Continuances—beyond 90 days after initial petition—extraordinary circumstances—procrastination—The trial court did not abuse its discretion by denying a father's motion to continue a termination of parental rights hearing where the father filed the motion at the start of the hearing and argued that he had insufficient time to follow the recommendations in his psychosexual evaluation, which he received only the day before the hearing. The father failed to show the existence of extraordinary circumstances for continuance of the termination hearing beyond 90 days from the date of the initial petition (pursuant to N.C.G.S. § 7B-1109(d))—especially because the father's procrastination in submitting to the court-ordered evaluation caused the delay. **In re S.M., 673.**

Grounds for termination—abandonment—no findings on willfulness—evidence of minimal contact with child—The termination of a mother's parental rights to her daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7))

was reversed and remanded on appeal where the termination order failed to address whether the mother's conduct was willful but where some evidence (showing minimal contact between the mother and her child during the relevant statutory period) might have supported termination of parental rights on these grounds. **In re K.C.T., 592.**

Grounds for termination—dependency—alternative care placement—sufficiency of findings—The trial court erred in finding grounds to terminate a mother's parental rights based on dependency (N.C.G.S. § 7B-1111(a)(6)) where it failed to enter a finding of fact that the mother lacked an appropriate alternative child care arrangement, and where no evidence was presented to support such a finding. **In re K.C.T., 592.**

Grounds for termination—dependency—existence of appropriate alternative child care arrangement—sufficiency of findings—Where the trial court terminated a sixteen-year-old mother's parental rights in her infant based on dependency (N.C.G.S. § 7B-1111(a)(6)) but failed to make any findings regarding whether the mother had an appropriate alternative child care arrangement, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed. **In re K.H., 610.**

Grounds for termination—failure to make reasonable progress—Respondents' parental rights to their three children were properly terminated based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the children where respondents did not adequately address the mother's substance abuse and mental health, conditions and safety of the home, and the children's medical, dental, and developmental needs. Although respondent-father made some progress on his case plan, he did not make reasonable progress toward the primary issues which led to the removal of the children. The trial court's determination that respondent-mother's failure was willful was supported by the evidence and findings of fact. **In re A.H.F.S., 503.**

Grounds for termination—failure to make reasonable progress—incarceration—ability to comply with case plan—The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the trial court found that, although the father's incarceration for a drug offense limited his ability to comply with his case plan, the father failed to complete parts of his case plan that he could have accomplished while incarcerated or to supply documentation confirming that he completed any case plan item apart from one parenting class. Additionally, the court found that the father never inquired about his daughter in the fifteen months before his incarceration, even though he knew she was in the department of social services' custody. **In re A.J.P., 516.**

Grounds for termination—failure to make reasonable progress—juvenile mother and child in same foster home—Where a sixteen-year-old mother and her nine-month-old baby were taken into social services custody and placed in the same foster home, the time that the mother and baby lived together in the same foster home could not count toward the requisite twelve months of separation for termination under N.C.G.S. § 7B-1111(a)(2) because they were not living apart from each other. **In re K.H., 610.**

Grounds for termination—failure to make reasonable progress—removal conditions—direct or indirect—In a termination of parental rights case, the Supreme Court rejected a mother's argument that the removal conditions she had

to correct to avoid termination based on N.C.G.S. § 7B-1111(a)(2) were limited to those set forth in the underlying petition, which the mother contended were the need for stable and appropriate housing. The trial court had the authority to require her to address any condition that directly or indirectly contributed to the children's removal, which included parenting, mental health concerns, and housing instability. **In re E.C., 581.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the evidence supported the court's findings of fact, including that the father was the mother's drug supplier, the father knew about the mother's pregnancy months before the child's birth, and the father provided drugs to the mother throughout her pregnancy. These findings established a nexus between the conditions leading to the daughter's removal (she tested positive for controlled substances at birth and her mother's drug abuse problems persisted) and the substance abuse and mental health components of the father's case plan that he failed to comply with. **In re A.J.P., 516.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—extremely limited progress—Grounds existed to terminate a mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for willful failure to make reasonable progress where the mother made only extremely limited progress in correcting the conditions that led to her children's removal and no evidence suggested that the mother had any barriers preventing her from complying with her case plan. Among other things, she failed to cooperate with social services workers; to obtain stable housing, employment, and income; to participate in domestic violence counseling; and to complete a court-ordered substance abuse assessment. **In re S.M., 673.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—failure to comply with case plan—In a termination of parental rights case, the trial court's findings supported its conclusion that a mother willfully left her children in foster care where she failed to comply with the components of her case plan addressing her parenting and mental health issues, and she addressed the housing component only one month before the termination hearing—after the children had been in Youth and Family Services custody for more than three years. **In re E.C., 581.**

Grounds for termination—failure to make reasonable progress—willfully leaving juveniles in placement outside home—voluntary kinship placement—The trial court erred in finding grounds to terminate a mother's parental rights for willfully leaving her daughter in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal (N.C.G.S. § 7B-1111(a)(2)). These grounds did not apply because the mother agreed to place her child with the child's aunt and uncle through a voluntary kinship placement, and the aunt and uncle later obtained full custody though a civil custody order under Chapter 50 of the General Statutes. **In re K.C.T., 592.**

Grounds for termination—failure to pay reasonable portion of cost of care—six months immediately preceding petition—sufficiency of findings—Where the trial court terminated a sixteen-year-old mother's parental rights in her infant for willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3))

but failed to address the six-month time period immediately preceding the filing of the petition, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed. **In re K.H., 610.**

Grounds for termination—neglect—likelihood of future neglect—In an action between two parents, the trial court properly terminated respondent-mother's parental rights to her child on the grounds of neglect based on an unchallenged finding that the child was previously neglected due to living in an environment injurious to his welfare when living with respondent, and on findings showing a likelihood of repetition of neglect if the child were returned to her care. Respondent's previously stated desire to relinquish her parental rights for a sum of money, her past substance abuse and lack of treatment, her previous failure to contact her son for a period of more than a year, and a lack of evidence that the condition of her home had changed sufficiently demonstrated respondent's inability or unwillingness to provide adequate care and supported a reasonable conclusion that neglect would likely continue in the future. **In re D.L.A.D., 565.**

Grounds for termination—neglect—likelihood of future neglect—The trial court properly terminated a father's parental rights to his son on grounds of neglect, where the father's continued substance abuse, limited progress on his case plan, multiple criminal charges during the pendency of the case, and incarceration after entering an Alford plea to one of those charges—during which he made no attempt to contact his son—indicated a likelihood of future neglect if the son were returned to the father's care. **In re A.S.T., 547.**

Grounds for termination—neglect—likelihood of future neglect—The trial court properly terminated respondent-father's parental rights to his three children on the grounds of neglect after making supplemental findings of fact from the existing record (on remand from an earlier appeal) without taking new evidence. The findings were binding where respondent did not challenge their evidentiary basis, and they established a pattern of neglect consisting of an unsafe and unsanitary home and improper care of the children, which in turn supported a reasonable conclusion that neglect would likely continue if the children were returned to the father's care. **In re R.L.O., 655.**

Grounds for termination—neglect—likelihood of future neglect—neglect by abandonment—The trial court erred in finding grounds to terminate a mother's parental rights to her daughter based on neglect (N.C.G.S. § 7B-1111(a)(1)) where there was no evidence to support a finding of a high likelihood of future neglect if the child were returned to the mother's care, apart from highly speculative testimony regarding the mother's ability to care for the child in light of her own mental disabilities. Furthermore, the mother did not neglect her daughter by abandonment where she consistently sent gifts and repeatedly contacted her daughter and her daughter's caregivers over a long period of time leading up to the termination hearing. **In re K.C.T., 592.**

Grounds for termination—neglect—sufficiency of findings—The trial court's findings supported its conclusion that grounds existed to terminate a father's parental rights based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the father's failure to comply with his case plan during the time he was not incarcerated demonstrated a likelihood of future neglect. Specifically, he continued using illegal drugs, failed to comply with mental health treatment, failed to maintain stable employment or income, failed to take parenting classes, and failed to maintain stable housing

suitable for the child. His minimal eleventh-hour efforts during his subsequent incarceration did not outweigh his previous failure to make progress on his case plan. **In re O.W.D.A., 645.**

Grounds for termination—willful abandonment—conduct outside the statutory period—The trial court properly terminated a father's parental rights to his daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the trial court found the father knew of his daughter about four months before her birth but failed to contact or provide support to her between her birth and his incarceration for possession of cocaine. Although the father was incarcerated during the relevant six-month period, the trial court properly considered the father's conduct outside that period in evaluating his credibility and intentions within the relevant period. **In re A.J.P., 516.**

Grounds for termination—willful abandonment—no contact or financial support—In an action between two parents, the trial court properly terminated a father's parental rights to his daughter based on willful abandonment where, during the nearly three years prior to the filing of the termination petition, the father had no contact with his daughter and provided no financial or other tangible support for her. Although the trial court failed to use the statutory language of "willful abandonment," its findings—based on clear, cogent, and convincing evidence—supported the conclusion that respondent's conduct constituted willful abandonment. **In re N.M.H., 637.**

Jurisdiction—UCCJEA—home state—record evidence—The trial court had jurisdiction to terminate respondents' parental rights to their two children, despite respondents' argument that the trial court failed to make specific findings establishing North Carolina as the children's home state (per the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) in a previous order adjudicating the children neglected, where record evidence established that both children lived in various locations in North Carolina since they were born and at all times until the department of social services obtained custody. **In re A.S.M.R., 539.**

Motion for continuance—more time for counsel to review court records—In a termination of parental rights case, the trial court did not abuse its discretion by denying the father's motion to continue the termination hearing to allow his counsel time to review a permanency planning order that counsel allegedly never received a copy of. The father failed to show extraordinary circumstances justifying the continuance—which would have extended beyond the statutorily allowed period—where his counsel's court file contained multiple references to the permanency planning order, including summaries of the trial court's findings and of the evidence at the permanency planning hearing. **In re A.J.P., 516.**

No-merit brief—abandonment and neglect—drug use and failure to comply with case plan—The termination of a father's parental rights on the grounds of neglect and abandonment (he had a history of drug-related offenses and failed to comply with his case plan) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds. **In re X.P.W., 694.**

No-merit brief—neglect and willful failure to make reasonable progress —The trial court's termination of a mother's parental rights to her two daughters—on grounds of neglect and willful failure to make reasonable progress to correct the conditions leading to the children's removal from the home—was

affirmed where her counsel filed a no-merit brief, and where the record evidence supported the trial court's findings of fact, which in turn supported the statutory grounds for termination and the court's determination that terminating the mother's parental rights was in the children's best interest. **In re G.L., 588.**

On remand from earlier appeal—no new evidence taken—abuse of discretion analysis—On remand from an earlier appeal, the trial court did not abuse its discretion by terminating respondent-father's parental rights to his three children on review of the existing record without taking further evidence. Not only did respondent stipulate that the trial court could enter an order on remand without an evidentiary hearing, but also the Court of Appeals' instructions for the trial court on remand left the decision to take new evidence in the trial court's discretion. **In re R.L.O., 655.**

Standing to file petition—effect on trial court's jurisdiction—In a termination of parental rights case, where the trial court entered a permanency planning order awarding custody and guardianship of the children to their great-aunt and uncle while specifically retaining jurisdiction and providing for further hearings upon motion by any party, the trial court had jurisdiction to enter an order granting nonsecure custody of the children to the department of social services (DSS) after DSS filed a motion seeking review of the children's custody arrangement. Thus, as a party granted custody by a "court of competent jurisdiction," DSS had standing to file a petition to terminate respondent-parents' rights to the children and, therefore, did not deprive the trial court of its jurisdiction over the termination proceeding. **In re K.S.D-F., 626.**

Standing—underlying adjudication order—not appealed—collateral attack —Respondents' failure to appeal from a trial court's order adjudicating their two children neglected constituted an abandonment of any non-jurisdictional challenges to that order. Not only were they precluded from collaterally attacking that order in a subsequent termination of parental rights proceeding, but in addition, their contention that the adjudication order contained errors, even if true, would not deprive the department of social services of standing to pursue a termination of parental rights proceeding. **In re A.S.M.R., 539.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 11, 12, 13, 14
February 15, 16, 17, 18
March 22, 23, 24, 25
May 3, 4, 5, 6
August 30, 31
September 1, 2
October 4, 5, 6, 7
November 8, 9, 10

IN RE A.H.F.S.

[375 N.C. 503 (2020)]

IN THE MATTER OF A.H.F.S., R.S.F.S., AND C.F.S.

No. 369A19

Filed 20 November 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress

Respondents' parental rights to their three children were properly terminated based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the children where respondents did not adequately address the mother's substance abuse and mental health, conditions and safety of the home, and the children's medical, dental, and developmental needs. Although respondent-father made some progress on his case plan, he did not make reasonable progress toward the primary issues which led to the removal of the children. The trial court's determination that respondent-mother's failure was willful was supported by the evidence and findings of fact.

2. Termination of Parental Rights—best interests of child—findings—basis

The trial court's conclusion that termination of respondents' parental rights to their three children was in the children's best interests was supported by unchallenged findings of fact addressing the statutory factors in N.C.G.S. § 7B-1110(a). Although respondent-father had a strong bond with the oldest child, and the three children would not be able to live together as a family unit after termination, the trial court did not abuse its discretion by weighing certain factors more than others in determining that termination was in the best interests of the children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 28 May 2019 by Judge Mack Brittain in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Susan F. Davis for petitioner-appellee Henderson County Department of Social Services.

Katelyn Bailey Heath and Heather Williams Forshey for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

Mercedes O. Chut for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent-parents appeal from the trial court's order terminating their parental rights to A.H.F.S., R.S.F.S., and C.F.S.[1] After careful review, we affirm.

On 5 May 2016, the Henderson County Department of Social Services (DSS) filed petitions alleging that Riley, a newborn, was a neglected and dependent juvenile, and Charley, a one-year-old, was a neglected juvenile. DSS stated that Riley and respondent-mother had tested positive for amphetamines at Riley's birth, and respondent-mother had admitted to using an unknown substance twice in the days leading up to Riley's birth. DSS further claimed that Charley, along with respondent-mother, had also tested positive for drugs when he was born in 2014. DSS alleged that respondent-mother had untreated bipolar and anxiety disorders and claimed that, while respondent-mother was still at the hospital, a social worker observed her "acting erratically, acting anxious, speaking very fast and repeating herself." Because of respondent-mother's behavior, the hospital would not allow respondent-mother to be with Riley unsupervised.

Respondent-mother left the hospital on 2 May 2016 against the advice of doctors because she stated she wanted a cigarette. Riley remained at the hospital, and respondent-mother visited only once after leaving. Respondent-father also visited Riley only once while she was at the hospital. Both respondents refused to take a drug screen offered by the social worker. DSS asserted that because of respondent-mother's history and current substance abuse and due to respondent-father's long work hours neither parent could properly supervise or care for Riley or Charley. DSS stated that a babysitter was watching Charley while respondent-father worked, but the babysitter could not also watch Riley. DSS further claimed that neither of the respondents could identify an

1. The minor children A.H.F.S., R.S.F.S., and C.F.S. will be referred to throughout this opinion as "Amy," "Riley," and "Charley," which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

appropriate family member or friend who could care for the two juveniles. Accordingly, DSS obtained nonsecure custody of Riley.

A nonsecure custody hearing was held on 12 May 2016. DSS filed a supplemental petition claiming that Charley was at risk because respondent-father was allowing respondent-mother to care for Charley without supervision. DSS asserted that respondent-mother had unaddressed substance abuse and mental health issues and had refused to demonstrate sobriety by complying with drug screens. DSS obtained nonsecure custody of Charley.

On 2 August 2016, the trial court adjudicated Riley a neglected and dependent juvenile and Charley a neglected juvenile. On the same date, the trial court entered a separate dispositional order granting legal custody of the juveniles to respondents subject to "strict and complete compliance" with requirements set forth in the order.

On 21 February 2017, DSS filed new petitions alleging that Riley was a neglected and dependent juvenile and that Charley and newborn Amy were neglected juveniles. DSS alleged that Amy had been born approximately ten to twelve weeks premature but that it was difficult to determine her exact gestational age at birth because respondent-mother did not receive any prenatal care. At her birth, both Amy and respondent-mother tested positive for amphetamines and methamphetamines.

On 17 March 2017, DSS filed a supplement to Amy's juvenile petition. DSS stated that Amy was still in the Neonatal Intensive Care Unit, was being fed through a feeding tube, and had problems with her heart rate dropping. DSS further stated that respondents, or any potential caregivers for Amy, would need to receive special training in order to understand and identify the special needs of a premature baby. DSS claimed, however, that respondents had not received this training because respondent-mother had visited with Amy only twice since her birth, and respondent-father had not visited Amy since 25 February 2017. DSS additionally alleged that respondent-mother would not allow the social worker into the residence to observe its condition, and respondent-mother had refused drug screens requested by DSS on 9 February 2017 and 10 March 2017. Accordingly, DSS obtained nonsecure custody of Amy. Riley and Charley remained in respondents' home.

An adjudicatory hearing was held on 6 July 2017. On 3 August 2017, the trial court entered an order adjudicating Riley, Charley, and Amy neglected juveniles. On the same date, the trial court entered a separate dispositional order in which it granted legal custody of all three juveniles to DSS and authorized DSS to place the children in foster care. The trial

court granted respondents supervised visitation. To achieve reunification, both parents were ordered to, *inter alia*, obtain mental health and substance abuse services, maintain appropriate housing, ensure that the children received appropriate evaluations, and comply with recommendations from those evaluations.

On 15 November 2017, the trial court set the primary permanent plan for the juveniles as reunification and the secondary plan as termination of parental rights and adoption. On 23 August 2018, the trial court held a permanency planning review hearing. In an order entered 8 October 2018, the trial court found that respondents had failed to complete the requirements for reunification. The court determined that the juveniles' return home within six months was unlikely, reunification efforts would be unsuccessful or inconsistent with the health or safety of the juveniles, and adoption should be pursued. Accordingly, the trial court changed the primary permanent plan for the juveniles to termination of parental rights and subsequent adoption with a secondary permanent plan of reunification or custody/guardianship with a third party. The trial court further ordered that DSS should not file a petition or motion to terminate parental rights until the results of an Interstate Compact on the Placement of Children (ICPC) home study on a relative were known.

On 19 December 2018, DSS filed a motion to terminate respondents' parental rights pursuant to neglect and willful failure to make reasonable progress. *See* N.C.G.S. § 7B-1111(a)(1) and (2) (2019). On 28 May 2019, the trial court entered an order terminating respondents' parental rights based on the grounds alleged in the petition.

On 27 June 2019, respondents gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

[1] Respondents first argue that the trial court erred by concluding that grounds existed to terminate their parental rights. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f) (2019). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (1982)). If the petitioner meets its burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court

must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110).

"[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019). We begin our analysis with consideration of whether grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondents' parental rights. This section provides that the court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care . . . for more than [twelve] months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95 (2020).

Respondents do not contest that the juveniles have been in placement outside of their home for more than twelve months. Instead, respondents contend they made reasonable progress towards correcting the conditions which led to their removal. We disagree.

We first address the conditions that led to the removal of the juveniles. The trial court's finding of fact 21 states that the juveniles were adjudicated neglected and removed from respondents' care in 2017 "due to domestic violence between the parents, the mother's substance abuse, the conditions and safety of the home, the mother's mental health and the juvenile's medical needs which need to be addressed." Respondent-mother contends that this finding is inaccurate because the 2017 adjudicatory order contains no findings regarding domestic violence. We agree. The adjudicatory order entered on 3 August 2017 does not mention domestic violence as an issue necessitating the filing of the juvenile petition and removal of the juveniles from respondents' home. Thus, we will not consider that portion of finding of fact 21 that states the juveniles were removed from respondents' care due to domestic violence.

Respondent-mother also contends that the only conditions which led to the juveniles' removal were: (1) her positive drug test at Amy's birth; and (2) the unsafe and cluttered condition of her home shortly before Amy's birth. She claims the remaining conditions cited in finding of fact 21 and described in the adjudicatory order existed throughout the 2016 case in which the juveniles were not removed from her home, and thus these conditions were not a proximate cause of their removal in 2017. We are not persuaded.

In the 2017 adjudicatory order, the trial court cited respondent-mother's substance abuse and untreated mental health issues, the unsafe condition of respondents' home, and Riley's and Charley's physical, emotional and developmental issues that were not being addressed by respondents as grounds for removal. The trial court also noted that respondent-mother was the primary caregiver for the juveniles, and respondent-father's long work hours prevented him from contributing to childcare or the upkeep of the home. Respondent-mother did not appeal from the trial court's adjudicatory order and is bound by the doctrine of collateral estoppel from relitigating this issue. *See In re T.N.H.*, 372 N.C. 403, 409 (2019) (stating that because the challenged facts were necessary to the determination in a prior adjudicatory order and the mother did not appeal from that adjudicatory order, she was bound by the doctrine of collateral estoppel from relitigating the findings of fact) (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973)). Respondent-mother cannot now contend that these issues did not lead to the juveniles' removal.

We next address respondent-mother's failure to correct the conditions which led to the juveniles' removal. The trial court found that respondent-mother: (1) failed to complete individual substance abuse therapy as recommended by her Comprehensive Clinical Assessment; (2) failed to submit to forty-three of fifty-six requested drug screens and tested positive for methamphetamines on 1 April 2019 and 15 April 2019; (3) was convicted of two counts of Felony Possession of a Schedule II controlled substance in March 2019 with the dates of the offenses being 20 November 2018 and 28 February 2019; (4) was diagnosed with severe bipolar disorder and failed to address these issues in therapy as recommended by her Comprehensive Clinical Assessment; (5) failed to demonstrate skills learned in parenting classes; (6) failed to attend seventeen of twenty-eight medical/dental appointments for the juveniles and failed to ensure that the medical, dental, and developmental need of the juveniles are being met; and (7) failed to provide a safe and appropriate home for the juveniles.

Respondent-mother contends that there was insufficient evidence to support the trial court's finding that her home was unsafe. She further argues that her admission that the home was unsafe, cited by the trial court in finding of fact 35, occurred over a year before the termination hearing and was both stale and an improper recitation of testimony. We disagree. Respondent-mother refused to let social workers into the home on numerous occasions, thus preventing social workers from determining whether the conditions of the home had improved. When respondent-mother did allow social workers inside the home, they reported little improvement. On 7 July 2018, the guardian ad litem reported to the trial court that "[t]here has been marginal improvement in the cleanliness and safety of the house." On 23 August 2018, a social worker reported to the court that while she had observed some progress during recent visits, "the home consistently has extreme clutter, safety hazards throughout the home such as cleaning chemicals, motor oil bottles on the ground, choking hazards as well as trash throughout the home." Thus, the trial court could reasonably infer from these continuing conditions that the home was still unsafe.

Respondent-mother additionally challenges as not being supported by the evidence the portion of finding of fact 36 which states that while she completed parenting class, she failed to demonstrate the ability to provide proper care for the juveniles. We are not persuaded. The social worker testified at the termination hearing concerning respondent-mother's inability to meet the juveniles' needs. The social worker noted that immediately following a conversation with the pediatrician that Amy was lactose intolerant, respondent-mother offered the children regular milk, and social workers were forced to intervene. Moreover, respondent-mother was invited to attend the juveniles' medical and dental appointments. Of the twenty-eight appointments to which she was invited, she did not attend seventeen of those appointments. Considering the fact that each of the juveniles has special needs, the trial court could reasonably infer that respondent-mother has not demonstrated the ability to provide proper care for the juveniles when she missed over half of the juveniles' medical appointments.

Respondent-mother argues that finding of fact 39, that she failed to ensure the medical, dental, and developmental needs of the juveniles were being met, is erroneous. Respondent-mother asserts that she did not have legal custody of the juveniles and thus had no ability to ensure these needs were being met. We disagree. All three juveniles have special needs. To address the juveniles' special needs, the trial court ordered respondent-mother to attend medical, dental, and developmental

appointments. Respondent-mother does not challenge the trial court's findings that she failed to attend numerous appointments. Thus, again, we conclude the trial court could properly infer that respondent-mother failed to ensure the juveniles' medical, dental, and developmental needs were being met.

The trial court could reasonably conclude that respondent-mother's continuing unaddressed substance abuse issues, the unsafe condition of the home, and respondent-mother's failure to attend medical and developmental appointments for the juveniles, evidenced a failure to correct the conditions that led to the removal of the juveniles.

Respondent-mother contends that the trial court failed to find that she had the ability to make progress regarding the conditions of removal by making a finding of willfulness. However, the trial court made this required finding in its conclusions of law when it determined that respondent-mother had "willfully" failed to make reasonable progress. Although set forth in the conclusions of law, the trial court's determination of willfulness was an ultimate finding of fact. Regardless of whether this finding is classified as an ultimate finding of fact or a conclusion of law, it still must be sufficiently supported by the evidentiary findings of fact. *See In re Z.A.M.*, 374 N.C. at 97 (stating that this Court reviews termination orders "to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order"). Here, we conclude that the trial court's conclusion that respondent-mother willfully failed to make reasonable progress is supported by clear, cogent, and convincing evidence and sufficient evidentiary findings of fact. Accordingly, we hold that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights.

We next address respondent-father's willful failure to correct the conditions which led to the juveniles' removal. Respondent-father contends that he completed a majority of the requirements of his case plan and thus made reasonable progress. While respondent-father did make progress on several requirements of his case plan, we conclude that the trial court did not err in finding that his progress did not constitute reasonable progress under the circumstances of this case.

Regarding respondent-father, the trial court made the following pertinent findings of fact:

> 34. The conditions of the home led to the removal of the juveniles. The Social Worker has been to the home 21

> times and has been denied access to the home 9 times. The Social Worker has observed the home and yard to be extremely cluttered with safety hazards and trash in the home and yard. On April 17, 2019 the Social Worker went to the home and was denied access to the inside of the home by the mother who said the house was trashed.
>
> 35. Both the mother and father have discussed numerous times that items and money have been stolen from the home. The mother has acknowledged to the Social Worker that the home is not safe for the juveniles.
>
> . . . .
>
> 47. The father continues to reside with the mother. The condition of the home is not appropriate for the juveniles.
>
> 48. The father completed parenting classes but has failed to demonstrate benefit from those classes.
>
> 49. The father has failed to ensure that the juveniles' medical, dental and developmental needs are being met. Of the 28 times the father was invited to the juveniles' appointment, he was a no show 18 times, even though [DSS] would notify the father months in advance to the date and time of the appointments.

Respondent-father contends that finding of fact 34 is not specific enough regarding when the clutter and safety hazards were observed. However, as noted previously herein, a social worker and the guardian ad litem raised concerns about the state of the home. Accordingly, we conclude this finding of fact was supported by clear, cogent, and convincing evidence.

Respondent-father challenges finding of fact 48, claiming that the trial court's determination that he "failed to demonstrate benefit" from parenting classes was not supported by clear, cogent, and convincing evidence. Respondent-father cites reports from DSS and the guardian ad litem which he claims demonstrated his progress. However, a social worker testified the respondents have had multiple meetings with the children's therapists, during which the therapists discussed recommendations for respondents to follow during visits to address each child's needs. Neither respondent has followed through with those recommendations. Additionally, respondent-father would engage in arguments with respondent-mother and would repeatedly tell her to "shut up" in

the presence of the juveniles. Accordingly, we conclude there was clear, cogent, and convincing evidence to support this finding of fact.

Respondent-father also challenges finding of fact 49 and argues that he attended over a third of the juveniles' appointments and "took no actions to impede [DSS] in getting the children's needs met." Respondent-father claims that this constitutes reasonable progress. We disagree. Respondent-father, along with respondent-mother, were ordered to attend the juveniles' medical, dental, and developmental appointments. As discussed previously, the juveniles all have special needs, and it was important that respondents attend these appointments to be educated regarding these special needs and to comply with treatment recommendations for the juveniles. As found by the trial court, respondent-father failed to attend a majority of the appointments even though he was given notification months in advance of the date and time of the appointments. Even when respondent-father attended appointments, a social worker testified that he was unable to follow through with treatment recommendations. Thus, we conclude that clear, cogent, and convincing evidence supports the trial court's finding that respondent-father missed numerous appointments, and the trial court could reasonably infer that respondent-father failed to ensure that the juveniles' medical, dental, and developmental needs were being met.

The trial court also made several findings demonstrating respondent-father's compliance with his case plan and efforts to correct the conditions that led to the juveniles' removal. The trial court found as fact that respondent-father completed individual therapy, "did what he could to complete couple's therapy," and had attended scheduled visitation with the juveniles. Despite these findings demonstrating that respondent-father made some progress, we conclude that respondent-father had not remedied the primary conditions which led to the removal of the juveniles. As noted by the trial court, respondents continue to reside together, and their primary residence is still unsafe.

Respondent-father argues that the trial court erroneously based its determination that grounds existed to terminate his parental rights largely based on his continuing relationship with respondent-mother. As discussed above, it is apparent that the trial court considered ample evidence independent of his relationship with respondent-mother.

Because the trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(2) is sufficient in and of itself to support termination of respondents' parental rights, we need not

address respondents' arguments regarding N.C.G.S. § 7B-1111(a)(1). *In re T.N.H.*, 372 N.C. at 413.

[2] We next consider respondents' arguments concerning disposition. If the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. at 842. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988).

We initially note that the trial court properly considered the statutory factors set forth in N.C.G.S. § 7B-1110(a) when determining the juveniles' best interests. The trial court made uncontested findings: (1) regarding the age of the juveniles; (2) that adoption of each juvenile was likely; (3) that termination of respondents' parental rights would aid in the permanent plan of adoption; (4) that Charley had a strong bond with respondents, but Riley and Amy did not; (5) that the juveniles were bonded to their prospective foster parents; (6) that the foster parents were providing for the juveniles' special needs; and (7) that the proposed adoptive parents had agreed to allow the juveniles to visit with each other on a regular basis. Because respondents do not challenge these dispositional findings, they are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

Respondent-father argues that it was not in Riley's and Amy's best interests that his parental rights be terminated without first considering the results of an ICPC home study previously ordered by the court at the 23 August 2018 permanency planning review hearing. Respondent-father further claims that it was not in Charley's best interests to terminate his parental rights given the strong bond between himself and Charley. Lastly, respondent-father contends that while Riley and Amy did not have a strong bond with respondents because all three juveniles were living in different prospective adoptive homes, it was not in Riley's and Amy's best interests that respondent-father's parental rights be terminated because it eliminated the potential for them to live together as a family. We are not persuaded.

First, although the trial court found that Charley was strongly bonded to respondents, this Court has recognized that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437. Based on the trial court's consideration of the other factors and given the respondent's lack of progress in his case plan, this Court concluded in *In re Z.L.W.* that "the trial court's determination that other factors outweighed [the] respondent's strong bond with [the juveniles] was not manifestly unsupported by reason." *Id.* at 438. Similarly, here, we conclude that the trial court's determination that other factors outweighed respondents' strong bond with Charley was not an abuse of discretion.

Second, while the trial court had previously ordered that DSS wait to file a petition to terminate respondents' parental rights pending an ICPC home study in Virginia, and termination of respondents' parental rights precluded the three juveniles living together as a family unit, we have explained in *Z.L.W.*:

> [w]hile the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies

> involving child neglect and custody [is] that the best interest of the child is the polar star").

Id. at 438. Consequently, in *In re Z.L.W.*, we held the trial court did not abuse its discretion in determining termination, rather than guardianship, was in the best interests of the juveniles. *Id.*

In the instant case, as in *In re Z.L.W.*, the trial court's findings of fact demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101. Thus, while consideration of placement alternatives and preserving family integrity is an appropriate consideration in the dispositional portion of the termination hearing, the best interests of the juveniles remain paramount. Accordingly, "[b]ecause the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors," *id.*, we conclude the trial court did not abuse its discretion by concluding that termination of respondent-father's parental rights was in the juveniles' best interests.

Respondent-mother's argument concerning disposition is contingent on respondent-father's retention of his parental rights. Respondent-mother claims that respondent-father substantially complied with his case plan and was a fit parent, and thus the trial court abused its discretion by determining that termination of their parental rights was in the juveniles' best interests. However, because we have already determined that the trial court properly terminated respondent-father's parental rights, these arguments are now moot. We therefore hold that the trial court's conclusion that termination of respondent-mother's parental rights was in the juveniles' best interests did not constitute an abuse of discretion.

In summary, we conclude that the trial court did not err in its determination that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondents' parental rights. We further conclude that the trial court did not abuse its discretion by determining that termination of respondents' parental rights was in the juveniles' best interests. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

IN RE A.J.P.

[375 N.C. 516 (2020)]

IN THE MATTER OF A.J.P.

No. 452A19

Filed 20 November 2020

1. Termination of Parental Rights—motion for continuance—more time for counsel to review court records

In a termination of parental rights case, the trial court did not abuse its discretion by denying the father's motion to continue the termination hearing to allow his counsel time to review a permanency planning order that counsel allegedly never received a copy of. The father failed to show extraordinary circumstances justifying the continuance—which would have extended beyond the statutorily allowed period—where his counsel's court file contained multiple references to the permanency planning order, including summaries of the trial court's findings and of the evidence at the permanency planning hearing.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings

The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the evidence supported the court's findings of fact, including that the father was the mother's drug supplier, the father knew about the mother's pregnancy months before the child's birth, and the father provided drugs to the mother throughout her pregnancy. These findings established a nexus between the conditions leading to the daughter's removal (she tested positive for controlled substances at birth and her mother's drug abuse problems persisted) and the substance abuse and mental health components of the father's case plan that he failed to comply with.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—incarceration—ability to comply with case plan

The trial court properly terminated a father's parental rights to his daughter on grounds of willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where the trial court found that, although the father's incarceration for a drug offense limited his ability to comply with his case plan, the father failed to complete parts of

his case plan that he could have accomplished while incarcerated or to supply documentation confirming that he completed any case plan item apart from one parenting class. Additionally, the court found that the father never inquired about his daughter in the fifteen months before his incarceration, even though he knew she was in the department of social services' custody.

4. Termination of Parental Rights—grounds for termination—willful abandonment—conduct outside the statutory period

The trial court properly terminated a father's parental rights to his daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the trial court found the father knew of his daughter about four months before her birth but failed to contact or provide support to her between her birth and his incarceration for possession of cocaine. Although the father was incarcerated during the relevant six-month period, the trial court properly considered the father's conduct outside that period in evaluating his credibility and intentions within the relevant period.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 26 July 2019 by Judge Hal G. Harrison in District Court, Madison County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for petitioner-appellee Madison County Department of Social Services.

Cranfill Sumner & Hartzog LLP, by Laura E. Dean, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

NEWBY, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights in the minor child A.J.P. (Ava).[1] On appeal

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

respondent-father argues (1) that the trial court abused its discretion by denying his motion to continue the termination hearing; (2) that some findings of fact are not supported by clear, cogent, and convincing evidence and that the remaining findings are insufficient to support the trial court's conclusions of law; (3) that sufficient grounds did not exist to terminate his parental rights for having willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress under the circumstances to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019); and (4) that sufficient grounds did not exist to conclude he had willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7). After careful review, we affirm.

Ava was born in July 2016. On 13 July 2016, the Madison County Department of Social Services (DSS) obtained nonsecure custody of Ava and filed a juvenile petition alleging that Ava was a neglected and dependent juvenile. The juvenile petition alleged that Ava was born "possibly premature" with a low birth weight and was admitted into the neonatal intensive care unit (NICU). Ava's meconium tested positive for cocaine, benzodiazepines, and clonazepam. Ava's mother had received no prenatal care and tested positive for cocaine and benzodiazepines. Ava's mother was on probation for a felony possession of cocaine conviction. The putative father, who was Ava's mother's boyfriend at the time, was on probation for a felony hit-and-run conviction. The juvenile petition further alleged that Ava's mother and putative father were unable to care for Ava and lacked an appropriate alternative child care arrangement.

The trial court held a hearing on the juvenile petition on 8 August 2016 and later entered an order adjudicating Ava to be a dependent juvenile. The trial court set the permanent plan to reunification with a concurrent plan of adoption. Following a hearing held on 12 October 2016, the trial court entered a disposition order on 14 November 2016. The trial court adopted the developed and signed case plan for Ava's mother and the putative father but found that they had made minimal efforts on the case plan. Ava remained in DSS custody.

After a hearing on 6 April 2017, the trial court entered a permanency planning order on 4 May 2017 that changed the permanent plan to adoption, with a secondary plan of guardianship. On 6 April 2017, Ava's mother relinquished her parental rights to Ava. Following a hearing on 13 July 2017, the trial court entered a permanency planning order on 23 October 2017. The trial court found that the putative father had indicated he was willing to relinquish his parental rights to Ava but had failed to maintain contact with DSS. The trial court ordered DSS to

proceed with filing a petition to terminate the putative father's parental rights if a relinquishment was not received. On 25 July 2017, the putative father relinquished his parental rights to Ava; however, as later discovered, he is not the biological father.

After a hearing on 27 October 2017, the trial court entered a permanency planning order on 13 November 2017 ordering DSS to proceed with filing a motion to terminate the parental rights of any unknown fathers, and DSS did so on 18 January 2018. DSS alleged that any unknown fathers had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress under the circumstances to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2), and had willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7).

Ava was born in July 2016. A year and three months later, respondent-father was incarcerated on 9 October 2017 on convictions for possession of a firearm by a felon and felony possession of cocaine with a projected release date of 20 September 2019. Two months after DSS filed its motion, in March of 2018, respondent-father contacted DSS to indicate that he might be Ava's biological father. In May 2018, a paternity test confirmed that respondent-father was Ava's biological father.

On 13 June 2018, the trial court ordered DSS to facilitate a home study on two individuals as possible placement providers for Ava. DSS made reasonable efforts to secure a relative placement on behalf of respondent-father, but could not do so. On 2 August 2018, DSS sent an out-of-home family services agreement to respondent-father. The agreement required him to (1) complete a mental health assessment and substance use assessment and follow recommendations; (2) complete a domestic violence evaluation; (3) not incur new legal charges; (4) keep DSS informed of the outcomes of pending and future charges; (5) follow recommendations of probation and parole; (6) keep $25.00 in his possession at all times to pay for random urinary drug screens for six months; (7) remain substance free; (8) keep DSS informed of all prescribed medications; (9) obtain and maintain employment and show financial ability to meet Ava's basic needs for six months; (10) obtain and maintain housing for six months; (11) attend Child and Family Team meetings and permanency planning meetings, as well as cooperate with DSS; (12) be respectful to DSS staff; (13) keep DSS informed of any changes of address and/or phone number; (14) complete parenting classes; and (15) follow and adhere to the visitation plan. Six weeks later, respondent-father signed the agreement on 24 September 2018 and returned it.

On 24 September 2018, Ava's mother and respondent-father testified in a hearing, and the trial court entered a permanency planning order on 31 October 2018. In its findings, the trial court described Ava's mother's testimony that she and respondent-father had a sexual relationship which resulted in her pregnancy. Their relationship involved the use of controlled substances, and respondent-father was the supplier of her controlled substances. Ava's mother testified that she had a conversation with respondent-father in March 2016 when she learned she was pregnant and that respondent-father knew she was pregnant. Respondent-father continued to supply her with controlled substances during her pregnancy. In addition, Ava's mother testified that she contacted respondent-father from the hospital when Ava was born and that respondent-father bought Ava gifts from time to time but did not provide child support. Respondent-father, on the other hand, testified that he had no knowledge of Ava's birth until September 2017, after a conversation with Ava's mother. Six months later, in March of 2018, he contacted DSS regarding Ava, who was almost two years old by that time.

In a later proceeding on 1 July 2019, the trial court clarified by an oral finding of fact that, among other things, respondent-father knew of the child during the pregnancy, thereby finding the mother's testimony credible. In the 31 October 2018 order, the trial court relieved DSS of further reasonable efforts to reunify Ava with respondent-father, concluded that the permanent plan remained adoption, and ordered DSS to file a motion to terminate respondent-father's parental rights.

On 31 October 2018, the same day the order was filed, DSS filed a motion to terminate respondent-father's parental rights. The termination hearing was continued on 17 December 2018, 16 January 2019, and 21 February 2019. On 4 April 2019, DSS filed a petition to terminate respondent-father's parental rights. DSS alleged that respondent-father had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2), and willfully abandoned Ava, *see* N.C.G.S. § 7B-1111(a)(7). That same day, the termination hearing was continued to 16 May 2019.

On 16 May 2019, counsel for respondent-father withdrew from representing respondent-father due to a conflict of interest, and a new attorney was appointed to represent respondent-father. The trial court continued the termination hearing again until 1 July 2019 to allow the new attorney to prepare for the hearing.

On 1 July 2019, the trial court held a hearing on the petition to terminate respondent-father's parental rights. At the beginning of the termination hearing, respondent-father's attorney requested a continuance, indicating that he needed more time to review the permanency planning order filed on 31 October 2018 because it was not included in the court file that he copied at the time of his appointment. The trial court denied his motion to continue.

During the 1 July 2019 termination hearing, the trial court orally made substantive findings, stating that by the standard of clear, cogent, and convincing evidence

> the respondent is the biological father of this juvenile; that the biological mother informed him of her pregnancy back in March of 2016, approximately four months prior to the child's birth. Thereafter and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little or no contact. Attempts by the father to find an appropriate (inaudible) person failed because of his family's inability to let that happen.
>
> The one credit we learned for the respondent was presented through testimony of the DART [substance abuse] program, which he never signed and did not pursue any action to comply with that case plan except for the completion of a parenting class called Fatherhood Accountability in prison.
>
> [Respondent] testified as to other actions he could have (inaudible) classes, but offered no supporting documentation to support (inaudible) through that testimony.
>
> The Court further finds that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child and to (inaudible). The respondent was here in August the child (inaudible) and acknowledged (inaudible) the Department's effort to terminate his parental rights, elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.
>
> Therefore, at this time the Court will conclude as to ground one that the respondent has failed to make

> reasonable progress toward complying (inaudible) and, further, that the respondent has abandoned the child (inaudible).
>
> All right. We will proceed with disposition.

On 26 July 2019, the trial court entered a written order concluding that both grounds alleged in the petition existed to terminate respondent-father's parental rights, that the respondent-father had willfully left Ava in foster care or placement outside the home for more than twelve months without making reasonable progress and had willfully abandoned Ava. To support its conclusion, the trial court reiterated its oral findings, including that "the respondent father was aware the . . . mother was pregnant" before Ava's birth in July 2016 even though "the respondent father . . . testified he did not know of the existence of the juvenile until shortly before he was incarcerated" in October 2017. The trial court found "that the . . . mother and father had an ongoing relationship prior to the birth of the juvenile that involved the use of controlled substances"; "that at no time from the birth of the juvenile in July 2016 (the same month the juvenile came into DSS custody) did the respondent father contact DSS to inquire as to the juvenile until March 2018, approximately 20 months after the juvenile came into DSS custody; [and] that the respondent father did not contact [DSS] prior to his incarceration before October 2017." The trial court also determined that it was in Ava's best interests that respondent-father's parental rights be terminated, and the trial court terminated his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father appeals.

I.

[1] First, respondent-father argues that the trial court erred by denying his motion to continue the termination hearing in order to allow his counsel to review the permanency planning order filed 31 October 2018. We disagree.

Respondent-father's counsel made an oral motion to continue the termination hearing when it commenced on 1 July 2019 and advised the trial court that he needed "more time for preparation." He explained that although he had copied the court file at the time of his appointment on 16 May 2019, the court file did not contain a copy of the 31 October 2018 order, and he "was not aware" of the existence of the order at that time. Counsel claimed he did not become aware of the order until he "received a copy of the DSS Court Report . . . June 28th, which made reference to that hearing and order." Counsel for DSS opposed the motion to

continue, stating that he had provided a copy of the order to respondent-father's counsel as a potential exhibit and had not received a discovery request from him. The trial court denied respondent-father's motion.

Section 7B-803 of the North Carolina General Statutes provides the following:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C.G.S. § 7B-803 (2019). Additionally, N.C.G.S. § 7B-1109(d) provides that "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2019).

Respondent-father did not assert in the trial court that a continuance was necessary to protect a constitutional right. *See In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (A motion based on a constitutional right presents a question of law, and the order of the court is reviewable.). Thus, we review the trial court's denial of his motion to continue for abuse of discretion. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here the petition to terminate respondent-father's parental rights was filed on 4 April 2019, and the termination hearing was scheduled for 16 May 2019 in District Court, Madison County. On 16 May 2019, respondent-father's counsel withdrew due to a conflict of interest, respondent-father was appointed new counsel, and the trial court continued the matter until 1 July 2019, more than six weeks later, "to allow [the new] attorney to prepare for the termination hearing." Any further continuance of the 1 July 2019 termination hearing, which was held eighty-eight days after the filing of the petition for termination, would have pushed the hearing beyond the 90-day period set forth in N.C.G.S. § 7B-1109(d). Thus, respondent-father was required to make a showing that extraordinary circumstances existed to warrant another continuance. *See* N.C.G.S. § 7B-1109(d).

Respondent-father, however, made no showing that extraordinary circumstances existed to require another continuance of the termination hearing, and we conclude that the trial court did not abuse its discretion by denying respondent-father's motion to continue. Although respondent-father's counsel argued that he was not aware of the order at issue until a few days prior to the termination hearing, there were numerous references to the 24 September 2018 permanency planning hearing and the resulting 31 October 2018 order in the court file. Significantly, five DSS court reports discuss the 24 September 2018 permanency planning hearing, provide that Ava's mother testified at that hearing, and summarize the findings of the resulting permanency planning order. The DSS court reports summarize key portions of the 31 October 2018 order such as Ava's mother's testimony that respondent-father knew she was pregnant and that she informed him that he was possibly the father of the child before Ava's birth and repeatedly after her birth.

Here the court file that counsel had access to and copied on 16 May 2019, a month and a half before the termination hearing, contained multiple references to the 31 October 2018 order following the 24 September 2018 permanency planning hearing and summarized the evidence presented at the hearing and some of the trial court's findings. We cannot say that the trial court abused its discretion by denying the motion to continue.

II.

[2] Next, respondent-father contends the trial court erred by adjudicating grounds for the termination of his parental rights based on willful failure to make reasonable progress to correct the conditions that led to Ava's removal and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(2), (7). Specifically, respondent-father challenges several of the trial court's findings of fact as not being supported by clear, cogent, and convincing evidence and argues that the findings of fact are insufficient to support the trial court's conclusions of law. Those findings of fact which he does not challenge are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Our Juvenile Code provides for a two-step process for the termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). The petitioner bears the burden at the adjudicatory stage of proving by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under subsection 7B-1111(a) of the North Carolina General Statutes. N.C.G.S.

§ 7B-1109(f). "We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). If the trial court adjudicates one or more grounds for termination, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); then citing N.C.G.S. § 7B-1110 (2015)).

Termination under N.C.G.S. § 7B-1111(a)(2)

> requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020). Leaving a child in foster care or placement outside the home is willful when a parent has "the ability to show reasonable progress, but [is] unwilling to make the effort." *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002).

Moreover, this Court has held that

> parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.

In re B.O.A., 372 N.C. 372, 384, 831 S.E.2d 305, 313–14 (2019). For a respondent's noncompliance with a case plan to support termination of his or her parental rights, there must be a "nexus between the components of the court-approved case plan with which [the respondent]

failed to comply and the 'conditions which led to [the child's] removal' from the parental home." *Id.* at 385, 831 S.E.2d at 314.

In its written termination order filed 26 July 2019, the trial court found facts regarding the grounds under N.C.G.S. § 7B-1111(a)(2) in finding of fact 11, which spans a page and a half of the five-page order. The trial court found that Ava tested positive for controlled substances at birth, received treatment in the NICU, and was placed in DSS custody when she was eleven days old. By the time of the order, she had been in DSS custody for nearly three years. Ava had been removed from the home of her mother and her mother's boyfriend, partly as the result of their substance abuse issues. The trial court further found that respondent-father and the mother had an ongoing relationship before Ava's birth that involved the use of controlled substances, and respondent-father was aware the mother was pregnant.[2]

Over a year after Ava's birth in July 2016, respondent-father was incarcerated in October 2017 and, five months after that, contacted DSS in March 2018 to inquire about Ava. In its oral findings at the adjudicatory stage, the trial court found

> that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child . . . . [He] elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.

In its written findings, the trial court found that respondent-father had not developed a case plan and had not complied with the requirements of a DSS case plan to eliminate the reasons Ava came into DSS custody or to place himself in a position to be reunified with Ava. The trial court found that respondent-father had failed to maintain contact with DSS; timely sign and return a case plan to DSS; make an effort to reunify with Ava, except for completing a parenting class; develop a relationship with Ava; and visit Ava.

Initially, respondent-father asserts that the style of the trial court's finding of fact 11 impedes appellate review because the findings therein constitute a "stream of consciousness" rather than careful consideration of the evidence presented. *See In re L.L.O.*, 252 N.C. App. 447, 458–59,

2. In an earlier order, the trial court had found respondent-father supplied Ava's mother with controlled substances during her pregnancy.

799 S.E.2d 59, 66 (2017) (determining that a trial court's "stream of consciousness" style of findings "impede[d its] ability to determine whether the trial court reconciled and adjudicated all of the evidence presented to it"). We are not persuaded that the trial court's findings in finding of fact 11 amount to "stream of consciousness." Although all of the trial court's findings supporting grounds for termination under N.C.G.S. § 7B-1111(a)(2) are grouped together in finding of fact 11, the trial court did not use a personal pronoun, describe its thought process, or explain its personal experiences and feelings. The style of the trial court's finding of fact 11 does not impede appellate review.

Next, respondent-father challenges the portion of finding of fact 11 which provides that Ava "came into DSS custody partly as the result of [the mother's] substance abuse issues," rather than describing the circumstances surrounding Ava's removal as "entirely" due to the mother's substance abuse. Although the mother's substance abuse was a primary reason for the juvenile's removal from the home, the trial court also cited additional reasons in its adjudication order, including the mother's lack of prenatal care; Ava testing positive for controlled substances at birth; Ava having a low birth weight and possibly being born premature; the mother being on probation for felony possession of cocaine; the putative father being on probation for felony hit-and-run causing serious injury; the mother and putative father's inability to care for Ava; and the mother and putative father's lack of an appropriate alternative child care arrangement. Accordingly, the trial court's use of the word "partly" was supported by clear, cogent, and convincing evidence.

Respondent-father also challenges the following portion of finding of fact 11: "a Petition was initially filed by Madison County DSS on 13 July, 2016 alleging the juvenile to be a neglected juvenile." Although Ava was ultimately adjudicated to be a dependent juvenile, the record clearly demonstrates that the 13 July 2016 juvenile petition alleged that Ava was a neglected and dependent juvenile. Thus, respondent-father's challenge is without merit.

Respondent-father next argues that no clear and convincing evidence supports the trial court's findings that he had an ongoing relationship with the mother that involved drug use and that he was aware of when Ava was born. Rather, respondent-father claims that the trial court relied solely on the mother's testimony for that finding. Here respondent-father's own testimony at the termination hearing, however, supports the trial court's finding. Respondent-father testified that he and Ava's mother had an ongoing relationship before Ava's birth that involved the use of controlled substances.

> [Attorney for DSS]: You and [Ava's mother] had a relationship with each other before this child was born. Right?
>
> [Respondent-father]: Yes, we did.
>
> . . . .
>
> [Attorney for DSS]: That relationship included, at some point, the use of controlled substances as well. Right?
>
> [Respondent-father]: Yes.

Accordingly, clear, cogent, and convincing evidence supports the trial court's finding that respondent-father's relationship with the mother before Ava's birth involved the use of controlled substances.

Respondent-father also disputes several of the trial court's findings regarding his case plan. First, respondent-father contests the portion of finding of fact 11 that provides that he "has not developed a DSS case plan" is not supported by clear, cogent, and convincing evidence and that his ability to comply with the case plan was "extremely limited" by his incarceration, rather than "more limited" as stated by the DSS social worker and incorporated into the findings of fact by the trial court. Even if the disputed portions of these findings are disregarded, *see In re J.M.*, 373 N.C. 352, 358, 838 S.E.2d 173, 177 (2020), respondent-father did not timely sign and return the case plan or make the necessary strides towards its completion.

A DSS social worker testified at the termination hearing that DSS sent respondent-father a case plan on 2 August 2018 and that he did not sign it until 24 September 2018. It was reasonable for the trial court to infer that waiting nearly two months to sign the DSS case plan was not "timely." Likewise, while the DSS social worker testified at the termination hearing that certain components of respondent-father's case plan were not possible to achieve in a prison setting, respondent-father could only verify that he completed one case plan item, completing a parenting class. According to the trial court,

> [respondent-father] testified that he completed the DART substance [abuse] program in 2017 and participated in Narcotics Anonymous meetings while incarcerated; the respondent father has provided no documentation of same to the Court to confirm these services were completed and the court therefore gives little to no weight to same.

When reading finding of fact 11 and finding of fact 12 in conjunction, it is clear that the trial court acknowledged that, while respondent-father

testified he completed a substance abuse program in 2017 and participated in Narcotics Anonymous meetings, he failed to provide any documentation to confirm that he completed those services. The crux of the challenged portions of both written findings 11 and 12 and the trial court's oral findings is that respondent-father failed to confirm his completion of substance abuse treatment.

Next, respondent-father argues that the remaining findings of fact do not support the trial court's conclusion that he willfully left Ava in foster care or placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal. Specifically, respondent-father argues that because the mother's substance abuse was the cause of Ava's removal, his lack of progress in the mental health, domestic violence, housing, and employment components of his case plan was not relevant in determining whether grounds existed under N.C.G.S. § 7B-1111(a)(2) to terminate his parental rights. We disagree.

Here the findings in the adjudication order indicate that Ava was removed from the custody of the mother and the putative father on 13 July 2016 based on a myriad of reasons, including the mother's substance abuse issues; the lack of prenatal care; Ava testing positive for controlled substances at birth; and their inability to care for Ava. Ava was not removed from respondent-father's custody since he never had custody of the child. Nonetheless, at the termination hearing, the trial court orally found as fact "that the biological mother informed [respondent father] of her pregnancy back in March of 2016, approximately four months prior to the child's birth." The trial court also found that respondent-father's relationship with the mother involved the use of controlled substances, respondent-father was the mother's supplier of controlled substances, and respondent-father continued to provide her with controlled substances during her pregnancy with Ava. The trial court found in its 31 October 2018 permanency planning order that respondent-father had been incarcerated since October 2017 for possession of cocaine and possession of a firearm by a felon and had previous convictions for possession of controlled substances in 1996 or 1997 and in 2006.

A careful review of the record shows the need for the substance abuse and mental health components of respondent-father's case plan. The family services agreement provided that the objective of the mental health and substance abuse components of respondent-father's case plan was to "identify and correct underlying traumas that cause these behaviors [in order] to create a safe and secure environment for

[Ava]." Because respondent-father contributed to the problematic circumstances that led to Ava's removal, we find there is a sufficient nexus between the conditions that led to Ava's removal and the substance abuse and mental health components of respondent-father's case plan. *See In re B.O.A.*, 372 N.C. at 386–87, 831 S.E.2d at 315 (noting that the history shown in various reports and orders contained in the record reflected the existence of a sufficient nexus between the conditions that led to the child's removal and the case plan relating to the mother's mental health, substance abuse, and medication management issues).[3]

III.

[3] Next, respondent-father asserts that the trial court's findings are insufficient to demonstrate that it considered the obstacles to his completion of the case plan, namely the timing of when he discovered Ava was in DSS custody and his incarceration. "A parent's incarceration is a 'circumstance' that the trial court must consider in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile.' " *In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007). *But see*, *e.g.*, *In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) ("Because respondent was incarcerated, there was little involvement he could have beyond what he did—write letters to [his children] and inform DSS that he did not want his rights terminated.").

Respondent-father was incarcerated in part due to a conviction for felony possession of cocaine. The trial court noted in its written findings of fact that a DSS social worker acknowledged that respondent-father's ability to comply with the case plan was "more limited" while incarcerated. Even if respondent-father attempted to comply with certain aspects of the case plan, he did not supply documentation to confirm his completion of any case plan item except for a parenting class taken while incarcerated. Given respondent-father's contribution to Ava's removal from the home by supplying drugs to Ava's mother during her pregnancy and his criminal history involving controlled substances, it was imperative that he prove his successful completion of the substance abuse components of the case plan, which could be accomplished while incarcerated.

---

3. We agree, however, with respondent-father's assertion that a nexus between the domestic violence, housing, and employment components of his case plan and the conditions that led to Ava's removal is lacking. Accordingly, respondent-father's failure to comply with those components is not relevant to the determination of whether his parental rights to Ava are subject to termination under N.C.G.S. § 7B-1111(a)(2). *See In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314.

The trial court also orally found as fact that "that the biological mother informed him of her pregnancy back in March of 2016, approximately four months prior to the child's birth." Following Ava's birth, "and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little or no contact."

> The Court further f[ound] that at no time during or since the birth of this child has the . . . respondent contacted or tried to contact this child and to (inaudible). The respondent was here in August the child (inaudible) and acknowledged (inaudible) the Department's effort to terminate his parental rights, elected not to send cards, not to make calls. In addition, the respondent has been in this courtroom on (inaudible), during which time he never once requested the opportunity to see this child.

It is clear that respondent-father had limited communication with DSS and did not inquire as to how to communicate with Ava via cards, letters, or phone calls. He personally met and received contact information from the child's guardian *ad litem* but did not make an effort to contact him or to understand the role of the guardian *ad litem*. With regard to his efforts to complete other case plan items, the trial court found that "[a]ttempts by the father to find an appropriate (inaudible) person [as an alternative child care arrangement] failed because of his family's inability to let that happen." In finding of fact 11, the trial court found that respondent-father had "made no effort to reunify with [Ava], except the completion of a parenting class."

Ava has been in foster care since she was eleven days old. While respondent was incarcerated for over half of the time Ava was in foster care, he was not incarcerated at her birth or during the first fifteen months of her life during which she was in DSS custody. Fifteen months passed during which respondent-father knew of Ava but did not inquire about her even though he was not incarcerated. Given his minimal efforts to maintain contact with her or complete the case plan items he could during his incarceration, the trial court's findings are sufficient to demonstrate that respondent-father's failure was willful in that he had the ability to show reasonable progress but was unwilling to make the effort. Based on the foregoing, we conclude that the trial court's findings are sufficient to support its conclusion that respondent-father left Ava in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal. The trial

court did not err by terminating respondent-father's parental rights to Ava on this ground.

IV.

[4] Under N.C.G.S. § 7B-1111(a)(7), a trial court may terminate the parental rights of a parent who "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7). "In order to find that a parent's parental rights are subject to termination based upon willful abandonment, the trial court must make findings of fact that show that the parent had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child] . . . .' " *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 79, 833 S.E.2d 768, 774 (2019)). "Wilful [sic] intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "[I]f a parent withholds [that parent's] presence, [ ] love, [ ] care, the opportunity to display filial affection, and wilfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.*

"Although a parent's options for showing affection while incarcerated are greatly limited, a parent 'will not be excused from showing interest in his child's welfare by whatever means available.' " *In re D.E.M.*, 257 N.C. App. 618, 621, 810 S.E.2d 375, 378 (2018) (emphasis omitted) (quoting *In re J.L.K.*, 165 N.C. App. 311, 318–19, 598 S.E.2d 387, 392 (2004)). "As a result, our decisions concerning the termination of the parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children." *In re A.G.D.*, 374 N.C. at 320, 841 S.E.2d at 240. The trial court may "consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions" within the relevant period. *In re C.B.C.*, 373 N.C. at 22, 832 S.E.2d at 697.

Here the relevant six-month period preceding the filing of the termination petition is 31 April 2018 to 31 October 2018; respondent-father was incarcerated during this time period.

In finding of fact 12, the trial court supported its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7). The trial court found in finding of fact 12 that

> subsequent to the birth of the juvenile the respondent father had no contact with the juvenile; provided no care for the juvenile; provided no support for the juvenile; did not provide any care or support for the juvenile during the 14/15 months from the time the juvenile was born until he was incarcerated in October, 2017; developed no bond or relationship with the juvenile; did not contact DSS to inquire as to the status of the juvenile or develop a case plan with DSS to work to reunification with the juvenile to prevent the juvenile from remaining placed in foster care; that since paternity was established has not complied with DSS case plan requirements; did participate in the DART program while in DAC custody but has not provided documentation of same to DSS; that despite having a significant substance abuse problem over the past 20 years has only received treatment for the same while incarcerated; has presented no documentation as to completion of that program during this hearing; has recently completed a parenting course offered while incarcerated; that the respondent father has an older child with whom he has a limited relationship.

Respondent-father argues that the first part of finding of fact 12, which provides that he had not contacted or provided support or care for Ava between her birth in July 2016 and his incarceration in October 2017, is outside the relevant period. In making this argument, he relies on the assertion that there was no evidence or proper finding that he knew of Ava's existence prior to his incarceration. As previously discussed, the trial court found as fact that respondent-father knew of the child approximately four months before her birth. Therefore, we conclude that his failure to contact Ava or provide support and care for her between her birth and his incarceration was purposeful and deliberative and was properly considered by the trial court in evaluating respondent-father's credibility and intentions within the relevant period even though the conduct fell outside the six-month window. Accordingly, the trial court's finding of fact 12 adequately supports its conclusion that respondent-father willfully abandoned Ava, and the trial court's order terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7) is affirmed.

For the reasons stated above, we affirm the 26 July 2019 order of the trial court terminating respondent-father's parental rights.

AFFIRMED.

Justice EARLS dissenting.

In affirming the trial court's order terminating respondent's parental rights, the majority agrees with the trial court's conclusion that petitioners have proven by clear, cogent, and convincing evidence that respondent willfully failed to make reasonable progress towards correcting the conditions that led to Ava's removal, pursuant to N.C.G.S. § 7B-1111(a)(2), and that he willfully abandoned Ava, pursuant to N.C.G.S. § 7B-1111(a)(7). In reaching this conclusion, the majority disregards numerous recent precedents which establish that (1) a trial court must analyze the effects of a parent's incarceration on his or her capacity to comply with the terms of a court-approved DSS case plan before concluding that the parent has willfully failed to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2), and (2) a trial court must consider a parent's conduct within the "determinative" six-month period preceding the filing of a termination petition when assessing whether the parent has willfully abandoned his or her child within the meaning of N.C.G.S. § 7B-1111(a)(7). Because the trial court did neither, I dissent. However, because the record contains evidence that could support the conclusion that grounds existed to terminate respondent's parental rights, I would vacate the trial court's order and remand for further factfinding.

As a preliminary matter, the evidence that respondent knew he was Ava's biological father at or near the time of her birth is equivocal. At a permanency planning hearing in September 2018, respondent testified that he did not learn about Ava until September 2017 when he was informed of Ava's birth by her mother. At the same hearing, Ava's mother testified that, in the trial court's recounting, "respondent father was aware she was pregnant" and that she "contacted the respondent father from the hospital when the juvenile was born." In addition, DSS reported that Ava's mother "had told [respondent] he was possibly the father of [Ava] before [she] was born and repeatedly after her birth." On the basis of this testimony and the DSS report, the trial court made an oral finding of fact that "the biological mother informed [respondent] of her pregnancy in March of 2016, approximately four months prior to the child's birth. Thereafter and for the next fifteen months, respondent father did nothing to pursue his rights as the biological father of this child; there was little to no contact." In its written termination order, the trial court found that "respondent mother previously testified the respondent father was contacted shortly after the juvenile was born; that the respondent father was aware the respondent mother was pregnant; that

the respondent mother and father had an ongoing relationship prior to the birth of the juvenile that involved the use of controlled substances."[1]

Notably, the trial court did not find that respondent knew Ava was *his* biological child at any time prior to September 2017, notwithstanding Ava's mother's testimony and the DSS report. There is a distinction between this finding, which the trial court did not make, and the trial court's actual finding that respondent knew of Ava's mother's pregnancy. If respondent knew that Ava was his biological child at the time of her birth, then respondent's purported lack of effort to involve himself in her life might indicate a "purposeful and deliberative" intent to wholly abandon his parental duties, as the majority states. But if respondent instead knew only that Ava's mother was pregnant and gave birth to a child, his actions (or lack thereof) would be largely, if not entirely, irrelevant. From the beginning, Ava's mother represented to DSS that her boyfriend was Ava's biological father. At a minimum, the fact that Ava's mother was publicly maintaining that her boyfriend was Ava's biological father indicates that respondent's opportunities to initiate and maintain a relationship with Ava were limited. Of course, the trial court possessed the authority to "determine which inferences shall be drawn and which shall be rejected" from conflicting or contradictory evidence. *In re Gleisner*, 141 N.C. App. 475, 480 (2000). But the trial court did not expressly draw the inference that respondent knew he was Ava's biological father prior to September 2017. Thus, the significance of respondent's conduct towards Ava in the immediate aftermath of her birth is questionable.

Nevertheless, the majority relies heavily upon respondent's failure to develop a relationship with Ava "at her birth or during the first fifteen months of her life during which she was in DSS custody." Yet even if respondent knew or reasonably should have known that he was Ava's biological parent during this time period, the trial court's order still lacks sufficient findings to support its conclusion that there is clear, cogent, and convincing evidence that grounds existed to terminate respondent's parental rights.

First, the trial court, and the majority, both fail to adequately account for the limitations imposed by respondent's incarceration on his ability to comply with the court-approved DSS case plan. As this Court has

1. I reiterate my concern that a single individual's bare "testimony, supplemented by no other evidence besides the pleadings," may be insufficient to prove by clear, cogent, and convincing evidence that a ground exists to terminate parental rights. *In re L.M.M.*, 847 S.E.2d 770, 778 (N.C. 2020) (Earls, J., dissenting).

repeatedly emphasized, "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re S.D.*, 374 N.C. 67, 75 (2020) (alteration in original) (quoting *In re T.N.H.*, 372 N.C. 403, 412 (2019)). It is not enough that the trial court "noted in its written findings of fact that a DSS social worker acknowledged that respondent-father's ability to comply with the case plan was 'more limited' while incarcerated." Rather, the trial court was required to independently conduct "an analysis of the relevant facts and circumstances" in order to determine "the extent to which [respondent's] incarceration . . . support[ed] a finding" that he had failed to make reasonable progress in correcting the conditions that led to Ava's removal. *In re K.N.*, 373 N.C. 274, 283 (2020).

The trial court conducted no such analysis. For example, the trial court found that "the respondent father has not developed a DSS case plan [and] has not complied with the requirements of a DSS case plan to eliminate the reasons the juvenile came into DSS custody." It is uncontroverted that respondent did indeed sign a DSS case plan on 24 September 2018. According to the majority, these facts are reconcilable because "[i]t was reasonable for the trial court to infer that waiting nearly two months to sign the DSS case plan was not 'timely.' " Yet neither the trial court nor the majority address respondent's argument that his failure to immediately sign the case plan was caused by his inability to confer with his attorney about its terms, which resulted from his incarceration. As the trial court noted in a prior order, a writ was issued to allow respondent to attend a review hearing scheduled for 21 August 2018, but "law enforcement did not bring [respondent]." Respondent signed the case plan the next time he appeared in court with his attorney present on 24 September 2018. The trial court was not entitled to ignore the possibility that respondent's incarceration delayed his signing of the DSS case plan. *Cf. In re N.D.A.*, 373 N.C. 71, 82 (2019) (trial court must first determine "whether respondent-father had the ability to contact petitioner and [his child] while he was incarcerated" before making "a valid determination regarding the extent to which respondent-father's failure to contact [his child] and petitioner . . . was willful"). Similarly, the trial court and the majority both disregard respondent's testimony that he completed numerous courses required by his case plan while he was incarcerated because respondent failed to provide proper "documentation . . . to confirm these services were completed." Again, neither the trial court nor the majority considers the possibility that respondent's lack of documentation, or his failure to bring documentation to the termination hearing, resulted from the circumstances of his incarceration.

We have frequently held that a parent's incarceration does not excuse the parent from his or her obligation to comply with a DSS case plan to the extent his or her circumstances allow. *See, e.g.*, *In re M.A.W.*, 370 N.C. 149, 153 (2017). But our precedents establish that a trial court must analyze the circumstances of a parent's incarceration before determining that the parent has failed to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). *Cf. In re S.D.*, 374 N.C. at 77 (affirming a trial court's order that "addressed respondent-father's incarceration and the extent of his ability to satisfy the requirements of his case plan in the process of finding that his parental rights in [his child] were subject to termination"). In affirming the trial court's order without any meaningful examination of "the extent, if any, to which respondent-father's incarceration affected his ability to" comply with his DSS case plan, the majority erodes the protections afforded to all parents, including incarcerated parents, in termination proceedings. *In re N.D.A.*, 373 N.C. at 82.

Second, in attempting to justify the trial court's conclusion that respondent willfully abandoned Ava pursuant to N.C.G.S. § 7B-1111(a)(7), the majority ascribes undue weight to respondent's conduct during the time period surrounding Ava's birth. In examining whether respondent willfully abandoned Ava, the "*determinative period* . . . is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77 (emphasis added) (citation omitted); *see also In re K.N.K.*, 374 N.C. 50, 54 (2020); *In re J.D.C.H.*, 847 S.E.2d 868, 874 (N.C. 2020); *In re A.L.S.*, 374 N.C. 515, 521 (2020); *In re C.B.C.*, 373 N.C. 16, 22 (2019).[2] Thus, "[a]lthough the trial court *may* consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions," this conduct is less significant than conduct which occurs within the determinative period. *In re E.B.*, 847 S.E.2d 666, 672 (N.C. 2020) (emphasis added). A parent's conduct outside the determinative period is relevant only "*in evaluating a parent's credibility and intentions*"—that is, in providing context which the trial court may look to in interpreting the significance of a parent's conduct *during* the determinative period. *In re C.B.C.*, 373 N.C. at 22. A trial court's conclusion that a parent has "willfully abandoned" his or her child is necessarily unsupported

2. The majority does not cite to any of our numerous precedents describing the six-month period preceding the filing of the termination petition as the "determinative" period, instead referring only to a "relevant six-month period." The use of the phrase "relevant six-month period" appears intended to diminish the force of our precedents which conclusively establish that a parent's conduct during the determinative six-month period is more than "relevant" to the willful abandonment analysis under N.C.G.S. § 7B-1111(a)(7)—a parent's conduct during this window offers the most significant indicia of willful abandonment, carrying more probative value than conduct which occurs before (or after) the determinative period.

by clear, cogent, and convincing evidence when the trial court fails to address relevant conduct that occurs within the determinative six-month period.

In the present case, the petition to terminate respondent's parental rights was filed on 31 October 2018, meaning the "determinative six-month period" began on 31 April 2018. It is indisputable that respondent made efforts to assert his parental rights during these six months. In May 2018, respondent took a paternity test which confirmed his biological parenthood. In or around June 2018, respondent provided DSS with the names of two relatives for consideration as possible kinship placements for Ava. In September 2018, respondent entered into a case-plan agreement with DSS. These actions do not "impl[y] conduct on the part of the parent which manifests a willful determination to forego *all* parental duties and relinquish *all* parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (emphases added). Indeed, given that respondent's "options for showing affection . . . [were] greatly limited" while he was incarcerated, respondent's efforts are flatly inconsistent with the conclusion that he willfully abandoned Ava. *In re L.M.M.*, 847 S.E.2d 770, 775 (N.C. 2020).

Even assuming *arguendo* that "respondent acted willfully and with an intention to forego his parental responsibilities" by failing to establish himself in Ava's life at the time of her birth, *In re K.N.K.*, 374 N.C. at 55, the majority's reasoning fails because it does not account for his conduct evincing an intent to assume some responsibilities of parenthood during the determinative period. In affirming an order terminating parental rights pursuant to N.C.G.S. § 7B-1111(a)(7), this Court has held that a parent's "prior efforts in seeking a relationship with [his child]" before the determinative six-month period do not "preclude a finding that he willfully abandoned [his child] pursuant to N.C.G.S. § 7B-1111(a)(7) if he did nothing to maintain or establish a relationship with [the juvenile] during the determinative six-month period." *In re C.B.C.*, 373 N.C. at 23. The converse is also true—respondent's previous failure to establish himself in Ava's life is insufficient evidence to prove willful abandonment given that he attempted to establish a relationship with Ava during the determinative period. By failing to examine respondent's conduct during the six months preceding the filing of the termination petition, and instead relying solely on its evaluation of respondent's earlier conduct, the majority flips the willful abandonment inquiry on its head. This approach is irreconcilable with settled precedents which we have recently and repeatedly reaffirmed.

For the above-stated reasons, I respectfully dissent.

IN RE A.S.M.R.

[375 N.C. 539 (2020)]

IN THE MATTER OF A.S.M.R. AND M.C.R.

No. 379A19

Filed 20 November 2020

1. Termination of Parental Rights—standing—underlying adjudication order—not appealed—collateral attack

Respondents' failure to appeal from a trial court's order adjudicating their two children neglected constituted an abandonment of any non-jurisdictional challenges to that order. Not only were they precluded from collaterally attacking that order in a subsequent termination of parental rights proceeding, but in addition, their contention that the adjudication order contained errors, even if true, would not deprive the department of social services of standing to pursue a termination of parental rights proceeding.

2. Termination of Parental Rights—jurisdiction—UCCJEA—home state—record evidence

The trial court had jurisdiction to terminate respondents' parental rights to their two children, despite respondents' argument that the trial court failed to make specific findings establishing North Carolina as the children's home state (per the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) in a previous order adjudicating the children neglected, where record evidence established that both children lived in various locations in North Carolina since they were born and at all times until the department of social services obtained custody.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 13 June 2019 by Judge Justin K. Brackett in District Court, Cleveland County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Lauren Vaughan and Charles E. Wilson Jr. for petitioner-appellee Cleveland County Department of Social Services.

No brief for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

J. Thomas Diepenbrock for respondent-appellant mother.

DAVIS, Justice.

The issues in this case are whether (1) the existence of non-jurisdictional defects in an unappealed order adjudicating a juvenile to be neglected deprives a department of social services of standing to subsequently move for the termination of parental rights as to that juvenile; and (2) a trial court is required to make explicit findings in an adjudication order that jurisdiction exists under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) where evidence that clearly establishes jurisdiction is present in the record. For the reasons set out below, we affirm the trial court's order terminating the parental rights of respondents over their two children.

Factual and Procedural Background

This case involves a termination of parental rights proceeding initiated by petitioner Cleveland County Department of Social Services (DSS) against the respondent parents on the basis of neglect. Respondent-mother is the biological mother of two children—"Anna"[1] born in December 2015 and "Matthew" born in December 2016. Respondent-father is the legal father of Anna[2] and the biological father of Matthew. DSS first became involved with the family in June 2017 following a domestic violence incident between respondents. DSS found the family to be in need of services to address several issues related to mental health, domestic violence, and parenting, and the case was subsequently transferred for in-home case management. Due to respondents' failure to make reasonable progress to address these issues, DSS filed a juvenile petition on 1 September 2017 alleging that Anna and Matthew were neglected juveniles and obtained nonsecure custody of the children.

An adjudication hearing took place on 25 October 2017. At this proceeding, respondents waived their right to an evidentiary hearing, stipulated to the admission of the juvenile petition into evidence, and stipulated that the trial court could adjudicate Anna and Matthew to be neglected based on the information contained within the petition. The trial court entered an adjudication order on 2 November 2017

1. Pseudonyms are used throughout this opinion in order to protect the identities of the juveniles.

2. The termination order also terminated the parental rights of Anna's biological father. He is not a party to this appeal.

concluding that the children were neglected juveniles. The trial court entered a separate disposition order on 20 November 2017 in which it ordered that the children remain in DSS custody and that respondents address issues relating to domestic violence, substance abuse, parenting skills, and housing.

The trial court held permanency planning review hearings in December 2017, February 2018, May 2018, and July 2018. Following the July 2018 hearing, the trial court changed the children's primary permanent plan to adoption. On 23 October 2018, DSS filed motions to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). Following a hearing on 22 May 2019, the trial court entered an order on 13 June 2019 concluding that both grounds for termination existed. The trial court also determined that it was in the children's best interests for respondents' parental rights to be terminated. Respondents gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

Analysis

I. Standing of DSS to Seek Termination of Parental Rights

[1] Respondents' first argument on appeal is based upon alleged evidentiary errors and insufficient findings in the trial court's 2 November 2017 adjudication order. These alleged errors concern a conclusion of law that was mislabeled as a finding of fact, an invalid stipulation to a conclusion of law, a nonbinding stipulation as to the admission of the juvenile petition into evidence, and insufficient factual findings to support the ultimate determination of neglect. Respondents argue that (1) due to this combination of errors the trial court's adjudication order was invalid and therefore insufficient to legally place custody of the children with DSS; and (2) without a valid order granting DSS custody, DSS consequently lacked standing to move for the termination of respondents' parental rights. *See In re E.X.J.*, 191 N.C. App. 34, 39, 662 S.E.2d 24, 27 (2008) ("If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the trial court, as a result, lacks subject matter jurisdiction."), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

In response, DSS contends that respondents' assertions of error as to the adjudication order—even if correct—cannot be used to attack the standing of DSS to seek termination of respondents' parental rights because respondents failed to appeal the adjudication order. DSS asserts that the proper avenue for review of the trial court's adjudication order was an appeal of that order. Because they did not appeal from the

2 November 2017 adjudication order, DSS argues that respondents are now barred from collaterally challenging the validity of that order.

We agree with DSS that respondents are precluded from contesting the validity of the trial court's adjudication order in the present appeal, which is an appeal only of the trial court's subsequent termination order. Respondents have abandoned any challenge to the 2 November 2017 adjudication order by failing to appeal that order. For this reason, they cannot now contest the termination order from which this appeal arises by pointing to non-jurisdictional errors allegedly contained in that prior adjudication order.

As an initial matter, respondents are correct that DSS must have had proper legal custody of the juveniles in order to possess standing to seek the termination of parental rights over the juveniles. "[S]tanding is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction . . . .' " *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (quoting *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008)). Our General Assembly has determined that "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency *to whom custody of the juvenile has been given by a court of competent jurisdiction*" has standing to file a petition or motion to terminate parental rights. N.C.G.S. § 7B-1103(a)(3) (2019) (emphasis added).

Even assuming, without deciding, that the 2 November 2017 adjudication order actually did contain the errors asserted by respondents, those errors did not affect DSS's standing to ultimately seek termination of respondents' parental rights. A termination proceeding is separate and distinct from an underlying adjudication proceeding. *See In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("[A] termination order rests on its own merits."), *superseded by statute on other grounds*, Act of Aug. 23, 2005, S.L. 2005-398, § 12, 2005 N.C. Sess. Laws 1455, 1460–61 (amending various provisions of the Juvenile Code).

Although this Court has not previously considered the precise argument raised by respondents in this case, the Court of Appeals addressed this issue over thirty years ago in *In re Wheeler*, 87 N.C. App. 189, 360 S.E.2d 458 (1987). The respondent-parent in *In re Wheeler*—whose parental rights had been terminated by the trial court—argued that a fundamental error existed in the trial court's initial order adjudicating the child to be an abused and neglected juvenile because that order failed to recite the standard of proof as required by statute. *Id.* at 193. The respondent asserted that due to this error "the order was invalid and

could neither serve as [p]etitioner's . . . authority to file the [termination] petition nor bind the Court in the termination proceeding on the issue of abuse." *Id.*

The Court of Appeals agreed with the respondent that the trial court's failure to recite the applicable standard of proof constituted error but determined that the respondent had abandoned this argument. *Id.* at 193–94, 360 S.E.2d at 461. The court explained that

> the proper avenues for [r]espondent to attack the adjudication of neglect and abuse and the dispositional order granting custody to [p]etitioner were 1) appeal, . . . or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60. Although collateral attack in an independent or subsequent action is a permissible means of seeking relief from a judgment or order which is void on its face for lack of jurisdiction, . . . the error in this case was not a jurisdictional error subject to that kind of challenge. Because no appeal was taken or other relief sought from the [adjudication] order, it remained a valid final order which was binding in the later proceeding on the facts regarding abuse and neglect which were found to exist at the time it was entered.

Id. at 193–94, 360 S.E.2d at 461 (citations omitted).

In *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391 (2005), the Court of Appeals decided a similar issue. In that case, the respondent-parent argued that a termination order should be reversed due to the trial court's failure to appoint a guardian *ad litem* for her for the adjudication proceeding that had taken place nineteen months earlier. *Id.* at 462, 615 S.E.2d at 394. The Court of Appeals disagreed, ruling that even assuming that the trial court had, in fact, erred in failing to appoint a guardian *ad litem* for the adjudication proceeding, this error did not "bear[ ] [any] legal relationship with the validity of the later order on termination." *Id.* at 462, 615 S.E.2d at 394–95. The Court of Appeals held that this was so because "[o]nly the order on termination of parental rights is before th[e] Court; the order on adjudication is not." *Id.* at 462, 615 S.E.2d at 394. The Court of Appeals explained as follows the problems that would exist if the respondent's argument was allowed to prevail:

> First, this would create uncertainty and render judicial finality meaningless. Termination orders entered three, five, even ten years after the initial adjudication could be cast aside. Secondly, by necessarily tying the adjudication

> proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity. . . .
>
> Finally, the consequences of reversing termination orders for deficiencies during some prior adjudication would yield nonsensical results. While the order on termination would be set aside, the order on adjudication would not; consequently, the order on adjudication would remain a final, undisturbed order in all respects. This would generate a legal quagmire for the trial court: It has continuing jurisdiction over these children by operation of the undisturbed order on adjudication, but must "undo" everything following the time the children were initially removed from the home if it ever wishes to enter a valid termination of parental rights order.

Id. at 463–64 (emphasis omitted), 615 S.E.2d at 395–96.

The Court of Appeals has reaffirmed these principles in a number of other decisions as well. *See*, *e.g.*, *In re Y.Y.E.T.*, 205 N.C. App. 120, 123, 695 S.E.2d 517, 519 (2010) ("Respondents did not appeal from the trial court's adjudication and disposition order, and thus, this order and the findings and conclusions contained therein are binding on the parties."); *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010) (declining to address the respondents' challenges to the adjudication order because "[a]n [adjudication] order remains final and valid when no appeal is taken from it").

We conclude that the principles set out in *Wheeler* and its progeny are correct. For the reasons set out in those decisions, a respondent's failure to appeal an adjudication order generally serves to preclude a subsequent collateral attack on that order during an appeal of a later order terminating the parent's parental rights.

As a result, respondents' argument on this issue lacks merit. In this appeal, respondents seek to vacate the termination order based on alleged errors contained in the underlying order adjudicating Anna and Matthew to be neglected juveniles. These alleged errors in the adjudication order did not relate to the trial court's subject matter jurisdiction and instead concerned the sufficiency of the evidence, evidentiary issues relating to the parties' stipulations, and the trial court's factual

findings. Even assuming arguendo that these assertions have merit, any such errors did not affect DSS's standing to subsequently move for the termination of respondents' parental rights. The 2 November 2017 adjudication order conferred custody over the juveniles upon DSS, and—as a result—DSS possessed standing to file the motion to terminate respondents' parental rights. Accordingly, respondents' argument is overruled.

II. UCCJEA Findings

[2] In their second argument, respondents contend that an additional error existed in the adjudication order that was, in fact, jurisdictional and therefore rendered that order void. Respondents' argument is based on the trial court's failure to include in its adjudication order findings related to its jurisdiction under the UCCJEA. Respondents assert that "[a]n order entered under the Juvenile Code must contain findings to establish subject matter jurisdiction" under the UCCJEA. Because the adjudication order here lacked specific findings establishing that North Carolina was the home state of Anna and Matthew or setting out some other basis for concluding that jurisdiction existed under the UCCJEA, respondents assert that the adjudication order "is invalid and has no effect." Respondents contend that because the adjudication order is void for lack of jurisdiction, the subsequent termination order that relied on the prior adjudication of neglect is also invalid.

In response, DSS asserts that nothing in the record indicates that the trial court lacked jurisdiction under the UCCJEA to enter the adjudication order. DSS further notes that respondents cite no legal authority for their contention that the omission of findings in an adjudication order that expressly demonstrate the existence of jurisdiction under the UCCJEA necessarily constitutes reversible error.

Respondents' argument is unsupported by our case law. The UCCJEA is a jurisdictional statute that aims to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody." N.C.G.S. § 50A-101, Official Comment (2019). This Court recently addressed the issue of jurisdictional findings under the UCCJEA in *In re L.T.*, 374 N.C. 567, 843 S.E.2d 199 (2020). In that case, the respondent argued that the trial court lacked jurisdiction to enter its termination order because the order did not contain findings that North Carolina (as opposed to Delaware) was the home state of the child and that, for this reason, the UCCJEA prerequisites were not satisfied. *Id.* at 569, 843 S.E.2d at 200. We disagreed, explaining as follows:

> This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise.

> The trial court must comply with the UCCJEA in order to have subject matter jurisdiction over juvenile abuse, neglect, and dependency cases and termination of parental rights cases. The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction.

Id. at 569, 843 S.E.2d at 200–01 (citations omitted).

After examining the record, we determined that North Carolina was, in fact, the child's home state for purposes of the UCCJEA because "the record reflects that [the child] had lived in North Carolina for more than six months by the time DSS filed the juvenile petition." *Id.* at 570–71, 843 S.E.2d at 201. We therefore affirmed the trial court's termination order. *Id.* at 571, 843 S.E.2d at 202.

Here, as in *In re L.T.*, the lack of explicit findings establishing jurisdiction under the UCCJEA does not constitute error because the record unambiguously demonstrates that "the jurisdictional prerequisites in the Act were satisfied." *Id.* at 569, 843 S.E.2d at 201. The specific portion of the UCCJEA cited by respondents provides that a North Carolina court "has jurisdiction to make an initial child-custody determination" if North Carolina "is the home state of the child on the date of the commencement of the proceeding." N.C.G.S. § 50A-201(a)(1) (2019). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2019).

The record is clear in this case that both Anna and Matthew lived in various locations in North Carolina with either respondents or the children's maternal grandmother and great-grandmother from the time of their birth through 1 September 2017 at which time DSS obtained nonsecure custody of them. Thus, because the record reflects that North Carolina was the home state of the juveniles under the UCCJEA at all relevant times, the trial court possessed jurisdiction to conduct the adjudication proceeding and enter the ensuing adjudication order.

Conclusion

For the reasons set out above, we affirm the trial court's 13 June 2019 order terminating respondents' parental rights.

AFFIRMED.

IN RE A.S.T.

[375 N.C. 547 (2020)]

IN THE MATTER OF A.S.T.

No. 18A20

Filed 20 November 2020

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated a father's parental rights to his son on grounds of neglect, where the father's continued substance abuse, limited progress on his case plan, multiple criminal charges during the pendency of the case, and incarceration after entering an Alford plea to one of those charges—during which he made no attempt to contact his son—indicated a likelihood of future neglect if the son were returned to the father's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 October 2019 by Judge Benjamin S. Hunter in District Court, Person County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee Person County Department of Social Services.

Nelson Mullins Riley & Scarborough, LLP, by Carrie A. Hanger, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

BEASLEY, Chief Justice.

Respondent appeals from an order terminating his parental rights to his minor child, A.S.T. (Andrew).[1] We hold that the trial court did not err by terminating respondent's parental rights on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and affirm the trial court's order.

On 10 May 2017, the Person County Department of Social Services (DSS) filed a juvenile petition alleging that Andrew was a neglected

1. A pseudonym is used throughout the opinion to protect the juvenile's identity and for ease of reading.

juvenile after receiving reports of improper care, improper supervision, and substance abuse.[2] Subsequent drug screens of respondent and Andrew were positive for cocaine and benzoylecgonine. Andrew also tested positive for norcocaine, cocaethylene, and THC metabolites. Andrew's mother did not appear for her drug screens and her whereabouts were unknown when DSS filed the juvenile petition. DSS obtained nonsecure custody of Andrew by order entered 16 May 2017.

After a hearing on 5 June 2017, the trial court entered an order adjudicating Andrew to be a neglected juvenile. The trial court continued custody of Andrew with DSS and granted respondent supervised visitation with him for one hour each week. Respondent was ordered to establish a case plan with DSS, follow the terms of the case plan, submit to random drug screening, and complete a substance abuse assessment and follow all recommendations.

The trial court entered a review order after a hearing on 7 August 2017. The trial court found that respondent was participating in group substance abuse classes, was participating in the Parents as Teachers program during visitations, and was very appropriate during visitations. The only barrier to reunification was found to be consistency, and the trial court found that respondent needed to demonstrate he could continue with his sobriety, mental health treatment, and maintaining employment. Respondent was arrested on 24 September 2017 on charges of assault with a deadly weapon with intent to kill and discharging a firearm into occupied property.

In orders from review hearings on 20 November 2017 and 5 February 2018, the trial court again found that respondent was appropriate during visitations, but he continued to struggle with alcoholism. The trial court found respondent had tested positive for alcohol on 21 August 2017, he continued to have substance abuse issues, his bad judgment was slowing down his progress toward reunification, he was not in recommended group therapy, and he had not taken a recommended psychiatric evaluation.

In its order from the first permanency planning review hearing held on 30 April 2018, the trial court found that respondent had completed a psychiatric evaluation and had recently reengaged in substance abuse group therapy sessions, but his hair follicle drug screen on 28 February 2018 was positive for cocaine. Respondent continued to struggle with alcoholism and substance abuse issues. The trial court continued

2. Andrew was six months old when DSS filed the juvenile petition.

Andrew's primary permanent plan as reunification and set a concurrent plan of adoption.

At a subsequent permanency planning review hearing held on 16 July 2018, the trial court changed the primary permanent plan for Andrew to adoption and the concurrent plan to reunification.[3] Respondent had entered an *Alford* plea to discharging a firearm into occupied property on 18 May 2018 and was incarcerated at the time of the hearing, receiving a sentence of 25 to 42 months' imprisonment. In return for his plea, the State dismissed the charge of assault with a deadly weapon with intent to kill.

On 25 April 2019, DSS filed a motion to terminate respondent's parental rights to Andrew, alleging grounds of neglect and failure to make reasonable progress to correct the conditions that led to Andrew's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). After a hearing on 30 September 2019, the trial court entered an order terminating respondent's parental rights to Andrew on 17 October 2019.[4] The trial court found both grounds alleged in the motion to terminate parental rights and concluded that terminating respondent's parental rights was in Andrew's best interests. Respondent appealed.

Respondent argues the trial court erred in adjudicating grounds to terminate his parental rights. We disagree.

This Court reviews a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97

3. The trial court conducted two additional permanency planning review hearings on 1 October 2018 and 4 February 2019, while respondent was incarcerated. The trial court's orders from those hearings had findings of fact and conclusions of law similar to its previous permanency planning review orders with regard to respondent and Andrew but differed with regard to Andrew's mother and her child with another man.

4. The trial court's order also terminated the parental rights of Andrew's mother, but she is not a party to this appeal.

(1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

Grounds exist to terminate parental rights where "[t]he parent has . . . neglected the juvenile . . . within the meaning of [N.C.]G.S. [§] 7B-101." N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). To terminate parental rights based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. at 212 (citing *In re Ballard*, 311 N.C. at 715).

The trial court concluded that respondent had neglected Andrew and there was a probability the neglect would continue if he were returned to respondent's care. The trial court made the following findings of fact in support of its adjudication of the ground of neglect to terminate respondent's parental rights:

> 13. Prior to May 16, 2017, the parents were exercising custody of this child;
>
> 14. The parents failed to provide proper care for the child, and did keep this child in an injurious environment by using and continuing to use controlled substance after his birth;
>
> 15. The parents failed to provide proper care for the child, and did keep this child in an injurious environment by allowing the child to ingest cocaine while the child was less than six (6) months old;
>
> . . . .
>
> 17. After the parents lost custody, DSS offered services to the parents to work towards recovering custody of their child;
>
> 18. The parents initially utilized the services offered by DSS, but failed to consistently comply with their respective case plans;

19. The parents have not been willing to consistently work with the DSS social workers to reunify themselves with their child;

. . . .

21. [Respondent] testified that he received a citation for Driving While Impaired during the pendency of this action, and that he plead [sic] guilty to such offense;

22. [Respondent] also acknowledged that at that time he did not possess a valid North Carolina Driver's License;

23. . . . [Respondent's] criminal history shows four prior Driving While License Revoked convictions and two additional Driving While Impaired convictions which occurred prior to the current DSS proceeding;

24. [Respondent] denied that he used cocaine, but he acknowledged that he took a drug test on February 28, 2018 that showed cocaine in his system;

25. [Respondent] has committed a serious criminal offense (Shooting into an Occupied Dwelling) which has caused him to be incarcerated, leaving him unavailable to visit or resume custody of his child; he has a projected release date of June 22, 2020;

26. [Respondent] testified that he was not guilty of the offense and only took a plea to "get the case over with";

27. In either case, [respondent] has voluntarily made himself unavailable to care for [Andrew] for a substantial portion of [Andrew's] life;

. . . .

34. Both parents' last visit with [Andrew] was May 15, 2018, and [Andrew] has not seen his parents for sixteen (16) months;

35. That the parents have not provided regular care for their minor child for more than two (2) years;

. . . .

37. That [respondent] has failed to significantly or substantially contribute to [Andrew's] care for the last two years;

> 38. During his time of incarceration [respondent] testified, and the [c]ourt so finds, that he made no attempt to make any phone calls to his son from prison, even though he telephoned the mother . . . regularly;
>
> 39. [Respondent] also testified, and the [c]ourt so finds, that he did not send any cards, letters or gifts to his child while in prison;
>
> 40. [Respondent] testified that he took this position of no contact "because [Andrew] is a baby";
>
> 41. [Respondent's] options for showing affection while incarcerated are greatly limited, but he is not excused from showing interest in the child's welfare by whatever means available;
>
> . . . .
>
> 47. Services and recommendations for services to achieve reunification have been offered to the parents by Person County DSS, and the parents have not successfully recovered custody of their child;
>
> 48. The [c]ourt has conducted regular reviews of the custody of this child, and at each review, the [c]ourt has maintained custody of the child with Person County DSS, and declined to return custody of the child to the . . . mother or [respondent];
>
> 49. Twenty-eight (28) months have passed since the child was removed from the parents' custody and the parents have taken few tangible steps to resume custody of their child;
>
> . . . .
>
> 53. Based upon the foregoing facts, there are grounds to terminate the parental rights as to . . . [respondent] pursuant to [N.C.G.S. § 7B-1111(a)(1)] as the child is a neglected juvenile and there is a probability of continuing neglect within the foreseeable future . . . because . . . [respondent has] failed to make contact with [his] child in more than one year[.]

Respondent argues that finding of fact 15's statement that he "allow[ed] the child to ingest cocaine" is speculative because there was no evidence

about how the cocaine came to be in Andrew's body. It is uncontroverted that Andrew had cocaine in his system while he was under respondent's care and supervision. There was no evidence concerning the means by which the cocaine came to be in Andrew's system, and we thus disregard the portion of finding of fact 15 regarding Andrew's ingestion of cocaine. Nevertheless, the evidence is sufficient to support the remaining portion of finding of fact 15, and respondent's failure to keep Andrew from being exposed to cocaine supports the trial court's findings that he failed to provide proper care for Andrew and kept him in an injurious environment.

Respondent next argues that findings of fact 18 and 19 are unsupported by the evidence because he consistently complied with his case plan until he was incarcerated after entering an *Alford* plea in May 2018, as shown by his participation in substance abuse treatment, taking random drug screens, participation in a parenting education program, consistent visitation prior to his incarceration, and contact with the social worker even while incarcerated. Respondent contends that the only reason he did not complete his case plan was because he was incarcerated. Respondent, however, overly emphasizes his successes and minimizes his failings. The social worker testified that respondent's participation in his substance abuse treatment was inconsistent up until his incarceration and that he tested positive for alcohol and cocaine during the course of the case. Respondent denied using cocaine and stated that he had no idea how cocaine could have been in his system. Respondent then willfully placed himself in a position of being unable to continue working on his case plan when he entered an *Alford* plea to the offense of discharging a firearm into occupied property. The trial court's findings that respondent failed to consistently comply with and work on his case plan are supported by clear, cogent, and convincing evidence.

Respondent next challenges finding of fact 27, in which the trial court found that he "voluntarily" made himself unavailable to care for Andrew, and argues that he was wrongfully accused and pled guilty to the offense to shorten the time he would be away from Andrew. It is well established that "an 'Alford plea' constitutes 'a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea.' " *State v. Alston*, 139 N.C. App. 787, 792 (2000) (quoting *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 706 (Wis. 1998)).

> [A]n *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the

> expense, stress and embarrassment of trial and to limit one's exposure to punishment . . . .

Id. at 793 (quoting *Warren*, 579 N.W.2d at 707). By entering an *Alford* plea, respondent "agreed to be[ ] 'treated as . . . guilty' whether or not he admitted guilt." *Id.* (second alteration in original). Respondent's charge of discharging a firearm into occupied property and his subsequent plea resulted in his incarceration for more than two years and supports the trial court's finding that he "voluntarily made himself unavailable to care for [Andrew] for a substantial portion of [Andrew's] life."

Respondent also challenges the portion of finding of fact 38 which states that he made no attempt to telephone Andrew while he was incarcerated. Respondent does not challenge the evidentiary support for the finding, and it is fully supported by respondent's own testimony. Respondent instead presents arguments relating to the weight this finding should be afforded given other evidence in the case, which is not the province of this Court. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's responsibility during a termination-of-parental-rights hearing to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

Next, respondent challenges the portion of finding of fact 49 which states that he has taken few tangible steps toward reunification. He contends that his participation in substance abuse treatment, drug screens, and a parenting education program, along with his consistent visitation with Andrew and continued contact with the social worker after his incarceration refute this finding. The evidence before the trial court established that respondent never completed his substance abuse treatment; continued to test positive for cocaine until he was incarcerated; drove while impaired by alcohol while the case was pending; and discharged a firearm into occupied property, which resulted in his incarceration and disrupted his limited progress toward addressing his substance abuse issues. We hold that this finding of fact is supported by clear, cogent, and convincing evidence.

Lastly, respondent challenges finding of fact 53, wherein the trial court finds that he neglected Andrew and that there is a probability of continuing neglect within the foreseeable future. This determination, however, is a conclusion of law, and we will review it as such in conjunction with respondent's challenges to the trial court's conclusion of law that respondent's parental rights should be terminated on the ground of neglect. *See In re J.O.D.*, 374 N.C. 797, 807 (2020) ("[T]he trial court's

determination that neglect is likely to reoccur if [a child is] returned to his [parent's] care is more properly classified as a conclusion of law. . . . Although the trial court labeled these conclusions of law as findings of fact, 'findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal.' ") (fifth and sixth alterations in original) (internal citations omitted)).

Respondent contends that the trial court's conclusion that there is a probability of future neglect is based solely on his alleged failure to keep in contact with Andrew, which is unsupported by the evidence due to his incarceration and Andrew's young age. Respondent further argues that the trial court made no finding of fact concerning the probability of future neglect that was supported by competent evidence and that he presented evidence controverting the finding that there was a probability of future neglect. Respondent's arguments are misplaced.

We review de novo conclusions of law on the existence of grounds to terminate parental rights. *In re C.B.C.*, 373 N.C. at 19. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003). Therefore, in our analysis of whether the trial court erred by concluding that the ground of neglect existed to terminate respondent's parental rights, we are not limited to the trial court's statement that the probability of continuing neglect is due to respondent's failure to keep in contact with Andrew.

The trial court's findings of fact show that Andrew was adjudicated to be a neglected juvenile due to the substance abuse issues of both respondent and the mother. Respondent has failed to appreciably address his substance abuse issues. Respondent denied using cocaine, but he tested positive for cocaine in February 2018 and has only shown an extended abstinence from cocaine use while incarcerated. Respondent did not complete substance abuse treatment and was charged with driving while impaired just three months after DSS filed the underlying juvenile petition, while he was attending substance abuse treatment. Respondent also incurred serious felony charges during the pendency of this case and was convicted of discharging a firearm into occupied property, which resulted in his incarceration for a minimum of 25 months. During his incarceration, he made no attempt to contact Andrew and had limited contact with DSS. Although Andrew's young age limits the effect that respondent's contact with Andrew may have had, respondent cannot use his incarceration as a shield against a conclusion that there is a probability of future neglect. *See In re S.D.*, 374 N.C. 67, 75–76 (2020) ("[I]ncarceration does not negate a father's neglect

of his child because the sacrifices which parenthood often requires are not forfeited when the parent is in custody. Thus, while incarceration may limit a parent's ability to show affection, it is not an excuse for a parent's failure to show interest in a child's welfare by whatever means available." (cleaned up)).

We hold that the trial court's findings of fact support its conclusion that respondent has previously neglected Andrew and that there is a likelihood of future neglect if Andrew were returned to his care. *See id.* at 87. Accordingly, the trial court did not err by concluding that respondent's parental rights in Andrew were subject to termination on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). *See id.* at 87–88; *In re E.H.P.*, 372 N.C. at 395 ("[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights.") We therefore need not address respondent's arguments regarding the ground of failure to make reasonable progress to correct the conditions that led to the removal of Andrew from the home. *See id.* Respondent does not challenge the trial court's conclusion that it was in Andrew's best interests to terminate respondent's parental rights, and we thus affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF C.B., J.B., E.O., C.O., & M.O.

No. 354A19

Filed 20 November 2020

1. Termination of Parental Rights—best interest of the child—sufficiency of findings—likelihood of adoption—bond between parent and child

In a termination of parental rights case, the Supreme Court rejected the mother's challenges to the trial court's dispositional findings regarding her eleven-year-old child who had behavioral issues. The challenged findings on achievement of permanence and likelihood of adoption were supported by competent evidence, and the trial court was not required to make findings about the child's attitude toward adoption or whether the mother's relationship with the child was detrimental to his well-being.

2. Termination of Parental Rights—best interest of the child—statutory factors—lack of proposed adoptive placement

The trial court's findings supported its conclusion that termination of a mother's parental rights was in the best interests of her child, an eleven-year-old with behavioral issues. There was no abuse of discretion where the trial court properly considered the relevant statutory criteria in N.C.G.S. § 7B-1110(a); further, the lack of a proposed adoptive placement at the time of the hearing was not a bar to termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 19 July 2019 by Judge Wayne L. Michael in District Court, Davie County. This matter was calendared in the Supreme Court on 7 October 2020 and determined without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Holly M. Groce for petitioner-appellee Davie County Department of Social Services.

Ellis & Winters, LLP, by Steven A. Scoggan, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

HUDSON, Justice.

Respondent, the mother of the minor children, C.B. (Connor),[1] J.B., E.O., C.O., and M.O., appeals from the trial court's order terminating her parental rights. Because we determine the trial court did not abuse its discretion in determining that it was in Connor's best interests to terminate respondent's parental rights, we affirm the trial court's order.

I. Factual and Procedural Background

Respondent has a history with the Davie County Department of Social Services (DSS) due to improper supervision and care of her three oldest children. Connor, along with two of her other children, was previously removed from respondent's care in 2013 and adjudicated to be neglected and dependent juveniles. They were returned to respondent's custody in 2014.

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

Respondent now has five children, each with medical or psychological needs that require significant care. Connor has been diagnosed with autism, oppositional defiant disorder, and attention deficit hyperactivity disorder. He has significant behavior difficulties, including kicking, hitting, cursing, cheating, and yelling.

In January 2016, DSS received a report alleging concerns of improper supervision of the children and an injurious environment. DSS found that the children were chronically dirty and not receiving proper hygiene and that the home was cluttered, filthy, and in disarray. The report was substantiated for neglect and in-home services were provided for the family.

DSS and the in-home services team made multiple home visits from March to May 2016 in which they observed "[a] pattern of the children being dirty, the home being cluttered, in disarray, and lack of supervision" which placed the children at risk. During a 7 July 2016 home visit, a social worker observed Connor to be "out of control[,]" running around the house, jumping from the top of the bunk bed near a ceiling light fixture, and not being properly supervised. Since the January 2016 report, DSS received several additional reports regarding the care of the children, and the parents failed to make any improvement in the condition of the home.

On 12 July 2016, DSS filed juvenile petitions alleging the children were neglected and dependent juveniles and DSS obtained non-secure custody. The children were adjudicated to be neglected and dependent juveniles on 15 August 2016. In a separate disposition order entered on 28 September 2016, the trial court ordered respondent to complete a psychological evaluation and parenting assessment and follow all recommendations; participate in individual counseling, family counseling, and medication management and follow all recommendations; participate in parenting classes and follow all recommendations; attend all medical appointments for the three youngest children; participate in shared parenting with all of the foster families; and submit to random drug screens.

Respondent complied with some aspects of her case plan. However, she failed to demonstrate any appreciable progress in improving her parenting skills or in being able to manage, control, and meet the needs of her five special needs children. The trial court suspended respondent's supervised visitation in March 2018.

On 18 March 2019, DSS filed a petition to terminate respondent's parental rights to all five children alleging the grounds of neglect and willful failure to make reasonable progress to correct the

conditions that led to the children's removal from her care. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).[2] Following a 28 June 2019 hearing on the petition, the trial court entered an order on 19 July 2019 concluding that grounds existed to terminate respondent's parental rights as alleged in the petition, and that terminating respondent's parental rights was in the best interests of the children. Respondent appealed.

II. Analysis

On appeal respondent does not challenge the trial court's adjudication of grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1) and (2) or the trial court's decision regarding the best interest of four of her children. She argues the trial court erred in its dispositional decision by determining that termination of her parental rights was in the best interest of her oldest child, Connor. Specifically, respondent argues that the trial court failed to make necessary findings of fact as required by N.C.G.S. § 7B-1110(a), and that the court's findings did not support its conclusion that termination was in Connor's best interests. We disagree.

The termination of a parent's parental rights in a juvenile matter is a two-stage process consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. § 7B-1109, -1110 (2019). "If during the adjudicatory state, the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must determine whether terminating the parent's rights is in the juvenile's best interest." *In re J.J.B.*, 374 N.C. 787, 791 (2020) (cleaned up). In determining whether termination of parental rights is in the best interests of the juvenile,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

2. DSS also petitioned to terminate the parental rights of the children's fathers. However, none of the fathers are parties to this appeal.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

"The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (citing *State v. Hennis*, 323 N.C. 279, 285 (1988)). "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re J.J.B.*, 374 N.C. at 793.

Here, the trial court made the following pertinent findings regarding the statutory factors set forth in N.C.G.S. § 7B-1110(a) as they pertain to Connor:

18. . . .

a. [Connor] is 11 years old. . . .

b. The children are each placed in foster homes and are doing well. . . . There are no relative placements available for the children.

c. Termination of the parental rights of Respondent Mother, [and the children's fathers] will aid in accomplishing the plan of care for the juveniles which is currently TPR/adoption.

d. . . . [Connor] is placed in a therapeutic foster home. This is not an adoptive home but his behavior has improved there. DSS will continue to look for a forever home for him.

e. The children once had bonds with Respondent Mother . . . . However, the children have now spent nearly three years in foster care and the bond is diminishing. All visits ceased in March 2019. . . .

f. There are no barriers to this adoption except for this termination of parental rights. The likelihood of adoption

> is high with all children except [Connor] [for] who[m] [it] remains unknown at this time.
>
> g. Respondent Mother and Respondent Father [ ] are no longer together. The needs of the children are great and require significant intervention.
>
> h. . . . [Connor's] behavior ha[s] improved in [his] most recent placements. . . .
>
> 19. It is in the best interest of the child that the parental rights of Respondent Mother [and the children's fathers] be terminated.

A. Challenges to Findings

[1] In her brief, respondent challenges the trial court's finding "that the termination of [her] parental rights would help to achieve permanence for all of [her] children" as it relates to Connor, arguing that this finding is unsupported by the evidence. However, the trial court made no such finding. The trial court found only that termination "will aid in accomplishing the plan of care for the juveniles which is currently TPR/adoption." At the hearing, the social worker testified that the permanent plan for the children is termination of parental rights and adoption and that the termination of the parents' parental rights would aid in achieving that plan. The guardian ad litem's (GAL's) report, admitted into evidence at the hearing, stated the same conclusion. Therefore, this finding is supported by competent evidence.

Respondent further argues that "in substance, the trial court's 'finding' as to likelihood of adoption and accomplishment of the permanent plan amounted to a finding that there was insufficient information to make a determination about these factors." As stated above, the trial court made a finding regarding Connor's permanent plan and that finding was supported by competent evidence. Although the trial court found that Connor's likelihood of adoption was "unknown[,]" the trial court need not find a likelihood of adoption in order to terminate parental rights. *See, e.g.*, *In re A.R.A.*, 373 N.C. 190, 200 (2020) ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." (alteration in original) (quoting *In re D.H.*, 232 N.C. App. 217, 223 (2014))). Therefore, we hold the trial court made the requisite findings under N.C.G.S. § 7B-1110(a)(2)–(3).

Respondent also challenges the trial court's finding that there were "no barriers to adoption except for this termination of parental rights" as

it relates to Connor, arguing that this finding is unsupported by the evidence. She argues that Connor's "severe behavioral and mental health issues" rendered him difficult to care for and "landed him in at least nine different placements[.]" She further argues that even if "Connor were able to 'step down' from a therapeutic setting, DSS would still need to identify a family willing to adopt" and "if an adoptive family were to step forward, Connor's consent would be required before any adoption could occur." *See* N.C.G.S. § 48-3-601 (2019). Respondent's arguments are misplaced.

The trial court's findings show that although Connor had issues that made it difficult to determine the likelihood of his adoption, the court did not find those issues to be barriers that would necessarily preclude his adoption. Indeed, the trial court found that Connor's behaviors were improving in his current therapeutic foster home. At the hearing, a social worker testified about the possibility of Connor stepping down to a traditional foster care setting "within the next six months . . . at which time [DSS] would then seek for a foster-to-adopt placement." She further testified that DSS believed they would be able to identify an adoptive family for Connor just as they had been able to do for the other children. Therefore, we hold the trial court's finding that there were no barriers to adoption except for the termination of parental rights is supported by competent evidence.

Respondent also argues that the trial court erred by failing to make a finding concerning Connor's attitude toward adoption and the extent to which he would consent to be adopted. She argues that because Connor is now twelve years old, he must consent to an adoption, and thus this was a "relevant consideration" under N.C.G.S. § 7B-1110(a)(6) about which the trial court must make a finding of fact. She further argues that there was no evidence presented that Connor wanted to be adopted. This Court recently rejected this argument in *In re M.A.*, 374 N.C. 865 (2020). "To be sure, N.C.G.S. § 48-3-601 provides that a juvenile over the age of twelve must consent to an adoption." *In re M.A.*, 374 N.C. at 880. However, a trial court may waive the minor's consent requirement "upon a finding that it is not in the best interest of the minor to require the consent." N.C.G.S. § 48-3-603(b)(2). Because any refusal by Connor to consent "would not necessarily preclude [his] adoption, we hold that the trial court was not required to make findings and conclusions concerning the extent, if any, to which [the child was] likely to consent to any adoption that might eventually be proposed." *In re M.A.*, 374 N.C. at 880.

Finally, respondent argues that while the trial court found that Connor's bond with respondent had diminished after three years

in foster care and that her visitation was ceased, it did not find that Connor's relationship with respondent was detrimental to his well-being. Respondent asserts that "[t]his finding provided little to support a conclusion that [respondent's] rights to Connor should be terminated." There is no requirement that the trial court make a specific finding that the parent's relationship with the child was detrimental before it can terminate parental rights. The trial court's finding addressed the requisite factor in N.C.G.S. § 7B-1110(a)(4)—the bond between parent and child. Further, "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

B. Best Interest Determination

[2] Respondent contends the trial court's findings of fact do not support its conclusion that termination of her parental rights was in Connor's best interests. In arguing that the trial court's dispositional decision constituted an abuse of discretion, respondent primarily relies on the Court of Appeals' decision in *In re J.A.O.*, 166 N.C. App. 222 (2004).

This case is distinguishable from *In re J.A.O.* Here, although the court found that Connor has significant medical and psychological needs, the severity of those issues does not appear to reach the same level as the juvenile in *In re J.A.O. See also In re J.J.B.*, 374 N.C. 787, 794 (2020); *In re J.S.*, 374 N.C. 811, 824 n. 4 (2020). Although Connor has had at least nine placements in the three years he has been in foster care, the court found that his behaviors were improving in his current therapeutic placement. The juvenile in *In re J.A.O.* was fourteen at the time of the termination hearing and sixteen at the time the Court of Appeals issued its opinion. Connor was only eleven at the time of the termination hearing and is currently twelve years old. Further, the trial court in this case did not find that adoption was unlikely but instead found that the likelihood of adoption was unknown. Notably, the GAL in this case recommended terminating respondent's parental rights in her report, stating that "[t]he farther [Connor] gets from visitation with his biological family the likelihood of adoption is greater." Additionally, the mother in *In re J.A.O.* had made some reasonable progress towards correcting the conditions which led to the removal of her child from her care, whereas here, respondent failed to make such progress. Instead, the trial court found that the parents "have been unable to correct the conditions that led to children's removal" and that "[their] situation is no better today than it was at the time of the removal."

Respondent argues that this case, as in *In re J.A.O.*, "requires realistic weighing of the likelihood of adoption by an as-yet unidentified adoptive parent against the sense of permanence offered by relationships already in place." To the extent respondent is asking this Court to reweigh the record evidence and to substitute our weighing of the relevant statutory criteria for that of the trial court, we decline to do so as "such an approach would be inconsistent with the applicable standard of review, which focuses upon whether the trial court's dispositional decision constitutes an abuse of discretion rather than upon the manner in which the reviewing court would weigh the evidence were it the finder of fact." *In re I.N.C.*, 374 N.C. 542, 551 (2020).

Here, the trial court's dispositional findings demonstrate that it considered the relevant statutory criteria in N.C.G.S. 7B-1110(a) and made a reasoned determination that termination of respondent's parental rights was in Connor's best interests. The trial court made findings, supported by competent evidence, concerning Connor's age, the likelihood of adoption for Connor, whether termination would aid in accomplishing the permanent plan of adoption, and respondent's bond with Connor. Because Connor was not in a pre-adoptive placement, the court was not required to make a finding regarding Connor's bond with prospective adoptive parents. *In re A.R.A.*, 373 N.C. at 200. Further, although he did not have an adoptive placement at the time of the hearing, "the lack of a proposed adoptive placement for [the child] at the time of the termination hearing is not a bar to terminating parental rights." *In re A.J.T.*, 374 N.C. 504, 513 (2020).

III. Conclusion

We are satisfied that the trial court's conclusion that it was in Connor's best interests to terminate respondent's parental rights was neither arbitrary nor manifestly unsupported by reason. For these reasons, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE D.L.A.D.

[375 N.C. 565 (2020)]

IN THE MATTER OF D.L.A.D.

No. 123A20

Filed 20 November 2020

Termination of Parental Rights—grounds for termination—neglect —likelihood of future neglect

In an action between two parents, the trial court properly terminated respondent-mother's parental rights to her child on the grounds of neglect based on an unchallenged finding that the child was previously neglected due to living in an environment injurious to his welfare when living with respondent, and on findings showing a likelihood of repetition of neglect if the child were returned to her care. Respondent's previously stated desire to relinquish her parental rights for a sum of money, her past substance abuse and lack of treatment, her previous failure to contact her son for a period of more than a year, and a lack of evidence that the condition of her home had changed sufficiently demonstrated respondent's inability or unwillingness to provide adequate care and supported a reasonable conclusion that neglect would likely continue in the future.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 December 2019 by Judge Carlton Terry in District Court, Davidson County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for petitioner-appellees.

Richard Croutharmel for respondent-appellant mother.

NEWBY, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to D.L.A.D.,[1] a minor. We affirm the trial court's order.

1. The minor child D.L.A.D. will be referred to throughout this opinion as "Dillon," which is a pseudonym used to protect the identity of the child and for ease of reading. We use additional pseudonyms to protect the privacy of the parties discussed in this opinion.

Dillon was born to respondent-mother in October 2007 following her brief relationship with petitioner-father. Petitioner-father did not know that he was Dillon's father until 2013, when respondent-mother visited him at his place of employment and requested that he take a DNA test. Petitioner-father agreed, and the test confirmed his paternity. When petitioner-father learned he was Dillon's father, he went to the Guilford County child support agency and entered into a voluntary support agreement.

Petitioner-father met with Dillon for the first time in May 2015 and began visitation shortly thereafter. In August 2015, Dillon visited petitioner-father and arrived wearing clothing that was soiled, stained, torn, and did not fit properly. Additionally, on at least one visit, he was found to have an excessive amount of earwax in his ears. On 5 November 2015, after respondent-mother violated a court order and failed a drug test, petitioner-father was granted custody of Dillon in accordance with an emergency custody order. From then on, Dillon resided primarily with petitioner-father and his wife (petitioners) in Davidson County.

In early 2016, respondent-mother began conducting supervised visits with Dillon. But these visits eventually ceased, and respondent-mother indicated that she wanted her parental rights to Dillon to be terminated. On 8 March 2016, petitioner-father filed a petition in District Court, Surry County to terminate respondent-mother's parental rights to Dillon. On 16 December 2016, the trial court entered an order terminating respondent-mother's parental rights based on neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2019). Respondent-mother appealed. The Court of Appeals vacated the termination order after concluding that the trial court erred by terminating respondent-mother's parental rights because it lacked subject matter jurisdiction. *In re D.L.A.D.*, 2017 WL2950772 at *3 (N.C. Ct. App. 2017) (unpublished).

On 2 May 2019, petitioners filed a new petition to terminate respondent-mother's parental rights in Davidson County on the grounds of neglect and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (6) (2019). Respondent-mother filed an answer denying that grounds existed to terminate her parental rights. On 2 December 2019, the trial court entered an order in which it determined grounds existed to terminate respondent-mother's parental rights based on neglect under N.C.G.S § 7B-1111(a)(1). The court also concluded that it was in Dillon's best interests that respondent-mother's parental rights be terminated. The trial court thus terminated her parental rights. Respondent-mother appeals.

Respondent-mother argues that several of the trial court's findings of fact are not supported by the evidence and that the court erred by

concluding that grounds existed to terminate her parental rights. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f) (2019). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)).

In this case the trial court concluded that grounds existed to terminate respondent-mother's parental rights based on neglect. Section 7B-1111(a)(1) provides for termination based on a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C.G.S. § 7B-101(15). Section 7B-101(15) defines a neglected juvenile as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). To terminate parental rights based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 825, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

Here Dillon was not in respondent-mother's custody at the time of the termination hearing and had not been for close to four years. Additionally, because the Department of Social Services was never involved with the parties, no petition alleging neglect was ever filed, and Dillon was never adjudicated neglected. The trial court did, however, find that Dillon lived "in an environment injurious to his welfare when he was living with Respondent Mother." Respondent-mother does not challenge this finding, and it is therefore binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). Thus, we conclude that the trial

court's findings demonstrate that Dillon was previously neglected by respondent-mother.

We next consider whether the trial court's findings demonstrate that neglect would likely be repeated if Dillon were returned to respondent-mother's care. The trial court made the following relevant findings of fact:

> 9. At the time [Dillon] came into the care of Petitioners [at age seven-and-a-half], he was able to demonstrate how to crush and snort pills. He did not know how to tie his shoes. There is conflicting testimony as to whether he knew how to use any utensils to eat with but the [c]ourt finds that he was using his fingers to eat his food when he came into Petitioner[s]' custody.
>
> 10. Sometime in early 2016, Respondent Mother was to have regular supervised visits that were to be supervised by her sister[.] Only a few of those visits occurred and then they stopped. There were [c]ourt hearings in Surry County, North Carolina regarding custody and visitation, and possibly child support. At one of those hearings, for an unknown subject matter, the Respondent Mother, during a court recess, approached the child's therapist . . . and did in fact grab her by the arm, according to [the therapist's] testimony. Respondent Mother denies having done this.
>
> 11. During a hearing, Respondent Mother stated that she wanted her rights to be terminated and did not want to know anything further about the minor child, or words to this [e]ffect.
>
> 12. Respondent Mother, under oath, denied that [Dillon] had ever[ ] witnessed her crushing pills and snorting them. She stated the last time she had done this was before she had children. She stated she has not used cocaine in the past five years, but she had used it before she had children. However, she was forced to admit on cross examination that she did test positive for cocaine in the fall of 2015.
>
> 13. Respondent Mother lives with her boyfriend, [G.H.]. She started dating him sometime around December 2014. She testified that [G.H.] has a prescription for pain

medication and instead of taking the medication in the prescribed manner he crushes the pills and snorts them. He has done this the entire time she has known him and he has in fact done this in front of the children.

14. Respondent Mother, following the positive cocaine result from the hair follicle test, took a urine test on her own volition. The test was negative.

15. Respondent mother told [petitioner-father] that she would surrender her parental rights in exchange for the sum of $25,000.00. She denies that she ever lowered that price.

16. There was a period of time of more than twelve months that Respondent mother did not attempt to contact her sister to arrange supervised visits that she was awarded but did beg[i]n talking about visitation again sometime near July 2018.

17. There was some communication to the Petitioners about visitation. Since early 2016, the Petitioners would respond to Respondent Mother's requests with something to the effect that they were busy or that the minor child did not want to see the Respondent Mother.

18. There is evidence that some of the circumstances have changed since the fall of 2015. Respondent mother was awarded, and now receives disability as of May 2019. The minor child is in the primary care of Petitioners. There is no evidence that the condition of Respondent mother's home has changed. [G.H.] still resides in the home and he still snorts his pain medication.

19. In evaluating the credibility of the testimony, the [c]ourt finds and believes Respondent Mother had a substance abuse problem. There is no evidence that she has received any treatment for that problem.

. . . .

22. As to the grounds alleged in N.C.G.S. Section 7B-1111(a)(1), due to the lack of change in the Respondent mother's home, the Court finds that there is a high likelihood of repetition of neglect if the child was to return to her home.

We review only those findings necessary to support the trial court's conclusion that grounds existed to terminate parental rights. *In re B.C.B.*, 374 N.C. 32, 38, 839 S.E.2d 748, 753 (2020). Again, unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Respondent-mother first challenges the portion of finding of fact 18 that states "[t]here is no evidence that the condition of Respondent mother's home has changed." Respondent-mother contends that this finding "implicitly shift[ed] the burden to [her] to produce evidence showing that her parental rights should not be terminated."

Though the burden in a proceeding to terminate parental rights ultimately lies with the petitioner, *see* N.C.G.S. § 7B-1109(f), the trial court did not improperly shift the burden to respondent-mother through finding of fact 18. When viewed in the context of the entire termination order, the trial court's finding is merely an expression of its observation that respondent-mother failed to rebut petitioners' clear, cogent, and convincing evidence that the conditions of her home had not changed. *See In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) ("[T]he district court did not improperly shift DSS' burden of proof onto respondent-mother. Rather, the court simply observed that respondent-mother had failed to rebut DSS' clear, cogent, and convincing evidence that she and the father had not established safe and stable housing for the children."). Specifically, this observation appears to relate to the trial court's finding that respondent-mother's boyfriend G.H. still lived in her home and was still snorting his pain medication, just as he did when Dillon previously lived there.

Respondent-mother also contends that finding of fact 18 is erroneous because petitioners presented no evidence that the conditions of her home which were present in 2015 and led to her loss of custody of Dillon continued in 2019. The portion of finding of fact 18 that is directly relevant to the conditions of respondent-mother's home is that concerning G.H. continuing to reside in her home and snorting his pain medication. Respondent-mother does not challenge the portion of the finding that her boyfriend resides in her home. Furthermore, at the termination hearing, respondent-mother testified that G.H. had a prescription for pain medication and had been snorting his medication for as long as she had known him. Accordingly, we find that clear, cogent, and convincing evidence supports this finding of fact.

Respondent-mother next challenges the portion of finding of fact 19 which stated that she "had a substance abuse problem."

Respondent-mother asserts that the only evidence that she ever used illegal substances was a single positive drug test in 2015. However, in addition to respondent-mother's positive test for "'benzos and cocaine" in 2015, respondent-mother has a criminal record which includes convictions for possession of a Schedule IV controlled substance and misdemeanor possession of drug paraphernalia. Thus, the trial court could reasonably infer from this evidence that respondent-mother previously had a substance abuse problem.

Respondent-mother further challenges the final portion of finding of fact 19 because she claims no evidence in the record indicates that she never received treatment for substance abuse. Finding of fact 19, however, simply states that there is no evidence that respondent-mother *did* receive substance abuse treatment. Because the record does support a finding that respondent-mother had a substance abuse problem, and no evidence on the record indicates she received any treatment for this problem, this portion of the trial court's finding is supported by clear, cogent, and convincing evidence.

Respondent-mother next challenges both finding of fact 22, which states that there is a likelihood of repetition of neglect "due to the lack of change" in her home, and the trial court's conclusion that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1). We note that the challenged finding of fact is a conclusion of law, and we will review it accordingly in conjunction with respondent-mother's challenges to the trial court's explicit conclusion of law that her parental rights should be terminated on the ground of neglect. *See In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020) ("[T]he trial court's determination that neglect is likely to reoccur if [a child is] returned to his [parent's] care is more properly classified as a conclusion of law . . . . Although the trial court labeled these conclusions of law as findings of fact, 'findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal.' ").

Respondent-mother asserts both that there was insufficient evidence and that the trial court made insufficient findings to support a conclusion that neglect would likely continue. The trial court's conclusion that there would be a repetition of neglect if Dillon were returned to respondent-mother's custody was based on its determination that there had been no change in respondent-mother's home. We review conclusions of law on the existence of grounds to terminate parental rights *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine*

Glen P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Therefore, in our analysis of whether the court erred in concluding the ground of neglect exists to terminate respondent-mother's parental rights, we are not limited to the trial court's determination that the probability of continuing neglect is due to the lack of change in respondent-mother's home. Instead, we consider the totality of the trial court's findings in determining whether its conclusion was supported.

The trial court's findings of fact that support its conclusion that future neglect is likely are: (1) that respondent-mother originally stated that she wished to have her parental rights terminated and offered to relinquish them for $25,000.00, and that she never lowered that price; (2) that respondent-mother did not attempt to visit with Dillon for a period of over a year; (3) that respondent-mother had substance abuse issues, and no evidence shows she was ever treated for those issues; and (4) that G.H. continued to live in her home and snort pain medication. Moreover, the trial court complied with State law and specifically considered evidence of changed circumstances; it noted that respondent-mother now receives disability payments.

Based on all of these findings, the trial court could reasonably conclude that Dillon would likely be neglected in the future if he were placed in respondent-mother's custody. In open court, she stated her desire to terminate her parental rights. In 2016 she apparently conditioned her willingness to give up her parental rights on being paid $25,000.00, and, after she was questioned on this point, the trial court concluded she never lowered that price. Both of these indicate a future propensity to be inattentive to the child. An extended period in which a parent does not attempt to visit the child could show the same.[2] Next, a substance abuse problem that likely went untreated could inhibit a parent's capability or willingness to consistently provide adequate care to a child. In addition, although there was conflicting evidence regarding whether Dillon knew how to use eating utensils, the trial court ultimately found that he used his fingers to eat when he came into petitioners' custody at age seven-and-a-half. Finally, respondent-mother's apparent indifference to Dillon's ability from a young age to consume drugs in a way that violates standard professional recommendations could show a lack of the judgment required to keep a child safe. That simple fact is not undermined just because the substances G.H. consumes may themselves be

2. Though petitioners apparently resisted respondent-mother's efforts to visit Dillon at times, the facts indicate that respondent-mother did not attempt to visit Dillon at all for a period of over a year.

legal to possess. Therefore, the trial court's findings support not only the conclusion that Dillon was neglected in the past, but also that neglect would likely continue in the future.

Nor does the trial court's conclusion lose its footing simply because respondent-mother recently expressed a desire to visit Dillon, or because she now contests the termination of her parental rights. *See, e.g.*, *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1998) ("Moreover, while the evidence also shows that respondent frequently inquired about [the child] and stated that he loved [the child] in his correspondence with his sister, this evidence does not necessarily negate the court's finding that the child has been neglected."). Such expressions of minimally basic care matter, and the trial court was in fact aware of them in this case. But they need not outweigh the abundant evidence that, when viewed reasonably and as a whole, demonstrates a lack of capability or willingness on the part of respondent-mother to adequately care for Dillon.

We thus affirm the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

AFFIRMED.

Justice EARLS, dissenting.

In this case, the trial court failed to make findings of fact to support its conclusion that there was "a likelihood of future neglect by [respondent]" as required under N.C.G.S. § 7B-1111(a)(1) when "the child has been separated from the parent for a long period of time." *In re N.P.*, 374 N.C. 61, 63 (2020). Accordingly, I dissent from the majority's affirmance of the trial court's order terminating respondent's parental rights to her son, Dillon. The majority's holding that the requirements of § 7B-1111(a)(1) have been met is based entirely on evidence of respondent's conduct in 2015 and 2016—the majority does not address the "evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019). This holding is inconsistent with the juvenile code, with our precedents, and with the fundamental protections all parents enjoy in termination proceedings.[1] Because the record contains no evidence that could

1. The majority states its belief that "the trial court complied with State law and specifically considered evidence of changed circumstances; it noted that respondent-mother now receives disability payments." Yet the trial court's obligation to consider changed

support the conclusion that there is a likelihood of future neglect by respondent, I believe the proper course is to vacate the trial court's order and reverse.

Respondent has not had custody of Dillon since November 2015. She does not dispute that her conduct around the time that she lost custody of Dillon was inconsistent with her responsibilities as a parent. She tested positive for "benzos and cocaine." Most significantly, she failed to provide Dillon with clean clothing or maintain his personal hygiene. The record supports the trial court's finding of fact that Dillon "did live in an environment injurious to his welfare when he was living with respondent." Respondent does not challenge this finding of fact, which supports by clear, cogent, and convincing evidence the conclusion that respondent previously neglected Dillon within the meaning of N.C.G.S. § 7B-1111(a)(1).

However, finding that respondent previously neglected Dillon is only one half of the necessary inquiry. Proof that respondent previously neglected Dillon is insufficient to establish that her parental rights may be terminated. When, as in this case, "it cannot be shown that a parent is neglecting his or her child at the time of the termination hearing because the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re Z.V.A.*, 373 N.C. at 211–12. Although respondent's past conduct may be relevant in assessing the likelihood that she will neglect Dillon in the future, we have long held that the "determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715 (1984). "[T]ermination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." *Id.* at 714.

In termination proceedings, the burden is on the petitioners to prove by clear, cogent, and convincing evidence the existence of all the legal elements of an alleged ground for terminating parental rights, including

---

circumstances is not a mere formality. It is not enough that the trial court "noted" one changed circumstance. Instead, the trial court must analyze all of respondent's changed circumstances and explain how the changes connect to its ultimate disposition. *See Coble v. Coble*, 300 N.C. 708, 712 (1980) ("The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.") (cleaned up).

a likelihood of future neglect by the parent. *See, e.g.*, *In re A.R.A.*, 373 N.C. 190, 194 (2019). It is readily apparent that, in this case, the petitioners have failed to carry their burden. The trial court's sole finding of fact directly addressing the likelihood of future neglect by respondent is that "due to the lack of change in the Respondent mother's home, the Court finds that there is a high likelihood of repetition of neglect if the child was to return to her home." Even if the past conditions of respondent's home justified the conclusion that she previously neglected Dillon, the burden was still on the petitioners to affirmatively prove that (1) the conditions of respondent's home had not changed, and (2) those unchanged conditions currently indicate that respondent will likely neglect Dillon again in the future. The trial court's findings are plainly insufficient to support either conclusion.

In the absence of findings directly supporting the trial court's conclusion that respondent was likely to neglect Dillon in the future, the majority looks to the "the totality of the trial court's findings in determining whether its conclusion was supported." Ultimately, the majority rests upon four other findings of fact which, in its view, "support [the trial court's] conclusion that future neglect is likely." Yet these findings of fact are either not probative or not supported by the record.

First, respondent's statement to petitioner that she would relinquish her parental rights for $25,000 is not probative because it occurred in 2016 and has been repudiated by respondent's subsequent conduct. It is undoubtedly correct that respondent's extremely troubling comments were sufficient to "indicate a future propensity to be inattentive to the child" at the time the comments were made. But the trial court made no finding that respondent's desire to relinquish her parental rights extended beyond 2016. Indeed, such a finding would be inconsistent with her actions in this termination proceeding, as well as her consistent efforts to stay connected to Dillon and to exercise her visitation rights in 2018 and 2019. The fact that she has, by her actions, disavowed her previous statement—which occurred years ago—is precisely the kind of "changed circumstance[] occurring between the period of past neglect and the time of the termination hearing" that the trial court must consider. *In re Z.V.A.*, 373 N.C. at 212. Further, the connection between a statement uttered in 2016 and "the fitness of [respondent] to care for the child *at the time of the termination proceeding*" is highly attenuated, *In re Ballard*, 311 N.C. at 715, and respondent's vigorous assertion of her parental rights in the intervening years negates the probative value of her past comments. By relying upon a statement made in 2016 during an angry confrontation with petitioner to support its conclusion

that respondent is likely to neglect Dillon in the future, the majority collapses the "past neglect" and "likelihood of future neglect" inquiries into a single-factor test, impermissibly rendering the latter superfluous.

Second, the trial court's finding of fact that "there was a period of more than twelve months that Respondent mother did not contact her sister to arrange supervised visits that she was awarded" is not clear, cogent, and convincing evidence that respondent is likely to neglect Dillon in the future. As the trial court also found, "[s]ince early 2016, the Petitioners would respond to Respondent Mother's requests [for visitation] with something to the effect that they were busy or that the minor child did not want to see the Respondent Mother." This unchallenged finding of fact establishes that respondent's lack of visitation was not illustrative of her capacity or willingness to care for Dillon. *Cf. In re E.B.*, 847 S.E.2d 666, 674 (N.C. 2020) (in willful abandonment context, "it is relevant that respondent ceased visitation . . . after a breakdown in his relationship with petitioners, in that there was another possible cause for respondent's inconsistent visitation apart from a willful intent to abandon his child"); *In re Young*, 346 N.C. 244, 252 (1997) (failure to consider "probable hostile relationship between respondent and petitioner's family members who cared for [juvenile] during [] period of time" in which respondent did not attend visits diminishes significance of finding that there was a lack of visitation). This finding also suggests that respondent made efforts to initiate and maintain visitation with Dillon stretching back to around the time she initially lost custody of him. The majority claims that "[a]n extended period in which a parent does not attempt to visit the child when she is allowed to" could indicate a "future propensity to be inattentive to the child." Once again, the majority emphasizes respondent's conduct in 2016 without accounting for her actions in the intervening years. Dillon's father testified that he recalled respondent asking for visitation on two occasions in 2017. Further, the trial court found that respondent "began talking about visitation again sometime near July 2018." The circumstance that might support an inference of respondent's "future propensity to be inattentive to the child"—her failure to attempt to exercise her right to visits with Dillon—has changed. Accordingly, this fact does not support the conclusion that there is a likelihood of future neglect by respondent.

Third, the majority's reliance on the trial court's finding that respondent "had substance abuse issues" also misses the mark. The majority claims that based on respondent's positive test for "benzos and cocaine" in 2015, and her "criminal record which includes convictions for possession of a Schedule IV controlled substance and misdemeanor possession

of drug paraphernalia," the trial court could "reasonably infer . . . that respondent-mother previously had a substance abuse problem." I disagree. Although respondent tested positive for narcotics on a hair follicle test conducted in the fall of 2015, respondent tested negative on a urine test that she took "on her own volition" shortly thereafter. And while it is correct that respondent has previously been convicted for drug related offenses, none of these convictions establish that respondent herself personally abused illegal substances. Crucially, there is no indication in the record as to *when* those convictions occurred.[2] The only other evidence of respondent's purported substance abuse is respondent's sister's testimony that she "had concerns" about respondent based on "just some kinds of behavior and, honestly, hearsay," by which she meant her recollection that another sibling once told her that respondent was "snorting cocaine" at their mother's funeral. Respondent's sister also testified that she had never personally observed respondent abusing illegal substances.

Even if respondent previously had a substance abuse problem, evidence of her substance abuse in 2015 is of only extremely limited probative value in assessing the likelihood that she will neglect Dillon in the future. Respondent's past drug use is, standing alone and without further explanation, simply not enough to prove that her parental rights may be terminated pursuant to § 7B-1111(a)(1). As the Court of Appeals has rightfully held, it is not enough to prove that a respondent-parent has abused or continues to abuse illicit substances. Rather, "the burden is upon the petitioner to show that the parent's substance abuse would prevent the parent from providing for the proper care and supervision of the child." *In re D.T.N.A.*, 250 N.C. App. 582, 585 (2016). In this case, that means petitioner must bring forth "evidence to indicate that respondent's alleged drug or substance abuse would prevent [her] from providing for the proper care and supervision of [the juvenile]." *Id. See also In re Phifer*, 67 N.C. App. 16, 25 (1984) ("A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect"). And, as we have recently held, when the evidence of a respondent-parent's past drug use is equivocal, the trial court must offer

2. The transcript from the termination hearing indicates that these convictions occurred more than ten years ago. In response to the question "Can you tell the Court what convictions you've had for criminal activity within the last ten years?", respondent replied "[v]iolating probation" and did not mention any of the drug-related offenses. Later, when the juvenile's guardian *ad litem* is asked if he knew when the drug-related convictions occurred, he responded that "I honestly do not."

"greater explanation" than mere reference to a failed drug test in order to "support a determination as to the likelihood of future neglect." *In re K.N.*, 373 N.C. 274, 283 (2020). The trial court must consider "the nature and extent of respondent's earlier substance abuse issues." *Id.* We have also recently held that a parent's current drug use is "insufficient to support the conclusion" that the requirements of § 7B-1111(a)(1) have been satisfied unless the trial court "analyzes how th[is] fact[] connect[s] with the specific determinative question of respondent's future likelihood of neglecting [the child]." *In re E.B.*, 847 S.E.2d at 675. Thus, our precedents conclusively establish that evidence of respondent's purported substance abuse problem is not clear, cogent, and convincing evidence of a likelihood of future neglect by respondent.

The majority attempts to overcome this evidentiary deficit by noting the trial court's finding of fact that "[t]here is no evidence that [respondent] has received any treatment for [her substance abuse] problem." As a threshold matter, the burden is on the petitioners to prove that respondent currently has a substance abuse problem that renders her likely to neglect Dillon in the future, not on respondent to prove that she is a constitutionally fit parent. *In re Montgomery*, 311 N.C. 101, 110 (1984). A lack of evidence of respondent receiving treatment for her alleged prior substance abuse problem is not proof of an ongoing substance abuse issue, especially given that there is no evidence indicating that respondent has abused illegal substances even a single time since 2015. The trial court made no finding of fact that respondent has a substance abuse problem currently. To reach the opposite conclusion, the majority not only "improperly finds facts in this case, which is a job reserved for the trial court," it invents them out of whole cloth. *In re E.B.*, 847 S.E.2d at 677 (Newby, J., concurring in the result only).

Regardless, assuming *arguendo* that there was sufficient evidence in the record to support the finding that respondent currently has a substance abuse problem, the majority still fails to explain how this problem will adversely impact Dillon. According to the majority, "a substance abuse problem that likely went untreated could inhibit a parent's capability or willingness to consistently provide adequate care to a child." This generalized, conjectural inference is no substitute for an individualized analysis of how respondent's substance abuse problem implicates her own present and future "capability or willingness to provide adequate care to" Dillon. Just as a "respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect," and can only be evidence supporting termination of parental rights "depend[ing] upon an analysis of the relevant facts and circumstances," the mere existence of

a substance abuse problem would be insufficient to prove a likelihood of future neglect by respondent. *In re K.N.*, 373 N.C. 274, 282–83 (2020).[3]

Fourth, the majority does rely upon one finding of fact which is supported by evidence in the record and which establishes that conditions in respondent's home have not changed in at least one regard since she lost custody of Dillon—the fact that "[respondent's boyfriend] continued to live in her home and snort pain medication." According to the majority, respondent's "indifference to Dillon's ability from a young age to consume drugs in a way that violates standard professional recommendations could show a lack of the judgment required to keep a child safe." To be clear, the question presented to this Court is not whether or not it is advisable for a parent to allow his or her child to witness an adult ingest prescription medications "in a way that violates standard professional recommendations." The standard against which parents are judged is not the Platonic ideal. *Cf. In re E.B.*, 847 S.E.2d at 673 (that a parent exhibits "less than ideal parenting practices" does not justify terminating parental rights); *In re Adoption of Leland*, 65 Mass. App. Ct. 580, 583–84 (2006) ("[A] determination of current parental unfitness is not focused upon whether the parent is a good one, let alone an ideal one; rather, the inquiry is whether the parent is so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.") (cleaned up). Instead, "the court may appropriately conclude that the child is neglected" only when "a parent has failed or is unable to *adequately* provide for his [or her] child's physical and economic needs, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time." *In re*

3. The majority's reasoning has potentially dramatic implications. As a practical matter, upwards of 12 percent of children aged 17 or younger "live in households in the United States with at least one parent who had a [substance use disorder]." Rachel N. Lipari & Struther L. Van Horn, *Children Living With Parents Who Have A Substance Use Disorder*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (2015), https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html. Not all of those children are neglected children, and not all of those parents are likely to neglect their children in the future. Further, establishing the majority's reasoning as precedent will likely generate racially disparate consequences within the child welfare system, given that minorities are disproportionately likely to be arrested for drug-related offenses. *See, e.g.*, Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 Crime & Just. 49, 65-66 (2015) (summarizing numerous studies finding that minorities make up a disproportionate percentage of criminal drug offenders). It is also doubtful that the majority's reliance on a generalization about parents with substance abuse issues is sufficiently protective of every parent's paramount liberty interest in the care, custody, and control of his or her children. *See, e.g.*, *In re Montgomery*, 311 N.C. at 106 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

Montgomery, 311 N.C. at 109 (emphasis added). There is no evidence in the record to support a conclusion that respondent will be unable to stop her boyfriend from snorting pain medications in front of Dillon or that her failure to do so will cause Dillon harm. Absent such findings, the majority's assertion that respondent's decision to continue living with her boyfriend is evidence that she is likely to neglect Dillon in the future stretches N.C.G.S. § 7B-1111(a)(1) beyond recognition.

Our task in examining adjudicatory orders terminating a parent's rights to his or her child is not to judge parents against our own view of what constitutes a good parent. Nor is it our task, at the adjudicatory stage, to identify and secure the custodial arrangement that we believe advances the best interests of the juvenile.[4] Our only role is to examine the trial court's order and determine if it is based on evidence in the record establishing that the petitioners have met their burden of proving one of the statutorily enumerated grounds for terminating parental rights. In this case, the evidence in the record fails to support the trial court's conclusion that the petitioners have successfully carried their burden of proving by clear, cogent, and convincing evidence that there was "a likelihood of future neglect by the parent" as required under N.C.G.S. § 7B-1111(a)(1). Therefore, I respectfully dissent.

4. It is correct that, as we have often stated, "the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. at 109. However, a trial court may only proceed to "the dispositional stage at which point it must determine whether terminating the parent's rights is in the juvenile's best interests" after the court "determines at the adjudicatory stage that one or more of the grounds in N.C.G.S. § 7B-1111(a) exists to terminate parental rights." *In re K.L.M.*, 375 N.C. 118, 121 (2020). Thus, until the trial court has concluded that a ground exists to terminate parental rights, "the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994).

IN RE E.C.

[375 N.C. 581 (2020)]

IN THE MATTER OF E.C., C.C., N.C.

No. 413A19

Filed 20 November 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—removal conditions—direct or indirect

In a termination of parental rights case, the Supreme Court rejected a mother's argument that the removal conditions she had to correct to avoid termination based on N.C.G.S. § 7B-1111(a)(2) were limited to those set forth in the underlying petition, which the mother contended were the need for stable and appropriate housing. The trial court had the authority to require her to address any condition that directly or indirectly contributed to the children's removal, which included parenting, mental health concerns, and housing instability.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—failure to comply with case plan

In a termination of parental rights case, the trial court's findings supported its conclusion that a mother willfully left her children in foster care where she failed to comply with the components of her case plan addressing her parenting and mental health issues, and she addressed the housing component only one month before the termination hearing—after the children had been in Youth and Family Services custody for more than three years.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 8 August 2019 by Judge David H. Strickland in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Keith S. Smith, Senior Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Ward and Smith, P.A., by Mary V. Cavanagh, for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

HUDSON, Justice.

Respondent, the mother of minor children E.C. (Ellen)[1], C.C. (Cathy), and N.C. (Nancy), appeals from the trial court's order terminating her parental rights. Because we hold that the unchallenged findings of fact support the trial court's conclusion that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) for willfully leaving her children in foster care or a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, we affirm.

On 29 October 2015, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS), obtained nonsecure custody of Ellen and Cathy and filed a juvenile petition alleging that they were dependent juveniles.[2] The juvenile petition alleged that respondent was incarcerated in August 2015 and had a scheduled release date of February or March 2016. At the time of respondent's incarceration, respondent requested that her adult daughter stay with the juveniles and provide care for them. The adult daughter did not make enough money to continue providing care for the juveniles or to maintain the home. Also at the time of her incarceration, respondent was behind on several bills, including electricity, gas, and rent. In early October 2015, the electricity in the family's home was turned off, and an eviction notice was served on the family demanding that they vacate the home by 30 October 2015. In December 2015, while respondent was incarcerated, she gave birth to Nancy. YFS obtained nonsecure custody of Nancy on 7 December 2015 and filed a juvenile petition alleging that she was a dependent juvenile.

Following a hearing on 22 February 2016, the trial court entered an adjudication and disposition order on 8 April 2016. The trial court concluded that Ellen, Cathy, and Nancy (collectively, the children) were dependent juveniles and continued custody with YFS.

Following her release from prison in March 2016, respondent entered into a Family Services Agreement (FSA) with YFS on 15 March 2016.

---

1. Pseudonyms are used to protect the juveniles' identities and for ease of reading.

2. The juvenile petition and nonsecure custody order also concerned four of respondent's other children, but they are not the subjects of this appeal.

The FSA required respondent to: (1) complete a Families in Recovery to Stay Together (FIRST) assessment; (2) complete a Love and Logic Parenting course; (3) obtain employment; and (4) obtain safe and stable housing. Respondent had already completed a FIRST assessment on 14 March 2016 and it was recommended that she undergo a mental health assessment at Amara Wellness. She started the parenting course on 9 April 2016. Respondent completed a mental health assessment and the Love and Logic Parenting course in May 2016.

Following a hearing on 25 October 2016, the trial court entered a permanency planning order on 15 November 2016 finding that respondent was making limited progress on her case plan. She was taking temporary work assignments through a labor agency and was living with the children's father in a motel room. The trial court set the primary permanent plan as reunification and the secondary permanent plan as adoption and guardianship.

Following a hearing on 27 January 2017, the trial court entered a subsequent permanency planning order finding that respondent needed to participate in mental health services on a consistent basis. Although it was recommended that she participate in outpatient therapy two times per week, respondent had last seen her therapist on 6 January 2017.

The trial court held a hearing on 14 June 2017 and entered a subsequent permanency planning order on 15 August 2017 finding that respondent was not making adequate progress on her case plan within a reasonable time. She continued to live in a motel room with the children's father and acknowledged that it did not provide sufficient space to house her, the children's father, and all of her children. Respondent had last seen her therapist in May 2017. She had reported that she was working full time at Jack in the Box, but YFS was not able to confirm her employment. The trial court changed the primary permanent plan to adoption and the secondary permanent plan to reunification, guardianship, or custody with a relative or other suitable person.

Following a hearing on 1 November 2017, the trial court entered a subsequent permanency planning order on 9 November 2017 finding that respondent failed to attend therapy sessions. Respondent had not seen her therapist at Amara Wellness since May 2017. She claimed to be receiving therapy at a different agency but could not provide confirmation. Respondent had failed to attend several medical appointments for the children.

The trial court held a permanency planning hearing that began on 22 March 2018 but was continued to 3 May 2018 and then again to 13 July

2018. The trial court entered an order on 29 August 2018 finding that respondent had last participated in therapy in March 2018 and still lived in a motel room with the children's father. Respondent had left her employment at Jack in the Box and was working at McDonald's. The trial court concluded that termination of respondent's parental rights was in the best interests of the children and ordered YFS to file a petition to terminate respondent's parental rights within sixty days.

On 27 November 2018, YFS filed petitions to terminate respondent's parental rights to the children. YFS alleged grounds of neglect, willfully leaving the children in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6) (2019).

A hearing on YFS's petition for termination took place on 22 May 2019, 23 May 2019, and 11 June 2019. On 8 August 2019, the trial court entered an order terminating respondent's parental rights. The trial court concluded that grounds existed to terminate respondent's parental rights and that it was in the children's best interests that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appealed.

Respondent contends that the trial court erred by adjudicating grounds for termination of her parental rights under N.C.G.S. § 7B-1111(a)(1), (2), and (6). Because only one ground is needed to terminate parental rights, we only address respondent's arguments regarding the ground of willfully leaving the children in foster care or a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal. *See In re Moore*, 306 N.C. 394, 404 (1982) ("[T]he trial court is authorized to terminate parental rights 'upon a finding of *one or more*' of the six grounds . . . .").

We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). Here, respondent does not challenge any findings of fact, and thus, they are binding on appeal. *In re D.W.P.*, 373 N.C. 327, 330 (2020). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146 (2008), *aff'd per curiam*, 363 N.C. 368 (2009)).

Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). "[T]he willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re L.E.W.*, 846 S.E.2d 460, 469 (N.C. 2020) (second alteration in original) (quoting *In re Fletcher*, 148 N.C. App. 228, 235 (2002)).

"[P]arental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) . . . ." *In re B.O.A.*, 372 N.C. 372, 384 (2019). A trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the children's removal "simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *Id.* at 385 (citation omitted). However, "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* (citation omitted).

[1] Respondent argues that the trial court's findings of fact do not support its conclusion that she failed to correct the removal conditions by the time of the termination hearing. She argues that the conditions that must be corrected "are limited to those set forth in the underlying petition" and that "[i]ssues which arise after the child's removal are irrelevant to the analysis." Respondent asserts that by the time of the termination hearing, she had addressed the single issue that led to the removal of her children—"the need for stable and appropriate housing." Her argument is without merit.

In *In re B.O.A.*, this Court rejected a similar argument, stating that

> nothing in the relevant statutory language suggests that the only 'conditions of removal' that are relevant to a determination of whether a particular parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a

> nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile.

372 N.C. at 381. The trial court in an abuse, neglect, and dependency proceeding "has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home." *Id.* This Court concluded that:

> as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with that case plan provision is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2).

Id. at 385.

In the initial adjudication and disposition order, the trial court found that the children were placed in YFS custody due to respondent's incarceration, "which led to financial disruption and the eviction of the family[,]" and because no relative or caretaker could provide for them. In addition, the trial court made unchallenged findings of fact in its termination order that respondent's issues "revolve and have revolved around parenting, mental health concerns, and housing instability." These findings of fact establish the necessary "nexus" between the components of respondent's court-approved case plan with which she failed to comply and the conditions which led to the children's removal. *See In re B.O.A.*, 372 N.C. at 385.

[2] Respondent next argues that the trial court's findings of fact fail to support its conclusion that she willfully left the children in foster care. She contends that the findings fail to reflect her efforts to make a "positive and sustained response toward achieving reunification with her children." We disagree.

In its termination order, the trial court found that a case plan was developed for respondent in February 2016 to "address issues of parenting concerns, mental health concerns[,] and housing instability." Respondent only addressed the housing component of her case plan by moving into a four-bedroom house, and she did not address that component until April 2019.

Regarding parenting concerns, the trial court found that respondent adopted some stray cats and refused to get rid of them after Ellen and Cathy experienced allergic reactions during visitations. The trial court found that respondent had shown up for very few of the children's medical, dental, and therapy appointments, that respondent lacked the ability to understand and meet the needs of her children, and that respondent lacked a plan to understand and meet the children's needs. The trial court also found that on or about 29 August 2018, another child (Amy) of respondent who was also in YFS custody, had been placed with respondent for several months. Respondent became upset in response to a hearing during which the trial court ordered YFS to proceed with terminating respondent's parental rights to the children and demanded that YFS pick up Amy and place her back into foster care because she did not want to take care of her.

With respect to the mental health component of respondent's case plan, the trial court found that respondent was diagnosed, *inter alia*, with unspecified personality disorder with narcissistic, antisocial, and borderline traits, bipolar I disorder, and unspecified anxiety disorder. In March 2016, it was recommended that respondent engage in mental health services with Amara Wellness. Respondent attended sessions at Amara Wellness from March 2016 until spring 2017, but was inconsistent with attending her appointments. She began receiving mental health services again in the spring of 2018 until October 2018, but she had not received any mental health treatment from October 2018 until the date of the termination hearing in May and June of 2019.

These unchallenged findings of fact establish that respondent failed to comply with the components of her case plan addressing her parenting and mental health concerns. While respondent addressed the housing component of her case plan by moving from a motel room into a house, she did so only a month before the termination hearing. This limited and delayed progress does not amount to reasonable progress in light of the fact that the children had been in YFS custody for over three years. *See*, *e.g.*, *In re B.S.D.S.*, 163 N.C. App. 540, 546 (2004) (holding that when the respondent had not followed through on her obligation to seek therapy, only seeing a counselor three weeks prior to the termination hearing, such a delayed effort was deemed to be insufficient progress.).

Based on the foregoing, we hold that the trial court's findings of fact support its conclusion that grounds exist to terminate respondent's parental rights to the children under N.C.G.S. § 7B-1111(a)(2). The trial court's conclusion on this ground is "sufficient in and of itself to support

termination of respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 413 (2019). Respondent does not challenge the trial court's conclusion that termination of her parental rights is in the children's best interests. *See* N.C.G.S. § 7B-1110(a). Therefore, we affirm the trial court's order terminating respondent's parental rights to the children.

AFFIRMED.

IN THE MATTER OF G.L. AND I.L.

No. 191A20

Filed 20 November 2020

Termination of Parental Rights—no-merit brief—neglect and willful failure to make reasonable progress

The trial court's termination of a mother's parental rights to her two daughters—on grounds of neglect and willful failure to make reasonable progress to correct the conditions leading to the children's removal from the home—was affirmed where her counsel filed a no-merit brief, and where the record evidence supported the trial court's findings of fact, which in turn supported the statutory grounds for termination and the court's determination that terminating the mother's parental rights was in the children's best interest.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 and 28 January 2020 by Judge Meredith A. Shuford in District Court, Lincoln County. This matter was calendared in the Supreme Court on 7 October 2020, but was determined upon the basis of the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Randel S. Hudson for petitioner-appellee Lincoln County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

ERVIN, Justice.

IN RE G.L.

[375 N.C. 588 (2020)]

Respondent-mother Melissa C. appeals from adjudication and disposition orders[1] terminating her parental rights in her minor children G.L. and I.L.[2] On appeal, counsel for respondent-mother has filed a no-merit brief on his client's behalf as is authorized by N.C.R. App. P. 3.1(e). After carefully considering the potential issues identified by respondent-mother's counsel in light of the record and the applicable law, we affirm the trial court's termination orders.

The Lincoln County Department of Social Services had been involved with the children's family since the time that the children were born in 2005 and 2007, respectively. Prior to 13 January 2018, when DSS received yet another child protective services report relating to Ilsa and Gillian, the family had been the subject of five earlier child protective service reports and had been provided with case management services that were intended to address substance abuse and domestic violence concerns. According to the 13 January 2018 child protective services report, Ilsa and Gillian had attempted to intervene in an incident of domestic violence involving their parents in an attempt to protect respondent-mother. After failing to protect respondent-mother from their father, the children went to the home of a neighbor, who sought the assistance of law enforcement officers. At the time that investigating officers arrived at the scene of the assault, they determined that respondent-mother was intoxicated.

In the early morning hours of 5 March 2018, the father was arrested based upon pending drug-related charges. At that time, investigating officers reported that both Ilsa and Gillian were in the automobile that he was operating and that a strong odor of marijuana was emanating from the vehicle. Investigating officers discovered "two burnt marijuana joints" in the vehicle and eight amphetamine pills, a brown waxy substance wrapped in tinfoil, and a bag of methamphetamine on the father's person. Although a social worker went to the family home following this incident, no one was there.

At about noon on the same day, a social worker spoke by phone to respondent-mother, who stated that she was in Hickory and could not return until eight o'clock that night. In response to the social worker's

1. The trial court's orders also terminated the parental rights of the children's father. However, since the father has not challenged the lawfulness of the trial court's orders before this Court, we will refrain from discussing the evidence relating to the father in any detail in the remainder of this opinion.

2. G.L. and I.L. will be referred to throughout the remainder of this opinion as, respectively, "Gillian" and "Ilsa," which are pseudonyms used to protect the identities of the juveniles and for ease of reading.

assertion that respondent-mother needed to return to Lincoln County immediately, respondent-mother told the social worker that she would call at the time that she arrived home. At approximately 3:00 p.m., the social worker returned to the family home and was present when Ilsa and Gillian got off of the school bus. At the time of the children's arrival, there were no adults in the family home or in the grandparents' adjoining residence and the social worker could not make contact with either parent. As a result, the children were taken into DSS custody on an emergency basis.

On the same date, DSS filed a juvenile petition alleging that Ilsa and Gillian were neglected juveniles and obtained the entry of an order taking them into nonsecure custody. On 1 October 2018, Judge K. Dean Black entered an adjudication order finding the children to be neglected juveniles. On 25 October 2018, Judge Larry J. Wilson entered a disposition order placing the children in DSS custody, and ordering respondent-mother to complete parenting classes, obtain a mental health assessment and comply with all resulting recommendations, obtain a substance abuse assessment and comply with all resulting recommendations, complete domestic violence non-offenders counseling, and submit to random drug screens. In addition, Judge Wilson authorized respondent-mother to have weekly visits with Ilsa and Gillian in the event that she was able to produce a negative drug screen.

Unfortunately, respondent-mother made little progress in attempting to satisfy the requirements of her case plan. On 11 July 2019, following a permanency planning hearing held on 23 April 2019, Judge Black entered an order in which he found as a fact that respondent-mother had failed to complete parenting classes, had not scheduled a mental health assessment, had not completed substance abuse classes after having obtained a substance abuse assessment, had refused to participate in domestic violence treatment, had failed to submit to requested drug screens, had not visited with the children for several months in light of her refusal to submit to requested drug screens, and had been charged with possession of a controlled substance in a jail or prison, possession of methamphetamine, and possession of drug paraphernalia. Based upon these and other determinations, Judge Black changed the permanent plan for the children to a primary plan of adoption and a secondary plan of reunification and authorized the cessation of attempts to reunify Ilsa and Gillian with respondent-mother. In the interval between the 23 April 2019 review hearing and the entry of the 11 July 2019 order, respondent-mother was convicted of the pending drug-related offenses, placed upon supervised probation, and ordered to wear an ankle

monitor. On 29 May 2019, respondent-mother failed a drug screen that had been conducted for probation-related purposes by testing positive for the presence of methamphetamine.

On 15 July 2019, DSS filed a petition seeking to have respondent-mother's parental rights in Ilsa and Gillian terminated on the grounds of neglect, N.C.G.S. § 7B-1111(a)(2); willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2); willful failure to pay a reasonable portion of the children's care while they were in DSS custody, N.C.G.S. § 7B-1111(a)(3); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). After the filing of the termination petition, respondent-mother was charged with interfering with her electronic monitoring device, found to have violated the terms and conditions of her probation, and had her suspended sentence activated.

The termination petition came on for an adjudication hearing on 10 December 2019 and a disposition hearing on 10 January 2020. On 13 January 2020, the trial court entered an adjudication order, with an amended adjudication order having been entered on 22 January 2020. On 28 January 2020, the trial court entered a dispositional order. In these orders, the trial court concluded that respondent-mother's parental rights in Ilsa and Gillian were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2), and that it was in the children's best interests for respondent-mother's parental rights to be terminated. Respondent-mother noted an appeal to this Court from the trial court's termination orders.

Respondent-mother's appellate counsel has filed a no-merit brief on her behalf as authorized by N.C.R. App. P. Rule 3.1(e). As part of that process, respondent-mother's appellate counsel has advised respondent-mother of her right to file *pro se* written arguments on her own behalf and has provided her with the documents necessary to do so. Respondent-mother has not, however, submitted any written arguments for our consideration.

In the event that a parent's appellate counsel files a no-merit brief on his or her client's behalf pursuant to N.C.R. App. P. 3.1(e), this Court reviews the issues that are listed in that brief to see if they have potential merit. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). In his no-merit brief, respondent-mother's counsel identified certain issues relating to the adjudication and disposition portions of this proceeding

that could arguably support an award of appellate relief, including whether the trial court properly found that grounds for the termination of respondent-mother's parental rights in the children existed and whether the trial court abused its discretion by determining that the termination of respondent-mother's parental rights in the children would be in their best interests, before explaining why he believed that these potential issues lacked merit. After a careful review of the issues identified in the respondent-mother's no-merit brief in light of the record and the applicable law, we are satisfied that the findings of fact contained in the trial court's termination orders have ample record support and that those findings of fact support the trial court's determinations that respondent-mother's parental rights in Ilsa and Gillian were subject to termination on the basis of at least one of the grounds delineated in N.C.G.S. § 7B-1111(a) and that the termination of respondent-mother's parental rights in the children would be in their best interests. As a result, we affirm the trial court's termination orders.

AFFIRMED.

IN THE MATTER OF K.C.T.

No. 461A19

Filed 20 November 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—willfully leaving juveniles in placement outside home—voluntary kinship placement

The trial court erred in finding grounds to terminate a mother's parental rights for willfully leaving her daughter in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal (N.C.G.S. § 7B-1111(a)(2)). These grounds did not apply because the mother agreed to place her child with the child's aunt and uncle through a voluntary kinship placement, and the aunt and uncle later obtained full custody though a civil custody order under Chapter 50 of the General Statutes.

2. Termination of Parental Rights—grounds for termination—dependency—alternative care placement—sufficiency of findings

The trial court erred in finding grounds to terminate a mother's parental rights based on dependency (N.C.G.S. § 7B-1111(a)(6)) where it failed to enter a finding of fact that the mother lacked an appropriate alternative child care arrangement, and where no evidence was presented to support such a finding.

3. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—neglect by abandonment

The trial court erred in finding grounds to terminate a mother's parental rights to her daughter based on neglect (N.C.G.S. § 7B-1111(a)(1)) where there was no evidence to support a finding of a high likelihood of future neglect if the child were returned to the mother's care, apart from highly speculative testimony regarding the mother's ability to care for the child in light of her own mental disabilities. Furthermore, the mother did not neglect her daughter by abandonment where she consistently sent gifts and repeatedly contacted her daughter and her daughter's caregivers over a long period of time leading up to the termination hearing.

4. Termination of Parental Rights—grounds for termination—abandonment—no findings on willfulness—evidence of minimal contact with child

The termination of a mother's parental rights to her daughter on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) was reversed and remanded on appeal where the termination order failed to address whether the mother's conduct was willful but where some evidence (showing minimal contact between the mother and her child during the relevant statutory period) might have supported termination of parental rights on these grounds.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 23 August 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellees.

No brief for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant.

EARLS, Justice.

Respondent-mother appeals the trial court's order terminating her parental rights to her minor child K.C.T.[1] After careful review, we reverse in part and reverse and remand in part.

On 9 October 2015, the Wilkes County Department of Social Services (DSS) placed Kelly in a voluntary kinship placement with petitioners, who are her paternal aunt and uncle. DSS became involved with the family after respondent-mother reported that Kelly's father was manufacturing methamphetamine in their home. The father was arrested and charged with multiple felony drug offenses as well as misdemeanor child abuse. Respondent-mother was not charged with any crimes.

On 8 January 2016, petitioners filed a civil custody action. On 18 April 2016, they were awarded sole legal and physical custody of Kelly. The custody order denied respondent-mother any visitation with Kelly "until she petition[ed] the Court to modify the Order."

On 12 March 2019, petitioners filed a petition seeking to terminate the parental rights of both of Kelly's parents on the grounds of neglect, willfully leaving Kelly in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6)–(7) (2019). Kelly's father then relinquished his parental rights. On 27 June 2019, the trial court appointed a guardian *ad litem* to represent respondent-mother's interests under Rule 17 of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 17 (2019).

The matter was heard on 13 August 2019. Ten days later, the trial court entered an order terminating respondent-mother's parental rights. The trial court concluded that respondent-mother's parental rights were subject to termination based on all four grounds alleged by petitioners

1. The minor child K.C.T. is referred to by the pseudonym "Kelly" throughout this opinion in order to protect her identity and for ease of reading.

and further concluded that termination was in Kelly's best interest. Respondent-mother appeals.

The termination of parental rights proceeds in two stages, beginning with an adjudicatory determination. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

[1] In her brief, respondent-mother challenges each of the four grounds for termination found by the trial court. We begin with the ground both parties agree was improper: that respondent-mother willfully left Kelly in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal under N.C.G.S. § 7B-1111(a)(2). The Court of Appeals previously held, relying on our decision in *In re Pierce*, 356 N.C. 68 (2002),[2] that the "removal" contemplated by this ground "refers only to circumstances where a court has entered *a court order* requiring that a child be in foster care or other placement outside the home." *In re A.C.F.*, 176 N.C. App. 520, 525–26 (2006). In support of this holding, the Court of Appeals explained:

> [A]n interpretation of "left . . . in foster care or placement outside the home" and "removal" in G.S. § 7B-1111(a)(2) that broadly covers circumstances where parents leave their children in others' care without regard to involvement of the juvenile court may lead to nonsensical results. There are an infinite variety of reasons parents decide to entrust their children's care to others. Oftentimes, these reasons will not implicate the child welfare concerns of the State. To allow the termination ground set forth in G.S. § 7B-1111(a)(2) to be triggered no matter what the cause for a child's separation from his parent is inconsistent with affording parents notice that they are at risk of

2. In *In re Pierce*, this Court concluded that the period of the twelve-month placement outside the home in N.C.G.S. § 7A-289.32(3) (current version at N.C.G.S. § 7B-1111(a)(2)) did not begin until the juvenile was the subject of an order issued by the juvenile court. 356 N.C. 68, 74 (2002).

> losing their parental rights. Instead, it is logical that the General Assembly, in adopting G.S. § 7B-1111(a)(2), was primarily concerned with allowing termination where a juvenile court was involved in the "removal" of the child.

Id. at 525 (alteration in original). We find this reasoning persuasive and believe it applies with equal force to the circumstances of this case. Kelly entered petitioners' custody when respondent-mother agreed to a voluntary kinship placement. Although petitioners later obtained full custody of Kelly through a civil custody order, that order was entered under Chapter 50 of our General Statutes and not under Chapter 7B. A Chapter 50 civil custody order does not provide sufficient notice to a parent that their parental rights would be imperiled by their loss of custody or inform the parent what steps would be necessary to make reasonable progress and avoid termination. Accordingly, we reverse the portion of the trial court's termination order that relies on this ground for termination.

[2] The trial court also found that respondent-mother's rights were subject to termination based on dependency under N.C.G.S. § 7B-1111(a)(6). An adjudication under this ground requires the trial court to make two ultimate findings: (1) that the parent is incapable (and will continue to be incapable for the foreseeable future) of providing proper care and supervision to their child, rendering the child a "dependent juvenile" as defined by N.C.G.S. § 7B-101(9) (2019); and (2) that the parent lacks an appropriate alternative child care arrangement. N.C.G.S. § 7B-1111(a)(6); *see In re K.R.C.*, 374 N.C. 849, 859 (2020). Respondent-mother does not raise an argument with respect to the first required finding, and thus we do not discuss whether respondent-mother's alleged incapability rendered Kelly a dependent juvenile. But we agree with respondent-mother that the trial court failed to make the second required finding regarding an appropriate alternative child care arrangement, and thus its conclusion that dependency provides a ground for termination must be reversed. *See In re E.L.E.*, 243 N.C. App. 301, 308 (2015) (concluding that the failure to make a necessary termination finding requires reversal).

Petitioners argue that a finding regarding an alternative child care arrangement was unnecessary because respondent-mother "did not come forward with an alternative child care arrangement." However, the burden was on petitioners to show that respondent-mother lacked a suitable alternative child care arrangement, and they presented no evidence to meet their burden. *See* N.C.G.S. § 7B-1109(f) ("The burden in [adjudicatory hearings on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and

convincing evidence."). Respondent-mother was not questioned about potential alternative child care arrangements during her testimony, and no other witness addressed the issue. Since the trial court failed to make this required finding and no evidence was presented that would allow it to make such a finding, the portion of the trial court's order relying upon this ground for termination must be reversed. *See id.*

[3] The trial court also found that termination was warranted based on neglect. Under N.C.G.S. § 7B-1111(a)(1), a trial court may terminate a parent's rights if that parent has neglected their child. A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15). When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because "the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715).

At the time of the termination hearing on 13 August 2019, Kelly had been out of respondent-mother's care for almost four years. Respondent-mother argues the trial court's findings fail to address the likelihood of future neglect if Kelly was returned to her care.[3] She acknowledges the trial court found that "[s]ince the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child" but argues that this finding is both inadequate to satisfy the two-part neglect test and unsupported by the evidence. Since we agree with respondent-mother that the record evidence does not support this finding of fact, we need not consider whether the finding, if adequately supported, demonstrated a likelihood of repetition of neglect.

At the time Kelly entered petitioners' care she was living with her parents, and her father was manufacturing methamphetamine in the

3. Respondent-mother does not contest that the circumstances which led to her voluntarily placing Kelly with petitioners and which eventually led to respondent-mother losing custody of Kelly to petitioners constituted past neglect.

family home. There is no dispute that Kelly's parents were no longer in a relationship and were living apart at the time of the termination hearing, and thus the circumstances which led respondent-mother to voluntarily place Kelly in petitioners' care were irrelevant to her ability to provide care for Kelly at the time of the termination hearing. *See In re Young*, 346 N.C. 244, 248 (1997) ("Termination of parental rights for neglect may not be based solely on past conditions which no longer exist."). In order for the trial court's finding that respondent-mother was unable to provide proper care for Kelly to be viable, there must have been other evidence presented during the termination hearing to support it.

Two witnesses testified during the adjudicatory phase of the termination hearing. The first, Kelly's aunt, offered the following regarding respondent-mother's ability to provide care:

> Q. Do you currently have any concerns about [respondent-mother's] ability to take care of [Kelly]?
>
> A. I don't think that she would be able to take care of [Kelly].
>
> Q. Why do you believe that?
>
> A. I don't believe that she can because she can't, you know, keep her—she can't be in her own home. She don't have—she lives with her mom still. The only time that I knew that she was out of her mom's home is when she was with [the father].
>
> Q. Do you know why [respondent-mother] is living with her mother?
>
> A. I'm not sure.
>
> Q. Do you know if [respondent-mother's] mother is helping to take care of her?
>
> A. To the best of my knowledge, possibly. I'm not living there so I really couldn't say.

Her responses on cross-examination further reflected her lack of knowledge regarding respondent-mother's disabilities.

> Q. Now, you don't actually know—you testified believing that [respondent-mother] was mentally disabled. You don't actually know the details of her disability do you?
>
> A. No, I do not.

> Q. And, you don't actually have any frame of reference for whether or not she is capable of caring for a child in general do you?
>
> A. No.

The other witness was respondent-mother, and she denied that her "disability would make it impossible . . . to provide at least some level of care for [Kelly]."

Between respondent-mother's clear assertion that she could provide care for Kelly and the paternal aunt's mere supposition about whether respondent-mother was capable of caring for Kelly, there is no clear, cogent, and convincing evidence to support the trial court's finding that "the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child." Accordingly, we will disregard this finding. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence). Without this finding, the trial court's order lacks any findings whatsoever that address the possibility of repetition of neglect.[4]

Moreover, the trial court's remaining findings of fact and the other evidence presented at the termination hearing do not suggest that Kelly would be neglected if returned to respondent-mother's care. The trial court found that respondent-mother lived with her own mother, her brother, and her two minor cousins in a two-bedroom apartment. There were neither findings nor testimony identifying any issues with the safety of respondent-mother's residence or mentioning any concerns with the family members living there. The trial court also found that respondent-mother relies on family members for "assistance in caring for herself" and for travel. But as she was living with the very family members she was relying on for assistance, it is unclear how respondent-mother's disabilities, standing alone, would place Kelly at risk of neglect if she returned to respondent-mother's care.

Although a lack of evidence showing the probable repetition of neglect forecloses termination of parental rights for most forms of neglect, this Court has recognized that the neglect ground can support termination without use of the two-part *Ballard* test if a parent is

---

4. The dissent argues that respondent-mother's disability, standing alone, is sufficient to show a likelihood of future neglect. The position proposed by the dissent would require a trial court to find a likelihood of future neglect whenever a parent is unable to care for him or herself, regardless of the level of support surrounding the parent. That is not the law of this state.

presently neglecting their child by abandonment. *In re N.D.A.*, 373 N.C. 71, 81–82 (2019). Petitioners argue that the trial court's findings support a conclusion that respondent-mother neglected Kelly by abandoning her.

A trial court may terminate a parent's rights under the ground of neglect by abandonment when it finds that the parent has engaged in "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). The trial court's findings in support of this ground must reflect "that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing." *In re N.D.A.*, 373 N.C. at 81 (citation omitted). In deciding whether this ground exists, the trial court should consider the parent's conduct over an extended period, up to and including the time of the termination hearing. *Id.* at 81–82.

Here, the trial court found that while Kelly was in petitioners' care, respondent-mother never filed a motion seeking visitation, did not provide for Kelly's physical and financial needs, and wrote a Facebook message to petitioners in 2016 in which she stated she no longer wished to be a parent. But the trial court also found that respondent-mother (1) had four visits with Kelly prior to the filing of the civil custody action; (2) would send gifts to Kelly, usually around the time of her birthday; (3) sent $100 to petitioners for Kelly's care on one occasion in 2016; (4) had a video chat with Kelly on her fourth birthday; and (5) periodically communicated with petitioners on Facebook Messenger. Considering the totality of respondent-mother's conduct up until the time of the termination hearing, respondent-mother did not "manifest[ ] a willful determination to forego all parental duties" while Kelly was in petitioners' care.[5] *Id.* at 81. By consistently providing gifts and repeatedly contacting Kelly and her caregivers over a long period of time, respondent-mother showed her intent to remain a part of Kelly's life. Therefore, the trial court's findings of fact affirmatively demonstrate respondent-mother did not neglect Kelly by abandonment, and consequently, the portion of the trial court's termination order relying on this ground must be reversed.

[4] The final ground for termination found by the trial court was willful abandonment under N.C.G.S. § 7B-1111(a)(7). Under that provision, the trial court may terminate a parent's rights when said "parent has

5. The trial court's order also fails to address whether respondent-mother's alleged abandonment of Kelly was willful, and it is also subject to reversal on this basis. *See In re N.D.A.*, 373 N.C. 71, 82–83 (2019).

willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). Unlike neglect by abandonment, an adjudication under this ground requires specific focus on a parent's actions during "the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77 (citation omitted). But the trial court may also look outside the six-month window in order to evaluate the parent's "credibility and intentions." *Id.* (citation omitted).

In this case, the termination petition was filed on 12 March 2019, and thus the relevant period was from that date back until 12 September 2018. The trial court's findings and the evidence at the termination hearing reflect only one concrete action taken by respondent-mother during the determinative period: she provided Kelly "three boxes" of gifts for Christmas 2018. The trial court found that respondent-mother otherwise had no meaningful contact with Kelly and provided no financial assistance during the six-month period, and it also found that respondent-mother did not file a motion for visitation after petitioners were granted sole custody of Kelly. However, the trial court's findings do not address whether respondent-mother's conduct was willful.

Willful intent is a necessary component of abandonment, and, when adjudicating willful abandonment as a ground for termination under N.C.G.S. § 7B-1111(a)(7), the trial court must make adequate evidentiary findings to support its ultimate finding as to whether willful intent exists. *In re N.D.A.*, 373 N.C. at 78. There is no such ultimate finding here, and the trial court's termination order identifies multiple possible impediments to respondent-mother's ability to contact and provide support to Kelly. The trial court found that respondent-mother "has been diagnosed with bipolar disorder, oppositional defiant disorder, attention deficit disorder, and mental retardation" and that she "has an IQ in the range of 40–45." It also found that she lacked a driver's license, that she relied on her family and public transportation for travel, and that she lived in a different county than petitioners. Finally, the trial court found that respondent-mother was unemployed and relied on supplemental security income. Nonetheless, the trial court's order makes no attempt to explore the interplay between these impediments and respondent-mother's intent. Moreover, while the trial court found that respondent-mother had no meaningful contact during the relevant six-month period, it also found that respondent-mother "sent some gifts to [Kelly], usually around the time of [Kelly's] birthday"; that respondent-mother "had Facetime communication" with Kelly on her fourth birthday, which occurred two days after the termination petition

was filed; and that respondent-mother "used the social media platform Facebook and Facebook messenger to communicate periodically with the Petitioners," without discussing whether these actions had any relevance to respondent-mother's credibility and intentions. Taken together, the trial court's findings fail to show that respondent-mother "had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [Kelly].' " *Id.* at 79 (quoting *In re D.M.O.*, 250 N.C. App. 570, 573 (2016)). However, in light of the minimal contact between respondent-mother and Kelly during the relevant six-month period, the evidence may still support this ground for termination. *See In re C.B.C.*, 373 N.C. 16, 23 (2019) (establishing that efforts outside the six-month period do not preclude a finding of willful abandonment if nothing is done to maintain or establish a relationship during that period). Under these circumstances, the appropriate disposition is to reverse this part of the trial court's order and remand "for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether" willful abandonment existed. *In re K.N.*, 373 N.C. 274, 284 (2020) (citing *In re N.D.A.*, 373 N.C. at 84).

None of the grounds for termination found by the trial court were supported by sufficient findings of fact established by clear, cogent, and convincing evidence. The portions of the trial court's order concluding that respondent-mother's rights were subject to termination under N.C.G.S. § 7B-1111(a)(1), (2), and (6) are reversed. The portion of the trial court's order adjudicating grounds for termination under N.C.G.S. § 7B-1111(a)(7) is reversed and remanded for further proceedings not inconsistent with this opinion, including the entry of a new order containing proper findings and conclusions addressing the issue of whether respondent-mother willfully abandoned Kelly during the six months prior to the filing of the termination petition. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re K.N.*, 373 N.C. at 285.

REVERSED IN PART; REVERSED AND REMANDED IN PART.

Justice NEWBY dissenting.

The standard for appellate review of these cases is well-settled. This Court should ask whether the trial court's findings are supported by clear, cogent, and convincing evidence and whether those facts in turn support the trial court's conclusions of law. *See In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019). This Court should not find facts,

as it not positioned to make observations and determinations that a trial court can. Yet again, however, the majority of this Court chooses to ignore the facts found by the trial court to reach its desired outcome.

When the trial court order is viewed as a whole, it is clear that the trial court's findings of fact supported by clear, cogent, and convincing evidence ultimately support its decision to terminate respondent's rights based on, *inter alia*, neglect and willful abandonment.[1] Moreover, I would remand to the trial court to make the required finding on whether there was an alternative childcare placement for the termination ground of dependency. Therefore, I respectfully dissent.

The evidence at the termination hearing showed the following: The child was born on 14 March 2015. Around June of 2015, when the child was three months old, respondent learned that the child's father was making methamphetamine in the mobile home they lived in with their daughter. Despite knowing that the child's father was manufacturing and using drugs in the home, respondent and the child continued to live in the mobile home with him until around October 2015, a little less than approximately five months after respondent discovered the child's father was manufacturing methamphetamine. The father and respondent got into a domestic dispute, leading respondent to contact DSS to seek assistance. Respondent told DSS about the meth lab and was not criminally charged. After respondent contacted DSS, the child's biological father was arrested and charged with felony drug offenses, including manufacturing methamphetamine; maintaining a dwelling for the use, storage, or sale of a controlled substance; trafficking methamphetamine; and misdemeanor child abuse. Following the father's arrest, DSS placed the child in petitioners' care and custody pursuant to a voluntary kinship placement. Petitioners are the child's paternal aunt and uncle. At the time that the child was placed with petitioners, she was not up to date on her vaccinations.

Eventually, on 8 January 2016, petitioners filed an action seeking sole legal and physical custody of the child. In April 2016, petitioners were granted custody of the child. In its order, the trial court held that respondent would have no visitation with the minor child until she petitioned the court to modify the custody order. Respondent did not appear

---

1. Because termination would be proper on any of these grounds, I do not address the trial court's decision to terminate respondent's parental rights based on N.C.G.S. § 7B-1111(a)(2). *See* N.C.G.S. § 7B-1111(a)(2) (2019); *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . .").

at that hearing, nor did she ever file a motion to address visitation despite the court order allowing her to do so. While respondent visited the child four times between the child's voluntary kinship placement and petitioners filing their custody action, respondent had no visitation with the minor child since the entry of the custody order.

On 12 March 2019, petitioners filed a petition to terminate respondent's parental rights. Respondent was appointed a guardian *ad litem* (GAL) for herself based on need. After receiving evidence and holding a termination hearing, the trial court made the following findings:

> 14. . . . . [Respondent] resides in a 2-bedroom apartment with her mother, her biological brother and two minor cousins.
>
> 15. The Respondent-Mother is not gainfully employed. She receives supplemental security income for disabilities diagnosed in her childhood. The Respondent-Mother has been diagnosed with bipolar disorder, oppositional defiant disorder, attention deficit disorder, and mental retardation. The Respondent-Mother has an IQ in the range of 40–45. The Court makes these findings based upon the Respondent-Mother's testimony, although no documentation was submitted supporting these diagnoses.
>
> 16. After the Petitioners were granted custody of the minor child, the Respondent-Mother sent some gifts to the minor child, usually around the time of the minor child's birthday.
>
> 17. In 2016, the Respondent-Mother sent the Petitioners one hundred ($100.00) dollars. Apart from this isolated payment, the Respondent-Mother has provided no financial support for the benefit of the minor child.
>
> 18. On or about the minor child's 4th birthday, the Respondent-Mother had Facetime communication with the child. The Respondent-Mother has used the social media platform Facebook and Facebook messenger to communicate periodically with the Petitioners.
>
> 19. On the date of the custody hearing in April 2016, the Respondent-Mother sent a vulgar message to the Petitioners through Facebook messenger insulting them and also stating she no longer wanted to be a parent to

the minor child. The Respondent-Mother denied sending the message and asserted her Facebook account had been hacked. The Court admitted the messages into evidence over the objection of the Respondent-Mother's attorney.

20. The Respondent-Mother has never had a driver's license and relies on family members and public transportation for travel.

21. As a result of her psychological conditions and her mental limitations, the Respondent-Mother does not have the capability to provide for the proper care of the minor child. The Respondent-Mother needs assistance in caring for herself and has always depended on family members.

22. The Respondent-Mother has failed to provide for the minor child's physical and economic needs while she has been in the care of the Petitioners.

23. The Respondent-Mother neglected the minor child while the child was in her custody by failing to obtain proper medical care and exposing her to an environment where methamphetamine was manufactured.

24. During the six-months immediately preceding the filing of the petition to terminate her parental rights, the Respondent-Mother had no meaningful contact with the minor child and did not provide any financial support.

25. The Respondent-Mother has failed to perform her natural and legal obligations of support and maintenance for the minor child.

26. Since the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child.

Ultimately, the trial court concluded as a matter of law that respondent's rights should be terminated on, *inter alia*, grounds of neglect, N.C.G.S. § 7B-1111(a)(1), dependency, N.C.G.S. § 7B-1111(a)(6), and willful abandonment, N.C.G.S. § 7B-1111(a)(7).

First, the trial court properly terminated respondent's parental rights based on neglect. Subsection 7B-1111(a)(1) of the North Carolina General Statutes provides that a trial court may terminate a parent's parental rights when "[t]he parent has . . . neglected the juvenile." A

neglected juvenile is defined in the North Carolina General Statutes as a child "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). To terminate a parent's rights based on neglect, one must "show[ ] . . . neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). Neglect can also be shown through abandonment, and the determinative period for evaluating a parent's conduct is not limited to the six months preceding the petition's filing. *In re N.D.A.*, 373 N.C. 71, 81, 833 S.E.2d 768, 776 (2019).

In this case, there is no question that respondent allowed the child to live in a home where the child's biological father was manufacturing methamphetamine, clearly indicating a showing of past neglect. Though respondent was not living with the child's biological father at the time of the termination hearing, the trial court made several findings about respondent's current living situation, i.e., her sharing a two-bedroom apartment with four other family members, her inability to function without assistance based on her diagnosed disabilities, and her sole reliance on others for transportation, among other things. Ultimately, the trial court found that, though respondent no longer lived with the child's biological father, she "does not have the capability to provide for the proper care of the minor child" due to her inability to care for herself. This manifested itself initially, for example, in her failure to be able to ensure that the child received proper medical care before coming into petitioners' custody. These findings all indicate that because of respondent's limitations, it is likely respondent will neglect the child in the future, in addition to showing neglect based on abandonment due to respondent's failure to make meaningful contact with the child or provide financial support.

The majority rejects these trial court findings, instead reasoning that it did not believe that the mother's disabilities would place the child at risk of future neglect if the child were returned to respondent's care. The wisdom of this determination, however, is not for this Court to question. Instead, utilizing the proper standard of review, it is clear based on respondent's own testimony that the trial court's findings of fact about past neglect of the child and respondent's own disabilities are supported by the record. The trial court certainly could conclude these limitations

ultimately prevent respondent from taking care of herself, and even more, from taking care of the child. Thus, the trial court's decision to terminate respondent's parental rights based on neglect is supported by the findings and evidence.

Second, the trial court properly terminated respondent's parental rights based on subsection 7B-1111(a)(6), which provides for termination when

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6) (2019).

Here there is no question that the trial court made findings on respondent's inability to care for the child. As discussed above, the trial court found that even after the child had been removed from the home, respondent was still unable to care for herself without the assistance of others. Specifically, "[s]ince the minor child has been in the custody of the Petitioners, the Respondent-Mother's circumstances have not improved such that she would be able to provide proper care for the child." This was based on her psychological conditions and mental limitations, manifested in the fact that respondent had to depend on other family members for her own care, rendering it impractical for her to provide proper care for the child.

The majority nonetheless makes much about the fact that petitioners had the burden "to show that respondent-mother lacked a suitable alternative child care arrangement." Notably, at no point in the proceeding did respondent present an alternative childcare arrangement. Despite the majority's contention that petitioners bore the burden to show the lack of an alternative placement, case law has recognized that "[h]aving an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement." *In re L.H.*, 210 N.C. App. 355, 366, 708 S.E.2d 191, 198 (2011). While petitioners bear the burden generally to show that respondent's parental rights

should be terminated, contrary to the majority's suggestion, the burden does not rest solely on petitioners to show that respondent offered no alternative childcare arrangement. Where, as here, respondent fails to present an alternative childcare arrangement, that fact must be taken into account. Instead of reversing the entire ground for termination as the majority does, this termination ground should be remanded to the trial court to make the proper finding of whether there was an alternative childcare arrangement.

Finally, the trial court properly terminated respondent's parental rights based on willful abandonment. Under N.C.G.S. § 7B-1111(a)(7), the trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7).

> "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. [244,] 251, 485 S.E.2d [612,] 617 [(1997)] (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (citation omitted).

In re B.C.B., 374 N.C. 32, 35–36, 839 S.E.2d 748, 752 (2020) (alterations in original).

Because petitioners filed the termination petition on 12 March 2019, the determinative period spans from 12 September 2018 to 12 March 2019. The trial court determined that during this period respondent had no meaningful contact with the minor child and did not provide financial

support. Despite the trial court's order in the custody action allowing petitioner to petition the trial court to modify the order to allow for visitation privileges, the trial court's order here expressly indicates that respondent never filed any motion to address visitation, nor has she had any visitation with the child since the entry of the custody order. Moreover, the trial court explicitly found that other than one isolated $100 payment in 2016, three years before the filing of the termination petition, respondent failed to provide financial support for the minor at any other time, including within the determinative six-month period. When viewed as a whole and combined with the findings that respondent cannot properly care for the child based on her own limitations and inability to care for herself without assistance, the trial court's findings support its conclusion that respondent willfully abandoned the child.

The majority, however, faults the trial court for failing to use the word "willful" in its findings and, in its view, for failing to link its findings to its conclusion that respondent willfully abandoned the child. Instead, the majority cites to respondent's actions outside of the determinative six-month window to support its conclusion that the trial court's findings here were insufficient. It remands to the trial court to make a clearer connection between its factual findings and its determination that willful abandonment existed as a ground to terminate respondent's parental rights. This is unnecessary, however, since the trial court considered the evidence before it, evaluated respondent's lack of meaningful contact and lack of support during the determinative six-month period, and evaluated all facts before it to reach its conclusion. Respondent's inability to care for herself and her failure to make any meaningful contact or provide support during the determinative period show that respondent's conduct met the required statutory ground to terminate her parental rights based on willful abandonment.

Under the proper standard of review, the trial court's decision to terminate respondent's parental rights based on neglect and willful abandonment was supported by its findings and the evidence. I would remand to the trial court to make the required finding on whether there was an alternative childcare placement for the termination ground of dependency. Thus, I respectfully dissent.

IN RE K.H.

[375 N.C. 610 (2020)]

IN THE MATTER OF K.H.

No. 255A19

Filed 20 November 2020

1. **Termination of Parental Rights—grounds for termination—failure to make reasonable progress—juvenile mother and child in same foster home**

   Where a sixteen-year-old mother and her nine-month-old baby were taken into social services custody and placed in the same foster home, the time that the mother and baby lived together in the same foster home could not count toward the requisite twelve months of separation for termination under N.C.G.S. § 7B-1111(a)(2) because they were not living apart from each other.

2. **Termination of Parental Rights—grounds for termination—failure to pay reasonable portion of cost of care—six months immediately preceding petition—sufficiency of findings**

   Where the trial court terminated a sixteen-year-old mother's parental rights in her infant for willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) but failed to address the six-month time period immediately preceding the filing of the petition, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed.

3. **Termination of Parental Rights—grounds for termination—dependency—existence of appropriate alternative child care arrangement—sufficiency of findings**

   Where the trial court terminated a sixteen-year-old mother's parental rights in her infant based on dependency (N.C.G.S. § 7B-1111(a)(6)) but failed to make any findings regarding whether the mother had an appropriate alternative child care arrangement, the trial court's findings were insufficient to support its conclusion of law on this ground for termination and the order was reversed.

Justice ERVIN concurring in part and dissenting in part.

Justice DAVIS concurs in this concurring and dissenting opinion.

Justice NEWBY dissenting.

IN RE K.H.

[375 N.C. 610 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 28 March 2019 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Supreme Court on 2 September 2020.

Austin "Dutch" Entwistle III for petitioner-appellee Cabarrus County Department of Social Services.

Daniel E. Peterson for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

HUDSON, Justice.

In 2017 a sixteen-year-old mother and her nine-month-old baby were taken into custody by the Cabarrus County Department of Social Services (DSS) and placed in the same foster home. After six months together, the child was moved to a different foster home apart from her mother. Less than eight months later, DSS filed a motion to terminate respondent-mother's parental rights to her child. Here, we conclude that a parent and child must be living apart from each other for more than twelve months prior to the filing of a motion to terminate parental rights in order for grounds for termination to exist under N.C.G.S. § 7B-1111(a)(2). Furthermore, the factual findings the trial court made here were insufficient to support the termination of the mother's parental rights under either N.C.G.S. § 7B-1111(a)(3) or (6). Accordingly, we reverse the trial court's order terminating respondent-mother's parental rights.

I. Factual and Procedural History

In March of 2017, respondent was only sixteen years old and had a nine-month-old daughter named Kaitlyn.[1] At the time, DSS received a report that respondent's father punched her in the face. It was also reported to DSS that respondent abused drugs, left Kaitlyn in the care of strangers, and had attempted to poison her family. On 5 April 2017, DSS filed a petition alleging that Kaitlyn was a neglected and dependent juvenile. That same day, DSS was granted nonsecure custody of both respondent and Kaitlyn.

Initially, respondent and Kaitlyn were placed in separate foster homes. Kaitlyn was adjudicated to be a neglected and dependent juvenile by an order filed on 8 June 2017 and the trial court determined that

1. A pseudonym is used to protect the identity of the juvenile child and for ease of reading.

the primary permanent plan for Kaitlyn would be reunification with a secondary plan of guardianship.

The next day, 9 June 2017, respondent and Kaitlyn were placed in the same foster home. They remained together until 19 December 2017 when Kaitlyn was moved to a placement apart from respondent after respondent was caught with cigarettes and marijuana stems were found in a shoebox under her bed. Over the course of the next several months, respondent's progress was turbulent, respondent was moved between multiple placements, and ultimately the primary permanent plan for Kaitlyn was changed to adoption with a secondary plan of reunification.

On 8 August 2018, DSS filed a motion to terminate the parental rights of Kaitlyn's parents (TPR motion) alleging that termination was appropriate under N.C.G.S. § 7B-1111(a)(1)–(3), (6), and (7). A hearing on the motion was held on 25 February 2019 and 27 February 2019. On 28 March 2019, the trial court entered an order terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), (3), and (6) (TPR order). Respondent filed a notice of appeal on 10 April 2019.

II. Standard of Review

Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden "of proving by 'clear, cogent, and convincing evidence' that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. § 7B-1109(f) (2019)). "We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' The trial court's conclusions of law are reviewable de novo on appeal." *Id.* (citation omitted).

III. Analysis

A. N.C.G.S. § 7B-1111(a)(2)

[1] In the TPR order, the trial court found that grounds for termination existed under N.C.G.S. § 7B-1111(a)(2), which provides as follows:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made

> in correcting those conditions which led to the removal of the juvenile.

N.C.G.S. § 7B-1111(a)(2) (2019).

As the Court has previously explained, "[t]ermination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *In re Z.A.M.*, 374 N.C. at 95–96 (citing *In re O.C.*, 171 N.C. App. 457, 464–65, *disc. review denied*, 360 N.C. 64 (2005)). Under the first step, "the twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed." *In re J.G.B.*, 177 N.C. App. 375, 383 (2006). "Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained." *Id.*

The time period a juvenile is left in foster care or placement outside the home is distinct from the time period a trial court considers in evaluating whether the parent has made reasonable progress in correcting the conditions that led to the juvenile's removal. *In re J.S.*, 374 N.C. 811, 815 (2020) ("[A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be left in foster care or placement outside the home pursuant to a court order for more than a year at the time the petition to terminate parental rights is filed. This is in contrast to the nature and extent of the parent's *reasonable progress*, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." (cleaned up) (emphasis in original)). In the TPR order, the trial court found that "[t]he juvenile has been in care for approximately 13 months" and considered respondent's conduct up until the date of the termination hearing in February 2019. It is unclear which thirteen months the trial court considered when calculating how long Kaitlyn had been in foster care and whether the trial court considered the months between the filing of the TPR motion and the termination hearing. The trial court's consideration of respondent's conduct up until the termination hearing was relevant to its consideration of respondent's reasonable progress but should not have been considered in its calculation of how long Kaitlyn had been left in foster care or placement

outside the home. We are unable to determine from the TPR order how the trial court calculated the relevant time period.[2]

The issue we are asked to consider is how long Kaitlyn was "left in foster care or placement outside the home" and thus whether the statutory twelve-month period elapsed.[3] Importantly, this case presents a rare circumstance in which respondent was also a minor in DSS custody. If the relevant time period began when Kaitlyn was put into nonsecure custody on 5 April 2017 and ran continuously until 8 August 2018 when DSS filed the TPR motion, more than twelve months had elapsed, and we would then analyze whether the trial court's findings of fact were supported by clear, cogent, and convincing evidence that respondent "willfully" left Kaitlyn in the placement for that period of time. *See* N.C.G.S. §§ 7B-1109(f), -1111(a)(2). However, if the relevant time period was suspended during the time Kaitlyn and respondent lived together in the foster home from 9 June 2017 to 19 December 2017, Kaitlyn had only been "left in foster care or placement outside the home" for approximately ten months in total,[4] and a termination of respondent's parental rights under subsection (a)(2) could not be sustained. *In re J.G.B.*, 177 N.C. App. at 383.

The General Assembly's stated purpose with respect to the termination of parental rights is "to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile." N.C.G.S. § 7B-1100(1) (2019).

Our appellate courts have previously explained that the purpose of the twelve-month requirement under N.C.G.S. § 7B-1111(a)(2) is to "provide[ ] parents with at least twelve months' notice to correct the

---

2. Although the TPR order does not specify which time period it utilized for this part of the analysis, DSS argued in its brief to this Court that the trial court "properly considered evidence ranging from 5 April 2017, when the trial court placed Kaitlyn in [DSS]'s custody, until 25 February 2019 when the trial court held a hearing on [DSS]'s motion to terminate." As explained, this time period cannot satisfy the statutory requirement because almost half of it elapsed after the TPR motion was filed.

3. The parties do not dispute that Kaitlyn was placed in foster care "pursuant to a court order." *In re J.G.B.*, 177 N.C. App. 375, 383 (2006); *see also In re A.C.F.*, 176 N.C. App. 520, 525–26 (2006) ("[W]e conclude the statute refers only to circumstances where a court has entered *a court order* requiring that a child be in foster care or other placement outside the home."). Kaitlyn was placed under a nonsecure custody order on 5 April 2017.

4. Kaitlyn and respondent were separated from 5 April 2017 through 9 June 2017 and then again from 19 December 2017 until 8 August 2018.

conditions which led to the removal of their children before being made to respond to a pleading seeking the termination of his or her parental rights." *In re A.C.F.*, 176 N.C. App. at 527. This requirement "gives full support to the State's interests in preserving the family, while keeping in place a legislatively-established time frame for moving to termination if a child's return home proves untenable." *Id.* (citing N.C.G.S. § 7B-1100 (2003)).

We apply the law with this purpose in mind. The statute requires that the parent have "willfully left the juvenile *in foster care or placement outside the home* for more than 12 months." N.C.G.S. § 7B-1111(a)(2) (emphasis added). Typically, when a child is placed in foster care he or she is removed from the parents' home and placed elsewhere. *See* N.C.G.S. § 131D-10.2(9) (2019) (" 'Foster care' means the continuing provision of the essentials of daily living on a 24-hour basis for dependent, neglected, abused, abandoned, destitute, orphaned, undisciplined or delinquent children or other children who, due to similar problems of behavior or family conditions, *are living apart from their parents, relatives, or guardians* in a family foster home or residential child-care facility." (emphasis added)). Thus, the plain meaning of the term "foster care" presumes that the child has been physically separated and is living apart from his or her parents. Likewise, the phrase "placement outside the home" connotes a separation of the parent and child where the child lives in a home apart from the parent.

In the case of a minor parent, interpreting "foster care or placement outside the home" to require a physical separation of the parent and juvenile fulfills the legislature's purpose of requiring that "more than 12 months" pass between the time a juvenile is left in foster care and the time a motion or petition for termination may be filed. As we explained above, this time period "provides parents with at least twelve months' notice to correct the conditions which led to the removal of their children[.]" *In re A.C.F.*, 176 N.C. App. at 527. It is unlikely that a parent—particularly a minor parent—would be on notice that his or her child has been "removed" from the home or that a court might find that he or she "willfully left" the child in foster care during the period of time when the parent and child were living in the same foster home. Requiring that the minor parent and juvenile live separately for at least twelve months prior to the filing of a motion or petition for termination provides the notice the legislature intended to the parent that he or she must correct the conditions that led to the child's removal.

Here, Kaitlyn and respondent were placed in the same foster home on 9 June 2017. We conclude that as of that date Kaitlyn was not in a living situation upon which the legislature intended to base the termination

of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2). To the contrary, reading the statute as a whole and affording the words their plain meaning, we conclude that grounds for termination exist under subsection (a)(2) only when the juvenile has actually lived apart from the parent for more than twelve months. Therefore, we conclude that the months that Kaitlyn and respondent lived together in the same foster home from 9 June 2017 to 19 December 2017 cannot count towards the requisite twelve-month separation under N.C.G.S. § 7B-1111(a)(2). When DSS filed the TPR motion on 8 August 2018, Kaitlyn had only been "left in foster care or placement outside the home" for approximately ten months. Because the statutorily required twelve months had not accrued, termination on the basis of this ground cannot be sustained. *See In re J.G.B.*, 177 N.C. App. at 383 ("Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B–1111(a)(2) cannot be sustained."). Accordingly, we reverse the trial court on this issue.

B. N.C.G.S. § 7B-1111(a)(3)

[2] The trial court also found that grounds for termination of respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(3), which provides as follows:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3).

The motion to terminate respondent's parental rights was filed on 8 August 2018. Therefore, the relevant six-month period of time during which the trial court must determine whether respondent was able to pay a reasonable portion of the cost of Kaitlyn's care but failed to do so was from 8 February 2018 to 8 August 2018.

In the TPR order, the trial court made factual findings that respondent "worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile"; that "at various points in time, [respondent] was employed, although that employment was part-time"; that "[respondent] is physically and financially able to pay a reasonable portion of the child's care, and thus has the ability

to pay an amount greater than zero"; that "[respondent] has [not] made a significant contribution towards the cost of care"; and that "[t]he total cost of care for [Kaitlyn] through June 2018 is $14,170.35."

However, none of these findings—nor any others related to this ground for termination—address the specific, relevant six-month time period from 8 February 2018 to 8 August 2018. Therefore, we conclude that the trial court's findings of fact are insufficient to support its conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3), which specifically requires that "the parent has for a *continuous period of six months immediately preceding the filing of the petition or motion* willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3) (emphasis added). Accordingly, we reverse the trial court on this issue.

C. N.C.G.S. § 7B-1111(a)(6)

[3] Lastly, the trial court found that grounds for termination of respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(6), which provides as follows:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6). The trial court failed to make any finding in the TPR order that addressed whether respondent had an appropriate alternative child care arrangement. Therefore, there are insufficient findings of fact to support the trial court's conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(6). Accordingly, we reverse the trial court on this issue.

IV. Conclusion

We conclude that Kaitlyn was not "left in foster care or placement outside the home for more than 12 months" and therefore that termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2)

cannot be sustained. Furthermore, the trial court made insufficient findings of fact to support its conclusions of law that grounds to terminate respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(3) and (6). Accordingly, we reverse the order terminating respondent's parental rights.[5]

REVERSED.

Justice ERVIN, concurring, in part, and dissenting, in part.

I agree with the Court's determinations that the trial court erred by concluding that grounds exist to support the termination of respondent-mother's parental rights in Kaitlyn for failure to make reasonable progress toward correcting the conditions that led to Kaitlyn's removal from her home pursuant to N.C.G.S. § 7B-1111(a)(2), failure to pay a reasonable portion of the cost of Kaitlyn's care following her removal from the home pursuant to N.C.G.S. § 7B-1111(a)(3), and incapability pursuant to N.C.G.S. § 7B-1111(a)(6). I also agree that the trial court's decision that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) should be reversed given the absence of any evidence tending to show that respondent-mother "willfully left the juvenile in foster care or placement outside the home for more than [twelve] months." I am, however, unable to join those portions of the Court's opinion reversing, rather than remanding, the trial court's decision that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6). As a result, I concur in the Court's decision, in part, and dissent from that decision, in part.

As the Court notes, the trial court erred by determining that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) given its failure to make sufficient findings of fact to establish that respondent-mother failed to pay a reasonable portion of the cost of the care that Kaitlyn received following her removal from the home during the six month period immediately preceding the filing of the DSS termination motion and pursuant to

5. We note that in an adjudicatory hearing on the termination of parental rights all findings of fact must be based on "clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2019). We do not find such evidence in the record here that could support findings of fact necessary to conclude that respondent-mother's parental rights could be terminated under N.C.G.S. § 7B-1111(a)(2), (3), and (6). Thus, we conclude that the proper disposition is to reverse rather than remand.

N.C.G.S. § 7B-1111(a)(6) given the trial court's failure to make sufficient findings of fact to establish that respondent-mother lacked an alternative plan of care for Kaitlyn. Having made that set of determinations, however, I believe that the Court should next address the issue of what remedy should be provided in order to rectify the trial court's errors. The Court has not, however, engaged in the sort of evidentiary analysis that I believe to be appropriate and has, instead, simply reversed the trial court's determination with respect to the grounds for termination set out in N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6) without further analysis.

As a general proposition, a reversal represents a proper remedy on appeal in the event that the record evidence is "too scant" to support the trial court's decision, *State v. Greene*, 255 N.C. App. 780, 783, 806 S.E.2d 343, 345 (2017), while a remand is appropriate in the event that, even if the trial court's required findings of fact are defective, the record contains sufficient evidence to permit the trial court to have reached the result that it deemed appropriate in the event that proper findings had been made. *See*, *e.g.*, *In re N.B.*, 200 N.C. App. 773, 779, 688 S.E.2d 713, 717 (2009) (remanding a termination of parental rights case to the trial court for further findings of fact on the grounds that "[t]he trial court . . . [did] not make any findings of fact which directly address[ed] whether [the respondent] lacked an appropriate alternative childcare arrangement"); *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (remanding a worker's compensation order which lacked necessary findings to the Industrial Commission for further proceedings given that "[s]pecific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law"), *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005); *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (stating that, "[w]here the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded . . . for proper findings of fact"); *Barnes v. O'Berry Center*, 55 N.C. App. 244, 247, 284 S.E.2d 716, 718 (1981) (vacating and remanding a worker's compensation order "for more definitive findings and conclusions based on the evidence in the present record").[1] Thus, in identifying the proper

1. A trial court is, of course, entitled, in the exercise of its discretion, to receive and consider additional evidence upon remand, *see In re S.M.L.*, 846 S.E.2d 790, 802 (N.C. Ct. App. 2020) (stating that, "[o]n remand, . . . the trial court may," "in its discretion," "hold an additional hearing and consider additional evidence regarding the allegation of neglect"), unless the appellate courts either explicitly mandate or prohibit the taking of such an

remedy for the trial court's erroneous decision to find that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6), the ultimate issue that we must resolve is whether the record contained sufficient evidence to support the result that the trial court originally reached in the event that proper findings had been made.

After a careful examination of the record, I am persuaded that the complete reversal of the trial court's order required by the Court's decision is unwarranted given that "the trial court may be able to make more specific findings," *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 32, 821 S.E.2d 840, 852 (2018) (citing *Clark v. Gragg*, 171 N.C. App. 120, 126, 614 S.E.2d 356, 360 (2005)), *aff'd*, 372 N.C. 64, 824 S.E.2d 397 (2019), that support a determination that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6). More specifically, the record developed before the trial court indicates that respondent-mother failed to make any contribution toward the cost of the care that Kaitlyn received between 8 February 2018 and 8 August 2018, which is the relevant six-month period preceding the filing of the termination petition for purposes of determining whether respondent-mother's parental rights in Kaitlyn are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3). In addition, the record contains evidence tending to show that, at some point between "late 2017" and 8 August 2018, respondent-mother was employed at a shoe store, that she did not work there for "long at all," and that she was terminated from that employment "due to her attendance." Finally, the record reflects that respondent-mother did not suffer from any physical or other health-related limitations that precluded her from earning sufficient income to allow her to make a payment in excess of zero toward the cost of Kaitlyn's care. *See*, *e.g.*, *In re J.M.*, 373 N.C. 352, 359, 838 S.E.2d 173, 178 (2020) (affirming the trial court's conclusion that the respondent had failed to pay a reasonable portion of the cost of her children's care while they were in DSS custody based upon a determination that the respondent "was working at a . . . restaurant at the beginning of the six-month period but quit the job of her own accord"); *In re Tate*, 67 N.C. App. 89, 95, 312 S.E.2d 535, 539–40 (1984) (affirming the trial court's conclusion that the respondent failed to pay a reasonable portion of the cost of foster care for the child based upon determinations that, while the respondent was "an able-bodied

---

action, *see Robbins v. Robbins*, 240 N.C. App. 386, 407–08, 770 S.E.2d 723, 735 (2015) (stating that "[o]n remand the trial court shall, if requested by either party, consider additional evidence and arguments" regarding the marital distribution scheme).

woman capable of working," she had quit multiple jobs during the child's placement in foster care, with at least one of these resignations having stemmed from the respondent's lack of enthusiasm for working on weekends); *In re Bradley*, 57 N.C. App. 475, 478–79, 291 S.E.2d 800, 802 (1982) (affirming the trial court's determination that the respondent, a prisoner, had failed to pay a reasonable portion of the cost of care for the child given that the respondent had been terminated from a work-release program "for having returned therefrom in a highly intoxicated condition" and holding that, where "the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount").

Assuming, without in any way deciding, that the record is insufficient to establish precisely when respondent-mother left the shoe store's employment, I believe that the trial court could have reasonably concluded that, except for respondent-mother's failure to pay proper attention to her work-related responsibilities, she would have been employed and able to make a contribution in an amount in excess of zero toward the cost of the care that Kaitlyn received. As a result, I believe that the record contains sufficient evidence to have permitted the trial court to have reasonably determined, in the event that it chose to do so and made the necessary factual findings, that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3).

Similarly, I believe that the record contains sufficient evidence to permit a reasonable trial judge to determine that respondent-mother lacked an appropriate child care arrangement for Kaitlyn for purposes of N.C.G.S. § 7B-1111(a)(6).[2] Although respondent-mother argues that

2. Respondent-mother did not contend on appeal that the record lacked sufficient evidence, if believed, to establish that she was "incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile" as defined in N.C.G.S. § 7B-101, and that "there is a reasonable probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6). Any such contention would have been unpersuasive given the presence of evidence tending to show that respondent-mother had consistently struggled with serious behavioral issues, including running away, acting disrespectfully toward authority figures, continuously abusing impairing substances, setting fire to a book, and engaging in sexually inappropriate conduct, that resulted in the disruption of numerous placements and Kaitlyn's removal from respondent-mother's care. According to DSS social worker Tara Williams, there had been no change throughout the duration of the proceedings before the trial court relating to respondent-mother's drug use, "sexualized behavior," propensity to run away, failure to cooperate with her case plan, "[a]gressiveness toward adults," or lack of significant effort to regain custody of Kaitlyn. In spite of the fact that respondent-mother had been doing well in the placement in which

record contains evidence tending to show that respondent-mother's foster mother and her husband were willing to have Kaitlyn placed with them, that they had space for Kaitlyn in addition to respondent-mother, and that the foster mother's husband had the time to care for Kaitlyn, I am not convinced the presence of this evidence in the record precludes the trial court from finding that respondent-mother lacked an adequate alternative child care arrangement.

As an initial matter, the record suggests that the foster mother's husband smoked cigarettes, a factor that a reasonable trial court might deem disqualifying given the child's relatively young age and the potential health risks associated with second-hand smoke. More fundamentally, given respondent-mother's history of failing to successfully remain in any one placement for a significant period of time and the relative novelty of her placement at the time of the termination hearing, a reasonable trial judge could have serious doubts about the likelihood that respondent-mother's placement with the child in that household would be successful over the long haul. At an absolute minimum, I believe that the record discloses the existence of a genuine issue of fact concerning whether respondent-mother did, in fact, have an adequate alternative child care arrangement sufficient to preclude termination of her parental rights in Kaitlyn pursuant to N.C.G.S. § 7B-1111(a)(6). *See*, *e.g.*, *In re N.N.B.*, 843 S.E.2d 474, 447 (N.C. Ct. App. 2020) (concluding that, while the respondent's sister "may well be an 'appropriate' placement for a child who does not require" a particularly high level of care, the sister "[was] not an 'appropriate' placement for [the child] because of his psychiatric needs"). As a result, given that the record contains sufficient evidence that, if believed and set out in proper findings of fact, would support a determination that respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6), I would reverse the trial court's termination order and remand this case to the District Court, Cabarrus County, for the entry of a new order containing proper findings of fact and conclusions of law concerning the issue of whether respondent-mother's parental rights in Kaitlyn were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and N.C.G.S. § 7B-1111(a)(6) and respectfully dissent from the Court's

---

she resided at the time of the termination hearing, the trial court expressed skepticism that this "[twelve]-week period is sufficient to indicate . . . that there has been a substantial change in behavior and there is not a likelihood of future continued behavior to remove the dependency of the child." As a result, the record contains ample evidence tending to show respondent-mother's incapability for purposes of N.C.G.S. § 7B-1111(a)(6).

decision to simply reverse the trial court's order with respect to these two grounds for termination.

Justice DAVIS concurs in this concurring and dissenting opinion.

Justice NEWBY dissenting.

I agree with Justice Ervin that, because the trial court failed to make all the necessary factual findings under N.C.G.S. § 7B-1111(a)(6) (2019), the appropriate disposition is to remand for additional findings, not to simply reverse and permanently undo the termination order. But my disagreement with the majority goes deeper. The trial court appropriately found that grounds exist to terminate respondent-mother's parental rights under N.C.G.S. §§ 7B-1111(a)(2) and (a)(3), and it did not omit any necessary factual findings for those grounds. Its order should be affirmed. The majority, by a combination of misguided statutory interpretation and selective review of the facts, reverses the trial court on these well-supported determinations. I respectfully dissent.

First, the majority errs by reversing the trial court's conclusion that grounds existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2). That provision states that a court may terminate a respondent's parental rights if it finds that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). The majority holds that because respondent-mother (who was a minor) and the child, "Kaitlyn," were placed in the same home for foster care for several months, that period of time cannot count towards the required twelve or more months under the statutory provision. The majority thus interprets the phrase "in foster care or placement outside the home" in subsection 7B-1111(a)(2) to not include time when the minor parent and child are under the same roof, even if during that time the child is neither under the parent's care nor in the parent's home.

That interpretation evades a natural understanding of the statutory provision. Subsection 7B-1111(a)(2) applies when the parent willfully leaves the child in foster care or some other placement outside of the home for over twelve months. *Id.* The majority, quoting *In re A.C.F.*, 176 N.C. App. 520, 527, 626 S.E.2d 729, 734 (2006), notes that the purpose behind this requirement is to "provide[ ] parents with at least twelve

months' notice to correct the conditions which led to the removal of their children before being made to respond to a pleading seeking the termination of his or her parental rights." The provision thus helps ensure that for a period of time the child does not reside in the home in which they would typically reside if the parent had full custody and supervision—it gives the parent a chance to get things in order in that home so that perhaps the child could eventually return. Thus, a plain understanding of this provision dictates that it applies when the child is not under the parent's care and not living in the parent's home.

The facts of this case make the analysis under subsection (a)(2) somewhat tricky. Respondent-mother is a minor. For her and Kaitlyn, home was respondent-mother's adoptive parents' home, until they were each removed and placed in foster care. Kaitlyn was placed in foster care from 5 April 2017 at least until the termination motion was filed on 8 August 2018. For part of that time, from 9 June 2017 to 19 December 2017, respondent-mother and Kaitlyn were both placed in the same foster home, and then at Church of God Children's Home. After that, respondent-mother was sent elsewhere because of recurring serious behavioral issues. Even during that six-month stretch, though, Kaitlyn was outside of respondent-mother's custody, and no evidence shows that respondent-mother had the responsibility for caring for Kaitlyn during that time. Similarly, neither was Kaitlyn in "respondent-mother's home." She was in the home of a foster family, and then in Church of God Children's Home. Indeed, respondent-mother herself was removed from her home and placed in foster care, so Kaitlyn was not in respondent-mother's home (with respondent-mother's adoptive parents) for as long as both of them were in foster care. Therefore, the evidence shows that from around April 2017 until the filing of the termination motion in August 2018—a period of about sixteen straight months—Kaitlyn resided "in foster care or placement outside [respondent-mother's] home."

Moreover, the majority's contrary holding will create perverse incentives. If the time when both minor parent and child are in the same foster care placement cannot count towards the time in which the child is outside the parent's home, DSS may be unnecessarily encouraged to put minor parents and their children in separate placements. Thus, the trial court's determination that grounds exist to terminate respondent-mother's parental rights to Kaitlyn under N.C.G.S. § 7B-1111(a)(2) should be affirmed.[1]

1. Because the majority holds that Kaitlyn was not out of the home for over twelve months, it does not consider whether respondent-mother "willfully" left Kaitlyn in such placement or care, or whether reasonable progress has been made to correct the

Affirming the trial court's conclusion under subsection (a)(2) would be sufficient to uphold the order terminating respondent-mother's parental rights. Nevertheless, I also disagree with the majority's decision to reverse the trial court's determination that grounds exist to terminate respondent-mother's parental rights under subsection (a)(3).

Subsection 7B-1111(a)(3) provides that the court may terminate a parent's parental rights when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3). The majority holds that because, in its view, the trial court order was not sufficiently specific in its findings regarding respondent-mother's earnings and contributions during the six-month period immediately preceding the filing of the termination motion, that court's findings do not support a conclusion that grounds exist under N.C.G.S. § 7B-1111(a)(3) to terminate respondent-mother's parental rights.

I disagree. As the majority notes, the relevant six-month period stretches from 8 February 2018 to 8 August 2018. The trial court specifically found that respondent-mother "worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile." By broadly referencing the year "2018," the trial court recognized and included all of the appropriate six-month period. Arguably, it also included the month of January 2018, which was outside the relevant six months. But that hardly invalidates the fact that its findings apply to the relevant six months as well. The trial court also found that respondent-mother "is physically and financially able to pay a reasonable portion of the child's care, and thus has the ability to pay an amount greater than zero" but that she "has [not] made a significant contribution towards the cost of care." Again, though the trial court did not specifically say that respondent-mother made no payments during the

---

conditions leading to the child's removal. *See* N.C.G.S. § 7B-1111(a)(2). But the record and the trial court's findings abound with evidence that respondent-mother has had recurring issues abusing drugs, engaging in sexually inappropriate behavior, running away, and failing to provide appropriate discipline and nutrition to Kaitlyn, and that any progress on these issues has been limited.

applicable six-month period, its finding that respondent-mother had not contributed substantially *whatsoever* would include the relevant period.

Overall, the trial court's findings may not go as far as precisely naming the relevant six-month period, but they do encompass that period. The findings are thus sufficient to support the trial court's conclusion that, during the relevant six-month period leading up to the filing of the termination motion, respondent-mother "willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3). The trial court's conclusion that grounds existed to terminate respondent-mother's parental rights under that provision should be affirmed.[2]

Thus, the trial court appropriately found that grounds exist to terminate respondent-mother's parental rights under both N.C.G.S. § 7B-1111(a)(2) and N.C.G.S. § 7B-1111(a)(3). The trial court order should be affirmed on either or both of those bases.

I respectfully dissent.

IN THE MATTER OF K.S.D-F., K.N.D-F.

No. 491A19

Filed 20 November 2020

1. Termination of Parental Rights—standing to file petition—effect on trial court's jurisdiction

In a termination of parental rights case, where the trial court entered a permanency planning order awarding custody and guardianship of the children to their great-aunt and uncle while specifically retaining jurisdiction and providing for further hearings upon motion by any party, the trial court had jurisdiction to enter an order granting nonsecure custody of the children to the department of social services (DSS) after DSS filed a motion seeking review of the children's custody arrangement. Thus, as a party granted custody by a "court of competent jurisdiction," DSS had standing to file a

---

2. Alternatively, if, as the majority holds, the trial court's findings regarding subsection (a)(3) were somehow technically deficient, I agree with Justice Ervin that the appropriate disposition would be to remand, not to reverse.

petition to terminate respondent-parents' rights to the children and, therefore, did not deprive the trial court of its jurisdiction over the termination proceeding.

2. Termination of Parental Rights—best interest of the child—likelihood of adoption—sufficiency of evidence

The trial court did not abuse its discretion by determining that termination of a mother's and father's parental rights was in their children's best interest where, although no potential adoptive placement had been identified at the time of the termination hearing, the evidence showed a high likelihood of the children being adopted and of more resources for recruiting potential adoptive families becoming available once the parents' rights were terminated.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 September 2019 by Judge Burford A. Cherry in District Court, Catawba County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marcus Almond for petitioner-appellee Catawba County Department of Social Services.

Elon University Guardian ad Litem Appellate Advocacy Clinic, by Senior Associate Dean Alan D. Woodlief Jr., for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

Robert W. Ewing for respondent-appellant mother.

EARLS, Justice.

Respondents appeal from an order terminating their parental rights to their children K.S.D-F. (Katie) and K.N.D-F. (Kennedy).[1] Because the trial court had jurisdiction to enter the termination order and did not abuse its discretion by concluding that termination of respondents'

1. Pseudonyms used throughout the opinion to protect the children's identities and for ease of reading.

parental rights was in the children's best interests, we affirm the trial court's order.

Background

On the day of Kennedy's birth in May 2008, both she and respondent-mother tested positive for marijuana, which initiated a report to Catawba County Department of Social Services (DSS). Respondent-mother admitted that she and respondent-father both smoked marijuana, and respondent-father later confirmed that he smoked marijuana every day. On 7 July 2008, the children were found by DSS to be in need of services.

On 12 August 2008, respondents participated in a Child and Family Team Meeting where they both admitted to using marijuana on a regular basis, and respondent-father stated he would continue to do so. Respondents entered into a case plan on 21 August 2008, but they refused to consent to random drug screens. Respondents were unemployed and were evicted from their residence on or about 5 September 2008. The children moved from relative to relative, and on 19 December 2008 respondent-mother agreed to place the children in a Safety Resource Placement. The children were placed with their paternal great-aunt and great-uncle (the Turners).

On 23 December 2008, DSS filed a juvenile petition alleging that Katie and Kennedy were neglected juveniles, due to respondents' failure to provide proper care, supervision, or discipline. In addition to the disclosures of drug use, unemployment, and unstable housing, the juvenile petition alleged that respondent-mother had failed a drug screen requested by her probation officer in October 2008, respondent-father had previously relinquished his parental rights to another child after DSS filed a motion to terminate his parental rights, and both respondents had criminal records.

Following a hearing on 26 January 2009, Katie and Kennedy were adjudicated to be neglected juveniles based upon the facts alleged in the juvenile petition. At the time of the hearing, the children were in the custody of their mother but were residing with the Turners. The trial court granted custody of the children to DSS, which left the children in the Turners' care. Respondents were ordered to enter into and comply with a case plan that required them to abstain from possessing or using illicit substances; submit to drug screens; complete a substance abuse assessment, a psychological evaluation, and a parenting assessment; follow recommendations from the assessments and psychological evaluation; and maintain stable housing and employment. Respondents were allowed one hour of visitation a week.

In an order entered on 18 May 2009 after a 20 April 2009 review hearing, the trial court noted that respondent-mother had completed her mental health assessment but had missed several drug screens. Of the two drug screens she did complete, she tested positive for marijuana once. Respondent-father visited the children twice but had not contacted the social worker in several months, had not engaged in his case plan, and had not responded to messages left by the social worker or his attorney. The children remained in DSS's custody and in the care of the Turners, though the Turners were not approved for a long-term placement after a home study was completed. Visitation remained unchanged.

In an order entered on 7 August 2009 after a 13 July 2009 review hearing, the trial court ceased reunification efforts with respondent-father due to his lack of participation. The children remained in DSS's custody and in the care of the Turners. The trial court found that respondent-mother was not in compliance with her case plan; she had missed five requested drug screens and had only attended two visitations over a fourteen-week period. Visitation with respondent-father was ceased, and respondent-mother's visitation was modified to one hour every other week.

The trial court entered a permanency planning order on 28 October 2009. Custody of the children remained unchanged, and while the trial court noted several concerns that prevented the Turners from being an appropriate long-term placement, it noted that the children were doing "very well" in their care. The trial court found that respondent-mother remained noncompliant with her case plan, noting six missed drug screens, several missed visits with the children, her continued unemployment, and her failure to "meaningfully" address the issues which brought the children into DSS's care. The trial court ceased reunification efforts with respondent-mother and ordered that the permanent plan be a concurrent plan of (1) custody/guardianship with relatives, namely the Turners, or adoption by the Turners; and (2) adoption by a non-relative. Respondent-mother was allowed one visit per month, and the trial court restricted unauthorized contact between the children and respondent-mother.

The trial court entered a subsequent permanency planning order on 23 February 2010 following a hearing on 25 January 2010. The trial court noted respondent-father's complete lack of contact and respondent-mother's continued noncompliance with her case plan. The trial court found that while a home study would not allow the Turners to be approved to adopt the children, guardianship with the Turners was

appropriate. The permanent plan was changed to custody/guardianship with relatives, namely the Turners, and custody and guardianship was granted to the Turners. The trial court prohibited visitation with respondent-father but allowed respondent-mother two hours of visitation a month, supervised by the Turners, provided that respondent-mother was "sober and appropriate." The trial court did not schedule further reviewing hearings, but it retained jurisdiction and provided that "the matter may be brought on for hearing upon motion of any party."

On 24 June 2016, DSS filed a "Motion for Review," which requested that the trial court "conduct a custody review . . . to address the children's custody, placement, and safety." The motion alleged that the Turners returned the children to respondent-mother's care in December 2015. The children also had contact with respondent-father, had witnessed illegal drug use by respondents, and had been subjected to inappropriate discipline by respondent-mother, where she slapped and hit them in the head or face and kicked them. After respondent-mother tested positive for THC, the trial court entered an order for nonsecure custody, granting custody of the children to DSS. Katie and Kennedy were placed into foster care and were moved several times due to their behavior.

The trial court entered a permanency planning order on 5 January 2017 following a hearing on 9 December 2016. The trial court concluded that the most appropriate permanent plan remained guardianship with the Turners. The children remained in DSS's custody, but a trial home placement with the Turners was approved. Reunification with respondents was not resumed, visitation with respondent-father was denied, and respondent-mother was allowed one hour a week of visitation supervised by DSS.

In February 2017, the Turners requested that Katie and Kennedy be removed from their care due to their unmanageable behaviors. They were placed in separate foster homes. A subsequent permanency planning order entered on 26 April 2017 removed the Turners as parties in the matter. The trial court found that respondent-mother had begun working on her case plan again; she completed a parenting and substance abuse assessment, obtained stable housing and employment, and was attending all visitations. DSS maintained custody of the children, reunification efforts with respondent-mother were resumed, and the permanent plan was changed to reunification with respondent-mother, with a secondary plan of adoption. Respondent-mother was allowed at least four, and up to twelve, hours of visitation per month, though visitation for respondent-father was not resumed.

A 13 September 2017 permanency planning order noted respondent-mother's "sporadic" visitation, missed drug screens, unemployment, and arrest for assault since the last hearing. While the permanent plan remained unchanged, respondent-mother's visitation was suspended pending two consecutive negative drug screens.

A 5 April 2018 permanency planning order found that respondent-mother had no contact with DSS since the previous hearing. She had not visited the children due to her failure to produce two consecutive negative drug screens. She missed five requested drug screens but had tested positive for cocaine and THC in January 2018 at the birth of another child. She was involved in a high-speed car chase with law enforcement, who witnessed drugs being thrown from the car during the chase. The social worker was able to reach respondent-father, who signed a case plan but did not submit to a drug screen. The primary plan was changed to adoption, with a secondary plan of reunification. Katie and Kennedy remained in foster care, though they had changed placements several times due to their behavior.

In a 25 September 2018 permanency planning order, the trial court maintained the permanent plan as adoption and changed the secondary plan to guardianship. Respondent-mother had only sporadically attended therapy to address her substance abuse concerns and failed to follow through on additional options offered by her social worker. The trial court also found she had limited contact with her social worker, was unemployed, had missed eighteen drug screens but had tested positive for THC at a screen in April 2018, had failed to comply with three requests for a hair follicle drug screen, and DSS had been unable to verify her residence. Due to her failure to provide acceptable drug screens, she had not visited with the children. The trial court found that respondent-father did not have legal employment. He completed a substance abuse assessment but only attended one class. Like respondent-mother, he failed to submit to eighteen requested drug screens, as well as three requested hair follicle tests, though he tested positive for marijuana after submitting to a drug screen requested by his probation officer. The trial court concluded that further efforts to reunify the children with respondents "would clearly be unsuccessful and contrary to the children's best interests, safety and welfare." The children remained in foster care, and each child had changed foster placements three more times.

On 16 November 2018, DSS filed a motion to terminate respondents' parental rights. As grounds for termination, the petition alleged that the children were neglected, respondents had willfully left the children

in foster care for more than twelve months without showing reasonable progress to remedy the conditions that led to the removal of the children, and respondents had failed to pay a reasonable portion of the cost of care for the children while they were in foster care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019).

Subsequent to a termination hearing conducted on 4 June, 3 July, 30 July, and 14 August 2019, the trial court entered an order terminating respondents' parental rights on 12 September 2019. The trial court concluded it had jurisdiction over the proceeding and that DSS was a proper party to bring the motion before the court. It adjudicated that grounds existed to terminate respondents' parental rights due to neglect and willfully leaving the children in foster care for more than twelve months without showing reasonable progress to remedy the conditions that led to the children's removal. Based upon the evidence presented at the termination hearing, the trial court concluded that terminating respondents' parental rights was in Katie's and Kennedy's best interests. Respondents filed notices of appeal.

Analysis

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)).

On appeal, respondents do not challenge the trial court's adjudication of grounds to terminate their parental rights under N.C.G.S. § 7B-1111(a)(1), neglect, or N.C.G.S. § 7B-1111(a)(2), failure to make reasonable progress. Instead, they argue that: (1) DSS did not have standing to file the petition to terminate respondents' parental rights, which prevented the trial court from having jurisdiction to enter the termination order; and (2) the trial court erred in making its dispositional determination that terminating their parental rights was in the children's best interests. They also contend that a de novo standard of review applies to their best interests argument. We address each argument in turn.

Standing and Jurisdiction

[1] Respondents argue that the trial court lacked jurisdiction over the termination proceeding because DSS did not have standing to file a

motion to terminate their parental rights, as DSS had not been given custody of the children by a court of competent jurisdiction pursuant to N.C.G.S. § 7B-1103(a) (2019). They assert that the trial court did not have subject-matter jurisdiction to enter the 15 August 2016 nonsecure custody order granting custody to DSS because there was no pending juvenile petition before the court. Specifically they claim that because DSS only filed a "Motion for Review" and not a juvenile petition, the trial court did not have jurisdiction to enter the 15 August 2016 nonsecure custody order, arguing that once the juvenile petition had been adjudicated, the nonsecure custody provisions in the Juvenile Code were no longer effective. This argument has no merit.

"The [district] court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights . . . ." N.C.G.S. § 7B-1101 (2019); *see also* N.C.G.S. § 7B-101(6) (2019) (defining "[c]ourt" as the district court). Jurisdiction arises upon the filing of "a properly verified juvenile petition" and extends "through all subsequent stages of the action." *In re T.R.P.*, 360 N.C. 588, 593 (2006) (citing N.C.G.S. § 7B-201(a) (2005)); *see* N.C.G.S. § 7B-201(a) (2019) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated . . . .").

In this matter, the trial court obtained jurisdiction on 23 December 2008, when DSS filed a petition alleging that Katie and Kennedy were neglected juveniles. Following a hearing, Katie and Kennedy were adjudicated to be neglected juveniles, and the trial court ordered they be placed in the custody of DSS, "with placement in its discretion." At the time of the hearing, the children had been residing with the Turners, and the trial court ordered that the placement continue. In the 23 February 2010 permanency planning order, the trial court determined that a permanent plan for custody and guardianship with the Turners was in the children's best interests and awarded custody and guardianship to the Turners. The trial court specifically retained jurisdiction and provided that further hearings could be brought upon a motion by any party. DSS filed such a motion on 24 June 2016, seeking to address the children's "custody, placement, and safety" as it had reason to believe the children had been residing with respondent-mother since December 2015 and had contact with respondent-father, both in violation of court orders, and that the children witnessed illegal drug use and been subjected to inappropriate discipline.

Contrary to respondents' assertion, the trial court did have jurisdiction to enter the nonsecure custody order on 15 August 2016. The trial

court obtained jurisdiction on 23 December 2008 with the filing of the juvenile petition, and upon ordering custody and guardianship to the Turners in its 23 February 2010 permanency planning order, it did not terminate its jurisdiction and have a civil custody order entered but specifically retained jurisdiction and provided for further hearings through the filing of a motion by any party. *See* N.C.G.S. § 7B-911 (2019) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person . . . ."). DSS then filed a "Motion for Review," and the trial court had jurisdiction when it entered the nonsecure custody order on 15 August 2016 granting custody of the children to DSS. DSS subsequently had standing to file the 16 November 2018 motion to terminate respondents' parental rights as DSS had been granted custody of the children. *See* N.C.G.S. § 7B-1103(a)(3) (2019) (stating that "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction" has standing to file a petition or motion to terminate parental rights).

Further, in contrast to respondents' argument that the trial court entered the order for nonsecure custody without being presented with such a request in a "proper pleading," DSS did request review of custody in its "Motion for Review." Therefore, this matter is distinguishable from those cited by petitioners, *In re Transp. of Juvs.*, 102 N.C. App. 806, 807–08 (1991), where the Court of Appeals concluded that "without an action pending before it, the district court was without jurisdiction to enter an order" *ex mero motu* to transport delinquent juveniles; and *In re McKinney*, 158 N.C. App. 441, 448 (2003), where the Court of Appeals determined that a "Motion in the Cause" that did not ask for parental rights to be terminated was insufficient to give the trial court jurisdiction to enter an order doing so.

This matter is also distinguishable from *In re Ivey*, 156 N.C. App. 398 (2003), which respondents also rely on. In *In re Ivey*, DSS filed *no* petition alleging the child to be abused or neglected, which prevented the trial court from having jurisdiction to grant DSS nonsecure custody. *Id.* at 401. Moreover, DSS presented no evidence, and the nonsecure custody order contained no findings of fact, to allow for DSS to take temporary custody prior to a petition being filed. *Id.* at 402. Here, a juvenile petition was filed which conferred jurisdiction on the trial court, and jurisdiction continued "through all subsequent stages of the action," including the entry of the nonsecure custody order. *In re T.R.P.*, 360 N.C. at 593.

Accordingly, we conclude the trial court had jurisdiction to enter the nonsecure custody order placing the children into the custody of DSS, and thus, the agency had standing to file the motion to terminate respondents' parental rights. The trial court had jurisdiction over the termination action.

Best Interests Determination

[2] " 'If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage,' at which it 'determine[s] whether terminating the parent's rights is in the juvenile's best interest.' " *In re I.N.C.*, 374 N.C. 542, 546 (2020) (alteration in original) (first quoting *In re A.U.D.*, 373 N.C at 6; then quoting N.C.G.S. § 7B-1110(a)). In determining whether termination of parental rights is in the child's best interests,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

We first address respondents' argument concerning the appropriate standard of review for a disposition entered under N.C.G.S. § 7B-1110(a). Respondents acknowledge this Court's long-standing precedent that "[t]he trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6 (citing *In re D.L.W.*, 368 N.C. 835, 842 (2016)); *see also In re Montgomery*, 311 N.C. 101, 110 (1984). However, they argue that "*Montgomery*'s dispositional standard of review has been abrogated by statutory changes and *A.U.D.* was incorrect to rely on it and its progeny for the standard of review" and advocate for a de novo standard of review. We recently considered similar arguments in *In re C.V.D.C.*,

374 N.C. 525 (2020), and as in that case, "we again reaffirm our application of the abuse of discretion standard when reviewing the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest' under N.C.G.S. § 7B-1110(a)." *Id.* at 529; *see also In re Z.A.M.*, 374 N.C. 88, 99 (2020); *In re A.R.A.*, 373 N.C. 190, 199 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. at 6–7 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)). Given this standard of review, respondents' argument that each of the N.C.G.S. § 7B-1110(a) factors weighs against termination in this matter when reviewed under a de novo standard cannot prevail.

Respondents also argue that even under the abuse of discretion standard the termination order should be reversed. Under their abuse of discretion argument, they only challenge Finding of Fact 7, which provides that "[a]lthough there is not a potential adoptive placement identified at this time, it is likely that the children can be adopted[, and f]urthermore, more resources for recruiting potential adoptive families will be available after entry of an order terminating parental rights." Respondents contend that the trial court's finding that the children likely would be adopted is "manifestly unsupported by reason" because DSS was unable to find a stable home for the children in the ten years between the adjudication and the termination hearing.

However, the trial court's finding is supported by the evidence. Both the social worker and the guardian ad litem recommended terminating respondents' parental rights and reported it was "likely that [Katie and Kennedy] can be adopted together" and "very likely [they can] be adopted once they have been legally free for adoption." At the disposition hearing, the social worker testified to potential adoptive placements, including one with a relative, and "absolutely" agreed that additional doors for recruiting potential adoptive homes would open upon the termination of respondents' parental rights. This evidence fully supports the challenged finding.

Respondents also rely on *In re J.A.O.*, 166 N.C. App. 222 (2004). However, the salient facts in that case are very different from the facts here. In *In re J.A.O.*, the juvenile's mother "had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224. At the termination hearing, the guardian ad litem opined that it was in the juvenile's best interests not to terminate the respondent's parental rights. *Id.* at 225. The guardian ad litem testified that it was "highly unlikely that a child of [the juvenile's] age and

physical and mental condition would be a candidate for adoption, much less selected by an adoptive family." *Id.* at 228. The Court of Appeals stated that although there was a small possibility that the juvenile would be adopted, the "remote chance of adoption in this case" did not "justif[y] the momentous step of terminating respondent's parental rights." *Id.* This is distinguishable from the current matter, where the guardian ad litem and social worker both recommended termination and provided that adoption was likely, or even very likely, and the social worker testified to potential adoptive placements.

A careful review of the trial court's dispositional findings shows that the trial court considered all of the relevant statutory criteria set out in N.C.G.S. § 7B-1110(a). The record establishes that the trial court's conclusion that termination of respondents' parental rights was in Katie's and Kennedy's best interests was neither arbitrary nor manifestly unsupported by reason. For the reasons stated above, we affirm the 12 September 2019 order of the trial court terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF N.M.H.

No. 474A19

Filed 20 November 2020

Termination of Parental Rights—grounds for termination—willful abandonment—no contact or financial support

In an action between two parents, the trial court properly terminated a father's parental rights to his daughter based on willful abandonment where, during the nearly three years prior to the filing of the termination petition, the father had no contact with his daughter and provided no financial or other tangible support for her. Although the trial court failed to use the statutory language of "willful abandonment," its findings—based on clear, cogent, and convincing evidence—supported the conclusion that respondent's conduct constituted willful abandonment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 28 August 2019 by Judge Robert J. Crumpton in District Court, Wilkes

County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee mother.

No brief for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to his minor child, N.M.H. (Nicole)[1], in this private termination action. We affirm.

Petitioner and respondent are the mother and father of Nicole, who was born in September 2010 while petitioner and respondent were married. Petitioner and respondent resided in Caldwell County for most of their marriage. Petitioner admitted to abusing drugs during her marriage to respondent and accused respondent of the same, which he denied. Petitioner and respondent separated in 2012 when petitioner stopped using drugs and moved to Wilkes County with Nicole in order to provide a better life for herself and Nicole. Respondent helped care for Nicole while petitioner continued to work in Caldwell County for approximately one month after the parties separated, until petitioner got a job in Wilkes County. Petitioner and respondent divorced in 2014, and petitioner married her current husband in 2015.

From 2012 until July 2016, respondent had sporadic contact with petitioner through Facebook Messenger. During this four-year period, respondent visited the minor child approximately three or four times. Around 1 July 2016, petitioner agreed to let the minor child stay overnight at respondent's house. The next day, the child came home dirty and smelling like cigarette smoke, and the child stated that respondent had a smoke room in his house. At that point, petitioner contacted respondent via Facebook Messenger, and they got into an argument. Petitioner told respondent she would not bring the child back to him. From that point in 2016, respondent had no contact with petitioner until March 2019, after

1. A pseudonym agreed to by the parties is used to protect the identity of the juvenile and for ease of reading.

he was served with the petition in this matter. Similarly, respondent had no contact with the minor child from July 2016 on. Other than paying for a $160 dance class in 2016, respondent did not provide any financial support for the minor child from 2012 on, nor did he give the child any type of gift or tokens of affection at any point.

On 14 March 2019, petitioner filed a petition to terminate respondent's parental rights to Nicole on grounds of neglect and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2019). In support of the asserted grounds, petitioner alleged that respondent had abandoned Nicole, had not provided any financial support for Nicole, had not provided any care for Nicole, had not shown any ability and/or willingness to provide a safe and loving home for Nicole, and had shown a complete indifference to the welfare and well-being of Nicole.

The termination petition was heard on 23 August 2019, and the trial court entered an order terminating respondent's parental rights on 28 August 2019. The trial court determined that both grounds alleged in the termination petition to terminate respondent's parental rights existed and concluded that termination was in Nicole's best interests. Respondent appealed to this Court.

On appeal, respondent argues that the trial court erred by adjudicating grounds to terminate his parental rights to Nicole. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)).

> At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). . . . If the petitioner meets her burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

In re B.C.B., 374 N.C. 32, 35, 839 S.E.2d 748, 751–52 (2020).

Respondent only challenges the trial court's determination that grounds existed to terminate his parental rights at the adjudicatory stage in this case.

> "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)); *see also* N.C.G.S. § 7B-1109(f) (2019). Unchallenged findings are deemed to be supported by the evidence and are "binding on appeal." *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019); *accord In re A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) (reviewing only the challenged findings necessary to support the trial court's determination that grounds for termination existed).

In re K.N.K., 374 N.C. 50, 53, 839 S.E.2d 735, 737–38 (2020) (alteration in original).

In this case, the trial court concluded that petitioner proved that grounds existed to terminate respondent's parental rights based on neglect and willful abandonment based on the following findings of fact:

> 11. From 2012 until July 2016, the Respondent had sporadic contact with the Petitioner using the Facebook messenger app.
>
> 12. From 2012 until the summer of 2016, the Respondent visited with the child approximately three to four times. These visits were of short duration and in a public location. The Petitioner arranged these visits because the minor child did not know the Respondent.
>
> 13. On or about July 1, 2016, the Petitioner agreed for the minor child to have an overnight visit at the Respondent's home.
>
> 14. When the minor child returned after her visit at the Respondent's home, she was dirty and smelled of cigarette smoke. The minor child told the Petitioner that the Respondent had a "smoke room" in his home.
>
> 15. The Petitioner contacted the Respondent using Facebook messenger and an argument ensued. The

Petitioner told the Respondent she would not bring the minor child back to him.

16. The Respondent did not have any further contact with the Petitioner until March 2019, after he was served with the petition filed in this matter.

17. The Respondent has not provided financial support for the minor child at any time that she has been in the Petitioner's care since 2012.

18. The Respondent has been self-employed as a mechanic. He is under no physical or mental disability that prevents him from being gainfully employed. The Respondent has had the ability to provide financial support for the minor child but has provided no support since the parties separated.

19. The Respondent has four other children. He pays child support for two of the children that do not reside in his primary custody.

20. The Respondent never filed any type of custody action seeking visitation with the minor child. The Respondent has not sought any visits with the minor child since July 2016.

21. The Respondent has had no contact with the minor child since July 2016.

22. The Respondent has never sent the minor child any type of gift or customary or expected tokens of affection on her birthday, Christmas, or any holiday.

23. The Respondent has failed to provide for the minor child's physical and economic needs while she has been in the care of the Petitioner since 2012.

24. During the six-months immediately preceding the filing of the petition to terminate his parental rights, the Respondent had no contact with the minor child and did not provide any financial support.

25. The Respondent has failed to perform his natural and legal obligations of support and maintenance as a parent for the minor child.

Respondent first argues the trial court erred by determining that his parental rights to Nicole were subject to termination based on willful abandonment. Under N.C.G.S. § 7B-1111(a)(7), the trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7).

> "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (citation omitted).

In re B.C.B., 374 N.C. at 35–36, 839 S.E.2d at 752 (alterations in original).

Petitioner filed the petition to terminate respondent's parental rights on 14 March 2019. Thus, the determinative six-month period for willful abandonment was from 14 September 2018 through 14 March 2019.

Respondent challenges several of the trial court's findings as not supported by the evidence, including findings of fact 12 and 17. Those findings of fact concern the number and duration of his visits with Nicole prior to the summer of 2016, petitioner's reason for scheduling those visits, and his failure to contribute anything to Nicole's care. Respondent directs this Court's attention to evidence that petitioner did not remember how many visits respondent had with Nicole before 1 July 2016, that he was more involved in Nicole's life prior to 2012, and that he paid for a dance class for Nicole in 2016. We note that respondent's challenges to findings of fact 12 and 17 do not relate to the determinative six-month

period, but that the trial court may still rely on the findings to evaluate respondent's credibility and intentions. *See In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773.

We agree with respondent that the trial court's finding of fact 17, that respondent failed to provide financial support for the minor child since 2012, is not consistent with the evidence at the termination hearing showing that at one point in 2016 respondent paid $160 for a dance class for the minor child. Nevertheless, other than this one payment, the record is clear that respondent did not provide any financial support to the child from 2016 to the date the termination petition was filed, including during the relevant six-month period.

As for finding of fact 12, even assuming that respondent had more than three to four visits with the child between 2012 and 2016, it is undisputed that after the summer of 2016 respondent neither contacted nor visited the child at any point during the almost three years preceding the filing of the termination petition, including within the relevant six-month period. Moreover, respondent testified that he did not see the minor child at any point during 2014 or 2015 and that he saw the child three times during 2016, meaning that he only saw the child three times between 2014 and 2016, and did not see the child at any point after mid-2016.

Respondent asserts, and we agree, that the trial court does not utilize the word "willful" when discussing whether respondent's conduct met the required statutory standard of willful abandonment. Nevertheless, when read in context, the trial court's order makes clear that the court applied the proper willfulness standard to determine that respondent willfully abandoned the child under N.C.G.S. § 7B-1111(a)(7). When evaluating the findings together, it is evident that the trial court took into consideration that respondent did not contact the minor child or petitioner at any point in the nearly three years preceding the filing of the termination petition. Only after the filing did petitioner reach out. Similarly, during the years preceding the filing, respondent never pursued court-ordered visitation with the child, nor did he utilize any avenue to arrange visits with the minor child since mid-2016. In sum, from the summer of 2016 to the filing of the termination petition, which occurred on 14 March 2019, respondent made no attempt to contact the child.

Though in July 2016 respondent and petitioner got into a disagreement via Facebook Messenger and petitioner testified that she told respondent that she was "done messaging [respondent]," nothing in the record indicates that petitioner blocked respondent from further

communicating with her or from seeking to communicate with the minor child. Respondent knew how to contact petitioner through Facebook Messenger despite not having her phone number, but respondent did not make any effort to contact the child in a nearly three-year time span. *See In re L.M.M.*, 847 S.E.2d 770, 775–76 (N.C. 2020) (concluding that the trial court did not err by terminating the respondent's parental rights based on willful abandonment where, though the petitioner had blocked the respondent on Facebook, the respondent utilized no other channel to contact the petitioner or minor child during the determinative period).

The trial court's conclusion that respondent's conduct met the statutory standard of abandonment of the child is consistent with other cases in which this Court has upheld termination based on willful abandonment. *See In re K.N.K.*, 374 N.C. at 54–55, 839 S.E.2d at 738–39 (concluding that termination was justified based on willful abandonment where the respondent had no contact with the minor child, provided no financial support, and sent no cards, gifts, or other tokens of affection not only during the determinative six-month period, but at any point during the approximately three years preceding the filing of the termination petition); *In re B.C.B.*, 374 N.C. at 40–41, 839 S.E.2d at 754–55 (concluding that the trial court properly terminated the respondent's parental rights based on willful abandonment when the respondent chose not to take advantage of visitation and had no contact with the minor child, and reiterating that a parent is not excused from contacting or showing interest in a child even if only limited means are available to do so).

Moreover, the findings as a whole show that the trial court, in making its ultimate determination, properly considered respondent's failure to provide any tangible or financial support. Despite paying for a $160 dance class for the child in 2016, respondent did not provide any other financial or tangible support or any tokens of affection, including cards, for the child from 2016 on, including within the determinative six-month period preceding the filing of the termination petition. Nonetheless, respondent pays child support for his other biological children who do not reside in his primary custody. *See In re C.J.H.*, 240 N.C. App. 489, 503–04, 772 S.E.2d 82, 92 (2015) (discussing the respondent's failure to provide support during the relevant period when concluding that the respondent had abandoned the juvenile).

While the trial court should have used the statutory language of "willful abandonment" to address respondent's conduct, the trial court's findings that are supported by clear, cogent, and convincing evidence ultimately support the conclusion that respondent's conduct met the statutory criterion of willful abandonment. *Cf. In re N.D.A.*, 373 N.C.

at 77–78, 833 S.E.2d at 773–74 (concluding that, despite the trial court's finding that the respondent had failed to contact the minor child or provide support during the six-month period, the record indicated that the respondent had attempted to work out arrangements to visit the child on numerous occasions, including during the relevant six-month period, and therefore the trial court's order did not support termination based on willful abandonment since the trial court failed to make specific findings on whether the respondent's actions were willful).

Because we conclude that termination was proper on willful abandonment grounds, we need not review the neglect ground for termination as contested by respondent. *See In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421 ("[A] finding of only one ground is necessary to support a termination of parental rights . . . ."). Accordingly, the trial court's order terminating respondent's parental rights is affirmed.

AFFIRMED.

IN THE MATTER OF O.W.D.A.

No. 397A19

Filed 20 November 2020

Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings supported its conclusion that grounds existed to terminate a father's parental rights based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the father's failure to comply with his case plan during the time he was not incarcerated demonstrated a likelihood of future neglect. Specifically, he continued using illegal drugs, failed to comply with mental health treatment, failed to maintain stable employment or income, failed to take parenting classes, and failed to maintain stable housing suitable for the child. His minimal eleventh-hour efforts during his subsequent incarceration did not outweigh his previous failure to make progress on his case plan.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 15 August 2019 by Judge C.W. McKeller in District Court, Henderson County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record

and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Deputy County Attorney Sara H. Player for petitioner-appellee Henderson County Department of Social Services.

Michelle FormyDuval Lynch, for appellee Guardian ad Litem.

Edward Eldred for respondent-appellant father.

HUDSON, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to O.W.D.A. (Owen).[1] After careful review, we affirm.

At Owen's birth in February 2017, his mother tested positive for oxycodone, amphetamines, and methamphetamines, and Owen tested positive for amphetamines and methamphetamines. Consequently, the mother agreed to a safety plan where she would be supervised with Owen by the maternal grandparents.

The Henderson County Department of Social Services (DSS) filed a petition on 6 July 2017 alleging that Owen was a neglected juvenile. At the time DSS filed the petition, the mother was unemployed and did not have stable housing for herself and Owen other than in the maternal grandparents' home. DSS stated that respondent-father was in jail due to a probation violation, was unemployed, and had no stable income. Respondent-father admitted to having an extensive criminal history which included convictions for obtaining property by false pretenses, fraud, larceny, and drug-related offenses. Additionally, respondent-father admitted to using heroin and methamphetamine prior to and since Owen's birth.

At the time of the adjudicatory hearing on 21 December 2017, Owen was in a kinship placement with the maternal grandparents. On 7 February 2018, the trial court entered the consent order in which it adjudicated Owen a neglected juvenile. The trial court entered a separate dispositional order on the same day, and DSS was granted legal custody of Owen.

Following hearings held on 8 November and 13 December 2018, the trial court entered a review order on 11 February 2019. The trial court

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

made extensive findings regarding how both respondent-father and the mother were and were not making progress in the areas required by the court; ultimately, the court found that neither parent was making sufficient progress toward reunification, such that "[i]t is neither possible nor likely that the juvenile can be returned to a parent within six months." Accordingly, the trial court ordered that the primary permanent plan for the juvenile be adoption with a secondary permanent plan of guardianship.

On 12 February 2019, DSS filed a petition to terminate respondent-father's and the mother's parental rights. DSS alleged that grounds existed to terminate respondent-father's parental rights based on neglect and willful failure to make reasonable progress during the requisite period of time. N.C.G.S. § 7B-1111(a)(1)–(2) (2019). On 28 June 2019, respondent-father filed an answer in which he opposed termination of his parental rights. The mother relinquished her parental rights on 11 July 2019. Following a hearing held on 25 July 2019, the trial court entered an order on 15 August 2019 in which it determined that grounds existed to terminate respondent-father's parental rights as alleged in the petition. The trial court further concluded it was in Owen's best interest that respondent-father's parental rights be terminated. Accordingly, the trial court terminated his parental rights.

On 11 September 2019, respondent-father gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1). Respondent-father's counsel, however, failed to sign the notice of appeal. On 13 February 2020, cognizant of the defect in the notice of appeal, respondent-father filed a petition for writ of certiorari. On 10 March 2020, we allowed respondent-father's petition for writ of certiorari.

Respondent-father argues that the trial court erred by adjudicating that grounds existed to terminate his parental rights. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019)

(quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

"[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. at 395. We begin our analysis with consideration of whether grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). A trial court may terminate parental rights where it concludes the parent has neglected the juvenile within the meaning of section 7B-101 of the General Statutes. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715). "However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *Smith v. Alleghany Cty. Dep't of Soc. Servs.*, 114 N.C. App. 727, 732 (1994) (quoting *Ballard*, 311 N.C. at 714).

Here, the trial court found that Owen was adjudicated neglected on 21 December 2017 and noted the requirements that respondent-father was required to complete in order to achieve reunification. Among these requirements were that respondent-father refrain from substance abuse, obtain a mental health assessment and comply with all recommendations, including medication compliance, maintain stable income, obtain and maintain an appropriate residence that would be "sufficient and safe" for respondent-father and Owen, refrain from criminal activity, maintain contact with his social worker, and complete a parenting class. The trial court also made the following additional findings of fact concerning the adjudication of neglect, respondent-father's compliance

with his case plan, and its determination that there would be a repetition of neglect should Owen be returned to respondent-father's care:

> 18. The essential underlying issues of the neglect adjudication that concerned the father were [his] abuse of alcohol and illegal substances as well as housing and employment instability. The juvenile has been in [DSS'] custody since he was 10 months old and, prior to entering [DSS'] custody, he was in a kinship placement with [his maternal grandparents]. The father was given the opportunity to work a case plan in the In-home services case prior to [DSS] filing a petition for neglect and did not work the plan sufficient to prevent custody being granted to [DSS]. Throughout the history of this case, the father tested positive for illegal substances on numerous drug screens even after engaging in DART treatment on two separate occasions. The father had a major relapse in May 2018 and was found in the possession of Methamphetamine and the implements to use the drug in June 2018. He is currently incarcerated for the next several years as a result of his criminal activity related to his continued use of drugs.
>
> 19. The father obtained a mental health assessment with Family Preservation Services/Parkway on May 29, 2018, but failed to follow through with the recommended treatment. He was assigned a therapist, but never started therapy. By his own admission, he is not taking the medication prescribed by a mental health professional while incarcerated.
>
> 20. The father has had a sporadic employment history. He was terminated from his employment at Asheville Packaging after less than a month due to being late for work. Prior to his incarceration, he was performing occasional odd jobs with a friend, but did not have stable income and employment.
>
> 21. The father only recently started a parenting class while incarcerated. He had the opportunity to take parenting classes during the time period that he was not incarcerated from December 21, 2017 to June 27, 2018 and failed to do so.
>
> 22. Prior to his incarceration, the father was residing with the paternal grandfather of the juvenile. The father did not

> want the social worker to visit the home, stating that he was only staying there temporarily. The father also stated that he did not feel that the home was appropriate for the juvenile. This was the last residence that the father had prior to his incarceration and now he will be incarcerated for at least three years.
>
> 23. The father's progress on his case plan prior to entering incarceration in July 2018 was not reasonable progress under the circumstances towards correcting the conditions which led to the neglect adjudication. Although the father has been incarcerated on multiple occasions throughout the course of this case, there was a period of time from December 21, 2017 to June 27, 2018 when he was not incarcerated and could have worked his case plan and court-ordered requirements for reunification given to him at Disposition on December 21, 2017 and he failed to do so.
>
> . . . .
>
> 26. The father has neglected the juvenile within the meaning of Chapter 7B of the General Statutes, and there is a probability that such neglect would recur if the Juvenile were to be in the care of the father.
>
> 27. While the father is currently incarcerated, based upon the father's lack of progress during the substantial period of time that he was not in custody, the Court has determined that the neglect of the juvenile would likely be repeated if the juvenile were to be placed in the father's care.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

We first consider respondent-father's challenge to the portion of finding of fact number 18 which states, in part, that "[t]he essential underlying issues of the neglect adjudication that concerned the father were the abuse of alcohol and illegal substances as well as housing and employment instability." Respondent-father contends that the sole essential underlying issue of the neglect adjudication that related to him was his incarceration. We are not persuaded.

First, respondent-father stipulated to the findings of fact and consented to Owen's adjudication as a neglected juvenile. Among the trial court's findings of fact were:

> 12. The father admitted to using heroin and methamphetamine prior to and since the juvenile's birth. The father was on probation and his probation was violated. He was recommended for an intensive outpatient program. At the time the petition was filed, the father was in jail and the father was likewise unemployed and had no stable income or housing. Father has an extensive criminal history including convictions for obtaining property by false pretenses, fraud, larceny and drug-related offenses.

Respondent-father did not appeal from the trial court's adjudicatory order and is bound by the doctrine of collateral estoppel from re-litigating this issue. *See In re T.N.H.*, 372 N.C. at 409 (stating that because the challenged findings of fact concerned necessary facts that were stipulated to by the mother when the juvenile was adjudicated neglected, and the mother did not appeal from the adjudicatory order, she was bound by the doctrine of collateral estoppel from re-litigating the findings of fact) (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973)). Respondent-father cannot now contend that the above issues did not lead to the juvenile's adjudication as neglected. Therefore, finding of fact number 12 above, which was stipulated to by respondent-father in the adjudication order, supports finding of fact number 18 in the order terminating respondent-father's parental rights in Owen.

Additionally, we note that the trial court's finding stated that "[t]he essential underlying issues of the neglect adjudication *that concerned the father* were [his] abuse of alcohol and illegal substances as well as housing and employment instability." Although it appears that the direct issues that led to the adjudication of neglect primarily related to the mother, the trial court was permitted to consider indirect issues which contributed to Owen's neglect and removal. *See In re B.O.A.*, 372 N.C. 372, 381 (2019) (stating that "the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that *directly or indirectly* contributed to causing the juvenile's removal from the parental home" (emphasis added)). Thus, we conclude that finding number 18 is supported by clear, cogent, and convincing evidence.

We next consider respondent-father's arguments that the trial court erred by concluding that grounds existed pursuant to N.C.G.S.

§ 7B-1111(a)(1) to terminate his parental rights. Respondent-father contends the trial court erroneously relied on circumstances that existed twelve months prior to the termination hearing and failed to consider the circumstances that had changed during the intervening months. Relatedly, respondent-father asserts that the trial court considered only one circumstance that existed at the time of the hearing: his incarceration. Respondent-father thus argues that the trial court terminated his parental rights solely because he was incarcerated and would remain incarcerated for several more years. Respondent-father cites *In re N.D.A.*, 373 N.C. 71 (2019), and argues that "a trial court may not use incarceration as a sword to terminate parental rights[.]" We do not find his arguments persuasive.

We first note that *In re N.D.A.* is distinguishable from this case. In *In re N.D.A.*, the trial court concluded that grounds existed to terminate the father's parental rights on the ground of neglect by abandonment. This Court stated:

> A trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." We agree with the Court of Appeals that, "in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing."

Id. at 81 (citations omitted). The father in *In re N.D.A.* had been incarcerated when DSS began its investigation relating to the juvenile, remained incarcerated when the juvenile was adjudicated neglected, and continued to be incarcerated for a period of time thereafter. *Id.* at 82. This Court vacated and remanded the trial court's termination order upon determining that:

> the trial court's findings of fact did not adequately support a determination that respondent-father's parental rights in [the juvenile] were subject to termination based upon neglect by abandonment given the absence of any findings concerning respondent-father's ability to contact petitioner or [the juvenile], to exercise visitation, or to pay

> any support in order to determine that his abandonment was willful.

Id.

Here, the trial court's conclusion that grounds existed to terminate respondent-father's parental rights was not based upon neglect by abandonment. Instead, the trial court determined that there would be a likelihood of future neglect based upon respondent-father's history of failure to comply with his case plan. In addition to finding that the father was incarcerated at the time of the hearing, the trial court also found that during the period before his incarceration respondent-father: (1) failed to refrain from substance abuse; (2) obtained a mental health assessment but failed to follow through with the recommended treatment; (3) failed to maintain stable employment or income; (4) failed to take parenting classes; and (5) failed to maintain stable housing suitable for Owen. The court considered each of these failures as evidence of past neglect and the likelihood of future neglect. *See In re Z.V.A.*, 373 N.C. at 211–12 (stating that if it cannot be shown whether the parent is neglecting the child at the time of the termination hearing because the parent and child have been separated, "there must be a showing of past neglect and a likelihood of future neglect by the parent"); *see also In re T.N.H.*, 372 N.C. at 412–13 (recognizing that although "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision," respondent-mother's history of unstable housing and her failure to complete her case plan *before* becoming incarcerated supported the trial court's conclusion to terminate her parental rights under N.C.G.S. § 7B-1111(a)(9)).

Furthermore, the trial court here did not look only at past circumstances in making its determination. While the trial court emphasized respondent-father's failure to comply with his case plan before his incarceration, it is evident that the trial court also considered evidence of changed circumstances occurring during his incarceration, which began in late June 2018. Specifically, the trial court found and considered that respondent-father had started taking a parenting class and that he was working while incarcerated. The trial court also found and considered, however, that respondent-father, by his own admission, was not taking the medication prescribed to him for his mental health while incarcerated.

Although a court "must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing," *In re Z.V.A.*, 373 N.C. at 212, "evidence of changed

conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect," *Smith*, 114 N.C. App. at 732 (quoting *Ballard*, 311 N.C. at 714). Therefore, although respondent-father may have made some minimal progress during his most recent incarceration, the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements while not incarcerated, and to conclude that there was a probability of repetition of neglect should Owen be returned to his care. *See id.* at 732 (holding that the trial court adequately considered mother's improved psychological condition and living conditions at the time of the hearing even though it found, because of recency of improvement, that probability of repetition of neglect was great), *disc. review denied*, 337 N.C. 696 (1994); *see also In re J.H.K.*, 215 N.C. App. 364, 369 (2011) ("Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children." (cleaned up)). Taken together, the trial court's findings support its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights.

The trial court's conclusion that one statutory ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support termination of respondent-father's parental rights. *In re E.H.P.*, 372 N.C. at 395. As such, we need not address respondent-father's arguments regarding N.C.G.S. § 7B-1111(a)(2).[2] Furthermore, respondent-father does not challenge the trial court's conclusion that termination of his parental rights was in Owen's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

---

2. We note respondent-father's challenge to finding of fact 13. However, this finding of fact related solely to the trial court's conclusion that grounds existed to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Accordingly, this finding is not necessary to affirm the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent-father's parental rights, and we therefore decline to address it. *See In re T.N.H.*, 372 N.C. at 407 ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. 394, 404 (1982)).

IN RE R.L.O.

[375 N.C. 655 (2020)]

IN THE MATTER OF R.L.O., L.P.O., AND C.M.O.

No. 87A20

Filed 20 November 2020

1. Termination of Parental Rights—on remand from earlier appeal—no new evidence taken—abuse of discretion analysis

On remand from an earlier appeal, the trial court did not abuse its discretion by terminating respondent-father's parental rights to his three children on review of the existing record without taking further evidence. Not only did respondent stipulate that the trial court could enter an order on remand without an evidentiary hearing, but also the Court of Appeals' instructions for the trial court on remand left the decision to take new evidence in the trial court's discretion.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated respondent-father's parental rights to his three children on the grounds of neglect after making supplemental findings of fact from the existing record (on remand from an earlier appeal) without taking new evidence. The findings were binding where respondent did not challenge their evidentiary basis, and they established a pattern of neglect consisting of an unsafe and unsanitary home and improper care of the children, which in turn supported a reasonable conclusion that neglect would likely continue if the children were returned to the father's care.

3. Termination of Parental Rights—best interests of the child—current circumstances—speculation

On remand from an earlier appeal, respondent-father failed to show the trial court abused its discretion by concluding that termination of his parental rights was in the best interests of his three children on the existing record without taking additional evidence. The trial court properly relied on evidence from the original termination hearing, and respondent's argument that the trial court failed to take into account changes in the children's circumstances was based on speculation and not supported by a forecast of evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 20 December 2019 by Judge Christine Underwood in District Court, Iredell County. This matter was calendared for argument in the Supreme

Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Lauren Vaughan for petitioner-appellee Iredell County Department of Social Services.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

Christopher M. Watford, for respondent-appellant father.

EARLS, Justice.

Respondent-Father appeals from an order terminating his parental rights to his minor children, R.L.O. (Ron), L.P.O. (Larry), and C.M.O. (Cathy).[1] Having successfully appealed an earlier order that was vacated and remanded by the Court of Appeals, respondent's central argument before this Court is that the trial court failed to hear new evidence on remand and therefore could not make appropriate findings of fact to justify the termination of his parental rights on grounds of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1). However, on remand, respondent stipulated that the trial court could proceed without receiving new evidence. While that does not relieve the trial court of the responsibility to determine whether the petitioner has presented "clear, cogent, and convincing" evidence of the grounds for termination, *see* N.C.G.S. § 7B-1109(f) (2019) ("The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."), the stipulation is binding here as well and does prevent respondent from raising the trial court's failure to hear new evidence as a reason for this Court to reverse its order. The trial court's supplemental findings of fact establish a pattern of neglect by respondent and a course of conduct from which it was reasonable to conclude that his neglect of the children would continue in the future. Therefore we affirm the trial court's order.

A. Factual and Procedural Background

The Iredell County Department of Social Services (DSS) obtained non secure custody of the children and filed juvenile petitions alleging

1. Pseudonyms are used in this opinion to protect the children's identities and for ease of reading.

that they were neglected and dependent juveniles on 3 July 2017.[2] On 4 October 2017, prior to the hearing of the juvenile petition filed by DSS, the guardian *ad litem* (GAL) for the children filed a petition seeking to terminate the parental rights of respondent and the children's mother. The GAL alleged that grounds existed to terminate their parental rights based on abuse, neglect, and the commission of a felony assault resulting in serious bodily injury to another child who lived in the home. *See* N.C.G.S. § 7B-1111(a)(1), (8) (2019). The trial court consolidated the proceedings for hearing and entered orders in the matters on 5 April 2018. The trial court adjudicated the children to be neglected and dependent juveniles but concluded the entry of a disposition in the juvenile matter was "moot" because it also entered an order terminating parental rights. The trial court found the existence of all three grounds alleged in the petition to terminate the parental rights of respondent and the children's mother and concluded that termination of parental rights was in the children's best interests. Respondent and the children's mother appealed to the North Carolina Court of Appeals.

The Court of Appeals affirmed the order adjudicating the children to be neglected and dependent juveniles but vacated the trial court's determination that the disposition was moot and remanded for entry of a disposition order. *In re R.L.O.*, No. COA18-593, 2018 WL 6613855, at *14 (N.C. Ct. App. Dec. 18, 2018) (unpublished). The Court of Appeals also affirmed the orders terminating the parental rights of the children's mother. *Id.* As to respondent, the Court of Appeals held that the trial court erred in concluding that respondent committed a felony assault resulting in serious bodily injury to another child who lived in the home pursuant to N.C.G.S. § 7B-1111(a)(8) because there was insufficient evidence. *Id.* at *10. The Court of Appeals further concluded that the trial court erred by ruling that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights because the trial court failed to make findings demonstrating abuse or neglect at the time of the termination hearing or that there was a probability of a repetition of abuse or neglect if the children were returned to respondent's care. *Id.* at *12–13. Accordingly, the Court of Appeals vacated the order terminating respondent's parental rights and remanded for additional findings on whether there was a probability of repetition of neglect. *Id.* at *11–14. In remanding the matter, the Court of Appeals explicitly

2. The Court of Appeals' opinion in this case includes a detailed discussion of the underlying facts surrounding the filing of the juvenile petitions which will not be repeated here. *See In re R.L.O.*, No. COA18-593, 2018 WL 6613855 (N.C. Ct. App. Dec. 18, 2018) (unpublished).

stated that whether to receive additional evidence on remand was in the trial court's discretion. *Id.* at *14.

On remand, the trial court did not receive additional evidence and entered new adjudication and disposition orders terminating respondent's parental rights on 20 December 2019 based on "a review of the record[ ] and . . . without consideration of new evidence." The trial court did make additional findings of fact, again found the existence of all three grounds alleged in the petition, and concluded that termination of respondent's parental rights was in the children's best interests. Respondent appeals.

B. Legal Analysis

The legal standards applicable to this case are well established. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). Whether or not to receive additional evidence on remand is a determination within the trial court's discretion so long as the reviewing court's mandate does not specify otherwise. *See In re S.M.M.*, 374 N.C. 911, 914 (2020) (holding that when the Court of Appeals is silent as to whether the trial court should take new evidence on remand, that decision is left to the trial court's discretion).

Additionally, "[a] trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

[1] With regard to respondent's appeal, the Court of Appeals' instructions for the trial court on remand were clear:

> On remand, the trial court must consider the evidence of a probability of a repetition of neglect by respondent-father in light of a parent's right to reunification efforts when a child is placed in DSS custody following an initial adjudication of abuse, neglect, or dependency and the limited grounds upon which the trial court is authorized to forgo such efforts under N.C. Gen. Stat. § 7B-901(c). The court may receive additional evidence as it deems appropriate. *See In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007).

In re R.L.O., 2018 WL 6613855, *14. The Court of Appeals explicitly left to the trial court the determination of whether to consider new evidence on the issue of the probability of future neglect by respondent. Respondent contends that the trial court erred by making new findings of fact and entering its new adjudication order without receiving new evidence. However, respondent stipulated that the trial court could enter an order on remand without receiving new evidence.[3] The adjudication and disposition orders on remand both specifically state that "[t]he attorneys stipulated that the Court conduct a review of the record, and to enter this order without consideration of new evidence." Respondent does not dispute the existence of this stipulation, stating in his brief that "[i]n its order following remand, the trial court and the parties who stipulated agreed that the trial court could enter a new order without a hearing and 'without consideration of new evidence.' " Having made that stipulation before the trial court, respondent is bound by it now. Therefore, it was not an abuse of discretion for the trial court to decide not to open the record to receive additional evidence on remand.

[2] Nevertheless, we still must consider respondent's argument that the trial court erred by adjudicating that grounds existed to terminate his parental rights based on neglect pursuant to N.C.G.S. § 7B-1111(a)(1). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. at 395.

A trial court may terminate parental rights when it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101(15). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or

---

3. Between the time of the first termination hearing and the hearing on remand, respondent was found guilty of felony child abuse and sentenced to a term of incarceration. Any reopening of the record would have permitted consideration of that fact.

caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. at 212 (citing *In re Ballard*, 311 N.C. at 715).

Respondent objects to the findings made by the trial court but does not challenge the trial court's evidentiary basis supporting those findings. Instead, respondent argues that the findings improperly attempt to implicate him in the abuse perpetrated by the mother against the children's sibling. Respondent contends the trial court's findings are irrelevant and apply only to the time before DSS removed the children from his care. He argues the trial court failed to make findings on remand that demonstrated that it considered evidence of changed circumstances and instead relied solely on pre-removal evidence for its conclusions of law. Ultimately, he contends the trial court's findings do not support its conclusion that there is a high likelihood of repetition of neglect should the children be returned to his care, and thus the trial court erred in adjudicating the existence of the ground of neglect. Respondent's arguments are misplaced.

Respondent's failure to challenge the evidentiary basis for the trial court's findings of fact makes them binding on appeal. *In re Z.V.A.*, 373 N.C. at 211. The trial court's findings establish that the children were removed from respondent's home on 3 July 2017 and subsequently adjudicated to be neglected juveniles. The children's mother was suffering from postpartum depression after the birth of Cathy and was not fit to care for them. Respondent knew the mother was incapable of providing for their care, yet he regularly left her to care for the children without providing her assistance or ensuring that she was receiving proper treatment for her mental health issues. The trial court found respondent willfully failed to ensure the children were properly cared for and placed

them at a substantial risk of harm by other than accidental means when he left them in their mother's care. Their home was in poor condition, with "scraps of food, insects, and trash in the home," and "[o]utside of the home, there was a copious amount of trash, including tires and scrap metal." During one visit by a social worker, the home had a nonfunctioning toilet that was clogged with human waste and toilet paper; there were bags of trash inside the home, some of which were torn; the kitchen was dirty; clothes were strewn about the house; some of the rooms could not be accessed due to the clutter found therein. The social worker described the home at times as appearing to have been "ransacked." Respondent was responsible for keeping the home in a habitable condition but failed to do so and did not ensure the children were properly cared for.

Respondent also entered into a safety agreement with DSS and moved with the children to temporarily reside with a family friend. Shortly thereafter, however, he returned with the children to the home and left them in their mother's unsupervised care knowing she had not received treatment for her mental health issues and that she was not a proper caregiver for them. The trial court found that respondent failed to comply with the safety agreement and placed the children at substantial risk of harm by other than accidental means.

DSS identified problems in the home, discussed the problems with respondent, and offered him services to alleviate the problems. DSS made a referral for day care to assist respondent and the children's mother, in part to alleviate pressures on the mother, but respondent and the mother failed to properly follow up with that offered assistance. DSS also recommended services to assist with the following: (1) therapy for the children's sibling; (2) the mother's mental health; (3) improper supervision of the children; (4) "domestic discord"; and (5) lack of transportation. Nonetheless, respondent and the mother failed to take advantage of the services and address the problems.

The trial court also made detailed findings about the mother's child abuse which showed that respondent had to have been aware of the abuse and did nothing to either protect his children or seek medical treatment for the abused child. The trial court's findings demonstrate that respondent and the mother did not provide proper care for the children. Among the findings found by the trial court were that (1) respondent and the mother failed to seek proper treatment for diaper rashes; (2) respondent and the mother allowed the children to become extremely dirty with ants in their hair and mouse feces in their diapers; (3) the children suffered from numerous insect bites; and (4) Larry had a bruise on

his arm consistent with a human bite mark. The lack of care continued up until DSS obtained custody of the children. Police officers and social workers found Larry in his bed with roaches and ants, his clothing so dirty it was sticking to his skin, roaches running around the house, the house uninhabitable and smelling of human feces, and the house full of trash and personal belongings strewn about making it difficult to walk inside. Ron also suffered from a speech delay for which respondent and the mother failed to seek treatment. The parents had been arrested and remained in custody through the hearings on charges for felony child abuse. Based on these findings, the trial court concluded respondent had neglected the children, and there was a high probability the neglect would reoccur if the children were returned to his care and custody.

Respondent argues the trial court based its entire conclusion on findings of fact regarding events that occurred prior to the children's removal from the home by DSS. Respondent concedes there was evidence to support prior neglect but argues the trial court made no findings regarding changed circumstances occurring between the period of past neglect and the time of the termination hearing and thus failed to comply with the Court of Appeals' mandate and our law regarding neglect. *See In re Z.V.A.*, 373 N.C. at 212. We disagree.

The mandate from the Court of Appeals was that "the trial court must consider the evidence of a probability of a repetition of neglect by respondent-father." *In re R.L.O.*, 2018 WL 6613855, at *14. The mandate did not require the trial court to make specific findings of fact, and the trial court's new findings on remand establish a probability of repetition of neglect. Moreover, respondent directs this Court to no evidence of changed circumstances from the time the children were removed from his care through the hearing from which the trial court may have made the findings sought by respondent. "It is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005), and this Court will not presume error where none is shown. *See State v. Williams*, 274 N.C. 328, 333 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.").

We hold the trial court's findings on remand, which are binding on this Court, fully support its determination that the ground of neglect existed to terminate respondent's parental rights. Because only one ground is needed to terminate parental rights, we need not address respondent's arguments as to the remaining two grounds found by the trial court. *See In re E.H.P.*, 372 N.C. at 395.

[3] We next address respondent's argument that the trial court abused its discretion when it determined that termination of respondent's parental rights was in the best interests of the children. " 'If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage,' at which it 'determine[s] whether terminating the parent's rights is in the juvenile's best interest.' " *In re I.N.C.*, 374 N.C. 542, 546 (2020) (alteration in original) (first quoting *In re A.U.D.*, 373 N.C. 3, 6 (2019); then quoting N.C.G.S. § 7B-1110(a)). In determining whether termination of parental rights is in the child's best interests,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6 (citing *In re D.L.W.*, 368 N.C. 835, 842 (2016)). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 6–7 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

Respondent contends that the trial court abused its discretion when it accepted counsel's stipulation that new evidence need not be considered on remand and by failing to consider the children's current circumstances when making its best interests determination. Certainly the trial court was not restricted from considering new evidence on remand. However, there is nothing in the record suggesting the trial court believed it was bound by the stipulation of trial counsel or that it felt restricted in any manner from receiving new evidence in this case

if such evidence were required. The Court of Appeals specified that, on remand, "[t]he court may receive additional evidence as it deems appropriate" and "the trial court may hear additional evidence in its sound discretion." *In re R.L.O.*, 2018 WL 6613855, at *14. Moreover, respondent has not demonstrated any need for the trial court to receive new evidence in this case beyond his mere speculation, which is insufficient to show that the trial court abused its discretion by not receiving additional evidence on remand. *See In re S.M.M.*, 374 N.C. 911, 915 (2020) ("Mere speculation that some facts may have changed in the eighteen months since the court originally heard the evidence is not sufficient to demonstrate that the trial court abused its discretion in denying respondent's motion to reopen the evidence on remand. Absent any forecast of relevant testimony or other evidence bearing upon the Court's ultimate determination of the child's best interests, the trial court's decision to refrain from reopening the record is entirely consistent with this Court's general admonition that a trial court must always hear any relevant and competent evidence concerning the best interests of the child."). Respondent has not forecast any evidence concerning the children's current circumstances that would have had a bearing on the trial court's determination of the children's best interests. Thus, we conclude respondent has not shown that the trial court abused its discretion by entering its dispositional order without taking new evidence, and we hold this argument is without merit.

Respondent also challenges the trial court's ultimate conclusion that it was in the children's best interests to terminate his parental rights. Respondent contends that the trial court's findings as to the ages of the children are unsupported because they are based on the date of the original termination hearing and not the date of the hearing on remand. However, the trial court's order was based on evidence from the original termination hearing and its analysis of that evidence. Consequently, there is no error.

Respondent additionally argues the trial court's finding that there is a high likelihood the children will be adopted is unsupported in the absence of new evidence of the children's circumstances since the original termination hearing. He presents a similar argument regarding the finding that the children have been placed in the same foster home and have a loving bond with their foster parents who desire to adopt them. Respondent's arguments are speculative, and he has not shown that the trial court abused its discretion by not receiving new evidence on remand. *See In re S.M.M.*, 374 N.C. at 914–15. Additionally, respondent concedes that, as found by the trial court, there was no permanent plan

for the children at the time of the hearing. Respondent asserts, however, that the trial court's dispositional finding that adoption would be the most appropriate permanent plan for the children is an expression of preference and not a proper finding of fact. We agree and ignore this portion of the trial court's finding of fact.

The trial court made findings of fact regarding the relevant factors under N.C.G.S. § 7B-1110(a), which are either unchallenged by respondent or supported by competent evidence. The trial court's findings reflect reasoned decision-making and support its conclusion that termination of respondent's parental rights is in the children's best interests. Respondent has not shown that the trial court abused its discretion in so concluding, and we affirm the trial court's orders terminating respondent's parental rights to Ron, Larry, and Cathy.

AFFIRMED.

IN THE MATTER OF S.E.T.

No. 10A20

Filed 20 November 2020

Process and Service—termination of parental rights case—personal jurisdiction—service of process by publication—affidavit requirement

The trial court's order terminating a father's parental rights to his daughter was void where the court lacked personal jurisdiction over the father because the mother (who filed the termination petition) failed to properly serve the father with process by publication, pursuant to Civil Procedure Rule 4(j1), by neglecting to file an affidavit showing the circumstances warranting service by publication. Moreover, where the mother filed a motion seeking leave to serve process by publication, her trial counsel's signature on the motion—certifying the facts therein pursuant to Civil Procedure Rule 11(a)—did not satisfy the affidavit requirement under Rule 4(j1).

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 25 September 2019 by Judge Kim Gasperson-Justice in District Court, Henderson County. This matter was calendared in the Supreme Court on 7 October 2020, but was determined upon the basis

of the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Emily Sutton Dezio, PA, by Emily Sutton Dezio, for petitioner-appellee.

Sean P. Vitrano for respondent-appellant.

ERVIN, Justice.

Respondent-father Jeremy T. has sought review of an order entered by the trial court terminating his parental rights in his daughter S.E.T.[1] As a result of our determination that the trial court lacked personal jurisdiction over respondent-father in light of the failure of petitioner-mother Heather G. to effect proper service by publication pursuant to N.C.G.S. § 1A-1, Rule 4(j1) (2019), we vacate the trial court's termination order.

Petitioner-mother gave birth to Sara in Buncombe County in April 2009 and named respondent-father as Sara's father on her birth certificate. On 7 May 2019, petitioner-mother filed a petition seeking to terminate respondent-father's parental rights in Sara on the grounds that respondent-father had neglected Sara, N.C.G.S. § 7B-1111(a)(1); was incapable of caring for Sara and lacked an adequate alternative child care arrangement, N.C.G.S. § 7B-1111(a)(6); and had willfully abandoned Sara, N.C.G.S. § 7B-1111(a)(7). On the same date, a summons directed to respondent-father at 639 Maple Street in Hendersonville, which is the address at which the Hendersonville Rescue Mission is located, was issued. The summons was returned unserved on 16 May 2019 bearing a notation made by Deputy Sheriff C.E. Wade of the Henderson County Sheriff's Office that respondent-father had "[n]o address located in Henderson County," that respondent-father did "not stay at address given," and that respondent-father had "been banned from property per Director."

On 28 May 2019, petitioner-mother filed a motion seeking leave to serve respondent-father by publication in which respondent-mother alleged:

> 2. That the [p]etitioner-mother] has been unable to obtain service of [her] Petition on [respondent-father].

1. S.E.T. will be referred to throughout the remainder of this opinion as "Sara," which is a pseudonym that will be used to protect the juvenile's privacy and for ease of reading.

3. Pursuant to criminal charges in 2019 the last known address of [respondent-father] was: 639 Maple Street, Hendersonville, NC 28792.

4. The current whereabouts of [respondent-father] are unknown.

5. That after all due diligence service on [respondent-father] is not possible.

On 14 June 2019, Judge Thomas M. Brittain entered an order granting petitioner-mother's request to be allowed to serve respondent-father by publication in which Judge Brittain made findings of fact that tracked the allegations contained in respondent-mother's motion and concluded that petitioner-mother was "in need of an order allowing service on [respondent-father] by publication in Henderson County at this time to perfect service in this matter."

On three consecutive Wednesdays ending on 10 July 2019, petitioner-mother obtained the running of a notice of service by publication in the *Hendersonville Lightning* that informed respondent-father that a termination of parental rights proceeding had been initiated against him and advising him that he had until 28 July 2019 within which to file a responsive pleading. Respondent-father did not file a pleading in response to petitioner-mother's termination petition. On 9 August 2019, petitioner-mother filed a notice of hearing directed to respondent-father's provisional appointed counsel indicating that this matter would be heard on 29 August 2019.

The issues raised by petitioner-mother's termination petition came on for hearing before the trial court on 29 August 2019. After respondent-father failed to appear for the termination hearing, his provisional appointed counsel sought leave to withdraw from his representation of respondent-father on the grounds that he "ha[d] not heard from this client in [an]y way, shape or form[.]" The trial court granted this withdrawal motion based upon a finding that respondent-father's provisional appointed counsel had "received no communication from [respondent] and . . . can take no position in this matter . . . ." The only evidence received at the termination hearing consisted of petitioner-mother's testimony.

On 25 September 2019, the trial court entered an order finding that respondent-father's parental rights in Sara were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) based upon his use of methamphetamine, his failure to maintain contact with Sara, and his

failure to provide any financial support for Sara; his failure to pay for Sara's support after custody had been awarded to petitioner-mother pursuant to N.C.G.S. § 7B-1111(a)(4); his incapability of caring for Sara as a result of his substance abuse pursuant to N.C.G.S. § 7B-1111(a)(6);[2] and his abandonment of Sara pursuant to N.C.G.S. § 7B-1111(a)(7). In addition, the trial court found that it would be in Sara's best interests for respondent-father's parental rights to be terminated given that petitioner-mother had married, that her husband assisted petitioner-mother in caring for Sara, that petitioner-mother and her husband were able to provide financial and emotional support for Sara, and that petitioner-mother's husband intended to adopt Sara.

Respondent-father, proceeding *pro se*, attempted to note an appeal to this Court from the trial court's order. After respondent-father's appellate counsel filed a certiorari petition noting that respondent-father had failed to attach a certificate of service to his notice of appeal and requesting the issuance of a writ of certiorari authorizing review of the trial court's termination order on the merits, *see* N.C. R. App. P. 3(e), 3.1(b), 26(d), this Court granted respondent-father's certiorari petition.

In seeking relief from the trial court's termination order before this Court, respondent-father contends that, since the trial court never acquired jurisdiction over his person in this case, the challenged termination order is void. More specifically, respondent-father contends that petitioner-mother failed to comply with the statutory requirements for service of process by publication set out in N.C.G.S. § 1A-1, Rule 4(j1), given that "[p]etitioner[- mother]'s counsel did not file with the [trial] court an affidavit showing 'the circumstances warranting the use of service [by] publication, and information, if any, regarding the location of the party served.' " N.C.G.S. § 1A-1, Rule 4(j1). In response, petitioner-mother asserts that, prior to serving respondent-father by publication, she filed a motion seeking leave to serve respondent-father by publication signed by her trial counsel in which she set forth the basis for her contention that she was entitled to serve respondent-father by publication; notes that N.C.G.S. § 1A-1, Rule 11(a), provides that an attorney's signature upon a pleading, motion, or other similar document "constitutes a certificate by [counsel] that [s]he has read the [motion]" and that, "to the best of h[er] knowledge, information, and belief formed after reasonable inquiry," the filing "is well grounded in fact[,]" N.C.G.S. § 1A-1, Rule 11(a) (2019); and argues that the presence of her trial counsel's

2. Petitioner-mother had not alleged that respondent-father's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6) in her termination petition.

signature on the motion seeking leave to have respondent-father served by publication was "the equivalent of a verification of the facts contained therein" sufficient to satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1).

As a result of the fact that "[s]ervice of process by publication is in derogation of the common law," statutory provisions authorizing service of process in that manner "are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E.2d 593, 596–97 (1965). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974)); *see also Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 284 (2008) (stating that "[a] judgment against a defendant is void where the court was without personal jurisdiction"), *aff'd per curiam*, 362 N.C. 505, 666 S.E.2d 750 (2008).

N.C.G.S. § 7B-1106, which governs service of process in termination of parental rights proceedings, provides, in pertinent part, that:

> (a) Except as provided in [N.C.]G.S. [§] 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:
>
> (1) The parents of the juvenile.
>
> . . . .
>
> The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Service of the summons shall be completed as provided under the procedures established by [N.C.]G.S. [§] 1A-1, Rule 4. Prior to service by publication under G.S. 1A-1, the court shall make findings of fact that a respondent cannot otherwise be served despite diligent efforts made by petitioner for personal service. The court shall approve the form of the notice before it is published.

N.C.G.S. § 7B-1106(a) (2019). As a result, in order to properly effectuate service of process by publication in a termination of parental rights proceeding, the petitioner must comply with both the "findings" requirement

set out in N.C.G.S. § 7B-1106(a) and the provisions of N.C.G.S. § 1A-1. Rule 4(j1).

According to N.C.G.S. § 1A-1, Rule 4(j1):

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)may be served by publication. . . . If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of [N.C.]G.S. [§] 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C.G.S. § 1A-1, Rule 4(j1). As the Court of Appeals has correctly held, a "[f]ailure to file an affidavit showing the circumstances warranting the use of service by publication is reversible error." *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003).

Petitioner-mother candidly concedes that she did not file an affidavit showing "the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served,"[3]

---

3. Although petitioner-mother has not directly asserted that the findings that the trial court made in the order allowing petitioner-mother's motion for leave to serve respondent-father by publication obviated the necessity for compliance with the affidavit requirement set out in N.C.G.S. § 1A-1, Rule 4(j1), she does mention the fact that the the trial court "agreed [that] there was good cause to serve [respondent] by publication" in attempting to distinguish decisions finding a lack of personal jurisdiction stemming from failures to comply with the affidavit requirement from the facts of this case. *See In re A.J.C*, 259 N.C. App. 804, 810, 817 S.E.2d 475, 480 (2018) (vacating a termination of parental rights order as a result of the petitioner's failure to file the affidavit required by N.C.G.S. § 1A-1, Rule 4(j1)); *Cotton*, 160 N.C. App. at 704, 586 S.E.2d at 808 (stating that, "where there was no affidavit showing circumstances warranting use of service by publication or alleging facts showing due diligence, no *in personam* jurisdiction was established over the defendant") (citing *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 160–61, 323 S.E.2d 458, 463 (1984))). However, nothing that appears in N.C.G.S. § 7B-1106(a) in any way suggests that the making of the findings required by N.C.G.S. § 7B-1106(a) suffices to excuse a petitioner's failure to comply with the separate affidavit requirement contained in N.C.G.S.

N.C.G.S. § 1A-1, Rule 4(j1), as part of her effort to obtain service of process upon respondent-father by publication. In addition, while the record does contain an affidavit executed by the publisher of the *Hendersonville Lightning* "attesting to the publication of the notice of service by publication" in a local newspaper, the existence of this affidavit does not satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1), given that it fails to delineate the circumstances warranting service by publication in this case. *Cotton*, 160 N.C. App. at 703, 586 S.E.2d at 808; *In re A.J.C.*, 259 N.C. App. 804, 808, 817 S.E.2d 479, 480 (2018). As a result, the record simply does not contain an affidavit of the type contemplated by N.C.G.S. § 1A-1, Rule 4(j1).

We are not persuaded by petitioner-mother's argument that the fact that her trial counsel signed her motion for leave to serve respondent-father by publication, when taken in conjunction with N.C.G.S. § 1A-1, Rule 11, should be deemed sufficient to satisfy the affidavit requirement set out in N.C.G.S. § 1A-1, Rule 4(j1), and that a contrary determination "would mean that there is no value in the attorney's verification on the Motion Requesting Leave to Serve by Publication." Simply put, N.C.G.S. § 1A-1, Rule 11(a), provides that

> Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . .

N.C.G.S. § 1A-1, Rule 11(a). Petitioner-mother's argument to the contrary notwithstanding, the statutory language contained in N.C.G.S. § 1A-1, Rule 11(a), obviating the necessity for a verification or an affidavit does not apply in situations in which the necessity for a verification or affidavit is "specifically provided by rule or statute[.]" *Id.* As a result,

---

§ 1A-1, Rule 4(j1). In addition, we note that the trial court's findings provide little or no justification for a decision to authorize petitioner-mother to serve respondent-father by publication. *Cf. Cotton*, 160 N.C. App. at 703–04, 586 S.E.2d at 808 (concluding that the trial court's after the fact finding that "plaintiff had satisfied the trial court [at a child custody hearing] that she had made diligent efforts to locate defendant" lacked sufficient record support and did not suffice to "cure plaintiff's failure to strictly comply with the statute permitting service by publication").

since N.C.G.S. 1A-1, § Rule 4(j1), specifically requires the filing of "an affidavit showing . . . the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served" in order for service by publication to be properly effectuated, the signature of petitioner-mother's trial counsel upon the motion seeking leave to serve respondent-father by publication does not suffice to satisfy the statutory affidavit requirement.

"An affidavit is '(a) written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.' "[4] *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (quoting BLACK'S LAW DICTIONARY, 80 (Rev. 4th ed. 1968)). "Documents which are not under oath may not be considered as affidavits." *In re Ingram*, 74 N.C. App. 579, 580, 328 S.E.2d 588, 589 (1985). In light of the fact that the signature of petitioner-mother's trial counsel on the motion seeking leave to serve respondent-father by publication was not "confirmed" by an "oath or affirmation," that motion simply cannot be treated as an affidavit sufficient to satisfy the requirements of N.C.G.S. § 1A-1, Rule 4(j1).

Thus, we hold that, since the statutory requirements for service of process by publication must be strictly construed, *Harrison*, 265 N.C. at 247, 143 S.E.2d at 596–97, and since petitioner-mother failed to properly serve respondent-father by publication in accordance with N.C.G.S. § 1A-1, Rule 4(j1), the trial "court acquired no jurisdiction over [respondent-father,]" *Sink*, 284 N.C. at 561, 202 S.E.2d at 143. As a result, we vacate the trial court's order terminating respondent's parental rights in Sara.[5]

VACATED.

---

4. Unlike the situation before the Court in our recent decision in *Gyger v. Clement* (No. 31PA19) (14 August 2020), nothing in the statutory provisions at issue in this case in any way suggests that the term "affidavit" as used in N.C.G.S. § 1A-1, Rule 4(j1), should be understood in any way other than in its traditional sense.

5. In view of our decision to vacate the trial court's termination order for lack of personal jurisdiction, we need not address respondent-father's remaining challenges to that order.

IN RE S.M.

[375 N.C. 673 (2020)]

IN THE MATTER OF S.M., J.M., S.M., A.M., I.M., S.M.

No. 462A19Δ665

Filed 20 November 2020

1. Appeal and Error—preservation of issues—constitutional rights—continuance—termination of parental rights hearing

A father in a termination of parental rights case waived his argument that a continuance was necessary to protect his constitutional rights where he failed to make his constitutional arguments before the trial court.

2. Termination of Parental Rights—continuances beyond 90 days after initial petition—extraordinary circumstances—procrastination

The trial court did not abuse its discretion by denying a father's motion to continue a termination of parental rights hearing where the father filed the motion at the start of the hearing and argued that he had insufficient time to follow the recommendations in his psychosexual evaluation, which he received only the day before the hearing. The father failed to show the existence of extraordinary circumstances for continuance of the termination hearing beyond 90 days from the date of the initial petition (pursuant to N.C.G.S. § 7B-1109(d))—especially because the father's procrastination in submitting to the court-ordered evaluation caused the delay.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—extremely limited progress

Grounds existed to terminate a mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for willful failure to make reasonable progress where the mother made only extremely limited progress in correcting the conditions that led to her children's removal and no evidence suggested that the mother had any barriers preventing her from complying with her case plan. Among other things, she failed to cooperate with social services workers; to obtain stable housing, employment, and income; to participate in domestic violence counseling; and to complete a court-ordered substance abuse assessment.

4. Termination of Parental Rights—best interest of the child—statutory factors—likelihood of adoption—behavioral issues

The trial court did not abuse its discretion by concluding that termination of a mother and father's parental rights served their twelve-year-old child's best interests where a family was interested in adopting all six of their children (including the twelve-year-old) and the trial court did not find that the child's behavioral issues made adoption unlikely.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 8 August 2019 by Judge Hal G. Harrison in District Court, Yancey County. This matter was calendared for argument in the Supreme Court on 7 October 2020 but determined on the record and briefs, without oral argument, pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Daniel M. Hockaday for petitioner-appellee Yancey County Department of Social Services.

James M. Weiss for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant mother.

Sydney Batch for respondent-appellant father.

MORGAN, Justice.

Respondents, the parents of the minor children S.M. (Sarah), J.M. (Jimmy), S.M. (Sam), A.M. (Ann), I.M. (Inez), and S.M. (Sally),[1] appeal from orders terminating their parental rights which were entered by the Honorable Hal G. Harrison, District Court, Yancey County, on 8 August 2019. The trial court found the existence of the ground of neglect and the ground of willful failure to make reasonable progress to correct the conditions that led to the children's removal from the parents' care. Both parents appeal the trial court's decision that termination of their parental rights was in the best interests of their second oldest child, Jimmy. Respondent-mother singly appeals both grounds for termination, arguing that the record does not contain clear, cogent, and convincing evidence

1. Pseudonyms are used to protect the juveniles' identities and to facilitate ease of reading.

that her failure to make reasonable progress was willful, or that the children were at risk of future neglect. Respondent-father also challenges the trial court's denial of his oral motion for a continuance which was made on the day of the termination hearing. The trial court did not err in its denial of respondent-father's motion. Since the trial court properly concluded that grounds for termination of both respondents' parental rights were shown to exist by clear, cogent, and convincing evidence, and that such termination of their parental rights was in the best interests of all six children, consequently we affirm the determinations of the trial court in this case.

Factual and Procedural Background

Respondents are the parents of six children: S.M., J.M., S.M., A.M., I.M., and S.M. The Yancey County Department of Social Services (DSS) received a report on 8 February 2018 that the children were dirty, did not have clothing appropriate for the weather, and had not been enrolled in school since August of 2016. A second report dated 16 February 2018 alleged concerns about sexual abuse of the eldest child, Sarah, by respondent-father. Following an investigation of this report, DSS placed the children with their maternal grandparents as a safety resource on the same date.

On 23 February 2018, DSS filed petitions alleging that Sarah was an abused and neglected juvenile and that Jimmy, Sam, Ann, Inez, and Sally were neglected juveniles. DSS also obtained nonsecure custody of all six children on the same date. The petitions detailed the investigations of both reports, in which a social worker observed that the children were dirty and had an unpleasant odor; the house was unclean, sparsely furnished, and had a terrible odor; the children had not been enrolled in public school since 31 August 2016; and respondents could not provide documentation to prove that the children were being homeschooled. Substance abuse and domestic violence issues in the home were described in the DSS court filings. In one such instance, the children and respondent-mother reported that earlier in February 2018, respondent-father had poured alcohol on respondent-mother and had set her on fire in front of the children.

Upon filing the abuse and neglect petitions, DSS developed many of the same concerns with the maternal grandparents in their capacity as a safety resource for the children as the agency had expressed with the respondents' home. As a result, DSS placed the children at Black Mountain Home for Children. The children remained in this placement for the duration of the case, except for respondents' second eldest child,

Jimmy, whom DSS transferred to a therapeutic foster home due to behavioral issues.

The trial court held a hearing on the abuse and neglect petitions on 10 May 2018. It adjudicated the children to be neglected juveniles and entered an order reflecting this determination in open court on the same day. The order was signed by the trial court and filed on the respective dates of 15 and 18 June 2018. At a disposition hearing held on 18 June 2018, the trial court found that the barriers to reunification were substance abuse, housing instability, domestic violence, a history of sexual abuse, the children's lack of schooling, and respondents' lack of progress on their case plan. In a written order signed on 25 September 2018 which referenced the 18 June 2018 hearing, the trial court ordered respondents to obtain substance abuse and mental health assessments, and to comply with the recommendations resulting from those evaluations. Additionally, respondents were directed to find and maintain employment in order to provide for the basic needs of the children, as well as to be able to provide housing which was sufficient to accommodate a large family. Respondent-father was also ordered to obtain a psychosexual evaluation. In a review order entered 1 November 2018, the trial court maintained the children's permanent plan as reunification with respondents, but also found many of the same barriers to reunification as still intact, including substance abuse issues, domestic violence, housing instability, and a general lack of progress on respondents' DSS case plan. The trial court required ongoing efforts on the part of respondents to comply with each directive contained in the original disposition order which was entered after the 18 June hearing.

The trial court held a permanency planning hearing on 28 January 2019. In an order entered on 19 February 2019, the trial court changed the permanent plan from reunification to adoption with a concurrent plan of guardianship, consequently ceasing reunification efforts with respondents. The permanency planning order detailed a significant lack of compliance with the DSS case plan and prior orders of the court. While respondents had obtained substance abuse assessments which resulted in no recommendations, each of them subsequently had failed additional drug screens and had refused to take other tests offered by DSS as ordered in their case plan. While respondents reported that they were living in a single-family home leased by the father of respondent-mother, they offered inconsistent accounts about the duration of time that they were able to stay there. Respondents refused to provide DSS with court-ordered information, including their prescriptions and sources of income. They also failed to be forthcoming with information

that they had changed addresses when county officials attempted to initiate child support litigation against them. Despite claiming substantial income from a plumbing and electrical business that the couple reportedly ran, respondents had failed to pay any money towards the children's support and had failed to secure a residence suitable for a large family on their own initiative. In addition, respondent-father had failed to pay for his psychosexual evaluation during the seven months since the trial court had ordered the assessment. While the trial court noted that respondents had completed parenting classes as ordered, the couple still "failed to comply with a majority of the case plan requirements . . . ." In finding the existence of these aforementioned facts and circumstances in its 19 February 2019 order, the trial court suspended visitation privileges of respondents until they complied with their case plan, relieved DSS of its duty to further provide reasonable efforts to reunify respondents with their children, and ordered DSS to file termination of parental rights petitions as to both respondents.

On 28 February 2019, DSS filed petitions to terminate respondents' parental rights to the children, alleging the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal from their care. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). The trial court conducted the termination of parental rights hearing on 28 May 2019, at which time respondent-father's attorney made several preliminary requests. Relevant to this appeal, counsel for respondent-father noted for the trial court that the parties had received the report of respondent-father's psychosexual evaluation only the day before the hearing via facsimile transmission, and moved for a continuance "for the father to be able to respond to that evaluation by following recommendations." The trial court denied the continuance motion, citing the protracted time period which elapsed between the tribunal's order for the evaluation and the point at which respondent-father chose to address the issue.

At the hearing, DSS elicited testimony from the social worker who was assigned to the children's cases. Cross-examination of the DSS witness ensued after her direct examination. Following closing statements, the trial court found "complete and total irresponsibility" on the part of respondents in complying with their case plan. Specifically, the trial court stated that, based on the neglect that compelled the removal of the children from respondents' care in the first place, and combined with the respondents' conduct during the fifteen months preceding the hearing, it was "highly likely" that neglect of the children would continue. Likewise, the parents had "allowed the children to remain in [DSS]

custody for a period of twelve months without making any substantial progress" on their case plans. The trial court expressed amazement with the social worker's testimony that a prospective adoptive family had indicated a willingness to accept all six children, found that a bond had already formed between the family and the children, and determined that termination of respondents' parental rights remained as the only barrier between the children and adoption. The trial court entered six orders on 8 August 2019, ultimately concluding that there was clear, cogent, and convincing evidence that grounds existed to terminate respondents' parental rights as alleged in the petition, and that terminating respondents' parental rights was in the best interests of each child. Respondents appealed.

Analysis

In this matter, we examine respondent-mother's appeal and respondent-father's appeal separately; we combine each parent's individual challenge to the trial court's decisions only with regard to their mutual position that the trial court erred in its conclusion that termination of their parental rights was in the best interests of their child, Jimmy. First, we address respondent-father's separate contention that the trial court's denial of his oral motion to continue the 28 May 2019 termination of parental rights hearing violated his due-process rights, before discussing respondent-mother's individual argument that the trial court's findings of two different grounds for termination of her parental rights were unsupported by clear, cogent, and convincing evidence. We note here that the trial court entered a separate termination order for each of respondent-mother's six children, with each order containing virtually identical findings of fact and conclusions of law supporting the trial court's adjudications. In order to facilitate our discussion of the salient matters pertaining to the adjudication of grounds for termination involving all six of the juveniles with respect to respondent-mother's argument, we shall refer to the findings of fact and conclusions of law as enumerated in the trial court's termination order entered in Jimmy's case. Lastly, we review the respondents' united argument.

A. Motion to Continue

[1] Respondent-father first argues that the trial court erred in denying his motion to continue the termination hearing "after counsel received [respondent-father's] psychosexual evaluation the day prior to trial and was unable to prepare or call witnesses based on said evaluation." Respondent-father asserts that "[i]t was evident that [respondent-father's] counsel did not have sufficient time to prepare for how

the evaluation may be used in the TPR trial nor did he have time to subpoena any necessary witnesses." Therefore, respondent-father contends that the trial court violated his constitutional right to due process, as that right, combined with the right to counsel and the right to confront witnesses, includes a guarantee in favor of parties to have a reasonable time to prepare their case according to *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996) (quoting *State v. Covington*, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986)). Although respondent-father argues on appeal that the trial court's denial of his motion to continue violates his due-process rights to prepare his defense and to subpoena witnesses, respondent-father did not assert this position at the termination hearing. Respondent-father argued at the hearing that the continuance was necessary "in order for [respondent-father] to be able to respond to [the psychosexual] evaluation by following recommendations." Because respondent-father did not assert before the trial court that a continuance was necessary to protect a constitutional right, that position is waived and we are constrained to review the trial court's denial of his motion to continue for abuse of discretion. *In re A.L.S.*, 374 N.C. at 516-17, 843 S.E.2d at 91. "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

[2] Our state's Juvenile Code offers controlling guidance on the continuance of a termination of parental rights hearing with regard to the date on which a petitioning party initiates such a termination proceeding. In juvenile cases, the trial court

> may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests

> of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted *only in extraordinary circumstances when necessary for the proper administration of justice*, and the court shall issue a written order stating the grounds for granting the continuance.

N.C.G.S. § 7B-1109(d) (2019) (emphasis added). Furthermore, "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *In re D.W.*, 202 N.C. App. 624, 627, 693 S.E.2d 357, 359 (2010) (quoting *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003)).

In the present case, the transcript from the termination hearing shows that respondent-father's counsel made an oral motion to continue at the start of the termination hearing on 28 May 2019, advising the trial court that all parties had received the psychosexual evaluation report regarding respondent-father just the previous day through facsimile transmission. The attorney argued that a continuance was necessary "in order for [respondent-father] to be able to respond to that evaluation by following recommendations." DSS objected to the continuance motion, asserting that the fault for the delayed receipt of the results rested solely with respondent-father because he did not present himself to Crossroads Counseling Center (Crossroads) to begin the evaluation until 22 January 2019, seven months after he was first ordered to complete it. In response to the objection of DSS, respondent-father submitted that the delay was due in part to his inability to pay the required $500.00 down payment for the evaluation, as well as his difficulty in finding a provider to complete the evaluation.

The 28 May 2019 hearing at which respondent-father made his motion was conducted 89 days after the termination petitions were filed on 28 February 2019. Thus, any continuance granted in the matter would obviously have extended the occurrence of the hearing beyond 90 days after the filing of the termination petitions. Although the trial court had ordered respondent-father to complete the evaluation in June 2018, nearly a year prior to the termination hearing, respondent-father did not go to Crossroads to begin the evaluation process until 22 January 2019. At a permanency planning hearing which was held six days later on 28 January 2019, respondent-father was reminded that two more evaluation sessions were needed to complete the process; however, he proceeded to miss two appointments on 13 February 2019 and 25 March 2019.

Due to the applicable authority of N.C.G.S. § 7B-1109(d) and the appellate case law of *In re Humphrey* as construed in *In re D.W.*, respondent-father must show, as the movant for a continuance of the termination of parental rights hearing, the existence of extraordinary circumstances for the continuance and its necessity for the proper administration of justice. Here, respondent-father has failed to demonstrate to the trial court that good cause exists for the continuance of the termination of parental rights hearing to a juncture beyond 90 days from the date of the initial petition. Respondent-father's procrastination in addressing his court-ordered obligation to report to Crossroads for the essential evaluation directly resulted in the shortness of time for the parties involved in the hearing to have access to the psychosexual evaluation of respondent-father. The trial court did not abuse its discretion in heeding the standards of N.C.G.S. § 7B-1109(d) in its determination that extraordinary circumstances did not exist so as to make it necessary for the proper administration of justice to grant respondent-father's continuance motion in order to have more time to review the psychosexual evaluation report which he himself had delayed due to his slowness to fulfill the trial court's directive. The trial court's denial of the continuance request was within its discretion, and since continuances are not favored and good cause for the termination hearing's continuance was not shown within the purview of the cited statute, there was not an abuse of the trial court's discretion in its denial of the motion.

B. Grounds

[3] Respondent-father concedes that DSS met its burden in establishing grounds to terminate his parental rights. Respondent-mother argues, however, that the trial court erred in concluding that grounds existed to terminate her parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(2) because the findings of fact do not support the court's determination that she willfully failed to make reasonable progress to correct the conditions that led to the children's removal from her care. Among her contentions, respondent-mother takes issue with the trial court's Finding of Fact 12, citing a lack of evidentiary basis for the trial court's conclusions that respondent-mother tested positive for drugs on 5 February 2019, that she "continued to test positive" or "refused to comply with requested drug screens," that she "evaded service of child support paperwork," and that she failed to provide a home address to DSS. We address each of respondent-mother's issues, including Finding of Fact 12, along with examining her overall contention that the trial court never explained why it found her noncompliance with the court-ordered case plan to be willful.

This Court reviews a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* at 407, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

In determining that respondent-mother willfully failed to make reasonable progress, the trial court found that, in order to comply with the case plan, respondent-mother was required "to obtain and maintain stable and suitable housing; maintain employment; obtain a substance abuse assessment and comply with treatment recommendations from the same; submit to requested random drug screens; participate in recommended therapy; attend [child and family team meetings]; and exercise visitations." The trial court further found in Finding of Fact 12:

> 12. . . . The parents have not complied with the terms of the DSS case plan in that the parents have not maintained stable housing; have failed to provide DSS information regarding their housing; have failed to provide documentation as to employment and income; have failed to provide their address to DSS; that their initial substance [abuse] assessments contained no recommendations; the parents tested positive for controlled substances thereafter; that the parents were ordered to obtain a second substance abuse assessment; that the parents have not obtained that assessment; have continued to test positive for controlled substances and/or refused to comply with requested drug screens; had a recent positive drug screen (02/05/19); have missed some scheduled DSS meetings; have failed to provide copies of prescriptions to DSS although being ordered to do so; . . . that domestic violence counseling is also recommended and the parents have not participated in the same at this point; the parents' visitations have been

> suspended by prior [o]rder of the [c]ourt; that the parents have failed to provide for the monthly support for juveniles; have evaded the service of child support paperwork from the local child support agency; have acted in a generally uncooperative manner with respect to DSS workers; and have not remedied the reasons the juveniles came into DSS custody.

Regarding this finding at issue, respondent-mother directs our attention to the social worker's testimony that during the social worker's interactions with respondent-mother, respondent-mother provided a house number for an address. Respondent-mother submits that this information refutes the trial court's determination contained in Finding of Fact 12 that states that respondent-mother "failed to provide [her] address to DSS." However, a review of the social worker's testimony about this subject beyond the isolated reference illuminated by respondent-mother reveals that respondent-mother's mere identification of a house number does not constitute a provision of her address to DSS in light of conflicting and even incorrect residential information which also was supplied. A fuller examination of the social worker's testimony shows that she was unable to locate the residence after respondent-mother and respondent-father provided contradictory addresses. The social worker also testified that she had received conflicting information from respondents as to whether they owned or rented the residence. Upon consideration of this broader context of respondent-mother's compliance with the case plan as to the furnishment of the address to DSS, the trial court's finding of fact that respondent-mother had failed to provide her address is supported by clear, cogent, and convincing evidence.

Respondent-mother also disputes the segment of Finding of Fact 12 that the parents "have continued to test positive for controlled substances and/or refused to comply with requested drug screens." She concedes that she refused drug screens previously requested by DSS, but that there was no evidence that DSS offered another drug screen after her negative drug test of 5 February 2019. Respondent-mother therefore posits the deduction that there "can be no reasonable inference drawn for the affirmative finding that [she] 'continues to test positive' or 'refused to comply' with requested drug screens without evidence those screens were actually requested." Respondent-mother's creative rationale is unpersuasive.

At the hearing, the social worker testified that after the parents' first substance abuse assessment, they both subsequently tested positive for controlled substances. The social worker confirmed that

respondent-mother refused drug screens previously requested by DSS and that there were occasions when both parents left the DSS building without taking drug tests when asked by the agency to submit to drug screens prior to departure from its site. While the social worker did not testify as to the timing of respondent-mother's positive drug test results or the frequency of respondent-mother's drug screen refusals, nonetheless the trial court's determination that the evidence at the hearing had shown that, during the course of the case plan, respondent-mother along the way had "continued to test positive" and/or had "refused to comply with requested drug screens" is supported by clear, cogent, and convincing evidence. The lack of specificity regarding any positive drug screens or refusals of drug screens by respondent-mother after 5 February 2019 does not render the trial court's determination based on the social worker's competent and uncontroverted testimony to be unsupported.

Respondent-mother next challenges the portion of Finding of Fact 12 which states that the parents "had a recent positive drug screen (02/05/19)," asserting that the determination is contrary to DSS's own evidence. She claims that the social worker testified that respondent-father tested positive on 5 February 2019 while respondent-mother "tested clean." We agree with respondent-mother's assertion on this point; the uncontested testimony of the social worker indeed establishes that respondent-mother tested negative for controlled substances on 5 February 2019. Therefore, we disregard this portion of Finding of Fact 12 as it pertains to respondent-mother. *In re N.G.*, 374 N.C. 891, 901, 845 S.E.2d 16, 24 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

Respondent-mother then contests the aspect of Finding of Fact 12 that she "evaded the service of child support paperwork from the local child support agency." Respondent-mother was not ordered to pay child support as part of her case plan, and therefore this finding is not germane to the trial court's adjudication of grounds for termination under N.C.G.S. § 7B-1111(a)(2), that she willfully left the children in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions prompting removal of the juveniles. As a result, we need not address this challenge. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59.

Respondent-mother contends that the remaining contents of Finding of Fact 12 do not support the trial court's conclusion that she willfully failed to make reasonable progress. Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the

home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). "[A] finding that a parent acted 'willfully' for purposes of N.C.G.S. § 7B-1111(a)(2) 'does not require a showing of fault by the parent.' " *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). This Court has stated that "a trial judge should refrain from finding that a parent has failed to make 'reasonable progress . . . in correcting those conditions which led to the removal of the juvenile' simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (alteration in original) (citation omitted). However, "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* (citation omitted).

Respondent-mother represents that she made progress on her case plan and "changed those things she could control." She asserts that the record demonstrates that she completed parenting classes and obtained a comprehensive clinical assessment which resulted in no further recommendations for her to follow. This assertion of respondent-mother must be evaluated with a recognition that the referenced clinical assessment was based on her self-report alone without any contact or solicitation of information from DSS, after which respondent-mother proceeded to test positive for opiates. While respondent-mother trumpets her regular attendance of visitations with the children and that she only stopped spending such time with the juveniles due to a court order, it is worthy of note that the visitations were ceased due to respondent-mother's repeated noncompliance with stipulated rules to be followed during the visitations. Respondent-mother offers the bald assertion that she had secured housing, and that she "attempted to secure employment and continued to seek out opportunities," while supporting these claims only with the reference that she failed to show up for work on her first day on a new job and consequently was terminated. As to her representation that she obtained housing, respondent-mother did not challenge the trial court's findings that she failed to maintain stable housing and to provide DSS with information regarding her housing, and therefore

these findings are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Respondent-mother additionally maintains that she "refrained from the use of illegal drugs as indicated by her negative drug screen on 5 February 2019"; that she "refrained from domestic violence situations"; and that "DSS could present no evidence that she gained criminal charges or otherwise behaved in a manner that was unfit for the minor children." Respondent-mother's contention that she "refrained from domestic violence situations" is unfounded, as she never completed the domestic violence counseling ordered by the trial court, and continued to relate and reside with respondent-father whom she claimed set her on fire in front of the children. Having presented no evidence of her own during the hearing, respondent-mother's completion of parenting classes and the registration of a single negative drug screen stand alone as affirmative attainments by her toward the successful fulfillment of her case plan, while the remainder of the record illustrates respondent-mother's lack of reasonable progress in correcting the conditions which led to the removal of the children from the home. *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224–25 (1995) ("Extremely limited progress is not reasonable progress.").

Respondent-mother contends that although the trial court's Finding of Fact 12 "contain[s] language characterizing [respondent-mother's] failures as willful," it "never explains for the purposes of appellate review, why this demonstrates willfulness." Specifically, she argues that the trial court never made findings regarding respondent-mother's ability to make progress on her case plan, and the findings "are silent on the ways that [respondent-mother] could overcome barriers such as transportation and cost to complete such a plan."

There is no evidence in the record that respondent-mother had any barriers in her ability to comply with the case plan or any circumstances that would render it unduly difficult for her to meet the requirements. Indeed, respondent-mother has failed to direct this Court to any such evidence. After the removal of the children from the care of respondent-mother, her "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (quoting *In re J.W.*, 173 N.C. App. 450, 465–66, 619 S.E.2d 534, 545 (2005), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006)). We have cited and

applied the pertinent appellate case law regarding the manner in which respondent-mother's failures and incompletions constitute "willfulness" under N.C.G.S. § 7B-1111(a)(2). Therefore, we hold that the findings of fact sufficiently demonstrate willfulness in respondent-mother's lack of progress.

The trial court's findings demonstrate that respondent-mother failed to fully cooperate with the DSS social workers; failed to obtain stable housing, employment, and income; failed to participate in domestic violence counseling; failed to complete a second substance abuse assessment after being ordered to do so; failed to provide DSS with a list of her prescriptions as ordered; and failed to provide DSS with accurate information and court-ordered documentation in order to verify that she was meeting her case plan requirements. Based upon all of the noted shortfalls in respondent-mother's compliance with her case plan as established by the trial court, we conclude that the trial court's findings of fact support its decision to find the existence of the ground that respondent-mother willfully failed to make reasonable progress to correct the conditions that led to the children's removal from the home. *See In re L.E.W.*, 375 N.C. 124, 139, 846 S.E.2d 460, 471 (2020) (holding that even though the mother had "made some progress toward compliance with the provisions of her case plan, she had failed to make reasonable progress toward correcting the conditions that had led to" the child being removed from the home).

In light of our conclusion that the trial court properly adjudicated a ground for terminating respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2), we deem it unnecessary to address respondent-mother's contentions regarding the ground of neglect. *See In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019); *In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' " (alteration in original)).

C. Best Interests Determination

[4] Both respondents argue that the trial court erred in finding that termination of their parental rights as to the child Jimmy served the juvenile's best interests. They challenge several portions of the trial court's Finding of Fact 15 with regard to its best interests conclusion, while claiming that the prototypical nature of the trial court's order terminating their parental rights to Jimmy failed to account for his unique

circumstances. In addition, respondent-mother independently argues that the trial court committed reversible error by failing to address two of the six best interests factors found in N.C.G.S. § 7B-1110(a). Neither respondent-mother nor respondent-father challenges the trial court's determinations as to the best interests of the other five children. While we agree with respondents that two portions of the trial court's Finding of Fact 15 lack sufficient evidentiary foundation, thus compelling us to disregard them, the remaining findings of the trial court and composition of the record provide an abundance of support for the conclusion that termination of respondents' parental rights regarding Jimmy was in the best interests of the child.

In determining whether termination of parental rights is in the best interests of the juvenile,

> the court shall consider the following criteria and make written findings regarding the following *that are relevant*:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019) (emphasis added).

"The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455 (quoting *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527). "The trial court's dispositional findings are binding on appeal if supported by any competent evidence." *In re J.S.*, 374 N.C. at 822, 845 S.E.2d at 75. The trial court's position offers the most candid weighing of the evidence, thus its findings as to the disposition of respondents' parental rights "cannot be upset" if the record

contains any competent evidence supporting such a disposition. *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (quoting *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000)).

Here the trial court entered the following Finding of Fact 15 regarding the factors set forth in N.C.G.S. § 7B-1110(a):

> 15. That the [c]ourt finds by clear, cogent and convincing evidence that it is in the best interests of the juvenile that the parental rights of the respondent parents be terminated in that the respondent parents were given an opportunity to comply with the DSS case plan to reunify with the juvenile; the parents have failed to comply with the terms of the same; that at the permanency planning hearing held 28 January, 2019, DSS was relieved of providing further efforts to reunify the juvenile with the respondent parents; the parents have failed to eliminate those reasons the juvenile came into DSS custody; the parents have failed to provide for the financial support of the juvenile; the juvenile's permanent plan is designated adoption; that DSS is seeking an adoptive family for the juvenile; that an adoptive family has been identified and is willing to take the juvenile and siblings; that a bond has been established with these individuals; that although acknowledging the parents have a bond with the juvenile the visitations for the parents have been suspended by prior [o]rder of the [c]ourt due to their failure to comply with case plan requirements; that one of the remaining barriers to implementing that permanent plan is termination of parental rights; that terminating parental rights of the respondent parents would assist DSS in achieving the permanent plan for the juvenile; that the juvenile is currently placed at Black Mountain Children's Home; the juvenile is thriving in that placement; the juvenile's current physical, emotional and educational needs are being met; these needs were not met in the home of the respondent parents; that the Guardian Ad Litem Report recommended termination of parental rights to be in the interests of the juvenile.

Respondents challenge passages of Finding of Fact 15 as being unsupported by the evidence. First, respondents dispute the portion of the finding which states that Jimmy had formed a bond with the prospective adoptive parents, asserting that DSS did not present any evidence to

support this determination. We disagree. The social worker testified that DSS had identified a prospective adoptive family that was interested in adopting all six children. Her testimony described the bond which had formed between the prospective adoptive family and each of the children, coupled with a fondness between each of them as denoted by an earnest desire of the juveniles to visit and live with the identified family. Reporting generally on all six juveniles, including Jimmy, the social worker stated that each child spoke highly of the prospective adoptive family. She further confirmed Jimmy's inclusion in the process of building the familial bond by describing his visits with the family later in the hearing. We find that this evidence is competent to support the trial court's finding of an established bond between Jimmy and the prospective adoptive parents.

Second, respondents attack the section of Finding of Fact 15 that states that Jimmy was thriving in his placement at Black Mountain Children's Home. Respondent-father points out that Jimmy was removed from the placement in March 2019; both respondents contend that DSS presented no evidence that Jimmy thrived while he resided there. We agree with respondent-father and respondent-mother that this element of Finding of Fact 15 is not supported by the evidence. DSS supplied the report for the termination hearing that indicated that Jimmy was residing and thriving at Black Mountain Children's Home on 22 February 2019, three months before the termination hearing. The social worker testified at the hearing, however, that Jimmy was removed from Black Mountain Children's Home in March 2019 due to behavioral issues and was currently in a therapeutic foster home where he was "doing very well." We therefore disregard the portion of Finding of Fact 15 which states that Jimmy was "currently placed at Black Mountain Children's Home" and was "thriving in that placement," because the evidence does not support it. *See In re N.G.*, 274 N.C. at 901, 845 S.E.2d at 24.

Respondents also challenge the trial court's establishment in Finding of Fact 15 that the Guardian ad Litem (GAL) report recommended that it was in the best interests of the juvenile that respondents' parental rights be terminated. Respondents argue that the GAL report was not admitted into evidence at the hearing and that the GAL did not testify because she was not present at the hearing. We agree with respondents' position in this challenge. The transcript from the hearing indicates only that a copy of the GAL report was "distribute[d]" to the parties and to the trial court before the start of the termination hearing; the transcript does not show that the GAL report was admitted into evidence by the trial court during the hearing. The GAL report was not included in the record on appeal

and there is nothing in the record to show that the GAL testified at the hearing. Therefore, we find that there was not competent evidence of record to support a consideration of the GAL's recommendation by the trial court regarding the best interests of the child Jimmy, and we therefore pay no heed to this portion of Finding of Fact 15. *See In re N.G.*, 374 N.C. at 901, 845 S.E.2d at 24.

Respondent-mother further argues that the trial court failed to make necessary findings regarding all of the factors set forth in N.C.G.S. § 7B-1110. She asserts that the trial court neglected to make findings with respect to both Jimmy's age and the likelihood of his adoption. "Although the trial court must consider each of the factors in N.C.G.S. § 7B-1110(a), written findings of fact are required only 'if there is "conflicting evidence concerning" the factor, such that it is "placed in issue by virtue of the evidence presented before the [trial] court[.]" ' " *In re J.S.*, 374 N.C. at 822, 845 S.E.2d at 75 (alterations in original) (citation omitted). Here, neither party disputed the fact that Jimmy was twelve years old at the time of the termination hearing, and the record does not reflect any controversy concerning the relevance of Jimmy's age in a calculation of his best interests. Therefore, the trial court was not required to make a finding on the factor of Jimmy's age in determining the juvenile's best interests.

As to the factor of Jimmy's likelihood of adoption, the trial court found "that an adoptive family has been identified and is willing to take the juvenile and siblings . . . ." The social worker testified at the termination of parental rights hearing that DSS had "identified [a] preadoptive home that is interested in adopting all six kids" and that the home was "a licensed home through Black Mountain [Children's Home]." In considering the factor of likelihood of adoption as codified in N.C.G.S. § 7B-1110(a)(2), the trial court must endeavor to ensure that the drastic action of terminating a respondent's parental rights operates to achieve the concrete goal of a permanent home for the child. Supported by the competent and uncontested testimony of the social worker, the trial court sufficiently addressed in written format the statutory factor of the juvenile's likelihood of adoption under N.C.G.S. § 7B-1110(a)(2) in finding that there was a home interested in adopting all six children, thus including Jimmy. We do not require a trial court to reproduce the exact language of the statute in its findings, as confronting the concern of the statute will suffice. *See In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language.").

Respondents also contend that the trial court abused its discretion in determining that termination of their parental rights was in Jimmy's best interests because it failed to consider the child's unique circumstances and needs arising from his behavioral issues. Both respondents rely on the Court of Appeals decision in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004) to support their arguments.

The juvenile in *In re J.A.O.* had "a history of being verbally and physically aggressive and threatening, and he ha[d] been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *Id.* at 228, 601 S.E.2d at 230. At the time of the termination hearing, the juvenile was fourteen years old, had been in foster care since he was eighteen months old, and had been in nineteen different treatment centers during that time. *Id.* at 227, 601 S.E.2d at 230. The GAL testified at the hearing that the juvenile was an unlikely candidate for adoption and that termination was not in his best interests because it would "cut him off from any family that he might have." *Id.* On appeal, the Court of Appeals held that the trial court abused its discretion in concluding that termination of the mother's parental rights was in the juvenile's best interests. *Id.* at 228, 601 S.E.2d at 230. The lower appellate court reasoned that "after 'balancing the minimal possibilities of adoptive placement against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring, we must conclude that termination would only cast [the juvenile] further adrift.' " *Id.* (citation omitted). Therefore, the Court of Appeals determined that rendering the juvenile a "legal orphan" was not in the juvenile's best interests. *Id.* at 227, 601 S.E.2d at 230.

The instant case is readily distinguishable from *In re J.A.O.* Here, although Jimmy was diagnosed with attention deficit hyperactivity disorder and post-traumatic stress disorder, his diagnoses and behavioral issues remain significantly less severe than the juvenile's more numerous and challenging conditions in *In re J.A.O.* The trial court in the case at bar did not find that Jimmy's behavioral issues made adoption unlikely, and instead recognized that a pre-adoptive home was interested in adopting Jimmy and his five siblings; on the other hand, the trial court in *In re J.A.O.* determined there that "it is highly unlikely that a child of [the juvenile's] age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family." *Id.* at 228, 601 S.E.2d at 230. Furthermore, while the trial court in the current case expressly found that the evidence sufficiently established the

existence of the ground that respondent-mother failed to show that reasonable progress had been made in correcting those conditions which led to the removal of the juvenile, the trial court in *In re J.A.O.* noted that "evidence tended to show that respondent had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224, 601 S.E.2d at 228. Respondents' reliance on *In re J.A.O.* is misplaced regarding their contention that the trial court here abused its discretion in terminating their parental rights in light of Jimmy's behavioral challenges. In *In re J.A.O.*, the Court of Appeals determined that the juvenile's "woefully insufficient support system" caused the appellate court to "conclude that termination [of parental rights] would only cast [the juvenile] further adrift." *Id.* at 227–28, 601 S.E.2d at 230. We have no basis upon which to find that the trial court abused its discretion regarding Jimmy's circumstances where the evidence supports an optimism for the juvenile's well-being which is already being advanced by a potential adoptive family. Such prospects justify the trial court's decision that termination of respondents' parental rights was in the child Jimmy's best interests.

Conclusion

Based upon the foregoing considerations, this Court determines that the trial court properly acted within its discretion in denying respondent-father's oral motion to continue the termination of parental rights hearing. The trial court did not err in finding that grounds existed to terminate respondent-mother's parental rights based on its determination under N.C.G.S. § 7B-1111(a)(2) that respondent-mother willfully left the juveniles in foster care or in a placement outside the home for more than twelve months without showing to the satisfaction of the trial court that reasonable progress under the circumstances had been made in correcting those conditions that led to the removal of the juveniles, as clear, cogent, and convincing evidence supported this determination. The trial court did not abuse its discretion in concluding that it was in the best interests of the child Jimmy that the parental rights of respondent-mother and respondent-father be terminated. Accordingly, we affirm the trial court's orders terminating respondents' parental rights to each of their six children.

AFFIRMED.

IN RE X.P.W.

[375 N.C. 694 (2020)]

IN THE MATTER OF X.P.W., B.W.

No. 39A20

Filed 20 November 2020

Termination of Parental Rights—no-merit brief—abandonment and neglect—drug use and failure to comply with case plan

The termination of a father's parental rights on the grounds of neglect and abandonment (he had a history of drug-related offenses and failed to comply with his case plan) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 11 October 2019 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared in the Supreme Court on 7 October 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Kelsey L. Kingsbery and Michelle C. Prendergast, for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant father.

HUDSON, Justice.

Respondent-father appeals from the trial court's 11 October 2019 order terminating his parental rights to his minor children X.P.W. and B.W. ("Zeb" and "Ann").[1] Counsel for respondent-father has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in respondent-father's brief are meritless and therefore affirm the trial court's order.

---

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

On 14 March 2018, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS) became involved with respondent-father's family when Zeb tested positive for opiates at birth. After additional testing was performed on Zeb, he also tested positive for Fentanyl, codeine, and morphine. The mother subsequently admitted to YFS that she used non-prescribed oxycodone and Xanax, and had also used Percocet shortly before Zeb's birth. YFS requested that both respondent-father and the mother obtain a substance abuse assessment.

On 24 March 2018, the mother was found unresponsive by respondent-father on the floor of their hotel room after she suffered an overdose. Emergency responders revived the mother using Narcan, and she was taken to the hospital. Ann and several older siblings not party to this appeal were present in the hotel room when the mother overdosed. The mother told YFS that she took too much oxycodone, although hospital records reflect that she informed hospital staff that she had used heroin. On 26 March 2018, Ann was temporarily placed with the father of her older siblings.

On 4 April 2018, YFS filed a petition alleging that Zeb and Ann were neglected and dependent juveniles. YFS recounted how it became involved with the family and claimed the mother had a history of substance abuse. YFS stated that Ann had previously tested positive for opiates at her birth, that the mother had overdosed in August 2017 and had to be revived with six doses of Narcan, and that the mother also tested positive for opiates on 18 January 2018 while on probation. YFS also claimed that respondent-father was on probation and had a history of drug-related offenses. YFS noted that both respondent-father and the mother were supposed to obtain substance abuse assessments following Ann's birth. Respondent-father went to obtain an assessment on 3 April 2018, but YFS had not received the results as of the filing of the petition. The mother had received an assessment on 29 March 2018 but did not attend recommended detox. DSS asserted, however, that neither respondent-father or the mother had presented relatives or other individuals who could provide care for the juveniles. Accordingly, DSS obtained non-secure custody and placed the juveniles in foster care.

Following a hearing held on 23 May 2018, and in accordance with a mediated case plan agreement, the trial court entered an order on 29 June 2018 in which it adjudicated Zeb and Ann neglected juveniles. The trial court ordered respondent-father and the mother to comply with a case plan that included substance abuse treatment, random drugs screens, and maintaining sobriety. The trial court further ordered that

the primary permanent plan for the juveniles be reunification with a secondary plan of adoption.

The trial court held review hearings on 3 August 2018 and 24 October 2018. In orders entered from those hearings on 21 August 2018 and 19 November 2018, respectively, the trial court found that respondent-father and the mother had "engaged in a pattern of excuses" and had not complied with their case plans. The trial court noted that both respondent-father and the mother had positive drug screens, failed to engage in recommended substance abuse treatment, and were inconsistent with visitation. Nevertheless, the trial court ordered that reunification remain part of the permanent plan for the juveniles.

Following a permanency planning review hearing held on 14 January 2019, the trial court entered an order on 4 February 2019 in which it found that respondent-father and the mother were not actively participating in their case plans and were not cooperating with YFS or the guardian ad litem. The trial court also noted that neither respondent-father nor the mother had seen the juveniles since 28 September 2018 and that when they had attended visitation they appeared to be under the influence of substances. Both parents tested positive for drugs on 21 August 2018. Additionally, the trial court found that YFS last had contact with the mother on 14 September 2018, and respondent-father last had contact with YFS on 24 October 2018. Accordingly, the trial court suspended reunification efforts, changed the primary permanent plan for the juveniles to adoption, and changed the secondary permanent plan to guardianship. The trial court also concluded that termination of respondent-father's and the mother's parental rights were in the juveniles' best interests.

On 1 April 2019, YFS filed a petition to terminate respondent-father's and the mother's parental rights on the grounds of neglect, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7) (2019). On 6 June 2019, respondent-father filed an answer denying the material allegations in the petition. The mother passed away due to Fentanyl and cocaine toxicity on 14 June 2019. Following hearings held in August and September 2019, the trial court entered an order on 11 October 2019 in which it determined grounds existed to terminate respondent-father's parental rights due to neglect and abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7). The trial court further concluded it was in Zeb's and Ann's best interests that respondent-father's parental rights be terminated. Accordingly, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel has advised respondent-father of his right to file *pro se* written arguments on his own behalf and provided him with the documents necessary to do so. Respondent-father has not submitted written arguments to this Court.

We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). Respondent-father's counsel identified three issues that could arguably support an appeal, but he also explained why these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief and in light of our consideration of the entire record and applicable law, we are satisfied that the trial court's 11 October 2019 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY

In recognition of the need to continuously examine and improve the North Carolina judicial system in order to ensure that everyone, regardless of their race, gender or gender identification, sexual orientation, ethnicity, national origin, religious beliefs, or economic status, receives equal treatment under the law within our court system, the Supreme Court of North Carolina hereby creates **THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY**.

We recognize the inequalities within our judicial system that stem from a history of deeply rooted discriminatory policies and practices and the ongoing role of implicit and explicit racial, gender, and other biases. While progress has been made, we are cognizant of the persistence of discrimination in our judicial system, and its effects on those who come before our courts.

In recent years, we have documented declining public trust in the fairness and impartiality of our state courts. In 2017, the Final Report of the North Carolina Commission on the Administration of Law and Justice concluded that fifty-three percent of North Carolinians believe that courts are not always fair, and only forty-two percent of the public believes that the courts are "sensitive to the needs of the average citizen."[1] Restoring the trust and confidence of the people we serve will take concerted, proactive effort. Court officials must treat every person with respect and dignity, give proper notice and opportunity to be heard, and provide equal protection under the law, free from discrimination and disparate treatment, and be appropriately accountable for the role that we each play in our system of justice.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be as follows:

Section 1.1: Commission Membership

The Commission shall consist of no more than thirty (30) members who reflect the racial, ethnic, gender, socioeconomic, and geographic

1. N.C. Comm'n on the Admin. of Law and Justice, Final Report at 3–4 (2017), *available at* https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i.

diversity of North Carolina. The Chief Justice or his or her designee shall serve as Chair.

Section 1.2: Selection of Members

The Chief Justice shall appoint the members of the Commission, which shall be drawn from the following stakeholder communities:

a. judges representing the District Court, Superior Court, and Appellate Court divisions;

b. district attorneys;

c. public defenders;

d. clerks of the superior court;

e. magistrates;

f. court managers;

g. family court or custody mediators;

h. tribal court representatives;

i. members of law enforcement, one of whom shall be an elected sheriff and one of whom shall be a chief of police or other law enforcement executive;

j. probation officers;

k. juvenile court counselors;

l. social workers;

m. law school deans;

n. scholars or professors;

o. individuals or organizations who advocate on behalf of historically marginalized groups, justice-involved persons, and victims of domestic violence or human trafficking;

p. attorneys in private practice, selected in consultation with the North Carolina State Bar and North Carolina Bar Association, one of whom shall be a family attorney, DSS attorney, or parent attorney, and one of whom shall be employed by a legal aid program; and

q. non-attorney residents of North Carolina.

The Chief Justice may appoint additional *ex officio* members.

Section 1.3: Terms of Commissioners

With the exception of the chairperson, the members of the Commission shall serve for a term of three years; provided, however, that in the discretion of the Chief Justice, initial appointments may be for a term of between two and four years so as to accomplish staggered terms for the membership of the Commission. No member shall serve more than two consecutive terms.

Section 1.4: Committees

The Commission may form standing or ad hoc committees, which may include additional members at the discretion of the Chair.

SECTION 2: RESPONSIBILITIES OF THE COMMISSION

By virtue of this Order, the Court issues the following charge to the Commission:

The Commission shall make recommendations and formulate plans to reduce and ultimately eliminate disparate treatment, impacts, and outcomes in the North Carolina judicial system based on identifiable demographics.

Section 2.1: Calendar Year 2021

The Court issues the following specific charge to the Commission for calendar year 2021:

a. recommend such rules, policies, or procedures as are necessary to eliminate adverse consequences based solely on inability to pay a legal financial obligation;

b. evaluate jury selection practices and procedures and recommend such changes to rules, policies, and procedures as are necessary to ensure that no person is prevented from serving on a jury as a result of explicit or implicit bias;

c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication reports on Pretrial Justice and Criminal Case Management;

d. make recommendations regarding the display of symbols and images in courthouses and judicial system buildings that have the effect of diminishing public trust and confidence in the impartiality and fairness of the judicial system; and

e. in coordination with the School of Government and other education providers, develop effective, ongoing educational programming for elected and appointed officials, court system personnel, and the private bar to build cultural competency and understanding of systemic racism, implicit bias, disparate outcomes, the impacts of trauma and trauma informed practices, and procedural fairness.

Section 2.2: Calendar Year 2022

The Court issues the following specific charge to the Commission for calendar year 2022:

a. develop and submit a plan to collect and disseminate data on court performance, including but not limited to criminal charging, intermediate and final case outcomes, case processing times, and racial and gender disparities;

b. develop and submit a plan for eliminating racial and gender disparities in the administration of abuse, neglect, and dependency cases;

c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication report on Improving Indigent Defense Services;

d. develop a plan for obtaining and analyzing feedback from the public, jurors, litigants, witnesses, lawyers, victims, law enforcement, and system employees regarding the performance of the judicial system and system actors.

Section 2.3 Additional Recommendations

The Commission may make such other recommendations as are determined to be necessary or prudent to accomplish its charge.

Section 3: Coordination With Other Commissions

The Commission shall, as appropriate, solicit information and recommendations from, and coordinate with, the following:

- the North Carolina Equal Access to Justice Commission;

- the North Carolina Sentencing and Policy Advisory Commission;

- the Chief Justice's Family Court Advisory Commission;
- the Commission on Indigent Defense Services;
- the North Carolina Judicial Standards Commission;
- the North Carolina Human Trafficking Commission;
- the Governor's Crime Commission;
- the Governor's Task Force for Racial Equity in Criminal Justice;
- the Legislative Task Force on Justice, Law Enforcement and Community Relations; and
- Such other commissions, associations, conferences, or agencies as the Commission deems appropriate.

Ordered by the Court in Conference, this the 13th day of October, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

RESPONSE OF SENIOR ASSOCIATE JUSTICE PAUL NEWBY TO THE COURT'S ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY

Equal justice under the law is a bedrock principle of our judicial system. As recognized in our State Constitution, "justice shall be administered without favor, denial, or delay."[1] If our courts fail to provide equal justice, they fail to accomplish one of their fundamental tasks. It is also important that North Carolinians believe in the judiciary's commitment and ability to administer justice impartially and in accordance with the law. The formal legal authority of our courts will not mean very much if we ever reach a point where a large majority of citizens have lost faith in the judicial system.

Consistent with my devotion to these principles, I would like to support the majority's administrative order establishing the Chief Justice's Commission on Fairness and Equity. Unfortunately, however, the order is seriously flawed in ways that I cannot in good conscience overlook. First, the timing of this order appears political. Second, and perhaps most troublesome, the order makes factual findings without evidence, based solely on the subjective personal opinions of a majority of this Court, regarding matters which have and will come before the Court. Lastly, the order's directives to the new commission improperly require it to invade the General Assembly's lawmaking powers through the adoption of rules and policies on matters within the legislature's authority.

The timing of the order seems political: The Supreme Court's current majority has been in place for over a year and a half and will remain in place for two months after the election. However, the majority has chosen to create the commission only three weeks before the election, just as early voting begins. It begs the question of why now. The 2017 report that the order cites, *Final Report of the North Carolina Commission on the Administration of Law and Justice*, states that 76% of individuals polled believe judges' decisions are influenced by politics. Unfortunately, given its timing, today's order will only serve to increase the belief that judges make decisions with political considerations in mind.

Judges should not prejudge issues that are currently pending before the Court: The primary role of the judicial branch is to fairly and impartially decide the cases which come before it. Judges are not to make broad policy pronouncements which will call into question their impartiality. The order creating the commission makes findings based solely on the personal opinions of the majority of the Court. The order states

that our judicial system perpetuates inequalities "that stem from a history of deeply rooted discriminatory policies and practices" and refers to "the ongoing role of implicit and explicit racial, gender, and other biases." Further the order states, "we are cognizant of the persistence of discrimination in our judicial system and its effects on those who come before our courts." These unsupported findings expose the majority's personal opinions and seem to prejudge matters at issue in criminal cases currently pending and likely to come before the Court. Those pending matters raise the issue of the improper role of racial bias in a particular case or within the justice system.[2] By their statements it seems the majority views the North Carolina judicial system and its current participants as biased. By making these policy pronouncements, the majority wrongly tilts the scales of justice in favor of parties claiming discrimination in violation of this Court's duty to approach each case impartially and make decisions based on the applicable law and the evidence presented.

Lawmaking belongs to the legislative branch, not the judicial branch. When judges invade the lawmaking arena, no one is left to hear disputes: Under our constitutional system, the General Assembly, not the judiciary, establishes policies through laws, including the State's criminal justice policies. The order creating the commission seems to insert the judicial branch into the policymaking arena. Once the Court makes policy decisions by rulemaking and other administrative authority, it can no longer provide a fair and neutral review of that policy. If, for instance, this Court ultimately adopts administrative orders that significantly reduce fines in criminal cases,[3] school funding would suffer because the clear proceeds of those fines go to the public schools.[4] Local boards of education and public school systems would have no mechanism for disputing the lawfulness of those orders. When the Court takes a policymaking role, there is no one left to impartially decide a matter when a dispute arises.[5]

The goal of the judiciary is that every person will be afforded equal justice under the law, which is an ideal I wholeheartedly embrace. The order creating the Commission on Fairness and Equity, however, is flawed because of its political timing, its unsupported broad policy statements which prejudge issues raised in pending and future cases, and its improper placement of the judiciary in a legislative policymaking role. I support the establishment of a commission properly tasked to perform a good faith examination of our judicial system, but the commission as established by this order exceeds the appropriate parameters of the judicial branch of government.

1. N.C. Const. art. I, § 18.

2. *See*, *e.g.*, *State v. Crump*, No. 151PA18 (N.C. argued Oct. 12, 2020) (deals in part with questioning on racial bias during jury selection); *see also State v. Augustine*, No. 130A03-2, 2020 WL 5742626 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Golphin*, 847 S.E.2d 400 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Walters*, 847 S.E.2d 399 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Robinson*, 375 N.C. 173, 846 S.E.2d 711 (Aug. 14, 2020) (Racial Justice Act case); *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (June 5, 2020) (*Batson*-related case, which is a legal principle on racial discrimination in jury selection practices); *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (June 5, 2020) (Racial Justice Act case); *State v. Burke*, 374 N.C. 617, 843 S.E.2d 246 (June 5, 2020) (Racial Justice Act case); *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (May 1, 2020) (*Batson*-related case).

3. Section 2.1.a of the order directs the commission to recommend rules and policies regarding legal financial obligations.

4. N.C. Const. art. IX, § 7.

5. Other examples where the order embroils the commission in policy matters include section 2.1.b, "jury selection practices and procedures," and section 2.2.a, "criminal charging."

ORDER AMENDING THE NORTH CAROLINA BUSINESS COURT RULES

Pursuant to Section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 3 of the North Carolina Business Court Rules.

* * *

Rule 3. Filing and Service

3.1. Mandatory electronic filing. Except as otherwise specified in these rules, all filings in the Court must be made electronically through the Court's electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice. Counsel who appear in the Court are expected to have the capability to use the electronic-filing system. Instructions for filing documents through the Court's electronic-filing system are available on the Court's website. Counsel should exercise diligence to ensure that the description of the document entered during the filing process accurately and specifically describes the document being filed.

3.2. Who may file. A filing through the electronic-filing system may be made by counsel, a person filing on counsel's behalf, or a pro se party. Parties who desire not to use the electronic-filing system may file a motion for relief from using the system, but the Court will grant that relief for counsel only upon a showing of exceptional circumstances. A request by a pro se party to forgo use of the electronic filing system will be determined on a good-cause standard.

3.3. User account. Counsel who appear in the Court in a particular matter ("counsel of record") and pro se parties who are not excused from using the electronic filing system must promptly create a user account through the Court's website. Any person who has established a user account must maintain adequate security over the password to the account.

3.4. Electronic signatures.

(a) **Form**. A document to be filed that is signed by counsel must be signed using an electronic signature. A pro se party must also use an electronic signature on any document that the party is permitted to file by e-mail pursuant to BCR 3.2. An electronic signature consists of a person's typed name preceded by the symbol "/s/." An electronic

signature serves as a signature for purposes of the Rules of Civil Procedure.

(b) **Multiple signatures.** A filing submitted by multiple parties must bear the electronic signature of at least one counsel for each party that submits the filing. By filing a document with multiple electronic signatures, the lawyer whose electronic identity is used to file the document certifies that each signatory has authorized the use of his or her signature.

(c) **Form of signature block**. Every signature block must contain the signatory's name, bar number (if applicable), physical address, phone number, and e-mail address.

3.5. Format of filed documents. All filings must be made in a file format approved by the Court. The Court maintains a list of approved formats on its website. Pleadings, motions, and briefs filed electronically must not be filed in an optically scanned format, unless special circumstances dictate otherwise. Proposed orders must be filed in a format permitted by the filing instructions on the Court's website. The electronic file name for each document filed with the Court must clearly identify its contents.

3.6. Time of filing. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date, unless the Court orders otherwise.

3.7. Notice of ~~filing~~Filing. When a document is filed, the Court's electronic-filing system generates a Notice of Filing. The Notice of Filing appears in the user account for all counsel of record and pro se parties who have created a user account. Filing is not complete until issuance of the Notice of Filing. A document filed electronically is deemed filed on the date stated in the Notice of Filing.

3.8. Notice and entry of orders, judgments, and other matters. The Court will transmit all orders, decrees, judgments, and other matters through the Court's electronic-filing system, which, in turn, will generate a Notice of Filing to all counsel of record. The issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure. The Court will file a copy of each order, decree, or judgment with the Clerk of Superior Court in the county of venue. If a pro se party is permitted to forgo use of the electronic-filing system under BCR 3.2, the Court will deliver a copy of every order, decree, judgment, or other matter to that pro se party by alternative means.

3.9. Service.

(a) ~~**Effect of Notice of Filing**~~**Service through the Court's electronic-filing system defined**. After an action has been designated as a mandatory complex business case or otherwise assigned to the Court, the issuance of a Notice of Filing ~~constitutes adequate service under the Rules of Civil Procedure of the filed document~~is service under Rule 5(b) of the Rules of Civil Procedure. Service by other means is ~~not required unless~~ required if the party served is a pro se party who has not established a user account. ~~Service of materials on pro se parties is governed by BCR 3.9(e). Documents filed with the Court must bear a certificate of service stating that the documents have been filed electronically and will be served in accordance with this rule~~.

(b) **Certificate of Service**. A Notice of Filing is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

~~(b)~~(c) **E-mail addresses**. Each counsel of record and pro se ~~parties~~party who ~~have~~has established a user account must provide the Court with a current e-mail address and maintain a functioning e-mail system. The Court will issue a Notice of Filing to the e-mail address that a person with a user account has provided to the Court.

~~(c)~~(d) **Service of non-filed documents**. When a document must be served but not filed, the document must be served by e-mail unless (i) the parties have agreed to a different method of service or (ii) the Case Management Order calls for another manner of service. ~~Service by e-mail under this rule constitutes adequate service under Rule 5 of the Rules of Civil Procedure~~.

~~(d) **Effect on Rule 6(e) of the Rules of Civil Procedure**. Electronic service made under these rules through the electronic filing system or by e-mail under BCR 3.9(c) is treated the same as service by mail for purposes of Rule 6(e) of the Rules of Civil Procedure.~~

(e) **Service on a pro se ~~parties~~party**. All documents filed with the Court must be served upon a pro se party by any method allowed by the Rules of Civil Procedure, unless the Court or these rules direct otherwise.

3.10. Procedure when the electronic-filing system appears to fail. If a person attempts to file a document, but (i) the person is unable for technical reasons to transmit the filing to the Court, (ii) the document appears to have been transmitted to the Court but the person who filed the document does not receive a Notice of Filing, or (iii) some other technical reason prevents a person from filing the document, then the person attempting to file the document must make a second attempt at filing.

If the second attempt fails, the person may (i) continue further attempts to file or (ii) notify the Court of the technical failure by phone call to the judicial assistant for the presiding Business Court judge and e-mail the document for which filing attempts were made to filinghelp@ncbusinesscourt.net. The e-mail must state the date and time of the attempted filings and a brief explanation of the relevant technical failure(s). The e-mail does not constitute e-filing, but serves as proof of an attempt to e-file in order to protect a party in the event of an imminent deadline and satisfies the deadline, notwithstanding BCR 3.7, unless otherwise ordered. The e mail should also be copied to counsel of record. The Court may ask the person to make another filing attempt.

The Court will work with the parties on an alternative method of filing, such as a cloud-based file-sharing system, if the parties anticipate or experience difficulties with filing voluminous materials (e.g., exhibits to motions and final administrative records) using the Court's electronic-filing system. In such event, counsel should contact the presiding Business Court judge's judicial assistant for assistance.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the Notice of Filing.

3.11. Filings with the Clerk of Superior Court. Unless otherwise directed by the Administrative Office of the Courts, the Clerk of Superior Court in the county of venue maintains the official file for any action designated to the Court, and the Court is not required to maintain copies of written materials provided to it. Accordingly, material listed in Rule 5(d) of the Rules of Civil Procedure must be filed with the Clerk of Superior Court in the county of venue, either before service or within five days after service.

3.12. Appearances. Counsel whose names appear on a signature block in a court filing need not file a separate notice of appearance for the action. After making an initial filing with the Court, counsel should verify that their names and contact information are properly listed on the docket for the action on the Court's electronic filing system. Counsel

whose names do not appear on that docket, but whose names should appear, should contact the judicial assistant for the presiding Business Court judge and request to be added. Out-of-state attorneys may be added to that docket only after admission pro hac vice to appear in the action.

* * *

These amendments to the North Carolina Business Court Rules are effective immediately.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 13th day of October, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 7, 9, 10, 11, 12, 18, 27, and 28, and Appendixes A and B.

* * *

~~Rule 7. Preparation of the Transcript; Court Reporter's Duties~~

~~(a) **Ordering the Transcript.**~~

~~(1) **Civil Cases**. Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to produce the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record and upon the person designated to produce the transcript. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to produce the transcript. In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).~~

~~(2) **Criminal Cases**. In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.~~

~~When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to produce the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number, and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.~~

~~(b) **Production and Delivery of Transcript**.~~

~~(1) **Production**. In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript.~~

~~In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract on the person designated to produce the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one hundred-twenty days to produce and electronically deliver the transcript in capitally-tried cases.~~

~~In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one-hundred-twenty-five days to produce and electronically deliver the transcript in capitally-tried cases.~~

~~The transcript format shall comply with standards set by the Administrative Office of the Courts.~~

~~Except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may, pursuant to Rule 27(c)(1), extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made pursuant to Rule 27(c)(2) to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally-tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.~~

~~(2) **Delivery**. The court reporter, or person designated to produce the transcript, shall electronically deliver the completed transcript to the parties, including the district attorney and Attorney General of North Carolina in criminal cases, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to produce the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.~~

~~(3) **Neutral Transcriptionist**. The neutral person designated to produce the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.~~

Rule 7. Transcripts

(a) **Scope**. This rule applies to the ordering, preparation, delivery, and filing of each transcript that is to be designated as part of the record on appeal.

(b) **Ordering by a Party**. A party may order a transcript of any proceeding that the party considers necessary for the appeal.

(1) **Transcript Contract**. A party who orders a transcript for the appeal after notice of appeal is filed or given must use an Appellate Division Transcript Contract form to order the transcript. That form is available on the Supreme Court's rules webpage.

(2) **Service of Transcript Contract**. An appellant must serve its transcript contract on each party and on the transcriptionist no later than fourteen days after filing or giving notice of appeal. An appellee must serve its transcript contract on each party and on the transcriptionist no later than twenty-eight days after any appellant files or gives notice of appeal.

(3) **Transcript Documentation**. A party who has ordered a transcript for the appeal, whether ordered before or after notice of appeal, must complete an Appellate Division Transcript Documentation form. That form is available on the Supreme Court's rules webpage.

(4) **Service of Transcript Documentation**. A party must serve the transcript documentation on all other parties within the time allowed under subsection (b)(2) of this rule for that party to serve a transcript contract.

(c) **Ordering by the Clerk of Superior Court**. If a party is indigent and entitled to appointed appellate counsel, then that party is entitled to have the clerk of superior court order a transcript on that party's behalf.

(1) **Appellate Entries.** The clerk of superior court must use an appropriate appellate entries form to order a transcript. Those forms are available on the Judicial Branch's forms webpage.

(2) **Service of Appellate Entries**. The clerk must serve the appellate entries on each party and on each transcriptionist no later than fourteen days after a judge signs the form. Service on a party who has appointed appellate counsel must be made upon that party's appointed appellate counsel.

(d) **Formatting**. The transcriptionist must format the transcript according to standards set by the Administrative Office of the Courts.

(e) **Delivery**.

(1) **Deadlines**. The transcriptionist must deliver the transcript to the parties no later than ninety days after having been served with the transcript contract or the appellate entries, except:

a. In a capitally tried case, the deadline is one hundred eighty days.

b. In an undisciplined or delinquent juvenile case under Subchapter II of Chapter 7B of the General Statutes, the deadline is sixty days.

c. In a special proceeding about the admission or discharge of clients under Article 5 of Chapter 122C of the General Statutes, the deadline is sixty days.

(2) **Certification**. The transcriptionist must certify to the parties and to the clerk of superior court that the transcript has been delivered.

(f) **Filing.** As soon as practicable after the appeal is docketed, the appellant must file each transcript that the parties have designated as part of the record on appeal. Unless granted an exception for good cause, the appellant must file each transcript electronically.

(g) **Neutral Transcriptionist**. The transcriptionist must not have a personal or financial interest in the proceeding, unless the parties otherwise agree by stipulation.

* * *

Rule 9. The Record on Appeal

(a) **Function; Notice in Cases Involving Juveniles; Composition of Record**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the ~~verbatim~~ transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered

out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the ~~verbatim~~ transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or

a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) **Composition of the Record in Criminal Actions**. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire ~~verbatim~~ transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in ~~capitally tried~~capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the ~~verbatim~~ transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(b) **Form of Record; Amendments**. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers**. Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified**. The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the ~~verbatim~~ transcript

of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, statements and events at evidentiary and non evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the ~~verbatim~~ transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that ~~Verbatim~~ Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the record on appeal that the testimonial evidence will be presented in the ~~verbatim~~ transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a ~~verbatim~~ transcript of those proceedings has been made, appellant may also designate that the ~~verbatim~~ transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the ~~verbatim~~ transcript that has been made, provided that when the ~~verbatim~~ transcript

is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the ~~verbatim~~ transcript as a proposed alternative record on appeal.

(3) **~~Verbatim~~ Transcript of Proceedings—Settlement, Filing, ~~Copies~~Notice, Briefs**. Whenever a ~~verbatim~~ transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the ~~settled record on appeal and~~ transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing a copy of the exhibit with the clerk of the appellate court. The copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. A copy that impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) [Reserved]

(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this

is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

* * *

Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal

(a) **Preserving Issues During Trial Proceedings**.

(1) **General.** In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) **Jury Instructions**. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence**. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented

all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) **Plain Error**. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) **Appellant's Proposed Issues on Appeal**. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) **Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law**. Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its

brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the ~~verbatim t~~ranscript of proceedings, if one is filed under Rule 9(c)(2).

* * *

Rule 11. Settling the Record on Appeal

(a) **By Agreement**. Within ~~thirty-five~~forty-five days after ~~the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered~~all of the transcripts that have been ordered according to Rule 7 are delivered (seventy days in ~~capitally tried~~capitally tried cases)~~,~~ or ~~thirty-five~~forty-five days after ~~appellant files~~the last notice of appeal is filed or given, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal that has been prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in ~~capitally tried~~capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in ~~capitally tried~~capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served,

submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the ~~proposed~~ record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any ~~verbatim~~ transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification

of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 12. Filing the Record; Docketing the Appeal; Copies of the Record

(a) **Time for Filing Record on Appeal**. Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal**. At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1 288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal**. The appellant shall file one copy of the printed record on appeal, one copy of each exhibit designated pursuant to Rule 9(d), one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), and one copy of any ~~paper~~ deposition or administrative hearing transcript~~, and shall cause any court proceeding transcript to be filed electronically pursuant to Rule 7~~. The appellant is encouraged to file each of these documents electronically, if permitted to do so by the electronic-filing site. Unless granted an exception for good cause, the appellant shall file one

copy of each transcript that the parties have designated as part of the record on appeal electronically pursuant to Rule 7. The clerk will reproduce and distribute copies of the printed record on appeal as directed by the court, billing the parties pursuant to these rules.

* * *

Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, ~~the appealing party may contract with a court reporter for production of such parts of the proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7~~then the parties may order transcripts using the procedures applicable to court proceedings in Rule 7.

(c) **Composition of Record on Appeal**. The record on appeal in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the ~~verbatim~~ transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the administrative tribunal or any of its individual commissioners, deputies, or

divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the ~~verbatim~~ transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the ~~verbatim~~ transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84 4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within ~~thirty-five~~forty-five days after ~~filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3)~~all of the transcripts that have been ordered according to Rule 7 and Rule 18(b)(3) are delivered or forty-five days after the last notice of appeal is filed, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal that has been prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled

by agreement under Rule 18(d)(1), the appellant shall, ~~within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3)~~within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the ~~proposed~~ record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 18(c) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record

on appeal, but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any ~~verbatim~~ transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into

evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the

Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal**. Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 27. Computation and Extension of Time

(a) **Computation of Time**. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service**. Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, or by e-mail if allowed by these rules, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted**. Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules, or by order of court, for doing

any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division**. The trial tribunal for good cause shown by the appellant may extend once, for no more than thirty days, the time permitted by: (1) Rule 7~~(b)(1)~~ for ~~the person designated to prepare the transcript to produce such transcript~~ a transcriptionist to deliver a transcript; and (2) Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division**. All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined**. Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

* * *

Rule 28. Briefs—Function and Content

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of

review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues**. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript

of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file ~~verbatim~~ portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required**. Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced ~~verbatim~~ in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required**. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced ~~verbatim~~ in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record**. References in the briefs to parts of the printed record on appeal and to parts of the ~~verbatim~~ transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs**. Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) **Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no

later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Appendix A. Timetables for Appeals

Timetable of Appeals from Trial Division and Administrative Tribunals Under Articles II and IV of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (Civil)	30	Entry of Judgment (Unless Tolled)	3(c)
Cross-Appeal	10	Service and Filing of a Timely Notice of Appeal	3(c)
Taking Appeal (Administrative Tribunal)	30	Receipt of Final Administrative Tribunal Decision (Unless Statutes Provide Otherwise)	18(b)(2)
Taking Appeal (Criminal)	14	Entry of Judgment (Unless Tolled)	4(a)
~~Ordering Transcript (Civil, Administrative Tribunal)~~Serving Transcript Contract (Appellant)	14	Filing or Giving Notice of Appeal	~~7(a)(1)~~ 7(b)(2) 18(b)(3)
Serving Transcript Contract (Appellee)	28	Appellant Filing or Giving Notice of Appeal	7(b)(2) 18(b)(3)
Ordering Transcript ~~(Criminal~~ Indigent) Serving Appellate Entries (Clerk of Superior Court)	14	~~Order Filed by Clerk of Superior Court~~Judge Signing Appellate Entries	~~7(a)(2)~~ 7(c)(2)
~~Preparing and Delivering Transcript (Civil, Non-Capital Criminal)~~	~~60~~	~~Service of Order for Transcript~~Service of Transcript Contract or Appellate Entries	~~7(b)(1)~~ 7(e)(1)
~~(Capital Criminal)~~	~~120~~		
Delivering Transcript (General Rule)	90		
(Capitally Tried Cases)	180		
(Undisciplined or Delinquent Juvenile Cases)	60		

(Special Proceedings about the Admission or Discharge of Clients)	60		
Serving Proposed Record on Appeal ~~(Civil, Non-Capital Criminal)~~ ~~(Administrative Tribunal)~~ (General Rule)	 ~~35~~ ~~35~~ 45	~~Notice of Appeal (No Transcript) or Court Reporter's Certificate of Delivery of Transcript~~All Transcripts Being Delivered or Notice of Appeal, Whichever is Later	11(b) 18(d)
Serving Proposed Record on Appeal ~~(Capital)~~(Capitally Tried Cases)	70	~~Court Reporter's Certificate of Delivery~~All Transcripts Being Delivered	11(b)
Serving Objections or Proposed Alternative Record on Appeal ~~(Civil, Non-Capital Criminal)~~ ~~(Capital Criminal)~~ ~~(Administrative Tribunal~~) (General Rule) (Capitally Tried Cases)	 ~~30~~ ~~35~~ ~~30~~ 30 35	Service of Proposed Record ~~Service of Proposed Record~~	11(c) 18(d)(2)
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	11(c) 18(d)(3)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	11(c) 18(d)(3)
Filing Record on Appeal in Appellate Court	15	Settlement of Record on Appeal	12(a)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Filing the Record on Appeal in Appellate Court (60 Days in Death Cases)	13(a)

Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief (60 Days in Death Cases)	13(a)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument (Usual Minimum Time)	30	Filing Appellant's Brief	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

Timetable of Appeals from Trial Division Under Article II, Rule 3.1, of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal	30	Entry of Judgment	3.1(b); N.C.G.S. § 7B-1001
Notifying Court Reporting Manager	1 (Business)	Filing Notice of Appeal	3.1(c)
Assigning Transcriptionist	5 (Business)	Completion of Expedited Juvenile Appeals Form	3.1(c)
Delivering a Transcript of the Proceedings	40	Assignment by Court Reporting Manager	3.1(c)
Serving Proposed Record on Appeal	15	Delivery of Transcript	3.1(d)
Serving Notice of Approval, Specific Objections or Amendments, or Proposed Alternative Record on Appeal	10	Service of Proposed Record on Appeal	3.1(d)

Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	3.1(d); 11(c)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	3.1(d); 11(c)
Filing Record on Appeal in Appellate Court	5 (Business)	Settlement of Record on Appeal	3.1(d)
Filing Appellant's Brief	30	Filing of Record on Appeal	13(a)(1)
Filing Appellee's Brief	30	Service of Appellant's Brief	13(a)(1)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	13(a)(1); 28(h)

Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review Prior to Determination	15	Docketing Appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or From Order of Court of Appeals Denying Petition for Rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	Filing of First Notice of Appeal	14(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Filing Notice of Appeal Certification of Review	14(d) 15(g)(2)

Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief	14(d) 15(g)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellee's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule ~~7(b)(1)~~27 authorizes the trial tribunal to grant only one extension of time ~~for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed~~the delivery of a transcript. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

* * *

Appendix B. Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using font no smaller than 12-point and no larger than 14-point using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not

limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)

(or)

(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	
v	)	No. _____
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record on appeal that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), ~~court reporter~~ transcriptionist, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7."

Entire transcripts should not be inserted into the printed record on appeal, but rather should be electronically filed by the ~~court reporter~~appellant pursuant to Rule 7. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and

other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the record on appeal should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]

By: _____
[Name]

Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2021 and apply to cases that are appealed on or after that date.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends Rule 4 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) Persons Required to Attend. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to

writing and signed, as provided in subsection (c) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement.**

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties and their attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims).

Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

This amendment to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions becomes effective on 23 November 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends Rule 4 of the Rules of Mediation for Matters Before the Clerk of Superior Court.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:

a. the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, so orders.

(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed

settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in a mediation at the discretion of the mediator.

(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing

of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

* * *

This amendment to the Rules of Mediation for Matters Before the Clerk of Superior Court becomes effective on 23 November 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends Rule 4 of the Rules for Settlement Procedures in District Court Family Financial Cases.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be

required to give legal effect to their understanding. If the parties intend to submit their agreement to the court for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or
2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 23 November 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 17th day of November, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of November, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS