375 N.C.—No. 4 Pages 698-965

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY 19, 2021

MAILING ADDRESS: The Judicial Department
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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

Filed 11 December 2020

In re A.K.O. 698
In re A.L.S. 708
In re A.M.O. 717
In re A.P. 726
In re B.E. 730
In re C.A.H. 750
In re D.M. 761
In re J.S. 780
In re K.D.C. 784
In re K.P.-S.T. 797
In re N.K. 805
In re Q.B. 826
In re R.L.D. 838
In re S.D.H. 846
In re T.N.C. 849
In re Z.O.G.-I. 858
State ex rel. Utils. Comm'n
v. Stein 870

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APPEAL AND ERROR

Preservation of issues—termination of parental rights—child's due process rights—In a termination of parental rights action, respondent-father failed to preserve for appellate review an argument that the trial court failed to protect his fifteen-year-old son's procedural rights—by providing notice and an opportunity to appear and give testimony independent of the court-appointed guardian ad litem, protections not specifically granted in N.C.G.S. § 7B-1110—where respondent did not raise the issue for the trial court's consideration. **In re B.E., 730.**

NATIVE AMERICANS

Indian Child Welfare Act—compliance—termination of parental rights—The trial court's order terminating a mother's parental rights in her child was remanded for further proceedings where the record did not contain sufficient information to show whether the trial court adequately ensured that the notice requirements of the Indian Child Welfare Act were met. The trial court had reason to know that the child might be an Indian child, the notices sent by the department of social services (DSS) to the relevant tribes were not contained in the record, and there was no indication that DSS sought assistance from the Bureau of Indian Affairs after several of the tribes did not respond to the notices. **In re N.K., 805.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—abuse of discretion analysis—The Supreme Court declined to deviate from well-established precedent that a trial court's best interest determination in a termination of parental rights case should be reviewed for abuse of discretion, rather than de novo, as argued by respondent-mother. In this case, the trial court did not abuse its discretion by concluding termination of respondent's parental rights was in the child's best interest based on detailed dispositional findings addressing the statutory factors contained in N.C.G.S. § 7B-1110(a), and that the child's best interests lay in being adopted by his maternal aunt and uncle with whom he had resided for several years. **In re A.M.O., 717.**

Best interests of the child—adoption or guardianship—sixteen-year-old minor—misapprehension of law—remand—Where the trial court's best interests determination—which found that termination of parental rights would aid in the accomplishment of the permanent plan of adoption or guardianship—appeared to rest upon a misapprehension of the legal differences between adoption and guardianship (termination was not necessary to accomplish guardianship), the matter was remanded for reconsideration of guardianship as a dispositional alternative. The trial court was instructed to give proper weight to the now-seventeen-year-old minor's age, his lack of consent to adoption, his bond with his parents, and the availability of a family to be appointed as guardians. **In re A.K.O., 698.**

Best interests of the child—misapprehension of law—co-parenting inconsistent with termination—The trial court's disposition order concluding that termination of respondent-father's parental rights in his son was in the son's best interests was vacated and remanded for reconsideration where the court's order—directing the department of social services to continue to allow respondent-father to co-parent his son and to honor the son's request not to be adopted by his foster parents—indicated a misapprehension of the law regarding the effect termination would have on the parental-child relationship. **In re Z.O.G.-I., 858.**

Best interests of the child—statutory factors—likelihood of adoption—child's wishes—The trial court did not abuse its discretion by concluding that termination of respondent-father's parental rights was in the best interests of his fifteen-year-old son where the court's findings addressed each of the dispositional factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence. The findings demonstrated the court's consideration of the son's views on being adopted, and supported the court's determination that the son's best interests would not be served by requiring him to consent to adoption. **In re B.E., 730.**

Best interests of the child—statutory factors—sufficiency of findings—adoption—The trial court did not abuse its discretion by concluding that termination of a mother's and father's parental rights was in their nine-year-old daughter's best interests where the trial court appropriately considered the statutory factors, making unchallenged findings that the daughter was bonded with her prospective adoptive family and that termination would aid in the permanent plan of adoption. Explicit written findings were not required on matters for which there was no conflict in the evidence. **In re A.K.O., 698.**

Best interests of the child—sufficiency of dispositional findings—mother's poverty and mental health—dispositional alternatives—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in her child's best interests where the trial court made sufficient dispositional findings and performed the proper statutory analysis. The trial court was not required to make dispositional findings concerning the mother's poverty and mental health issues, and it also was not required to consider whether an alternative plan of guardianship that included visitation would have been in the child's best interests. **In re N.K., 805.**

Competency inquiry—parental guardian ad litem—In a termination of parental rights proceeding, the trial court did not abuse its discretion by failing to conduct a second inquiry into whether respondent-mother was entitled to a guardian ad litem despite respondent being adjudicated incompetent and appointed a guardian of the person in a separate adult protective services proceeding. Although these events occurred after the trial court's first determination that respondent was not entitled

to a Rule 17 guardian, the trial court was not required to hold another competency hearing before proceeding with termination where there was sufficient evidence that respondent was competent to take part in the proceedings without the aid of a guardian ad litem. **In re Q.B., 826.**

Competency inquiry—parental guardian ad litem—obligation of petitioning agency to request—In a termination of parental rights proceeding, the petitioning department of social services was not obligated to request the appointment of a guardian ad litem for respondent-mother if there was reason to believe she was incompetent where Civil Procedure Rule 17(c) imposed no such requirement. **In re Q.B., 826.**

Competency of parent—appointment of guardian ad litem—trial court's discretion—In a termination of parental rights case, the trial court did not abuse its discretion by failing to inquire into whether a guardian ad litem should have been appointed for respondent-mother, who had untreated mental health problems and a mild intellectual deficit. The trial court had ample opportunity to observe the mother during the proceedings, and the record tended to show that she was not incompetent. **In re N.K., 805.**

Effective assistance of counsel—brief cross-examination—conciliatory closing argument—A mother received effective assistance of counsel at a termination of parental rights hearing, even though her attorney only conducted a brief cross-examination of the department of social service's (DSS) key witness and gave a closing argument in which he largely agreed with DSS's presentation of facts that were unfavorable to the mother. Despite the conciliatory tone of his closing argument, the attorney sufficiently advocated for the mother by mentioning several positive facts in her favor, expressing that she did not want to lose her parental rights, and asking the court to rule against terminating her rights. **In re T.N.C., 849.**

Grounds for termination—dependency—appropriate alternative child care arrangement—no allegation or findings—The trial court erred by concluding that grounds of dependency existed to terminate a mother's parental rights in her child where the department of social services made no allegation that the mother lacked an appropriate alternative child care arrangement and the trial court made no findings addressing the issue. **In re K.D.C., 784.**

Grounds for termination—dependency—incarceration—The trial court did not err by terminating a mother's parental rights in her children on the grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where the mother would be incarcerated for at least twenty-two months beyond the termination hearing and there was no appropriate alternative child care arrangement. The trial court's error in finding that her expected release date was approximately eight additional months later (thirty months) was harmless. **In re A.L.S., 708.**

Grounds for termination—failure to make reasonable progress—The trial court properly terminated respondent-father's parental rights in his child based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the child where respondent was put on notice of the requirements of his case plan but failed to consistently submit to drug screens or to demonstrate maintained sobriety, failed to obtain income either through employment or disability benefits, failed to participate in individual therapy, and delayed starting his visitation schedule with the child until over a year after he was released from incarceration. **In re Z.O.G.-I., 858.**

Grounds for termination—failure to make reasonable progress—incarceration—The trial court erred by concluding that grounds of failure to make reasonable progress existed to terminate a mother's parental rights where the department of social services failed to carry its burden of proof. The finding that the mother, who was incarcerated, was able to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; and her completion of a "mothering" class was a sufficient attempt to complete a required "parenting" class. **In re K.D.C., 784.**

Grounds for termination—neglect—failure to address underlying problems—sufficiency of evidence—A mother's parental rights in her child were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the child had been adjudicated neglected and the neglect was likely to recur based on the mother's failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. Contrary to the mother's argument on appeal, the trial court made an independent determination by taking judicial notice of the underlying adjudicatory and dispositional orders, admitting reports from the department of social services and the child's guardian ad litem, and hearing testimony from the child's social worker. **In re N.K., 805.**

Grounds for termination—neglect—likelihood of future neglect—incarceration—The trial court's findings did not support its conclusion that grounds of neglect existed to terminate a mother's parental rights where the trial court erred in determining that there would be a likelihood of future neglect. The finding that the mother, who was incarcerated, had the ability to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; she completed a "mothering" class (in lieu of a required "parenting" class), an anger management class, and a grief recovery class; and she maintained regular contact with her children. **In re K.D.C., 784.**

Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence—There was a reasonable probability that a father with an extensive history of substance abuse and domestic violence would repeat the neglect of his children if they were returned to his care where the trial court found that he was inconsistent with drug screening requirements, failed to establish the status or durability of his sobriety, failed to comply with his recommended long-term individual counseling for domestic violence, and demonstrated no meaningful recognition of the effect of domestic violence on his children. **In re D.M., 761.**

Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence—There was a reasonable probability that a mother with an extensive history of substance abuse and domestic violence would repeat the neglect of her children if they were returned to her care where the trial court found that she was inconsistent with drug screening requirements, failed to establish the status or durability of her sobriety, failed to complete her recommended domestic violence counseling, and demonstrated no meaningful recognition of the effect of domestic violence on her children. **In re D.M., 761.**

Grounds for termination—neglect—non-compliance with case plan—The trial court's determination that grounds existed to terminate respondent-father's parental rights in his children based on neglect was upheld where it was supported by

unchallenged findings of fact and record evidence that respondent failed to comply with numerous requirements of his service plan related to substance abuse, domestic violence, housing, parenting, visitation, and child support. **In re K.P.-S.T., 797.**

Grounds for termination—neglect—private termination—In a private termination of parental rights action where the child had not been in respondent-mother's physical custody for several years, the trial court properly terminated respondent's rights based on neglect where its unchallenged findings established that the child was previously neglected, supporting a conclusion that the child was likely to be neglected again if returned to respondent's care. **In re R.L.D., 838.**

Grounds for termination—neglect—substance abuse and inappropriate discipline—denial of effect on children—The trial court properly terminated respondent-mother's parental rights in her children based on neglect where the trial court found, based on sufficient evidence, that respondent-mother was in denial about how alcohol abuse by the children's father and physical abuse he inflicted on them affected the children and that her failure to address past trauma through recommended therapy precluded her from providing her children with proper care and supervision. These and other findings supported the court's conclusion that there was a high likelihood of the repetition of neglect should the children be returned to her care. **In re B.E., 730.**

Grounds for termination—willful abandonment—determinative time period—no contact or support—The trial court's decision terminating a father's parental rights in his child on the grounds of willful abandonment was affirmed where, during the determinative six-month period, the father had no contact with his child, who had moved to California with the mother, despite having working cell phone numbers for the mother and her husband; had expressed no interest in a relationship with the child; and had sent nothing to or for the child except for one partial child support payment. The trial court was also permitted to consider the father's actions outside of the six-month period to evaluate his intentions—for example, the father's failure to express any interest in seeing the child after learning she was back in North Carolina (after the termination petition was filed). **In re C.A.H., 750.**

No-merit brief—neglect—abandonment—parental rights to another child terminated—The termination of a mother's parental rights in her three children on grounds of neglect, abandonment, and having her parental rights in another child terminated and lacking the ability or willingness to establish a safe home (N.C.G.S. § 7B-1111(a)(1), (7), (9)) was affirmed where her counsel filed a no-merit brief, the evidence supported termination under subsection (a)(9) (which was sufficient to uphold the order), and the trial court did not abuse its discretion in deciding that terminating her rights would be in the children's best interests. **In re J.S., 780.**

No-merit brief—neglect—failure to pay a reasonable portion of the cost of care—personal jurisdiction—The termination of a mother's and father's parental rights to their daughter on grounds of neglect and willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(1), (3)) was affirmed where the parents' counsel filed a no-merit brief, the trial court properly exercised personal jurisdiction over the parents (who were served process by publication after diligent but unsuccessful attempts to effect personal service), and the order was supported by clear, cogent, and convincing evidence and based on proper legal grounds. **In re A.P., 726.**

No-merit brief—termination on multiple grounds—substance abuse—The termination of a father's parental rights in his two children on multiple statutory grounds (he had a history of substance abuse, which the children were exposed to at home, and he made minimal progress in addressing the problem) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence. **In re S.D.H., 846.**

UTILITIES

General rate case—coal ash spill—coal ash remediation costs—rejection of equitable sharing proposal—reversed and remanded—In two general rate cases (consolidated on appeal), where the Utilities Commission entered orders allowing two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the orders were reversed and remanded because the Commission failed to consider all "material facts in the record," pursuant to N.C.G.S. § 62-133(d), before rejecting an equitable sharing arrangement proposed by the Public Staff in response to the companies' numerous environmental violations. Specifically, the Commission failed to evaluate the extent to which the companies committed environmental violations relating to coal ash management before deciding whether the companies' coal ash-related costs were reasonable or whether equitable sharing of those costs between shareholders and ratepayers was necessary. **State ex rel. Utils. Comm'n v. Stein, 870.**

General rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—reasonableness of the costs—In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission properly found the companies "reasonably and prudently incurred" these costs in compliance with the Coal Ash Management Act (CAMA), which was enacted shortly after the companies faced criminal charges for a coal ash spill at one of their facilities. The Attorney General failed to rebut the presumption of reasonableness by failing to produce evidence showing the companies should have begun the remediation process sooner than they did or that the companies' coal ash spill was the main reason for CAMA's enactment. Further, the intervenors in both cases failed to identify which specific costs were unreasonable. **State ex rel. Utils. Comm'n v. Stein, 870.**

General rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—section 62-133.13—applicability—In two general rate cases (consolidated on appeal), the Utilities Commission properly allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates because N.C.G.S. § 62-133.13 (forbidding utilities from recovering costs related to unlawful discharges of coal combustion residuals into surface waters) did not preclude it from doing so. Although the companies had recently faced criminal charges when a burst pipe at one of their facilities emitted large quantities of coal ash into a local river, the Commission found the companies incurred their coal ash remediation costs to comply with federal and state environmental law rather than as the result of that coal ash spill. **State ex rel. Utils. Comm'n v. Stein, 870.**

General rate case—coal ash spill—return on coal ash remediation costs—consideration of "other material facts"—In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies

to defer certain coal ash remediation costs and to include those costs in the cost of service used to establish their retail rates, the Commission properly allowed the companies to earn a return on the unamortized balance of those costs. Although this decision represented a departure from ordinary ratemaking procedures, it was nevertheless lawful where the Commission properly exercised its authority under N.C.G.S. § 62-133(d) to "consider all other material facts of record" apart from those specifically mentioned throughout section 62-133 (the ratemaking statute) when determining what rates would be "just and reasonable." **State ex rel. Utils. Comm'n v. Stein, 870.**

General rate case—coal ash spill—return on coal ash remediation costs—sufficiency of findings—In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission entered sufficient findings of fact pursuant to N.C.G.S. § 62-79(a) to enable the Court of Appeals to discern the bases for also allowing the companies to earn a return on the unamortized balance of those costs. Although intervenors in both cases argued that the Commission made contradictory findings about how it classified the coal ash-related costs under the ratemaking statute (N.C.G.S. § 62-133), the Commission clearly decided that it had authority to allow the return on those costs regardless of the classification issue. **State ex rel. Utils. Comm'n v. Stein, 870.**

General rate case—increase in basic facilities charge—for one class of ratepayers—In a general rate case, the Utilities Commission did not err by authorizing an electric company to increase the basic facilities charge for the residential rate class while leaving the facilities charges against other classes of ratepayers unchanged. Evidence in the record supported the increase, as well as the exact dollar figure the Commission chose and the methodology used to generate that figure, and the Commission properly balanced competing policy goals when approving the increase. Further, the Commission adequately considered any adverse effects of the increased facilities charge on low-income customers and showed that the increase was not "unduly discriminatory" under N.C.G.S. § 62-140. **State ex rel. Utils. Comm'n v. Stein, 870.**

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.K.O.

[375 N.C. 698 (2020)]

IN THE MATTER OF A.K.O. AND A.S.O.

No. 68A20

Filed 11 December 2020

1. Termination of Parental Rights—best interests of the child—adoption or guardianship—sixteen-year-old minor—misapprehension of law—remand

Where the trial court's best interests determination—which found that termination of parental rights would aid in the accomplishment of the permanent plan of adoption or guardianship—appeared to rest upon a misapprehension of the legal differences between adoption and guardianship (termination was not necessary to accomplish guardianship), the matter was remanded for reconsideration of guardianship as a dispositional alternative. The trial court was instructed to give proper weight to the now-seventeen-year-old minor's age, his lack of consent to adoption, his bond with his parents, and the availability of a family to be appointed as guardians.

2. Termination of Parental Rights—best interests of the child—statutory factors—sufficiency of findings—adoption

The trial court did not abuse its discretion by concluding that termination of a mother's and father's parental rights was in their nine-year-old daughter's best interests where the trial court appropriately considered the statutory factors, making unchallenged findings that the daughter was bonded with her prospective adoptive family and that termination would aid in the permanent plan of adoption. Explicit written findings were not required on matters for which there was no conflict in the evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 December 2019 by Judge Dennis J. Redwing in District Court, Cherokee County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Elizabeth Myrick Boone for petitioner-appellee Cherokee County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

Dorothy Hairston Mitchell for respondent-appellant father.

NEWBY, Justice.

Respondents appeal from the trial court's orders terminating their parental rights to A.K.O. and A.S.O. ("Alyson" and "Adam").[1] After careful review, we affirm in part, vacate in part, and remand to the trial court to reconsider Adam's age of 17 years old, reweigh his request to keep respondents' parental rights intact with whom he had a strong bond, and to reevaluate guardianship for Adam as an alternative to termination of parental rights. Alyson, Adam's younger sister, was only nine years old at the time of the hearing, significantly younger than Adam; thus, our analysis regarding Adam is not applicable to Alyson.

On 31 March 2017, the Cherokee County Department of Social Services (DSS) received a report claiming that respondents were both in jail, and Alyson had not been in school that day. The reporter expressed concern because Alyson had stated that the family was homeless, and they were "going to somebody's old house that stinks." The reporter believed it to be an abandoned house. Social workers met with respondent-father at the Cherokee County Detention Center concerning the allegations. Respondent-father told social workers that he was not sure what was happening with the children because he had been in jail for the past week, but he informed social workers that he, along with respondent-mother and the two juveniles, had recently moved to Murphy, North Carolina and were living in his grandparents' house.

Social workers went to the grandparents' house in Murphy. Upon arriving at the house, they observed a significant amount of furniture, trash, clothes, broken glass, and other objects on the outside grounds. The items were stacked in large unorganized piles and had "a strong offensive pet like odor." The social workers knocked on the door, and it was answered by respondent-mother. The social workers informed respondent-mother of the report they received and told her they needed to discuss it with her. Upon being admitted into the home, social workers found the house to be cluttered with trash, clothing, dishes, glasses, and other items. They also found three mattresses on the floor of the

1. Pseudonyms are used in this opinion to protect the juveniles' identity and for ease of reading.

living room. On the mattresses were two unrelated males and the two juveniles. The two men and the two juveniles were wearing dirty and soiled clothing. The home had a pungent smell, and one of the social workers observed a dog urinate in the living room. The dog's urine was not cleaned up throughout the visit, and pet feces and urine spots could be found throughout the home. Additionally, the floor was falling in one of the bedrooms, and some rooms were so cluttered that social workers could not enter them.

Social workers asked if respondent-mother would be willing to take a drug screen, and respondent-mother agreed to complete one. At that time, she disclosed that she had taken prescription medication that had not been prescribed for her a couple of days beforehand. Respondent-mother was transported to the Health Department where she tested positive for methamphetamine, amphetamine, and THC. Respondent-mother subsequently admitted to "snorting meth a couple of days ago." Respondent-mother was asked about a safety resource placement for the children, but she was unable to identify a suitable placement that would be approved by DSS. Accordingly, DSS filed a petition alleging that Alyson and Adam were neglected and dependent juveniles and obtained nonsecure custody.

On 15 May 2017, the trial court adjudicated Alyson and Adam neglected and dependent juveniles. The trial court ordered that custody of the juveniles should remain with DSS, granted respondents visitation, and ordered respondents to work on their case plan. The trial court subsequently set the permanent plan for the juveniles as reunification. Following a hearing held on 7 March 2018, the trial court entered an order changing the permanent plan to guardianship along with a concurrent plan of reunification.

In an order entered on 20 May 2019, the trial court found that respondents were not complying with their case plans. Specifically, the trial court found respondents did not have appropriate housing, had not made child support payments, and had missed half their visits with the juveniles since December 2018. The trial court additionally found that respondents were consistently testing positive for marijuana and methadone, and on 7 January 2019 their drug screens were positive for opioids and marijuana. Accordingly, the trial court changed the permanent plan for the juveniles to adoption with a concurrent plan of guardianship.

On 26 August 2019, DSS filed petitions to terminate respondents' parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay support, and dependency. N.C.G.S.

§ 7B-1111(a)(1)–(3), (6) (2019). On 2 December 2019, the trial court entered orders in which it determined grounds existed to terminate respondents' parental rights based on the grounds alleged in the petitions. The trial court further concluded in separate dispositional orders that it was in Alyson's and Adam's best interests that respondents' parental rights be terminated. Accordingly, the trial court terminated their parental rights. Respondents appeal, arguing that the trial court erred when it determined termination of their parental rights was in Alyson's and Adam's best interests.

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 subsection 7B-1111(a) of the General Statutes. N.C.G.S. § 7B-1109(f). 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).

We review the trial court's determination of "whether terminating the parent's rights is in the juvenile's best interest," *id.*, for abuse of discretion, *In re Z.A.M.*, 374 N.C. 88, 99, 839 S.E.2d 792, 800 (2020). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 100, 839 S.E.2d at 800 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). We review the trial court's dispositional findings of fact to determine

whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020). Dispositional findings not challenged by respondents are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019).

I.

[1] First, we consider whether the trial court abused its discretion by terminating respondents' parental rights to Adam. The trial court made a finding of fact indicating it considered Adam's age and took judicial notice of the findings of facts made at the adjudication hearing. The trial court also made the following findings concerning the factors set forth in N.C.G.S. § 7B-1110(a):

> 8. [Adam] is bonded with his current foster parents, their biological children, and their extended family.
>
> 9. [Adam's] foster family have extended family that are bonded with [Adam] and are interested in adopting [him].
>
> 10. That the court considered the testimony of [Adam] with regard to his bond with his sister [Alyson] and his forthright expression of his desires in this case.
>
> 11. That the [c]ourt admires [Adam] for his actions in trying to understand this situation and responding by making reasoned decisions on behalf of his sister [Alyson].
>
> . . . .
>
> 15. That termination of the Respondent Parents' parental rights will aid in the accomplishment of the permanent plan of Adoption or Guardianship for [Adam], legally freeing [Adam] for adoption [or] guardianship.
>
> 16. That [Adam] testified that he would prefer Guardianship with the family in Alabama so he can remain with his sister, but wishes to maintain a relationship with the Respondent Parents and does not want their parental rights terminated.
>
> 17. That [Adam] testified that he wishes to keep his family name and wants to continue to have the Respondent Parents' names listed on all of his legal documents.
>
> 18. That [Adam] testified that he wanted to stay with and protect his sister.

> 19. The Respondent Parents testified to their desire to maintain a relationship with [Adam].
>
> . . . .
>
> 21. Based upon the ongoing Neglect of [Adam] demonstrated by the Respondent Parents from at least March 31, 2017 to the present, there is a probability of repetition of the Neglect should [Adam] be returned to the home of the Respondent Parents.
>
> 22. The conduct of the Respondent Parents has been such as to demonstrate that they will not promote the healthy and orderly physical and emotional wellbeing of [Adam].
>
> 23. [Adam] is in need of a Permanent Plan of Care at the earliest age possible that can be obtained only by the severing of the relationship between [Adam] and the Respondent Parents by termination of the parents' parental rights.

Respondents challenge findings of facts 8, 9 and 15 in the trial court's order. Respondents both argue that there was no competent evidence to support findings of fact 8 and 9 that Adam had a bond with his foster family's extended relatives in Alabama. Respondents further challenge finding of fact 15, which states that termination of respondents' parental rights will aid in the accomplishment of the permanent plan of adoption or guardianship by "legally freeing [Adam] for adoption [or] guardianship." Respondents note that, due to his age, Adam's consent is required for him to be adopted. *See* N.C.G.S. § 48-3-601(1) (2019) (providing that a minor over the age of 12 must consent to adoption, unless consent is not required under N.C.G.S. § 48-3-603 (2019) and the trial court makes the necessary findings under that section). Here Adam clearly expressed his desire to not be adopted but rather to keep his biological parents' rights intact.

Findings of fact 8 and 9 are supported by competent evidence. During the dispositional hearing, DSS's Court Report was admitted into evidence without objection. In the report, DSS stated that Adam and Alyson had "spent holidays and vacations" with the family in Alabama and, "[d]uring these times, they have developed a bond with the family." This evidence supports the factual findings in that it permits a reasonable inference that Adam is bonded with the prospective adoptive family in Alabama. Consequently, we are bound by them on appeal. *See In re E.F.*, 375 N.C. 88, 91, 846 S.E.2d 630, 632 (2020).

We next consider respondents' challenges to finding of fact 15 concerning the need to terminate respondents' rights to aid in the accomplishment of the permanent concurrent plans of adoption or guardianship. Adam, just days away from his sixteenth birthday when the trial court entered its order, indicated that he does not wish to be adopted and prefers guardianship even though his permanent plan remains a concurrent plan of adoption or guardianship. While it is true that termination of respondents' parental rights would aid in the permanent plan of adoption, *see In re A.J.T.*, 374 N.C. 504, 512, 843 S.E.2d 192, 197 (2020), it is not legally necessary to accomplish the concurrent permanent plan of guardianship, *see* N.C.G.S. § 7B-600(a) (2019) (providing for appointment of guardians "when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile"). Thus, the trial court was incorrect in believing that termination of respondents' parental rights is necessary to free Adam for guardianship.

We next consider respondents' arguments that the trial court failed to make written findings regarding all the factors set forth in N.C.G.S. § 7B-1110(a). Respondent-father contends the trial court failed to address his bond with Adam, whereas respondent-mother asserts that the trial court failed to make written findings regarding her bond with Adam, as well as the likelihood of Adam being adopted.

Subsection 7B-1110(a) requires the trial court to consider all the factors but "does not, however, explicitly require written findings as to each factor," particularly when there was no conflict in the evidence regarding those factors. *In re A.U.D.*, 373 N.C. 3, 10, 832 S.E.2d 698, 702 (2019). Here it is uncontested that Adam had a bond with his parents. Adam testified that he had a bond with his father, and during closing arguments the attorney for DSS stated that Adam was bonded with his parents. It was also undisputed that Adam did not wish to be adopted and would not give his consent to being adopted, and therefore it was unlikely that he would be adopted. Thus, because these factors were uncontested, no written findings were necessary. *Id.* at 11, 832 S.E.2d at 703.

We further note that while the trial court may not have made explicit findings regarding the statutory factors set forth in N.C.G.S. § 7B-1110(a)(2) and (4), its remaining dispositional findings of fact demonstrate that it considered Adam's bond with his parents and the likelihood of his being adopted. In finding of fact 10, the trial court found that it had considered the "expression of [Adam's] desires in this case," meaning that Adam did not wish to be adopted. In finding of fact 16, the trial court noted Adam's testimony that he wished to maintain a relationship with his parents and did not want their rights terminated.

Accordingly, we conclude that the trial court did not err by failing to make written findings of fact using the exact language contained in N.C.G.S. § 7B-1110(a).

Lastly, respondents argue that consideration of the statutory factors set forth in N.C.G.S. § 7B-1110(a) does not support termination of their parental rights. Specifically, respondents cite: (1) their bond with Adam; (2) the likelihood that he would not be adopted because he would not grant consent; (3) that termination of their parental rights was unnecessary to accomplish Adam's preferred disposition of guardianship; and (4) that due to Adam's age, there were few, if any, benefits to Adam being adopted. While generally the trial court's decision is well supported, it seems the trial court's decision to terminate respondents' parental rights was made under a mistake of law concerning guardianship.

First, it is undisputed that Adam had a bond with respondents, and it appears he especially had a strong bond with respondent-father. When considering the other factors set forth in N.C.G.S. § 7B-1110(a), however, the trial court's determination that termination of respondents' parental rights is in Adam's best interests seems to misapprehend the weight that should be given to Adam's consent to adoption, particularly given his age. While termination of respondents' parental right would technically aid in accomplishing the permanent plan of adoption, the trial court should not place undue emphasis on this statutory factor when Adam will not consent to adoption and is a much older juvenile.

Adam clearly expressed that did not wish to be adopted and would not give consent to being adopted. Here, just prior to the termination hearing, Adam wrote a letter to the judge who would preside over the hearing, in which he stated:

> I understand there is a family in Alabama who are willing to adopt my sister and provide guardianship for me. I understand that I have a choice, being over 12 years old, that I seek guardianship and **NOT** adoption. I prefer guardianship over adoption due to wanting to keep my last name, I want [respondents'] names to remain on legal documents, and I will be an adult in two years and will only return to Alabama to visit my biological sister. I am struggling to understand the benefits of adoption as I will be turning 18 in twenty-six months. When moving to Alabama I do not want to give up access to mom and dad. I want to be able to speak directly to my parents . . . unrestrained and unsupervised by others.

Adam is now 17 years old. Given Adam's well-reasoned objection to adoption, the trial court's unchallenged finding that Adam's interest in maintaining a relationship with respondents is reciprocated by respondents, as well as the fact that Adam is approaching the age of majority, there are few benefits to terminating respondents' parental rights. As a juvenile ages, the trial court should afford more weight to his wishes.

While Adam is unlikely to be able to return to respondents' home, other dispositional alternatives were available. The guardian *ad litem* advocated for placing Adam in guardianship rather than proceeding with adoption. Contrary to findings of fact 15 and 23, termination of respondents' parental rights is not necessary to place Adam in guardianship with the family in Alabama. *See* N.C.G.S. § 7B-600(a). Those findings suggest a misapprehension of the legal differences between adoption and guardianship. In such a situation, the proper remedy is to remand for reconsideration. *Cf. In re Estate of Skinner*, 370 N.C. 126, 146, 804 S.E.2d 449, 462 (2017) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard."). As such, we vacate that portion of the order terminating respondents' parental rights to Adam and remand to the trial court to reconsider guardianship as a dispositional alternative, which does not require termination, and to give proper weight to Adam's age, his lack of consent to adoption, his bond with his parents, and the availability of a family that could be appointed as guardians.

II.

[2] We next consider respondents' arguments concerning the order terminating their parental rights to Alyson. Respondents argue that the trial court failed to make a written finding of fact regarding the bond between Alyson and respondents. Respondent-mother argues that the matter should be remanded for further findings under N.C.G.S. § 7B-1110(a), whereas respondent-father asserts that because the trial court failed to consider all relevant statutory factors, the trial court abused its discretion by terminating his parental rights. We are not persuaded.

Explicit written findings regarding each of the factors set forth in N.C.G.S. § 7B-1110(a) are not required when there is no conflict in the evidence. *In re A.U.D.*, 373 N.C. at 10–12, 832 S.E.2d at 702–03. Here the guardian *ad litem* testified that Alyson had a bond with respondent-mother. The guardian *ad litem* described a visit between Alyson and respondent-mother as follows: "[Alyson] and her mom generally will color, or they'll play a game on the phone, or yesterday they were

playing a Heads Up! game and enjoying themselves. It was a nice visit." Additionally, a DSS Court Report from July 2018 stated that "the children and the respondent parents are well bonded." Alyson also wrote a letter to the presiding judge, which was admitted into evidence, in which she stated that she loved her prospective adoptive family and would like to live with them. Alyson further explained, "I would live with my parents but I know why I can't." It thus appears that the undisputed evidence shows Alyson had a bond with respondents. Even assuming *arguendo*, however, that the trial court erred by failing to make a finding regarding this dispositional factor, we would decline to find reversible error because it would only delay permanence for Alyson.

Here Alyson was only nine years old at the time of the hearing, significantly younger than Adam, and thus the same considerations are not applicable to Alyson. Specifically, Alyson's consent is not required for adoption. Additionally, the trial court made unchallenged findings that Alyson was bonded with her prospective adoptive parents, termination of respondents' parental rights would aid in the permanent plan of adoption, Alyson was in need of a permanent plan of care at the earliest age possible, and respondents' conduct had demonstrated that they would not promote Alyson's physical and emotional well-being. Furthermore, it is not contested that Alyson is likely to be adopted.

Therefore, we conclude the trial court appropriately considered the factors set forth in N.C.G.S. § 7B-1110(a) when determining Alyson's best interests and that the trial court's determination that respondents' minimal bond with Alyson was outweighed by other factors was not manifestly unsupported by reason. We therefore hold the trial court's conclusion that termination of respondents' parental rights was in Alyson's best interests did not constitute an abuse of discretion and affirm the trial court's orders as to Alyson.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

IN THE MATTER OF A.L.S. AND M.A.W.

No. 153A20

Filed 11 December 2020

Termination of Parental Rights—grounds for termination—dependency—incarceration

The trial court did not err by terminating a mother's parental rights in her children on the grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where the mother would be incarcerated for at least twenty-two months beyond the termination hearing and there was no appropriate alternative child care arrangement. The trial court's error in finding that her expected release date was approximately eight additional months later (thirty months) was harmless.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 27 December 2019 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

E. Garrison White for petitioner-appellee Cabarrus County Department of Human Services.

Adams, Howell, Sizemore & Adams PA, by Sarah M. Skinner, for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Tiffany K. appeals from orders entered by the trial court terminating her parental rights in her minor children A.L.S. and M.A.W.[1] After careful consideration of respondent-mother's arguments in light of the record and the applicable law, we affirm the trial court's termination orders.

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1. A.L.S. and M.A.W. will, respectively, be referred to throughout the remainder of this opinion as "Allen" and "Maria," which are pseudonyms used to protect the juveniles' identities and for ease of reading.

On 24 August 2018, the Cabarrus County Department of Human Services filed petitions alleging that Allen and Maria were neglected and dependent juveniles and obtained the entry of orders placing the children in nonsecure custody. DHS alleged that respondent-mother had tested positive for the presence of cocaine and marijuana while pregnant with Maria. On or about 17 May 2018, DHS received a report that Maria had tested positive for the presence of cocaine at birth and that there were concerns about the quality of the care that respondent-mother had been providing for the children. Respondent-mother provided the name of an individual who was willing to serve as a temporary safety provider for Allen and Maria. However, several problems developed with this safety placement, including an accidental shooting in the home, the existence of domestic discord and criminal activity, and the fact that the provider's health difficulties interfered with her ability to provide adequate care for the children. In addition, DHS alleged that, on 16 July 2018, respondent-mother had tested positive for the presence of cocaine and reported that she would be rendered homeless as a result of being evicted from her home. Finally, DHS alleged that respondent-mother was on probation and had pending court dates in both Cabarrus and Rowan County involving multiple criminal charges.

The juvenile petitions came on for hearing in the District Court, Cabarrus County, on 25 October 2018. On 7 November 2018, Judge William G. Hamby, Jr., entered an order concluding that the children were neglected and dependent juveniles and ordering that they remain in DHS custody. As a precondition to allowing her to reunify with the children, Judge Hamby ordered respondent-mother to complete a psychological and parenting capacity evaluation and a substance abuse assessment, to submit to random drug and alcohol screens, to complete a life skills assessment, to take advantage of a supervised weekly visitation plan, and to obtain and maintain suitable housing for herself and her children. On or about 27 October 2018,[2] respondent-mother was arrested and charged with having committed multiple criminal offenses including giving fictitious information to a law enforcement officer, resisting a public officer, hit and run driving, and fleeing to elude arrest.

After a review hearing held on 10 January 2019, the trial court entered an order on 20 February 2019 finding that respondent-mother

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2. As an aside, we note that the 20 February 2019 order states that respondent-mother's arrest occurred on both 24 October 2018 and 27 October 2018. However, we are unable to determine that the actual date upon which respondent-mother was placed under arrest makes any material difference for the purpose of properly resolving the issues that have been raised for our consideration on appeal.

had made little progress toward satisfying the requirements imposed upon her in the initial dispositional order. Prior to her incarceration, respondent-mother had attended two of a possible six visits with Allen and Maria and had failed to maintain biweekly contact with DHS. At this stage of the proceedings, however, the primary permanent plan for Allen and Maria remained reunification coupled with a secondary permanent plan of guardianship.

After a permanency planning hearing held on 28 March 2019, the trial court entered an order finding that, due to respondent-mother's incarceration, she had not made any progress in complying with the requirements that had been imposed upon her in the initial dispositional order and that it was not possible for the children to be returned to her care within the next six months. In addition, the trial court noted that respondent-mother had entered pleas of guilty to numerous charges on 31 January 2019 and had been sentenced to a term of thirty-two to fifty-six months imprisonment. The trial court changed the primary permanent plan for Allen and Maria to one of adoption, with a secondary permanent plan of reunification.

On 10 July 2019, DHS filed motions seeking to have the parental rights of respondent-mother and the children's unknown father terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to pay a reasonable portion of the cost of the care that the children had received while in DHS custody for a continuous period of six months prior to the filing of the termination motions, N.C.G.S. § 7B-1111(a)(3); failure to legitimate the children, N.C.G.S. § 7B-1111(a)(5); dependency, N.C.G.S. § 7B-1111(a)(6); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). The termination motions came on for hearing before the trial court on 14 November 2019. On 27 December 2019, the trial court entered orders terminating respondent-mother's parental rights in the children on the basis of neglect, dependency, and willful abandonment and determining that the termination of respondent-mother's parental rights would be in the children's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-mother noted an appeal to this Court from the trial court's termination orders.

In seeking relief from the trial court's termination orders before this Court, respondent-mother challenges a number of the trial court's findings of fact as lacking in sufficient evidentiary support. In addition, respondent-mother challenges the lawfulness of the trial court's conclusion that her parental rights in Allen and Maria were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) on the grounds that the trial court's findings and the record evidence did not support a conclusion

that the children were likely to be neglected in the event that they were returned to her care; that her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6) on the grounds that the trial court had failed to explicitly find that her incarceration constituted a condition that rendered her incapable of parenting Allen and Maria for the foreseeable future; and that her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(7) on the grounds that the trial court's findings and the record evidence did not support a conclusion that she had willfully abandoned them.

According to well-established North Carolina law, the termination of a parent's parental rights in a juvenile involves the use of a two-stage process. 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, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If [the trial court] determines that one or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[s] to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016).

"This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 'in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law,' with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (2019) (citations omitted). "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). "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)). In view of the fact that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019), we will focus our attention upon the validity of respondent-mother's challenge to the lawfulness of the trial court's determination that respondent-mother's parental rights in the children were subject to termination on the basis of dependency pursuant to N.C.G.S. § 7B-1111(a)(6).

According to N.C.G.S. § 7B-1111(a)(6), a trial court may terminate a parent's parental rights in a juvenile based upon a finding 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 [N.C.]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). A dependent juvenile is one who is "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2019). "Thus, the trial court's findings regarding this ground 'must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020) (quoting *In re L.R.S.*, 237 N.C. App. 16, 19, 764 S.E.2d 908, 910 (2014)).

In its termination orders, the trial court found that respondent-mother had been incarcerated during a "majority of this case" and remained imprisoned at the time of the termination hearing.[3] The trial court also found that respondent-mother had been arrested in October 2018 for "habitual felon, resisting public officer (3 counts), fictitious information to an officer, failure to he[e]d light or siren, hit/run fail to stop, flee/elude arrest (3 counts), and reckless driving." In addition, the trial court found that, on 31 January 2019, respondent-mother had been sentenced to a term of thirty-two to fifty-six months imprisonment and had a projected release date of 18 May 2022. The trial court further found that, since January 2019, respondent-mother had identified at least six individuals as potential placements for Allen and Maria

3. The adjudicatory findings of fact and conclusions of law contained in the separate orders terminating respondent-mother's parental rights in Allen and in Maria are substantially similar and will be considered as if they were identical in this opinion in the interests of brevity.

and that all of "these individuals [had either failed to] complete[ ] the information packet or [had] declined to move forward with the [home study] process." Moreover, the trial court found that, even though several home study requests had been submitted relating to potential relative placements, all of them had been rejected "due to either criminal history or unsafe environment or a response was never received from the requested family member." For that reason, the trial court found that there was not a proper alternative care plan in place for the juveniles and that "no other options" for the juveniles aside from adoption were actually available. Based upon these findings of fact, the trial court concluded as a matter of law that respondent-mother was incapable of providing for the proper care and supervision of Allen and Maria so as to make them dependent juveniles as defined in N.C.G.S. § 7B-101(9), that there was a reasonable probability that respondent-mother's incapability would continue for the foreseeable future, and that respondent-mother lacked an appropriate alternative child care arrangement for the children.

Respondent-mother has not challenged the lawfulness of the trial court's determination that she lacked an appropriate alternative child care arrangement in her brief before this Court. Instead, respondent-mother argues that the trial court erred by determining that she was incapable of providing for the care and supervision of Allen and Maria and that this incapability would continue for the foreseeable future. We do not find respondent-mother's arguments to be persuasive.

As an initial matter, respondent-mother argues that the trial court erred by finding that her projected release date was 18 May 2022. According to respondent-mother, awarding credit for the time that she spent in pretrial confinement "results in a release date as early as 24 September 2021," so that, at the time of the termination hearing, respondent-mother had "as little as [twenty-two] months and [ten] days remaining on her sentence, with no other charges pending."

At the 14 November 2019 termination hearing, a social worker testified that respondent-mother's projected release date was May 2022. However, a copy of the criminal judgment that had been entered against respondent-mother was admitted into evidence and shows that respondent-mother had been sentenced to a term of thirty-six to fifty-six months imprisonment and awarded credit against the service of her sentence for 129 days of pretrial confinement. As a result, as DHS now acknowledges, it appears that respondent-mother could possibly be released as early as September 2021, a date which is approximately twenty-two months after the date upon which the termination hearing

was held. Even so, we conclude that any error that the trial court might have committed in determining respondent-mother's expected release date did not prejudice her chances for a more favorable outcome at the termination hearing. *See Starco, Inc. v. AMG Bonding and Ins. Servs., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (stating that, "to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." (citation omitted)).

At the time of the termination hearing, respondent-mother was not scheduled to be released from imprisonment for at least twenty-two additional months and potentially faced up to forty-two additional months' imprisonment. The fact that respondent-mother faces an extended period of incarceration regardless of the exact date upon which she is scheduled to be released provides ample support for the trial court's determination that she was incapable of providing for the proper care and supervision of the children and that there was a reasonable probability that her incapability would continue for the foreseeable future. *See In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911 (holding that, where the respondent-mother was not scheduled to be released from federal custody for at least an additional thirteen months at the time of the termination hearing and potentially faced another 30 months of imprisonment, her "extended incarceration [was] clearly sufficient to constitute a condition that rendered her unable or unavailable to parent [the juvenile]"); *see also In re N.T.U.*, 234 N.C. App. 722, 760 S.E.2d 49 (2014) (holding that, where the respondent-mother had been incarcerated since the juvenile had initially entered DSS custody, had been awaiting trial upon homicide and bank robbery charges for a period of two years, and did not have a scheduled trial date, the trial court did not err by determining that the respondent-mother was incapable of providing care for the juvenile and that there was a reasonable probability that her incapability to do so would continue for the foreseeable future). For that reason, any error that the trial court might have committed in determining the exact length of respondent-mother's period of incarceration constituted, at most, harmless error, with the trial court having sufficiently tied respondent-mother's incarceration to the relevant statutory standard in its findings.

In addition, respondent-mother argues that the trial court failed to explicitly identify a cause or condition that rendered her unable to provide care for the children as contemplated by N.C.G.S. § 7B-1111(a)(6), with this contention resting upon the decisions of the Court of Appeals in *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (2002), and *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012). In *In re Clark*, the Court of

Appeals relied upon a prior version of N.C.G.S. § 7B-1111(a)(6), which provided that a parent's parental rights in a child were subject to termination in the event that the trial court found

> [t]hat 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 [N.C.] G.S. [§] 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other *similar* cause or condition.

In re Clark, 151 N.C. App. at 288, 565 S.E.2d at 247 (emphasis added) (quoting N.C.G.S. § 7B-1111(a)(6) (2001)). In light of the applicable statutory language, the Court of Appeals held that the trial court had erred by concluding that the respondent-father was incapable of providing for his daughter's care, despite his incarceration, given that "[t]here was no evidence at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for [his daughter], nor did the trial court make any findings of fact regarding such a condition," *id.* at 289, 565 S.E.2d at 247–48, and given the absence of "clear and convincing evidence to suggest that respondent was incapable of arranging for appropriate supervision for the child." *Id.* at 289, 565 S.E.2d at 248.

In *In re J.K.C.*, the Court of Appeals relied upon *In re Clark* in affirming the dismissal of a termination petition that rested upon allegations of neglect and dependency. *In re J.K.C.*, 218 N.C. App. at 25, 721 S.E.2d at 266-77. In reaching this conclusion, the Court of Appeals held that, even though the trial court had found that the respondent-father was incarcerated and that no relative was able to provide appropriate care for his children, "the guardian ad litem here did not present any evidence that respondent's incapability of providing care and supervision was due to one of the specified conditions or any other *similar* cause or condition." *Id.* (emphasis added). As a result, in both *In re Clark* and *In re J.K.C.*, the Court of Appeals ruled in favor of the parent based upon the failure of the petitioner to present any evidence that the respondent lacked the ability to provide care for his children as a result of one of the causes or conditions delineated in N.C.G.S. § 7B-1111(a)(6).

The current version of N.C.G.S. § 7B-1111(a)(6) differs from that at issue in *In re Clark* and *In re J.K.C.* by permitting a finding of incapability

based upon "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) (emphasis added). The current version of N.C.G.S. § 7B-1111(a)(6), unlike the version upon which the Court of Appeals relied in *In re Clark* and *In re J.K.C.*, does not use the word "similar" to describe the other causes or conditions that suffice to support a finding of incapability. In light of this alteration in the relevant statutory language, the trial court in this case was not required to find that respondent-mother was incapable of providing for the children's care based upon of the statutorily enumerated conditions or any other *similar* cause or condition.

As the record reflects, DHS presented evidence tending to show that respondent-mother was incapable of providing for the care and supervision of Allen and Maria based upon a cause or condition encompassed within N.C.G.S. § 7B-1111(a)(6) — the fact that the sentence of imprisonment that had been imposed upon her would not expire until at least twenty-two additional months from the time of the termination hearing. *See In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911. Based upon this evidence, the trial court found as a fact that respondent-mother was incarcerated at the time of the termination hearing and would continue to be incarcerated for the duration of her sentence. The trial court's conclusion that respondent-mother was incapable of providing for the proper care and supervision of Allen and Maria for the foreseeable future flows logically from the findings of fact that detail the nature and extent of her continued incarceration. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) (stating that "[e]vidence must support findings; findings must support conclusions; conclusions must support the [order]" and that "[e]ach step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself").

Thus, we hold the trial court did not err by determining that respondent-mother's parental rights in the children were subject to termination for dependency pursuant to N.C.G.S. § 7B-1111(a)(6). In addition, we note that respondent-mother has not challenged the lawfulness of the trial court's conclusion that termination of her parental rights would be in Allen's and Maria's best interests. *See* N.C.G.S. § 7B-1110(a). As a result, for all of these reasons, we affirm the trial court's orders terminating respondent-mother's parental rights in Allen and Maria.

AFFIRMED.

IN THE MATTER OF A.M.O.

No. 67A20

Filed 11 December 2020

Termination of Parental Rights—best interests of the child—abuse of discretion analysis

The Supreme Court declined to deviate from well-established precedent that a trial court's best interest determination in a termination of parental rights case should be reviewed for abuse of discretion, rather than de novo, as argued by respondent-mother. In this case, the trial court did not abuse its discretion by concluding termination of respondent's parental rights was in the child's best interest based on detailed dispositional findings addressing the statutory factors contained in N.C.G.S. § 7B-1110(a), and that the child's best interests lay in being adopted by his maternal aunt and uncle with whom he had resided for several years.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 November 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Erika Leigh Hamby for petitioner-appellee Wilkes County Department of Social Services.

Keith Karlsson for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

HUDSON, Justice.

Respondent appeals from the trial court's order terminating her parental rights in "Adam,"[1] a minor child born in November 2010. Because we conclude the court did not abuse its discretion by determining that termination of respondent's parental rights was in Adam's best interests, we affirm.

1. A pseudonym.

Wilkes County Department of Social Services (DSS) filed a juvenile petition on 26 July 2017 seeking adjudications of abuse, neglect, and dependency for Adam. The petition alleged respondent was involved in a motor vehicle accident in Stone Mountain State Park on 15 June 2017 while Adam was in the vehicle. Respondent then fled with Adam into the park forest so that rangers were unable to determine if the child needed medical care. When she was located, respondent was arrested and charged with driving while impaired, misdemeanor child abuse, and failure to secure a motor vehicle passenger under sixteen years of age. The petition further alleged respondent was hospitalized with spinal injuries after another motor vehicle accident on 24 July 2017 and was unable to care for Adam.

Following respondent's arrest on 15 June 2017, Adam was moved into a kinship placement with his maternal aunt and uncle. On the day DSS filed its petition, the trial court placed Adam in nonsecure custody with DSS, but he remained in his kinship placement.

The trial court held a hearing on the petition on 11 September 2017 and entered an order adjudicating Adam a neglected juvenile on 20 November 2017. The court made findings consistent with DSS's allegations and noted the agency's "ongoing concerns of both mental health and substance abuse issues for [respondent] based on arrest records, contacts, and a history of traffic accidents."[2] The court awarded legal and physical custody of Adam to DSS and authorized his continued placement with his maternal aunt and uncle. Respondent was granted twice-monthly supervised visitation.

Respondent signed a Family Services Case Plan with DSS on 14 September 2017 in which she agreed to do the following: obtain substance abuse and mental health assessments and follow all treatment recommendations, submit to random drug screens, write a statement explaining why Adam was taken into custody, attend parenting classes, obtain employment and register to pay child support, obtain appropriate housing, maintain weekly contact with the DSS social worker and notify the social worker of any criminal charges, attend all meetings and court proceedings, and comply with all court orders.

At the initial permanency planning hearing on 11 June 2018, the trial court assessed respondent's minimal compliance with her case plan and

2. Prior to the car accident, DSS had received a report on 14 April 2017 that Adam had witnessed respondent being sexually assaulted by her then-boyfriend while the couple was drinking alcohol and snorting Xanax. When DSS finally located respondent on 31 May 2017, she refused a forensic interview for Adam but agreed to obtain therapy for him.

concluded that further "reunification efforts clearly would be unsuccessful or . . . inconsistent with [Adam's] health, safety or wellbeing and need for a safe, permanent home within a reasonable time." The court relieved DSS of reunification efforts and established a permanent plan for Adam of custody with an approved caretaker with a secondary plan of guardianship. Respondent was granted twice-monthly supervised visitation for a minimum of one hour, conditioned upon her passing a random drug/alcohol screen as a condition of any visitation.

Following a permanency planning review hearing on 1 October 2018, the trial court changed Adam's primary permanent plan to adoption. The court incorporated into its findings reports from DSS and the guardian *ad litem* (GAL) that respondent had accrued new criminal charges, including felony drug possession, "was bonded out of jail in early September[,] . . . [and] will be attending a year-long treatment program in Hickory, NC called Safe Harbor star[t]ing October 1, 2018." The court ordered that respondent, who had not visited Adam since April 2018, "shall have no visitation with the child unless and until [she] is granted such privileges by a Court of competent jurisdiction after proper motion and notice to all other parties."

At a review hearing on 1 April 2019, the trial court found respondent had failed to attend the treatment program in Hickory and had instead absconded from probation which resulted in a period of incarceration. Respondent claimed to have started opioid treatment on 28 February 2019 but had yet to obtain a mental health assessment or address her alcohol abuse and had not visited Adam since April 2018. The court maintained Adam's primary permanent plan as adoption with a secondary plan of guardianship but reinstated respondent's twice-monthly supervised visitation conditioned on the approval of Adam's therapist and respondent passing a drug screen prior to each visit.

DSS filed a petition to terminate respondent's parental rights in Adam on 1 April 2019. After a hearing on 30 July 2019, the trial court entered an order terminating respondent's parental rights (TPR Order) on 6 November 2019.

Based on findings of fact made by clear, cogent, and convincing evidence, the court adjudicated the following statutory grounds for termination: respondent had neglected Adam and was likely to repeat that neglect if the child were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1) (2019); respondent had willfully left Adam in an out-of-home placement for more than twelve months without making reasonable progress to correct the conditions that led to his removal by DSS, *see* N.C.G.S.

§ 7B-1111(a)(2) (2019); and respondent had willfully abandoned Adam for the six-month period immediately preceding DSS's filing of its petition on 1 April 2019, *see* N.C.G.S. § 7B-1111(a)(7) (2019). The court made additional dispositional findings based on the factors in N.C.G.S. § 7B-1110(a) (2019) and concluded it was in Adam's best interests for respondent's parental rights to be terminated.

Respondent filed timely notice of appeal from the termination order pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019). On appeal, respondent does not challenge the trial court's conclusion that grounds exist to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) and (7). However, she contends the court erred at disposition by concluding it was in Adam's best interests that her rights be terminated.

The statute governing the dispositional stage of a termination of parental rights proceeding provides as follows:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, 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). The court must "consider" each of the statutory factors but need only make written findings as to factors for which there is conflicting evidence. *In re A.R.A.*, 373 N.C. 190, 199 (2019).

"The trial court's dispositional findings are binding on appeal if they are supported by any competent evidence" or if they are not specifically contested by the parties. *In re E.F.*, 375 N.C. 88, 91 (2020). The trial

court's determination of "whether terminating the parent's rights is in the juvenile's best interest[s]" under N.C.G.S. § 7B-1110(a) "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). Under this deferential standard, we will reverse the court's assessment of a child's best interests only if its decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re J.S.*, 374 N.C. 811, 822 (2020) (quoting *In re K.N.K.*, 374 N.C. 50, 57 (2020)).

Counsel for respondent anchors his argument on appeal to the premise that the proper standard of review for the trial court's best-interests determination under N.C.G.S. § 7B-1110(a) is *de novo*, rather than abuse of discretion. Respondent contends that a "[p]roper application of a *de novo* standard will result in reversal in this case."

In *In re J.J.B.*, 374 N.C. 787 (2020), this Court was presented with the same argument from counsel in favor of applying a *de novo* review standard to the trial court's best-interests determination under N.C.G.S. § 7B-1110(a). After due consideration of counsel's position, we unanimously "reaffirm[ed] our application of an abuse of discretion standard of review to the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest[s.]' " *Id.* at 791 (alterations in original) (quoting *In re Z.A.M.*, 374 N.C. 88, 99–100 (2020)). We again decline to alter our longstanding standard of review. *See*, *e.g.*, *In re L.M.T.*, 367 N.C. 165, 171 (2013); *In re Montgomery*, 311 N.C. 101, 110 (1984).

Having staked her entire appeal on this Court undertaking a *de novo* review of Adam's best interests, respondent offers no argument—even in the alternative—positing that the trial court's decision is so unreasonable or arbitrary as to amount to an abuse of discretion. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402 (2005). Given respondent's tactical choice to disregard what she acknowledges to be the existing standard of review in favor of an argument based entirely on this Court's adoption of a new standard, we could conclude our analysis here. *Cf. generally Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."). Nevertheless, based on our review of the evidence and trial court's order, we are satisfied the court did not abuse its discretion in determining that Adam's best interests warranted the termination of respondent's parental rights.

The trial court made the following uncontested findings which demonstrate its consideration of the factors in N.C.G.S. § 7B-1110(a):

2. [Adam] is currently eight (8) years old.

3. He is placed in the home of [his maternal aunt and uncle], and has been in that placement since June 16, 2017.

4. [His maternal aunt and uncle] are eager to adopt [Adam].

5. [Adam] is very bonded to his aunt and uncle . . ., and is happy in their home. He is able to maintain contact with his maternal grandmother and other extended family.

. . . .

7. At some visits [Adam] and Respondent Mother would play happily, and he would hug her and hang out with her, but at the end of the visit there were no tears and he appeared ready to return to his aunt's home. At other times he would cry and get angry because he didn't understand why it was taking so long for him to get back to his mother.

8. He is currently in the third grade and doing well. Early in his placement with his aunt and uncle he struggled academically, but has been receiving good grades lately and he has been acting as if education is important to him.

9. When [Adam] was initially placed with his aunt and uncle he had some aggressive behaviors and did not like structure. He did not know how to bathe himself or wipe himself, and would cause himself to throw up after eating.

10. At this time the minor child has made a complete turnaround in his behaviors, and the Social Worker describes him as a "southern gentleman."

. . . .

12. At this time [Adam's] therapist doesn't believe that contact with his mother or [her new husband] would be beneficial for the minor child.

13. [Adam] doesn't speak about his mother much, but when he does he says he loves and misses her, but

> feels safe at his aunt's home. Sometimes he will talk about going fishing with his mom, but will then talk about how she told him to get away from the police. He still asks about his mom and where she is, and if she is okay.
>
> 14. [Adam] expressed he wishes to remain with his aunt and uncle because he feels safe in their home.
>
> 15. There is a high likelihood that [Adam] will be adopted.
>
> 16. Adoption was approved as one of the concurrent Permanent Plans for [Adam] . . . .
>
> 17. Termination of parental rights will aid in the accomplishment of this plan.
>
> 18. [Adam] has spent one quarter of his life in his aunt and uncle's home.
>
> 19. It appears that [Adam] cares for his mother and will always love her as well as his deceased father.
>
> 20. . . . [T]here is a very loving and strong bond with his aunt and uncle. [Adam] feels safe and supported with his aunt and uncle.

We are bound by these findings for purposes of our review. *See In re E.F.*, 846 S.E.2d at 632.

The trial court reached the following conclusions of law based on its dispositional findings of fact:

> 5. That termination of the Respondent's parental rights is in the best interest of [Adam] pursuant to N.C.G.S. § 7B-1110 in that;
>
> a. There is a waning bond between [Adam] and Respondent Mother.
>
> b. There is a strong and loving bond between [Adam] and his aunt and uncle.
>
> c. [Adam] is deserving of permanency and an opportunity to excel.
>
> d. There exists a strong possibility of adoption of [Adam] by his aunt and uncle.

> e. [Adam] is in need of care that Respondent Mother cannot currently provide.
>
> 6. Based on the age of [Adam], his bond with his current foster family, and the need to accomplish a Permanent Plan to provide stability for [him] it is in the best interest of [Adam] and is consistent for his health and safety for the Respondent's parental rights to be terminated so that [he] can proceed with the Permanent Plan of adoption.

In a footnote to her argument, respondent takes exception to the trial court's description of her bond with Adam as "waning" in Conclusion of Law #5(a). She contends "the evidence presented at the termination hearing does not support this conclusion of law."

We view the statement challenged as more properly classified as a finding of fact. *See In re Z.L.W.*, 372 N.C. 432, 437 (2019) ("The trial court also found . . . that the [parent-child] bond had diminished over the long time that [the juveniles] had spent in foster care."). Though included in Conclusion of Law #5, subparts (a)–(e) serve to provide the factual bases for the trial court's conclusion that termination of respondent's parental rights is in Adam's best interests, in accordance with the criteria listed in N.C.G.S. § 7B-1110(a).

Competent evidence, as well as the trial court's uncontested findings of fact, supports the court's finding that Adam and respondent's bond was diminishing over time since Adam entered DSS custody in July of 2017. In addition to dispositional Findings of Fact 7, 13, 14, and 19 quoted above, the trial court's adjudicatory findings show respondent attended just six visits with Adam between January and April of 2018 and had not visited him since 13 April 2018, more than fifteen months before the 30 July 2019 termination hearing. Moreover, respondent had been "allowed weekly phone calls with [Adam] from September 2017 through July 2018. Initially she availed herself of these calls, but when these calls were ceased in July 2018 she had not called [Adam] in over 6 weeks." Each of these findings is supported by the DSS social worker's testimony. As reflected in the trial court's findings, the social worker and GAL reported that Adam still loves respondent but does not "talk about her outside of being asked[.]"Asked directly by the trial court, the maternal aunt testified that Adam spoke "less" about respondent rather than more as time has gone on. Finally, as stated in dispositional Finding of Fact 14, the social worker testified Adam had expressed his desire to remain with his aunt and uncle permanently. Respondent's argument about Conclusion of Law 5(a) is without merit.

Respondent also claims the trial court should have awarded guardianship of Adam to his maternal aunt and uncle pursuant to N.C.G.S. § 7B-600(a) (2019) rather than terminating respondent's parental rights in order to allow the aunt and uncle to adopt Adam. Given Adam's young age and desire to maintain a relationship with his mother, respondent contends guardianship is a superior outcome to adoption, providing Adam with a permanent home without unnecessarily severing the parental bond. *See* N.C.G.S. § 7B-100(4) (2019).

Similar arguments were raised in the recent cases *In re Z.L.W.*, 372 N.C. 432 (2019) and *In re Z.A.M.*, 374 N.C. 88 (2020). In both instances, the trial court concluded that it was in the juveniles' best interests to terminate the respondent-parents' rights despite the existence of a strong parent-child bond. *In re Z.A.M.*, 374 N.C. at 100 ("Respondents both assert that the trial court did not give enough weight to the children's bond with them, nor did the court take into account the children's preferences."); *In re Z.L.W.*, 372 N.C. at 437 ("[T]he trial court made extensive findings regarding the strong bond between respondent and [the juveniles]. The trial court also found, however, that the bond had diminished over the long time that [the juveniles] had spent in foster care."). The respondent-parents also argued that the trial court should have considered guardianship for the juveniles in lieu of adoption. *In re Z.A.M.*, 374 N.C. at 100 ("Respondents . . . assert that the trial court should have considered guardianship as an option so the parents could have the chance to regain custody of the children in the future."); *In re Z.L.W.*, 372 N.C. at 438 ("Respondent further argues. . . the trial court should have considered other dispositional alternatives, such as granting guardianship or custody to the foster family, thereby leaving a legal avenue by which [the juveniles] could maintain a relationship with their father.").

In both *In re Z.A.M.* and *In re Z.L.W.*, we concluded the trial court did not abuse its discretion in choosing to terminate the respondents' parental rights. While acknowledging the existence of the bond between the respondents and their children, we noted "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.A.M.*, 374 N.C. at 100 (quoting *In re Z.L.W.*, 372 N.C. at 437). Moreover,

> this Court rejected the respondent's argument that the trial court should have considered dispositional alternatives, such as granting guardianship or custody to the foster family. This Court explained that,

> [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)[.]

Id. at 100–01 (emphasis omitted) (quoting *In re Z.L.W.*, 372 N.C. at 438).

Here, as in *In re Z.A.M.* and *In re Z.L.W.*, the trial court made detailed dispositional findings regarding the factors in N.C.G.S. § 7B-1110(a) and provided a reasoned basis for its conclusion that it was Adam's best interests to be adopted into the safe and loving home of his maternal aunt and uncle, where he has resided since June 2017. *In re Z.A.M.*, 374 N.C. at 101; *In re Z.L.W.*, 372 N.C. at 437–38. Therefore, we hold the trial court did not abuse its discretion in terminating respondent's parental right and so affirm the termination order.

AFFIRMED.

IN THE MATTER OF A.P.

No. 208A20

Filed 11 December 2020

Termination of Parental Rights—no-merit brief—neglect—failure to pay a reasonable portion of the cost of care—personal jurisdiction

The termination of a mother's and father's parental rights to their daughter on grounds of neglect and willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(1), (3)) was affirmed where the parents' counsel filed a no-merit brief, the trial court properly exercised personal jurisdiction over the parents (who were served process by publication after diligent but unsuccessful attempts to effect personal service), and the 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 10 February 2020 by Judge Meredith A. Shuford in District Court, Lincoln County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Fielding Yelverton for appellee Lincoln County Department of Social Services.

Stacie C. Knight for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father and David A. Perez for respondent-appellant mother.

NEWBY, Justice.

Respondent-mother and respondent-father appeal from the trial court's order terminating their parental rights in the minor child "Amy."[1] Counsel for respondents have jointly filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Because we conclude the issues identified by counsel as arguably supporting the appeal are meritless, we affirm.

Amy was born in October 2018 in Lincoln County, North Carolina. On the date of Amy's birth, the Lincoln County Department of Social Services (DSS) received a report that respondent-mother tested positive for amphetamines upon her admission to the hospital, "had been using heroin, Suboxone, and other drugs," and would be involuntarily committed, leaving newborn Amy without a caretaker who could consent to medical treatment. Respondent-father, who claimed to be Amy's biological father, was reportedly "at the hospital 'raising cane' " and had to be escorted from the premises.

A DSS social worker responded to the hospital. Medical staff advised her that respondent-mother was in the critical care unit, that she "would be sedated for three to ten days due to withdrawals," and that Amy "would need to be transferred to another hospital for further treatment." Staff had also observed respondent-father arguing with respondent-mother with his hand around her neck. Respondent-father "admitted that he and [respondent-mother] had been using illegal Subutex" and

1. We use this pseudonym to protect the juvenile's identity and for ease of reading.

stated that they were living in a tent in Lincolnton but planned to move to South Carolina "with a man named Johnny who[m] they had met on Craigslist."

The following day, DSS obtained nonsecure custody of Amy and filed a juvenile petition alleging she was neglected and dependent. In addition to the events described above, the petition alleged respondent-mother and respondent-father had histories with child protective services involving incidents of substance abuse and domestic violence as well as prior criminal convictions for impaired driving and drug offenses and pending felony charges.

Respondents appeared in court for a nonsecure custody hearing held on 6 November 2018 but left before their case was called. They did not attend any subsequent hearings in the case but were represented by counsel throughout the proceedings.

The trial court held a hearing on DSS's petition on 11 December 2018 and entered an order adjudicating Amy a neglected and dependent juvenile on 24 January 2019.[2] DSS maintained custody of Amy, and the trial court granted respondents ninety minutes per week of supervised visitation conditioned upon a weekly drug test. The trial court ordered each respondent to obtain substance abuse assessments and follow all treatment recommendations, to submit to random drug screens as requested by DSS, to obtain and maintain stable housing and employment, and to attend parenting classes. The trial court reiterated these requirements in a review order entered on 19 March 2019.

A permanency planning hearing was held on 4 June 2019. In the resulting order entered on 12 July 2019, the trial court established for Amy a primary permanent plan of adoption with a secondary plan of reunification. The court found respondents had yet to comply with its prior orders, were not cooperating with DSS, and had attended no visits with Amy since 7 December 2018.

On 1 August 2019, DSS filed a petition to terminate respondents' parental rights in Amy. A summons was issued to both respondents the same day. After unsuccessfully attempting to effect personal service upon respondents, DSS filed a motion for leave to serve respondents by publication on 24 September 2019. *See* N.C.G.S. § 7B-1106(a) (2019). The trial court granted the motion after a hearing held on 1 October

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2. At the time of the hearing, DSS had not received the results of respondent-father's DNA paternity test, but respondent-father was named on the birth certificate as Amy's father.

2019. In its order, the court detailed the steps undertaken by DSS to ascertain the "current address or whereabouts" of respondents and found the agency "has made diligent efforts to serve a copy of the petition and summons on the parents . . . through multiple addresses, all of which [have] been returned unserved." The court directed DSS to serve respondents by publication in both Lincoln County and McDowell County, North Carolina. Counsel subsequently filed affidavits with the court confirming DSS had served respondent-mother and respondent-father in accordance with the procedures in N.C.G.S. §§ 1-75.10(a)(2) and 1A-1, Rule 4(j1)–(j2)(3) (2019) by publishing a separate "Notice of Service of Process by Publication" addressed to each respondent in the *Lincoln Times-News* newspaper on 14, 21, and 28 October 2019 and in *The McDowell News* on 25 October, 1 November, and 8 November 2019.

The trial court held a termination of parental rights hearing on 21 January 2020. Respondents did not attend the hearing but were represented by counsel, neither of whom objected to the form of service or to the court's exercise of personal jurisdiction over their client. *See generally In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (noting that "any form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons' " (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956))).

Based on the evidence adduced by DSS and the guardian *ad litem*, the trial court entered an order on 10 February 2020 terminating respondents' parental rights in Amy. As grounds for termination, the court concluded that respondents had neglected Amy and were likely to subject her to further neglect if she returned to their care and that respondents had willfully failed to pay a reasonable portion of Amy's cost of care for the six-month period immediately preceding the filing of the petition to terminate their parental rights. N.C.G.S. § 7B-1111(a)(1), (3) (2019). The court also considered the dispositional factors in N.C.G.S. § 7B-1110(a) (2019) and determined it was in Amy's best interests that respondents' parental rights be terminated. Respondents each filed and served timely notice of appeal.

Counsel for respondent-mother and respondent-father have jointly filed a no-merit brief on behalf of their clients pursuant to Rule 3.1(e) of the Rules of Appellate Procedure. In their brief, counsel identified three issues arguably supporting an appeal but explained why they believed these issues lacked merit. Counsel also advised respondent-mother and respondent-father of their right to file pro se written arguments with

this Court and provided them with the documents necessary to do so. Neither respondent has submitted written arguments to this Court.

We carefully and independently review the issues identified by counsel in a no-merit brief in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Having undertaken this review, we are satisfied that the trial court properly exercised personal jurisdiction over respondents and that its 10 February 2020 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. We therefore affirm the order terminating respondents' parental rights.

AFFIRMED.

IN THE MATTER OF B.E., J.E.

No. 11A20

Filed 11 December 2020

1. Termination of Parental Rights—grounds for termination—neglect—substance abuse and inappropriate discipline—denial of effect on children

The trial court properly terminated respondent-mother's parental rights in her children based on neglect where the trial court found, based on sufficient evidence, that respondent-mother was in denial about how alcohol abuse by the children's father and physical abuse he inflicted on them affected the children and that her failure to address past trauma through recommended therapy precluded her from providing her children with proper care and supervision. These and other findings supported the court's conclusion that there was a high likelihood of the repetition of neglect should the children be returned to her care.

2. Appeal and Error—preservation of issues—termination of parental rights—child's due process rights

In a termination of parental rights action, respondent-father failed to preserve for appellate review an argument that the trial court failed to protect his fifteen-year-old son's procedural rights—by providing notice and an opportunity to appear and give testimony independent of the court-appointed guardian ad litem, protections

not specifically granted in N.C.G.S. § 7B-1110—where respondent did not raise the issue for the trial court's consideration.

3. Termination of Parental Rights—best interests of the child—statutory factors—likelihood of adoption—child's wishes

The trial court did not abuse its discretion by concluding that termination of respondent-father's parental rights was in the best interests of his fifteen-year-old son where the court's findings addressed each of the dispositional factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence. The findings demonstrated the court's consideration of the son's views on being adopted, and supported the court's determination that the son's best interests would not be served by requiring him to consent to adoption.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 24 September 2019 and 25 October 2019 by Judge William F. Helms III in District Court, Union County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride, for petitioner-appellee Union County Division of Social Services.

Winston & Strawn LLP, by John H. Cobb, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

Jeffrey William Gillette for respondent-appellant father.

BEASLEY, Chief Justice.

Respondent-mother and respondent-father appeal from the trial court's orders terminating their parental rights in the minor children "Justin"[1] and "Billy." We affirm.

I. Procedural History

Respondents have three children together: Justin, born in 2006; Billy, born in 2004; and Chaz, born in 2003. In November 2016, the Union

1. Pseudonyms are used throughout the opinion to protect the juveniles' identity and for ease of reading. A third child will be referred to by the pseudonym "Chaz."

County Division of Social Services (DSS) obtained nonsecure custody of respondents' children and filed juvenile petitions alleging they were neglected and dependent. The petitions cited a Child Protective Services (CPS) report received on 29 September 2016 stating that Chaz came to school with a "busted lip" and said respondent-father had "backhanded him in the face and repeatedly hit him in the head with a fist" while intoxicated. The report indicated respondent-father regularly drank alcohol and became angry. It also described respondents' children as frequently hungry due to the "minimal food" in the home and described the home as rat-infested and unkempt.

DSS's petitions further alleged that respondent-father admitted striking Chaz and agreed to refrain from physical discipline as part of a safety agreement. However, respondent-father refused to obtain a substance abuse assessment and failed to attend an assessment scheduled for 28 October 2016. After a social worker met with respondents, respondent-father participated in a substance abuse assessment on 3 November 2016 but refused to engage in the recommended treatment to address "his intensive history of abusing alcohol."

Finally, the petitions alleged DSS received another CPS report of respondent-father repeatedly striking Chaz on the head and knocking him to the ground while drinking alcohol on 7 November 2016. When a social worker met with respondents about the report, respondent-father refused to enter into a safety agreement to refrain from physical discipline, abstain from alcohol, or participate in substance abuse treatment. Respondents told DSS that they had no family support or alternative placement options for the children.

Upon the parties' stipulation to facts consistent with the petitions' allegations, the trial court adjudicated respondents' children neglected and dependent juveniles on 7 February 2017. The court maintained the children in DSS custody and ordered respondent-father to abstain from alcohol, attend Alcoholics Anonymous, engage in substance abuse treatment through Daymark Recovery, attend parenting classes, complete the activities in his Out of Home Services Agreement with DSS, maintain a residence separate from respondent-mother, and submit to random alcohol screens. Respondent-mother was ordered to attend parenting classes, complete the activities in her Out of Home Services Agreement, and obtain a psychological and mental health evaluation and comply with any treatment recommendations. The court forbade both respondents to discuss the case with the children "at any time."

While awaiting an appropriate therapeutic placement for Chaz, the trial court authorized a trial home placement for the child with

respondent-mother beginning in March 2017. At the initial review hearing on 3 May 2017, however, the court ordered Chaz removed from respondent-mother's home and returned to foster care. In its review order, the trial court found respondent-mother "was unable to get [Chaz] to the [school] bus on time" and had failed to administer the child's medication properly despite "multiple instructions" and DSS's provision of "medication bags . . . with the correct amount of medication she needed to administer the medication each night." The court further found that, despite receiving food stamps and additional financial assistance, respondent-mother "cannot keep food in the home" and "has demonstrated an inability to manage her finances" to the detriment of the children; that respondent-mother's home "is in poor condition," infested with insects and rodents, and strewn with trash and soiled clothing; that "the clothing in [Chaz's] bedroom had dog feces mixed within it"; and that respondent-mother "sends [Chaz] to school in clothes that are dirty and too small for him." Although respondent-mother had completed a series of parenting classes, the court found she continued to make inappropriate promises and other statements about the case to the children and had otherwise failed to show "she is able to put what she has learned into effect."

With regard to respondent-father, the trial court found that he continued to drink alcohol, that he smelled of alcohol at his visits with the children, and that he had informed DSS "he would cut back on drinking but would never quit completely" but "the changes he would be making would be temporary only because of DSS involvement."

At the initial permanency planning hearing held 21 March 2018, the trial court concluded that further DSS efforts to reunify the children with respondents "clearly would be futile, unsuccessful and inconsistent with the [children's] health and safety and need for a safe, permanent home within a reasonable period of time." The court established a primary permanent plan of adoption for the children with a secondary plan of custody or guardianship with an approved caretaker.

DSS filed a motion for termination of respondents' parental rights on 14 May 2018. After a series of continuances, the trial court held an adjudicatory hearing beginning on 27 February 2019, proceeding over four dates, and concluding on 8 May 2018. On 24 September 2019, the court entered an order adjudicating the existence of grounds to terminate respondents' parental rights for (1) neglect, (2) willful failure to make reasonable progress to correct the conditions that led to the children's removal from the home, and (3) dependency.

The trial court held a dispositional hearing on 27 September 2019. In an order entered on 25 October 2019, the court concluded that terminating respondents' parental rights was in the best interests of Justin and Billy but not in the best interests of Chaz. The court terminated respondents' parental rights in Justin and Billy and dismissed DSS's motion as to Chaz. *See* N.C.G.S. § 7B-1110(a)–(b) (2019).

Respondents each filed timely notice of appeal pursuant to N.C.G.S. § 7B-1001(a1) (2019). We consider their appeals in turn.

II. Respondent-Mother's Appeal

[1] Respondent-mother claims the trial court erred in concluding that grounds exist to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) and (6). "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 A.L.S.*, 374 N.C. 515, 519 (2020) (quoting *In re C.B.C.*, 373 N.C. 16, 19 (2019)). We have held that "an 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). Therefore, if we determine that one of the trial court's adjudicated grounds for termination is supported by the findings of fact and conclusions of law, we need not review the remaining grounds. *Id.*

The trial court concluded, *inter alia*, that respondent-mother had neglected the children under N.C.G.S. § 7B-1111(a)(1). A juvenile is "neglected" within the meaning of our Juvenile Code if he does not receive "proper care, supervision, or discipline" from his parents or "lives in an environment injurious to [his] welfare." N.C.G.S. § 7B-101(15) (2019). "In order to constitute actionable neglect, the conditions at issue must result in 'some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment.' " *In re K.L.T.*, 374 N.C. 826, 831 (2020) (quoting *In re Stumbo*, 357 N.C. 279, 283 (2003)).

For purposes of N.C.G.S. § 7B-1111(a)(1),

> "the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " In the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights

> impossible.' " In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent."

In re S.D., 374 N.C. 67, 73 (2020) (quoting *In re N.D.A.*, 373 N.C. 71, 80 (2019)).

In support of its adjudication under N.C.G.S. § 7B-1111(a)(1), the trial court recounted the conditions leading to the children's prior adjudication as neglected on 7 February 2017. As respondent-mother states in her brief, "[t]he children were removed from the custody of their parents primarily due to the father's alcohol abuse and improper discipline. The trial court also noticed issues with the cleanliness of the home." The court also made findings detailing the causes of Chaz's failed trial home placement with respondent-mother in the spring of 2017.[2]

Respondent-mother argues that, given the progress she and respondent-father had made at the time of the termination hearing, the evidence and the trial court's findings of fact do not support the court's conclusion that Justin and Billy were likely to experience further neglect if they were returned to her custody. *See generally In re Z.V.A.*, 373 N.C. 207, 212 (2019) (requiring court to "consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing"). She contends the trial court "relied heavily on circumstances that no longer existed at the time of the [termination] hearing." We disagree.

The trial court made the following additional findings of fact which support its conclusion that "there is a high likelihood of repeated neglect if the juveniles were returned to [respondent-mother]":

> 16. . . .
>
> (A) . . .

2. Respondent-mother objects to the trial court's reliance on Chaz's 2017 trial home placement as evidence that she is likely to neglect the children in the future. In the two years since the trial placement, she avers, respondent-father returned to live with her, and they "completed two parenting classes, engaged in therapy, and had maintained a clean and substance free home for an extended period time." However, the trial court was free to consider the results of a prior trial home placement in determining whether, *at the time of the termination hearing*, respondent-mother was likely to subject the children to future neglect. *See In re Ballard*, 311 N.C. 708, 716 (1984) ("[T]he trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect.").

i. [Respondent-mother] has been ordered not to discuss this case with the juveniles. . . . She has continued to discuss the case with the juveniles, making them promises about the outcome of the case and telling them what to say to providers and to DSS workers. This has impeded the juveniles['] ability to make emotional progress in their current placement.

ii. The juveniles have been led to believe that things will get better. They have been told that they would not have to do anything because she would get them back.

. . . .

vii. [Respondent-mother] has failed to understand the impact of her actions or inactions, has had on her children. She fails to understand the importance of maintaining a safe, clean environment for the juveniles.

(B) . . .

i. [Respondent-mother] has not gained insight into the effects of [respondent-]father's severe alcohol abuse and physical abuse on the children . . . . She minimizes [respondent-]father's actions and makes excuses for his behavior.

ii. [Respondent-mother] . . . cannot stand without assistance for more than 15 minutes and has difficulty completing basic household tasks. She continues to reside with [respondent-father], who does not help or assist her with the housework.

iii. [Respondent-mother] is in need of counseling for anxiety and depression, in part due to sexual abuse of her as a child and young adult, but she does not believe she needs counseling and will not continue counseling.

17. . . .

(A) . . .

. . . .

iv. [Respondent-father] admits to drinking alcohol since age 9, sometimes as many as 24 beers per day, but

> he does not believe he needs to permanently stop drinking and has not showed insight into his drinking problem after undertaking some treatment through Daymark Recovery Services.
>
> (B) . . .
>
> i. [Respondent-father] has failed to understand [the] impact that improper discipline has on the juveniles, and he has not acknowledged that his discipline was improper, therefore making it likely that he would exercise improper discipline again in the future.
>
> ii. [Respondent-father] says that he has corrected his alcohol use. However, he acknowledges he may drink again at some point in the future.
>
> iii. [Respondent-father] will not complete therapy to address his issues of abandonment, as well as his lack of insight into his own substance abuse issues.

To the extent respondent-mother does not contest these findings, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97 (1991).

Respondent-mother challenges the portion of Finding of Fact 16(A)(i) which states her ongoing discussions of the case with the children "impeded the[ir] ability to make emotional progress in their current placement." She acknowledges that, "[a]t some point after the adjudication, [she] was ordered not to discuss the case with her children" and that she "should have refrained from making the comments to her children[.]" However, she insists DSS adduced no evidence that her statements "prevented the children from making emotional progress."

In its initial "Adjudication and Disposition Order" entered in February 2017 and in subsequent review orders, the trial court ordered respondent-mother not to "discuss the case with the juveniles at any time" or "under any circumstances." The DSS social workers who observed respondent-mother's visitations with the children testified respondent-mother routinely flouted this prohibition as reflected in Finding of Facts 16(A)(i)–(ii). Respondent-mother's inappropriate comments to the children were an ongoing problem throughout the case up to the time of the termination hearing.

As for the effect of these comments on the children, a social worker testified that Chaz had "a hard time" and became disruptive in his foster placement after respondent-mother falsely assured him, " 'You're

coming home. Don't worry about it. They can't keep you that long[.]" More recently, respondent-mother had told Billy "she can get the kids back in the snap of a finger," leaving him to wonder why he remained in foster care if his mother "could change the judge's mind with the snap of a finger[.]" Both social workers testified that this type of statement to the children "gets their hopes up" by creating unrealistic expectations and promising outcomes respondent-mother cannot deliver. We find this evidence sufficient to support an inference that the children's emotional progress was at least "impeded" by respondent-mother's actions.

Respondent-mother next objects to Finding of Fact 16(A)(vii) and claims the evidence showed she had come to understand, at the time of the termination hearing, both "the importance of maintaining a clean and safe home for her children" and "how her own actions negatively affected the children."

To the extent respondent-mother's objection concerns her willingness to maintain a clean home, we agree the trial court's finding does not account for her improvement in this area. Respondent-mother acknowledged the home had fallen into "disarray" after her back surgery in 2015 and was "a mess" when the children were removed by DSS in November 2016. However, she testified that she and respondent-father had cleaned up the house after he returned in 2017 with the assistance of the DSS social worker and a "Medicaid nurse" who comes to the residence ten hours per week to assist with cleaning. Respondent-mother introduced photographs of the home taken on the morning of 28 February 2019, depicting "how the house looks now[.]"

The DSS social worker largely corroborated respondent-mother's account of the improvement made to conditions in the state of the home between 2017 and the social worker's final visit to the residence in March 2018. Absent any proffer of evidence contradicting respondent-mother's evidence of her ongoing maintenance of a clean home up to the time of the termination hearing, we deem this portion of Finding of Fact 16(A)(vii) to be unsupported by the record. Therefore, we disregard the finding for purposes of our review. *In re J.M.J.-J.*, 374 N.C. 553, 559 (2020); *In re J.M.*, 373 N.C. 352, 358 (2020).

The remainder of Finding of Fact 16(A)(vii) is amply supported by the evidence, including respondent-mother's own testimony. Despite her completion of two sets of parenting classes in February and May of 2017, respondent-mother continued to exhibit a lack of understanding of her responsibility to ensure a safe home environment for her children. DSS introduced a psychological evaluation of respondent-mother prepared by

Dr. George Popper in November 2017. Dr. Popper described respondent-mother's "insight as to the impact of substance abuse and physical discipline . . . on her children" as "inconsistent." By the time of the termination hearing, respondent-mother no longer accepted that the children were neglected at the time of their removal in November 2016. She denied respondent-father had been intoxicated when he "backhanded" Chaz in the mouth and accused the child of exaggerating the incident and of biting his own mouth on the school bus the following morning in order to draw blood and "make some stuff happen." Respondent-mother also denied respondent-father's alcohol use had caused a disruption in the home and suggested his drinking was "[n]ot necessarily . . . a problem with [the] children being in the home" because respondent-father "was not staggering around falling down drunk."

The evidence also supports the trial court's finding that respondent-mother fails to understand the impact of her actions and inactions on the children. In addition to her failure to recognize how her inappropriate statements affected the children, the evidence showed respondent-mother engaged in inappropriately sexualized contact with the children during visitations, requiring ongoing correction by DSS staff or respondent-father. Moreover, in her hearing testimony, respondent-mother repeatedly disavowed any duty to protect her children from respondent-father's substance abuse, anger issues, or physical disciplining, insisting that she "cannot do nothing about it" and "cannot force [respondent-father] to do anything." We find that respondent-mother's argument as to Finding of Fact 16(A)(vii) lacks merit.

Respondent-mother next challenges the evidentiary support for Finding of Fact 16(B)(i), which states she "has not gained insight into the effects of [respondent-father's] severe alcohol abuse and physical abuse on the children" and "minimizes . . . and makes excuses for his behavior." The evidence, however, supports this finding. Respondent-mother devoted a substantial portion of her hearing testimony to denying that the children had been neglected, downplaying the degree of respondent-father's alcohol consumption, and insisting that the physical discipline respondent-father inflicted on Chaz was entirely appropriate, or at least understandable. Respondent-mother refused to believe respondent-father's own account of his alcohol consumption and claimed to be unaware of any occasion when he had hit the children while drinking. In additional to accurately reflecting respondent-mother's testimony, Finding of Fact 16(B)(i) is supported by Dr. Popper's findings regarding respondent-mother's tendency to defend respondent-father and "minimize his physical abuse of [Chaz]." Respondent-mother's argument lacks merit.

To the extent respondent-mother separately contends that the evidence showed her and respondent-father's mutual "acknowledgment of the importance of maintaining a sober household and refraining from physical discipline," we again find her position without merit.

The evidence did show respondent-father's completion of the Moderate Level Substance Abuse Treatment Program at Daymark Recovery Services in October 2018.[3] On the date of his graduation from Daymark, however, he announced to his group, "My medications allow me to drink beer not liquor. [Respondent-mother] will only be mad if it's liquors. I can't say that I won[']t have another drink but it won't be every day."

By respondent-father's own account, he began drinking alcohol at nine years of age and had continued until November 2017 at age 62. He had completed several previous courses of treatment for alcohol abuse, including inpatient treatment at Black Mountain in 1976 which led to a years-long period of sobriety. Respondent-father then resumed drinking and accumulated multiple convictions for impaired driving. Respondent-father also previously attended outpatient treatment at Daymark in 2012.

More recently, respondent-father claimed to have quit drinking alcohol for a three-year period after hitting respondent-mother and then promising her that he "wouldn't drink anymore."[4] He testified he had resumed drinking after this interval because he "wanted a beer" and "she didn't care if [he] drank beer, just don't drink no liquor." Respondent-father claimed respondent-mother objected to him drinking liquor "simply because she knows [he is] not supposed to be drinking it with [his heart] medicine."

Although respondent-father testified he had not drunk alcohol since November 2017, he refused to acknowledge his alcoholism or commit to refrain from drinking alcohol:

> Q. Okay. You have been told you're an alcoholic, haven't you?
>
> A. Does that make me an alcoholic?
>
> . . . .

---

3. Respondent-father also completed Daymark's Substance Abuse Intensive Outpatient Treatment Program in February 2017.

4. According to respondent-mother, respondent-father had been arrested for hitting her in "[p]robably 2003."

Q. But you don't believe you are?

A. I like beer.

Q. You're not gonna – you might drink again, right?

A. Well, they ain't gonna quit making it, but I might not quit – might not start back drinking either.

Q. Okay.

A. But there is always that possibility.

. . . .

Q. . . . But you don't admit you're an alcoholic?

A. Well, my – I don't admit that I'm retarded either, but I don't see the point in discussing it.

Q. And you believe you're powerless over alcohol?

A. No.

Respondent-father also insisted that his physical discipline of Chaz was an appropriate response to the child's conduct. He did not commit to refraining from similar discipline in the future. Moreover, respondent-father refused to follow Dr. Popper's recommendation to obtain treatment for his anger issues, believing he did not "have anger issues."

Contrary to her assertion on appeal, respondent-mother did not commit to maintaining a household free from alcohol abuse or physical discipline. She took the position that she was accountable only for her own actions and was powerless to exert any control over respondent-father or "force him to do anything." Asked if she had ever threatened to leave respondent-father if he continued to drink alcohol, respondent-mother replied, "No, not really. I told him that – I have told him straight out that, if he's gonna drink liquor, that I'm not gonna be with him, and I'm – that's the truth, I'm not, because I can't deal with it no more." As respondent-father's beverage of choice was beer, respondent-mother's ultimatum did not in any way amount to a demand for his sobriety. Her objection to Finding of Fact 16(B)(i) on this basis is unfounded.

Respondent-mother also claims the trial court erred in basing its adjudication in part on Finding of Fact 16(B)(iii), which notes her refusal to pursue counseling recommended by Dr. Popper to address the sexual abuse and other trauma she experienced as a child. While acknowledging "it is not unreasonable for the trial court to want [her] to address

her underlying childhood traumas,"[5] respondent-mother contends "DSS failed to provide a nexus between [her] past trauma and how it [sic] neglected her children."

The evidence showed Dr. Popper recommended counseling for respondent-mother "to deal with the emotional trauma she suffered as a child[.]"He found respondent-mother's "parenting role models were obviously quite poor," and "the trauma she experienced growing up has had a lasting impact on her ability to care for herself and for her children." Dr. Popper deemed it likely that the emotional abuse respondent-mother suffered at the hands of her alcoholic mother and the sexual abuse inflicted by her brothers and uncle made her less equipped to assert herself against potential abusers in order to protect her children. Dr. Popper expressed his "concern that [respondent-mother] could be intimidated by a potential abuser" and recommended "this [a]s one of the issues that she should address in counseling."

The nexus between respondent-mother's unresolved childhood trauma and her ability to provide her children with proper care and supervision and a safe environment was laid bare by respondent-mother's hearing testimony. Asked about her reaction to respondent-father's alcohol use in the home, respondent-mother described how she would "shut down" to protect herself, as follows:

> My momma was an alcoholic. After so many drinks, she started hitting, and I had to shield myself, and it was my problem. And every time I seen [respondent-father] drink, after the third beer, I shielded myself. I kept myself in a little box for I cannot get hurt. And I kept the boys – I said, "Okay" – I even made them aware of it. "Do not make anybody mad when they are drinking," because of my past, and I recently got over my past of that, because when you live with an alcoholic or raised by an alcoholic, it is hard. You got to know the boundaries. And I – after three beers – I know he wasn't gonna hurt me or anything, but from my past, I automatically shield myself.

---

5. Insofar as respondent-mother's argument may also be construed to challenge the evidentiary support for the finding that she "does not believe she needs counseling and will not continue counseling," we find her claim refuted by her own testimony as well as the testimony of the DSS social worker. Respondent-mother's argument that an unwillingness to discuss her childhood trauma with a therapist "is not the same as her unwillingness to go [to therapy]" lacks merit. And although respondent-mother offered to resume therapy on the date of the termination hearing, nearly two-and-a-half years into the case, the trial court was free to find her offer neither timely nor credible. *See In re D.L.W.*, 368 N.C. 835, 843 (2016).

Respondent-mother also voiced her helplessness to resolve respondent-father's "anger management problem," explaining she had learned to "back off" when she saw he was getting upset. She also seemed to justify respondent-father backhanding Chaz in the mouth in September 2016 by noting, "If I done that to my daddy, he would have done the same thing to me." Because respondent-mother's testimony vindicates each of Dr. Popper's concerns about her need for treatment to address the impact of her childhood trauma, the trial court did not err in citing this issue as a factor tending to show a likelihood of future neglect.

Having reviewed each of the contested findings of fact, we now turn to respondent-mother's claim that the trial court's findings do not support its conclusion that "there is a high likelihood of repeated neglect if the [children] were returned to her" care. *See generally In re J.O.D.*, 374 N.C. 797, 807 (2020) ("[T]he trial court's determination that neglect is likely to reoccur if [the juvenile] was returned to [the respondent-parent's] care is more properly classified as a conclusion of law."). Respondent-mother asserts the trial court improperly based its conclusion on "circumstances that no longer existed at the time of the [termination] hearing." We disagree.

As the trial court found, when given an opportunity to parent Chaz without respondent-father in the home, respondent-mother was unable to administer his medication or otherwise care for him properly. More significantly, although she had made progress regarding the cleanliness of her residence and had completed parenting classes, respondent-mother had not resolved the primary risk posed to the children—that of respondent-father's continued presence in the home. *See In re Z.V.A.*, 373 N.C. 207, 212 (2019) ("The district court's determination in the present case that neglect would likely be repeated if [the child] was returned to respondent-father was intrinsically linked to respondent-father's inability to sever his relationship with respondent-mother."); *see also In re A.R.A.*, 373 N.C. 190, 198 (2019) ("Respondent-mother's argument disregards the primary reason for the removal of her children—the presence of the father in the home.").

As he had multiple times in the past, respondent-father had completed a course of substance abuse treatment at the time of the termination hearing and claimed to have abstained from alcohol since November 2017. However, he continued to deny his alcoholism and felt at liberty to resume drinking beer provided he abstained from liquor. Respondent-father had failed to recognize or obtain treatment for his anger problem and refused to acknowledge using inappropriate physical discipline on Chaz. He testified that DSS had taken the children into custody because

the social worker "just wanted to show [him] she had the power to do what she said she could do."

At the time of the termination hearing, respondent-mother denied the children had ever experienced neglect or inappropriate discipline in the home and disclaimed any responsibility for respondent-father's alcohol abuse or disciplinary methods. She had further failed to address the psychological issues identified by Dr. Popper which prevented her from recognizing the harm caused to the children by respondent-father's behaviors and from taking the necessary steps to provide the children with a safe home. Therefore, we hold the trial court did not err in adjudicating grounds for termination of her parental rights for neglect under N.C.G.S. § 7B-1111(a)(1).

Because we affirm the trial court's adjudication of neglect, we do not review respondent-mother's arguments regarding the additional grounds for termination found by the trial court. *In re E.H.P.*, 372 N.C. at 395. Respondent-mother does not separately contest the court's dispositional determination that terminating her parental rights is in Justin and Billy's best interests. Accordingly, we affirm the trial court's orders as to respondent-mother.

III. Respondent-Father's Appeal

Respondent-father does not challenge the trial court's adjudication of grounds to terminate his parental rights under N.C.G.S. § 7B-1111(a). Rather, he argues that the trial court abused its discretion at the dispositional stage of the proceeding by concluding it was in Billy's best interests to terminate respondents' parental rights, thereby "ignoring Billy's expressed wishes not to be adopted[.]"

If the trial court adjudicates the existence of one or more grounds for the termination of parental rights, it must then "determine whether terminating the parent's rights is in the juvenile's best interest" after considering 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 dispositional findings are binding . . . if they are supported by any competent evidence" or if not specifically contested on appeal. *In re E.F.*, 375 N.C. 88, 91 (2020).

We review the trial court's determination of a juvenile's best interests under N.C.G.S. § 7B-1110(a) only for abuse of discretion. *Id.* "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *In re J.J.B.*, 374 N.C. at 791 (quoting *In re Z.A.M.*, 374 N.C. 88, 100 (2020)). A trial court may also abuse its discretion if it "misapprehends the applicable law," *Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 281 (2020), or fails to comply with a statutory mandate, *Harris v. Harris*, 91 N.C. App. 699, 705–06 (1988).

Our adoption statutes require the child's consent to an adoption if he is at least twelve years of age. N.C.G.S. § 48-3-601(1) (2019). Under N.C.G.S. § 48-3-603(b)(2) (2019), however, the trial court is authorized to "issue an order dispensing with the [child's] consent . . . upon a finding that it is not in the best interest of the [child] to require the consent."

The trial court made the following findings of fact regarding the dispositional factors in N.C.G.S. § 7B-1110(a):

(A) . . . [Billy] is 15-years old. He will not reach the age of majority for three years. The undersigned [j]udge has determined that he does not need [Billy's] consent for adoption based on the evidence and testimony heard throughout the case.

(B) . . . [L]ikelihood of adoption for [Billy] is high.

(C) . . . Termination of Parental Rights would aid in accomplishing the permanent plan for [Billy] which is adoption.

(D) . . . [Billy] has somewhat of a bond with his mother but is afraid of his father. [Billy's] only reason to return home would be to protect his younger brother, [Justin] from [respondent-father] and [Chaz]. [Billy] feels as he is one of the parents in regard to [Justin]. This does not constitute a

positive bond between [Billy] and his parents. [Billy] is afraid of returning home.

(E) [Billy] has an interesting character of wanting to cure his father and take care of his brother, [Justin]. [Billy] needs to discuss with his therapist what he believes his relationship with his family is.

(F) . . . [Billy] has a good relationship with his current placement. His current placement wants to adopt him, although they recognize he may not want to be adopted. [Billy's] current placement providers have taken good care of him. [Billy's] foster parents are sensitive to his wishes and concerns regarding his relationship with his parents. They are willing to provide a permanent home for him and he wants to stay in his current home on a permanent basis.

(G) Other relevant considerations:

1) It has been discussed with [Billy] the difference between adoption and guardianship. [He] reports that he understands some aspects between the two.

2) Based on the evidence and testimony heard throughout this case, pursuant to NCGS 48-3-603(b)(2), it is not in [Billy's] best interest for his consent to be required for adoption.

The court separately concluded it was in Billy's best interests that the parental rights of respondent-mother and respondent-father be terminated.

[2] We begin by addressing respondent-father's claim that the trial court "fail[ed] to safeguard [Billy's] statutory due process rights" by providing Billy with notice of the dispositional hearing and affording him the opportunity to attend the hearing and testify on his own behalf, independent of his court-appointed guardian *ad litem* (GAL).[6] Assuming arguendo that respondent-father has standing to assert Billy's procedural rights on appeal, we conclude he has failed to preserve this issue for our review.

6. Respondent-father also asks this Court to "consider" requiring the appointment of counsel to represent the personal preferences of older juveniles, separate from the GAL attorney advocate who advances the juvenile's best interests. Because we conclude respondent-father failed to preserve these issues for appellate review under N.C. R. App. P. 10(a)(1), we decline to consider this issue.

Under the North Carolina Rules of Appellate Procedure, "[i]n 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." N.C. R. App. P. 10(a)(1). In this case, neither respondent-father nor any other party presented the trial court with the argument that Billy had the right to notice and to appear and testify at the dispositional hearing under N.C.G.S. § 7B-1110(a). Therefore, this issue was not preserved for appeal. *See In re E.D.*, 372 N.C. 111, 116 (2019).

We recognize that "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Braxton*, 352 N.C. 158, 177 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13 (2000)). However, while characterizing his claim as sounding in "statutory due process,"[7] respondent-father concedes there is no explicit statutory grant of the procedural rights he would provide to Billy. The absence of clear statutory language directed to the trial court compels our conclusion that respondent-father was required to comply with Rule 10(a)(1) in order to raise this claim on appeal. *See In re E.D.*, 372 N.C. at 117 ("When a statute 'is clearly mandatory, and its mandate is directed to the trial court,' the statute automatically preserves statutory violations as issues for appellate review." (quoting *State v. Hucks*, 323 N.C. 574, 579 (1988)).

As respondent-father observes, the statutes governing juvenile abuse, neglect, and dependency proceedings provide certain procedural rights to juveniles who are at least twelve years old in addition to the general right to representation by a GAL under N.C.G.S. § 7B-601(a) (2019).[8] Section 7B-906.1, for example, requires the clerk of court to provide older juveniles with fifteen days' notice of all permanency planning hearings; it also requires the court to "consider information from . . . the juvenile"[9] in addition to the juvenile's parents, caretaker, and

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7. Respondent-father did not raise any issue of constitutional due process in the trial court and thus may not raise such a claim for the first time on appeal. *See State v. Gainey*, 355 N.C. 73, 87 (2002).

8. Though not cited by respondent-father, N.C.G.S. § 7B-1108(b)–(d) (2019) governs the appointment of a GAL to represent a juvenile in a termination of parental rights proceeding.

9. The statute governing the initial dispositional hearing in an abuse, neglect, or dependency proceeding also provides "[t]he juvenile" with "the right to present evidence, and . . . [to] advise the court concerning the disposition[.]" N.C.G.S. § 7B-901(a) (2019). Unlike N.C.G.S. § 7B-906.1(c), however, the statute does not expressly distinguish the juvenile from the GAL. *Id.*

GAL in determining "the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-960.1(b)–(c) (2019). Similarly, juveniles twelve years of age or older are entitled to written notice of hearings to review a voluntary foster care placement under N.C.G.S. § 7B-910(d) (2019), and all post-termination placement reviews under N.C.G.S. § 7B-908(b)(1) (2019).

Conspicuously absent from N.C.G.S. § 7B-1110—the statute governing the dispositional hearing in a termination of parental rights case—is any equivalent language providing juveniles of any age with the right to notice or the right to attend and testify at the hearing. *See* N.C.G.S. § 7B-1110(a); *see also* N.C.G.S. §§ 7B-1106(a)-(a1), -1106.1(a) (2019) (addressing service of process or notice of a petition to terminate parental rights or a motion to terminate parental rights filed in a pending abuse, neglect, or dependency proceeding). Moreover, § 7B-1110 *does* expressly provide juveniles twelve years of age or older with the right to be served with a copy of the order terminating their parent's rights. N.C.G.S. § 7B-1110(d) (2019). Our General Assembly has thus demonstrated its ability to codify special protections for older juveniles in the termination of parental rights statutes when it intends to do so.

Faced with the absence of favorable statutory language, respondent-father infers from other sections of the Juvenile Code the General Assembly's "clear preference that the express wishes of older juveniles be communicated directly to the trial court[,]" rather than through intermediaries such as the GAL. For purposes of issue preservation under Rule 10(a)(1), it suffices to say that an unarticulated legislative "preference" is not a clear statutory mandate directed to the trial court. *See generally In re E.D.*, 372 N.C. at 117 (limiting the statutory mandate exception to Rule 10(a)(1)). Accordingly, we hold respondent-father failed to preserve for appeal his arguments regarding Billy's right to participate in the dispositional hearing under N.C.G.S. § 7B-1110(a).

[3] Respondent-father also claims the trial court abused its discretion by "ignoring Billy's expressed wishes not to be adopted and by finding that his consent should be waived based on evidence that was neither relevant nor reliable." We find no merit to this assertion.

The trial court received evidence from both DSS and the GAL that Billy had no desire to return to respondents' home and wished to remain permanently with his current foster parents, with whom he had resided since December 2016. The social worker and GAL both testified that Billy had expressed a preference for a guardianship arrangement with his current foster parents rather than adoption "because of loyalty to his

family" and a concern that, "if he's adopted, the bond [with his family] might be threatened[.]" Both witnesses emphasized the number of conversations they had with Billy about the differences between guardianship and adoption, as well as the difficulty Billy experienced in trying to understand the differences.

The trial court's findings accurately reflect the evidence on Billy's position with regard to being adopted by his foster parents. Furthermore, by finding that it was not in Billy's best interests to require his consent to adoption, and by citing the applicable adoption statute, N.C.G.S. § 48-3-603(b)(2), the court demonstrated its consideration of Billy's stated preference for guardianship in lieu of adoption.[10] Although respondent-father contends the court did not give "proper weight" to Billy's preference, the weight assigned to particular evidence, and to the various dispositional factors in N.C.G.S. § 7B-1110(a), is the sole province of the trier of fact.[11] *See In re A.J.T.*, 374 N.C. 504, 514 (2020) ("Respondents essentially ask this Court to do something it lacks the authority to do—to reweigh the evidence and reach a different conclusion than the trial court.").

Respondent-father also claims the trial court "abused its discretion when it found the likelihood of adoption was high and that termination of parental rights would aid in the adoption." Rather than challenge the evidentiary support for these findings, respondent-father reiterates the point that Billy's adoption would require the trial court to disregard Billy's stated wishes and waive the consent requirement pursuant to N.C.G.S. § 48-3-603(b)(2). On their face, however, these findings evince the court's full awareness of the legal implications of Billy's opposition to being adopted and the court's determination that it was contrary to Billy's best interests to require his consent to adoption. Given the waiver mechanism in N.C.G.S. § 48-3-603(b)(2), the evidence fully supports a finding that Billy is likely to be adopted. As a matter of law, the termination of respondents' parental rights would further that goal.

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10. Although respondent-father does not challenge the trial court's finding on this basis, we note the finding was not made in the context of a pending adoption proceeding under Chapter 48 and is not binding in any future action for Billy's adoption.

11. Respondent-father also asserts the trial court "ignored all the evidence from the social worker and GAL that Billy clearly understood the difference between adoption and guardianship." However, the social worker testified that Billy had stated his preference for guardianship, "but he's also says [sic] he really doesn't understand the difference." Moreover, the trial court's findings credit Billy with understanding "some aspects" of the distinction between guardianship and adoption. Because these findings are supported by competent evidence, they are binding. *In re E.F.*, 375 N.C. at 91.

Having considered each of respondent-father's arguments, we hold the trial court did not abuse its discretion in concluding it was in Billy's best interests to terminate respondent-father's parental rights. The court's findings address each of the dispositional factors in N.C.G.S. § 7B-1110(a) and support its ultimate determination that adoption will provide Billy with the most stable and enduring permanent plan of care. *See* N.C.G.S. § 7B-1100(2) (2019). Accordingly, we affirm the termination orders as to respondent-father.

AFFIRMED.

IN THE MATTER OF C.A.H.

No. 188A20

Filed 11 December 2020

Termination of Parental Rights—grounds for termination—willful abandonment—determinative time period—no contact or support

The trial court's decision terminating a father's parental rights in his child on the grounds of willful abandonment was affirmed where, during the determinative six-month period, the father had no contact with his child, who had moved to California with the mother, despite having working cell phone numbers for the mother and her husband; had expressed no interest in a relationship with the child; and had sent nothing to or for the child except for one partial child support payment. The trial court was also permitted to consider the father's actions outside of the six-month period to evaluate his intentions—for example, the father's failure to express any interest in seeing the child after learning she was back in North Carolina (after the termination petition was filed).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 January 2020 by Judge Christine Underwood in District Court, Alexander County. This matter was calendared in the Supreme Court on 23 November 2020 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Sydney Batch for respondent-appellant father.

MORGAN, Justice.

Respondent-father, the biological father of C.A.H. (Charlie)[1], appeals from the trial court's orders terminating respondent-father's parental rights on the grounds of willful failure to pay for the cost of care of the child and willful abandonment. We affirm the trial court's decision to terminate respondent-father's parental rights.

Factual Background and Procedural History

Charlie was born in September 2014. Petitioner-mother and respondent-father were in a relationship at the time of her birth, but the parents never married. After Charlie was born, petitioner and respondent briefly resided together at the maternal grandfather's home until their separation sometime around December 2014. During the time that Charlie's parents lived together, respondent assisted petitioner with the care of Charlie and with the purchase of necessities for their child.

On 18 March 2016, petitioner obtained a Domestic Violence Protective Order (DVPO) prohibiting respondent from having contact with petitioner and Charlie for a one-year period. While the DVPO was in effect, the paternal grandmother, while babysitting Charlie, took the juvenile to respondent's house in violation of the order. Petitioner was escorted to respondent's home by law enforcement in order to retrieve Charlie from respondent. This was the last time that respondent saw his daughter.

On 10 September 2016, petitioner married her husband, Mr. I. Mr. I was in the military and was stationed in California at the time of the marriage. Petitioner could not live on the military base with her husband, Mr. I, and her daughter, Charlie, without having full custody of the child. Petitioner filed a child custody action and obtained sole custody of Charlie in an order entered by the trial court on 21 December 2016. Respondent was incarcerated at the time of the hearing and was scheduled to be released in May 2017. The trial court ordered respondent to pay $140.00 per month in child support to begin in June 2017 after respondent's release from imprisonment. Petitioner subsequently moved to California with Charlie after entry of the custody order.

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1. Pseudonyms are used in this opinion to protect the juvenile's identity and for ease of reading.

Respondent was released from incarceration in February 2017. Shortly after his release, he contacted petitioner to request a visit with Charlie. When petitioner gave respondent a California address for the location of the authorized visit, respondent became angry. Respondent did not arrange a trip to California for the scheduled visit and did not tell petitioner that he did not plan to attend it. Petitioner and Charlie waited for two hours for respondent at the restaurant which was the chosen site for the respondent's visit with his daughter in California. When petitioner subsequently communicated with respondent via text message concerning respondent's failure to appear for his planned visit with Charlie, respondent answered that it was not "up to him to come and see [Charlie]. It was up to [petitioner] to bring her to him." Respondent testified at the termination of parental rights hearing that he did not attend the visit in California "because it would cost $1,000.00 to get a ticket to go half way across the world." Respondent's last contact with petitioner regarding Charlie was in February 2017.

Petitioner and Mr. I moved back to North Carolina with Charlie in April 2018. Petitioner did not inform respondent that the three of them had moved back to North Carolina. Respondent did not learn that Charlie had returned to reside in North Carolina until respondent was served with the petition to terminate his parental rights.

On 25 April 2019, petitioner filed a petition to terminate respondent's parental rights, alleging the grounds of willful failure to pay for the care, support, and education of the minor child; willful abandonment; and the earlier involuntary termination of respondent's parental rights with respect to another child. *See* N.C.G.S. § 7B-1111(a)(4), (7), (9) (2019). A hearing on the petition was held on 25 July, 29 August, 27 September, and 6 November of the year 2019. In an order entered 2 January 2020, the trial court found that grounds existed to terminate respondent's parental rights based on respondent's willful failure to pay for Charlie's care and respondent's willful abandonment of Charlie. In a separate disposition order entered on the same day of 2 January 2020, the trial court found that termination of respondent's parental rights to Charlie was in the child's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appeals to this Court.

Analysis

On appeal, respondent challenges the trial court's conclusions that grounds existed to terminate his parental rights. Respondent first argues that the trial court erred in concluding that grounds existed to terminate his parental rights based on willful abandonment. We disagree.

"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). 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, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 403, 293 S.E.2d 127, 132 (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).

The trial court may terminate parental rights when "[t]he parent 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) (2019). "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 B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020) (quoting *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997)). "[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). "The willfulness of a parent's actions is a question of fact for the trial court." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020). "[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) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)).

In the present case, the determinative six-month period for the alleged ground of willful abandonment is 25 October 2018 to 25 April 2019. In support of its conclusion that grounds existed to terminate respondent's parental rights based on willful abandonment, the trial court made the following pertinent findings of fact:

> 9. The minor child [Charlie] was born of a romantic relationship between Petitioner and Respondent. The two were never married. After the minor child was born, the

parties lived together for a brief period of time. During that time, Respondent did assist Petitioner with her care and with the purchase of necessaries.

10. On March 28, 2016 Petitioner obtained a [DVPO] against Respondent, which prevented them from having contact for 12 months. While this [DVPO] was valid, Respondent's mother, while babysitting the minor child, took [Charlie] to Respondent's house in violation of the order. Petitioner required the assistance of law enforcement to enforce the order and obtain the minor child from Respondent's residence in February 2016. This was the last time Respondent was in the presence of the minor child.

11. Petitioner filed for and obtained sole custody of the minor child in Alexander County File Number 16 CVD 123. Respondent was incarcerated at the time of the entry of the custodial order.

12. Pursuant to this Order, he was required to begin paying child support in the amount of $140.00 each month beginning June 1, 2017. He was entitled to "some regular visitation with the minor child upon his release from custody." His release date was in May 2017. There is a provision in the custody order that provides that either party can notice the matter back on if they cannot agree on a visitation schedule. Respondent has never noticed the custody matter back on for hearing or for a modification.

13. Respondent was in arrears on his child support obligation as of July 31, 2019 in the amount of $3,297.37. His payment history consists of three payments: March 15, 2019 for $114.21; May 3, 2019 for $114.21; and June 7, 2019 for $114.21. As a result of his failure to pay child support, an order to show cause is pending in that action.

14. From June 2017 until April 2019 when this petition was filed, Respondent should have made 23 monthly payments toward his child support obligation. In the 12 months next preceding the filing of this TPR action, the Respondent only made one payment toward his child support obligation. Since its filing, he has made two additional payments. None of these payments was for the full amount of court-ordered support. Aside from these three child support

payments, Respondent has provided the minor child with no monetary support, gifts, cards, or other assistance.

15. Petitioner married [Mr. I] on September 10, 2016. She did not join him in California where he was stationed until after she obtained the custody order. Respondent and Petitioner's husband knew one another prior to Petitioner dating her now husband.

16. February 13, 2017 is the last time Respondent contacted Petitioner regarding the minor child. He had been released from custody and requested a visit. Petitioner and the minor child were residing at Camp Pendleton in California. She offered him the opportunity to choose the day and time for the visit. When she sent him an address in California for the place of visitation, this angered him. It is unclear whether he was aware that the minor child was living in California when he requested the visitation. Nevertheless, he did not arrange a trip to California to visit the minor child and did not make arrangements to visit the minor child in North Carolina. He also did not tell Petitioner that he did not plan to attend the arranged visit. She and the minor child waited at the restaurant for two hours. When Petitioner text[ed] him regarding his failure to show, he responded angrily. He told her it wasn't "up to him to come and see her. It was up to her to bring her to him." When asked during his testimony why he didn't attend the visitation, he stated "because it would cost $1,000.00 to get a ticket to go halfway across the world."

17. The next time Respondent reached out to Petitioner was in September 2017 when his uncle died. He did not ask about [Charlie].

18. Petitioner has maintained the same working telephone number since before the birth of the minor child . . . . Respondent has always had the ability to reach her via this telephone number. Further, the Respondent was aware of her husband's number, having communicated with him via this number in the past, and this number has not changed. She did not give Respondent her physical or mailing addresses in California, and he did not ask her for this information.

> 19. Petitioner, her husband, and the minor child returned to Alexander County, North Carolina in April 2018. Neither Respondent nor any member of the family has made contact with Petitioner or her husband to inquire about the welfare of the minor child since February 2017. Except for one partial-support payment prior to the filing of the petition, the Respondent has not provided for the support of his biological child. He did not learn that the minor child had returned to North Carolina until he was served with the petition to terminate parental rights.
>
> 20. Respondent is employed, but has not sent sufficient money to benefit the minor child as required by the child support order. He has been brought to court on several occasions for failure to pay child support. He does not suffer from any disability. He is able-bodied and capable of working. He has not complied with the court order to pay support for the benefit of his biological child, but he is providing financially for the two children he calls his "step-children." He explains thusly, "They are involved in my life. They aren't being kept from me."
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> 21. Even since the filing of the TPR petition April 25, 2019, Respondent has not communicated with Petitioner to inquire about the welfare of his child or to arrange for visitation with her.
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> . . . .
>
> 23. Grounds exist to terminate the parental rights of Respondent pursuant to N.C.G.S. §7B-1111(a)(7) in that the parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition . . . .

On appeal, respondent acknowledges that the trial court correctly found in Finding of Fact 12 that respondent did not file a motion to modify the child custody order despite his knowledge that he could do so. He attempts to explain, however, that his failure to do so was attributable to his limited financial resources and his financial inability to hire an attorney. Since respondent concedes that the record supports this finding, Finding of Fact 12 is "deemed supported by competent evidence and [is] binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019).

Respondent next challenges Finding of Fact 21, regarding his lack of contact with petitioner since the filing of the termination of parental rights petition, as "not [being] supported by competent evidence."However, petitioner testified at the termination hearing that respondent did not contact her after the filing of the termination petition. Indeed, respondent acknowledged during his testimony that he did not contact petitioner to ask her about Charlie after the termination petition was filed. Thus, this finding is supported by clear, cogent, and convincing evidence.

Respondent also challenges Finding of Fact 23 that grounds exist to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) because the determination is "not supported by competent evidence."[2] However, Finding of Fact 23 is not an evidentiary finding of fact, but instead is an ultimate finding of fact. *In re J.D.C.H.*, 847 S.E.2d 868, 874 (N.C. 2020). "[A]n 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' " *See In re N.D.A.*, 373 N.C. at 76, 833 S.E.2d at 773 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755, 762 (1937)); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."). As an ultimate finding of fact, the trial court's determination that respondent's parental rights were subject to termination based on willful abandonment "must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773. Accordingly, we address respondent's challenge to Finding of Fact 23 in our discussion below regarding whether the trial court erred by concluding that respondent's parental rights were subject to termination based on willful abandonment. *In re J.D.C.H.*, 847 S.E.2d at 874.

Respondent further asserts that the trial court erred in concluding that grounds existed to terminate his parental rights based on willful abandonment. Respondent acknowledges that he did not have any contact with Charlie in the six months immediately preceding the filing of

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2. During his argument regarding the ground of willful abandonment in his brief, respondent contends that Findings of Fact 21 and 22 are "not supported by competent evidence." Finding of Fact 22, however, pertains to the other termination ground found by the trial court; namely, respondent's failure to pay for the child's care. Finding of Fact 23 is the trial court's ultimate finding that grounds existed to terminate respondent's parental rights based on willful abandonment. Therefore, respondent's reference to Finding of Fact 22 during his willful abandonment argument is presumed by this Court to be a typographical error, so we address his argument as to Finding of Fact 23.

the termination petition. Respondent argues, however, that his lack of contact was not willful because petitioner did not provide respondent with an address at which to contact Charlie and did not inform him when petitioner moved back to North Carolina with Charlie. We disagree.

First, although the trial court found that petitioner did not provide respondent with a mailing address for petitioner in California, the trial court also found that respondent never asked for this information. The trial court also found that respondent was in possession of petitioner's telephone number, as well as the telephone number for her husband Mr. I. Respondent cannot rely upon petitioner's lack of provision of her address to him to support his claim that his lack of contact was not willful when respondent never made a request for the contact information. Second, while it is true that petitioner did not inform respondent of her relocation from California when she moved back to North Carolina in April 2018 and that respondent only learned of petitioner's return to North Carolina with Charlie when the termination of parental rights petition was filed a year later, respondent had not had any contact with petitioner or expressed any interest in a relationship with Charlie since February 2017. Moreover, respondent made no attempt to reestablish a relationship with Charlie after he learned that his daughter had returned to reside in North Carolina. Although the statutory determinative period for the ascertainment of willful abandonment is the six months immediately preceding the filing of the petition, as we cited earlier, "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773. Here, the trial court found that even after the filing of the termination petition, respondent "has not communicated with [p]etitioner to inquire about the welfare of [Charlie] or to arrange for visitation with her." Thus, the trial court could properly take into account respondent's lack of contact with petitioner about Charlie after the filing of the termination of parental rights petition and after respondent's discovery that Charlie was back in North Carolina in evaluating respondent's intentions and in making its eventual determination that respondent's lack of contact was willful.

The trial court's findings of fact establish that respondent made no effort to participate in the juvenile Charlie's life during the six-month statutory determinative period at issue for the adjudication of the ground of willful abandonment or for the duration of over two years preceding that period. The trial court found that respondent did not send any cards or gifts to his daughter Charlie, did not contact petitioner to inquire into Charlie's welfare, and except for one partial child support payment

which was made one month prior to the filing of the termination petition, did not provide for Charlie's care. After learning that petitioner had moved to California with Charlie in February 2017, respondent did not attempt to set up any further visitation, did not move to modify the child custody order in an effort to create a visitation schedule, and did not ask petitioner for her address in order to have any contact with Charlie. The trial court further found that respondent possessed petitioner's telephone number and "has always had the ability to reach [petitioner] via this telephone number." Respondent's last contact with petitioner to inquire about Charlie was in February 2017. These findings of fact by the trial court in the instant case demonstrate that respondent "willfully withheld his love, care, and affection from [Charlie] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697.

In contravention of this conclusion, respondent claims that his actions during the determinative period did not demonstrate his intent to "willfully forego his parental duties or desire to have a relationship with his daughter." He asserts that during the statutory stretch of time he tendered a child support payment, made several attempts to contact petitioner through his friends' social media and messaging accounts, and met with two attorneys to discuss the child custody order. Respondent argues that the evidence of such actions by him did not demonstrate his intent to abandon Charlie.

However, in reviewing a trial court's adjudication of grounds to terminate parental rights, our examination is limited to "whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695. It is the trial court's "responsibility to 'pass [ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (alteration in original). Because "the trial court is uniquely situated to make this credibility determination . . . appellate courts may not reweigh the underlying evidence presented at trial." *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019). Here, the trial court weighed the evidence and eventually determined that respondent's conduct during the determinative period constituted willful abandonment. *See In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738 ("The willfulness of a parent's actions is a question of fact for the trial court.").

In this matter, the trial court's findings of fact support its ultimate finding and conclusion that respondent willfully abandoned Charlie. The

findings establish that respondent had no contact with Charlie or petitioner for over two years prior to the filing of the termination petition on 25 April 2019 and that respondent had the ability to make at least a modicum of contact during that time span but made no effort to do so. Respondent's sole payment of some child support for less than the court-ordered amount during the six months immediately preceding the filing of the termination petition does not undermine the trial court's ultimate finding and conclusion that respondent willfully abandoned Charlie. *See In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015) (affirming termination based on abandonment where the respondent "did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile," despite making a last minute child support payment). Therefore, we hold that the trial court did not err by concluding that grounds existed to terminate respondent's parental rights due to willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

The trial court's conclusion that a ground for termination of parental rights existed pursuant to N.C.G.S. § 7B-1111(a) is sufficient to support termination of respondent's parental rights. *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62. As such, we need not address respondent's arguments regarding the ground of willful failure to pay for the cost of Charlie's care as directed in the child custody order. *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020). Respondent does not challenge the trial court's best interests determination. Consequently, we affirm the trial court's orders terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF D.M., M.M., D.M.

No. 339A19

Filed 11 December 2020

1. **Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence**

There was a reasonable probability that a father with an extensive history of substance abuse and domestic violence would repeat the neglect of his children if they were returned to his care where the trial court found that he was inconsistent with drug screening requirements, failed to establish the status or durability of his sobriety, failed to comply with his recommended long-term individual counseling for domestic violence, and demonstrated no meaningful recognition of the effect of domestic violence on his children.

2. **Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—substance abuse and domestic violence**

There was a reasonable probability that a mother with an extensive history of substance abuse and domestic violence would repeat the neglect of her children if they were returned to her care where the trial court found that she was inconsistent with drug screening requirements, failed to establish the status or durability of her sobriety, failed to complete her recommended domestic violence counseling, and demonstrated no meaningful recognition of the effect of domestic violence on her 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 orders entered on 15 April 2019 and 18 June 2019 by Judge Shamieka L. Rhinehart in District Court, Durham County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Elizabeth Kennedy-Gurnee for petitioner-appellee Durham County Department of Social Services; and William A. Blancato for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant father.

Christopher M. Watford for respondent-appellant mother.

ERVIN, Justice.

Respondent-father Marcus B. and respondent-mother Danita M. appeal from orders entered by the trial court terminating their parental rights in their minor children D.M., M.M., and D.M.[1] After careful consideration of the arguments that have been advanced in the parents' briefs in light of the record and the applicable law, we affirm the trial court's termination orders.

I. Factual Background

On 25 August 2015, the Durham County Department of Social Services filed a petition alleging that David and Michael were neglected juveniles. In its petition, DSS alleged that, from 22 May 2014 to 24 June 2015, the family had received in-home services that were intended to address the parents' problems with domestic violence and substance abuse. However, respondent-father failed to engage in services that were intended to address issues relating to domestic violence, mental health, or substance abuse during this time. Although the last documented incident of domestic violence involving the parents had occurred on 18 January 2015, a social worker observed "aggressive, controlling speech" that respondent-father had directed toward respondent-mother on three separate occasions between 6 July 2015 and 14 August 2015.

DSS further alleged that, on 5 July 2015, it had received a new report that the parents had left David and Michael, who were three and one years old, respectively, at the time, in the family home by themselves. According to DSS, the family home was "regularly filthy, cluttered, and unsanitary with open garbage and roaches on the floor." Respondent-mother told representatives of DSS that she absented herself from the home every evening until it became time for the children to go to bed because respondent-father would drink alcohol, become confrontational, and act in a verbally aggressive manner. Although respondent-mother was five months pregnant with her eleventh child, she admitted to DSS representatives that she had smoked marijuana until relatively recently. On 14 August 2015, respondent-mother left the family home with David and Michael and entered a domestic violence shelter.

1. D.M., M.M., and D.M. will be referred to throughout the remainder of this opinion as, respectively, "David," "Michael," and "Danielle," which are pseudonyms used to protect the juveniles' identities and for ease of reading.

On 22 October 2015, Judge William A. Marsh, III, entered an order determining that David and Michael were neglected juveniles in that they "are not receiving proper care or supervision or live in an environment injurious to their welfare." Judge Marsh ordered that David and Michael remain in respondent-mother's custody on the condition that she provide them with a safe and stable living environment and abstain from being with respondent-father in the presence of the children. In addition, Judge Marsh prohibited the parents from residing together with the children. As a precondition for allowing the parents to reunify with the children, Judge Marsh ordered respondent-mother to ensure that the children were properly supervised at all times; to participate in and complete domestic violence services and follow all recommendations; refrain from engaging in physical altercations with respondent-father; actively participate in mental health and substance abuse services and comply with all resulting recommendations; submit to random drug screens; complete a parenting program; and obtain and maintain safe and stable housing. Similarly, Judge Marsh ordered respondent-father to ascertain the amount of child support that he should be required to pay through the IV-D program; ensure that the children were properly supervised at all times; participate and complete anger management services through the Duke Addictions program; refrain from engaging in physical altercations with respondent-mother; comply with all substance abuse and mental health recommendations that he received from Duke Addictions; submit to random alcohol screens; complete a parenting program; and obtain and maintain gainful employment or some other lawful source of income.

On 8 December 2015, respondent-mother gave birth to Danielle. On 6 July 2016, respondent-mother was arrested and charged with driving while impaired. As a result, David and Michael were placed in the temporary legal custody of respondent-father by consent on 13 July 2016.

On 20 September 2016, DSS filed a petition alleging that Danielle was a neglected and dependent juvenile and obtained the entry of an order placing David, Michael, and Danielle in nonsecure custody. In its petition, DSS alleged that, on the evening of 19 September 2016, the parents had been drinking and began arguing. At 6:00 a.m., respondent-father awoke and could not locate David and Michael. After law enforcement officers had been notified, David and Michael were found at the home of an individual who had been authorized to supervise respondent-mother's visits with the children and who reported that she had "heard something at the door"; that "it was the children trying to get in"; that, upon opening the door, she saw "a small red car drive away;" and that, while

she could not identify the vehicle's driver, "[respondent-mother] is known to drive a small red car." At the time that the parents arrived at the police station, they were observed to be under the influence of an impairing substance and placed under arrest.

The issues raised in the 20 September 2016 petition came on for hearing before Judge Marsh on 10 November 2016. On 10 November 2016, Judge Marsh entered an order determining that Danielle was a neglected and dependent juvenile. In addition, Judge Marsh found that the parents had completed a parenting program, that respondent-mother was not currently engaged in substance abuse and mental health treatment, and that respondent-father needed to engage in substance abuse treatment. As a precondition for allowing the parents to reunify with Danielle, the trial court ordered respondent-mother to resume her participation in mental health therapy; ensure that Danielle was properly supervised at all times; refrain from engaging in physical altercations with respondent-father; actively engage in mental health and substance abuse services and follow any resulting recommendations; submit to random drug screens; maintain safe and stable housing; and participate in supervised visitation with Danielle. Similarly respondent-father was ordered to ensure that Danielle was properly supervised at all times; refrain from engaging in physical altercations with respondent-mother; maintain gainful employment or some other source of lawful income; maintain stable housing; refrain from the use of impairing substances; and complete services with Duke Addictions.

After a permanency planning hearing held on 2 February 2018 and 27 March 2018, the trial court entered an order on 5 June 2018. In its order, the trial court found that respondent-mother had completed active parenting and anger management classes in September 2017 and that respondent-mother had been referred to a family violence case manager with DSS on 6 September 2017, had been referred for domestic violence counseling, and was awaiting the assignment of a counselor. The trial court further found that respondent-mother had begun participating in Vision's Substance Abuse Comprehensive Outpatient Treatment on 31 October 2016 and that, after several negative urine screens, it had been determined that respondent-mother no longer needed these services. In addition, the trial court found that respondent-mother had been referred to Carolina Outreach on 9 November 2017 with a recommendation that she begin weekly occupational therapy and medication management. However, respondent-mother had only attended three therapy sessions since January 2018 and was not consistently engaged in the medication management process. In view of the fact that respondent-mother

was participating in substance abuse services at Visions, DSS had not received random drug screening information and had referred respondent-mother to Duke Family Care for that purpose. On 26 March 2018, respondent-mother had begun full-time employment as a housekeeper at a hotel. Finally, the trial court found that it was not possible for the children to be returned to respondent-mother in the near future because she was still engaged in mental health treatment and attempting to secure stable housing and employment.

In the same order, the trial court found that respondent-father had been working three days a week at a Bojangles restaurant and was earning a weekly amount of $200 in addition to the $1,060 in Supplemental Security Income that he received each month. Although respondent-father had been participating in the Substance Abuse Comprehensive Outpatient Treatment program, Visions had determined that he was no longer eligible to receive their services for insurance-related reasons in November 2017. In addition, even though respondent-father had been referred to B & D Integrated Solutions, he had not been receiving services from that entity. Respondent-father had completed a domestic violence assessment and active parenting and anger management classes in September 2017. On the other hand, respondent-father had not been attending Alcoholics Anonymous or Narcotics Anonymous meetings. The trial court further found that it was not possible for the children to be returned to respondent-father because he had not been consistently participating in mental health treatment and lacked stable housing. In addition, the trial court expressed "uncertain[ty]" concerning the level of sobriety that respondent-father had achieved and maintained given that respondent-father had not participated in random drug screening. As a result, based upon all of these considerations, the trial court established a primary permanent plan for all three children of reunification, with a secondary permanent plan of adoption. After a permanency planning hearing held on 25 June 2018, the trial court entered an order instructing respondent-mother to present negative drug and alcohol screens and requiring respondent-father to re-engage in substance abuse treatment.

On 20 June 2018, DSS filed a motion seeking to have the parents' parental rights in the children terminated based upon neglect, N.C.G.S. § 7B-1111(a)(1); 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 dependency, N.C.G.S. § 7B-1111(a)(6). The termination petition came on for hearing before the trial court in early 2019, with the adjudicatory phase of the proceeding having been conducted on 20 and 21 February 2019 and 20 and 21 March 2019 and with the dispositional phase of the proceeding having

been conducted on 16 and 17 April 2019. On 15 April 2019, the trial court entered an adjudication order determining that the parents' parental rights were subject to termination on the basis of neglect and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home. On 18 June 2019, the trial court entered a dispositional order concluding that termination of the parents' parental rights would be in the children's best interests and terminating the parents' parental rights in the children. *See* N.C.G.S. § 7B-1110(a) (2019).

The parents noted an appeal to this Court from the trial court's termination orders. On 22 November 2019, the trial court entered an order dismissing respondent-mother's appeal on the grounds that she had failed to attach a certificate of service to her notice of appeal. On 11 December 2019, respondent-mother filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's termination orders on the merits. On 27 December 2019, this Court allowed respondent-mother's certiorari petition.

II. Substantive Legal Analysis

In seeking relief from the trial court's termination orders before this Court, the parents contend that the trial court erred by determining that their rights in the children were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress, N.C.G.S. § 7B-1111(a)(2). "[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, 831 S.E.2d 49, 53 (2019). For that reason, we begin our analysis by considering whether the trial court erred by determining that the parents' parental rights in the children were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

Termination of parental rights proceedings involve the use of a two-stage process. 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, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). "If [the trial court] determines that one or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[s] 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).

"This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 'in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law,' with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 772 (2019) (citations omitted). "Findings of fact not challenged by respondent[s] 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)). "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, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982)).

"[A] trial judge may terminate a parent's parental rights in a child in the event that it finds that the parent has neglected his or her child in such a way that the child has become a neglected juvenile as that term is defined in N.C.G.S. § 7B-101." *In re M.A.*, 374 N.C. 865, 869, 844 S.E.2d 916, 920 (2020) (citing N.C.G.S. § 7B-1111(a)(1) (2019)). A neglected juvenile is "[a]ny juvenile less than 18 years of age . . . whose parent . . . 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).

> "[I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis omitted)). In the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " *Id.* (citation omitted). In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citation omitted).

In re N.D.A., 373 N.C. at 80, 833 S.E.2d at 775.[2] "When determining whether 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.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)).

In Finding of Fact No. 8,[3] the trial court found that the family had received in-home services from 22 May 2014 to 24 June 2015 in order to address the parents' substance abuse and domestic violence problems. Subsequently, all three children were found to be neglected juveniles. In Finding of Fact Nos. 10 and 11, the trial court found that David and Michael had been removed from respondent-mother's care and placed in the temporary custody of respondent-father on 13 July 2016 as a result of the fact that respondent-mother had been charged with driving while subject to an impairing substance. In the aftermath of this determination, the parents were allowed to be in each other's presence as long as they were able to refrain from engaging in domestic violence and utilizing impairing substances. In Finding of Fact No. 12, the trial court found that, on 19 September 2016, the children came into DSS custody based upon improper supervision, the parents' substance abuse problems, and the level of conflict between the parents.

In Finding of Fact Nos. 14 through 25 and Finding of Fact No. 31, the trial court described respondent-mother's progress, or lack thereof, in addressing the barriers to reunification that had been found to exist, which included substance abuse problems, mental health concerns, unstable housing, domestic violence issues, and the lack of appropriate parenting skills. In Finding of Fact Nos. 23 through 32, the trial court described respondent-father's progress, or lack thereof, in addressing

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2. As we have noted today in our opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 & n.3 (N.C. Dec. 11, 2020), a showing of past neglect and a probability of future neglect is not necessary to support a determination that a parent's parental rights in a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in light of the fact that such a determination is also permissible in the event that there is a showing of current neglect.

3. The references to specific findings of fact contained in the remainder of this opinion are all to the adjudication order that the trial court entered on 15 April 2019 given that all of the parents' challenges to the trial court's decision to terminate their parental rights in the children are directed to that order.

the barriers to reunification that had been found to be exist, which included substance abuse problems, mental health concerns, domestic violence issues, the lack of stable housing and gainful employment, and the absence of appropriate parenting skills. The trial court found that, "[b]ased on the fact of the lack of insight as it relates to [d]omestic [v]iolence issues, inconsistency in mental health services, lack of stable housing and lack of consistency in random drug screens, . . . the risk of harm to these children still exists" and "the children would live in an environment injurious to their welfare if returned to their parents." As a result, the trial court determined that "[t]here is a reasonable probability of repetition of neglect" if the children were returned to their parents' care.

A. Respondent-Father's Appeal

[1] Although respondent-father has not questioned the propriety of the trial court's determination that the children had been the subject of a prior adjudication of neglect, he does challenge the lawfulness of the trial court's decision that there was a reasonable probability that the neglect that the children had experienced would be repeated in the event that they were returned to his care in light of his alcohol abuse, the existence of domestic violence concerns, the inconsistent level of mental health services that he had received, and the fact that he lacked stable housing. More specifically, respondent-father asserts that some of the trial court's findings of fact lack sufficient evidentiary support and that the remaining findings do not suffice to establish that there was a reasonable likelihood that the neglect that the children had experienced would be repeated if they were returned to his care.

As the trial court's order reflects, respondent-father has an extensive history of substance abuse and involvement in domestic violence dating back to May 2014. It is undisputed that, in September 2016, all three children were taken into DSS custody as a result of the parents' failure to provide them with proper supervision, the parents' abuse of impairing substances, and the existence of conflict between the parents. After carefully considering the record developed before the trial court, we are satisfied that the trial court's findings suffice to support its determination that there was a likelihood that the children would be neglected in the event that they were returned to the parents' care.

As an initial matter, respondent-father argues that the portion of Finding of Fact No. 36(a) stating that his "last random [drug] screen was back in May 2018 and he is currently not receiving treatment for substance abuse" lacks sufficient record support. Respondent-father argues,

in reliance upon his own testimony at the termination hearing, that he had returned to Visions about three weeks earlier and that he had been participating in a substance abuse aftercare program and drug screens as part of that process. According to respondent-father, the record contains evidence tending to show that his last assessment and alcohol screening, which was negative, had occurred on 10 January 2019.

After carefully reviewing the record evidence, we are unable to conclude that the challenged portion of Finding of Fact 36(a) is supported by clear, cogent, and convincing evidence. As we have already noted, the adjudicatory phase of the termination hearing commenced on 20 February and concluded on 21 March 2019. For that reason, a month elapsed between the date upon which the termination hearing began and the date upon which it concluded. At the 21 February 2019 hearing date, Sheena Wagner, a substance abuse counselor with the Duke Family Care Program, testified that she had last obtained a drug screen from respondent-father in May 2018 and that she had closed respondent-father's case in September 2018 in light of his failure to submit to three random drug screens. A closure report generated by Duke Family Care on 18 September 2018 and admitted into evidence confirmed this portion of Ms. Wagner's testimony. In addition, Ms. Wagner testified that she had conducted a reassessment for respondent-father in January 2019 and that he had reported his participation in the aftercare program at Visions on that occasion. After recommending that respondent-father continue to participate in that aftercare program, Ms. Wagner contacted Visions and learned that respondent-father "had not been engaged for some months."

On the other hand, respondent-father testified at the 20 March 2019 hearing that he had returned to Visions aftercare just a few weeks earlier. The trial court appears to have found this testimony to be credible in Finding of Fact No. 27, in which it stated that respondent-father had "returned [ ] to Visions approximately three weeks ago." In addition, a Duke Family Care progress summary that was accepted into evidence at the termination hearing indicates that respondent-father had submitted to a drug screen in January 2019 and had tested negative for the presence of all substances. The contents of this progress summary were reflected in Finding of Fact Nos. 24 and 29. As a result, in light of the fact that the trial court's findings generally appear to accept the validity of respondent-father's contention that he had recently returned to participation in substance abuse treatment and had tested negatively shortly before the end of the termination hearing, we disregard the challenged portion of Finding of Fact 36(a) in evaluating the validity of the

trial court's determination that respondent-father's parental rights in the children were subject to termination on the basis of neglect in light of his alleged failure to adequately address his substance abuse problems. *See In re J.M.*, 373 N.C. 352, 358, 838 S.E.2d 173, 177 (2020) (disregarding a finding of fact that lacked sufficient evidentiary support in determining whether the trial court had properly found the existence of grounds for terminating a parent's parental rights).

In addition to challenging the sufficiency of the record support for certain of the trial court's findings of fact, respondent-father argues that the trial court's remaining findings of fact do not support the trial court's determination that there is a reasonable probability of repetition of neglect if the children were returned to his care based upon his failure to adequately address his alcohol abuse problems. As the trial court's unchallenged findings and the record evidence reflect, however, respondent-father had an extensive history of substance abuse; the parents had received in-home services from 22 May 2014 to 24 June 2015 for the purpose of addressing problems relating to substance abuse and domestic violence; and the children had been removed from the home on 19 September 2016 after an evening during which the parents had been arguing and drinking alcohol. In addition, the trial court's findings and the record evidence reflect that respondent-father's treatment at Duke Family Care was terminated in September 2018 after Ms. Wagner had been unable to make contact with him for three consecutive months. Although respondent-father does appear to have completed a reassessment and drug screen in January 2019, his most recent drug screen prior to that date had been approximately eight months earlier. In addition, even though the record contains evidence tending to show that respondent-father had begun participating in a substance abuse aftercare program at Visions before the conclusion of the termination proceeding, his involvement in that program had only commenced after the motion to terminate his parental rights in the children had been filed and the termination hearings had actually begun. A careful review of the trial court's findings and the record evidence demonstrates that the record contains ample support for the trial court's determination that, in light of respondent-father's "extensive substance abuse histor[y]" and his inconsistent involvement in the drug screening process, respondent-father had failed to establish "the status or durability" of his sobriety and to mitigate the risks that continued alcohol abuse might pose for the children. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that the trial judge has the responsibility for evaluating the credibility and weight to be afforded to the evidence and to determine the reasonable inferences that should be drawn from the credible evidence).

In addition, respondent-father argues that the trial court had erred by determining that it was likely that the neglect that the children had previously experienced would recur in the event that they were returned to his care on the basis of the trial court's determination that he had failed to adequately address the issue of domestic violence. In respondent-father's view, the trial court lacked any basis in the evidentiary record for making Finding of Fact No 36(b), in which the trial court determined that, even though "there may be no reported domestic violence incidents between these parties since 2016, this does not mean to this Court that the mother or father have expressed meaningful insight about how domestic violence impacts them or could cause harm to their children." More specifically, respondent-father contends that he had not been called upon to testify about his understanding of the impact that domestic violence would have upon the parents or the children, that no expert witness had testified that he was oblivious to the adverse effects that domestic violence could cause, and that the manner in which the trial court had addressed this issue in its order had impermissibly shifted the burden of proof with respect to the domestic violence issue away from DSS and onto him. Once again, we are not persuaded by respondent-father's argument.

In its termination order, the trial court made unchallenged findings that the parents had an extensive history of domestic violence dating back to May 2014, with DSS having taken the children into its custody on 19 September 2016 as the result, in part, of the "arguing of the parents." In addition, the trial court judicially noticed the finding contained in the initial adjudication order "that these children are neglected due to the domestic violence between both the parents." The trial court further found that respondent-father had been referred to Penny Dixon, a contractor for DSS associated with the Durham Crisis Response Center, for a domestic violence assessment and that, even though respondent-father had completed the assessment process on September 2017, he had failed to comply with Ms. Dixon's recommendation that he participate in long-term individual counseling, with respondent-father having claimed in his testimony at the termination hearing that he had been waiting on a return call from Ms. Dixon. As a result of the fact that respondent-father "did not exercise any initiative to follow through with [Ms. Dixon,]" the trial court found that there had been "no expressed insight from the father about how domestic violence impacts him[.]"

Respondent-father's assertion that the trial court had no basis for finding that he had not attained an understanding of the potential ill effects of domestic violence in the absence of an admission on his own

part or testimony to that effect from an expert witness lacks merit. In view of the fact that the record contains evidence tending to show an extensive history of domestic violence between the parties dating back to May 2014, the trial court could have reasonably found that respondent-father's failure to comply with the recommendation that he participate in long-term, individual counseling for the purpose of addressing the issue of domestic violence was tantamount to a failure on his part to adequately recognize and address the role that domestic violence had played in his own life and that of his children. In addition, rather than improperly shifting the burden of proof with respect to domestic violence from DSS to respondent-father, the challenged portion of the trial court's termination order merely noted that respondent-father had failed to successfully rebut the evidence that DSS had presented in support of its contention that he had failed to adequately address his domestic violence issues. *See, e.g.*, *In re Clark*, 72 N.C. App. 118, 125, 323 S.E.2d 754, 758 (1984) (holding that, instead of impermissibly shifting the burden of proof from the petitioner to the parent, the challenged finding of fact was "nothing more than an accurate statement of the procedural stance of the case" and simply stated that "the respondents did not produce evidence that contradicted the allegations set forth in the petition").

Similarly, respondent-father contests the validity of the trial court's determination that there was a probability that the neglect that the children had previously experienced would be repeated in the event that they were returned to his care given his failure to adequately address concerns relating to his mental health and housing stability. The trial court's findings concerning respondent-father's failure to address the issues of substance abuse and domestic violence, which were the two central problems that led DSS to intervene in the life of the family beginning in May 2014 and that resulted in the children's removal from the family home in September 2016, are sufficient, standing alone, to support the trial court's determination that there was a likelihood that the children would be neglected in the future in the event that they were returned to respondent-father's care. *See In re M.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (holding that, even though the respondent claimed to have made reasonable progress in addressing the issues of substance use, domestic violence, and income and housing stability, the trial court's findings concerning the respondent's failure to adequately address the issue of domestic violence, which was the primary reason that the children had been removed from the home, were, standing alone, sufficient to support a determination that a repetition of neglect was likely to occur). For that reason, we will refrain from addressing respondent-father's remaining challenges to the trial court's determination that his

parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), including those relating to mental health and housing concerns. As result, given that the trial court did not err by determining that respondent-father's parental rights in the children were subject to termination on the basis of neglect; that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019); and that respondent-father has not challenged the validity of the trial court's best interests determination, we affirm the trial court's termination order with respect to respondent-father.

B. Respondent-Mother's Appeal

[2] Like respondent-father, respondent-mother acknowledges that the children had previously been adjudicated to be neglected juveniles while arguing that the trial court erred by finding that there was a likelihood that the earlier neglect would be repeated in the event that the children were returned to her care. In support of this contention, respondent-mother challenges the sufficiency of the evidentiary support for certain of the trial court's findings of fact and asserts that there had been a "marked change in [her] circumstances" from the time of the children's removal from her home to the time of the termination hearing. After a thorough review of the record, we are convinced that the trial court's findings regarding respondent-mother's failure to adequately address the issues of substance abuse and domestic violence have sufficient evidentiary support and support its determination that there was a likelihood of future neglect in the event that the children were returned to her care.

As an initial matter, respondent-mother challenges a portion of Finding of Fact No. 36(c), in which the trial court found that it is "uncertain as to the status and durability of [respondent-mother's] sobriety and . . . that the risk of harm to the children has not been removed by these parents," as lacking in sufficient evidentiary support. According to respondent-mother, the quoted portion of the trial court's adjudication order is "not an actual finding" given that the trial court failed to carry out its duty to "ascertain the truth from the various circumstances" and has done nothing more than state that "the court is not certain as to what to find."

After examining Finding of Fact No. 36(a) in its entirety, we have no hesitation in concluding that the language upon which respondent-mother's argument rests states a logical inference that the trial court

chose to make from other evidentiary facts. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (stating that "[a]ny determination reached through 'logical reasoning from evidentiary facts' is more properly classified a finding of fact"). At the beginning of Finding of Fact 36(a), the trial court provided a detailed discussion of respondent-mother's lack of progress in addressing her substance abuse problems. Among other things, the trial court found that respondent-mother's case at Duke Family Care had been closed in September 2018 after Ms. Wagner had been unable to contact respondent-mother for three consecutive months. In addition, the trial court found that, while respondent-mother tested negatively when screened for alcohol use in January 2019, her most recent test result before that date had been provided in May 2018. Finally, the trial court found as a fact that:

> both of these parents have extensive substance abuse histories and because of a lack of being consistent in participating in random drug screens for alcohol, this Court is uncertain as to the status and durability of their sobriety and finds that the risk of harm to the children has not been removed by these parents; when the parents are under the influence they create an injurious environment where they become incapable of providing proper supervision and care.

Thus, when considered in its entirety, Finding of Fact No. 36(a) consists of (1) a description of respondent-mother's extensive history of substance abuse and her inconsistent record of participating in required drug screens and (2) a reasonable inference that the extent and duration of respondent-mother's sobriety had not been demonstrated. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (holding that the trial court "had the responsibility to 'pass upon the credibility of the witnesses and the weight to be given to their testimony and the reasonable inferences to be drawn therefrom' " (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968))). As a result, we hold that Finding of Fact No. 36(a) constitutes a proper finding on the part of the trial court.

In addition, respondent-mother argues that Finding of Fact No. 36(a) lacks sufficient record support. In support of this assertion, respondent-mother relies upon findings of fact made in the 5 June 2018 permanency planning order that she had several negative urine screens from 31 August 2017 to 20 October 2017, that she had a negative drug screen on 27 March 2018, and that she submitted to drug screens during her period of relapse in April and June 2018 and upon an unchallenged finding of fact contained in the trial court's termination order

that she provided a negative drug screen in January 2019. In further support of her challenge to the sufficiency of the evidentiary support for Finding of Fact No. 36(a), respondent-mother points to the results of drug screens administered by her probation officer in "mid-late 2018" that did not test for alcohol. Finally, respondent-mother directs our attention to testimony from her probation officer that she had regularly met with respondent-mother since September 2018 without detecting any odor of alcohol or seeing any evidence of alcohol use and that the records maintained by DSS concerning her visits with the children from September 2018 to February 2019 did not contain a single indication that respondent-mother smelled of alcohol or appeared to be intoxicated.

The fundamental problem with respondent-mother's challenge to the sufficiency of the evidentiary support for Finding of Fact No. 36(a) is that the trial court never found that respondent-mother had ever failed or refused to submit to drug screens or had ever had negative results during the drug screening process. Similarly, the trial court never found that respondent-mother had or had not been observed to be under the influence of alcohol at any time since September 2018. Instead, Finding of Fact No. 36(a) simply states that respondent-mother had been inconsistent in her participation in the drug screening process. In unchallenged Finding of Fact No. 23, the trial court found that, while respondent-mother participated in two drug screens in April and May of 2018, she "did not get randomly screened from June to December 2018." In addition, respondent-mother missed a drug screening appointment scheduled for 30 July 2018, with her Duke Family Care case having been closed in September 2018 after Ms. Wagner could not contact respondent-mother for three consecutive months. As a result, we conclude that Finding of Fact No. 36(a) has ample evidentiary support. *See In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (stating that a "finding that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding) (citing *In re Moore*, 306 N.C. at 403–04, 293 S.E.2d at 132).

Next, respondent-mother argues that the trial court erred by finding that there was a likelihood that the neglect that the children had previously experienced would be repeated in light of the fact that she had demonstrated the existence of a marked change in circumstances relating to her substance abuse problems at the time of the termination hearing. The argument that respondent-mother makes in support of this contention relies upon an attempt to shift the focus from her inconsistency in submitting to random drug screens and a claim that DSS had failed to prove that she had consumed alcohol after the summer of 2018.

The record does, of course, reflect that respondent-mother last tested positive for the presence of alcohol in April of 2018 and that she had tested negative for the presence of all controlled substances, including alcohol, in January 2019. On the other hand, the trial court's unchallenged findings of fact establish that respondent-mother did not submit to random drug screens from June to December 2018 and that her case with Duke Family Care had been closed in September 2018 after she failed to respond to Ms. Wagner's attempts to make contact with her. In light of respondent-mother's extensive substance abuse history and her failure to consistently participate in the drug screening process, we hold that the trial court had an ample evidentiary basis for determining that respondent-mother had failed to achieve a stable or durable state of sobriety sufficient to eliminate the risk of harm to her children.

In addition to her challenge to the trial court's treatment of her struggles with substance abuse, respondent-mother objects to the manner in which the trial court addressed the issue of her involvement with domestic violence. As an initial matter, we note that the trial court's unchallenged findings of fact establish that respondent-mother had completed a domestic violence assessment in September of 2017, at which it had been recommended that respondent-mother complete domestic violence counseling, and that respondent-mother had never presented a certificate of completion indicating that she had obtained the recommended counseling. In addition, the trial court's findings reflect that respondent-mother had received counseling at the Durham Crisis Response Center from May 2018 to December 2018.

According to respondent-mother, Finding of Fact No. 20, in which the trial court stated that the counseling sessions in which respondent-mother participated at the Durham Crisis Response Center "do not contain[ ] counseling particularly on domestic violence," lacks sufficient evidentiary support. Respondent-mother makes a similar challenge to Finding of Fact No. 36(b), in which the trial court found, in pertinent part, that:

> [respondent-mother] has an extensive history of being in domestic violence relationships with her partners which stems from at least 1997 when a former partner fractured her bone. . . . The court takes judicial notice of the findings of fact in the adjudication order that these children are neglected due to the domestic violence between both the parents. The Court finds that there may be no reported domestic violence incidents between these parties since 2016, this does not mean to this Court

> that [respondent-mother] or [respondent-father] have expressed meaningful insight about how domestic violence impacts them or could cause harm to their children. The court reviewed [respondent-mother's exhibit #4 — Assessment from the Durham Crisis Response Center]; [respondent-mother] discussed in one session about maintaining sobriety, the care of her children in foster care, how to handle grief and to get her children back.

In respondent-mother's view, the trial court erred by finding that her counseling sessions at the Durham Crisis Response Center did not address domestic violence issues.

In support of her contention that she had received domestic violence counseling at the Durham Crisis Response Center, respondent-mother points to an intake form in which she indicated that she wanted to address "domestic violence, coping skills" and to counseling notes that mention issues relating to the safety of the children, the management of grief, an analysis of past deficiencies in the decisions that she had made, and the need to control her substance abuse. According to respondent-mother, her counselor at the Durham Crisis Response Center "would have used these topics to relate to domestic violence or would have redirected [respondent-mother.]"

In its adjudication order, the trial court stated that it had reviewed respondent-mother's assessment from the Durham Crisis Response Center and the records relating to respondent-mother that had been generated by that entity relating to respondent-mother through December 2018. The counseling case notes indicate that various topics had been discussed during the counseling that respondent-mother had received at the Durham Crisis Response Center, such as "concerns about safety of [the] children in foster care," respondent-mother's desire for reunification with the children, and the changes that respondent-mother was "making to maintain sobriety." The Durham Crisis Response Center records only contain a single reference to the issue of domestic violence, which appears in a set of case notes that are dated 18 June 2018. For that reason, we hold that the trial court's determination that the counseling that respondent-mother received at the Durham Crisis Response Center did not involve any particular focus upon issues relating to domestic violence had ample evidentiary support and that, even though the record might support a contrary decision, "this Court lacks the authority to reweigh the evidence that was before the trial court." *In re A.U.D.*, 373 N.C. at 12, 832 S.E.2d at 704; *see also In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984) (stating that "our appellate courts

are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.")

Similarly, respondent-mother argues that the trial court erred by finding that there was a likelihood that the neglect that the children had experienced would be repeated in the event that they were returned to her care given that she had demonstrated that there had been a marked change in her circumstances relating to the issue of domestic violence issues by the time of the termination hearing. In support of this contention, respondent-mother maintains that she had been able to show improvement in her situation as it relates to domestic violence by "refrain[ing]" from respondent-father, having been involved in no reported incident of domestic violence involving respondent-father for three years, obtaining a domestic violence assessment, and engaging in counseling at the Durham Crisis Response Center.

As we have previously indicated, the trial court did not err by finding that the counseling that respondent-mother had received at the Durham Crisis Response Center did not place any particular emphasis upon issues relating to domestic violence. In addition, the trial court acknowledged that there had been no reported incidents of domestic violence involving the parents since 2016 and that respondent-mother had obtained a domestic violence assessment in 2017. Even so, given respondent-mother's extensive history of participation in interpersonal relationships involving domestic violence and her failure to complete the recommended domestic violence counseling, the trial court could have reasonably concluded that respondent-mother had failed to express "meaningful insight about how domestic violence impacts them or could cause harm to their children." For that reason, we hold that the trial court did not err by determining that respondent-mother had failed to adequately address the issue of domestic violence by the time of the termination hearing and that its findings of fact with respect to this issue suffice to support its determination that there was a likelihood of future neglect in the event that the children were returned to her care.

In light of our determination that the trial court's findings with respect to the issues of substance abuse and domestic violence suffice to show the existence of the required likelihood of future neglect in the event that the children were returned to respondent-mother's case, we need not address respondent-mother's challenge to the trial court's determination that she had failed to adequately address her mental health and housing problems. *See In re M.A.*, 374 N.C. at 870, 844 S.E.2d at 921 (holding that a parent's failure to adequately address the issue

of domestic violence can be sufficient to support a determination that there is a likelihood of future neglect). In view of the fact that the trial court did not err by finding that respondent-mother's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), that the existence of a single ground for termination will suffice to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421, and that respondent-mother has not challenged the trial court's determination that the termination of her parental rights would be in the children's best interests, we affirm the trial court's termination order with respect to respondent-mother as well.

AFFIRMED.

IN THE MATTER OF J.S., J.S., J.S.

No. 92A20

Filed 11 December 2020

Termination of Parental Rights—no-merit brief—neglect—abandonment—parental rights to another child terminated

The termination of a mother's parental rights in her three children on grounds of neglect, abandonment, and having her parental rights in another child terminated and lacking the ability or willingness to establish a safe home (N.C.G.S. § 7B-1111(a)(1), (7), (9)) was affirmed where her counsel filed a no-merit brief, the evidence supported termination under subsection (a)(9) (which was sufficient to uphold the order), and the trial court did not abuse its discretion in deciding that terminating her rights would be in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 26 November 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. This matter was calendared in the Supreme Court on 23 November 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 filed for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Kip David Nelson for appellee Guardian ad Litem.

Lisa Anne Wagner for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children, "James," "Jiles," and "Jacyn."[1] Respondent-mother's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. After an independent review, we conclude that the issues raised by counsel in respondent-mother's brief do not entitle her to relief and affirm the trial court's decision to terminate respondent-mother's parental rights.

James and Jiles entered the nonsecure custody of Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS) upon the agency's 15 March 2018 filing of a juvenile petition which alleged that the children were neglected and dependent. In the petition, YFS represented that it had been involved with the family for several years, that respondent-mother and the children's father had an extensive history of domestic violence, and that respondent-mother's parental rights to another child had previously been terminated. The petition went on to detail recent incidents of domestic violence perpetrated by the father against respondent-mother, alleging that some of them occurred in the presence of James and Jiles. The trial court entered an order adjudicating the two children as neglected juveniles on 5 June 2018.

Jacyn was born in September 2018. On 31 January 2019, YFS filed a petition alleging that Jacyn was a neglected juvenile. In this petition, YFS alleged that respondent-mother had multiple pending criminal charges, that YFS had received a report regarding another incident of domestic violence between respondent-mother and the children's father, and that the parents had not made progress addressing the issues which led to the previous neglect adjudication regarding James and Jiles. YFS was granted nonsecure custody of Jacyn and the agency placed her with her two brothers. Jacyn was adjudicated as a neglected juvenile by virtue of an order entered by the trial court on 12 March 2019.

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1. We use pseudonyms for respondent-mother's children to protect their privacy and for ease of reading.

YFS filed motions in the cause to terminate respondent-mother's parental rights to Jacyn on 21 June 2019 and to James and Jiles on 28 August 2019. Both motions alleged the same four grounds for termination: (1) neglect, (2) willful failure to pay a reasonable portion of the children's cost of care, (3) abandonment, and (4) respondent-mother's parental rights with respect to another child of hers had been terminated involuntarily and she lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(1), (3), (7), (9) (2019). The motions were based on substantially the same allegations. In the motions, YFS detailed the circumstances that led to the prior neglect adjudications for the three children and, in light of the submitted information, alleged that respondent-mother had failed to make adequate progress with respect to the case plan requirements that were established to remediate those circumstances.

The motions to terminate respondent-mother's parental rights to the three children were heard on 30 October 2019. Respondent-mother was not present at the hearing. After the evidence was presented, the trial court found that respondent-mother's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1), (7), and (9) (2019): respectively, neglect, abandonment, and the parental rights of respondent-mother with respect to another child of hers had been terminated involuntarily and respondent-mother lacked the ability or willingness to establish a safe home. The trial court found that there was insufficient evidence of the existence of the alleged ground to terminate addressed in N.C.G.S. § 7B-1111(a)(3) that respondent-mother had willfully failed to pay a reasonable portion of the cost of care for the three juveniles. Lastly, the trial court concluded that termination of respondent-mother's parental rights to James, Jiles, and Jacyn was in the children's best interests. The trial court entered its written order memorializing its decision to terminate respondent-mother's parental rights to all three children on 26 November 2019.[2] Respondent-mother appeals.[3]

Respondent-mother's appellate counsel has filed a no-merit brief on respondent-mother's behalf pursuant to Rule 3.1(e) of the North Carolina

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2. The order also terminated the parental rights of the father of James, Jiles, and Jacyn. He did not appeal and therefore is not a party in the matter before this Court.

3. The record on appeal does not include proof that respondent-mother's notice of appeal was served on the other parties as required by N.C. R. App. P. 3.1(b). However, neither YFS nor the guardian *ad litem* raised this issue, and thus it has been waived. *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) ("[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal[.]")

Rules of Appellate Procedure. Counsel has also advised respondent-mother of the right to file pro se written arguments on respondent-mother's own behalf with this Court and has provided respondent-mother with the documents necessary to do so. Respondent-mother did not submit any written arguments.[4]

In the no-merit brief, respondent-mother's counsel concedes that there was an adequate basis for the trial court's adjudication regarding the mother's inability to establish a safe home. N.C.G.S. § 7B-1111(a)(9) (providing that a parent's rights can be terminated when parental rights for another child have been terminated and "the parent lacks the ability or willingness to establish a safe home"). Respondent-mother's parental rights to another child had been terminated in an earlier case; the trial court concluded that respondent-mother was unable to establish a safe home in the present case. In light of respondent-mother's history of domestic violence, mental health issues, incarceration, and unstable housing, this determination by the trial court was appropriate. *See In re T.N.H.*, 372 N.C. 403, 412–13, 831 S.E.2d 54, 61–62 (2019) (affirming termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(9) based on the mother's history of incarceration, unstable housing, and failure to complete a case plan). Accordingly, the trial court did not err in finding and concluding that a basis for termination of respondent-mother's parental rights existed.

As to disposition, counsel for respondent-mother also concedes that the trial court did not abuse its discretion in deciding that termination of respondent-mother's parental rights would be in the children's best interests. This decision can only be reversed if "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.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019). A trial court is required to consider several statutory factors and ultimately determine whether termination is in a child's best interests. N.C.G.S. § 7B-1110(a); *In re C.J.C.*, 839 S.E.2d 742, 746 (2020). The trial court here properly considered the pertinent factors and aptly exercised its discretion.

We conduct an independent review of any issues identified in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). In the brief filed on behalf of respondent-mother in this appeal, respondent-mother's counsel discusses four

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4. YFS did not submit any appellate materials to this Court, but the guardian *ad litem* did file a brief, agreeing with respondent-mother's counsel that there are no meritorious claims upon which respondent-mother could prevail.

issues that could arguably support an appeal, yet acknowledges that the appeal ultimately lacks merit due to the existence of a ground to allow termination of parental rights under N.C.G.S. § 7B-1111(a)(9). Based upon our review of the issues identified in the no-merit brief, we are satisfied that the trial court's 26 November 2019 order was based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

IN THE MATTER OF K.D.C. AND A.N.C.

No. 27A20

Filed 11 December 2020

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

The trial court's findings did not support its conclusion that grounds of neglect existed to terminate a mother's parental rights where the trial court erred in determining that there would be a likelihood of future neglect. The finding that the mother, who was incarcerated, had the ability to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; she completed a "mothering" class (in lieu of a required "parenting" class), an anger management class, and a grief recovery class; and she maintained regular contact with her children.

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

The trial court erred by concluding that grounds of failure to make reasonable progress existed to terminate a mother's parental rights where the department of social services failed to carry its burden of proof. The finding that the mother, who was incarcerated, was able to comply with her case plan during her incarceration was not supported by sufficient evidence; her release date was too remote in time (fifteen months) to expect her to have secured housing and employment; and her completion of a "mothering" class was a sufficient attempt to complete a required "parenting" class.

3. Termination of Parental Rights—grounds for termination—dependency—appropriate alternative child care arrangement—no allegation or findings

The trial court erred by concluding that grounds of dependency existed to terminate a mother's parental rights in her child where the department of social services made no allegation that the mother lacked an appropriate alternative child care arrangement and the trial court made no findings addressing the issue.

Justice NEWBY concurring in part and dissenting in part.

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) from orders entered on 1 October 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 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 Wilkes County Department of Social Services.

Erica M. Hicks for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeals from the trial court's orders terminating respondent-mother's parental rights to her children K.D.C. and A.N.C. ("Katie" and "Anna").[1] After careful review, we reverse.

Factual Background and Procedural History

On 15 January 2017, the Wilkes County Department of Social Services (DSS) received a report that Katie and Anna were living in an injurious environment due to improper care and supervision, moral turpitude, and substance abuse. At the time, Katie and Anna were living with their father and with K.S., their older brother. Respondent-mother was incarcerated on drug trafficking charges with a projected release date in 2020.

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

A social worker went to the juveniles' home to investigate the report and observed track marks on K.S.'s arms. A drug screen administered to K.S. on the day of the social worker's investigative visit to the residence was positive for methamphetamine and marijuana. The father agreed to a safety plan to ensure that Katie and Anna had sober caretakers, and K.S. agreed to refrain from providing care for, or allowing drugs around, his juvenile siblings. However, shortly thereafter, both the father and K.S. tested positive for the presence of methamphetamine upon their submission of drug screens to DSS. A social worker requested a safety placement for the juveniles, but the father was unable to identify family or friends that could qualify for kinship placements.

On 7 March 2017, DSS obtained non-secure custody of the juveniles and filed petitions alleging that Katie and Anna were neglected. On 24 April 2017, the trial court adjudicated Katie and Anna as neglected juveniles after the parties to the action stipulated to the allegations in the petition. The trial court ordered that custody of the juveniles remain with DSS and set the permanent plan as reunification, with a secondary plan of custody with an approved caretaker.

Following a review hearing held on 21 May 2018, the trial court entered an order in which it found that the father had completed his case plan, and that it was appropriate to begin a trial placement of Katie, along with her older sibling B.C.,[2] with the father. Katie and B.C. were placed with the father in June 2018. The trial placement with the father was ceased, however, after DSS received a report alleging improper supervision and discipline by the father. Upon investigation of the report, DSS determined that B.C. had taken a car on a "joy ride" and had wrecked the vehicle. The father allegedly punched B.C. in the lip after the father learned of these events. Katie and B.C. were removed from the trial placement with the father and placed in foster care.

Following the disrupted trial placement, the father regressed in his behavior. The father tested positive for cocaine on 23 July 2018, did not appear for scheduled drug screens in August 2018, and admitted that he had started drinking alcohol and using cocaine. Additionally, DSS received a report that the father had inappropriately touched Anna and that the report was being investigated by the Wilkes County Sheriff's Department. DSS requested that the father complete an updated case plan, but he failed to do so and fell out of contact with DSS. In December

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2. No petition to terminate respondent-mother's parental rights, or order which terminates her parental rights to B.C., appears in the record. Respondent-mother's parental rights to B.C. therefore are not a subject of this appeal.

2018, the father was charged with drug-related offenses. With these developments, in an order entered on 15 January 2019, the trial court changed the permanent plan for the juveniles to adoption, with a secondary plan of custody. DSS was relieved of further reunification efforts.

On 23 April 2019, DSS filed petitions to terminate the parental rights of both respondent-mother and the father to Katie and Anna. DSS alleged that grounds existed to terminate both parent's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay support for the children, and dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). DSS additionally alleged that grounds existed to terminate the father's parental rights due to abandonment. N.C.G.S. § 7B-1111(a)(7) (2019). On 1 October 2019, the trial court entered orders in which it determined that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). The trial court further concluded that it was in the juveniles' best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated the parental rights of respondent-mother to Katie and Anna.[3]

On 28 October 2019, respondent-mother gave written notice of appeal from the order terminating her parental rights to Katie. The record on appeal does not include proof that respondent-mother's notice of appeal was served on the other parties, as required by N.C. R. App. P. 3.1(b). However, neither DSS nor the guardian ad litem objected to this lack of service, and thus, any issue about the deficiency of service has been waived. *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (stating that "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal").

On 17 February 2020, respondent-mother filed a petition for writ of certiorari, seeking review of the order terminating her parental rights to Anna. Respondent-mother attached an affidavit to the petition, explaining that her trial counsel sent her notices of appeal concerning both Katie and Anna and instructed respondent-mother to sign them and then mail them to the Wilkes County Clerk of Court for filing purposes. Respondent-mother inadvertently mailed only the notice of appeal regarding Katie, which was timely filed. A notice of appeal concerning

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3. The trial court's orders also terminated the father's parental rights to Katie and Anna, but he did not appeal and therefore is not a party to the proceedings currently before this Court.

Anna was subsequently filed, but it was accomplished after the deadline for giving notice of appeal. On 1 April 2020, we allowed respondent-mother's petition for writ of certiorari as to Anna. Accordingly, we shall address the merits of respondent-mother's appeal as to both juveniles.

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, 839 S.E.2d 792, 796–97 (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, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a district 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 Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). "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 this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, failure to make reasonable progress, and dependency. N.C.G.S. § 7B-1111(a)(1), (2), (6). To support its conclusion that these circumstances existed to terminate respondent-mother's parental rights pursuant to these statutory grounds, the trial court found as fact that Katie and Anna were previously adjudicated as neglected in April 2017.[4] The trial court further found that respondent-mother entered into a case plan which required her to (1) complete parenting classes, (2) obtain and maintain employment and housing upon her release from custody, (3) complete a mental health assessment and follow all recommendations, and (4) complete a mental health and substance abuse assessment and follow all treatment recommendations. The trial court also found the following facts:

> 8. The Respondent-Mother was incarcerated in the North Carolina Department of Corrections at the time DSS began

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4. We note that the trial court entered separate termination orders regarding the juveniles Katie and Anna. The findings of fact and conclusions of law supporting the trial court's adjudications are essentially identical in each termination order. In order to facilitate our discussion of the relevant matters pertaining to the adjudication of grounds involving the two juveniles, we shall refer to the findings of fact and conclusions of law as enumerated in the trial court's termination order entered in Katie's case.

> its investigation. She was sentenced for drug trafficking in 2015. The Respondent-Mother is serving a seven-year, nine[-]month sentence with a projected release date of December 25, 2020.
>
> . . . .
>
> 12. The Respondent-Mother did not complete parenting classes and did not complete her substance abuse assessment or mental health assessment. The Respondent-Mother did complete a "Mothering" class on April 25, 2019. She also completed an anger management class in October 2017 and a grief recovery class in August 2018.
>
> . . . .
>
> 21. The Respondent-Mother does not have a plan for employment or housing upon her anticipated release from prison. She believes she may be able to obtain employment at Tyson Foods in Wilkesboro.
>
> . . . .
>
> 24. Both Respondents have neglected the minor child. The Respondent-Mother has not provided any care for the minor child since 2015. There is a significant possibility of future neglect by the Respondents.
>
> 25. . . . . The Respondent-Mother did not complete her parenting classes. The Respondent-Mother did not provide any verification that she completed her mental health and substance abuse assessments. Although the Respondent-Mother was incarcerated, she had the ability to complete these requirements of her case plan but failed to do so. . . . .
>
> . . . .
>
> 27. Neither Respondent has the ability to provide for the proper care and supervision of the minor child due to their incarceration. The Respondents' incapability will continue for the foreseeable future in light of their incarceration. The Respondent-Mother will not be released from custody for over a year. She does not have appropriate plans for housing or employment.

"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).

Respondent-mother challenges two of the trial court's findings of fact—Findings 12 and 25—as being unsupported by the evidence. Regarding Finding of Fact 12, respondent-mother contends that the portion of the finding that she "did not complete parenting classes . . . or a mental health assessment" is not supported by the evidence and should be stricken. Similarly, as to Finding of Fact 25, respondent-mother asserts that the portion of this finding that she failed to complete a parenting class or to document that she completed her required mental health or substance abuse assessments is incorrect; more specifically, she argues that while she did not provide verification of completion of a mental health or substance abuse assessment, there was no evidence presented that she had the ability to participate in a substance abuse assessment while incarcerated or to provide verification of a completed mental health assessment. We agree with respondent-mother that portions of the trial court's Findings 12 and 25 are not supported by clear, cogent, and convincing evidence.

First, with regard to the requirement that respondent-mother must complete parenting classes, we do find that there is clear, cogent, and convincing evidence to support the trial court's finding that respondent-mother did not complete parenting classes. A supervisory social worker with DSS testified that respondent-mother did not complete parenting classes while incarcerated, although respondent-mother had indicated to the social worker that parenting classes were available to respondent-mother in July 2017, shortly after respondent-mother signed her case plan. Since respondent-mother testified that she completed a "Mothering" class, the trial court could reasonably infer from the evidence presented that parenting classes were available, and that the "Mothering" class did not satisfy the requirement that she complete parenting classes. *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) (indicating that it is the trial judge's duty to consider all the evidence and pass upon the credibility of the witnesses, and to determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (indicating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and that it is not the role of an appellate court to substitute its judgment for that of the trial court).

Second, we agree with respondent-mother that there was insufficient evidence to support the trial court's finding of fact that respondent-mother failed to obtain a substance abuse assessment or a mental health assessment, or that she had the ability to complete these aspects of her case plan. The supervisory social worker was asked whether respondent-mother had been "able to receive any type of treatment for

any sort of mental health issues or substance abuse issues while she's been incarcerated." The social worker responded that she had received a letter from respondent-mother indicating that respondent-mother had completed a mental health assessment, but the social worker never received verification from the respondent-mother of its completion. The social worker was silent concerning respondent-mother's attainment of a substance abuse assessment or treatment, and the social worker testified that the social worker did not seek verification from the prison system regarding what type of mental health or substance abuse assessments respondent-mother may have received. Although petitioner DSS argues that there was no evidence that respondent-mother completed a substance abuse assessment and that she did not provide verification that she completed either a mental health assessment or a substance abuse assessment, nonetheless the burden was on DSS to prove respondent-mother's non-compliance with her case plan, and was not on respondent-mother to prove such compliance. *See* N.C.G.S. § 7B-1109(f) (2019) ("The burden in [an adjudicatory hearing on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."). Thus, we conclude that the trial court's findings of fact that respondent-mother failed to complete her mental health and substance abuse assessments, and that respondent-mother had the ability to fulfill these requirements, are not supported by clear, cogent, and convincing evidence. Therefore, we disregard these portions of Findings of Fact 12 and 25. *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020) (indicating that findings of fact not supported by clear, cogent, and convincing evidence will be disregarded).

[1] Respondent-mother next contends that the trial court's findings of fact do not support its conclusions of law that grounds existed to terminate her parental rights. We begin our analysis of this issue with consideration of whether grounds of neglect existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

A trial court may terminate parental rights upon a finding that the 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).

> 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 . . . a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. at 843, 788 S.E.2d at 167 (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 *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

Katie and Anna were previously adjudicated to be neglected juveniles. Respondent-mother, however, has been incarcerated throughout DSS's involvement in this case. This Court has stated:

> A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. Thus, respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration.

In re K.N., 373 N.C. 274, 282–83, 837 S.E.2d 861, 867–68 (2020) (extraneity omitted).

Here, the trial court found that respondent-mother had the ability to comply with her case plan, despite respondent-mother's incarceration, with regard to obtaining mental health and substance abuse assessments and following all treatment recommendations. As previously discussed, however, we have concluded that these findings were not supported by clear, cogent, and convincing evidence, and we have disregarded them in our analysis pursuant to our cited precedent. While we note the trial court's finding that respondent-mother failed to complete a parenting class as required by her case plan, we also acknowledge that respondent-mother completed a "Mothering" class, which appears to be at least a plausible attempt by respondent-mother to complete her case plan and to improve her parenting skills. In addition to the "Mothering" class, respondent-mother completed anger management and grief recovery classes. The trial court further found that respondent-mother had not

secured stable housing or employment in anticipation of her release from incarceration. In light of the fact that the termination of parental rights hearing was held fifteen months prior to respondent-mother's release from incarceration, respondent-mother's inability to secure employment and housing so far in advance is difficult to consider justly as a failure to comply with her case plan. Lastly, the trial court found that respondent-mother maintained regular contact with Katie and Anna. On these facts, this Court concludes that the trial court erred in deciding that there would be a likelihood of future neglect by respondent-mother as the parent of Katie and Anna. Accordingly, we hold that the trial court erred in its determination that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

[2] Secondly, we examine whether the trial court properly concluded that grounds existed to terminate respondent-mother's parental rights based on her failure 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).

In determining whether grounds existed to terminate respondent-mother's parental rights pursuant to this statutory basis, we must consider whether respondent-mother had the ability to make reasonable progress while incarcerated. *See In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007) (noting that the incarceration of a parent may be considered by a trial court as it determines whether the parent has made reasonable progress toward correcting those conditions which led to the juvenile's removal). As earlier addressed, there was insufficient evidence that respondent-mother failed to complete, or had the ability to complete, the requirements of her case plan that she obtain mental health and substance abuse assessments and follow all recommendations. We also reasoned that although respondent-mother failed to secure employment and housing in anticipation of her release from

incarceration, it is overly rigid here to equate respondent-mother's inability to secure housing and employment with a failure to comply with her case plan when she is not scheduled to be free from incarceration to have a job or a residence for another fifteen months after the trial court's determination was entered on this point. The remaining requirement of respondent-mother's case plan was her completion of parenting classes. Although respondent-mother did not complete a recognized standard parenting class, we deem it to be worthy of acknowledgement, in determining whether she has failed to comply with her case plan in order for us to assess the imposition of N.C.G.S. § 7B-1111(a)(2), that she did complete a "Mothering" class.

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) (quoting *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006)). We have also stated while "[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 order for a respondent's noncompliance with her case plan to support the termination of 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." *In re J.S.*, 374 N.C. at 815–16, 845 S.E.2d at 71 (extraneity omitted). At the same time 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)." *In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314 (quoting *In re S.N.*, 194 N.C. App. 142, 149, 669 S.E.2d 55, 60 (2008)).

Under the circumstances of this case, realizing the petitioning party's responsibility to satisfy the burden of proof in termination of parental rights cases; considering the findings of fact by the trial court that are supported by clear, cogent, and convincing evidence; and appreciating the delicate balance that must be maintained between and among our case precedent, we conclude, based on the facts and circumstances of the present case, that DSS failed to sustain its burden of proving that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights. Respondent-mother was separated from the juveniles Katie and Anna when the initial neglect petition was

filed, due to respondent-mother's incarceration on drug charges. It is apparent to us that a primary component of her case plan was obtaining a substance abuse assessment and following all treatment recommendations. As earlier discussed, due to insufficient evidence, we disregard the trial court's finding that respondent-mother failed to comply with this requirement of her case plan. Likewise, due to similar insufficient evidence, the trial court's finding that respondent-mother failed to obtain a mental health assessment is disregarded. The finding of the trial court that respondent-mother failed to secure employment and housing at a juncture fifteen months in the future after respondent-mother has satisfied her term of incarceration is too remote in time to be fairly evaluated as a case plan violation. Finally, although respondent-mother failed to complete parenting classes, her completion of a "Mothering" class is considered by us to be a sufficient attempt by respondent-mother under these facts and circumstances to comply with her case plan. As a result, we reverse the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights.

[3] The final ground for termination of respondent-mother's parental rights found by the trial court was dependency under N.C.G.S. § 7B-1111(a)(6). A trial court may terminate parental rights based on dependency 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 [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). A dependent juvenile is defined as "[a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2019). The incapability under N.C.G.S. § 7B-1111(a)(6) "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). "In determining whether a juvenile is dependent, 'the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

In the present case, DSS made no allegation in its petition that respondent-mother lacked an appropriate alternative child care

arrangement, and the trial court did not make any findings of fact addressing the issue. DSS contends that although the trial court failed to make a specific finding of fact regarding the matter, there was no evidence in the record that would support a finding that respondent-mother had an alternative caregiver arrangement. Consistent with DSS's assertion, the guardian ad litem represents that it was undisputed that respondent-mother did not have an alternative child care arrangement. We are not persuaded due to our agreement with, and application of, the determination of the Court of Appeals in *In re B.M.* that "[f]indings of fact addressing *both prongs must be made* before a juvenile may be adjudicated as dependent, and *the [trial] court's failure to make these findings will result in reversal of the [trial] court*." *Id.* (emphasis added) (citing *In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006)). Neither DSS nor the guardian ad litem has cited any evidence presented at the termination hearing regarding whether respondent-mother possessed or suggested an alternative child care arrangement. *See* N.C.G.S. § 7B-1109(f) ("The burden in [an adjudicatory hearing on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."). As a consequence of the lack of evidence in the record and the lack of a finding of fact by the trial court that respondent-mother lacked an appropriate alternative child care arrangement, we determine that the trial court erroneously decided that the ground of dependency was established pursuant to N.C.G.S. § 7B-1111(a)(6) to justify the termination of respondent-mother's parental rights.

Conclusion

Based on this Court's determinations that the trial court erroneously found that grounds existed to terminate respondent-mother's parental rights to the juveniles Katie and Anna pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6), and that it was in the juveniles' best interests to terminate respondent-mother's parental rights to both of the children, the trial court's orders terminating respondent-mother's parental rights are reversed.

REVERSED.

Justice NEWBY concurring in part and dissenting in part.

Because respondent-mother is scheduled for release from prison this month, and considering the other factors discussed by the majority,

I agree with much of the majority's analysis. I disagree, however, with the majority's decision to reverse the portion of the trial court's orders terminating respondent-mother's parental rights on the dependency ground. My disagreement is based on the same reasons stated in *In re K.C.T.*, No. 461A19 (N.C. Nov. 20, 2020) (Newby, J., dissenting). "While petitioners bear the burden generally to show that respondent's parental rights should be terminated, . . . the burden does not rest solely on petitioners to show that respondent offered no alternative childcare arrangement." *Id.* Respondent-mother is in the best position to show whether an alternative childcare arrangement existed. While the trial court should have made a finding of fact on whether an alternative childcare arrangement existed, failure to make this finding for the dependency ground for termination does not warrant reversal. Instead, the matter should be remanded to the trial court to make the proper finding. *See id.* Therefore, I concur in part and dissent in part.

IN THE MATTER OF K.P.-S.T. AND B.T.-F.T.

No. 451A19

Filed 11 December 2020

Termination of Parental Rights—grounds for termination—neglect—non-compliance with case plan

The trial court's determination that grounds existed to terminate respondent-father's parental rights in his children based on neglect was upheld where it was supported by unchallenged findings of fact and record evidence that respondent failed to comply with numerous requirements of his service plan related to substance abuse, domestic violence, housing, parenting, visitation, and child support.

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

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Maggie D. Blair for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

ERVIN, Justice.

Respondent-father B. T., Jr., appeals from an order entered by the trial court terminating his parental rights in his minor children K.P.-S.T. and B.T.-F.T.[1] After careful consideration of respondent-father's challenge to the trial court's termination order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

Kenny and Bill were born on 11 April 2017. The Guilford County Department of Health and Human Services received a report of neglect indicating that the children had tested positive for the presence of cocaine at birth. After the report was closed and the case was transferred to in-home services, the children's mother entered into an updated safety agreement on 21 June 2017. On 26 June 2017, DHHS received another report of neglect alleging that there had been an incident involving domestic violence between the mother and respondent-father that had resulted in the mother's arrest for committing a misdemeanor assault in the presence of a minor.

On 27 June 2017, DHHS filed a petition alleging that Kenny and Bill were neglected and dependent juveniles and obtained the entry of an order placing the children in the nonsecure custody of DHHS. In its petition, DHHS alleged that the parents had violated the safety plan by consuming alcohol in the presence of the children, by abusing other impairing substances, and by engaging in incidents of domestic violence in the presence of the children. The issues raised by the petition came on for hearing before Judge Betty J. Brown on 28 September 2017, at which time the results of paternity testing that established respondent-father's status as the biological father of the children were presented for the court's consideration. On 6 March 2018, Judge Brown entered an order finding Kenny and Bill to be neglected juveniles based upon the information contained in the petition and certain stipulations entered into by DHHS and the parents.[2]

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1. K.P.-S.T. and B.T.-F.T. will be referred to throughout the remainder of this opinion as "Kenny" and "Bill," respectively, which are pseudonyms used to protect the juveniles' identities and for ease of reading.

2. The dependency allegation was voluntarily dismissed by DHHS.

A service agreement proposed by DHHS had been presented to respondent-father on 21 July 2017. At that time, respondent-father declined to sign the proposed service agreement until he had had an opportunity to discuss it with his attorney. Respondent-father failed to attend a meeting that had been scheduled for the purpose of finalizing his service agreement with DHHS in August 2017 on the grounds that he had been unable to get off of work. The service agreement was eventually approved as a result of the 28 September 2017 adjudication and disposition hearing and signed by respondent-father on 16 October 2018. As a result of his service agreement, respondent-father was required to address issues relating to substance abuse; domestic violence; housing, environmental, and other basic physical needs; parenting skills; employment and income management; and visitation and child support.

After a permanency planning hearing held on 2 August 2018, Judge Lora C. Cubbage entered an order on 20 August 2018 that established the permanent plan for the children as one of adoption, with a secondary plan of reunification. On 19 March 2019, DHHS filed a petition seeking to have the parental rights of both parents in the children terminated based upon neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the home, N.C.G.S. § 7B-1111(a)(2); and willful abandonment, N.C.G.S. § 7B-1111(a)(7). The termination petition came on for hearing before the trial court on 5 August 2019, with the hearing having concluded on 6 August 2019. On 23 September 2019, the trial court entered an order terminating respondent-father's parental rights[3] in the children on the basis of a determination that his parental rights were subject to termination for 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 removal of the children from the home, N.C.G.S. § 7B-1111(a)(2),[4] and a determination that the termination of respondent-father's parental rights would be in the children's best interests. Respondent-father noted an appeal to this Court from the trial court's termination order.

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3. Although the trial court terminated the mother's parental rights in the children in the same order, she did not seek relief from the trial court's order before this Court. As a result, we will refrain from discussing the proceedings relating to the mother in any detail in this opinion.

4. The trial court did not find that respondent-father's parental rights in the children were subject to termination based upon willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining that his parental rights in Kenny and Bill were subject to termination. According to well-established North Carolina law, termination of parental rights proceedings involve the use of a two-stage process. 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, 832 S.E.2d 698, 700 (2019) (quoting N.C.G.S. § 7B-1109(f)). "If [the trial court] determines that one or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile[s] 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 (2015)).

"This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 'in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law,' with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (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)). "[A] finding of only one ground is necessary to support a termination of parental rights." *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019).

In the brief that he has submitted for our consideration on appeal, respondent-father has refrained from challenging the sufficiency of the evidentiary support for any of the trial court's findings of fact. Instead, respondent-father argues that the trial court's findings of fact fail to support its conclusions that respondent-father's parental rights in the children were subject to termination on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward addressing the conditions that had led to the children's removal from the home, N.C.G.S. § 7B-1111(a)(2). According to respondent-father, both N.C.G.S. § 7B-1111(a)(1) and N.C.G.S. § 7B-1111(a)(2) "require[ ] the court to consider [his] progress in addressing the conditions that led to the children's removal," and that, contrary to the decision that is reflected in the trial court's termination order, he made "reasonable substantive progress in addressing [those] issues."

According to N.C.G.S. § 7B-1111(a)(1), a trial judge may terminate a parent's parental rights in a child in the event that it finds that the parent has neglected his or her child in such a way that the child has become a neglected juvenile as that term is defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is "[a]ny juvenile less than 18 years of age . . . whose parent . . . 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).

> [I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding. In the event that a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes a showing of past neglect and a likelihood of future neglect by the parent.

In re N.D.A., 373 N.C. at 80, 833 S.E.2d at 775 (cleaned up).[5] "When determining whether 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.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (citing *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018)).

After acknowledging the existence of a prior adjudication that the children were neglected juveniles, respondent-father asserts that the children were removed from the mother's home as the result of prenatal exposure to cocaine, parental substance abuse, and incidents of

5. As we have noted today in our opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 & n.3 (N.C. Dec. 11, 2020), a showing of past neglect and a probability of future neglect is not necessary to support a determination that a parent's parental rights in a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in light of the fact that such a determination is also permissible in the event that there is a showing of current neglect.

domestic violence and argues that he made reasonable progress toward addressing those problems. A careful review of the record and the trial court's unchallenged findings of fact persuades us that the trial court did not err by reaching the opposite conclusion and determining that there was a likelihood that the children would be neglected in the event that they were placed under respondent-father's care.

In Finding of Fact No. 16, the trial court stated that the "current ongoing neglect by [respondent]father is evidenced by the fact that he has not complied in an adequate and consistent manner with his "service agreement" before describing the deficiencies in the manner in which respondent-father attempted to comply with the obligations that he assumed in accordance with his service agreement. As an initial matter, we note that respondent-father refused to sign the proposed service agreement when it was presented to him on 21 July 2017 and did not do so until 16 October 2018, which was over a year later. On the day upon which he did sign it, respondent-father was encouraged to begin working upon satisfying the requirements of his service agreement immediately in order to prevent the loss of his parental rights in his children.

As far as respondent-father's progress with respect to substance abuse-related issues is concerned, the trial court found that, while respondent-father did complete a substance abuse assessment on 26 June 2017, he had failed to comply with the recommendations that had resulted from that assessment. In addition, respondent-father failed to submit to requested random drug screens between September 2017 and June 2019. Although respondent-father did submit to one drug screen in January 2019, which was negative, he provided the required urine sample more than twenty-four hours after the initial request had been made, an action which precluded this drug screen from being treated as random in nature. Respondent-father also failed to complete the assessment or treatment that was necessary in order for him to regain his driver's license, which remained in a state of suspension as the result of a 2004 conviction for driving while subject to an impairing substance. As a result, the trial court found that respondent-father had not complied with the substance abuse-related component of his service agreement.

After determining that respondent-father had not been the aggressor in the domestic violence incidents in which he had been involved with the mother, DHHS modified the domestic violence-related component of his service agreement so as to require respondent-father to work with a therapist in order to become better educated about the effects of domestic violence upon children. As of February 2019, respondent-father had not begun this educational process. For that reason, the trial

court found that respondent-father had not complied with the domestic violence-related component of his service agreement.

In spite of the fact that the service agreement required him to address housing-related concerns, respondent-father failed to consistently update his social worker concerning his living situation. Although he provided a copy of his lease to his social worker in February 2019, respondent-father failed to act in a similar fashion after he moved during the summer of 2019. Respondent-father also failed to show that he had working utility service at his residence and never submitted to a home visit despite the fact that the social worker made multiple attempts to organize one. As a result, the trial court found that respondent-father had failed to comply with the housing-related component of his service agreement.

As far as the component of his service agreement relating to parenting skills is concerned, respondent-father did not obtain the required parenting evaluation. After failing to respond when efforts were made to schedule the required evaluation in 2017, respondent-father scheduled an appointment for the purpose of obtaining the evaluation in January 2019. However, respondent-father later cancelled this appointment and never rescheduled it. Similarly, after failing to respond when efforts were made to schedule parenting classes for him in 2017, respondent-father did complete an assessment associated with these classes in January 2019 and attended two class sessions. However, respondent-father failed to complete the parenting program. As a result, the trial court found that respondent-father was not in compliance with the parenting-related component of his service agreement either.

In addressing the components of respondent-father's service agreement relating to visitation and child support, the trial court found respondent-father had sporadically visited with Kenny and Bill until November 2017. However, he had not visited with the children since that time. In addition, respondent-father did not send letters, cards, or gifts to the children during the six-month period immediately prior to the filing of the termination petition and did not have consistent contact with the social worker, having had no contact with the social worker between October 2018 and January 2019 and having had only sporadic, bi-weekly contact with the social worker after that time.

On 1 February 2018, respondent-father was ordered to pay $301 each month in child support and an additional $20 each month toward an existing arrearage. Respondent-father paid $73.16 in support in July 2019 and had a $69.83 arrearage. Although respondent-father's fiancée

expressed a willingness to assist him in complying with the requirements of his service agreement, the trial court found that he had been out of compliance with its requirements even after the couple had become engaged in October 2018. As a result, the trial court found that respondent-father had failed to comply with five out of the six components of his service agreement.[6]

In seeking to persuade us that the trial court's findings of fact show that he had complied with the provisions of his service agreement, respondent-father argues that he was no longer having contact with the mother, who had caused the children's prenatal exposure to cocaine and had been the aggressor in the incidents of domestic violence in which he had been involved with the mother. In addition, respondent-father argues that there had been no police reports reflecting domestic violence in his current home. Moreover, respondent-father notes that his substance abuse evaluation indicated that he had nothing more than a "mild" problem with alcohol and cannabis, that he had incurred no new drug or alcohol related charges, and that the drug screen to which he had submitted in January 2019 was negative. Reduced to its essentials, however, respondent-father's argument is tantamount to a request that we reweigh the evidence. As this Court's precedent clearly states, even if the evidence would have supported a contrary decision, "this Court lacks the authority to reweigh the evidence that was before the trial court." *In re A.U.D.*, 373 N.C. at 12, 832 S.E.2d at 704.

After a careful review of the trial court's findings and the record evidence, we hold that the trial court's findings of fact support its determinations that respondent-father had previously "neglected the juveniles," that it is likely that this earlier neglect would be repeated if respondent-father became responsible for the children's care, that respondent-father is "currently neglecting the juveniles," and that respondent-father's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). In view of the fact that the trial court did not err by finding the existence of at least one ground for terminating his parental rights in the children and the fact that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421, we need not review respondent-father's challenge to the trial court's determination that his parental rights in the

6. The trial court did find that respondent-father had complied with the employment-related component of his service agreement given that he was employed full time and had provided paycheck stubs verifying his employment status to the social worker.

children were also subject to termination for willfully failing to make reasonable progress toward correcting the conditions that had led to the children's removal from the home pursuant to N.C.G.S. § 7B-1111(a)(2). As a result, since at least one ground exists to support the termination of respondent-father's parental rights in the children and since respondent-father has not challenged the lawfulness of the trial court's determination that the termination of his parental rights would be in the best interests of the children, we affirm the trial court's termination order with respect to respondent-father.

AFFIRMED.

IN THE MATTER OF N.K.

No. 54A20

Filed 11 December 2020

1. **Termination of Parental Rights—competency of parent—appointment of guardian ad litem—trial court's discretion**

    In a termination of parental rights case, the trial court did not abuse its discretion by failing to inquire into whether a guardian ad litem should have been appointed for respondent-mother, who had untreated mental health problems and a mild intellectual deficit. The trial court had ample opportunity to observe the mother during the proceedings, and the record tended to show that she was not incompetent.

2. **Termination of Parental Rights—grounds for termination—neglect—failure to address underlying problems—sufficiency of evidence**

    A mother's parental rights in her child were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the child had been adjudicated neglected and the neglect was likely to recur based on the mother's failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. Contrary to the mother's argument on appeal, the trial court made an independent determination by taking judicial notice of the underlying adjudicatory and dispositional orders, admitting reports from the department of social services and

the child's guardian ad litem, and hearing testimony from the child's social worker.

3. Termination of Parental Rights—best interests of the child—sufficiency of dispositional findings—mother's poverty and mental health—dispositional alternatives

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights would be in her child's best interests where the trial court made sufficient dispositional findings and performed the proper statutory analysis. The trial court was not required to make dispositional findings concerning the mother's poverty and mental health issues, and it also was not required to consider whether an alternative plan of guardianship that included visitation would have been in the child's best interests.

4. Native Americans—Indian Child Welfare Act—compliance—termination of parental rights

The trial court's order terminating a mother's parental rights in her child was remanded for further proceedings where the record did not contain sufficient information to show whether the trial court adequately ensured that the notice requirements of the Indian Child Welfare Act were met. The trial court had reason to know that the child might be an Indian child, the notices sent by the department of social services (DSS) to the relevant tribes were not contained in the record, and there was no indication that DSS sought assistance from the Bureau of Indian Affairs after several of the tribes did not respond to the notices.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 12 November 2019 by Judge B. Carlton Terry, Jr., in District Court, Davidson County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined upon the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Danielle De Angelis for petitioner-appellee Davidson County Department of Social Services.

Chelsea K. Barnes for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Amber K. appeals from the trial court's order terminating her parental rights in her son N.K.[1] After careful review of respondent-mother's challenges to the trial court's order in light of the record and the applicable law, we conclude that, while the trial court correctly applied North Carolina law in terminating respondent-mother's parental rights in Ned, this case should be remanded to the District Court, Davidson County, for further proceedings intended to ensure compliance with the Indian Child Welfare Act.[2]

I. Factual Background

On 26 February 2018, within a week after his birth, the Davidson County Department of Social Services filed a petition alleging that Ned was a neglected and dependent juvenile and obtained the entry of an order taking Ned into nonsecure custody. In its petition, DSS alleged that respondent-mother had tested positive for the presence of marijuana at the time of Ned's birth; that respondent-mother had a history of substance abuse problems; that respondent-mother had untreated mental health problems; that Ned had an older full sibling and two older half siblings, all of whom had been taken into the custody of the Davie County Department of Social Services based upon reports of improper supervision and abuse; that respondent-mother had been charged with assaulting a child under twelve; and that there were concerns about domestic violence between the parents.

In advance of the hearing to be held for the purpose of considering the merits of the allegations made in the DSS petition, respondent-mother completed an assessment at Daymark in early March 2018 and began recommended mental health and substance abuse treatment. In addition, respondent-mother entered into an Out of Home Family Services Agreement with DSS on 16 March 2018 in which she agreed to complete mental health and substance abuse treatment and to authorize the release of treatment-related information to DSS, to provide verification of her income, to obtain and maintain suitable housing, to visit with Ned and attend his medical and developmental appointment; to complete an updated psychological evaluation or parenting capacity assessment and comply with any resulting recommendations, to refrain from

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1. N.K. will be referred to throughout the remainder of this opinion as "Ned," which is a pseudonym that will used to protect the identity of the juvenile and for ease of reading.

2. The trial court's order also terminated the parental rights of Ned's father. However, since the father is not a party to the present appeal, we will refrain from discussing the proceedings relating to him in any detail in this opinion.

engaging in domestic violence and to participate in a domestic violence treatment program, and to maintain contact with DSS.

The DSS petition came on for an adjudication hearing on 28 March 2018. At that time, DSS and Ned's parents entered into a stipulation with DSS that certain facts existed and that Ned could be adjudicated to be a neglected and dependent juvenile. On 25 April 2018, Judge Mary F. Paul (now Covington) entered an order finding Ned to be a neglected and dependent juvenile. After a dispositional hearing held on 25 April 2018, Judge Paul entered a dispositional order on 29 May 2018 ordering that Ned remain in DSS custody, establishing a visitation plan, and ordering respondent-mother to comply with the provisions of her service agreement.

After a review and permanency planning hearing on 5 September 2018, Judge Covington entered an order on 28 November 2018 finding that respondent-mother had stopped attending mental health and substance abuse treatment in June 2018, had resumed the use of impairing substances, and had not reengaged in mental health and substance abuse treatment despite promising DSS that she would do so. In addition, Judge Covington found that respondent-mother's housing had been unstable; that she had failed to take advantage of referrals relating to housing, income support, and employment; that she had failed to participate in a scheduled parenting capacity assessment; that she had acknowledged the occurrence of incidents of physical aggression against the father that had resulted in the entry of a protective order against her; and that she had violated the protective order, resulting in the institution of new criminal charges against her. On the other hand, Judge Covington found that respondent-mother had attended the majority of her scheduled visits with Ned and had remained in contact with DSS. In light of these findings, Judge Covington ordered that Ned remain in DSS custody, established "a primary plan of termination of parental rights and adoption and a secondary plan of reunification with a parent," reduced the amount of visitation that respondent-mother was entitled to have with Ned, and ordered respondent-mother to comply with the provisions of her service agreement.

Another review and permanency planning hearing was held on 6 March 2019. In an order entered on 18 April 2019, Judge Covington changed the permanent plan for Ned to "a primary plan of termination of parental rights and adoption and a secondary plan of guardianship with a court approved caretaker" and relieved DSS from the necessity for making any further efforts to reunify Ned with respondent-mother.

Finally, Judge Covington reduced the amount of visitation that respondent-mother was entitled to have with Ned even further.

On 23 April 2019, DSS filed a petition seeking to terminate respondent-mother's parental rights in Ned based upon neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to Ned's removal from the family home, N.C.G.S. §7B-1111(a)(2); failure to pay a reasonable portion of the cost of the care that Ned had received while in DSS custody, N.C.G.S. § 7B-1111(a)(3); and dependency, N.C.G.S. § 7B-1111(a)(6). Respondent-mother filed a verified answer denying the material allegations contained in the termination petition on 8 May 2019.

The termination petition came on for hearing before the trial court on 24 October 2019. On 12 November 2019, the trial court entered an order terminating respondent-mother's parental rights in Ned. In its termination order, the trial court found that respondent-mother's parental rights in Ned were subject to termination based upon neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to Ned's removal from the family home, N.C.G.S. § 7B-1111(a)(2), and that the termination of respondent-mother's parental rights would be in Ned's best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Substantive Legal Analysis

A. Competency Inquiry

[1] In seeking relief from the trial court's termination order before this Court, respondent-mother begins by arguing that the trial court had abused its discretion by failing to conduct an inquiry regarding her competency on its own motion for purposes of determining whether she was entitled to the appointment of a guardian *ad litem*. A parent's entitlement to the appointment of a guardian *ad litem* in juvenile proceedings, including those involving a request for the termination of parental rights, is governed by N.C.G.S. § 7B-1101.1(c) (2019), which provides that, "[o]n motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with [N.C.]G.S. [§] 1A-1, Rule 17." An "incompetent adult" for purposes of N.C.G.S. 1A-1, Rule 17, is an adult "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy,

cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (2019).

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *In re T.L.H.*, 368 N.C. 101, 106, 772 S.E.2d 451, 455 (2015) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). "[T]rial court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard." *Id.* at 107, 772 S.E.2d at 455. "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.' " *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In *In re T.L.H.*, this Court specifically addressed "the extent to which a trial court must inquire into a parent's competence to determine whether it is necessary to appoint a guardian *ad litem* for that parent despite the absence of any request that such a hearing be held or that a parental guardian *ad litem* be appointed." *Id.* at 102, 772 S.E.2d at 452. After acknowledging the applicability of the abuse of discretion standard to the issue under consideration, we explained that the trial court should be afforded substantial deference in deciding whether an inquiry into a litigant's competence ought to be undertaken given that it "actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record." *Id.* at 108, 772 S.E.2d at 456.

> As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

Id. at 108–09, 772 S.E.2d at 456.

In spite of the significant mental health issues disclosed in the record before us in that case, we held in *In re T.L.H.* that "sufficient evidence tending to show that [the] respondent was not incompetent existed to obviate the necessity for the trial court to conduct a competence inquiry

before proceeding with the termination hearing." *Id.* at 109, 772 S.E.2d at 456. In reaching this conclusion, we noted that the respondent "exercised what appears to have been proper judgment in allowing DHHS to take custody of [the child,]" "demonstrated a reasonable understanding of the proceedings that would inevitably result from that decision[,]" provided cogent testimony at a permanency planning hearing that demonstrated her understanding of her case plan and the consequences of her decisions, and took steps to comply with aspects of her case plan. *Id.* at 109, 772 S.E.2d at 456–57. As a result, this Court was "unable to conclude that the apparent failure to conduct such an inquiry constituted an abuse of discretion" given the existence of "ample support for a determination that respondent understood that she needed to properly manage her own affairs and comprehended the steps that she needed to take in order to avoid the loss of her parental rights . . . ." *Id.* at 108, 109, 772 S.E.2d at 456, 457.

In our recent decision in *In re Z.V.A.*, 373 N.C. 207, 835 S.E.2d 425 (2019), this Court applied the framework delineated in *In re T.L.H.* in holding that the trial court "did not abuse its discretion when it did not conduct an inquiry into [the respondent's] competency." *Id.* at 211, 835 S.E.2d at 429. In reaching this result, we reasoned that, despite the respondent's low intelligence quotient, she had been diagnosed with only a "mild intellectual disability" in light of her demonstrated ability to work and to attend school. *Id.* at 210, 835 S.E.2d at 429. In addition, we noted that the existence of sufficient evidentiary support for the trial court's findings that the respondent had developed adaptive skills that lessened the impact of her disability and had engaged in portions of her case plan "d[id] not suggest [the respondent's] disability rose to the level of incompetence so as to require the appointment of a guardian *ad litem* to safeguard [the respondent's] interests." *Id.* at 211, 835 S.E.2d at 429.

In attempting to distinguish this case from *In re T.L.H.* and *In re Z.V.A.*, respondent-mother argues that the reason for our decision to give deference to the trial court, which revolved around the trial court's opportunity to observe the party whose competence is at issue on a first-hand basis, was "not helpful or decisive" in this case because respondent-mother did not testify at the termination hearing. In addition, respondent-mother argues that the record fails to contain sufficient evidence to support a finding that respondent-mother was not incompetent, with respondent-mother emphasizing the existence of evidence tending to show that she had significant mental health problems and failed to comply with the provisions of her service agreement as indicative of her lack of judgment and her inability to manage her own affairs. We do not find respondent-mother's arguments to be persuasive.

As an initial matter, we note that, even though the record contains no indication that respondent-mother testified before the trial court, it clearly shows that respondent-mother was present for the pre-adjudicatory, adjudicatory, and dispositional hearings; for the subsequent review and permanency planning hearings; and for the termination hearing. As a result, Judge Covington and the trial court had ample opportunity to gauge respondent-mother's competence by observing her demeanor and behavior in court throughout the progress of the underlying neglect proceeding and the termination proceeding, making it completely appropriate for us to give deference to their failure to inquire into respondent-mother's competence.

Secondly, in spite of the fact that respondent-mother suffered from untreated mental health problems and had tested "in the range typically associated with a diagnosis of Mild Intellectual Deficits[,]"the record contains an appreciable amount of evidence tending to show that respondent-mother was not incompetent. According to the undisputed evidence and the trial court's unchallenged findings of fact, respondent-mother acknowledged the existence of her mental health and substance abuse problems at a relatively early stage and took steps to begin treatment for those problems. In addition, respondent-mother entered into a service agreement with DSS that was intended to address the reasons that led to Ned's placement in DSS custody and participated in negotiating a stipulation with DSS concerning the existence of certain facts and Ned's status as a neglected and dependent juvenile. Moreover, Judge Covington specifically found in the adjudication order that respondent-mother had appeared in open court and participated in the negotiation of the stipulations, confirmed that she understood them, and had entered into these stipulations freely and voluntarily with the full understanding that they would result in a decision finding Ned to be a neglected and dependent juvenile. In the same vein, we note that respondent-mother verified the answer to the termination petition that was filed on her behalf, served as her own payee for purposes of receiving disability benefits, acknowledged her need for treatment, expressed a preference for participating in certain treatment programs as compared to others, and engaged in various treatment programs during the course of the juvenile proceedings. Finally, the record shows that respondent-mother expressed her preference that Ned be placed with members of her family, attended the majority of her scheduled visits with Ned, had routine contact with DSS, and was consistently available to the court, DSS, and Ned's guardian *ad litem*.

After examining the record before us in this case, we do not believe that this case involves the sort of "extreme instance" in which a trial

judge would have abused his or her discretion by failing to inquire on his or her own motion into the extent, if any, to which respondent-mother was entitled to the appointment of a guardian *ad litem*. *In re T.L.H.*, 368 N.C. at 109, 772 S.E.2d at 456.

> We do not . . . wish to be understood as holding that the trial court would have had no basis for inquiring into respondent[-mother]'s competence in light of her history of serious mental health conditions. A trial court would have been well within the bounds of its sound discretion to conclude that respondent[-mother]'s lengthy history of serious mental illness raised a substantial question concerning her competence sufficient to justify further inquiry. In fact, such an inquiry in this case might well have been advisable.

Id. at 111–12, 772 S.E.2d at 458. On the other hand, given the opportunity that Judge Covington and the trial court had to observe respondent-mother in court and the appreciable amount of evidence in the record tending to show that respondent-mother was not incompetent, "we are unable to conclude that the trial court could not have had a reasonable basis for reaching the opposite result[.]" *Id.* at 112, 772 S.E.2d at 458. For that reason, we hold that, in this case, the trial court did not abuse its discretion by failing to conduct an inquiry into the issue of whether a guardian *ad litem* should have been appointed for respondent-mother.

B. Analysis of the Trial Court's Termination Order

A termination of parental rights proceeding is conducted using a two-stage process that 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 the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698, 700 (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, 832 S.E.2d at 700, 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. Grounds for Termination

[2] In respondent-mother's view, the trial court erred by determining that her parental rights were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress toward

correcting the conditions that had led to the child's removal from the family home, N.C.G.S. § 7B-1111(a)(2). "This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (2019) (cleaned up). "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)). "[A] finding of only one ground is necessary to support a termination of parental rights[.]" *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019).

A parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the parent has neglected the juvenile to such an extent that the juvenile is a "neglected juvenile" within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined as "[a]ny juvenile less than 18 years of age . . . whose parent . . . 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).

> In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding. In the event that a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes a showing of past neglect and a likelihood of future neglect by the parent. When determining whether 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. A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect.

In re M.A., 374 N.C. 865, 869–70, 844 S.E.2d 916, 920–21 (2020) (cleaned up).[3]

The trial court concluded that respondent-mother's parental rights in Ned were subject to termination for neglect based upon a determination that respondent-mother "ha[d] neglected [Ned] within the meaning of N.C.[G.S.] § 7B-101(15) and it is probable that there would be a repetition of the neglect of [Ned] if [he] were returned to the care of [respondent-mother]." In support of this determination, the trial court made detailed findings of evidentiary fact, including findings that Ned had previously been determined to be a neglected juvenile on 25 April 2018 and that respondent-mother had made little progress toward completing the requirements of the service agreement that she had entered into with DSS. More specifically, the trial court found that respondent-mother had failed to address her mental health, substance abuse, and domestic violence problems; that she had failed to establish and maintain safe and appropriate housing; and that her failures to adequately address those problems demonstrated that there was a likelihood that Ned would be neglected in the future in the event that he was returned to her care.

Although respondent-mother has not challenged any specific finding of fact contained in the trial court's termination order as lacking in sufficient evidentiary support and, on the contrary, concedes that the trial court's findings are supported by "some form of evidence," she does argue that, since the trial court's findings resemble language found in findings of fact set out in other orders and in the reports that were admitted into evidence at the termination hearing and since these earlier findings and the report language were predicated upon the use of lower standards of proof than the clear, cogent, and convincing standard of proof that is applicable in termination proceedings, they should not have been used to support the findings that the trial court made in the termination order. *See* N.C.G.S. § 7B-1109(f). This argument lacks merit.

As this Court recognized in *In re T.N.H.*, the "trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because[,] where

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3. As we have noted today in our opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 & n.3 (N.C. Dec. 11, 2020), a showing of past neglect and a probability of future neglect is not necessary to support a determination that a parent's parental rights in a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in light of the fact that such a determination is also permissible in the event that there is a showing of current neglect.

a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." 372 N.C. at 410, 831 S.E.2d at 60. On the other hand, we have also held that "the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* At the termination hearing, the trial court took judicial notice of the underlying adjudicatory and dispositional orders, allowed the admission of reports from the DSS and Ned's guardian *ad litem* into evidence, and heard live testimony from the social worker responsible for overseeing Ned's case. After carefully reviewing the record, including the orders and reports that were made part of the record and the live testimony that was received at the termination hearing, we are satisfied that the findings of fact addressing the issue of whether respondent-mother's parental rights in Ned were subject to termination are proper in form and have adequate evidentiary support.

In addition, respondent-mother argues that the trial court erred by concluding that her parental rights in Ned were subject to termination for neglect on the grounds that the trial court had failed to consider whether her poverty and mental health difficulties adversely affected her ability to care for Ned. More specifically, respondent-mother argues that the trial court had failed to make adequate findings of fact concerning the issue of whether her poverty and mental health problems were the sole reasons for her neglect of Ned and that the existence of these conditions "explain[s] and excuse[s] the facts used by the court for its grounds in termination." Once again, we do not find this argument persuasive.

Respondent-mother is, of course, correct in arguing that "her parental rights are not subject to termination in the event that her inability to care for her children rested solely upon poverty-related considerations[.]" *In re M.A.*, 374 N.C. at 881, 844 S.E.2d at 927 (citing N.C.G.S. § 7B-1111(a)(2) (2019) (providing that "[n]o parental rights . . . shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty")). Although the record contains evidence tending to show that respondent-mother had experienced financial difficulties, a careful analysis of the record shows that respondent-mother's inability to care for Ned did not stem solely from her poverty. The prior adjudication of neglect and the trial court's determination that there was a likelihood that Ned would be neglected in the event that he was returned to respondent-mother's care resulted from a combination of factors, including respondent-mother's substance abuse, mental health, and domestic violence problems. The evidence

and the trial court's unchallenged findings of fact tend to show that respondent-mother failed to complete treatment that was intended to assist her in addressing those problems and that respondent-mother disregarded the treatment-related referrals and recommendations that she had received from DSS, that respondent-mother continued to use controlled substances, and that respondent-mother continued to engage in acts of domestic violence against the father. Finally, the record contains evidence tending to show that, even though DSS referred respondent-mother to services that could have alleviated the financial hardships that she was experiencing relating to income, employment, housing, and transportation, respondent-mother refused to take advantage of the opportunities that were made available to her as a result of these referrals. As a result, we are satisfied that the trial court's unchallenged findings of fact and the record evidence establish that the trial court's decision to find that respondent-mother's parental rights in Ned were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) rested upon considerations other than respondent-mother's poverty.

Similarly, respondent-mother asserts that the trial court's findings do not support a determination that her parental rights in Ned were subject to termination on the basis of neglect given that her inability to care for Ned resulted from the existence of her mental health problems. As we understand this aspect of her challenge to the lawfulness of the trial court's termination order, respondent-mother is effectively asserting that termination of parental rights on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) is impermissible in the absence of a showing of willfulness.[4] This Court has, however, recently held that "[w]hether the respondent-mother's failure to comply with her case plan was willful is not relevant to establish this ground for termination." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748 (2020). On the contrary, we note that this Court held several decades ago that, "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent," *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), and that, "[w]here the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs, whether it be *by reason of mental infirmity* or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to

4. The only authority that respondent-mother has cited in support of her contention that a showing of willfulness must be made before a parent's parental rights in a child may be terminated for neglect is an unpublished decision of the Court of Appeals, *see In re M.A.F.*, 2010 WL 2163806 at *6 (N.C. Ct. App. 2010) (unpublished).

correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected." *Id.* (emphasis added). As a result, we conclude that respondent-mother's assertion that a parent's parental rights in a child may not be terminated on the basis of neglect in the event that the parent's inability to provide adequate care for that child stems from mental health problems rests upon a misapprehension of well-established North Carolina law.

Thus, we hold that the trial court's unchallenged findings of fact establish that Ned had previously been found to be a neglected juvenile and that the neglect that Ned had previously experienced was likely to recur in the event that he was returned to respondent-mother's care given her failure to adequately address her substance abuse, mental health, and domestic violence problems and to obtain appropriate housing. As a result, given that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *In re A.R.A.*, 373 N.C. at 194, 835 S.E.2d at 421, we further hold that the trial court did not err as a matter of North Carolina law in determining that respondent-mother's parental rights in Ned were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

2. Dispositional Determination

[3] In her final challenge to the substance of the trial court's termination order, respondent-mother argues that the trial court erred by determining that the termination of her parental rights would be in Ned's best interests. In determining whether the termination of a parent's parental rights would be in a child's best interests,

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§]8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, 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). "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, 832 S.E.2d at 700. An "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." *Id.* at 6–7, 832 S.E.2d at 700–01 (quoting *In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455).

In this case, the trial court made findings concerning each of the factors enumerated in N.C.G.S. § 7B-1110(a) in determining that the termination of respondent-mother's parental rights would be in Ned's best interests. As part of this process, the trial court found that Ned was twenty months old; that the primary permanent plan for Ned was one of adoption; that the termination of respondent-mother's parental rights would aid in the implementation of Ned's permanent plan by freeing Ned for adoption; that Ned's current foster family, with whom he had been placed within six days after his birth, was ready, willing, and able to adopt him; that Ned had a stronger bond with respondent-mother than he did with the father, with whom he had a minimal bond; that the relationship between Ned and respondent-mother was more like that between acquaintances than that between family members; that Ned was very bonded with his foster family, including both the parents and their children; and that all of Ned's needs were being met by his foster family, who had committed to providing him with a permanent home. Finally, the trial court found that Ned's foster parents had worked with the foster parents of Ned's full sibling, who was in foster care in Davie County, for the purpose of arranging visits between Ned and his sibling despite the absence of any court order requiring them to do so.

In view of the fact that respondent-mother has not challenged the trial court's dispositional findings as lacking in sufficient evidentiary support, those findings are binding upon this Court for purposes of appellate review. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. Instead, respondent-mother argues that the trial court abused its discretion at the dispositional phase of this termination proceeding by failing to make findings of fact concerning respondent-mother's poverty and mental

health problems. In addition, respondent-mother argues that the fact that she did not have a strong bond with Ned stemmed from the limited visitation that she had been authorized to have with her child and that the trial court had erred by failing to consider whether the implementation of an alternative plan of guardianship that included continued visitation intended to preserve the family unit would be in Ned's best interests. Once again, we do not find respondent-mother's arguments to be persuasive.

Aside from asserting that her poverty and mental health problems had contributed to the existence of the conditions that had led to the trial court's determination that her parental rights in Ned were subject to termination, respondent-mother has failed to explain how the issues of poverty and mental health were related to the dispositional decision that the trial court was required to make at the second stage of this proceeding. Moreover, we are unable to see how the factors upon which respondent-mother relies in support of this aspect of her argument support a reversal of the trial court's dispositional decision. As an additional matter, we note that this Court has rejected arguments that the trial court commits error at the dispositional stage of a termination of parental rights proceeding by failing to explicitly consider non-termination-related dispositional alternatives, such as awarding custody of or guardianship over the child to the foster family, by reiterating that "the paramount consideration must always be the best interests of the child." *In re J.J.B.*, 374 N.C. 787, 795, 845 S.E.2d 1, 6 (2020); *see also In re Z.A.M.*, 374 N.C. 88, 100–01, 839 S.E.2d 792, 800–01 (2020); *In re Z.L.W.*, 372 N.C. 432, 438, 831 S.E.2d 62, 66 (2019). As we have previously explained,

> [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, 316 S.E.2d at 251 (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").

In re Z.L.W., 372 N.C. at 438, 831 S.E.2d at 66.

After having made sufficient findings of fact concerning the dispositional factors enumerated in N.C.G.S. § 7B-1110(a), the trial court determined that "[Ned] is in need of a safe, stable home and a permanent plan of care at the earliest possible age which only can be obtained by the severing of the relationship between the child and [respondent-mother] and by the termination of parental rights[.]" In view of the fact that "the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors, we are satisfied the trial court's best interests determination was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *In re Z.A.M.*, 374 N.C. at 100, 839 S.E.2d at 801; *see also In re J.J.B.*, 374 N.C. at 796, 845 S.E.2d at 7. As a result, we hold that the trial court did not abuse its discretion by concluding that termination of respondent-mother's parental rights would be in Ned's best interests.

C. Indian Child Welfare Act

[4] In her brief before this Court, respondent-mother argues that the trial court erred by terminating her parental rights in Ned in the absence of a showing of compliance with the requirements of ICWA. 25 U.S.C. §§ 1901–1963 (2018).[5] We recently addressed the manner in which ICWA should be applied in *In re E.J.B.*, 375 N.C. 95, 846 S.E.2d 472 (2020). As we recognized in that decision, ICWA, which was enacted by Congress in 1978, "established 'minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes' in order to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *Id.* at 98, 846 S.E.2d at 474 (quoting 25 U.S.C. § 1902 (2018)). In order to achieve that goal, ICWA enacted notice requirements that are applicable to State court child custody proceedings involving Indian children, including proceedings involving requests for the termination of a parent's parental rights. 25 U.S.C. § 1912(a) (2018); *see also* 25 U.S.C. § 1903(1)(ii) (2018) (defining "child custody proceeding" to include requests that a parent's parental rights be terminated). ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4) (2018). ICWA's notice provisions require that:

5. We use the terms "Indian" and "Indian child" in order that our opinion will be worded consistently with the terminology used in ICWA. *See In re E.J.B.*, 375 N.C. C. at 95, 846 S.E.2d at 473 n.1.

> [i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a) (2018).

The Department of the Interior adopted binding regulations in order to ensure the uniform application of ICWA in 2016. *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 38,782 (June 14, 2016) (20 be codified at 25 C.F.R. pt. 23)). As we explained in *In re E.J.B.*, these regulations updated the existing notice provisions and added Subpart I, *see* 25 C.F.R. §§ 23.101–.144; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,867–68, pursuant to which "state courts bear the burden of ensuring compliance with the Act." *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.107(a)–(b); *see also In re L.W.S.*, 255 N.C. App. 296, 298 n.4, 804 S.E.2d 816, 819, n.4 (2017)). Among other things, the 2016 regulations provide that "[s]tate courts must ask each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child" and "inform the parties of their duty to notify the trial court if they receive subsequent information that provides reason to know the child is an Indian child." *In re E.J.B.*, 375 N.C. at 101, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.107(a)).

> If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . .

25 C.F.R. § 23.107(b). Although "[s]tate courts should seek to allow tribes to determine membership . . . ," *In re E.J.B.*, 375 N.C. at 102, 846 S.E.2d at 476 (citing 25 C.F.R. § 23.108(a)–(b) (providing that, except as otherwise required by federal or tribal law, the determination of whether a child is a member of a tribe or eligible for membership in a tribe is solely within the jurisdiction and authority of the tribe, with a state court lacking the authority to substitute its own membership determination for that of a tribe)), the trial court may make an independent determination concerning a child's status as an Indian child based upon the available information in the event that the relevant tribes repeatedly fail to respond to written membership inquiries in spite of diligent efforts to obtain a response made by the petitioner. Indian Child Welfare Act Proceedings 81 Fed. Reg. at 38,806; *In re E.J.B.*, 375 N.C. at 102, 846 S.E.2d at 476. However, in the event that "a tribe fails to respond to multiple written requests, the trial court must first seek assistance from the Bureau of Indian Affairs," *In re E.J.B.*, 375 S.E.2d at 102, 846 S.E.2d at 476 (citing 23 C.F.R. § 23,105(c) (providing that, if "the Tribe contacted fails to respond to written inquiries," the requesting party "should seek assistance in contacting the Indian Tribe from the" Bureau of Indian Affairs), before making its own independent determination.

In her brief, respondent-mother argues the trial court failed to comply with requirements of ICWA in light of the fact that it had been reported at an early stage of the proceedings that Ned might be an Indian child through his maternal grandmother in upstate New York. Although respondent-mother acknowledges that DSS sent inquiries to a number of tribes and received a response from the Eastern Band of Cherokee Indians that Ned was neither a member nor eligible for membership in the tribe, she argues that the question of whether Ned was an Indian child by virtue of his New York ancestry remained unresolved throughout the entire course of the proceedings before the trial court and that, until a determination has been made concerning the issue of whether Ned is an Indian child as a result of his potential affiliation with a tribe in New York, the trial court had failed to comply with the requirements of ICWA. We conclude that respondent-mother's argument has merit.

As the record reflects, Judge Jimmy L. Myers, who addressed the issue of whether Ned should be held in nonsecure custody early in the juvenile proceedings, was aware that Ned had "possible Native American heritage through [respondent-mother's] maternal grandmother" as early as the date upon which the 28 February 2018 order addressing the need for Ned to remain in nonsecure custody was entered. In that order, Judge Myers found that "[r]espondents report Native American Heritage" and that the parties "have reason to know that the juvenile is an Indian Child." As a result, Judge Myers ordered DSS to "make diligent efforts to verify the juvenile's status as an Indian Child and notify the tribe that the respondents believe to be a member of . . . and/or contact the Bureau of Indian Affairs[.]"

A nonsecure custody report submitted by DSS on 7 March 2018 indicated "[an] Indian Child Welfare Act application has been submitted in reference to the respondent[-]mother's grandmother's Indian heritage." In a report submitted on 25 April 2018 in connection with the initial dispositional hearing, DSS stated that Ned was not subject to ICWA given that DSS had "sent the necessary ICWA inquiry letters," that it had received a response from the Eastern Band of Cherokee Indians indicating that Ned was neither a registered member nor eligible to register as a member of the tribe, and that DSS was "waiting for responses to the remaining inquiries." The same information was contained in reports that DSS submitted in connection with permanency planning and review hearings held in August 2018 and March 2019.

In an order entered following the 6 March 2019 review and permanency planning hearing, Judge Covington found that "[t]he minor child is not an Indian child according to the information reported by [DSS,]" that "[t]he minor child is not a member of the Eastern Band of Cherokee Indians," and that "[DSS] is awaiting responses from other tribes." The report that DSS submitted in connection with a May 2019 permanency planning and review hearing contained no additional information, so the trial court reiterated Judge Covington's earlier finding that "[t]he minor child is not an Indian child" in the order that was entered as a result of the 29 May 2019 hearing. The trial court's termination order did not address the extent to which the efforts in which DSS had engaged resulted in adequate compliance with ICWA's notice requirements.

As was the case in *In re E.J.B.*, 375 N.C. at 103, 846 S.E.2d at 477, "the trial court had reason to know that an Indian child might be involved" in this case. In addition, given that the notices that DSS sent to the relevant tribes are not contained in the record, we have no basis for determining whether they complied with the requirements for the contents of such

notices set out in 25 U.S.C. § 1912 and 25 C.F.R. § 23.111(d). Finally, given the absence of a response from any of the tribes to which DSS sent notice other than the Eastern Band of Cherokee Indians and given the absence of any indication that, following the failure of these other tribes, which are not specifically identified in the record, to respond, DSS sought "assistance from the Bureau of Indian Affairs prior to making its own independent determination" of whether Ned was an Indian child as required by 25 C.F.R. § 23.105(c), the record fails to contain sufficient information to permit a determination that the trial court adequately ensured that compliance with the notice requirements of ICWA actually occurred. As a result, we hold that this case should be remanded to the District Court, Davidson County, for further proceedings concerning the issue of whether the notice requirements of ICWA were complied with prior to the entry of the trial court's termination order and whether Ned is an Indian child for purposes of ICWA. In the event that the trial court concludes upon remand, after making any necessary findings or conclusions, that the notice requirements of ICWA were properly complied with or that Ned was not an Indian child, it shall reaffirm the trial court's termination order. In the event that the trial court determines on remand that Ned is, in fact, an Indian child, it shall vacate the trial court's termination order and "proceed in accordance with the relevant provisions of" ICWA. *In re E.J.B.*, 375 N.C. at 106, 846 S.E.2d at 479.

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court did not err by failing to make inquiry on its own motion into the issue of whether a guardian *ad litem* should have been appointed for respondent-mother and that the trial court did not err in making the findings of fact, conclusions, and discretionary determinations contained in the trial court's adjudication and dispositional decisions. However, given the absence of any indication that the trial court complied with the notice provisions of ICWA, this case is remanded to the trial court for further proceedings not inconsistent with this opinion.

REMANDED.

IN THE MATTER OF Q.B.

No. 59A20

Filed 11 December 2020

1. Termination of Parental Rights—competency inquiry—parental guardian ad litem

In a termination of parental rights proceeding, the trial court did not abuse its discretion by failing to conduct a second inquiry into whether respondent-mother was entitled to a guardian ad litem despite respondent being adjudicated incompetent and appointed a guardian of the person in a separate adult protective services proceeding. Although these events occurred after the trial court's first determination that respondent was not entitled to a Rule 17 guardian, the trial court was not required to hold another competency hearing before proceeding with termination where there was sufficient evidence that respondent was competent to take part in the proceedings without the aid of a guardian ad litem.

2. Termination of Parental Rights—competency inquiry—parental guardian ad litem—obligation of petitioning agency to request

In a termination of parental rights proceeding, the petitioning department of social services was not obligated to request the appointment of a guardian ad litem for respondent-mother if there was reason to believe she was incompetent where Civil Procedure Rule 17(c) imposed no such requirement.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 November 2019 by Judge Lee F. Teague in District Court, Pitt County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Timothy E. Heinle for petitioner-appellee Pitt County Department of Social Services.

R. Bruce Thompson II for appellee Guardian ad litem.

Christopher M. Watford for respondent-appellant mother.

DAVIS, Justice.

The issue in this case is whether the trial court abused its discretion by failing to reconsider whether respondent-mother (respondent) was entitled to the appointment of a guardian *ad litem* (GAL) to assist her in her termination of parental rights proceeding. Because we conclude that the trial court did not abuse its discretion in failing to sua sponte conduct such an inquiry, we affirm the trial court's order terminating respondent's parental rights.

Factual and Procedural Background

This case involves a termination of parental rights proceeding initiated by petitioner Pitt County Department of Social Services (DSS) against respondent on the basis of neglect and dependency of her minor child "Quanna."[1] On 20 September 2017—approximately one month before the birth of Quanna—DSS received a report regarding respondent and her family. DSS had prior involvement with respondent dating back to 2012 due to reports concerning respondent's alleged neglect of Quanna's three older siblings.

The 2017 report alleged that respondent was unable to properly care for herself and for her existing three children. The report stated that respondent was selling her food stamps, she was unable to provide proper housing, food, and other necessities for her children, and the home was uninhabitable due to a lack of utilities and rat infestation.

DSS visited the home to investigate and found it to be uninhabitable with no indoor plumbing, no functioning utilities, a partially caved-in ceiling, no food in the home, and a rat and cockroach infestation. The DSS visit also revealed that respondent "appeared to be limited" intellectually, that she had a learning disability and various health issues, and that the monthly social security income that the household received was not being used to meet the basic needs of respondent or her children. Accordingly, DSS began two simultaneous investigations into the household—a DSS Child Protective Services investigation regarding respondent's three children and a DSS Adult Protective Services investigation into respondent's ability to care for herself and meet her own basic needs.

As part of the latter investigation, an Adult Protective Services petition was filed after DSS substantiated caretaker neglect "as a result of

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1. A pseudonym is used to protect the identity of the juvenile.

[respondent] being a disabled adult and her caretakers not meeting her basic needs." Respondent's primary caretaker was her sister, who was also the designated payee for respondent's social security income. The investigation found that despite receiving $448 monthly in food stamps and $735 monthly in social security income, respondent and her children were not having their basic needs met.

Respondent gave birth to Quanna in November 2017. While respondent was in the hospital, she became belligerent with hospital staff and demanded to be released with Quanna, despite having no plans for transportation and having obtained no crib, formula, diapers, or other necessities for the child. Moreover, after Quanna's birth the social security checks that the entire household had depended upon for income were suspended. Accordingly, on 1 December 2017 DSS filed a petition alleging that Quanna was a neglected and dependent juvenile and obtained nonsecure custody of her.

Pursuant to a request by DSS, respondent completed a psychological evaluation on 10 January 2018. The examiner, psychologist Rhonda Cardinale, reported that respondent had an IQ score of 63, which fell within the low functioning range of clinical impairment. Cardinale stated her opinion that respondent's evaluation "reflects that her overall level of intellectual functioning as well as her overall level of adaptive behavior skills falls into the range of clinical impairment." Cardinale opined that due to respondent's cognitive defects, she "would have difficulty independently and adequately making positive decisions for herself" and would "require assistance in ensuring that her basic needs are adequately met." Cardinale accordingly recommended that "the appointment of a guardian and/or legal decision maker be considered" for respondent.

On 25 January 2018, the District Court, Pitt County, conducted a hearing at the request of DSS to determine whether to appoint a GAL for respondent pursuant to Rule 17 of the North Carolina Rules of Civil Procedure with regard to the juvenile proceeding involving Quanna. The trial court subsequently entered an order on 15 February 2018 finding that although respondent was "low-functioning," she "underst[oo]d the role of the Court and the parties in the Courtroom as well as the Court's function in determining the status of the Juveniles." The trial court concluded that respondent was "not incompetent in accordance with Rule 17" and was "not therefore entitled to a substitutive Rule 17 Guardian."

An adjudication hearing was conducted on the juvenile petition regarding Quanna on 1 February 2018. Respondent stipulated to the facts

alleged in the petition. The trial court entered an order on 22 February 2018 determining that Quanna was a neglected and dependent juvenile. The trial court ordered DSS to retain custody of Quanna and granted respondent weekly supervised visitation sessions. Respondent was also ordered to obtain appropriate housing, complete a parenting program and demonstrate skills learned, submit to drug screens, maintain communication with DSS, comply with all recommendations made by Adult Protective Services, and submit to a psychological evaluation.

On 25 April 2018, respondent was adjudicated to be incompetent in a separate proceeding brought by DSS Adult Protective Services in Superior Court, Pitt County. As a result, the Beaufort County DSS was appointed to serve as the guardian of her person pursuant to Chapter 35A of the General Statutes.[2] In addition, respondent was assigned a Pitt County Adult Protective Services counselor, Priscilla Delano, to help her manage her bills and healthcare needs. Delano also became the payee for respondent's social security checks.

Respondent underwent a parenting capacity evaluation with a psychologist, Dr. Robert Aiello, on 5 April 2019. Dr. Aiello recommended that (1) respondent be referred for individual counseling; (2) she submit to random drug tests to ensure she refrained from using marijuana; (3) parties working with respondent "review written documents with her carefully and in simple terms;" (4) respondent continue her payee arrangement with Delano because she "should not be expected to manage funds independently;" and (5) Adult Protective Services continue to monitor and assist respondent to see to her medical needs and ensure she was taking her prescribed medications.

The trial court held permanency planning hearings in October 2018, January 2019, and May 2019. The resulting permanency planning orders concluded that although respondent had completed parenting classes and attended visitation sessions, she was still unable to properly parent Quanna independently due to her mental deficiencies, inability to manage her finances, and lack of appropriate support. The trial court consequently ordered that DSS cease reunification efforts with respondent and adopted a primary permanent plan of guardianship with a court-approved caretaker and a secondary plan of adoption for Quanna.

On 13 June 2019, DSS filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (a)(6) on the

2. According to the superior court's order, respondent's guardian of the person was authorized to maintain "the custody, care and control of the ward, but has no authority to receive, manage or administer the property, estate or business affairs of the ward."

grounds of neglect and dependency. A termination hearing was held on 24 October 2019. On 22 November 2019, the trial court entered an order concluding that the termination of respondent's parental rights in Quanna was warranted based on both grounds alleged by DSS. The trial court entered a separate dispositional order that same day concluding that it was in Quanna's best interests that respondent's parental rights be terminated.[3] Respondent appealed to this Court from both orders on 19 December 2019.

Analysis

[1] Respondent's primary argument on appeal is that the trial court abused its discretion by failing to sua sponte conduct a second inquiry into whether she should be appointed a GAL under Rule 17 to assist her during the termination proceeding. Section 7B-1101.1(c) of the Juvenile Code provides that a trial court may appoint a GAL "[o]n motion of any party or on the court's own motion" when a parent is "incompetent in accordance with . . . Rule 17." N.C.G.S. § 7B-1101.1(c) (2019). In essence, respondent's argument is that although a Rule 17 hearing already took place in January 2018, by the time the termination hearing occurred in October 2019 new events had occurred that rendered it necessary for the trial court to re-examine respondent's competency. In support of her argument, respondent relies heavily on *In re T.L.H.*, 368 N.C. 101, 772 S.E.2d 451 (2015)—the leading decision from this Court discussing the need for the appointment of a GAL under Rule 17 in a termination proceeding.

In re T.L.H. concerned the circumstances under which a trial court is obligated to sua sponte "inquire into a parent's competence to determine whether it is necessary to appoint a guardian *ad litem* for that parent" in the context of a termination proceeding. *Id.* at 102, 772 S.E.2d at 452. The respondent-mother in that case had voluntarily placed her newborn child in the custody of the Guilford County Department of Health and Human Services (DHHS) shortly after the child's birth in April 2013, due to her concerns regarding the presence of illegal drugs in her residence and the unsafe behavior of her romantic partner. She also acknowledged that she suffered from mental health problems and she had not been taking her prescribed psychotropic medications. *Id.*

DHHS subsequently filed a petition in April 2013 alleging that the child was neglected and dependent based, in part, upon allegations that the respondent "ha[d] been to the hospital on several occasions in the

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3. The trial court also terminated the parental rights of Quanna's father, who is not a party to this appeal.

last year due to mental health complications" and that she "ha[d] diagnoses of schizoaffective disorder, bipolar, cannabis abuse and personality disorder." *Id.* The petition also noted that the respondent's sole source of income was a monthly social security disability check "that had been awarded based on her diagnosed mental conditions." *Id.* at 103, 772 S.E.2d at 453.

Later that same month, the trial court—at the request of DHHS—appointed the respondent a GAL under Rule 17 on a "provisional/interim basis." *Id.* at 103, 772 S.E.2d at 452. The GAL ultimately served as respondent's advocate throughout the spring and summer of 2013, appearing on respondent's behalf at adjudication and disposition hearings and at a subsequent permanency planning hearing. *Id.* at 104, 772 S.E.2d at 453. In September 2013, DHHS filed a petition to terminate the respondent's parental rights and also requested that the trial court make an inquiry as to whether the respondent "need[ed] to have a Guardian ad Litem appointed for purposes of the [termination] proceeding." *Id.*

The trial court conducted a pretrial hearing in November 2013. At this hearing, the trial court released the respondent's GAL "[w]ithout making any specific findings concerning respondent's mental condition or the reasons underlying [the GAL's] initial appointment." *Id.* The termination hearing (at which the respondent did not appear) occurred in January 2014, and the trial court entered an order terminating respondent's parental rights. *Id.* at 104–05, 772 S.E.2d at 453–54. On appeal, the respondent argued that the trial court had abused its discretion by "failing to conduct an inquiry concerning whether she was entitled to the appointment of a [GAL under Rule 17]" in connection with her termination proceeding. *Id.* at 105, 772 S.E.2d at 454. We disagreed, holding that no abuse of discretion by the trial court had occurred. *Id.*

Initially, we noted that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *Id.* at 106–07, 772 S.E.2d at 455 (citing *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). Because such judgments are discretionary in nature, we explained that "both the appointment of a [GAL] and the extent to which an inquiry concerning a parent's competence should be conducted" are reviewed for abuse of discretion. *Id.* at 107, 772 S.E.2d at 455.

We ultimately held that the trial court's failure to conduct a Rule 17 competency inquiry did not amount to an abuse of discretion. *Id.* at 108, 772 S.E.2d at 456. We explained our reasoning as follows:

> As an initial matter, we note that the standard of review applicable to claims like the one before us in this case is quite deferential. Affording substantial deference to members of the trial judiciary in instances such as this one is entirely appropriate given that the trial judge, unlike the members of a reviewing court, actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record.
>
> Moreover, evaluation of an individual's competence involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals. Although the nature and extent of such diagnoses is exceedingly important to the proper resolution of a competency determination, the same can be said of the information that members of the trial judiciary glean from the manner in which the individual behaves in the courtroom, the lucidity with which the litigant is able to express himself or herself, the extent to which the litigant's behavior and comments shed light upon his or her understanding of the situation in which he or she is involved, the extent to which the litigant is able to assist his or her counsel or address other important issues, and numerous other factors. A great deal of the information that is relevant to a competency determination is simply not available from a study of the record developed in the trial court and presented for appellate review. As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

Id. at 108–09, 772 S.E.2d at 456 (emphasis added).

After carefully reviewing the record in *In re T.L.H.*, this Court held that there was sufficient evidence in the record to allow the trial court to reasonably conclude that the respondent was competent. *Id.* at 109, 772 S.E.2d at 456. For example, we noted that the respondent had exercised "proper judgment" in allowing DHHS to take custody of her child shortly

after his birth and had demonstrated a "reasonable understanding of the proceedings" when she informed DHHS that—despite her relinquishment of custody—she still wished to preserve her right to be reunified with her child. *Id.* We also observed that the testimony the respondent had provided at her permanency planning hearing was "cogent and gave no indication that she failed to understand the nature of the proceedings." *Id.* For instance, the respondent testified that she had obtained medication to treat her mental conditions, discussed the need for budgeting and careful management of her income, demonstrated an understanding of the need to apply for subsidized housing, and testified that she had moved into a new apartment after realizing that "obtaining an independent place to live would allow her to become drug-free." *Id.* at 109, 772 S.E.2d at 456-47. This Court concluded that this evidence suggested that the respondent "understood that she needed to properly manage her own affairs and comprehended the steps she needed to take in order to avoid the loss of her parental rights." *Id.*

In the present case, respondent asserts that these principles from *In re T.L.H.* support the proposition that the trial court abused its discretion in failing to sua sponte conduct a second Rule 17 competency hearing. She argues that at the time of the 24 October 2019 termination hearing there was new evidence before the trial court showing her diminished capacity that had not been available to the trial court at the time of her initial Rule 17 competency hearing on 25 January 2018. Namely, respondent points to (1) the results of her January 2018 cognitive evaluation (which found her to have borderline intellectual functioning); (2) her official adjudication of incompetency in April 2018; (3) the appointment of a legal guardian and an Adult Protective Services counselor to manage her finances and medical decisions; and (4) the results of her April 2019 parenting capacity evaluation (which recommended against independent parenting).

We disagree with respondent's argument, because we believe that here—as in *In re T.L.H.*—the record contains "an appreciable amount of evidence tending to show that [respondent] was not incompetent" at the time of the termination hearing. *Id.* at 108–09, 772 S.E.2d at 456. First, we note that respondent received a competency hearing on 25 January 2018 in order to determine whether the appointment of a GAL for her under Rule 17 was necessary. During this hearing, respondent was represented by her attorney, and the trial court heard testimony from several witnesses, including respondent, respondent's sister, and several different social workers connected to the case. The trial court also had access to the results of respondent's cognitive evaluation, which was conducted

several weeks prior to the hearing. In its order entered 15 February 2018, the trial court found that although respondent was "low-functioning," she nevertheless "underst[oo]d the role of the Court and the parties in the Courtroom as well as the Court's function in determining the status of the Juveniles." The trial court concluded that respondent was "not incompetent in accordance with Rule 17" and was therefore not entitled to a GAL under Rule 17.

Second, respondent's competency is supported by the fact that she attended all hearings related to this matter (including three permanency planning hearings that took place after January 2018), which gave the trial court a sufficient opportunity to continue to observe her capacity to understand the nature of the proceedings. *See In re J.R.W.*, 237 N.C. App. 229, 235, 765 S.E.2d 116, 121 (2014) ("[T]he fact that Respondent attended all but one of the hearings . . . gave the trial court ample opportunity to observe and evaluate her capacity to act in her own interests.").

Third, respondent's testimony during the termination hearing on 24 October 2019 demonstrates that she understood the nature of the proceedings and her role in them as well as her ability to assist her attorney in support of her case. Respondent's testimony indicated that she was able to comprehend all questions posed to her and that she responded appropriately in a lucid and cogent manner. Her testimony suggested that she understood (1) how her lack of contact with Quanna could impact the strength of the bond between them; (2) how mental health issues can affect a person's parenting abilities; (3) the importance of attending court proceedings consistently and the effect that might have on her reunification efforts; (4) the importance of complying with DSS recommendations and attending all DSS appointments; (5) the correlation between her medications and her health along with the importance of following her doctor's recommendations; (6) the details of her payee arrangement with DSS as the recipient of her social security income; (7) the need to budget and manage money appropriately; (8) the importance of finding appropriate housing if her children were to be returned to her care; and (9) how to obtain emergency and medical care for her children.

The testimony offered by respondent here is similar to the testimony that was given by the respondent in *In re T.L.H.* There, we determined that the respondent's testimony was cogent because it demonstrated that she (1) had a "reasonable understanding of the proceedings" and their consequences; and (2) understood the need to "properly manage her own affairs and comprehended the steps she needed to take in order to avoid the loss of her parental rights," such

as consistently taking her medications, properly managing her money, applying for subsidized housing, and moving into a new apartment that would provide a drug-free environment. *In re T.L.H.*, 368 N.C. at 109, 772 S.E.2d at 456–47.

Moreover, as in *In re T.L.H.*, the testimony of DSS social workers during respondent's termination hearing here demonstrated that she had the ability to exercise "proper judgment" by finding appropriate housing on her own, completing a parenting program, maintaining contact with DSS, complying with recommendations made by Adult Protective Services, submitting to psychological and parenting evaluations, and attending all scheduled visits with Quanna. *See id.* at 109, 772 S.E.2d at 456. This evidence demonstrates that respondent understood the steps she needed to take to reunify with Quanna and had the ability to complete the majority of her case plan.

Respondent, however, attempts to distinguish her circumstances from those in *In re T.L.H.*, contending that there existed far more evidence in her case tending to show a lack of competence. Specifically, respondent argues that—unlike the mother in *In re T.L.H.*—(1) she received a great deal of assistance and government services stemming from her cognitive limitations; (2) the results of her cognitive evaluation showed that she had significantly diminished intellectual capacity; and (3) she was formally adjudicated to be incompetent prior to the termination hearing. Respondent thus argues that substantial evidence existed by the time of the termination hearing that her mental state had deteriorated to the point that a re-examination of her competency was necessary. We are not persuaded.

Admittedly, the record contained some evidence tending to cast doubt on respondent's competency, which may have supported a decision to conduct a second Rule 17 competency inquiry had the trial court elected to do so. However, given our deferential standard of review, we are unable to conclude that the trial court abused its discretion by failing to sua sponte conduct another hearing on the issue of whether respondent was entitled to a GAL pursuant to Rule 17. *See In re T.L.H.*, 368 N.C. at 108–09, 772 S.E.2d at 456 ("[T]he standard of review applicable to claims like the one before us in this case is quite deferential . . . . the trial court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into [a] litigant's competence.") (emphasis added).

It is true that respondent's cognitive evaluation demonstrated that she had an IQ score of 63, which fell within the low functioning range of

clinical impairment and suggested that she may have difficulty in independent decision-making. It is also true that respondent received various government services in connection with her mental limitations, such as social security disability income and healthcare/money-management assistance from Adult Protective Services.

However, as our case law demonstrates, neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17. *See In re T.L.H.*, 368 N.C. at 110, 772 S.E.2d at 457 (holding that a trial court is not required to "inquire into a parent's competency solely because the parent is alleged to suffer from diagnosable mental health conditions"); *see also In re Z.V.A.*, 373 N.C. 207, 210, 835 S.E.2d 425, 429 (2019) (holding that although the respondent had an IQ of 64, the evidence did not suggest that her disability "rose to the level of incompetence so as to require the appointment of a [GAL under Rule 17] to safeguard [her] interests"); *In re J.R.W.*, 237 N.C. App. at 234, 765 S.E.2d at 120 ("[E]vidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings.").

It is also true that on 25 April 2018 respondent was adjudicated to be incompetent by the Superior Court, Pitt County, and as a result was appointed a guardian of her person and an Adult Protective Services counselor. However, we are unable to agree with respondent that these facts mandated a sua sponte competency determination.

Adjudications of adult incompetency are governed by Chapter 35A of our General Statutes. N.C.G.S. § 35A-1102. An adult guardian appointed under Chapter 35A generally has a broad range of powers with respect to the ward's person and property, N.C.G.S. § 35A-1241, whereas the duties of a GAL under Rule 17 appointed solely for purposes of assisting a parent during a particular juvenile proceeding are much more limited. See N.C.G.S. § 1A-1, Rule 17(e) (stating that a GAL "shall file and serve such pleadings as may be required" to assist the parent).

Accordingly, in determining whether the appointment of a GAL under Rule 17 is necessary in a termination proceeding, our courts have typically limited the scope of our examination to a determination of whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case. *See In re T.L.H.*, 368 N.C. at 108, 772 S.E.2d at 456 (finding that a litigant's competence may be demonstrated by her "reasonable understanding of the proceedings" and by "the extent to which the litigant is able to assist his or her counsel"); *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48 (stating that when a court inquires into the competency of a parent under Rule 17, the

court must "determine whether . . . the individual would be unable to aid in their defense at the termination of parental rights proceeding"). Thus, it follows that an individual can simultaneously be found incompetent under Chapter 35A yet not require a GAL under Rule 17.[4]

Furthermore, we note that in August 2019 (two months prior to the termination hearing), respondent's guardianship was changed to a limited guardianship. During the August 2019 guardianship hearing, the court found that respondent "understands conversation and communicates personal leads," "has the capacity to communicate important decisions," "[h]as capacity to appropriately relate to friends and family members, has capacity to make decisions without undue influence from others . . . and can utilize familiar community resources" for assistance. The court therefore determined that respondent's guardianship should be changed from a full guardianship to a limited guardianship. As a result, her "rights and privileges were increased," and she was granted authority to "participate in residential planning," handle larger amounts of money, "maintain her personal property," and independently make "decisions regarding any legal, medical, or social issues pertaining to her children."

Therefore, despite respondent's prior adjudication of incompetency under Chapter 35A, we nevertheless conclude that the trial court did not abuse its discretion by failing to sua sponte conduct a second inquiry into the need to appoint a GAL for her under Rule 17.

[2] In her final argument on appeal, respondent contends that when DSS filed its termination petition it was under an obligation to request the appointment of a GAL on her behalf. In making this argument, respondent cites Rule 17(c), which she interprets as imposing a requirement that a petitioner seek the appointment of a GAL if the petitioner has reason to believe that the respondent-parent is incompetent. *See* N.C.G.S. § 1A-1, Rule 17(c). She argues that DSS knew she was incompetent based upon the allegations contained in its termination petition, which described her limited capacity to care for Quanna, her inability to manage her funds appropriately, her low IQ, and her impaired adaptive behavior skills.

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4. In fact, at least one commentator has acknowledged this precise scenario. *See* Janet Mason, Guardian ad Litem for Respondent Parents in Juvenile Cases, Univ. of N.C. Sch. of Gov., 2014 Juvenile Law Bulletin 1, 20 (January 2014) (noting that "[a]ssessing competence in relation to a person's ability to participate meaningfully in the litigation also leaves open the possibility that someone who could be adjudicated incompetent in a proceeding under G.S. Chapter 35A . . . could participate meaningfully and assist the attorney in a juvenile case without the involvement of a guardian ad litem").

This argument is unavailing. We do not discern any language in Rule 17(c) that actually imposes a requirement on a county department of social services to request the appointment of a GAL for a parent believed to be incompetent. Although DSS did request in January 2018 that the trial court conduct an inquiry into the need for appointment of a GAL for respondent, the making of such a request—while salutary—was not expressly required under Rule 17(c). Accordingly, this argument is likewise without merit.

Conclusion

For the reasons set out above, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF R.L.D.

No. 122A20

Filed 11 December 2020

Termination of Parental Rights—grounds for termination—neglect—private termination

In a private termination of parental rights action where the child had not been in respondent-mother's physical custody for several years, the trial court properly terminated respondent's rights based on neglect where its unchallenged findings established that the child was previously neglected, supporting a conclusion that the child was likely to be neglected again if returned to respondent's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 December 2019 by Judge S. Katherine Burnette in District Court, Franklin County. This matter was calendared for argument in the Supreme Court on 23 November 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-appellees.

Edward Eldred for respondent-appellant mother.

HUDSON, Justice.

Respondent-mother appeals from the trial court's orders terminating her parental rights to R.L.D. ("Robin").[1] After careful review, we affirm.

Robin was born to respondent-mother in Illinois in 2006. After Robin was born, respondent-mother and Robin's father resided together in a motel in Kankakee, Illinois. During this time, in November 2007, Robin's leg was broken, and respondent-mother and the father were investigated by Child Protective Services. Robin's paternal aunt, G.D., testified that she visited the motel and observed that Robin did not have a crib to sleep in, that there was never any food in the room, that the room did not have a stove, and that respondent-mother and the father "were constantly doing drugs and [the father] was drinking a lot." In 2008, respondent-mother and the father were evicted from the motel and they, along with Robin, moved into the home of the paternal uncle, R.D., and G.D.

Respondent-mother and Robin lived with R.D. and G.D. only for a short period of time before leaving. The father remained with R.D. and G.D. In 2009, respondent-mother requested that R.D. and G.D. pick up Robin because respondent-mother was living with another man and Robin "was not safe around [respondent-mother's] boyfriend due to domestic violence and the boyfriend's insistence that [Robin] sleep in the same bed as the adults."

Robin lived with R.D. and G.D., along with the father, until December 2011. In December 2011, the father and Robin moved out of R.D. and G.D.'s home and moved in with the father's girlfriend. However, in August 2012, Robin was exposed to domestic violence between the father and his girlfriend. The girlfriend called respondent-mother, and respondent-mother subsequently called G.D. to pick up Robin. In 2012, respondent-mother signed a notarized statement in which she granted custody of Robin to R.D. and G.D. Respondent-mother also signed a separate document authorizing R.D. and G.D. to approve any medical treatment deemed necessary for Robin.

In 2014, with respondent-mother's permission, R.D. and G.D. relocated with Robin to North Carolina, where they moved in with their daughter and son-in-law, the petitioners, who are also Robin's cousins by marriage. In January 2015, R.D. and G.D. moved out of petitioners'

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

home and into their own residence. However, due to their own health issues, they decided along with petitioners that Robin would remain in petitioners' home. Robin has remained in petitioners' care since that time. In June 2015, respondent-mother signed an agreement granting petitioners "guardianship" of Robin.

On 15 March 2019, petitioners filed a petition to terminate respondent-mother's and the father's parental rights to Robin. Petitioners alleged that grounds existed to terminate respondent-mother's and the father's parental rights on the grounds of neglect, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (6), (7) (2019). On 11 June 2019, respondent-mother filed a response to the petition in which she opposed termination of her parental rights. On 9 December 2019, the trial court entered an order in which it determined grounds existed to terminate respondent-mother's parental rights pursuant to the grounds alleged in the petition. On the same day, the trial court entered a separate disposition order in which it concluded it was in Robin's best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated respondent-mother's parental rights.[2] Respondent-mother appeals.

Respondent-mother argues that the trial court erred by adjudicating that grounds existed to terminate her 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 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).

In this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (6), (7). We begin

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2. The district court's orders also terminated the parental rights of Robin's father, but he did not appeal and is not a party to the proceedings before this Court.

our analysis with consideration of whether grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

A trial court may terminate parental rights if it concludes the 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 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; or the custody of whom has been unlawfully transferred under [N.C.]G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

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 . . . 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)).[3] "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 *In re Ballard*, 311 N.C. at 715).

Here, Robin was not in respondent-mother's physical custody at the time of the termination hearing and had not been since 2012. Additionally, because the Department of Social Services was not involved in this case, no petition alleging neglect was ever filed, and Robin had not been adjudicated neglected. Therefore, we examine whether the trial court's

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3. The Court in *In re Ballard* held that an adjudication of past neglect is admissible in subsequent proceedings to terminate parental rights, but is not, standing alone, enough to prove that a ground exists to terminate parental rights on the basis of neglect. 311 N.C. at 713–15. The Court in *In re Ballard* did not suggest that a showing of past neglect is necessary in order to terminate parental rights in every case. Indeed, N.C.G.S. § 7B-1111(a)(1) does not require a showing of past neglect if the petitioner can show current neglect as defined in N.C.G.S. § 7B-101(15). To the extent other cases have relied upon *In re D.L.W.* as creating such a requirement, we disavow such an interpretation.

findings support the conclusion that Robin is likely to be neglected again if returned to respondent-mother's care.

Respondent-mother argues that the trial court's orders fail to establish that Robin is neglected. We disagree. The trial court made the following findings:

> 6. While pregnant with [Robin], G.D. saw [respondent-mother] smoking marijuana. G.D. saw the [respondent-mother] smoking marijuana every weekend.
>
> . . . .
>
> 8. In November, 2007, [Robin's] leg was broken and [respondent-mother was] investigated by Child Protective Services in Kanakee, Illinois. G.D. saw [Robin] with a cast on her leg and was concerned that there was a lack of food and the room in which they stayed was dirty. . . . .
>
> . . . .
>
> 10. In April, 2009, [respondent-mother] asked G.D. and R.D. to pick up [Robin] because [Robin] was not safe around [respondent-mother's] boyfriend due to domestic violence and the boyfriend's insistence that [Robin] sleep in the same bed as the adults.
>
> . . . .
>
> 23. [Respondent-mother] has not seen [Robin] since June, 2015.
>
> 24. [Respondent-mother] traveled to North Carolina in June, 2015, at the invitation and at the expense of the petitioners so that she could see where the petitioners and the juvenile lived in North Carolina.
>
> 25. At the time of her week's visit with petitioners, [respondent-mother] entered into an agreement with the petitioners that they would take "guardianship" of [Robin].
>
> 26. In the agreement, dated [29 June 2015], [respondent-mother] agreed that the petitioners could have guardianship of [Robin], and said agreement was to ". . . remain effective indefinitely unless otherwise notified in writing by the undersigned . . ."

27. Some of the decisions that [respondent-mother] specified that the petitioners could make for [Robin] related to her medical treatment, school, education, "decisions regarding all well-being including clothing, bodily nourishment, and shelter."

28. Another agreement provision is that the petitioners are to "accept all financial obligations associated with caring for [Robin]."

29. The petitioners have abided by the terms of the agreement and provided care for [Robin].

30. [Respondent-mother has not] provided financial support for [Robin] since 2012.

31. The petitioners have provided financial support for [Robin], including therapy sessions needed by [Robin].

32. [Robin] is being treated for anxiety and depression, ADHD and PTSD.

33. [Robin] has not lived independently with [respondent-mother] since 2012.

34. At no time since August, 2012, has [respondent-mother] had physical custody of the child.

. . . .

38. [Respondent-mother] has intermittently texted [petitioner] F.J. and asked to talk to [Robin] which has been facilitated.

39. [Respondent-mother's] conversations are monitored by petitioner F.J. to make sure that the conversations are appropriate. In the past, [respondent-mother] has called [Robin] "fat" and blamed [Robin] for not calling [respondent-mother]. [Respondent-mother] also cursed and screamed at [Robin] when [respondent-mother] received the notice of the petitioners' intended adoption of [Robin].

40. [Respondent-mother] currently is living in a hotel room in Illinois and has a job at the hotel cleaning rooms. She needs more rooms to clean in order to make more money.

> 41. Most recently, [petitioner] F.J. heard that [respondent-mother] was renting a room from a man.
>
> . . . .
>
> 44. [Respondent-mother] has taken no steps to provide for [Robin's] physical and economic needs.
>
> . . . .
>
> 46. [Respondent-mother] took no steps to correct the conditions that led to the removal of [Robin] from her care.
>
> 47. [Respondent-mother did not take] any steps to remedy the conditions that led to [Robin] being placed first with G.D. and later with the petitioners.
>
> 48. [Respondent-mother's] contact with [Robin] has been sporadic. It has consisted of her texting [petitioner] F.J. to put [Robin] on the phone.
>
> 49. [Respondent-mother] has sent a total of three packages to [Robin] since she has been in the care of petitioners. The first one had candy and clothes that did not fit [Robin]. The second one had a $20 gift card. The final one was for Christmas 2018, and arrived in January, 2019.
>
> 50. The contents of the last package that [respondent-mother] sent to [Robin] were age inappropriate and inappropriate in all regards as it primarily contained expired food and expired medications.
>
> 51. [Robin] is learning to cope with the trauma that she has experienced.
>
> . . . .
>
> 65. Respondent-mother has not] put in place the support system that [she] need[s] in order to create an environment where [Robin] will not be neglected in the future.
>
> 66. [Robin] is at a substantial risk of harm and of impairment if she is removed from the petitioners' home and is returned to [respondent-mother's] care.

Respondent-mother does not challenge these findings, and they are binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). It is clear from these findings

that when Robin was in respondent-mother's care nearly a decade ago, Robin was "in an environment injurious to [her] welfare," and that those risks continue. N.C.G.S. § 7B-101(15).

In addition to the findings shown above, the trial court also found the following:

> 42. [Respondent-mother] does not have stable housing at this time.
>
> 43. [Respondent-mother] does not have a stable job in that her most recent job at the wage of $2.00 [per hour] provides her with bare subsistence.

Respondent-mother argues that these findings are not supported by clear, cogent, and convincing evidence. However, petitioner F.J. testified that respondent-mother texted her that "she was living in the motel again, and she makes . . . $2.00 per room. And that . . . she doesn't get a lot of rooms so she doesn't work a lot." Petitioner F.J. additionally testified that "at one point" respondent-mother had moved in with "some other guy" and was "renting a room from him." Thus, we conclude there was clear, cogent, and convincing evidence that respondent-mother had neither stable housing nor employment.

Consequently, we conclude the trial court's findings support its conclusion that there was a substantial risk of harm or impairment to Robin and a likelihood of future neglect should she be removed from petitioners' care and returned to respondent-mother. Therefore, we affirm the trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother'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-mother's parental rights. *In re E.H.P.*, 372 N.C. 388, 395 (2019). As such, we need not address respondent-mother's arguments regarding N.C.G.S. § 7B-1111(a)(6) and (7). Furthermore, respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in Robin's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

IN THE MATTER OF S.D.H. AND S.J.J.

No. 231A20

Filed 11 December 2020

Termination of Parental Rights—no-merit brief—termination on multiple grounds—substance abuse

The termination of a father's parental rights in his two children on multiple statutory grounds (he had a history of substance abuse, which the children were exposed to at home, and he made minimal progress in addressing the problem) was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 12 December 2019 by Judge Mary F. Covington in District Court, Davidson County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Danielle De Angelis for petitioner-appellee Davidson County Department of Social Services.

Eric H. Cottrell for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

NEWBY, Justice.

Respondent-father appeals from the trial court's orders terminating his parental rights to the minor children S.D.H. (Sam), born in August 2011, and S.J.J. (Shannon), born in October 2014.[1] Although the orders also terminated the parental rights of the children's mother (respondent-mother), she is not a party to this appeal. Counsel for respondent-father has filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel as arguably supporting the appeal are meritless and therefore affirm the trial court's orders.

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

Davidson County Department of Social Services (DSS) obtained nonsecure custody of Sam and Shannon on 4 May 2017 and filed juvenile petitions the same day alleging they were neglected and dependent. The petitions stated the children were exposed to respondents' substance abuse in the home, including an incident in March 2017 when a friend of respondent-father overdosed in the residence while respondent-father was using Xanax and a second occasion on 8 April 2017 when police responded to the residence and found "a needle with heroin in it behind a teddy bear." Respondent-father subsequently tested positive for amphetamines, marijuana, and methamphetamine, and respondent-mother tested positive for these substances as well as codeine, morphine, and opiates.

The petitions further alleged that Sam had numerous unexcused absences from school "due to the family instability, homelessness, and the parents' drug use," and that respondents both had pending criminal charges. At the time the petitions were filed, respondent-mother had not had contact with DSS since signing her In-Home Services Agreement (IHSA) on 21 April 2017. Respondent-father had failed to attend scheduled appointments with the social worker or enter into an IHSA.

After a hearing on 7 June 2017, the trial court adjudicated Sam and Shannon as neglected and dependent on 1 August 2017. At the time of the dispositional hearing on 28 June 2017, respondents were both incarcerated and had more charges pending. In its initial disposition entered on 19 September 2017, the trial court maintained the children in DSS custody and ordered respondents to obtain a substance abuse assessment and comply with all treatment recommendations; submit to random drug screens and remain drug free; obtain and maintain housing and income suitable for the children; and cooperate with DSS to establish and pay child support in accordance with state guidelines.

On 29 November 2017, the trial court established reunification as the primary permanent plan for Sam and Shannon with a secondary plan of guardianship. At the next permanency planning hearing, however, the trial court relieved DSS of further reunification efforts toward respondent-mother and changed the children's permanent plan to reunification with respondent-father with a secondary plan of termination of parental rights and adoption. DSS and the trial court continued to work with respondent-father to achieve reunification until the permanency planning hearing held on 27 February 2019. Citing respondent-father's minimal progress on his case plan and his recent positive drug screens for opiates, heroin, and amphetamines, the trial court entered an order on 2 April 2019, relieving DSS of reunification efforts and changing the

primary permanent plan to termination of parental rights and adoption with a secondary plan of guardianship.

DSS filed petitions to terminate respondents' parental rights in Sam and Shannon on 23 May 2019. The trial court heard the petitions on 14 November 2019 and entered orders terminating respondents' parental rights on 12 December 2019. As to each respondent, the trial court concluded DSS had established four statutory grounds for termination: (1) neglect; (2) willful failure to make reasonable progress to correct the conditions which led to the children's removal from the home; (3) willful failure to pay a reasonable portion of the children's cost of care; and (4) dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). The court further concluded it was in the children's best interests that respondents' parental rights be terminated. N.C.G.S. § 7B-1110(a) (2019). Respondent-father appealed from the termination orders.

Counsel for respondent-father has filed a no-merit brief on her client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel identified three issues that could arguably support an appeal but also explained why she believed these issues lacked merit. 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 carefully and independently review issues identified by counsel in a no-merit brief filed under Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 12 December 2019 orders are supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's orders terminating respondent-father's parental rights.

AFFIRMED.

IN THE MATTER OF T.N.C., D.M.C.

No. 88A20

Filed 11 December 2020

Termination of Parental Rights—effective assistance of counsel —brief cross-examination—conciliatory closing argument

A mother received effective assistance of counsel at a termination of parental rights hearing, even though her attorney only conducted a brief cross-examination of the department of social service's (DSS) key witness and gave a closing argument in which he largely agreed with DSS's presentation of facts that were unfavorable to the mother. Despite the conciliatory tone of his closing argument, the attorney sufficiently advocated for the mother by mentioning several positive facts in her favor, expressing that she did not want to lose her parental rights, and asking the court to rule against terminating her rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 24 October 2019 by Judge David V. Byrd in District Court, Wilkes County. This matter was calendared in the Supreme Court on 23 November 2020, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Erika Leigh Hamby for petitioner-appellee Wilkes County Department of Social Services.

Matthew P. McGuire for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeared and was represented by counsel at a termination of parental rights hearing held 5 June 2019. Respondent-mother contends that her counsel's brief cross-examination of a witness for the Wilkes County Department of Social Services (DSS) during the termination hearing and her counsel's acquiescent closing arguments constituted ineffective assistance of counsel. Because respondent-mother has not shown how she was prejudiced by the allegedly ineffective assistance of her counsel, we affirm the trial court's

orders terminating respondent-mother's parental rights to the two juveniles who are the subject of this appeal.

Factual and Procedural Background

Respondent-mother is the mother of four children. Two of respondent-mother's children are the juveniles involved in this termination of parental rights matter: T.N.C. (Tammy) and D.M.C. (Dan). [1] DSS became involved with Tammy and Dan in May 2016, after receiving reports of improper supervision of the children by the parents, substance abuse by the parents, incidents of domestic violence between the parents, and a lack of food within the family home. The children were placed initially with a safety resource on 2 July 2016 and DSS began to offer case management services to the family on 13 September 2016. At this point, however, respondent-mother became incarcerated on methamphetamine-related charges. On 29 December 2016, DSS filed a petition alleging that Tammy, Dan, and their two stepsiblings were neglected juveniles based on respondent-mother's incarceration, and the failure of the father of Tammy and Dan to make timely progress on his case plan. The trial court adjudicated the children to be neglected juveniles and placed them in the custody of DSS by court order entered on 20 April 2017.

Upon her release from incarceration, respondent-mother entered into her own case plan on 11 April 2017 which required respondent-mother to attend parenting classes, obtain substance abuse and mental health assessments and follow any recommended treatments, obtain and maintain appropriate housing, establish and maintain employment, and submit to drug screens when requested by DSS. However, following respondent-mother's absconsion from probation and subsequent conviction for additional drug charges on 31 October 2018, DSS filed petitions to terminate respondent-mother's parental rights to Tammy and Dan on the ground of neglect and the ground of willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to their removal from the home pursuant to N.C.G.S. § 7B-1111(a)(1)–(2). The trial court held a hearing on the termination petitions on 5 June 2019. Although respondent-mother was still in custody, she was present for the proceedings and was represented by counsel.

During the termination of parental rights hearing, the active participation of respondent-mother's counsel consisted of a short cross-examination of one of DSS's witnesses in the course of the adjudication

1. Pseudonyms are substituted for the juveniles' real names to protect their identities and for ease of reading.

stage, along with the presentation of a conciliatory closing argument after both the adjudication and disposition stages. For the hearing's adjudication phase, DSS presented the testimony of its social worker who was assigned to the underlying neglect case. The social worker was the agency's sole adjudication witness. The cross-examination of the social worker by respondent-mother's counsel during adjudication focused upon the "significant amount of time that [respondent-mother has] been incarcerated" and its prevention of respondent-mother's ability from attending approximately 60% of her allotted visitations with Tammy and Dan. The total exchange between respondent-mother's counsel and DSS's social worker during cross-examination of the witness consisted of the following:

> Q: And unfortunately the real[i]ty was if I'm doing my math right, [respondent-mother] has been incarcerated for approximately 60 percent of this case. Does that sound about any [sic] accurate number?
>
> A: I haven't done the math, but she's been in and out. We had a stretch kind of from January until she, you know, absconded, that we had a potential period to get some things done but we were not able to maintain the housing or employment; things of that type.
>
> Q: Well, I'm just doing percentages based on the number of visits you said she couldn't have because she was incarcerated. So it's been a significant amount of time that she's been incarcerated?
>
> A: Uh hum. She's been in jail or incarcerated quite a lot.
>
> Q: And obviously it's true that the mother hasn't been out since last September?
>
> A: That's correct.
>
> Q: I will state the obvious, she's not done anything on her plan that she could do during that nine months?
>
> A: I don't know what's offered at that facility. I've not had any contact with her since July 3rd, of 2018.
>
> [Respondent-Mother's Counsel]: No further questions, Your Honor.

As for his closing argument on adjudication, respondent-mother's counsel offered this presentation:

> Well, Your Honor, unfortunately I cannot disagree with most of the facts that [DSS's counsel] has outlayed regarding [respondent-mother's] incarceration. I mean it's accurate. She was incarcerated when this started. She's incarcerated now. She's going to be incarcerated for the next three months. Obviously when she was out she did make some progress. Parenting classes, never failed drug tests, and I understand she had some -- but obviously, you know, as I kind of discussed this with her with this stage of the proceeding and her current situation, the court will apply the law and obviously I would ask you not to find the grounds but again I think you are someone as aware of the laws in regards to this situation.

Seizing upon the conciliatory tone of this closing argument, the guardian ad litem's counsel subsequently argued that, "by [respondent-mother's] own admission they [DSS representatives] have proven the grounds that DSS has alleged." At the conclusion of the adjudication stage of the proceedings, the trial court announced its determination of the existence of both grounds for termination of respondent-mother's parental rights which were alleged in DSS's petitions. The hearing then moved to the disposition phase, in which DSS presented two witnesses in an effort to substantiate the agency's position that it was in the best interests of the juveniles Tammy and Dan to terminate respondent-mother's parental rights.

Following DSS's presentation of its case during the disposition stage, respondent-mother's counsel ended the closing argument on behalf of respondent-mother with these observations:

> As [the father's counsel] said, these are always difficult cases for a lot of reasons. One, and similarly as [DSS's counsel] outlined, obviously I represent [respondent-mother] who is sitting here behind me and [respondent-mother] one thing, I would actually echo this. [Respondent-mother has] always been easy to deal with. [Respondent-mother has] always been pretty good about what she wants to do and so [respondent-mother is] not making any excuses for where she's at. It was her own actions that got her there and as you heard, time has gone by and the kids have been in custody for a while. The silver lining there which I like to tell parents is and as we go through this, as we're trying to go through this, you always want your kids to land somewhere good, land somewhere decent, where they're

> going to be happy, where they're going to be taken care of. Because no matter what [respondent-mother's] situation is or anybody's situation is at the end of the day that's fine – it's about the kids being happy and taken care of. So [respondent-mother] is certainly very appreciative that they've landed in the spot that they are. She has told the words she actually said to me – I'm not putting this in her mouth. This is her exact words to me. That she has a lot of respect for what they do and what they've done for her and her children. It's -- it's something she very much appreciates and she likes hearing her children are happy and they're taken [sic] of, they're protected, and they are -- I guess as much as I'm sure it hurts, they're where they want to be at this point in time. I find it encouraging that they still ask about her. I agree with [DSS's counsel] to some extent. I think some of the questions are of concern. I think that would be natural. But I also think some of it is that there is a bond there and there is an affection with the parents and I agree with [the father's counsel], I can't remember the last time I heard the question asked are either of these kids in therapy and the answer was no. So there is some positives. Obviously the court has to make -- has to make the decision what is in the best interest of the children. I can't stand here and change the facts. I can't change the facts that [respondent-mother] is in custody and won't be out for three months. And in all candor I think in being honest with herself and I [sic] least I would probably tell her, I think it could take [respondent-mother] a little while to get back on her feet and get herself set up and try to basically take care of herself after the pain of that but that's going to take some time. Obviously she wants her children. Obviously she never wanted her rights terminated. But again, I'm not making any excuses for her current situation. Because it's -- even though it hurts on this side, again, the kids are in a good situation. That's all anybody wants for their kids. Obviously, I'm ethically bound -- I'm duty bound to ask you not to terminate her rights. But obviously I understand the court is well versed along those lines.

On 24 October 2019, the trial court entered orders in which it found the existence of both alleged grounds for termination of the parental rights of respondent-mother by clear, cogent, and convincing evidence

and concluded that termination of respondent-mother's parental rights was in the best interests of both juveniles. The trial court then terminated the parental rights of respondent-mother to the children Tammy and Dan through entry of the termination orders.

Respondent-mother appeals to this Court from the trial court's orders. Before us, respondent-mother does not challenge the substance of the trial court's termination of parental rights orders. Instead, she contends that her trial counsel provided ineffective assistance, thus rendering the termination proceedings fundamentally unfair.

Analysis

North Carolina General Statutes Section 7B-1101.1(a) provides that a parent in a termination of parental rights proceeding "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C.G.S. § 7B-1101.1(a) (2019). Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. *See State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974) (stating that the right to counsel "is not intended to be an empty formality but is intended to guarantee effective assistance of counsel."); *see also In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation."). "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *In re Bishop*, 92 N.C. App. at 665, 375 S.E.2d at 679 (citing *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)). To make the latter showing, the respondent must prove that "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Respondent-mother contends in the instant case that the totality of counsel's actions during the termination of parental rights hearing "highlighted [respondent-mother]'s weaknesses and extolled the reasonableness of an order terminating her parental rights. [Respondent-mother] would have been better served by silence." She claims that her counsel violated his duty of zealous advocacy and implies that his tempered representation of respondent-mother's interests was "so deficient as to amount in every respect to no representation at all," quoting *State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986).

While a substantial amount of the tone of the advocacy of respondent-mother's counsel could reasonably be described as acquiescent in nature, nonetheless it is implausible to categorize counsel's statements here with the characterizations of the accused by his defense counsel in *Davidson*, who made the following comments about the defendant to the trial court during the sentencing phase of the case:

> Your Honor, every now and then you get appointed in a case where you have very little to say and this is one of them. I have talked to [the defendant] in the jail on three or four occasions. I talked to him, as you know, in the lock up before the trial began. The information that he has furnished me is not consistent with other information available to the State and information furnished me by [the prosecuting attorney] with regard to the man's criminal record. He has just completed doing a ten year sentence, he tells me, for armed robbery and he did not make me aware of that until after [the prosecuting attorney] had furnished me certain materials that he had available to him.
>
> As you very well know, I begged and pleaded with him to take a negotiated plea. He was not willing to do that. I informed this Court before the trial began and the record reflects that I did not think that he had any available, reasonable defense under the law of this state; consequently, I had very little to say.
>
> And, unless he would care to make a statement, I've said all I care to.

Id. at 545, 335 S.E.2d at 521 (alterations in original). The Court of Appeals explained that in its opinion in *Davidson* that defense counsel's argument "consisted almost exclusively of commentary entirely negative to defendant," and the lower appellate court expressed dismay that counsel "disparage[ed the defendant] before the court." *Id.* at 545, 335 S.E.2d at 521–22. The counsel's advocacy at issue in *Davidson*, which presented his client "in an entirely negative light," created "a considerable probability" that the statement "had an adverse impact" on the defendant's treatment by the tribunal. *Id.* at 546–47, 335 S.E.2d at 522. The defendant in *Davidson*, therefore, was entitled to a new sentencing hearing accompanied by representation that would not "undermine . . . confidence in the outcome." *Id.* at 547, 335 S.E.2d at 522.

By contrast, counsel's actions and arguments in the case at bar were not "altogether lacking in positive advocacy." *Id.* at 545, 335 S.E.2d at 521. Respondent-mother's counsel mentioned multiple facts in her favor during closing arguments, specifically noting that respondent-mother "did make some progress" on her case plan, that she still had a bond with her children, and that she did not want her rights to be terminated. Respondent-mother's counsel spoke favorably of his client, emphasizing her positive traits that she has "always been easy to deal with" and "always been pretty good about what she wants to do and so [she]'s not making any excuses for where she's at." Moreover, respondent-mother's counsel unequivocally asked the trial court to rule in his client's favor during his closing arguments at the close of both the adjudication and disposition phases of the hearing. Although respondent-mother challenges the moderate tone of her counsel's presentation on her behalf, it strains credibility to characterize her counsel's representation of her interests as the equivalent of "no representation at all." *Id.* at 546, 335 S.E.2d at 522 (citation omitted); *see also In re C.D.H.*, 265 N.C. App. 609, 613, 829 S.E.2d 690, 693 (2019) (explaining that a lack of positive advocacy does not necessarily equate to ineffective assistance because "it is possible that 'resourceful preparation reveal[ed] nothing positive to be said for' Mother" (alteration in original) (citation omitted)).

Furthermore, unlike defense counsel's negative representations of defendant during the sentencing phase of *Davidson* after the accused's determination of guilt, the observations by respondent-mother's counsel of respondent-mother in the course of both the adjudication and disposition phases in the case sub judice were positive depictions of her. Any candor, acceptance, or recognition regarding respondent-mother's circumstances in her situation as a parent which her counsel strategically elected to intersperse among his overt statements to trumpet and preserve respondent-mother's parental rights cannot be deemed by this Court to rise to the level of ineffective assistance of counsel as demonstrated in *Davidson*.

As we earlier recognized in the recitation of the guidelines addressed in our decision in *Braswell* which was applied by the Court of Appeals in its *Bishop* opinion, in order to prevail on a claim of ineffective assistance of counsel, a party in the position of respondent-mother here must show both that counsel's performance was deficient and that this deficiency was so serious as to deprive the party of a fair hearing. We further instructed in *Braswell* that the gauge for the deprivation of a fair hearing in this regard is the existence of a reasonable probability that, but for the errors of the party's counsel, there would have been a different result in

the proceedings. In the case before us, respondent-mother has failed to show deficient performance by her counsel in the representation of her interests in either the tone or content of the closing arguments, or in the brevity of the cross-examination by respondent-mother's counsel of the testifying witness for DSS during the adjudication phase of the hearing. In light of the insufficient establishment of a deficient performance by her counsel to amount to ineffective assistance of counsel, consequently respondent-mother cannot show any prejudice suffered by her as to the result in the proceedings.

The undisputed evidence presented at the termination of parental rights hearing supports the trial court's conclusions that at least one ground existed to terminate the parental rights of respondent-mother and that termination was in Tammy and Dan's best interests. In the face of the strength of this evidence, respondent-mother has not shown a reasonable probability that the outcome of the termination hearing would have been different if her counsel's representation of her interests had been different.

This Court has addressed and resolved the only issue which respondent-mother has brought before us in this appeal, which is whether she received ineffective assistance from her counsel during the adjudication and disposition phases of the hearing which led to the termination of respondent-mother's parental rights to the juveniles Tammy and Dan. We have determined that respondent-mother's counsel did not render ineffective assistance and consequently there was no prejudice to her in the proceedings of the hearing. Respondent-mother has not challenged the trial court's findings of fact or conclusions of law in her pursuit of this appeal. As a result, having found that respondent-mother did not receive ineffective assistance of counsel, and having recognized that the trial court's findings of fact and conclusions of law remain intact and binding by virtue of their unchallenged nature, we affirm the trial court's decision to terminate the parental rights of respondent-mother.

Conclusion

Based upon the foregoing facts, circumstances, and analysis, we affirm the orders of the trial court which terminate the parental rights of respondent-mother.

AFFIRMED.

IN THE MATTER OF Z.O.G.-I.

No. 41A20

Filed 11 December 2020

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

The trial court properly terminated respondent-father's parental rights in his child based on grounds of failure to make reasonable progress to correct the conditions which led to the removal of the child where respondent was put on notice of the requirements of his case plan but failed to consistently submit to drug screens or to demonstrate maintained sobriety, failed to obtain income either through employment or disability benefits, failed to participate in individual therapy, and delayed starting his visitation schedule with the child until over a year after he was released from incarceration.

2. Termination of Parental Rights—best interests of the child—misapprehension of law—co-parenting inconsistent with termination

The trial court's disposition order concluding that termination of respondent-father's parental rights in his son was in the son's best interests was vacated and remanded for reconsideration where the court's order—directing the department of social services to continue to allow respondent-father to co-parent his son and to honor the son's request not to be adopted by his foster parents—indicated a misapprehension of the law regarding the effect termination would have on the parental-child relationship.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 October 2019 by Judge Angela C. Foster in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 23 November 2020 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Womble Bond Dickinson (US) LLP, by Lawrence F. Matthews, for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant father.

NEWBY, Justice.

Respondent, the father of fifteen-year-old minor child Z.O.G.-I. (Zander),[1] appeals from the trial court's order terminating his parental rights based on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the child's removal from his care. Because the trial court determined that termination of respondent's parental rights was in Zander's best interests due in part to a misapprehension of the legal effects of the termination, we vacate the dispositional portion of the trial court's order and remand for entry of a new dispositional order.

On 14 October 2016, the Guilford County Department of Health and Human Services (DHHS) obtained nonsecure custody of Zander and filed a petition alleging that he was a neglected and dependent juvenile. The petition alleged that Zander's mother had a history with Child Protective Services due to issues with mental health, substance abuse, and housing. In-home services had been provided to the mother on multiple occasions with the most recent case being closed in June 2016. The petition alleged that the mother had been diagnosed with schizoaffective disorder, bipolar disorder, and depression and that she was not complying with her mental health and substance abuse treatment. At the time of the filing of the petition, respondent was incarcerated and scheduled to be released in the Spring of 2017. DHHS spoke with respondent on 13 October 2016, and respondent requested that Zander be placed with his paternal grandmother, Ms. R., but she had already declined to care for Zander several months earlier.

Following a 3 March 2017 hearing, the trial court entered an order on 11 April 2017 adjudicating Zander to be a dependent juvenile. The trial court found that the mother consented to a finding of dependency based on stipulated facts regarding her noncompliance with her mental health and substance abuse treatment and found that DHHS dismissed the neglect allegation. Respondent was incarcerated at the time of the hearing but was scheduled to be released a few months later.

Respondent was released from incarceration on 15 June 2017. Due to scheduling conflicts, a Child and Family Team Meeting was not held until 10 October 2017. Respondent entered into a case plan with DHHS

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

on 11 October 2017 which required him to maintain suitable housing for himself and Zander and provide documentation of a lease or rental agreement and all utilities; complete a parenting/ psychological evaluation and follow all recommendations; participate in shared parenting with Zander's caregivers; attend all scheduled visitations and demonstrate appropriate parenting skills; comply with child support requirements; obtain adequate income to meet the basic needs of his family through employment or disability, and provide DHHS with verification of his income; complete a substance abuse assessment and follow all recommendations; and submit to random drug screens within twenty-four hours of a request. A permanency-planning order was entered on 21 November 2017 setting the primary permanent plan as reunification with a concurrent secondary plan of adoption. The trial court ordered respondent to comply with the components of his case plan and allowed him four to five hours of supervised visits with Zander per month.

Following a 2 March 2018 review hearing, the trial court changed the permanent plan to adoption with a concurrent secondary plan of reunification on 12 April 2018 but stayed the filing of a petition for termination of parental rights until the next court hearing on 25 April 2018. The trial court found that respondent obtained housing with his girlfriend on 15 December 2017 and submitted a copy of a lease at the court hearing. The trial court found that he was employed but needed to provide documentation of his employment to DHHS. The trial court also found that respondent had not yet scheduled his parenting/psychological evaluation and was not participating in shared parenting. Respondent also tested positive for marijuana in August and October 2017. Respondent completed a substance abuse assessment on 12 November 2017, and no substance abuse diagnosis was made. Respondent had been incarcerated from 25 January 2018 to 27 February 2018, but the charges were later dismissed. The trial court found that neither parent was making adequate progress on their case plans within a reasonable time period, but that respondent was making some progress. The trial court ordered respondent to comply with his case plan and cooperate with DHHS and allowed him one hour of supervised visits per week.

The trial court entered another permanency planning order on 24 May 2018 lifting the stay on the termination of parental rights and ordering DHHS to file a petition within sixty days. The trial court found that respondent was not participating in shared parenting, had not yet set up his visitation with Zander, was not complying with requested drug screens, and was unemployed due to an alleged medical injury. Although

respondent had submitted a lease agreement at the previous hearing, he did not know his address, and a home study could not be completed by DHHS. DHHS filed a petition to terminate respondent's parental rights on 18 July 2018 alleging the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Zander's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).

A subsequent permanency planning order was entered on 7 August 2018. The trial court found that respondent had not scheduled his parenting/psychological evaluation, had not submitted to any drug screen, had not attended any visits with Zander, and was not participating in shared parenting. Respondent had also been unemployed since March 2018 due to a purported back injury but had not provided any documentation of the injury. A completed home study found the home to be appropriate, but DHHS did not approve the home study due to respondent's lack of compliance with his case plan.

The hearing on the petition to terminate parental rights began on 30 April 2019 and, after multiple continuances, concluded on 17 September 2019. In an order entered on 17 October 2019, the trial court concluded that grounds existed to terminate respondent's parental rights based on N.C.G.S. § 7B-1111(a)(1) and (2). The trial court also concluded that termination of respondent's parental rights was in Zander's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, the trial court terminated respondent's parental rights. Respondent appeals, challenging the trial court's adjudication that grounds existed to terminate his parental rights and its dispositional determination under N.C.G.S. § 7B-1110(a) that termination of his parental rights was in Zander's best interests.

We review a trial court's adjudication that grounds existed 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).

Under 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 trial 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). "[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). " '[A] respondent's prolonged inability to improve [his or] her situation, despite some efforts in that direction, will support a finding of willfulness "regardless of [his or] 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 (first and fourth alterations in original) (citations omitted).

> According to N.C.G.S. § 7B-904(d1)(3)[(2019)], a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker."

In re B.O.A., 372 N.C. 372, 381, 831 S.E.2d 305, 311–12 (2019) (second alteration in original). This Court has consistently recognized

> 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.

Id. at 384, 831 S.E.2d at 313–14.

I.

[1] In determining that respondent failed to make reasonable progress, the trial court found respondent "had the opportunity to correct the conditions that led to the juvenile's removal from the home, including but not limited to being offered a service agreement," which he entered into on 11 October 2017. The trial court made the following findings of fact addressing respondent's progress in complying with his service agreement:

> 20. . . . [Respondent] agreed to address the following conditions:
>
> a. Housing – [Respondent] agreed to obtain suitable housing for himself, his child and provide documentation of his lease/rental agreement and utilities. [Respondent] provided what he reported was a copy of his lease to the [c]ourt and [DHHS] on March 2, 2018 with sufficient address information. The assigned social worker made a referral to Catawba County to complete a home study on [respondent's] home, which he reported was in Catawba County. The home study was denied because he was not taking drug screens.
>
> b. Income – [Respondent] agreed to have adequate income to meet the basic needs of his family through employment or disability, and provide proof of income to [DHHS]. [Respondent] remains unemployed. He reports that this is a result of a back injury, but he has not provided any verification of the injury and is not receiving disability income. He has not filed for disability and does not have a doctor's note stating he is unable to work. The source of [respondent's] income is his girlfriend who pays the bills and provides for all of his needs. He stated that he is unemployed due to visits with the juvenile and that his girlfriend agreed he would take care of their kids while she worked. He does not know his girlfriend's income and, therefore, the [c]ourt cannot determine if there is sufficient income in the home to support this juvenile in the home as he already has three other kids in the home. [Respondent] quit

his job in 2018 and has applied to work at four or five temporary agencies but states he cannot take positions due to visits that occur one day per week. [Respondent] remains unemployed.

c. Parenting – [Respondent] agreed to complete a parenting/psychological evaluation, to follow all recommendations, participate in shared parenting, and attend visits as scheduled. [Respondent] attended a parenting psychological on January 3, 2019, with Agape Psychological Consortium, LLC. [Respondent] agreed to take Parenting Assessment Training Education (PATE) Program classes and has met with Demetria Powell-Harrison twice. [Respondent] completed his test and assessment received by [DHHS] on March 6, 2019. Social Worker discussed the results with [respondent] on March 8, 2019. [Respondent] is allowed supervised visits once a week for one hour per visit. [Respondent's] visits were originally inconsistent, however, since September 21, 2018, [respondent] began being very consistent with his visits and is participating in shared parenting with the foster parents. He has participated in a meeting with Milicent Day and requested that the foster parents be included in those sessions. He has failed to obtain individual therapy which was recommended by Dr. Morris in his parenting psychological evaluation. [Respondent] thought therapy was only optional though the social worker had informed him he was required to attend individual therapy.

d. Substance Abuse – [Respondent] agreed to participate in a substance abuse assessment and follow all recommendations, and submit to random drug screens in order to demonstrate his sobriety. [Respondent] has a significant substance abuse history. He was convicted of Felony Possession Controlled Substance with Intent to Sell (four counts) in 2016 and has a misdemeanor conviction of Possession of Drug Paraphernalia from 2012. [Respondent] completed a substance

> abuse assessment on November 12, 2017 with Joe Fortin. Mr. Fortin did not make a substance abuse diagnosis at that time. [Respondent] had not been complying with drug screen requests and has not demonstrated his sobriety in 2017.
>
> On November 2, 2018, [respondent] completed a second assessment with Joe Fortin, and he was diagnosed with Cannabis Use Disorder, mild and he ruled out Cocaine Use Disorder. As of February 1, 2019, [respondent] has met with Joe Fortin six out of 8 times. However he missed a session on February 8, 2019. Social Worker inquired about this and [respondent] reported that he did not know the time his classes were being held. However, classes are the same each week and Social Worker again informed him of this.

The trial court also found that respondent tested negative on at least twenty-three drug screens requested between April 2018 and April 2019. But, he tested positive for cocaine and marijuana on 10 October 2018 and tested positive for marijuana on 5 March 2019. Additionally, the trial court found that DHHS requested a drug screen on 18 February 2019 and, although respondent tested negative, he did not comply with DHHS's policy of completing the drug screen within twenty-four hours of the request. The trial court also found that respondent admitted to using marijuana twice in the months before the termination hearing, including three weeks before the 17 September 2019 hearing date, and that respondent's substance abuse counseling had not been effective. Finally, the trial court found that respondent "made only minimal progress in demonstrating that he can provide adequate care and supervision and a safe home to [Zander]." Respondent does not challenge any of these findings, and they are binding on appeal. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Respondent first argues that "[t]he trial court never provided formal guidance on what was required of [respondent] to demonstrate a change of conditions" or the reasons for Zander's removal. Respondent further claims he had made reasonable progress at the time of the termination hearing on 17 September 2019 because he had maintained a residence with his girlfriend and their children for over two years; he participated in substance abuse programs and produced multiple negative drug screens throughout the case; and he improved his parenting

skills, was participating in co-parenting with the foster parents, and was consistently visiting with Zander.

Respondent also asserts that he did not willfully leave Zander in foster care and that his progress was reasonable under the circumstances given his challenges with finances and transportation. Respondent argues that the trial court did not make a finding that he maintained the ability to comply with the case plan or that he was "unwilling to make the effort." *See In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175.

Here Zander was adjudicated to be a dependent juvenile based, in part, on respondent's inability to care for Zander due to his incarceration and his lack of an appropriate alternative child care arrangement. Respondent's case plan was designed to address his ability to appropriately care for Zander by obtaining a stable home and income, learning appropriate parenting skills, and addressing his substance abuse issues. Respondent was clearly put on notice of the conditions he needed to address when he entered into the service agreement. Indeed, the trial court consistently ordered him to comply with the requirements of his service agreement in each of its permanency planning orders. Therefore, respondent's argument that he was never provided formal guidance on what he was required to do to demonstrate changed conditions is without merit.

At the termination hearing, respondent testified that he was not able to start the parenting/psychological evaluation before January 2019 due to transportation issues. He also testified that he asked to take the evaluation in Catawba County, but he was told that he would have to pay for it himself, and that he did not have a job to earn money to pay the fee. Nonetheless, he acknowledged on cross-examination that he never inquired into what it would have cost to have the evaluation done in Catawba County. Respondent also testified that he quit his job in 2018 due to a reoccurring back injury; he also acknowledged that he did not apply for disability in order to obtain income. Respondent did not testify that his proposed issues with finances and transportation prevented him from participating in individual therapy, applying for disability, providing DHHS with verification of his injury, or abstaining from drug use.

The trial court found that respondent failed to obtain sufficient income to support Zander, failed to comply with the individual therapy recommendations of his parenting/psychological evaluation, and failed to address his substance abuse issues. The findings show that respondent did not obtain income through employment or disability. He quit his job in 2018 due to an alleged back injury and had not worked since. He

did not provide verification of his injury and did not apply for disability benefits. Respondent instead relied on his girlfriend's income but did not know how much money she made, leaving the trial court unable to determine if her income was sufficient to support the family.

The unchallenged findings also show that although respondent was consistently visiting with Zander at the time of the termination hearing, he did not do so until over a year after he was released from incarceration and two months after the petition was filed. Respondent continued to use marijuana after the filing of the termination petition and after the termination hearing had started. Respondent admitted to using marijuana twice in the months leading up to the September 2019 hearing date and as recently as three weeks before the hearing. Respondent has not specifically challenged any of the above findings, rendering them binding on appeal. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. These unchallenged findings support the trial court's ultimate finding and conclusion that respondent failed to make reasonable progress under the circumstances to correct the conditions that lead to removal.

As the fact-finder, the trial court was entrusted with evaluating the credibility of respondent's testimony and the weight it is afforded. *See In re S.C.R.*, 198 N.C. App. 525, 531–32, 679 S.E.2d 905, 909 (2009). Although respondent made some progress on his case plan, the findings in the trial court's order and unchallenged findings support the trial court's ultimate finding and conclusion that respondent willfully failed to make reasonable progress to correct the conditions that led to Zander's removal. Here the trial court weighed the evidence and ultimately determined that respondent "made only minimal progress in demonstrating that he can provide adequate care and supervision and a safe home to [Zander]," and therefore he willfully failed to make reasonable progress under the circumstances to correct the conditions that led to Zander's removal. Therefore, we affirm the trial court's adjudication of grounds under N.C.G.S. § 7B-1111(a)(2). As such, we need not address respondent's arguments regarding the ground of neglect. *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020).

II.

[2] Respondent also challenges the trial court's dispositional determination under N.C.G.S. § 7B-1110(a) that termination of his parental rights was in Zander's best interests. Respondent does not contend that the trial court failed to consider and make findings on the relevant statutory factors. Instead, he argues the trial court erred because the trial court's

decision to terminate respondent's parental rights is inconsistent with its conclusion about Zander's best interests.

In determining whether termination of parental rights is in the juvenile'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). "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. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Zander, who was approaching his fourteenth birthday at the time, testified that his placement with his foster parents was "wonderful[,]" but that he did not want to be adopted and wanted to live with respondent because he felt that he "need[ed] [respondent] in [his] life." Zander also testified that he would "be devastated" if the court were to terminate respondent's parental rights. In the termination order, the trial court found that there was a strong bond between Zander and respondent and that Zander had testified he wanted to live with respondent and did not want to be adopted. The trial court also found as follows: Zander was 13 years old; there was a high likelihood of adoption; the primary permanent plan was adoption; terminating respondent's parental rights would aid in accomplishing that plan; the relationship between Zander and his foster parents was stable, and they wished to adopt him; and the foster

parents had agreed to allow respondent to continue to contact Zander and to continue co-parenting. Respondent does not challenge these findings and, therefore, they are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

In the order terminating respondent's parental rights, the trial court also decreed that "[DHHS] shall ensure that [respondent] is allowed continued co-parenting of [Zander]" and that it "hereby honors the request of [Zander] not [to] be adopted pursuant to N.C.G.S. § 48-3-603(b)." Respondent argues that this is "contrary to" the legal consequences of a termination of parental rights under section 7B-1112, which "call[s] for a complete and total severance" of the parent-child relationship. *See* N.C.G.S. § 7B-1112 (2019). According to respondent, the trial court's decree "effectively frustrates the permanent plan of adoption and creates the prospect that Zander is now a 'legal orphan.' " We agree the matter should be remanded for a proper best interests determination.

Section 7B-1112 provides that

> [a]n order terminating parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued.

N.C.G.S. § 7B-1112; *see also Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) ("With the exception of a child's right to inherit from a parent, a termination of parental rights order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent."). The "[t]ermination of parental rights makes a child available for adoption by another person, rendering the child a legal stranger to the biological parent." *Huml v. Huml*, 264 N.C. App. 376, 398, 826 S.E.2d 532, 547 (2019) (citing *In re Estate of Edwards*, 316 N.C. 698, 706, 343 S.E.2d 913, 918 (1986)). A decree that a biological parent be allowed to continue to co-parent a minor child is at odds with the determination that the complete and permanent severance of parental rights and obligations is in the juvenile's best interests.

The trial court's decision here to order both that respondent's parental rights be terminated and that DHHS ensure respondent is allowed to continue co-parenting Zander suggests a misapprehension of the legal effects attendant to terminating parental rights. Perhaps the trial court had in mind a type of guardianship arrangement, which does not require termination of parental rights. In such a situation, the proper remedy

is to remand for reconsideration. *Cf. In re Estate of Skinner*, 370 N.C. 126, 146, 804 S.E.2d 449, 462 (2017) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard."). Therefore, we remand this case to the trial court for reconsideration of its decision that the termination of respondent's parental rights was in Zander's best interests.

In conclusion, we affirm the trial court's adjudication that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2); however, we vacate the dispositional portion of the trial court's order and remand the matter to the trial court for a new dispositional determination. 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 274, 285, 837 S.E.2d 861, 869 (2020).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC, Applicant; and DUKE ENERGY CAROLINAS, LLC, Applicant
v.
ATTORNEY GENERAL JOSHUA H. STEIN; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; NORTH CAROLINA JUSTICE CENTER, NORTH CAROLINA HOUSING COALITION, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHERN ALLIANCE FOR CLEAN ENERGY, and NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION; and SIERRA CLUB, Intervenors

Nos. 271A18 and 401A18

Filed 11 December 2020

1. Utilities—general rate case—coal ash spill—return on coal ash remediation costs—sufficiency of findings

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission entered sufficient findings of fact pursuant to N.C.G.S. § 62-79(a) to enable the Court of Appeals to discern the bases for also allowing the companies to earn a return on the unamortized balance of those costs. Although intervenors in both cases argued that the Commission made contradictory findings about how it classified the coal ash-related costs

under the ratemaking statute (N.C.G.S. § 62-133), the Commission clearly decided that it had authority to allow the return on those costs regardless of the classification issue.

2. Utilities—general rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—reasonableness of the costs

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the Commission properly found the companies "reasonably and prudently incurred" these costs in compliance with the Coal Ash Management Act (CAMA), which was enacted shortly after the companies faced criminal charges for a coal ash spill at one of their facilities. The Attorney General failed to rebut the presumption of reasonableness by failing to produce evidence showing the companies should have begun the remediation process sooner than they did or that the companies' coal ash spill was the main reason for CAMA's enactment. Further, the intervenors in both cases failed to identify which specific costs were unreasonable.

3. Utilities—general rate case—coal ash spill—return on coal ash remediation costs—consideration of "other material facts"

In two general rate cases (consolidated on appeal), where the Utilities Commission allowed two electric companies to defer certain coal ash remediation costs and to include those costs in the cost of service used to establish their retail rates, the Commission properly allowed the companies to earn a return on the unamortized balance of those costs. Although this decision represented a departure from ordinary ratemaking procedures, it was nevertheless lawful where the Commission properly exercised its authority under N.C.G.S. § 62-133(d) to "consider all other material facts of record" apart from those specifically mentioned throughout section 62-133 (the ratemaking statute) when determining what rates would be "just and reasonable."

4. Utilities—general rate case—coal ash spill—coal ash remediation costs—rejection of equitable sharing proposal—reversed and remanded

In two general rate cases (consolidated on appeal), where the Utilities Commission entered orders allowing two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates, the orders were reversed and

remanded because the Commission failed to consider all "material facts in the record," pursuant to N.C.G.S. § 62-133(d), before rejecting an equitable sharing arrangement proposed by the Public Staff in response to the companies' numerous environmental violations. Specifically, the Commission failed to evaluate the extent to which the companies committed environmental violations relating to coal ash management before deciding whether the companies' coal ash-related costs were reasonable or whether equitable sharing of those costs between shareholders and ratepayers was necessary.

5. Utilities—general rate case—coal ash spill—inclusion of coal ash remediation costs in rate base calculation—section 62-133.13—applicability

In two general rate cases (consolidated on appeal), the Utilities Commission properly allowed two electric companies to include certain coal ash remediation costs in the cost of service used to establish their retail rates because N.C.G.S. § 62-133.13 (forbidding utilities from recovering costs related to unlawful discharges of coal combustion residuals into surface waters) did not preclude it from doing so. Although the companies had recently faced criminal charges when a burst pipe at one of their facilities emitted large quantities of coal ash into a local river, the Commission found the companies incurred their coal ash remediation costs to comply with federal and state environmental law rather than as the result of that coal ash spill.

6. Utilities—general rate case—increase in basic facilities charge —for one class of ratepayers

In a general rate case, the Utilities Commission did not err by authorizing an electric company to increase the basic facilities charge for the residential rate class while leaving the facilities charges against other classes of ratepayers unchanged. Evidence in the record supported the increase, as well as the exact dollar figure the Commission chose and the methodology used to generate that figure, and the Commission properly balanced competing policy goals when approving the increase. Further, the Commission adequately considered any adverse effects of the increased facilities charge on low-income customers and showed that the increase was not "unduly discriminatory" under N.C.G.S. § 62-140.

Justice NEWBY concurring in part and dissenting in part.

Justice EARLS concurring in part and dissenting in part.

Consolidated appeals as of right pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from final orders of the North Carolina Utilities Commission entered on 23 February 2018 in Docket Nos. E-2, Sub 1131, 1142, 1103, and 1153, and on 22 June 2018 in Docket Nos. E-7, Sub 1146, 819, 1152, and 1110. Heard in the Supreme Court on 11 March 2020.

Troutman Sanders LLP, by Kiran H. Mehta, Molly McIntosh Jagannathan, and Christopher G. Browning, Jr., for Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, Solicitor General Matthew W. Sawchak, Deputy Solicitor General James W. Doggett, Solicitor General Fellow Matt Burke, and Special Deputy Attorneys General Jennifer T. Harrod and Teresa L. Townsend.

Lewis & Roberts, PLLC, by Matthew D. Quinn, and Bridget M. Lee and Dorothy E. Jaffee, for appellant Sierra Club.

Southern Environmental Law Center, by Gudrun Thompson and David Neal, for North Carolina Justice Center, North Carolina Housing Coalition, Natural Resources Defense Council, and Southern Alliance for Clean Energy, and North Carolina Sustainable Energy Association, by Benjamin W. Smith and Peter H. Ledford, intervenor-appellants.

Public Staff – NCUC, by Chief Counsel David T. Drooz and Staff Attorneys Chris Ayers, Layla Cummings, Megan Jost, and Nadia Luhr, intervenor-appellant.

North Carolina Department of Justice, Environmental Division, by Special Deputy Attorney General Marc Bernstein and Senior Deputy Attorney General Daniel S. Hirschman, for North Carolina Department of Environmental Quality, amicus curiae.

ERVIN, Justice.

These cases arise from appeals taken from orders entered by the North Carolina Utilities Commission addressing applications filed by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, both of which are wholly owned subsidiaries of Duke Energy Corporation, by various intervenors representing the utilities' consumers that focus upon

the lawfulness of the Commission's decisions concerning the extent to which the utilities are entitled to reflect costs associated with the storage, disposal, and removal of ash resulting from the production of electricity in coal-fired electric generating units in the cost of service used to establish the utilities' North Carolina retail rates. Among other things, various intervenors assert that the Commission erred by allowing the deferral of certain coal ash remediation costs and the inclusion of those costs in the cost of service used to establish the utilities' North Carolina retail rates, that the Commission erred by allowing the utilities to earn a return upon the unamortized balance of the deferred coal ash remediation costs, and that the Commission erred by approving an increased Basic Facilities Charge for Duke Energy Carolinas' North Carolina retail residential customers. After careful consideration of the parties' challenges to the Commission's orders, we conclude that the challenged orders should be affirmed, in part, and reversed and remanded, in part.

I. Factual Background

A. Substantive Facts

In the early part of the twentieth century, when the utilities began providing electric service in North Carolina, they used coal as the primary means of generating electric power. The burning of coal produces by-products known as coal combustion residuals, which include fly ash, bottom ash, boiler slag, and flue gas desulfurization material.[1] At present, Duke Energy Progress owns eight coal-fired electric generating facilities and nineteen unlined coal ash basins, while Duke Energy Carolinas owns eight coal-fired electric generating facilities and seventeen unlined coal ash basins.

In the early years during which the utilities operated coal-fired electric generating facilities, coal ash was either emitted through generating facility smokestacks or stored in on-site landfills. In the 1950s, the utilities began to store coal ash in unlined basins located at generating facility sites. As part of this process, the utilities mixed coal ash with water to form a "sluice," which would be piped from the generating facility to these unlined basins. The practices that the utilities employed in disposing of coal ash during this time were consistent with contemporaneous standard industry practices and with the concept of least cost planning as currently embodied in state law. *See* N.C.G.S. § 62-2(a)(3a) (2019).

1. The term "coal ash" is used throughout the remainder of this opinion to refer to coal combustion residuals and the by-products resulting from the combustion of coal in electric generating facilities.

The harmful effects of coal ash on human and environmental health were not fully understood at the time that the utilities began to dispose of it in unlined basins. Over time, however, pollutants emanating from the unlined coal ash basins began to contaminate nearby groundwater. In the 1970s, concerns developed about the manner in which coal ash was handled and stored. For that reason, the United States Environmental Protection Agency began to regulate unlined coal ash basins in accordance with the Clean Water Act and initiated a permitting program known as the National Pollutant Discharge Elimination System, pursuant to which the EPA delegated authority to the states to issue permits allowing the discharge of a specific amount of pollutants into nearby water sources, subject to certain terms and conditions, and authorizing the processing, incineration, placement in a landfill, or other beneficial uses of contaminated sludge. *See* 33 U.S.C. § 1251 *et seq*. (1972). In 1979, the North Carolina Department of Environmental Quality[2] adopted Groundwater Classification and Standards (2L Rules) requiring the taking of preventative and corrective measures relating to groundwater contamination associated with coal ash. *See* 15A N.C. Admin. Code 02L §§ .0100–.0515.

In the aftermath of a 2008 incident, during which more than five million cubic yards of coal ash spilled into the Emory River from the Tennessee Valley Authority's Kingston Fossil Plant, the effect of storing coal ash in unlined basins upon human and environmental health became a focus of additional attention at the EPA and in the electric power industry. On 17 April 2015, the EPA promulgated the Hazardous and Solid Waste Management System—Disposal of Coal Combustion Residuals from Electric Utilities (CCR Rule), *see* 80 Fed. Reg. 21301 (April 17, 2015), which established a "maximum contaminant level" for certain contaminants, prohibited "[a]n increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds" a prescribed maximum level, and required that groundwater monitoring be undertaken at existing coal ash basins by no later than 17 October 2017, with reporting of the results to begin by no later than 31 January 2018. 40 C.F.R. § 257.3–4; § 257.90(b), (e) (2019).

On 2 February 2014, a stormwater pipe that ran beneath an unlined coal ash basin located at Duke Energy Carolinas' Dan River generating facility burst, resulting in the emission of approximately 27,000 million gallons of wastewater and between 30,000 and 39,000 tons of coal ash

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2. The Department of Environmental Quality was known as the Department of Environmental and Natural Resources in the 1970s.

into the Dan River, affecting river conditions for up to sixty miles below the discharge site. The utilities entered pleas of guilty in federal court to nine criminal violations of the Clean Water Act relating to the Dan River facility and four additional power plants. In accordance with their plea agreements, the utilities agreed to pay a $68 million fine and were placed on probation for a five-year period pursuant to 18 U.S.C. § 3561(c)(2).

On 20 September 2014, the General Assembly enacted the North Carolina Coal Ash Management Act, N.C. Sess. L. 2014-122, which was subsequently amended in the Mountain Energy Act, N.C. Sess. L. 2015-110, and the Drinking Water Protection/Coal Ash Cleanup Act, N.C. Sess. L. 2016-95. CAMA, as amended, required a comprehensive assessment of groundwater and surface water discharges at coal ash basins, the taking of corrective action to address such discharges, and the closure of all of the utilities' unlined coal ash basins by no later than 2029 in accordance with a statutorily prescribed timeline. N.C.G.S. §§ 130A-309.211–.214 (2019). The utilities began closing their unlined coal ash basins pursuant to the requirements of the CCR Rule and CAMA in 2015.

B. Procedural History

At the beginning of the closure process, the utilities estimated that their collective coal ash cleanup costs would exceed $4.5 billion. On 21 December 2015, Duke submitted a letter to the Commission outlining the manner in which the utilities intended to account for ongoing and anticipated coal ash management and basin closure costs. In this letter, Duke explained that the utilities planned to create an Asset Retirement Obligation, which is an account associated with the retirement of a tangible long-lived asset, on their balance sheets in accordance with their understanding of Financial Accounting Standards Board (FASB) Accounting Standards Codification for Asset Retirement Environmental Obligations (ASC) 410-20, Federal Energy Regulatory Commission (FERC) General Instruction No. 25, and Generally Accepted Accounting Principles (GAAP). According to Duke, the creation of these Asset Retirement Obligations was triggered by the fact that the CCR Rule and CAMA required the closure of the utilities' unlined coal ash basins. Although Duke initially estimated that these Asset Retirement Obligations would involve approximately $2.13 billion for Duke Energy Progress and $1.84 billion for Duke Energy Carolinas, it noted that the utilities' actual compliance costs might be "materially different from these estimates based on the timing and requirements of the final regulations."

In accordance with fundamental principles of double-entry accounting, the utilities planned to record their coal ash management and ash

basin closure costs as both a liability and an asset. In the event that these costs were associated with generating facilities that were still in active service, the costs, inclusive of associated depreciation expense, would be placed in the relevant property, plant and equipment account. In the event that these costs were associated with a retired facility, they would be placed in a regulatory asset account. After noting that "[t]he Commission ha[d]," in prior matters, "issued orders allowing the [utilities] to defer all impacts of establishing an [Asset Retirement Obligation] until these costs [could] be considered in future rate making decisions," Duke stated that, since "actual costs incurred to comply with the federal and state regulations regarding closure of ash basins are being deferred," "all associated coal ash [Asset Retirement Obligation] deferrals [are being excluded] for earnings surveillance reporting," and that the utilities "are funding these expenditures with its debt and equity capitalization" and "are recording a debt and equity return (carrying charge) on the aforementioned net asset for regulatory purposes" given that "GAAP requires the equity return to be deferred . . . until rate recovery has begun." Finally, Duke pointed out that this letter had been sent for purely informational purposes and expressed the intention of "bring[ing] this matter before the Commission for ultimate disposition" after "sufficient clarity in North Carolina regarding the closure of ash basins"[3] had been obtained.

On 28 March 2016, the Commission determined that there was "good cause to establish formal dockets for [the utilities] in this matter" and "place[d] a copy of Duke's letter in each" of these dockets. Although it took no further action at that time, the Commission noted that its "inaction should not be construed as agreement or disagreement with the substance of Duke's analysis or the conclusions [that] Duke [had] reache[d]" and that it "reserve[d] the right, once a record [had been] established, to agree or disagree in whole or in part" with Duke's proposed accounting practices.

On 30 December 2016, the utilities filed a joint petition seeking the entry of an accounting order "authorizing the [utilities] to defer in a regulatory asset account (until the [their] next base rate cases) certain costs incurred in connection with compliance with federal and state environmental requirements" relating to coal ash management and coal ash basin closures. More specifically, Duke "request[ed] that the

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3. Subsequently, Duke explained that "the [utilities] did not file a deferral request at [this] time due to significant [unresolved] litigation and reconsiderations related to CAMA, the now-defunct Coal Ash Management Commission, and numerous other outstanding issues."

Commission allow [the utilities] to establish a regulatory asset account for the deferral of all non-capital costs as well as the depreciation expense and cost of capital at the weighted average cost of capital for all capital costs related to activities required under [the CCR Rule and CAMA]" and deferral of "a cost of capital on the deferred costs at the weighted average cost of capital" for costs incurred from 1 January 2015 until the approval of new rates in the utilities' next general rate cases.

As of 30 September 2016, Duke Energy Progress had recorded an Asset Retirement Obligation of $2.4 billion and Duke Energy Carolinas had recorded an Asset Retirement Obligation of $2.1 billion, while acknowledging that its actual compliance costs might be "materially different" based upon the timing and requirements of the final environmental regulations. In addition, Duke pointed out that Duke Energy Progress had already incurred $291.9 million in coal ash management and coal ash basin closure costs and that Duke Energy Carolinas had already recorded $434.4 million in such costs, with these costs including monies associated with engineering and regulatory compliance, mobilization for and the commencement of the closure process, the construction of rail infrastructure for coal ash excavation, dewatering activities, ash excavation, and plant closure.

Duke asserted that "noteworthy circumstances" justified the entry of the proposed accounting order and alleged that, "absent approval of this request, [both utilities'] return on equity for [their] North Carolina retail operations [was] expected to be well below the return last authorized by the Commission." More specifically, Duke alleged that the authorized return on equity that had been established in the utilities' last general rate cases was 10.2 percent and that, in the absence of the requested accounting order, Duke Energy Progress' earned return on equity would fall to 7.47 percent and that Duke Energy Carolinas' earned return on equity would fall to 7.61 percent. After emphasizing that the utilities were not seeking a rate change at that time, Duke stated that each utility intended to file a general rate case application within the next twelve months and pointed out that none of the fines, penalties, or costs associated with the Dan River spill had been included in the costs that either utility had deferred to date or would be included in the costs upon which any future general rate increase request would be predicated.

Duke asserted that "[c]losing ash basins is part of the life cycle of the [utilities'] coal plants," that "compliance with state and federal regulatory requirements is part of the normal operation of a utility," and that "[c]osts related to the operation of a power plant, including decommissioning costs, are typically paid for by customers." In light of the

"extraordinary and unprecedented" "magnitude, scope, duration and complexity of compliance," the utilities requested the Commission to enter the requested accounting order "so that all complexities may be adequately reviewed by the Commission and stakeholders at an appropriate time." Duke claimed that "[a]pproval of this deferral request [would] benefit the [utilities] and the customers by helping to assure investor confidence in" both utilities and ensuring that "needed capital [would be available] on reasonable terms." Unless the Commission approved its request, Duke argued that "the [utilities] may have to write off billions of dollars of costs for accounting purposes, which . . . would severely impair the [utilities'] financial stability and ability to attract capital on reasonable terms."

Various parties[4] submitted comments in response to Duke's filing. The Attorney General argued that the public interest would not be served by deciding the issues raised by Duke's filing outside the context of a general rate case. The Public Staff asserted that the relevant costs "generally satisfy the criteria for deferral for regulatory accounting (but not necessarily ratemaking) purposes" and reserved the right to litigate the amount of deferred costs used to set the utilities' rates in future general rate cases, the method that would be used to include the relevant costs in North Carolina retail rates, the length of any applicable amortization period, and the extent to which an equitable sharing of these costs between the ratepayers and shareholders should be implemented. Other parties contended that costs should be fully analyzed and categorized before the amount of deferred costs to be included in North Carolina retail rates was established.

1. General Rate Case Applications

a. Duke Energy Progress

On 1 June 2017, Duke Energy Progress filed an application requesting authorization to adjust and increase its North Carolina retail rates and the entry of an accounting order approving the establishment of certain regulatory assets and liabilities. In its application, Duke Energy Progress sought additional annual North Carolina retail revenues of approximately $477.5 million,[5] resulting in an overall increase of approximately

4. The parties submitting comments in response to Duke's filing included the North Carolina Waste Awareness and Reduction Network, Inc.; Appalachian State University; the Cities of Concord and Kings Mountain; the Carolina Utility Customers Association, Inc.; the Attorney General; and the Public Staff. The utilities and the Sierra Club submitted reply comments.

5. In subsequently filed supplemental testimony and exhibits, Duke Energy Progress reduced its proposed rate increase to $425.6 million.

14.9 percent. Duke Energy Progress requested that rates be established based upon coal ash basin closure costs of approximately $66 million per year for a period of five years and ongoing coal ash-related compliance costs of approximately $129 million per year. In addition, Duke Energy Progress sought the establishment of "a regulatory asset [and] liability for coal ash basin closure costs over or under the amount established in this proceeding and for those costs incurred between the cut-off date for this rate case and the effective date of new rates." A number of entities intervened in the proceeding initiated by the filing of Duke Energy Progress' application.[6]

On 20 June 2017, the Commission entered an order in which it: (1) declared that the application filed by Duke Energy Progress had initiated a general rate case pursuant to N.C.G.S. § 62-137; (2) suspended the proposed rates for a period of up to 270 days pursuant to N.C.G.S. § 62-134; and (3) established the applicable test year as the twelve-month period ending 31 December 2016. On 10 July 2017, the Commission entered an additional order consolidating the utilities' request to defer environmental compliance costs in Docket No. E-2 Sub 1103, and Duke Energy Progress' request to defer incremental storm damage expenses in Docket No. E-2, Sub 1131, with Duke Energy Progress' general rate proceeding. On 12 July 2017, the Commission entered an order requiring Duke Energy Progress to provide public notice of the filing of its application and the schedule of public hearings to be held in connection with that proceeding. A number of hearings were held before the Commission between 12 September to 7 December 2017, at which interested members of the public were allowed to testify and the parties were given the opportunity to present the testimony of various expert witnesses.

b. Duke Energy Carolinas

On 25 August 2017, Duke Energy Carolinas filed an application requesting authorization to increase its North Carolina retail rates and

6. The Public Staff intervened as a matter of right pursuant to N.C.G.S. § 62-15(d) and Commission Rule R1-19, while the Attorney General's intervention was recognized pursuant to N.C.G.S. § 62-20. The Commission allowed additional intervention petitions filed by the Carolina Utility Customers Association, Inc.; the Carolinas Industrial Group for Fair Utility Rates II; the North Carolina Waste Awareness and Reduction Network, Inc.; the North Carolina Sustainable Energy Association; the Fayetteville Public Works Commission; the Commercial Group; the North Carolina Electric Membership Corporation; the Environmental Defense Fund; the Kroger Company; the Sierra Club; Haywood Electric Membership Corporation; the United States Department of Defense and All Other Federal Executive Agencies; the Rate-Paying Neighbors of Duke Energy Progress, LLC's Coal Ash Sites; the North Carolina Farm Bureau Federation, Inc.; the North Carolina Justice Center, the North Carolina Housing Coalition, the Natural Resources Defense Council, and the Southern Alliance for Clean Energy, jointly (collectively, the Justice Center, et al.); and the North Carolina League of Municipalities.

the entry of an accounting order authorizing the establishment of certain regulatory assets and liabilities. In its application, Duke Energy Progress sought additional annual North Carolina retail revenues of approximately $611 million,[7] which resulted in an overall increase of approximately 12.8 percent, and the approval of an increase in the residential Basic Facilities Charge from $11.80 to $17.79 per month. Duke Energy Carolinas also requested that rates be established based upon coal ash basin closure costs of approximately $135 million per year for a period of five years and ongoing coal ash-related compliance costs of approximately $201 million per year. In addition, Duke Energy Carolinas sought the establishment of a "regulatory asset [and] liability for coal ash basin closure costs over or under the amount established in this proceeding and for those costs incurred between the cut-off date for this rate case and the effective date of new rates." A number of other entities intervened in the proceeding resulting from the filing of Duke Energy Carolinas' application.[8]

On 19 September 2017, the Commission entered an order in which it: (1) declared that Duke Energy Carolina's application had initiated a general rate case pursuant to N.C.G.S. § 62-137; (2) suspended the proposed rates for a period of up to 270 days pursuant to N.C.G.S. § 62-134; and (3) established that the applicable test year would be the twelve-month period ending 31 December 2016. On 13 October 2017, the Commission entered an order requiring Duke Energy Carolinas to provide public notice of the filing of its application and the times, dates, and locations at which hearings for the receipt of public witness testimony would be held. A number of hearings were held before the Commission between

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7. Subsequently, Duke Energy Carolinas filed supplemental testimony and exhibits changing its proposed rate increase to an annual amount of approximately $701 million.

8. Once again, the Public Staff intervened as a matter of right pursuant to N.C.G.S. § 62-15(d), while the Attorney General's intervention was recognized pursuant to N.C.G.S. § 62-20. The Commission allowed additional intervention petitions filed by the North Carolina Sustainable Energy Association; the Environmental Defense Fund; the North Carolina Waste Awareness and Reduction Network; the Carolina Utility Customers Association, Inc.; the Carolinas Industrial Group for Fair Utility Rates III; the Rate-Paying Neighbors of Duke Energy Carolinas, LLC's Coal Ash Sites; the North Carolina Farm Bureau Federation, Inc.; the Sierra Club; the Kroger Company; the North Carolina League of Municipalities; Appalachian State University; Piedmont Electric Membership Corporation; Rutherford Electric Membership Corporation; Haywood Electric Membership Corporation; Blue Ridge Electric Membership Corporation; the Commercial Group; Apple, Inc., Facebook, Inc., and Google, Inc., jointly; the Cities of Concord and Kings Mountain; the City of Durham; and the North Carolina Justice Center, the North Carolina Housing Coalition, the Natural Resources Defense Council, and the Southern Alliance for Clean Energy (collectively, the Justice Center, et al.).

16 January to 22 March 2018, at which interested members of the public were allowed to testify and the parties were given the opportunity to present the testimony of various expert witnesses.

2. The Commission's Orders

a. Duke Energy Progress

On 23 February 2018, the Commission entered an order allowing Duke Energy Progress to include $232.39 million in net additional coal ash-related costs, less a $30 million mismanagement penalty, to be amortized to North Carolina retail rates over a five-year period in its North Carolina retail cost of service and authorizing Duke Energy Progress to recover a return on the unamortized balance of these costs. In its order, the Commission found as fact that:

> 51. [Duke Energy Progress] expects to incur substantial costs related to [coal ash] in future years. It is just and reasonable to allow deferral of those costs, with a return at the overall cost of capital approved in this [o]rder during the deferral period. Ratemaking treatment of such costs will be addressed in future rate cases.
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> 53. Since its last rate case, [Duke Energy Progress] has become subject to new legal requirements relating to its management of coal ash. These new legal requirements mandate the closure of the 19 coal ash basins at [Duke Energy Progress'] coal-fired power plants. Since its last rate case, [Duke Energy Progress] has incurred significant costs to comply with these new legal requirements.
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> 54. On a North Carolina retail jurisdiction basis, the actual coal ash basin closure costs [that Duke Energy Progress] has incurred (netted against the amount already included in [Duke Energy Progress'] rates following its last rate case) during the period from January 1, 2015, through August 31, 2017, amount to $241,890,000. [Duke Energy Progress] is entitled to recover these coal ash basin closure costs, less a disallowance of $9.5 million, for a total amount of $232,390,000. . . . The actual coal ash basin closure costs incurred by [Duke Energy Progress], less the $9.5 million, are known and measurable, reasonable and prudent, and used and useful in the provision of service to [Duke Energy Progress'] customers.

> [Duke Energy Progress] is entitled to recover these costs through rates. Further, [Duke Energy Progress] proposes that these costs be amortized over a five-year period and that it earn a return on the unamortized balance. Under normal circumstances, the five-year amortization period proposed by [Duke Energy Progress] is appropriate and reasonable, and absent any management penalty should be approved, and under normal circumstances [Duke Energy Progress] is entitled to earn a return on the unamortized balance.
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> 55. Under the present facts, a mismanagement penalty in the approximate sum of $30 million is appropriate with respect to [Duke Energy Progress'] [coal ash] remediation expenses accounted for in the earlier established asset retirement obligation . . . with respect to costs incurred through the end of the test year, as adjusted. Through its use of available ratemaking mechanisms, the Commission is effectively implementing an estimated $30 million penalty by amortizing the $232,390,000 over five years with a return on the unamortized balance and then reducing the resulting annual revenue requirement by $6 million for each of the five years.
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> 56. [Duke Energy Progress] further proposes that it recover on an ongoing basis $129,115,000 in annual coal ash basin closure costs, subject to true-up in future rate cases. The amount sought by [Duke Energy Progress] is based upon its actual test year (2016) spend. [Duke Energy Progress'] proposal to recover these ongoing costs as a portion of the rates approved in this [o]rder is not approved. Rather, [Duke Energy Progress] is authorized to record its September 1, 2017, and future [coal ash] costs in a deferral account until its next general rate case.

In discussing the evidentiary support for these findings of fact, the Commission noted that cost deferral "is a recognized practice that allows recovery of expenditures that might otherwise constitute impermissible retroactive ratemaking," that the regulations requiring Duke Energy Progress to remediate the environmental risks associated with its unlined coal ash basis "were not in effect ten or fifteen years ago," that these regulations "[have] arisen in 2014 and 2015," and that Duke Energy Progress "is taking appropriate actions to comply" with all such requirements.

The Commission determined that it "[could not] agree with the ultimate positions of any party" with respect to the manner in which coal ash-related costs should be included in the cost of service used to establish Duke Energy Progress' North Carolina retail rates. In rejecting a proposal advanced by Public Staff witness Jay Lucas, who suggested that $88,000 in legal expenses associated with litigation relating to alleged coal ash-related environmental violations and $6.7 million in groundwater extraction and treatment costs, most of which related to the utility's Sutton facility, should be excluded from the company's North Carolina retail cost of service, citing *State ex rel. Utilities Commission v. Public Staff*, 317 N.C. 26, 343 S.E.2d 898 (1986) (*Glendale Water*) (holding that legal fees incurred as a result of the utility's failure to provide adequate service "could have been avoided" and should have been excluded from the utility's operating expenses for ratemaking purposes), the Commission noted that, in this instance, unlike the situation at issue in *Glendale Water*, there had been no finding or admission that any violation had occurred. In addition, the Commission pointed to the testimony of Duke Energy Progress witness James Wells that not all 2L Rule exceedances result in NPDES permit violations and that DEQ had never issued a notice of violation directed toward Duke Energy Progress based upon groundwater testing results. Instead, the Commission noted that Mr. Wells had testified that "the 2L [R]ules' correct[ive] action provisions are designed around the idea that older facilities, built before liners were a regulatory obligation, were likely to have associated groundwater impacts, that such impacts were not the result of regulatory noncompliance, and that they should be addressed in a measured process." According to Mr. Wells, the utility's use of unlined coal ash basins was "consistent with the industry standard" and "considered by the EPA to be the best available control technology" at the time that the facilities in question were constructed. The Commission added that, even though Duke Energy Progress had agreed to incur certain groundwater extraction and treatment costs pursuant to a settlement agreement with DEQ, that agreement "merely accelerated work that would have been required under CAMA" given that, unlike the 2L Rules, "CAMA's groundwater assessment and corrective action provisions are triggered by *exceedances*—not *violations*—of the 2L [Rules]."

The Commission stated that it was not persuaded by the Public Staff's contention that Duke Energy Progress should have "tak[en] steps that were not in accord with steps most of the industry was following," such as lining ash ponds or creating dry coal ash basins, while "disregarding responsibility of paying for that which [the Public Staff]—in 20/20 hindsight—wish[ed that Duke Energy Progress] had done" or by the

arguments advanced by several intervenors that Duke Energy Progress "should have done more than just comply with the current environmental regulations" given the testimony of Attorney General witness Dan Wittliff that "the definition of industry standards is compliance with the law." In addition, the Commission determined that the actions suggested by the Public Staff would have "cost money which would have been charged to customers" or exposed Duke Energy Progress "to credible claims of 'gold-plating,' and therefore cost disallowance, which would have prevented [Duke Energy Progress] from moving forward with these suggested improvements in the first place." In the Commission's view, the extent to which "seeps" constituted a violation of the law or required the issuance of an NPDES permit remained unresolved by DEQ.

The Commission rejected the Public Staff's contention that the Commission should disallow $109.8 million relating to the costs of off-site transportation and disposal of coal ash from the Sutton and Asheville plants on the theory that the coal ash in question should have been placed in on-site facilities given that acting in such a fashion would not have been feasible given the basin closure deadlines imposed by CAMA. In the Commission's view, "once CAMA became law, prudent planning required [Duke Energy Progress] to meet 'real world' difficulties as and when they arose, to ensure that the legislatively fixed . . . deadline would be met," and, "[h]ad [Duke Energy Progress] not arranged for off-site disposal, it would have been required" to undertake transportation measures which would have involved an "unreasonable task," with one exception.[9]

The Commission stated that the Public Staff's proposed "equitable sharing" arrangement, pursuant to which Duke Energy Progress' coal ash basin closure costs would be amortized to rates over a twenty-six year period without the inclusion of any return on the unamortized balance, resulting in a fifty-fifty sharing of those costs between the ratepayers and the shareholders, rested upon "[Duke Energy Progress'] alleged past failures . . . to prevent environmental contamination from its coal ash basins" and "an asserted [Commission] 'history of approval of sharing of extremely large costs that do not result in any new generation of electricity for customers.' " However, the Commission determined that the Public Staff had "provid[ed] insufficient justification" for its proposal, that it lacked "[a] 'determining principle' or prudency standard,"

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9. Duke Energy Progress "essentially agreed" that an adjustment in the amount of $9.5 million relating to the increased coal ash moving expenses at its Asheville plant associated with a contract involving Waste Management, Inc., should be made.

and that, if "the Commission [were] to adopt it, the Commission very well could be found to be acting arbitrarily and capriciously, and subject itself to reversal."

In addition, the Commission determined that the Public Staff's argument that the Commission had the authority to institute its equitable sharing proposal rested upon an "overly broad" view of the Commission's authority that lacked support in the applicable legal authorities. In rejecting the Public Staff's argument that the applicable legal support for its equitable sharing proposal could be found in this Court's decision in *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 476–81, 385 S.E.2d 451, 458–61 (1989) (*Thornburg I*) (affirming a Commission decision that nuclear plant abandonment costs constituted a utility "expense" for purposes of N.C.G.S. § 62-133(b)(3) and N.C.G.S. § 133(c) and that a decision to allow the amortization of these abandonment costs without a return upon the unamortized balance was permitted by N.C.G.S. § 62-133(d)), the Commission noted that the present case involved " 'reasonable and prudent' and 'used and useful' expenditures by [Duke Energy Progress]" rather than " 'abandoned plant' or cancellation costs." Instead, the Commission relied upon this Court's decision in *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 484, 486, 385 S.E.2d 463, 464 (1989) (*Thornburg II*) (reversing a Commission decision providing for an equitable sharing between customers and shareholders of approximately $570 million in construction costs associated with a new unit even though some portion of the relevant costs had been incurred in connection with the construction of certain abandoned facilities), and determined that the adoption of the Public Staff's equitable sharing proposal would be "unfairly punitive."

The Commission concluded that its determination that the relevant coal ash disposal costs were "used and useful" and "prudent and reasonable" was consistent with its own earlier decision in Docket No. E-22, Sub 532, which addressed costs that had been incurred for the "identical purpose" and rested upon a determination that such costs were "used and useful." In rejecting the Public Staff's argument that Duke Energy Progress should have put the relevant costs into rate base rather than "cho[osing]" to defer these costs and attempt to have them amortized to rates, the Commission determined that Duke Energy Progress had treated these costs as "[w]orking [c]apital" and that "no party [had] taken the position that [this] inclusion . . . was inappropriate." Similarly, in rejecting the Attorney General's assertion that Duke Energy Progress had "failed to request in advance permission to create a deferred account," the Commission found that Duke Energy Progress "had no choice in the matter" in light of the applicable regulatory accounting rules, that "it is

not necessary that something be classified as 'plant' in order to be properly included in rate base," and that, instead, "the issue is the source of the funds," citing *Utilities Commission v. Virginia Electric & Power Co.*, 285 N.C. 398, 206 S.E.2d 283 (1974) (*VEPCO*). In view of the fact that the relevant funds had been provided by investors, the Commission held that the funds were "used and useful" even though they did not result in "plant in service," so that Duke Energy Progress was "entitled to earn a return on those funds over the period in which the costs are amortized." In addition, the Commission held that, even if the costs in question did not relate to "used and useful" property, "the Commission would nevertheless approve [Duke Energy Progress'] cost recovery proposal in all respects, and would exercise its discretion to achieve that result" pursuant to N.C.G.S. § 62-133(c) and N.C.G.S. § 62-133(d).

The Commission further determined that the "disallowance methodologies" proposed by the intervenors "fail[ed] to comply with the Commission's prudence framework," in which a utility's costs "are presumed reasonable and prudent unless challenged" and any prudence-related challenges "must (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) quantify the effects by calculating imprudently incurred costs," citing its prior decisions in Docket No. E-2, Sub 537 and E-2, Sub 333. According to the Commission, the proposed disallowances would be "unjust and unreasonable," with a decision to place the entire cost of coal ash disposal upon shareholders having the ultimate effect of harming ratepayers given the increased capital costs that would result from such an action. In the same vein, the Commission rejected the Sierra Club's contention that the coal ash disposal costs that Duke Energy Progress sought to have included in the cost of service resulted from unlawful discharges and had to be disallowed pursuant to N.C.G.S. § 62-133.13 (providing that a utility is not entitled to have "costs resulting from an unlawful discharge to the surface waters of the State from a coal combustion residuals surface impoundment" included in the cost of service used to establish the utility's rates) on the grounds that the relevant costs related to "compl[iance] with the federal CCR [R]ule and CAMA." The Commission also rejected intervenor-proposed disallowances related to expenditures incurred to meet CAMA deadlines on the grounds that "[t]he Commission is unable to recreate the past and place a price tag on remediation costs that might have been incurred in anticipation of environmental requirements."

On the other hand, after determining that it was "unable to conclude that [Duke Energy Progress] mismanagement [was] the primary cause of

CAMA," the Commission concluded that it was also "unable to conclude that [the] mismanagement to which [Duke Energy Progress] admitted in the federal criminal court proceeding was not at least a contributing factor" to the incurrence of the relevant coal ash disposal costs. In light of its "admi[ssion] to pervasive, system-wide shortcomings such as improper communication among those responsible for oversight of coal ash management," the Commission concluded that Duke Energy Progress "ha[d] placed its consumers at risk of inadequate or unreasonably expensive service" by failing to "assur[e] safe operation of its coal-burning facilities so as not to render the environment unsafe," "result[ing] in cost increases greater than those necessary to adequately maintain and operate its facilities." As a result, the Commission imposed a $30 million mismanagement penalty "arising primarily from [Duke Energy Progress'] admissions of mismanagement in the federal criminal case."

Commissioner ToNola D. Brown-Bland dissented from the Commission's decision "that [Duke Energy Progress] is entitled to full recovery of all coal ash expenses subject to a one-time mismanagement penalty." In Commissioner Brown-Bland's view, the imposition of a $30 million mismanagement penalty did "not reasonably assure that the rates fixed for [Duke Energy Progress'] service are 'fair to both the public utilit[y] and to the consumer,' and that the rate set by the Commission and to be received by [Duke Energy Progress] is just and reasonable," quoting N.C.G.S. § 62-133(a) and citing N.C.G.S. § 62-131(a). According to Commissioner Brown-Bland, when Duke Energy Progress was notified that NPDES permit violations and unlawful groundwater exceedances had occurred in 2007, Duke Energy Progress was placed "on notice" that its existing unlined coal ash basins "were not compliant with the environmental regulations of the day," that their contents were leaching into the groundwater, and that Duke Energy Progress "had available to it a number of specific alternative actions that represented reasonable optional pathways to coal ash management compliance." As a result, Commissioner Brown-Bland determined that Duke Energy Progress' decision to store additional coal ash in unlined basins after 2007 was imprudent and resulted in a situation in which the company was required to handle a considerable quantity of coal ash twice—once when it was initially stored in an unlined basin and again when it was excavated and moved to a lined facility. As a result, Commissioner Brown-Bland concluded that it was "not fair to burden the consumers with rates that include costs attributable to [Duke Energy Progress'] imprudence" in dewatering, excavating, and moving coal ash waste that had been produced in or after 2007 and that the prudently incurred portion of Duke Energy Progress' coal ash costs should be amortized over a seven year period, with the unamortized balance being included in rate base.

Similarly, Commissioner Daniel G. Clodfelter concurred, in part, and dissented, in part. After stating that that he "[could not] concur" in the Commission's decision to impose a $30 million mismanagement penalty while simultaneously allowing Duke Energy Progress to earn a return on the unamortized balance of the relevant coal ash disposal costs, Commissioner Clodfelter described the mismanagement penalty imposed by the Commission as lacking "any clear connection between the amount selected for the penalty . . . and any particular actions or omissions by [Duke Energy Progress]." Instead, Commissioner Clodfelter would have disallowed certain costs which had, in his view, been imprudently incurred at the Sutton, Asheville, H.V. Lee, and Cape Fear facilities and would have placed certain costs incurred at the Mayo and Roxboro facilities into a regulatory asset account for consideration in Duke Energy Progress' next general rate case. After noting that the record did not allow a determination as to "what portion, if any, of [Duke Energy Progress'] future coal ash disposal expenditures may require an increase in investor-provided working capital," Commissioner Clodfelter concluded that he could not "support the accrual of a rate of return on amounts recorded to the regulatory asset account for future coal ash disposal costs."

On 2 April 2018, the Public Staff filed a motion seeking clarification "with respect to whether the unamortized balance of deferred coal ash costs is 'entitled' to a return as a matter of law, or is 'eligible' for a return as a matter of Commission discretion." More specifically, the Public Staff sought clarification concerning: (1) the Commission's conclusion that Duke Energy Progress' coal ash compliance costs constituted investor-funded working capital for purposes of this Court's decision in *VEPCO*; (2) the Commission's conclusion that Duke Energy Progress was "entitled to earn a return on those funds over the period in which the costs are amortized"; and (3) the Commission's statement that "costs placed in an [Asset Retirement Obligation] account are eligible for deferral and amortization and for earning on the unamortized balance" and that, "even if the remediation costs are [Asset Retirement Obligation] expenditures, they are eligible for ratemaking treatment as though they are used and useful assets." On 17 April 2018, the Commission entered an order stating that:

> [The Public Staff's concern] is a misinterpretation of the Commission's order when viewed in the context of the entirety of the order. The *holding* of the order is that but for a management penalty, the Commission in its discretion would have allowed amortization of historical

> deferred [coal ash] costs over five years with full return on the unamortized balance, but to implement the penalty, the return is to be reduced by $30 million. Relying on this logic, the Commission could have imposed a different penalty that could have reduced the return further or eliminated it altogether. As such the holding belies the Public Staff's reading of the order to be that the deferred [coal ash] costs are to be included in rate base with a return to be paid as a matter of law. The holding is not based on a determination that [Duke Energy Progress] is authorized to earn a return on the deferred balance of the [coal ash] historical remediation costs as a matter of law. Consequently, even if use of the word "entitled" were precedent setting, in a legislative ratemaking order, which it is not . . . , as the holding is not dependent on the interpretation of the word as the Public Staff reads it, the Public Staff's concerns are misplaced. In the context of the order taken as a whole, the Commission does not use the word "entitled" in contradistinction with the word "eligible" as the Public Staff reads it, nor, as the Commission stated in its February 23, 2018 order, does the Commission find it necessary to resolve the dispute between [Duke Energy Progress] and the Public Staff as to whether the deferred [coal ash] costs at issue in this case "may" vs. "must" be added to rate base as a matter of law and earn a return. Such determination is not necessary in establishing rates in this case.[10]

b. Duke Energy Carolinas

On 22 June 2018, the Commission entered an order allowing Duke Energy Carolinas to include $545.7 million, less a $70 million mismanagement penalty, in the cost of service used to establish its North Carolina retail rates; allowing Duke Energy Carolinas to recover a return on the unamortized balance of the deferred coal ash costs; and increasing its residential Basic Facilities Charge from $11.80 to $14.00 per month. In its order, the Commission found as fact that:

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10. Commissioner Clodfelter dissented from the Commission's clarification order on the grounds that the portions of the rate order to which the Public Staff's motion was directed were the same portions of the order with which he expressed disagreement in his partial dissent. For that reason, Commissioner Clodfelter would have allowed the Public Staff's clarification motion.

36. [Duke Energy Carolinas] shall increase the monthly [Basic Facilities Charge] for the residential rate class (Schedules RS, RT, RE, ES, and ESA) to $14.00. The increase in the [Basic Facilities Charge] for the residential rate class schedules is just and reasonable. The [Basic Facilities Charge] for other rate schedules shall be left unchanged from the current rates.

. . . .

66. [Duke Energy Carolinas] expects to incur substantial costs related to [coal ash] in future years. It is just and reasonable to allow deferral of those costs, with a return at the net-of-tax overall cost of capital approved in this Order during the deferral period. Ratemaking treatment of such costs will be addressed in future rate cases.

. . . .

69. Since its last rate case, [Duke Energy Carolinas] has become subject to new legal requirements relating to its management of coal ash. These new legal requirements mandate the closure of the coal ash basins at all of [Duke Energy Carolinas'] coal-fired power plants. Since its last rate case, [Duke Energy Carolinas] has incurred significant costs to comply with these new legal requirements.

70. On a North Carolina retail jurisdiction basis, the actual coal ash basin closure costs [Duke Energy Carolinas] has incurred during the period from January 1, 2015, through December 31, 2017, amount to $545.7 million. [Duke Energy Carolinas] is eligible to recover these coal ash basin closure costs. The actual coal ash basin costs incurred by [Duke Energy Carolinas] are known and measurable, reasonable and prudent, and, to the extent capital in nature, used and useful in the provision of service to the Company's customers. Further, [Duke Energy Carolinas] proposes that these costs be amortized over a five-year period, and that it earn a return on the unamortized balance. Under normal circumstances, the five-year amortization period proposed by [Duke Energy Carolinas] is appropriate and reasonable, and absent any management penalty, should be approved, and under normal circumstances the Commission within

> its discretion would allow [Duke Energy Carolinas] to earn a return on the unamortized balance.
>
> 71. Under the present facts, a management penalty in the approximate sum of $70 million is appropriate with respect to [Duke Energy Carolinas'] [coal ash] remediation expenses accounted for in the earlier established Asset Retirement Obligation . . . with respect to costs incurred through the end of the test year, as adjusted. Through its use of available ratemaking mechanisms, the Commission is effectively implementing an estimated $70 million penalty by amortizing the $545.7 million over five years with a return on the unamortized balance and then reducing the resulting annual revenue requirement by $14 million for each of the five years.
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> 72. [Duke Energy Carolinas] further proposes that it recover on an ongoing basis $201 million in annual coal ash basin closure costs, subject to true-up in future rate cases. The amount sought by [Duke Energy Carolinas] is based upon its actual test year (2016) spend. [Duke Energy Carolinas] proposal to recover these ongoing costs as a portion of the rates approved in this [o]rder is not appropriate. Rather, it is appropriate to allow [Duke Energy Carolinas] to record its January 1, 2018, and future [coal ash] costs in a deferral account until its next general rate case.

In support of these findings, the Commission noted that an increase in the residential Basic Facilities Charge from $11.80 to $14.00 would be "just and reasonable and [would] strike[ ] the appropriate balance [by] providing rates that more clearly reflect actual cost causation" given that "[t]he increase . . . minimizes subsidization and provides more appropriate price signals to customers in the rate class, while also moderating the impact of such increase on low-income customers to the extent that they are high-usage customers such as those residing in poorly insulated manufactured homes." The Commission further stated that a failure to "properly recover customer-related cost via a fixed monthly charge provides an inappropriate price signal to customers and fails to adequately reflect cost causation" and that "shifting customer-related cost to kWh energy rate further exacerbates these concerns." The Commission determined that Duke Energy Carolinas' proposal to increase the residential Basic Facilities Charge to $17.79, which reflects approximately fifty percent of the difference between the current rate and the purported

$23.78 customer-related cost identified in Duke Energy Carolinas' cost of service study lacked sufficient support in the utility's cost-of-service study and that, while the evidence "would support a higher charge" than $14.00 per month, "cost causation analyses are inherently subjective," so that "selecting a charge within the range advocated [by the parties] based on differing cost causation models [would be] appropriate." After acknowledging the effect that this increase would have upon customers, "especially low-income households," the Commission noted that Duke Energy Carolinas used "other means to address the financial needs of low-income customers which are more effective than biasing the rate design." The Commission left the basic facilities charges applicable to non-residential rate schedules "unchanged" on the grounds that non-residential rate schedules "are more complex" and "allow[ ] for the minimization of cost-subsidization issues" while "ensuring greater consistency with cost causation and allocation principles" and that "a greater amount of fixed costs in the residential rate schedule, as opposed to non-residential rate schedules, presently are recovered through variable energy rates, which is inconsistent with basic cost allocation principles that fixed costs should be recovered through fixed charges, whereas variable costs should be recovered through variable charges."

The Commission further noted that Duke Energy Carolina's request to defer the costs associated with the remediation of conditions at the existing unlined coal ash basins "was generally unopposed" and had the support of the Public Staff. The Commission also concluded "that deferral in a regulatory asset for previously incurred coal ash environmental costs [was] consistent with the Commission's criteria for deferrals and [was] reasonable" in light of the fact that the costs "were extraordinary when incurred," "were not being recovered in rates in effect at the time incurred," and would be difficult to quantify until a later time, when the costs were better understood.

In the Commission's view, N.C.G.S. § 62-133 "requires the Commission to determine the utility's rate base," which is defined as "the reasonable original cost of the public utility's property used and useful . . . less that portion of the cost . . . recovered by depreciation expense," "its reasonable operating expenses," "and a fair rate of return on the [utility's] capital investment" before multiplying the rate base by the rate of return and adding the operating expenses to produce the utility's "revenue requirement," quoting *Thornburg I*, 325 N.C. at 467 n.2, 385 S.E.2d at 453. The Commission held that, once a utility has demonstrated that "the costs it seeks to recover are (1) 'known and measurable'; (2) 'reasonable and prudent'; and (3) where included in rate base 'used and useful' in

the provision of service to customers," quoting Jonathan A. Lesser & Leonardo R. Giacchino, *Fundamentals of Utility Regulation* 39, 41–43 (Pub. Utils. Reports, Inc., ed., 2007) (Lesser & Giacchino), "the utility should have the opportunity to recover the costs so incurred" in order to avoid "an unconstitutional taking."

The Commission stated that the "seminal treatment of 'reasonable and prudent' costs" was set forth in its 1988 order in Docket Nos. E-2, Sub 537 and E-2, Sub 333, in which it determined that "the standard for judging prudence is 'whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at the time," with this determination to "be based on a contemporaneous view of the action or decision under question," so that "[p]erfection . . . [was] not [ ] required," and with "[h]indsight analysis—the judging of events based on subsequent developments— . . . not [being] permitted." In the Commission's view, "[a] decision cannot be imprudent if it represents the only feasible way to accomplish a necessary goal," so that, "if expenditures . . . support and provide service to customers, the costs are 'used and useful,' " citing our decisions in *Thornburg II* and *State ex rel. Utilities Commission v. Carolina Water Service*, 335 N.C. 493, 439 S.E.2d 127 (1994) (*Carolina Water*).

In rejecting the Attorney General's contention that Duke Energy Carolinas "bore the burden of quantifying the disallowances [that] the [Attorney General] deems appropriate" given the utility's alleged "fail[ure] to act appropriately before 2015," the Commission stated that a utility need not "disprove [i]ntervenor allegations unsupported by evidence" and that, on the contrary, "the [Attorney General] must quantify what the costs of the actions not taken should have been." The Commission further concluded that "most of the costs being challenged are questioned on the theory that [Duke Energy Carolinas] is in breach of a standard classified as a 'duty to exercise due care,' " a standard that is more appropriately utilized in the tort context and which environmental regulators and courts of general jurisdiction are better positioned than the Commission to apply. The standard typically employed by the Commission in resolving cost recovery challenges "has elements qualitatively and quantitatively distinct and more rigorous than a tort standard of due care," with the "[t]he expert witnesses sponsored [by the intervenors] in this case" having "failed to show what [Duke Energy Carolinas] should have done differently," "when it should have acted," or "what the cost of such alternative conduct should have been." In the Commission's view, "[a]ttempts to identify years-old hypothetical past

costs" would be a "fruitless endeavor" that created an "insurmountable obstacle" to acceptance of the intervenors' positions, particularly given the lack of "statutory or regulatory standards and guidelines to follow" in determining which actions should have been taken. In view of the fact that "[i]ntervenors may not rest merely on arguments and theories" and "must adduce actual evidence challenging some aspect of [Duke Energy Carolinas'] cost recovery case," the Commission determined that the intervenors had failed to successfully challenge the reasonableness of Duke's coal ash costs.

In addition, the Commission concluded that Duke Energy Carolinas had "met its burden—both the *prima facie* burden of production and the ultimate burden of persuasion"—of demonstrating that its coal ash costs should be included in the cost of service for ratemaking purposes and that it should be allowed to earn a return upon these costs. In reaching this conclusion, the Commission placed substantial reliance upon the testimony of Duke Energy Carolinas witness Jon Kerin, who asserted that Duke Energy Carolinas' historic coal ash management practices "generally comported with industry practices and then-applicable regulations." After noting that Mr. Wittliff had admitted that the costs that Duke Energy Carolinas had incurred in complying with the CCR Rule were prudent, the Commission rejected the Attorney General's contention that Duke Energy Carolinas should not be permitted to include the costs associated with CAMA compliance—a statute which, in the Attorney General's view, required "a more aggressive coal ash basin closure schedule for certain of [Duke Energy Carolinas'] basins than would have been set under the CCR Rule alone"—given that Mr. Wittliff "did not identify any specific costs that could have been lower or should be disallowed" and did not "know quantitatively" which costs would have eventually been required by the CCR Rule and CAMA in the absence of mismanagement "because [he] didn't do that kind of analysis." Furthermore, the Commission determined that there was "no evidence" that Duke Energy Carolinas' mismanagement was the "direct cause of CAMA"; that, even if it was, "such direct causation alone is not sufficient legal basis for disallowing otherwise recoverable costs" given that CAMA "operates within the context of [N.C.G.S. §] 62-133"; and that, "had [the General Assembly] intended to disavow the routine cost recovery standard, it can be expected that the legislature would have had to do so explicitly."

The Commission rejected the Public Staff's equitable sharing proposal, which was similar to the proposal that it had advocated in the Duke Energy Progress case with the exception of the use of a twenty-seven,

rather than a twenty-six year amortization period, for essentially the same reasons that it had cited in rejecting the Public Staff's equitable sharing proposal in that case. According to the Commission, the record contained "[n]o persuasive evidence" that any of the allegedly imprudent actions or inactions "caused discrete expenditures" by Duke Energy Carolinas and that "identification of an imprudent action or inaction is not by itself sufficient; rather, there must be a demonstration of the economic impact."

The Commission further noted that, because the relevant coal ash costs had been covered by investor-supplied, rather than ratepayer-supplied, funds, such funds are, "under principles of equity, law and fairness," "eligible for a return" because to hold otherwise would "deprive[ ]" "the investor supplying these funds . . . of the time value of money," "inadequately compensate [the investor] resulting in an increased risk, and "ultimately increase[e] [Duke Energy Carolinas'] cost of capital." The Commission held that the extent to which certain costs would, "had they not been accounted for in an [Asset Retirement Obligation] and deferred," have "been operating or other expenses" did not matter given that, once they had been capitalized and deferred, those costs "los[t] for ratemaking purposes the attributes of . . . 'expenses' deemed recoverable through [rates] then in effect that do not qualify for a return." Moreover, the Commission further determined that many of the relevant costs were, "[u]nder any analysis, . . . not expenses but capital items"; that, "[h]ad [Duke Energy Carolinas] not sought establishment of an [Asset Retirement Obligation] and deferral, it is incorrect that they would not have been added" to rate base; and that the Public Staff was "unable" "to support its position that deferred [Asset Retirement Obligation] costs are 'expenses.' " The Commission stated that it was "unnecessary to determine" whether the costs in question would have been eligible for inclusion in rate base in light of ordinary ratemaking principles and concluded that, "[i]n its discretion, as expressly authorized by [N.C.G.S. §] 62-133(d)," it had the authority to allow Duke to earn a return on the unamortized balance of its deferred coal ash costs.

As it had in the related Duke Energy Progress case, the Commission determined that "both GAAP and FERC accounting guidance require the recognition of a liability (the [Asset Retirement Obligation]) upon the requisite triggering event—the legal obligation to retire the [Duke Energy Carolina's] coal ash basins"—and that "[r]ecognition of the liability carries with it recognition of a corresponding asset—the capitalized cost of settling the liability, which under both GAAP and FERC rules is considered part of the property, plant and equipment for the assets that

must be retired." In addition, the Commission concluded, in reliance upon this Court's decision in *VEPCO*, that the costs in question were properly included in rate base as working capital. In view of the fact that the relevant costs were "intended to provide utility service in the present or in the future through achieving their intended purpose," which was "environmental compliance," "the retirement of the ash impoundments," and "the final storage location of the residuals from the generation of electricity," the Commission concluded that the costs associated with the coal ash basins at issue in this case, including those that will close as a result of the CCR Rule and CAMA (with the exception of the high priority sites), "will remain," which means that "they will remain used and useful, because they will still store coal ash, a byproduct of electricity generation."

The Commission disagreed with the Public Staff's determination that $2.1 million in legal expenses associated with the defense of coal ash-related environmental litigation and $1.5 million in groundwater extraction and treatment costs associated with the Belews Creek facility should be disallowed based upon the same reasoning that led the Commission to reach a similar conclusion in the Duke Energy Progress case. The Commission rejected the Public Staff's proposal that the Commission disallow $98 million in compliance costs which the Public Staff contended exceeded the cost of other reasonable alternatives on the grounds that the testimony of the Public Staff witnesses in support of these proposed disallowances "missed or overlooked pertinent facts and real world conditions," "lack[ed] . . . credibility," and failed to "effectively [ ] support their positions."

The Commission determined that "[t]he vast majority of these costs would have been incurred irrespective of management inefficiency in order to comply with [the CCR Rule] requirements" and "would have been required irrespective of the harms that constitute other alleged mismanagement." The Commission noted that "[Duke Energy Carolinas] undertook steps toward CCR remediation and incurred costs in anticipation of impending closure" while hesitating "to spend substantial sums until the requirements became clearer" and that, "[h]ad [Duke Energy Carolinas] acted in compliance with assertions that it act more aggressively sooner, it would have cost its consumers" more than the costs that resulted from the course of conduct in which it actually engaged. For that reason, the Commission concluded that, "from a ratemaking perspective," "the question of when the remediation should have taken place . . . is not determinative of whether the costs of the remediation should be recovered through rates and to what extent." In view of the

fact that "establishing a past cost in this case would be a near impossibility," the Commission declined to penalize Duke Energy Carolinas for its decision to wait until the adoption of the CCR Rule before undertaking the coal ash basis closure process, particularly given that "no attempt ha[d] been made by any party" to determine what the costs would have been if remediation had been undertaken at an earlier time.

Finally, in addressing Duke Energy Carolinas' alleged violations of the 2L Rules, the Commission determined that DEQ "does not agree that the existence of exceedances without evidence that they are caused by coal ash contamination pose[s] a risk to environment or human health so as to require immediate remediation." For that reason, the Commission concluded that Duke Energy Carolinas' "failure to take the costly actions" suggested by the intervenors "falls well short of mismanagement." On the other hand, the Commission determined that a mismanagement penalty in the amount of $70 million was appropriate in this case for reasons similar to those that underlay the imposition of a similar penalty in the Duke Energy Progress proceeding.

Once again, Commissioners Brown-Bland and Clodfelter dissented, in part, from the Commission's decision. As an initial matter, Commissioner Clodfelter stated that he would have disallowed "a substantial amount of [coal ash] costs" in determining Duke Energy Carolinas' cost of service for North Carolina retail ratemaking purposes on the grounds that they had either been imprudently incurred or had not, as the result of the utility's negligence, been included in the cost of service in prior general rate cases. Secondly, Commissioner Clodfelter would have refrained from allowing Duke Energy Carolinas to earn a return on the unamortized balance of the deferred coal ash costs on the grounds that the relevant statutory provisions did not authorize the allowance of such a return and that "the record presented in this case does not and cannot support allowance of a return as a matter of Commission discretion." Finally, Commissioner Clodfelter opposed the proposed increase in the residential Basic Facilities Charge on the grounds that there was "no evidence in the record to support any such increase" and that the increase "unfairly discriminates among different classes of customers."

Similarly, Commissioner Brown-Bland expressed opposition to the approval of the increased residential Basic Facilities Charge. Aside from her belief that the record did not support the approved increase and that this increase was "unfairly and discriminatorily upon only the residential class of customers," Commissioner Brown-Bland noted that the Commission had arbitrarily chosen "a random number between the

two ends offered" by the parties and that the approved residential Basic Facilities Charge "just happen[ed] to be the same as the fixed residential [Basic Facilities Charge] adopted in" the Duke Energy Progress order despite the fact that the two utilities had different cost structures and the fact that Duke Energy Progress' cost of service exceeded that of Duke Energy Carolinas. Commissioner Brown-Bland echoed Commissioner Clodfelter's concerns regarding the Commission's "fail[ure] to engage in the exercise of determining waste coal ash removal costs directly (much less indirectly) attributable to instances of imprudence on [Duke Energy Carolinas'] part," stating that the record "permit[ted] identification and disallowance of specific discrete costs and/or cost increases caused by identifiable and known acts of imprudence" and that the "better course of action" would have been for the Commission to undertake the difficult task of determining which expenses were and were not prudently incurred instead of "avoid[ing] the exercise" altogether. According to Commissioner Brown-Bland, the Commission's approach resulted in an "arbitrary monetary amount without rational basis" given that "a one-time management penalty does not provide an adequate substitute for the exercise of the Commission's" statutory ratemaking authority.

3. Appellate Proceedings

The Attorney General and the Sierra Club noted an appeal to this Court from the Commission's orders in both cases, while the Justice Center, et. al., and the Sustainable Energy Association (collectively, the environmental intervenors) noted an appeal from the Commission's order in the Duke Energy Carolinas proceeding. The Public Staff noted a cross-appeal to this Court from both of the Commission's orders. At the request of all parties, the two cases were consolidated for purposes of briefing and argument by order of this Court.

II. Substantive Legal Analysis

A. Standard of Review

In an appeal taken from an order entered by the Commission, "the rates fixed or any . . . order made by the Commission under the provisions of [Chapter 62] shall be *prima facie* just and reasonable." N.C.G.S. § 62-94(e). A reviewing court is limited to "decid[ing] all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b). The reviewing court "may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have

been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) [i]n violation of constitutional provisions," "(2) [i]n excess of statutory authority or jurisdiction of the Commission," "(3) [m]ade upon unlawful proceedings," "(4) [a]ffected by other errors of law," "(5) [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) [a]rbitrary or capricious," *id.*, with "due account [to] be taken of the rule of prejudicial error." N.C.G.S. § 62-94(c).

The Commission is responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony, *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 575, 584, 232 S.E.2d 177, 182 (1977), with the Commission's decision being entitled to great deference given that its members possess an expertise in utility ratemaking that makes them uniquely qualified to decide the issues that are presented for their consideration. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S. Ct. 2856, 2869, 771 L. Ed. 2d 443, 461 (1983) (stating that "[e]xpert discretion is the lifeblood of the administrative process"). "Assuming adequate findings of fact, supported by competent, substantial evidence," "[t]he Commission's determination, reached pursuant to the mandate of [N.C.G.S. §] 62-133 and to the statutory procedural requirements, may not be reversed" even if "we would have reached a different conclusion upon the evidence." *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 266–67, 177 S.E.2d 405, 412–13 (1970). The Commission's conclusions of law, on the other hand, are reviewed *de novo*. *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 615, 805 S.E.2d 712, 714 (2017), *aff'd per curiam*, 371 N.C. 109, 812 S.E.2d 804 (2018).

B. Coal Ash Costs

The briefs submitted by the parties debate: (1) whether the coal ash costs at issue in these proceedings are properly classified as property used and useful or as operating expenses; (2) whether these costs were reasonably incurred; and (3) whether the Commission's decision to award a return on the unamortized balance of the costs in both of these cases was lawful. We will address each of these issues turn.

1. Sufficiency of the Commission's Factual Findings

[1] The Public Staff, the Attorney General, the Sierra Club, and the utilities have advanced a number of arguments for the purpose of challenging the lawfulness of the Commission's decisions regarding the amount of coal ash costs that should be included in the cost of service used to

establish the utilities' North Carolina retail rates. However, before we address the parties' substantive arguments, we must address the validity of the Public Staff's contention that, in light of its failure to properly classify the costs at issue in these cases, the Commission's orders fail to contain sufficient findings of fact to satisfy the requirements of N.C.G.S. § 62-79(a) (providing that the Commission's orders must "be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings" and "shall include" "[f]indings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record").

In its brief, the Public Staff contends that the Commission made "inconsistent," "contradictory," and "mutually exclusive" conclusions concerning whether the utilities' coal ash-related costs constituted property "used and useful" upon which a return could be earned in accordance with N.C.G.S. § 62-133(b) or deferred operating expenses upon which, in the Public Staff's view, a return could be earned in the Commission's discretion pursuant to N.C.G.S. § 62-133(d). According to the Public Staff, the Commission's inconsistent reasoning "makes it impossible to know the true basis for the decision to deny equitable sharing and allow a return on coal ash costs." In addition, the Public Staff contends that the Commission erroneously determined in the Duke Energy Progress order that, even without a determination of the nature of the relevant coal ash costs, a return could be earned upon them as a matter of law or, in the alternative, in the exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d) given that this decision did not constitute a proper "exercise of discretion" and was nothing more than "a mechanism to circumvent judicial review." Moreover, the Public Staff argues that the Commission contradicted itself in the clarification order that it entered in the Duke Energy Progress case, in which it stated that its decision to allow a return upon the unamortized balance of the relevant coal ash costs rested upon an exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d), and had committed a similar error in the Duke Energy Carolinas order by deciding to allow a return upon the unamortized balance of the deferred coal ash costs on the grounds that, "to the extent" that the costs in question constituted capital expenditures, they amounted to property that was "used and useful" for purposes of N.C.G.S. § 62-133(b)(1) and that it had the authority to authorize the utility to earn a return upon the remaining coal ash-related costs pursuant to N.C.G.S. § 62-133(d). According to the Public Staff, treating the unamortized balance of the deferred coal ash costs as both property used and useful and as reasonable operating expenses constitutes "a direct violation of the ratemaking process," quoting *State ex rel.*

Utilities Commission v. Public Staff, 333 N.C. 195, 202, 424 S.E.2d 133, 137 (1993) (*Carolina Trace*). In response, the utilities argue that "this distinction is essentially academic" and "is not material to the outcome of this appeal."

The language in which the traditional ratemaking formula set forth in N.C.G.S. § 62-133(b) is couched has led the parties to raise a number of issues concerning how the coal ash costs at issue in these cases should be classified for ratemaking purposes. The Commission resolved the classification issue in the Duke Energy Progress case by deciding, in its discretion, that it had the authority to allow the utility to earn a return upon the unamortized balance of the relevant coal ash costs pursuant to either N.C.G.S. § 62-133(b)(1) or N.C.G.S. § 62-133(d) and by deciding in the Duke Energy Carolinas case that, regardless of whether the relevant coal ash costs constituted property "used and useful or operating" expenses, it had the authority to allow the company to earn a return upon the unamortized balance of those costs pursuant to N.C.G.S. § 62-133(d). In view of the fact that "[t]he purpose of the findings required by [N.C.G.S.] § 62-79(a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings," *State ex rel. Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984), and the fact that we are able discern the nature and extent of the Commission's decision from its findings and conclusion, we hold that the Commission's findings in both orders are sufficiently specific to satisfy the requirements of N.C.G.S. § 62-79(a).

2. Reasonableness of the Costs

[2] The Attorney General[11] argues that "utilities have the burden to show that their costs were reasonably incurred," citing N.C.G.S. §§ 62-75 and 134(c), and asserts that, once another party has offered "affirmative evidence . . . that challenges the reasonableness of [the utility's] expenses," quoting *Conservation Council*, 312 N.C. at 64, 320 S.E.2d at 683, "the utility must prove that its costs were reasonably incurred." As a precondition for the inclusion of any particular cost in the regulated cost of service, the Attorney General contends that the utility must show that the costs in question are "known and measurable" and "reasonable and prudent," citing N.C.G.S. § 62-133(b)(1) and *Thornburg I*.

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11. The Sierra Club "adopts and incorporates by reference" the arguments advanced by the Attorney General relevant to the reasonableness of the utilities' coal ash-related costs, as will be discussed in more detail below.

In the Attorney General's view, the Commission erred by concluding that the intervenors had failed to adequately challenge the reasonableness of the costs at issue in these cases. According to the Attorney General, the intervenors presented affirmative evidence demonstrating that the utilities had, for decades, unreasonably placed coal ash in unlined basins, resulting in "nearly 6000 test results that showed violations of 2L [R]ules." The Attorney General argues that such violations "could have been prevented" given that the utilities "[have known] for years how to stop [their] ash from contaminating groundwater: putting the ash in *lined* landfills, as opposed to unlined ponds," and that, by failing to act upon the basis of such "insights," the utilities had incurred costs which "could have [been] avoided," such as the cost of excavating coal ash that "could have already [been] put in lined landfills years earlier" and transporting such coal ash to off-site landfills.

In addition, the Attorney General asserts that the record contains evidence tending to show that the utilities had failed to manage their unlined coal ash basins in a reasonable manner so as to "eventually result[ ] in the spill at [the] Dan River plant" and the enactment of CAMA, which was introduced a mere three months after the Dan River spill and "singles out" the coal ash basins associated with the utilities' coal-fired generating facilities for accelerated closure. According to the Attorney General, the enactment of "CAMA caused [the utilities] to incur costs that [they] would not otherwise have incurred, such as the cost of complying with CAMA's basin-closure deadlines." The Attorney General asserts that the Commission *agreed* that Duke Energy Carolinas' mismanagement of the coal ash basins at its Dan River plant contributed to the enactment of CAMA before stating that it was unable to "precisely 'identify and quantify' how many of [the utilities'] costs were unreasonable," with this "inconclusiveness mean[ing] that [the utilities] did not meet [their] burden to show that [the] costs were reasonable," citing *State ex rel. Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 389, 206 S.E.2d 269, 277–78 (1974) (*Duke Power Co. I*).

The Attorney General further contends that, although the evidence elicited by the intervenors was "more than enough to require [the utilities] to prove that [they] incurred [their] coal ash costs reasonably," the Commission erroneously required the intervenors to "identify specific and discrete instances of imprudence"; "identify prudent alternatives to the [utilities'] actions"; and "quantify the precise economic effect of the [utilities'] imprudence" before determining that the intervenors had failed to satisfy this standard. In spite of the fact that the standard upon which the Commission relied "flowed from this Court's decision" in

Thornburg II, the Attorney General asserts that the costs in question in that case had been developed by an independent auditor assigned to scrutinize the challenged utility costs with the agreement of the utility and the Public Staff and had not been used to determine whether other intervenors had adduced sufficient evidence to require the utility to affirmatively establish the reasonableness of the costs that it sought to have included in the regulated cost of service.

The Attorney General argues that the Commission committed various errors in determining that the utilities had managed their coal ash basins in a reasonable manner. The Attorney General cites *Glendale Water*, 317 N.C. at 40–41, 343 S.E.2d at 907–08, for the proposition that "breaking environmental laws is unreasonable," arguing that the Commission had improperly failed to acknowledge that the utilities had committed thousands of documented "violations of the 2L [R]ules" based upon an erroneous determination that an exceedance of limitations specified in the 2L Rules does "not [constitute] proof of illegality" and that the "2L [R]ules are violated only when a polluter fails to clean up contaminated groundwater." In the Attorney General's view, an exceedance for the purpose of the 2L Rules, which he describes as "strict liability regulations," citing *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 365 (M.D.N.C. 1997), results in a violation of 15A N.C. Admin. Code 2L.0103(d) (stating that"[n]o person shall conduct . . . any activity which causes the concentration of any substance" in groundwater to exceed the limitations set out in the 2L Rules).

The Attorney General asserts that the Commission's conclusion that it "lack[ed] authority to assess independently whether a utility has acted unreasonably by breaking the law" given that the utilities had neither admitted to violating nor had been found in violation of the 2L Rules constituted an "erroneous[ ] abdicat[ion] [of] its dut[ies]" pursuant to N.C.G.S. §§ 62-133(b)(3), (c), citing *State ex rel. Utilities Commission v. N.C. Power*, 338 N.C. 412, 419–22, 450 S.E.2d 896, 900–02 (1994); *Carolina Water*, 335 N.C. at 503, 439 S.E.2d at 132; *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 464, 232 S.E.2d 184, 191–92 (1977). According to the Attorney General, the only reason that the utilities were not found to have violated the 2L Rules was the enactment of CAMA, which resulted from the utilities' mismanagement of their coal ash basins and obviated the necessity for the environmental regulators to determine whether violations had occurred as long as the utilities complied with CAMA and the applicable implementing regulations.

In the Attorney General's view, the mismanagement penalties imposed upon the utilities were not adequate "substitute[s]" for a

disallowance of challenged coal ash costs given that the Commission's authority to sanction a utility for mismanagement "is distinct from the Commission's duty under [N.C.G.S. §] 62-133(b)(3) to protect consumers by disallowing costs that are not reasonable." On the contrary, the Attorney General argues that "a utility's misconduct can serve as a basis *both* for penalizing the utility *and* for separately reducing rates on other statutory grounds," citing *State ex rel. Utilities Commission v. General Telephone Co.*, 285 N.C. 671, 684, 208 S.E.2d 681, 698 (1974).[12]

Similarly, the Public Staff argues that the Commission failed to adequately consider certain environmental violations in determining the reasonableness and prudence of the utilities' costs for North Carolina retail ratemaking purposes. After referencing the disallowances that it had proposed relating to groundwater extraction and treatment costs at the Sutton and Belews Creek facilities, the Public Staff argues that the Commission erred by failing to adequately consider the record evidence concerning these and other environmental violations and by failing to make findings and conclusions relating to that evidence in violation of N.C.G.S. § 62-79(a)(1). More specifically, the Public Staff contends that the record contained ample evidence that the utilities had committed environmental violations, with that evidence including: (1) the testimony of certain Public Staff witnesses that the costs to remediate off-site groundwater contamination at the Sutton and Belews Creek facilities would not have been incurred "*but for* the environmental violations"; (2) the text of a settlement agreement between DEQ and the utilities in which the latter agreed to remediate "offsite groundwater impacts" at the Sutton facility "consistent with 15A [N.C. Admin. Code §] 2L.106"; (3) groundwater monitoring data provided by Duke Energy Progress; (4) testimony by Mr. Wells and Duke Energy Carolinas witness Julius A. Wright that certain extraction and treatment costs were the direct result of environmental violations; (5) a Notice of Violation issued to Duke Energy Progress by DEQ asserting that the utility had committed environmental violations; (6) a DEQ press release announcing that Duke Energy Progress was being held accountable for coal ash-related groundwater pollution by means of a settlement agreement; and (7) the text of the Joint Factual Statement signed by Duke Energy Progress in the federal criminal case "acknowledg[ing]" certain environmental impacts of the Sutton facility on a nearby community. According to the Public Staff, the Commission failed to make the required findings

12. The Attorney General also argues that the Commission's mismanagement penalties against both utilities were "illusory" given that they "simply reduced a return that [the utilities] never should have received in the first place."

and conclusions concerning the extent to which environmental violations had occurred on the grounds that such findings would be inappropriate "in the absence of a guilty finding against the [utilities] or an admission of guilt by the [utilities]," with the Commission's decision to "simply defer[ ] to another state agency on a matter that relates to an issue properly before the Commission," citing *Carolina Trace* and *State ex rel. Utilities Commission v. Cooper*, 366 N.C. 484, 489–91, 494–95, 739 S.E.2d 541, 545–48 (2013) (*Cooper I*), constituting a failure to comply with the relevant ratemaking statutes.

The Public Staff contends that the Commission also erred by concluding that CAMA would have required groundwater extraction and treatment at the Sutton and Belews Creek facilities regardless of the extent to which environmental violations had actually occurred at those locations. In the Public Staff's view, exceedances of the limitations set out in the 2L Rules become violations pursuant to 15A N.C. Admin. Code § 02L.0106 only if their existence was the fault of the utility, with the utility only being required to perform "corrective action" or "remediation" in the event that the exceedance constitutes a violation. As a result, the Public Staff contends that, to the extent that the utilities were required to extract and treat groundwater that was contaminated as the result of an exceedance, those costs would not have otherwise been required pursuant to CAMA and should not be recouped in rates.

In response, the utilities argue that the correct legal standard for purposes of determining the reasonableness and prudence of costs pursuant to N.C.G.S. § 62-133(b) is the one that the Commission articulated in its 1988 order in Docket Nos. E-2, Subs 333 and 537, and that this Court upheld in *Thornburg II*, which focuses upon "whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at the time." In addition, the utilities assert that, "[e]ven if there is evidence in the record" that rebuts the presumption that the coal ash costs at issue in these cases had been reasonable and prudently incurred, they had elicited "substantial" and "compelling" evidence demonstrating that: (1) they "had managed [their respective] coal ash basins in the manner required by applicable regulations and consistent with industry standards prior to the promulgation of the CCR Rule and the enactment of CAMA"; (2) "the change in law wrought by the CCR Rule and CAMA caused [them] to manage coal ash differently"; (3) "[they] prudently and at reasonable cost conformed [their] practices to the new legal requirements"; and (4) no intervenor had "specif[ied] how the Compan[ies] should have acted differently in managing [their]

coal ash, at which sites it should have taken those actions, and how much those actions would have cost the [utilities].” In view of the fact that the Commission found in their favor with respect to this issue, the utilities argue that the task of a reviewing court is “not to determine whether there is evidence to support a position the Commission did not adopt” but, instead, to determine “whether there is substantial evidence, in view of the entire record, to support the position that the Commission *did* adopt,” quoting *State ex rel. Utilities Commission v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987).

Similarly, the utilities argue that the Attorney General “did not and could not allege that [they] had committed any act of imprudence related to the actual costs being sought for recovery in the proceedings before the Commission given that Mr. Wittliff, an expert witness testifying on behalf of the Attorney General, had stated that the relevant costs had been reasonably and prudently incurred and had failed to “identify any specific costs that could have been lower or should be disallowed.” The utilities assert that the Attorney General's contention that they should have installed liners at their unlined coal ash basins before being required to do so “put [them] in an impossible position” given that any such action “could have been called into question” as “premature” prior to a complete understanding of the applicable environmental requirements. In addition, the utilities contend that the Attorney General's claim that they had the burden of disproving the appropriateness of the proposed cost disallowances constituted a “remarkable position” unsupported by any legal authority. Finally, the utilities dispute the validity of the Attorney General's contention that, since imprudent action on the part of Duke Energy Carolinas “caused the enactment of CAMA,” the cost of complying with CAMA should be excluded from the cost of service for ratemaking purposes on the grounds that “legislative intent can only be determined from the legislation itself,” citing *Electric Supply Co. of Durham v. Swain Electrical Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991), and *Styres v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590 (1971), and that no such intent can be discerned from an examination of the relevant statutory provisions.

According to the utilities, the Commission was free to reject the remaining prudence challenges raised by the Public Staff as well. For instance, the utilities contend that the Commission properly determined that a number of the Public Staff's disallowance recommendations were “infected by hindsight” and “unfeasible” and that a settlement agreement with an environmental regulator was not tantamount to an admission of liability. In the utilities' view, the Commission addressed the Public

Staff's evidence concerning alleged environmental violations without "erroneously abdicat[ing] its duty to assess whether illegal conduct is unreasonable and disallow costs related to illegal conduct." In fact, the utilities assert that the Commission "expressly rejected" the Public Staff's proposed disallowances after giving "careful[ ] consideration" to the relevant evidence.

In spite of the fact that North Carolina utilities have the burden of proving that the costs upon which their rates are based are reasonable and prudent, the reasonableness and prudence of those costs is "presumed" unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility. *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76, 286 S.E.2d 770, 779 (1982) (*Bent Creek*). In order to satisfy this burden of production, an intervenor must offer affirmative evidence tending to show that the expenses that the utility seeks to recover "are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated [utilities] for the same or similar goods or services." *Id.* at 76–77, 286 S.E.2d at 779. If a utility expense is "properly challenged," "[t]he Commission has the *obligation* to test the reasonableness of such expenses." *Id.* at 76, 286 S.E.2d at 779. In addition, "[i]f there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence." *Id.* at 75, 286 S.E.2d at 778.

The essential thrust of the intervenors' challenge to the validity of the Commission's determination with respect to the reasonableness of the utilities' coal ash costs varies from one party to the other. On the one hand, the Attorney General's "reasonableness" argument rests upon the existence of evidence tending to show that the utilities should have begun to eliminate the use of unlined coal ash basins earlier than they actually did. On the other hand, the Public Staff's "reasonableness" argument rests upon those portions of the record that depict specific instances of what the Public Staff contends to be environmental noncompliance. We do not find either of these arguments persuasive given the state of the record and the findings and conclusions contained in the Commission's orders.

In addressing the Attorney General's contention that the utilities unreasonably polluted groundwater in violation of the 2L Rules by placing coal ash in unlined basins, the Commission found the testimony of Mr. Wells to be instructive in the Duke Energy Progress order. Mr. Wells testified that the utilities' "ash basins were built between 1956 and 1985" and that, "[a]t that time, unlined basins were the primary technology for treating ash transport water throughout the country." In addition, Mr. Wells noted that "[i]nitially, ash basins were not regulated under federal or state solid waste laws"; that "[u]tility surface impoundments eventually became regulated as wastewater treatment units under the Clean Water Act after it was significantly reorganized and expanded in 1972"; and that DEQ's predecessor promulgated the 2L Rules in 1984. According to Mr. Wells, "there was no obligation in the 2L [R]ules to *monitor* groundwater quality," with those rules only imposing an obligation "to take corrective action once exceedances had been identified." As a result, according to Mr. Wells, Duke Energy Progress "was under no universal obligation to monitor for groundwater impacts" associated with coal ash basins pursuant to the 2L Rules. Mr. Wells testified that, in the mid-2000s, Duke Energy Progress "began more comprehensively sampling groundwater resulting in the identification of more exceedances" while DEQ "began systematically adding groundwater to NPDES permits as they were reissued or modified" starting around 2008. Based upon this and similar evidence, the Commission rejected the intervenors' assertions that the utilities should have begun the coal ash remediation process prior to the adoption of the CCR Rule and the enactment of CAMA, a decision that was well within the scope of its statutory authority in light of the record evidence.

Similarly, in rejecting the Attorney General's argument that Duke Energy Progress had failed to satisfy evolving industry standards and should have done more than merely comply with the environmental regulations as they existed at the time, the Commission noted that Mr. Wittliff, who presented testimony on behalf of the Attorney General, had testified that "industry standard is compliance." Although Mr. Wittliff admitted that "there were a number of [utilities] that were doing exactly what [Duke Energy Progress] did," he also stated that "it was clear in the '80s that the trend was towards lined ponds" and that, by 1988, forty percent of coal ash basins had been lined even though that approach was not "a cheap solution" and could "be fairly pricy." Upon being pressed to identify "any other ways that [Duke Energy Progress] did not comply with industry standards," Mr. Wittliff reiterated his emphasis upon the necessity for compliance with the requirements of its NPDES permits and then stated that "that's where I would leave it." As a result, we

hold that the Commission's determination that the Attorney General had failed to adduce sufficient evidence to rebut the presumption that Duke Energy Progress' coal ash costs were reasonably and prudently incurred on the grounds that it should have begun using lined coal ash basins earlier than it did had adequate evidentiary support.[13]

The Commission relied heavily on the testimony of Mr. Kerin in addressing a similar issue in the Duke Energy Carolinas proceeding. Mr. Kerin testified that, "[u]ntil recently, coal has been the historic 'go-to' fuel choice for base-load, least-cost reliable service," with the industry standard being the use of unlined basins for the purpose of storing coal ash. Mr. Kerin stated that, "from 1974 to 2015, ash basins were a lawful and effective way of meeting the wastewater treatment requirements under the [Clean Water Act]" and "[had] been effective at treating wastewater to meet NPDES permit limits." For that reason, Mr. Kerin asserted that, "[i]n the absence of any regulatory directive to do so, [Duke Energy Carolinas] reasonably did not pursue and should not have pursued regulatory closure or retrofitting for any site that was still generating ash and that maintained its NPDES permit." At the time that the CCR Rule was promulgated and CAMA was enacted, Duke Energy Carolinas began preparing to comply with the new requirements.

In rebutting Mr. Wittliff's contention that the number of lined basins had been increasing by 1988 and 1999, Mr. Kerin testified that Duke Energy Carolinas last constructed a new coal ash basin in 1982. In addition, Mr. Kerin stated that, "while [Mr. Wittliff had] cite[d] an increase in the percentage of basins that were lined from 17 to 28 percent between 1975 and 1995, that [figure] still represents a minority of the new basins being constructed that were lined." In response to Mr. Wittliff's suggestion that Duke Energy Carolinas should have built new lined impoundments to store its coal ash, Mr. Kerin stated that this suggestion "ignores the fact that the construction of new lined impoundments would have entailed significant expense to [Duke Energy Carolinas], while not

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13. The fact that the record contains evidence that it would have been advisable for a utility to have taken specific action relating to a particular generating facility at an earlier time than that action was actually taken does not require us to make a different decision with respect to the "reasonableness" issue. Aside from the fact that evidence relating to a specific generating facility has no logical relation to the reasonableness of costs incurred at other facilities and would not, for that reason, support a finding that the utility's coal ash costs, considered in their entirety, were unreasonable, the ultimate question raised by such evidence is simply whether the utility should have made a different policy-based decision than the one that it actually made. As has been discussed in the text of this opinion, the Commission adequately addressed this policy-related "reasonableness" issue in its order in these cases.

removing the need to maintain the existing unlined impoundments." In Mr. Kerin's opinion, acting on the basis of Mr. Wittliff's suggestion "before [such measures] [were] consistent with industry standards" "would have put [Duke Energy Carolinas] at risk of disallowance of those costs." Mr. Kerin also pointed to Mr. Wittliff's testimony in the Duke Energy Progress case in which he responded in the negative when asked if Duke Energy Progress had acted imprudently when it began sluicing coal ash to unlined impoundments in view of the fact that "[t]he law allowed them to do it, and the law continued to allow them to do it, even though there was . . . concern." As a result, the record contains ample evidentiary support for the Commission's determination in the Duke Energy Carolinas proceeding that the intervenors had failed to elicit sufficient evidence to satisfy the burden of production imposed upon them in *Bent Creek*.

In spite of the fact that, as the Commission put it, the utilities' actions constituted "at least a contributing factor" to enactment of CAMA, we are unable to hold that, as a matter of law, utility mismanagement constituted the "primary cause of CAMA" or that "CAMA would not have been passed or that its requirements other than accelerated deadlines would have been less onerous but for [the utilities'] mismanagement." As this Court has stated on many occasions, "the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature" and that the legislative "intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332–33, 154 S.E.2d 548, 555 (1967). CAMA simply does not contain any language from which we can determine that the General Assembly's decision to enact its provisions stemmed from mismanagement on the part of either utility. Had the General Assembly wished to make such a statement, it certainly could have done so. As a result, we are unable to accept the Attorney's General invitation to require the disallowance of all of the coal ash-related costs at issue in these proceedings on the grounds that they necessarily resulted from utility imprudence.

We reach a similar conclusion with respect to the more nuanced "reasonableness" argument advanced in the Public Staff's brief. As the record reflects, Public Staff witness Jay Lucas testified in the Duke Energy Progress case, even though "some environmental violations are clearly due to [Duke Energy Progress'] negligence or mismanagement,

there are other actual and potential environmental violations that are not easily characterized as either plainly imprudent or plainly reasonable on [Duke Energy Progress'] part." In Mr. Lucas' view, any attempt to calculate the incurred costs associated with environmental violations "could be extremely complex and somewhat speculative" given that doing so would involve "a lot of estimations and assumptions over a long period of time, leaving doubts about accuracy." For this reason, the Public Staff concluded that, despite the fact that "there is some degree of [Duke Energy Progress] culpability for costs" "due to non-compliance with environmental violations," for "most" of the costs at issue in that case, such culpability "may fall short of imprudence." In light of this set of circumstances, the Public Staff advanced its equitable sharing proposal rather than attempting to contest the reasonableness and prudence of most of the coal ash-related costs that are at issue in these cases.

The "reasonableness" test enunciated by this Court in *Bent Creek* focuses upon whether the challenged utility costs were "exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated [utilities] for the same or similar goods or services." *Bent Creek*, 305 N.C. at 76–77, 286 S.E.2d at 779. As a result, the required legal analysis is clearly focused upon the extent to which specific costs that the utility seeks to utilize in establishing its North Carolina retail rates are excessive rather than upon general policy questions of the sort that underlie the Attorney General's broad-based "reasonableness" argument. We have no hesitation in recognizing that it would be difficult, if not impossible, to quantify, in even the most general sense, the costs which the utilities would have incurred had they handled the coal ash stored at their facilities in a manner that differed from what they actually did or if specific alleged environmental violations had not occurred. As the testimony of Mr. Lucas suggests, the Public Staff placed principal reliance upon its "equitable sharing" proposal for this very reason. However, with the exception of the Public Staff's suggested disallowances relating to costs incurred at the Sutton and Belews Creek facilities, we are compelled to agree with the Commission that the intervenors failed to identify and quantify the specific costs that should have been disallowed as unreasonable and imprudently incurred in these cases. In the absence of such evidence, we cannot say that the Commission erred by holding that the intervenors had failed to make a sufficient showing to require the utilities to demonstrate the reasonableness and prudence of their coal ash-related costs in detail.

3. Return on the Unamortized Balance

[3] The Public Staff argues that, in order for costs to be includable in rate base and eligible to earn a return, those costs must be for "used and useful" property, which "primarily means 'utility plant' that consists of long-lived physical assets used to provide utility service" and is "largely funded by capital investment," including "brick and mortar buildings, generators and turbines, poles, meters, and conductors such as transmission, distribution, and service wires that carry electricity from generators to customers." Similarly, the Attorney General argues that the concept of "property" involves "the rights in a valued resource such as land, chattel, or an intangible," and includes "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised," quoting *Property*, BLACK'S LAW DICTIONARY 1410 (10th ed. 2014). Although the Public Staff points out that working capital "has been judicially accepted as an intangible form of 'property' " that may be appropriately included in rate base, citing *VEPCO*, 285 N.C. at 414–15, 206 S.E.2d at 295–96, the Attorney General contends that working capital may only be included in rate base where it "qualifies as used and useful," so that all working capital does not necessarily qualify for inclusion in rate base, citing *Morgan*, 277 N.C. at 273, 117 S.E.2d at 417; *Thornburg II*, 325 N.C. at 486, 385 S.E.2d at 464; *Carolina Water*, 335 N.C. at 507, 439 S.E.2d at 135, given that "this Court has never recognized any exceptions to the 'used and useful' requirement" and that "there is no working-capital exception" or any exception "for funds supplied by investors" to the definition of "rate base" embodied in N.C.G.S. § 62-133(b)(1).

According to the Public Staff, property is "used and useful" if it is "in service for the production or delivery of utility service," citing *Carolina Water*, and is not "excess or overbuilt for the needs of current customers" so as to be "greater than necessary to provide service even if it is being used," citing *Carolina Trace*. In the same vein, the Attorney General contends that property is not used and useful if it is not used to provide *current* service or has been abandoned, citing *Carolina Trace* and *Carolina Water*. On the other hand, the Public Staff contends that costs that are properly categorized as operating expenses, rather than as property "used and useful," include "payments for goods or services that are consumed at or close to the time payment is made," "the depreciation of used and useful property at a rate corresponding to its useful life," and "income tax expense." Among other things, the Public Staff points out that operating expenses include "wages, salaries, fuel, maintenance, advertising, research and charitable contributions" and "annual charges for depreciation and operating taxes," quoting Charles

F. Phillips, Jr., *The Regulation of Public Utilities* 177 (1993). On the basis of similar logic, the Attorney General asserts that costs such as dewatering coal ash basins, treating contaminated water from coal ash basins, excavating coal ash, and putting excavated coal ash in landfills constitute operating expenses rather than the cost of property "used and useful." Although both of them agree that the utilities are entitled to earn a return on the reasonable original cost of "used and useful" property, the Public Staff and the Attorney General differ with respect to the issue of whether the Commission possesses the authority to award a return on deferred operating expenses.

In arguing that the Commission has the statutory authority to allow a utility to earn a return on the unamortized balance of costs that would ordinarily be categorized as operating expenses, the Public Staff suggests that N.C.G.S. § 62-133(d) allows the Commission, in the exercise of its discretion, to allow utilities to earn a return upon such costs, citing *Thornburg I* and *State ex rel. Utilities Commission v. Carolina Utility Customers Ass'n*, 348 N.C. 452, 458–59, 500 S.E.2d 693, 698–99 (1998) (CUCA). In the Public Staff's view, this Court's decisions in *Thornburg II*, *Carolina Trace*, and *Carolina Water* do not deprive the Commission of the right to allow a utility to earn a return upon the unamortized balance of deferred operating expenses given that "the extent of [N.C.G.S. §] 62-133(d) discretion does not appear to have been an issue directly before the Court in those cases." As a result, the Public Staff contends that the discretion granted by N.C.G.S. § 62-133(d) provides a separate basis for allowing a utility to earn a return on the unamortized balance of deferred operating expenses as long as the Commission considers all relevant facts and circumstances, including whether certain costs should be disallowed and as long as the Commission's order complies with the findings requirement enunciated in N.C.G.S. § 62-79(a) and reflects "a logical sequence of evidence supporting findings that in turn support conclusions."

The Attorney General, on the other hand, argues that "North Carolina law makes clear that the Commission has no discretion to give [a return on costs which are] not used and useful for providing service to customers now or within a reasonable time," citing *Carolina Trace*, *Carolina Water*, and *Thornburg II*. After acknowledging that N.C.G.S. § 62-133(d) "gives the Commission discretion on certain other issues," the Attorney General argues this "discretion . . . does not extend to the makeup of a utility's rate base," "is not a grant to roam at large in an unfenced field," quoting *State ex rel. Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E.2d 457, 460 (1962), and "is not nearly as broad as the discretion the Commission purported to exercise" in these cases.

According to both the Public Staff and the Attorney General, the Commission failed to determine which coal ash-related costs were properly characterized as property used and useful and which should be treated as deferred operating expenses.[14] In the Public Staff's view, "[t]he record evidence shows that coal ash costs at issue in this case are largely in the nature of operating expenses" given that they consist of costs "associated with operating, maintaining, and upgrading environmental equipment," with the Commission, in the words of Commissioner Clodfelter's dissent, having "lump[ed] all tasks, all waste units, all time periods, and all plants together and allow[ed] a return on the expenditures without further qualification." Although the Commission provided an example of a cost that was properly considered capital in nature, consisting of the cost of the landfill constructed by Duke Energy Progress at the Sutton facility, the Public Staff contends that this "isolated example . . . does not support a universal conclusion that all [coal ash-related] costs are capital costs" and argues that costs associated with inspections, maintenance, well sampling, coal ash processing, "[d]ewatering, excavation, transport, and offsite disposal at another company's facility are on their face operational activities" rather than "investments in plant or facilities used or useful to provide electric service to present and future customers."[15]

Similarly, the Attorney General argues that the costs associated with the closure of the unlined coal ash basins "mainly involve preparing closure plans for coal-ash impoundments, treating contaminated groundwater, excavating coal ash, transporting it to landfills, and disposing of it." According to the Attorney General, the Commission and the utilities both recognized that "a significant portion" of their coal ash costs consisted of operating expenses. After failing to "explain its reasons for concluding that [the utility's] coal-ash costs are used and useful" in the Duke Energy Progress order, the Attorney General contends that the Commission erred by determining in the Duke Energy Carolinas order that the relevant costs were "used and useful" given that those costs were associated with "property [which] might have been used and useful for past service" rather than property that was "used and useful" in

14. The Public Staff notes that, in the Duke Energy Progress order, the Commission concluded that all closure costs were property "used and useful," while it concluded in the Duke Energy Carolinas order that some closure costs related to property "used and useful" without specifying which costs fell into which category.

15. The Public Staff also notes that, in the Duke Energy Progress proceeding, the utility failed to "itemize the costs in any detail" and that "this lack of detail alone means there is not substantial evidence in the record for the Commission to decide that *all* the coal ash costs are 'property used and useful.' "

providing current service. According to the Attorney General, nine of the utilities' sixteen coal-fired electric generating facilities had been retired by the time that the applications in these cases were filed, with "more than half" of the costs that the utilities sought to include in cost of service in these cases being related to retired generating facilities. Moreover, the Attorney General contends that many of the costs relating to facilities that continue to operate are used to store coal ash which was created "years or decades ago" or to coal ash ponds that "have been closed for years."

The Attorney General argues that the Commission's orders reflect a "confus[ion]" about the nature of the applicable legal standard and a failure to distinguish between the legal principles applicable to the inclusion of operating expenses, which must merely be reasonable, and costs associated with "used and useful" property, which must satisfy a higher legal standard, in the cost of service used to establish the utilities' rates, citing *Thornburg II*, 325 N.C. at 493, 385 S.E.2d at 468. In other words, the Attorney General argues that, even "reasonable" costs may not be included in rate base if they were not expended to procure property "used and useful" in providing current service. *Id.*

The Attorney General[16] and the Public Staff[17] both take issue with the Commission's determination that some or all of the relevant coal ash-related costs constituted working capital. According to the Public Staff, Duke Energy Progress witness Laura Bateman sponsored an exhibit that labeled certain costs as working capital in reliance upon the testimony of Dr. Wright, who had previously stated that the relevant costs constituted "used and useful" "utility plant." The Public Staff contends that the testimony of Dr. Wright and Ms. Bateman are contradictory given that "utility plant" and "working capital" are two separate and distinct categories of "used and useful" property. In addition, the Public Staff contends that the Commission "shifted to a different legal conclusion" with respect to this issue in the Duke Energy Carolinas order by determining that the relevant coal ash costs were "just like 'classic' working capital" given that these funds "were furnished by [Duke Energy Carolinas] and

16. According to the Attorney General, it is "[un]clear whether the Commission actually concluded that [the utilities'] coal-ash costs were working capital."

17. The Public Staff disputed the validity of the Commission's determination that no party challenged the inclusion of coal ash costs in "working capital" given that its equitable sharing proposal, "which depends on no return for unamortized coal ash costs," is "legally incompatible" with treating the relevant costs as working capital and that Public Staff witness Michael A. Maness testified in the Duke Energy Carolinas proceeding that labeling the relevant costs in that manner did not convert them into working capital.

its investors." According to the Public Staff, "classic working capital is entitled to a return" pursuant to N.C.G.S. § 62-133(b)(1) while "expenses that are 'like' working capital only in the sense that they may be paid from investor-supplied funds" could only be eligible to earn a return in the exercise of the Commission's discretion pursuant to N.C.G.S. § 62-133(d). The Public Staff asserts that "the nature of past coal ash expenditures is incompatible with the definition of 'working capital' " in light of the fact that the monies in question do not represent "funds needed to finance ongoing utility service" or "relate to the carrying cost for funding of future utility operations."

The Attorney General contends that the fact that the coal ash costs at issue in these cases "have nothing to do with 'the Compan[ies'] forward-looking obligation to provide utility service' " compels the conclusion that "the Commission's analysis of working capital here negates the statutory command that only used and useful assets may be included in a utility's rate base," citing N.C.G.S. § 62-133(b)(1). Furthermore, the Attorney General notes that any determination that some or all of the relevant costs constitute working capital lacks sufficient evidentiary support given that "no witness for [either utility] actually testified that its coal-ash expenditures were funded by working capital"; that the Commission had relied upon Duke Energy Progress' placement of the relevant costs "in a working-capital section in [its] books"; and that one of Duke Energy Carolinas' own witnesses "testified directly that the company does not believe that booking coal-ash costs in a working-capital account, by itself, is enough to turn those costs into part of [Duke Energy Carolinas'] rate base." According to the Attorney General, the utilities "offered no evidence that [they] needed to draw on working capital to fund [their] post-2014 coal-ash costs."

The Public Staff and the Attorney General each contend that the Commission erred by concluding that the accounting method utilized by the utilities in recording their coal ash costs automatically "converted" those costs into amounts eligible for inclusion in rate base. In the Public Staff's view, "many of the expenditures made by [the utilities] for coal ash compliance are fundamentally operating expenses" that are not "transformed into property used and useful that *must* be allowed to earn a return just because FERC and GAAP guidance" provides for capitalizing the costs in question in an Asset Retirement Obligation. On the contrary, the Public Staff argues that "the statutory classification of 'property used and useful' is independent of GAAP and FERC accounting guidance," citing to a section of Commissioner Clodfelter's dissent in the Duke Energy Carolinas order in which Commissioner Clodfelter

expressed the opinion that the Commission had "conflated concepts of financial statement presentation with the classification of costs for ratemaking purposes," that the language from ASC 410-20 upon which the Commission and the utilities had relied was "irrelevant," and that nothing in the FERC Uniform System of Accounts "compel[s] inclusion of the capitalized amount of the [A]sset [R]etirement [O]bligation in rate base; quite the contrary."

The Public Staff contends that the fact that the costs at issue in these cases had been deferred for accounting purposes did not convert the resulting asset that was shown on the utilities' books into property "used and useful" for ratemaking purposes and that the Commission's decision to the contrary conflicts with our decision in *Thornburg I*.[18] Instead, the Public Staff contends that "it is proper ratemaking to treat deferred costs as a form of operating expense," which *could* be amortized in the future rather than "as rate base," citing *Thornburg I* and the Commission's decision in Docket No. G-5, Sub 327. The Public Staff argues that "many" of the costs at issue in this case "are costs of operating the sites in compliance with environmental regulations" that "do[ ] not become 'property used and useful' simply because [the costs] ha[ve] been incurred for environmental compliance."

Finally, the Public Staff argues that a capitalized expense remains an operating expense for ratemaking purposes, with the fact that the capitalization process changes the timing with which the costs in question are included in cost of service for ratemaking purposes being irrelevant to the question of whether those costs constitute "used and useful" property. According to the Public Staff, "nothing in the law . . . requires a return on such costs to protect investors from being deprived of the time value of money" despite the Commission's numerous contrary conclusions. For that reason, the Public Staff suggests that the Commission must determine if there are "other material facts of record" that call for the denial of a return in order to achieve just and reasonable rates, with the utilities' environmental violations being the sort of facts that the Commission should have considered in determining the level of coal ash costs that should have been included in the utilities' North Carolina retail rates.

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18. The Public Staff acknowledges that it never disputed the utilities' contention that Asset Retirement Obligation accounting was mandatory for its coal ash costs; instead, it simply took issue with their decision to "opt for special ratemaking treatment (deferral) after the [Asset Retirement Obligation] was created," which the Public Staff described as a "depart[ure] from the method that has been approved by the FASB and FERC."

In the Attorney General's view, ASC 410-20 merely "requires publicly traded companies to record an [Asset Retirement Obligation] whenever they have a legal obligation to incur costs to retire a long-lived asset and that obligation can be quantified," such as the coal ash costs at issue in these cases. The Attorney General contends that "the existence of an [Asset Retirement Obligation] does not require a finding that [the utilities'] coal-ash removal costs are 'property used and useful . . . in providing the service to be rendered to the public' " and that, even if it did, such a result would be "in conflict with the statutory language and structure of [N.C.G.S. §] 62-133."

According to the utilities, the Public Staff has provided an overly narrow definition of "property," with a more accurate definition sweeping in "all assets necessary to provide electricity to the public" and including "cash that should be kept on hand to pay the utility's bills as they become due." In the utilities' view, the extent to which property is "used and useful" "does not turn on whether the property generates electricity"; instead, the critical factor is "whether it serves the public and was paid by debt or equity investors" rather than "through rates that were set in anticipation of normal operating expenses."

Even though operating expenses are typically recovered through established rates and are not statutorily entitled to a return, the utilities contend that the Commission may, in its discretion, allow a return when "extraordinary expenses arise that justify deferral accounting" in the next general rate case when those costs were initially covered by shareholder funds, citing *VEPCO*. According to the utilities, "[a] substantial difference exists between operating expenses that are built into rates and are paid by customers," which cannot receive a return given that "the utility does not need to attract investor capital to fund those expenses," as compared to "extraordinary costs that must be advanced by debt and equity investors" and upon which a return could be authorized in the Commission's discretion in order to avoid a "competitive disadvantage in raising investment funds in the future."

The utilities argue that "the modification of the coal ash basin system" at issue in these cases "was paid for with shareholders' funds" and that these funds constituted working capital that was "necessary and appropriate for providing electricity to customers" and was, for that reason, properly deemed "used and useful" pursuant to *VEPCO*. According to the utilities, the cases upon which the Attorney General relies relate to abandoned power plants while the present proceedings have nothing to do with "excessive facilities tied to nuclear units that were never completed and never used to generate[ ] electricity (e.g., *Thornburg*)" and

"do[ ] not involve abandoned utility plants and equipment that no longer result in costs to the utility (e.g., *Carolina Trace* and *Carolina Water*)." On the contrary, the utilities argue that these cases involve capital funds advanced by investors that "have a direct relationship to power generation—the [utilities'] system[s] to address coal ash residue resulting from electricity generation."

As a separate matter, the utilities contend that "the vast majority" of the costs at issue in these proceedings "stand as long-term assets" and "improvements to real property," including new or modified coal ash basins that are "directly related to . . . power generation" and that "benefit the utility's customers." According to the utilities, 18 C.F.R. § 101, Electric Plant Instruction No. 3, provides that many construction costs constitute "capital costs because they are associated with the system being built," including "contract work, labor, materials and supplies, transportation of employees and equipment, general administration attributable to the construction, engineering services, insurance, legal costs and environmental studies." The utilities contend that "much of [the] construction costs for the coal ash basins" are contained within these categories, such as those relating to "environmental, health and safety studies associated with the construction, infrastructure costs, landfill construction, engineering closure plans, modification to power plants to accommodate basin modifications, mobilization costs and installation of water treatment systems."

The utilities argue that their accounting practices ensure that the costs at issue were "eligible for deferral and amortization and for earning on the unamortized balance" and that, "even if the remediation costs are [Asset Retirement Obligation] expenditures, they are eligible for ratemaking treatment as though they are used and useful assets." According to the utilities, the accounting and reporting requirements prescribed by the FERC and the Securities and Exchange Commission require utilities to record Asset Retirement Obligations "when a change in the law creates a legal obligation to perform the retirement activities," quoting 68 Fed. Reg. 19610, 19611 (April 21, 2003). In the event that a utility records an Asset Retirement Obligation, that amount is treated as "electric utility plant" and is shown as both an asset and a liability on the utility's balance sheet, citing 68 Fed. Reg. at 19611. The utilities contend that these principles allow them to "capitalize the asset retirement costs" given that those costs constitute an "integral part of the costs of the particular asset that gives rise to the asset retirement obligations, rather than separate and distinct assets," quoting 68 Fed. Reg. at 19615. In view of the fact that the new regulations governing the disposal of coal ash

required them to close their existing coal ash basins, the utilities claim that they were "required to follow the accounting requirements relating to [Asset Retirement Obligations]." As a result, given that "the expenditures at issue are no different from the costs to build the utility plant and . . . stand as the 'public utility's property used and useful,' " quoting N.C.G.S. § 62-133(b)(1), and the fact that the relevant costs constituted capitalized amounts funded by the shareholders, the utilities contend that the Commission properly allowed them to earn a return upon the unamortized balance of the deferred coal ash-related costs.

The "ultimate question for determination" in any utility case is what "a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future" would be in light of the statutory procedures prescribed for the Commission in N.C.G.S. § 62-133. *Morgan*, 277 N.C. at 267, 177 S.E.2d at 413. As a general proposition, the procedures delineated in N.C.G.S. § 62-133(b), in which a test period is established, the utility's investment in utility plant and working capital as of the end of the test period is determined, the utility's reasonable operating expenses during the test period are ascertained, and a reasonable return upon the utility's rate base is identified, provide a workable framework that can be used to establish just and reasonable rates. The circumstances revealed by the record in these cases are, however, anything but ordinary, with the coal ash-related costs that the utilities incurred between 1 January 2015 and 31 December 2017 not being readily susceptible to traditional ratemaking analysis for a number of reasons.[19] As a result, these cases compel us to definitively determine the scope of the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d), which the Commission used as the ultimate justification for its decision to allow the utilities to earn a return upon the unamortized portion of the deferred coal ash costs at issue in these cases.

This Court has, of course, discussed the manner in which N.C.G.S. § 62-133(d) should be interpreted and applied in several prior cases, a

19. Although we need not examine this issue in any detail, we note that the costs at issue in these cases do not appear to relate to a single test period as defined in N.C.G.S. § 62-133(c) and seem to consist of a combination of both costs associated with the decommissioning and construction of new utility facilities includable in rate base pursuant to N.C.G.S. § 62-133(b)(1) and costs that relate to the operation of those facilities that would ordinarily be treated as operating expenses pursuant to N.C.G.S. § 62-133(b)(3). While the Commission appears to have accepted the argument that these costs could be treated as working capital, the costs at issue in these cases, unlike the items traditionally treated as working capital, do not relate to a single test period. As a result, for all of these reasons, we have no hesitation in concluding that the costs in question do not readily fit within the confines of the traditional ratemaking principles enunciated in N.C.G.S. § 62-133.

number of which are discussed in detail in the parties' briefs. After carefully reviewing the relevant decisions of this Court, we have been unable to find anything that precludes the Commission from deferring certain extraordinary costs, amortizing them to rates, and allowing the utility, in the exercise of the Commission's discretion, to earn a return upon the unamortized balance in reliance upon N.C.G.S. § 62-133(d) in circumstances like those revealed by the present record.

Although the Attorney General contends that the approach adopted by the Commission in these cases is precluded by our prior decisions in *Thornburg II*, *Carolina Trace*, and *Carolina Water*, we agree with the Public Staff that the extent to which the Commission had the discretion to act as it did in these cases was not before the Court in any of those decisions. In *Thornburg II*, for example, we held that certain deferred nuclear plant cancellation costs had to be removed from rate base and treated in the same way that other abandoned plant costs had been treated, a process that involved the amortization of the related costs without a return on the unamortized balance. 325 N.C. at 497–98, 385 S.E.2d at 470–71. *Thornburg II* did not, however, make any reference to the application and interpretation of N.C.G.S. § 62-133(d).

Similarly, in *Carolina Trace*, we held that "[t]here is no statutory authority anywhere within Chapter 62 that permits the Commission *to include in rate base* any completed plant (as opposed to construction work in progress) that is not 'used and useful' within the meaning of this term as determined by our case law" (emphasis added). 333 N.C. at 203, 424 S.E.2d at 137. However, the dispute between the parties in *Carolina Trace* revolved around the application and interpretation of N.C.G.S. § 62-133(b)(1) rather than N.C.G.S. § 62-133(d).

Finally, in *Carolina Water*, we stated that, "[i]f facilities are not used and useful, they cannot be included in rate base," 335 N.C. at 508, 439 S.E.2d at 135, and that "[c]osts for abandoned property may be recovered as operating expenses through amortization" even though "a return on the investment may not be recovered by including the unamortized portion of the property *in rate base*." (emphasis added). *Id.* Once again, however, our decision in *Carolina Water Service* made no mention of the Commission's authority pursuant to N.C.G.G. § 62-133(d). As a result, given that none of these decisions and others like them involved the interpretation or application of N.C.G.S. § 62-133(d), they shed no light upon the extent of the Commission's authority pursuant to that specific statutory provision.

Our decisions interpreting and applying N.C.G.S. § 62-133(d) set out some of the principles that underlie this portion of North Carolina's

statutory ratemaking framework. The first occasion upon which we had an opportunity to interpret and apply what is now N.C.G.S. § 62-133(d) came in *Public Service Co.*, 257 N.C. 233, 125 S.E.2d 457, which was decided pursuant to former N.C.G.S. § 62-124. Former N.C.G.S. § 62-124 (1960) stated that, "[i]n fixing any maximum rate or charge," the Commission "shall" consider "all other facts that will enable it to determine what are reasonable and just rates." In *Public Service Co.*, we reversed a trial court judgment that affirmed an order in which the Commission refused to allow a natural gas utility to increase its rates in the face of a price increase by the utility's sole supplier of natural gas. In reaching this result, we stated that "[t]he Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in" the ratemaking statute and that former N.C.G.S. § 62-124 "[gave] the Commission the right to consider *all other facts* that will enable it to determine what are reasonable and just rates" (emphasis in original), citing N.C.G.S. § 62-124. *Id.* at 237, 125 S.E.2d at 460. We did, however, caution the Commission that "[t]he right to consider 'all other facts' is not a grant to roam at large in an unfenced field" and determined that the "other facts" upon which the Commission was entitled to rely had to "be established by evidence, be found by the Commission, and be set forth in the record to the end the utility might have them reviewed by the courts." *Id.*

Similarly, in *State ex rel. Utilities Commission v. Edmisten*, we recognized that, "[w]hile the Commission is limited, particularly by [N.C.G.S. § 62-133(b)], to a consideration of certain ultimate facts, it may consider many other evidentiary facts relevant thereto which may not be specifically listed in this section" pursuant to N.C.G.S. § 62-133(d). 291 N.C. 327, 345, 230 S.E.2d 651, 662 (1976). In upholding the Commission's authority to allow an electric utility to implement a temporary fuel adjustment clause in the exercise of its discretion, we recognized that "[N.C.G.S. § 62-133(d)] expressly empowers the Commission to 'consider all other material facts of record that will enable it to determine what are reasonable and just rates.' " *Id.* (citing *Morgan*, 277 N.C. 255, 177 S.E.2d 405).

Shortly thereafter, in *State ex rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 437, 263 S.E.2d 583, 588 (1980), in reversing the Commission's refusal to adopt rolled-in rates for an electric utility, we recognized that, "[a]lthough it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it" in accordance with N.C.G.S. § 62-133(d), "a summary disposition which indicates that

the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal," citing *Utilities Commission v. Piedmont Natural Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961) and N.C.G.S. § 62-94. In light of that basic principle, we held that the Commission erred by failing to "consider whether a rate schedule computed as if" two wholly owned subsidiaries of the same parent company were one utility "would be in the best interests of the customers." *Id.* at 438, 263 S.E.2d at 588.

A few years later, this Court stated in *State ex rel. Utilities. Commission v. Duke Power Co.*, that, in N.C.G.S. § 62-133(d), that "the legislature recognized and understood that there would be other facts and circumstances of record which the Commission might rightly consider in addition to those specifically detailed in [N.C.G.S. § 62-133]," 305 N.C. 1, 26, 287 S.E.2d 786, 801 (1982) (*Duke Power Co. II*), before indicating that "the 'other material facts of record' considered by the Commission in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are." *Id.* at 27, 287 S.E.2d at 801. In the same vein, we opined in *State ex rel. Utilities Commission v. Nantahala Power & Light Co.*, that "N.C.G.S. § 62-133(d) has been construed as a device permitting the Commission to take action consistent with the overall command of the general rate statutes, but not specifically mentioned in those portions of the statute under consideration in a given case," citing *Duke Power Co. II* and *Utilities Commission v. Public Staff*, 58 N.C. App. 453, 293 S.E. 2d 888 (1982), *modified and aff'd*, 309 N.C. 195, 306 S.E.2d 435 (1983), and that "the fixing of 'reasonable and just' rates involves a balancing of shareholder and consumer interests," *State ex rel. Utilities Commission v. Nantahala Power & Light Co.*, 313 N.C. 614, 690–91, 332 S.E.2d 397, 442 (1985). As a result, we held that the Commission was entitled to treat "the effect of the FERC-filed power supply contracts on Nantahala's costs of service" and "the entire historical development of the Nantahala-Tapoco electric system and the intercorporate allocation of the costs and benefits associated therewith" as material facts of record pursuant to N.C.G.S. § 62-133(d) in determining the utility's rates. *Id.* at 701, 332 S.E.2d at 448.

Finally, in *Thornburg I*, we cited N.C.G.S. § 62-133(d) in determining that the Commission was entitled to allow a utility to include abandoned nuclear plant costs in rates as an operating expense, 325 N.C. at 478, 385 S.E.2d at 459, noting that the Commission's decision was supported by N.C.G.S. § 62-133(d), which ensured that "the Commission would not be bound by a strict interpretation of the operating expense component"

set forth in N.C.G.S. § 62-133(c). *Id.* Thus, this Court's prior decisions, while failing to delineate the exact contours of the Commission's authority pursuant to N.C.G.S. § 62-133(d), have clearly indicated that N.C.G.S. § 62-133(d) is available to the Commission for the purpose of dealing with unusual situations and that the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d) is not limited by the more specifically stated ratemaking principles set out elsewhere in N.C.G.S. § 62-133(b).[20] Simply put, if the Commission's authority pursuant to N.C.G.S. § 62-133(d) could only be exercised in a manner that coincided with the Commission's authority as delineated in the other provisions of N.C.G.S. § 62-133, the enactment of N.C.G.S. § 62-133(d) would have been a purposeless undertaking.

After carefully examining our reported decisions construing N.C.G.S. § 62-133(d), we conclude that this statutory provision provides the Commission with an opportunity to consider facts that, while not specifically relevant to the ordinary ratemaking determinations required by N.C.G.S. § 62-133(b), should necessarily be considered in establishing rates that are just and reasonable to both the utility and the using and consuming public. For that reason, we reject the notion that the traditional rules governing the inclusion of costs in a utility's rate base pursuant to N.C.G.S. § 62-133(b)(1) and in a utility's operating expenses pursuant to N.C.G.S. § 62-133(b)(3) limit the scope of the Commission's authority pursuant to N.C.G.S. § 62-133(d), with any such determination being fundamentally inconsistent with the apparent legislative intent to use N.C.G.S. § 62-133(d) to provide a "safety valve" available to the Commission when ordinary ratemaking standards prove inadequate. However, as our earlier admonition that the predecessor to N.C.G.S. § 62-133(d) did not allow the Commission to "roam at large in an unfenced field" clearly indicates, N.C.G.S. § 62-133(d) does not give the Commission license to ignore the ordinary ratemaking standards set out elsewhere in N.C.G.S. § 62-133 in cases in which the use of those principles, without the necessity to consider "other facts," allows for the establishment of just and reasonable rates for the utility in question. Instead, N.C.G.S. § 62-133(d) provides the Commission with limited authority to take a holistic look at the cases that come before it in order

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20. As we acknowledge in more detail below, the Commission's authority to pursuant to N.C.G.S. § 62-133(d) is not unlimited. Any attempt to restrain the Commission's discretion pursuant to N.C.G.S. § 62-133(d) by confining its use to narrow deviations from the ordinary ratemaking processes set out in the remainder of N.C.G.S. § 62-133 strikes as unworkable given the difficulty of determining when such a departure would be sufficiently limited as to be permissible and when it would not.

to ensure that the limitations inherent in the ordinary ratemaking standards enunciated in N.C.G.S. § 62-133 do not preclude the Commission from carrying out its ultimate obligation to establish rates that are just and reasonable in extraordinary instances in which the traditional ratemaking standards set out in N.C.G.S. § 62-133 are insufficient. As a result, consistently with the results reached in the decisions that we have summarized above, we hold that the Commission may employ N.C.G.S. § 62-133(d) in situations involving (1) unusual, extraordinary, or complex circumstances that are not adequately addressed in the traditional ratemaking procedures set out in N.C.G.S. § 62-133; (2) in which the Commission reasonably concludes that these circumstances justify a departure from the ordinary ratemaking standards set out in N.C.G.S. § 62-133; (3) determines that a consideration of these "other facts" is necessary to allow the Commission to fix rates that are just and reasonable to both the utility and its customers; and (4) makes sufficient findings of fact and conclusions of law supported by substantial evidence in light of the whole record explaining why a divergence from the usual ratemaking standards would be appropriate and why the approach that the Commission has adopted would be just and reasonable to both utilities and their customers.

An examination of the extensive record that is before us in these cases satisfies us that the Commission did not, with a single exception set out in more detail below, err in using its authority to consider "other facts" pursuant to N.C.G.S. § 62-133(d) by allowing the amortization of deferred coal ash costs to rates and to allow the utilities to earn a return on the unamortized balance. The Commission's findings, which have adequate evidentiary support, establish that the enactment of CAMA forced the utilities to confront an "extraordinary and unprecedented" issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem. In light of the "magnitude, scope, duration and complexity" of the anticipated costs, the Commission determined that deferral of the necessary compliance costs would be appropriate and that these costs, including a return on the unamortized balance, should be amortized to rates over a period that the Commission deemed to be reasonable. In view of the unusual nature and complexity of the costs at issue in this proceeding and the circumstances under which they were incurred, the usual ratemaking standards set out in N.C.G.S. § 62-133 did not readily lend themselves to a decision that resulted in the establishment of just and reasonable rates for both the utilities and their customers. Finally, the Commission made detailed findings and conclusions explaining the nature of the manner in which it proposed to consider the relevant "other facts" and the reasons

that it believed that its decision was fair to both the utilities and their customers. As a result, we hold that, in light of the specific facts and circumstances disclosed by the record developed before the Commission in these cases and the detailed explanation that the Commission gave for reaching its decision, the Commission did not err in approving the basic ratemaking approach that was utilized in these proceedings.

4. Equitable Sharing

[4] The Public Staff contends that the Commission failed to address all of the material facts relating to the reasonableness of the utilities' coal ash costs for purposes of N.C.G.S. § 62-133(d) before rejecting its "equitable sharing" proposal. As part of this process, the Public Staff urged the Commission to adopt its equitable sharing proposal in order to adequately address the utilities' "culpability for extensive environmental violations resulting from its coal ash management." The Public Staff argues that, even though the utilities' culpability for environmental violations was a material fact of record that the Commission should have addressed in the course of deciding whether to adopt its equitable sharing proposal, the Commission failed to make findings and conclusions that adequately addressed its equitable sharing proposal.

The Public Staff begins by noting that, while the Duke Energy Progress order describes the Public Staff's equitable sharing proposal as resting upon the utilities' extensive "history of approval of sharing of extremely large costs that do not result in any new generation of electricity for customers," its "repeated references" to the utilities' environmental violations should have "le[ft] no doubt that [the existence of these violations] was a material reason for [its] equitable sharing proposal." Similarly, the Public Staff contends that, in its Duke Energy Carolinas order, the Commission erroneously concluded that the utilities' alleged environmental violations did not constitute part of the "real rationale for equitable sharing" and "that environmental violations [could] only be relevant to prudence" even though a finding of imprudence would have "justif[ied] a total disallowance of the associated costs" pursuant to N.C.G.S. § 62-133(b).

In addition, the Public Staff asserts that the Commission evaluated its equitable sharing proposal by considering "whether the costs were reasonable and prudent," "whether they were used and useful," and "what outcome would be fair and equitable." According to the Public Staff, the use of this standard precluded the implementation of an equitable sharing arrangement pursuant to N.C.G.S. § 62-133(d) given that the approach adopted in the Commission's order would appear to make

"full cost recovery with a return . . . mandatory as a matter of law (apart from mismanagement penalties) once costs have been determined to be prudent and 'used and useful.' "[21] Although both orders "hint[ed]" at the possibility of adjusting rates in its discretion pursuant to N.C.G.S. § 62-133(d), "other parts of the [o]rders reject[ed] that possibility as a legal conclusion."

In the Public Staff's view, the Commission's determination that the concept of equitable sharing had no support in the decisions of this Court rested upon a misinterpretation of *Thornburg I* and *Thornburg II*. More specifically, the Public Staff asserts that the Commission misinterpreted *Thornburg I* to mean that "equitable sharing applies *only* to costs that are not 'used and useful' and that equitable sharing therefore does not apply to coal ash costs" in spite of the fact that "[n]othing in *Thornburg I* or *Thornburg II* suggests that] N.C.G.S. § 62-133(d) limits the type of 'material facts' or remedies that may be considered to achieve reasonable and just rates."

The Public Staff contends that our decision in *Thornburg II* "support[s]" the idea of equitable sharing of excess plant costs which were not properly deemed to be "used and useful." According to the Public Staff, this Court did not reject the Commission's equitable sharing decision in *Thornburg II* on the grounds that the Commission lacked the authority to implement such a proposal; instead, the Public Staff contends that we rejected the specific equitable sharing arrangement that was at issue in that case, which involved the inclusion of nuclear plant cancellation costs in rate base on the grounds that such a regulatory treatment of those costs violated N.C.G.S. § 62-133(b)(1). In other words, the Public Staff contends that "*Thornburg II* does not stand for the proposition that the Commission lacks the discretionary authority to effectuate an equitable sharing between ratepayers and shareholders" and actually "upholds [the existence of] that authority," a result "which is consistent with N.C.G.S. § 62-133(d) and the Public Staff's equitable sharing recommendation."

The Public Staff contends that, contrary to the Commission's conclusion that allowing equitable sharing in these cases would result in an unconstitutional taking of utility property, there are "instances where the utility is not allowed full cost recovery or is required to share

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21. In the Public Staff's view, the mismanagement penalties imposed in these cases "remed[y] a different problem" —the acts which resulted in federal criminal plea—and are "no alternative" to the Public Staff's equitable sharing proposal, which was based upon "separate and more extensive state law violations."

revenues with its ratepayers," a result that is "within the police power of the state," citing *State ex rel. Utilities Commission v. N.C. Natural Gas Corp.*, 323 N.C. 630, 642–45, 375 S.E.2d 147, 154–56 (1989) and *State ex rel. Utilities Commission v. Carolina Water Service*, 225 N.C. App. 120, 135–36, 738 S.E.2d 187, 197–98 (2013). According to the Public Staff, "[u]tility shareholders . . . are not guaranteed a return on their money," with "equitable sharing [serving to] balance the interests of [the utilities] who bear some responsibility for coal ash costs due to their years of non-compliance with groundwater and surface water environmental regulations, against the interests of ratepayers who are being asked to pay a second time for disposal of coal ash after the [utilities'] initial disposal efforts proved inadequate for environmental protection."

According to the Public Staff, the Commission failed to make findings relating to numerous environmental violations, including: (1) at least 2,857 groundwater exceedances caused by Duke Energy Progress' coal ash basins that the Public Staff claimed to have resulted from violations of the applicable DEQ regulations; (2) the existence of "unauthorized seeps that [Duke Energy Carolinas] has admitted and 3,091 groundwater violations confirmed by [Duke Energy Carolinas'] own groundwater monitoring data"; (3) admissions to "nearly 200 distinct seeps" that the Public Staff claims to constitute unpermitted discharges in violation of N.C.G.S. § 143-215.1; (4) the presence of "seventeen admittedly engineered toe drains" that were not authorized by NPDES permits and that had been "deliberately constructed by [Duke Energy Progress] to allow drainage from its ash basins without regulatory approval and in violation of [N.C.G.S.] § 143.215.1"; (5) the presence of "twelve engineered seeps at [Duke Energy Carolinas'] coal-fired plants for which [it] did not yet have NPDES permits"; and (6) admissions by Duke Energy Carolinas that unauthorized seeps had occurred at four of its coal-fired plants.

In response, the utilities argue that the Commission had properly rejected the Public Staff's equitable sharing proposal for two separate reasons. First, the utilities aver that N.C.G.S. § 62-133(d) "does not give the Utilities Commission unbridled discretion to reduce rates" and must be read "in light of the other subsections of the statute" which, collectively, provide the Commission with "a specific formula for setting rates for a public utility," citing N.C.G.S. §§ 62-133(b) and (c). According to the utilities, the adoption of the position advanced by the Public Staff would "eviscerate" the guiding standards set forth by N.C.G.S. §§ 62-133(b) and (c) so as to "rais[e] grave constitutional concerns." Moreover, the utilities argue that the evidence upon which the Public Staff has relied in support of its equitable sharing proposal "bear on the elements of the

ratemaking formula or other specific provisions of [the] Public Utilities Act," with the facts upon which the Public Staff relies being "not material." Instead, the utilities contend that the Public Staff's equitable sharing proposal was "arbitrary" and "devoid of any determining principle," citing *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580, 710 S.E.2d 350, 354 (2011), a conclusion with which the Commission agreed in finding that the Public Staff's proposal was "standard-less" and "insufficient[ly] justif[ied]." The utilities point to the Public Staff's "dramatic departure" from the position that it took in Docket No. E-22, Sub 532, in which the Public Staff "stipulated that, because [the utility's] expenditures had been prudently incurred and were investor-funded, [the utility] should be entitled to recover these costs through rates over a five-year period and also receive a rate of return on the unamortized balance."

According to the utilities, neither *Thornburg I* nor *Thornburg II* support the Public Staff's equitable sharing proposal. The utilities argue that, in *Thornburg I*, this Court rejected an intervenor's argument that operating expenses must have a nexus to property used and useful and that, as long as the expenses were "reasonable," the Commission has the authority to allow their inclusion in the cost of service for ratemaking purposes. Although this Court upheld the Commission's decision in *Thornburg I*, that case involved an entirely different category of costs from those at issue here. The utilities contend that, in *Thornburg II*, this Court held that expenditures relating to "excessive" facilities "were not 'used and useful' and could not be included in rate base," with its decision in that case being susceptible to the interpretation that the Commission is entitled to "abandon[ ] the precise directives of [N.C.G.S. §] 62-133," "which require a return on property used and useful."

Secondly, the utilities contend that the Commission properly rejected the Public Staff's equitable sharing proposal on the grounds that the Commission did not abuse its discretion by determining that a further downward adjustment in the utilities' rates would not be reasonable and appropriate. In the utilities' view, the Commission simply "declined in these cases to exercise whatever discretion the Public Staff insists it possesses" to order an additional downward adjustment beyond the mismanagement penalty and explained throughout "[v]irtually the entire[ty]" of both order's majority decisions "why the circumstances of these cases do not make a further downward adjustment appropriate."

As we have already noted, our prior decisions clearly indicate that N.C.G.S. § 62-133(d) "expressly empowers" the Commission to consider all material facts of record in setting just and reasonable rates, *Edmisten*, 291 N.C. at 345, 230 S.E.2d at 662, with the existence of this authority

being coupled with a concomitant obligation on the Commission's part to consider all potentially relevant facts in formulating its decision. *See State ex rel. Utils. Comm'n v. General Tel. Co.*, 12 N.C. App. 598, 611, 184 S.E.2d 526, 534 (1971), *modified*, 281 N.C 318, 189 S.E.2d 705 (1972); *Duke Power Co. II*, 305 N.C. at 18, 287 S.E.2d at 796–97; *Edmisten*, 299 N.C. at 438, 263 S.E.2d at 588. After carefully reviewing the record, we are not persuaded that the Commission fulfilled its duty to consider *all* of the material facts of record revealed in the record in determining whether to adopt the ratemaking approach proposed by the utilities and to reject the Public Staff's equitable sharing proposal utilizing the authority granted to it pursuant to N.C.G.S. § 62-133(d). More specifically, the Public Staff expressly requested the Commission to consider evidence of environmental violations in evaluating its equitable sharing proposal in accordance with N.C.G.S. § 62-133(d). However, the Commission declined to adopt the Public Staff's equitable sharing proposal on the grounds, at least in part, that it had no role in determining whether the alleged environmental violations upon which the Public Staff's proposal rested had actually occurred. Instead, the Commission appears to have refused to consider the alleged environmental violations upon which the Public Staff's proposal rested, at least in part, on the grounds that the Commission's role was limited to making cost of service-related determinations and did not extend to ascertaining whether environmental violations had occurred, with the making of this determination having been left, in the Commission's view, to environmental regulators and courts of general jurisdiction unless a showing of management imprudence had been made.

Although the Commission is not, of course, statutorily charged with making definitive decisions concerning the extent, if any, to which the utilities committed environmental violations, we do believe that it was required, for ratemaking purposes, to evaluate the extent to which the utilities committed environmental violations in determining the appropriate ratemaking treatment for the challenged coal ash costs even if any such environmental violations did not result from imprudent management. In other words, given that the Commission decided to invoke its statutory authority to consider "other facts" in determining the rates that should be established for the utilities, it was required to consider *all* material facts of record in making that determination including, in these cases, facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins in violation of the 2L Rules and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any, in determining the

appropriate ratemaking treatment for the challenged coal ash costs.[22] Instead of conducting the required evaluation, the Commission appears to have determined that it lacked the authority to comment upon the nature and extent of any environmental violations that the utilities may or may not have committed. Moreover, even though the utilities are correct in noting that the Public Staff's equitable sharing proposal was not consistent with or subject to the detailed standards set out in the ordinary ratemaking procedures prescribed by N.C.G.S. § 62-133, the same is true of the Commission's decisions to allow the deferral of the relevant coal ash costs and the amortization of the deferred costs, including a return on the unamortized balance, to rates despite the fact that some percentage of those costs would not be eligible for inclusion in rate base pursuant to N.C.G.S. § 62-133(b)(1). Although the Commission remains free, at the conclusion of the proceedings on remand and after complying with the limitations upon its authority pursuant to N.C.G.S. § 62-133(d) set forth above, to reject the Public Staff's equitable sharing proposal, it may only do so after considering all of the potentially relevant facts and circumstances, *see Duke Power II*, 305 N.C. at 21, 287 S.E.2d at 798, and explaining the manner in which it has chosen to exercise its discretion by making appropriate findings and conclusions that have adequate evidentiary support.[23] In the event that the Commission concludes, on remand, to adopt the Public Staff's equitable sharing proposal, either as proposed or in some modified form, it may adjust other portions of its order including those relating to the proposed management penalty, in order to ensure that the utilities' rates are "just and reasonable" as that term is used in the Public Utilities Act and satisfy applicable constitutional standards, which set an absolute floor under and ceiling upon the Commission's authority. As a result, those portions of the Commission's orders rejecting the Public Staff's equitable sharing

22. We agree with the Commission's determination that the fact that the utilities entered into a settlement agreement with the Department of Water Quality does not, standing alone, constitute evidence that an environmental violation had occurred. *See* N.C. R. Evid. 408. Similarly, we agree with the Public Staff and the Commission that the existence of a settlement agreement which does not speak to the issue of liability does not constitute evidence of wrongdoing.

23. For this reason, the fact that the Commission may have had other criticisms of the Public Staff's "equitable sharing" proposal does not support a decision to affirm this portion of the Commission's orders given the Commission's failure to consider all relevant "material facts" as required by N.C.G.S. § 62-133(b)(1). In other words, the Commission is not entitled to consider the potential adverse impacts upon a utility's capital costs in applying N.C.G.S. § 62-133(d) without also considering other all of the potentially relevant facts, such as whether the manner in which the utility managed and operated its coal ash facilities resulting in environmental violations.

proposal are reversed and these cases are remanded to the Commission for further proceedings consistent with this opinion, including consideration of the Public Staff's equitable sharing proposal.

5. Discharges to Surface Waters

[5] In addition to adopting the arguments advanced by the Attorney General in challenging the Commission's decision with respect to the ratemaking treatment of the utilities' coal ash costs, the Sierra Club contends that the costs in question cannot be included in the cost of service used for North Carolina retail ratemaking purposes pursuant to N.C.G.S. § 62-133.13 given that those costs resulted from discharges to the surface waters of North Carolina in violation of State or federal surface water quality standards. According to the Sierra Club, the record contained "overwhelming evidence" establishing that: (1) "seeps at [the utilities'] coal ash ponds discharged polluted wastewater into adjacent surface waters"; (2) that "discharges from unauthorized seeps contained coal ash constituents at concentrations above water quality standards"; and (3) that "dewatering and pond closure would abate the illegal discharges," so that the costs in question "are not recoverable from ratepayers."

The Sierra Club urges this Court to reject the Commission's determination that N.C.G.S. § 62-133.13 did not apply to the costs at issue in these cases on the grounds that those costs had been incurred to comply with federal and State law rather than as the result of unlawful discharges as "unsupported by any evidence in the record, let alone competent, material, and substantial evidence," citing N.C.G.S. § 62-94(b)(5) and *CUCA*, 348 N.C. 452, 460, 500 S.E.2d 693, 699 (1998), and as an "arbitrary and capricious" decision, citing *State ex rel. Utilities Commission v. NUI Corp.*, 154 N.C. App. 258, 266, 572 S.E.2d 176, 181–82 (2002). In addition, the Sierra Club argues that the utilities "did not present evidence that the closure of any of its ponds was required by the CCR Rule" and that, "[i]rrespective of CAMA," the closure costs had been incurred in accordance with Special Orders on Consent addressing discharges from unpermitted seeps and a Superior Court determination that the closure of the utilities' ponds would eliminate these seeps. The Sierra Club further asserts that a determination to the contrary would have the effect of "nullify[ing] the applicability of" N.C.G.S. § 62-133.13, given that "the legislature knew full well that all of [the utilities'] ponds would be required to close" at the time that it enacted N.C.G.S. § 62-133.2 as part of CAMA. In the Sierra Club's view, the enactment of CAMA was a "direct response" to the utilities' "failure to operate its coal ash ponds in a safe and reasonable manner."

In response, the utilities argue that N.C.G.S. § 62-133.13 has no application to these cases given that it relates to unlawful discharges that "result[ed] in a violation of state or federal *surface* water quality standards" that occurred on or after 1 January 2014. In essence, the utilities contend that, while such prohibitions ensured that the costs relating to the Dan River spill were not included in the cost of service used for ratemaking purposes, the General Assembly did not intend to preclude the inclusion of the cost of abating the seeps associated with the utilities' coal ash basins in the costs upon which their rates were based. The utilities note that "the Commission went to great lengths to identify expenditures resulting from seeps that were alleged to have resulted in water quality issues" and that any such costs "independent of the requirements of the CCR Rule and CAMA" had been "expressly disallowed." Accordingly, the utilities assert that, with the exception of the costs reflected in these disallowances, "no seepage caused [the utilities] to incur any 'unjustified costs to comply with current laws and regulations.' "

We agree with the Commission's determination that N.C.G.S. § 62-133.13 does not bar the inclusion of the costs at issue in these cases in the utilities' cost of service for North Carolina ratemaking purposes given that the relevant statutory provision specifically defines "unlawful discharges" as "a discharge that results in a violation of State or federal surface water quality standards" and that the Commission determined, on the basis of adequate evidentiary support, that the costs at issue in these cases stemmed from the utilities' compliance with the CCR Rule, CAMA, and certain consent agreements requiring them to take corrective actions that were consistent with one or both of those regulatory requirements. In addition, the Commission determined in the Duke Energy Carolinas order that it "is a function of basic science" that "there will be a natural flow from an unlined basin into groundwater" as part of the "normal operation" of the basins so that, "except in limited fashion," "[Duke Energy Carolinas'] past coal ash management practices did not cause it to incur in the [relevant timeframe] unjustified costs to comply with current laws and regulations." In its Duke Energy Carolinas order, the Commission identified expenditures related to seeps and water quality issues associated with the coal ash basins located at the Dan River, Riverbend, Allen, Marshall, and Cliffside facilities and determined that the abatement of these seeps had been handled through the judgment entered in the federal criminal case or consent orders entered as the result of agreements between the utilities and DEQ. As a result, the Commission properly determined that the costs to which the Sierra Club's argument is directed were "independent of the requirements of the CCR Rule and CAMA," that the Commission had

expressly disallowed "any activities employed to resolve these seeps," and that N.C.G.S. § 62-133.13 does not preclude the inclusion of the relevant coal ash costs in the cost of service used to establish the utilities' North Carolina retail rates.

C. Basic Facilities Charge

[6] The environmental intervenors contend that the Commission erred by authorizing Duke Energy Carolinas to increase the Basic Facilities Charge for the residential rate class from $11.80 to $14.00 while leaving the facilities charges against other classes unchanged. Among other things, the environmental intervenors argue that this component of the Commission's order was not supported by competent, material, and substantial evidence so as to be subject to reversal pursuant to N.C.G.S. § 62-94(b)(5). According to the environmental intervenors, since no party advocated the establishment of a $14.00 per month customer charge, that figure constituted an arbitrary number that "most likely" was adopted because it was identical to the figure incorporated into a joint stipulation that the Commission approved in the Duke Energy Progress proceeding, so that the Commission's decision to utilize that figure reflected a failure to weigh the testimony of each witness concerning the amount of the charge and to explain the weight that should be given to that testimony, citing *State ex rel. Utilities Commission v. Cooper*, 367 N.C. 644, 649, 766 S.E.2d 827, 830 (2014) (*Cooper II*). The environmental intervenors claim that, even though "each link in the chain of reasoning must appear in the order itself," quoting *Eddleman*, 320 N.C. at 352, 358 S.E.2d at 346, "[t]here is no such chain linking evidence in the record to the Commission's decision to set the [c]harge at $14.00," a fact that establishes that the Commission erroneously afforded "only minimal consideration to competent evidence," quoting *State ex rel. Utilities Commission v. Thornburg*, 314 N.C. 509, 511, 334 S.E.2d 772, 773 (1985).

In addition, the environmental intervenors argue that the Commission's decision to increase the residential Basic Facilities Charge contravened various provisions of the Public Utilities Act, citing N.C.G.S. § 62-2(a)(3a), (4), (5); N.C.G.S. § 62-155(a) (stating that "[i]t is the policy of the State to conserve energy through efficient utilization of all resources"); and *State ex rel. Utilities Commission v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 757 (1978). According to the environmental intervenors, the Commission's decision was "inconsisten[t]" with the statutory "policy directives" contained in the Public Utilities Act, which state that rates should "promote conservation," "demand reduction," and encourage efficiency, and failed to "consider" intervenor

testimony explaining that the residential Basic Facilities Charge should remain unchanged in order to avoid "penaliz[ing] customers who have taken steps to conserve energy." The environmental intervenors argue that the increased residential Basic Facilities Charge "unfairly impacts low-income and minority ratepayers," who "tend to use less electricity than the average household," citing *Cooper I*, 366 N.C. at 495, 739 S.E.2d at 548 and N.C.G.S. § 62-133(a), with the Commission having treated these considerations as nothing more than "a mere afterthought." The environmental intervenors assert that the Commission's finding that the approval of a $14.00 residential Basic Facilities Charge would "moderat[e] the impact of [the] increase on low-income customers to the extent that they are high-usage customers such as those residing in poorly insulated manufactured homes" was merely "conclusory" and devoid of "evidentiary support in the record," quoting Commissioner Clodfelter's dissent, and had been "refuted by the testimony of [environmental intervenor witness John] Howat" "that low-income customers tend to have lower-than-average electricity usage."

The environmental intervenors take issue with the Commission's decision to utilize the Minimum System Methodology proposed by Duke Energy Carolinas in determining the level at which the residential Basic Facilities Charge should be established. According to the environmental intervenors, the Minimum System Methodology approach "resulted in hypothetical grid cost estimates that do not comport with [Duke Energy Carolinas'] actual, original costs of used and useful property" given its assumption " 'that a minimum system . . . would have the same number of poles, conductor feet, and transformers' as installed in the real-world grid" when, in fact, "the equipment imagined under [that methodology] would be capable of serving more than the minimal demand of customers" and that "the customer-related percentage of the distribution system [derived using the Minimum System Methodology] is effectively driven by . . . *non-existent facilities*." As a result, the environmental intervenors argue that the Minimum System Methodology "turns foundational ratemaking principles upside down"; "serves as a poor proxy for the actual, used and useful distribution grid"; and "violate[s] [Duke Energy Carolinas'] obligation to base rates on an ascertainment of the original costs of utility property that is used and useful in providing service to the public," citing N.C.G.S. § 62-133(b)(1). The environmental intervenors contend that the Commission has, in prior decisions, rejected the use of the Minimum System Methodology, with its failure to "acknowledge[e] or explain[ ] its prior, contrary decisions" demonstrating "lack of careful consideration" and "reasoned judgment" and rendering its decision to adopt that methodology in this case "arbitrary

and capricious," citing *Thornburg*, 314 N.C. at 515, 334 S.E.2d at 776. The environmental intervenors argue that "there was not even a scintilla of evidence to support" the Commission's decision with respect to the Basic Facilities Charge issue, particularly given that it ordered an overall revenue reduction for Duke Energy Carolinas, citing *Cooper II*, 367 N.C. at 438, 758 S.E.2d at 640, pointing to the "common-sense principle that an adjustment to the Basic Facilities Charge should bear some logical relationship to the overall change in rates."

Finally, the environmental intervenors argue that the Commission's order was "unduly discriminatory" given that it approved an increase in the residential Basic Facilities Charge while leaving similar rates for other customer classes unchanged, citing N.C.G.S. § 62-140(a); *State ex rel. Utilities Commission v. North Carolina Textile Manufacturers Ass'n*, 313 N.C. 215, 222, 328 S.E.2d 264, 269 (1985); and *CUCA*, 348 N.C. at 468, 500 S.E.2d at 704. According to the environmental intervenors, "[t]he Commission did not point to any competent, material and substantial evidence of a difference in conditions between customer classes to support its determination to increase the residential [c]harge while leaving the non-residential [c]harges the same" and only offered "murky generalizations and a vague reference to evidence in the record" in support of this decision.

In response, the utilities argue that Commission's decision to increase the residential Basic Facilities Charge to $14.00 had the necessary evidentiary support given that the figure adopted by the Commission was within the range recommended by the various witnesses and the fact that the Commission "is not limited to specific rates advocated by the parties and is," instead, "allowed to fix a rate based on the evidence presented, just as a jury in assessing an amount of damages is not limited to only specific amounts demanded by a plaintiff or defendant," citing *Duke Power Co. II*, *State ex rel. Utilities Commission v. Public Staff*, 323 N.C. 481, 493, 374 S.E.2d 361, 367 (1988), and *Legacy Data Access, Inc. v. Cadrillion, LLC*, 889 F.3d 158, 168 (4th Cir. 2018). In the utilities' view, the environmental intervenors seek to "box in the Commission and take away any room for the Commission as a regulatory body to use its expertise, discretion, or subjective judgment," a result which is "simply not the law in the State of North Carolina," citing *Duke Power Co. II*, 305 N.C. at 7, 287 S.E.2d at 790. On the contrary, the utilities contend that "the Commission does not have to provide an equation or create a graph on how it set the [Basic Facilities Charge] for the residential rate classes at $14.00" and point out that, "[i]n *Duke Power Co. [II]*, this Court did not require that the Commission provide a direct link or detail" as to the

specific return on equity that it approved in that proceeding, citing *id.* at 30, 287 S.E.2d at 803.

The utilities contend that the record contained "overwhelming evidence" supporting the Commission's decision to increase the residential Basic Facilities Charge, with this evidence resting upon Duke Energy Carolinas' cost of service study, which indicated that the charge in question should be set at $23.78 even though Duke Energy Carolinas only proposed to increase it to $17.79 in order "to moderate any effect of the increase on low-usage customers." In addition, the utilities point to the fact that Duke Energy Carolinas witness Michael Pirro testified that an increase in the residential Basic Facilities Charge was necessary because "it is important that [Duke Energy Carolinas'] rates reflect cost causation to minimize subsidization of customers within the rate class."

The utilities deny that the validity of the Commission's determination with respect to the appropriate level of the residential Basic Facilities Charge is controlled by this Court's decision in *Eddleman* on the grounds that, in *Eddleman*, this Court rejected an argument that the Commission's mislabeling of findings and conclusions did not constitute prejudicial error "so long as the order reflected a basic understanding of how the decision-making process is supposed to work." The utilities argue that, in this case, there is "no issue about whether the Commission . . . mislabel[ed] its findings of fact and conclusions of law." Similarly, the utilities deny that this case is controlled by *Cooper II*, in which this Court required the Commission to demonstrate that it had actually weighed the evidence and exercised its independent judgment without adopting any requirement that the Commission explain the weight to be given to the testimony of any specific witness.

The utilities acknowledge that the record contains considerable evidence concerning the potential effect of the proposed increase in the residential Basic Facilities Charge upon energy conservation and upon low-income households. On the other hand, the utilities note that the Commission also heard extensive evidence regarding "the need for the rates in the residential rate classes to more adequately reflect cost causation" and point out that, "[a]s the administrative agency vested by the General Assembly with 'broad powers to regulate public utilities and to compel their operation in accordance with the policy of the State,' these are the kinds of policy choices the Commission has been entrusted to make," citing *State ex rel. Utilities Commission v. Public Staff*, 123 N.C. App. 623, 625, 473 S.E.2d 661,663 (1996). For that reason, the utilities contend that the Commission "must have room to exercise its discretion and judgment," quoting *Eddleman*, 320 N.C. at 379, 358 S.E.2d at 361,

and did so in this case, having fully considered the policy pronouncements set forth in N.C.G.S. § 62-2(a), 3(a), (4), and (5) and N.C.G.S. § 62-155(a) and the evidence presented by the environmental intervenors in the course of determining that the importance of adopting residential rates that reflect the underlying cost of service outweighed the concerns expressed by the environmental intervenors.

The utilities argue that the Commission "clearly considered the impact of any increase . . . on low-income customers because it authorized a lesser increase" than the one that had been proposed by Duke Energy Carolinas "to moderate the impact of such increases" upon the affected customers. The utilities claim that the Commission simply "gave greater weight" to the evidence presented by Duke Energy Carolinas' witnesses than it did to the evidence supported by the environmental intervenors. In addition, the utilities argue that the Commission's decision to decrease the overall revenue that Duke Energy Carolinas was entitled to collect from customers was "primarily due to the impact of the Federal Tax Cuts and Jobs Act of 2017 lowering the corporate income tax rate," a consideration that "ha[d] no effect on the underlying cost to serve customers or the significant gap between that cost to serve and the [Basic Facilities Charge] for the residential rate classes."

The utilities also argue that the Minimum System Methodology "has served as a foundation for establishing the flat monthly [Basic Facilities Charge] by electric utilities since the early 1970s" and that "the Commission ha[d] never rejected the use" of this methodology in supporting its Basic Facilities Charge decisions. On the contrary, the Commission "simply did not award . . . the full amount of costs designated as customer-related by the cost of service study using [the Minimum System Methodology]" in previous orders given Duke Energy Carolinas' failure to request approval for a residential Basic Facilities Charge that mirrored the amount shown to be appropriate in its cost of service study. In addition, the utilities argue that the environmental intervenors had "completely miscast the nature of the [Minimum System Methodology,]" deny that it "is . . . an appraisal mechanism or determinant of the costs or value of utility assets," and contend that it "is a method for allocating the actual distribution system costs into the portion of those costs that are customer related . . . and the portion that are demand related" that did not violate N.C.G.S. § 62-133(b)(1).

Finally, the utilities argue that the Commission's decision to approve an increase in the residential Basic Facilities Charge was not unduly discriminatory and rested upon "reasonable differences between the residential and non-residential rate classes," citing N.C.G.S. § 62-140(a)

(stating that "[n]o public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage" and that "[n]o public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service"). According to the utilities, N.C.G.S. § 62-140(a) does not prohibit mere "preferences, advantages, prejudices, disadvantages, differences or discrimination in setting rates," citing *State ex rel. Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 22, 273 S.E.2d 232, 237 (1981), with the real question being "not whether the differential is merely discriminatory or preferential," but rather "whether the differential is an unreasonable or unjust discrimination." The utilities note that this Court held in *State ex rel. Utilities Commission v. Nello L. Teer Co.*, 266 N.C. 366, 146 S.E.2d 511 (1966), that the charging of different rates for services rendered did not constitute a per se violation of N.C.G.S. § 62-140 and stated in *State ex rel. Utilities Commission v. Carolina Utilities Customers Ass'n*, 351 N.C. 223, 524 S.E.2d 10 (2000), that utilities may treat customers differently "so long as the variance in charges bears a reasonable proportion to the variance in conditions," quoting *id.* at 243, 524 S.E.2d at 24, based upon the quantity of use, the time of use, the manner of service, and the cost of rendering the various services, citing *id.* at 244, 524 S.E.2d at 24, coupled with a consideration of competitive conditions, the consumption characteristics of the several classes, and the value of service to each class, citing *North Carolina Textile Manufacturers Ass'n*, 313 N.C. at 222, 328 S.E.2d at 269. After noting that the burden lies with the party seeking to challenge the validity of a Commission-approved rate, citing *id.*; *State ex rel. Utilities Commission v. Edmisten*, 314 N.C. 122, 132, 333 S.E.2d 453, 460 (1985), *vacated sub nom. Nantahala Power & Light Co. v. Thornburg*, 477 U.S. 902, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), the utilities argue that the environmental intervenors had failed to satisfy the applicable burden of proof given the presence in the record of evidence demonstrating the existence of "material differences" between the rate classes in this case and the "greater disparity between the [Basic Facilities Charge] and the true cost of service in the residential rate schedules as compared to the non-residential rate schedules."

We do not find the environmental intervenors' challenge to the lawfulness of the Commission's decision to authorize Duke Energy Carolinas to increase its residential Basic Facilities Charge to $14.00 to be meritorious. Duke Energy Carolinas witness Janice Hager testified that the Minimum System Methodology was "one of two [methodologies set out] in the [National Association of Regulatory Utility Commissioners] Cost

of Service manual for allocation of distribution costs," both of which "result in the assignment of distribution costs to customers." Ms. Hager emphasized that each of North Carolina's three major electric utilities "have a long history of using minimum system studies to identify the portion of distribution costs that are customer related" and opined that the "theory" underlying the Minimum System Methodology is "sound and consistent with cost causation which is the bedrock of [cost of service] studies." According to Ms. Hager, the Minimum System Methodology "allowed [Duke Energy Carolinas] to classify the distribution system into the portion that is customer-related (driven by number of customers) and the portion that is demand-related (driven by customer peak demand levels)" based upon the assumption that "[e]very customer requires some minimum amount of wires, poles, transformers, etc. to receive service."

Ms. Hager testified that Duke Energy Carolinas "develop[ed] its minimum system study . . . to consider what distribution assets would be required if every customer had only some minimum level of usage," thereby allowing "the utility to assess how much of its distribution system is installed simply to ensure that electricity can be delivered to each customer, regardless of the customer's frequency of use." Ms. Hager stated that, unless a minimal component of the utility's distribution system was treated as a customer-related cost, "low use customers could avoid paying for the infrastructure necessary to provide service to them which is counter to cost causation principles." In the event that these minimum system costs were allocated on a demand, rather than a customer-related, basis, Ms. Hager contended that "customers with higher usage [would be] subsidizing those with lower usage."

According to Mr. Pirro, "[t]he [proposed] base rate increase [was] allocated to the rate classes on the basis of rate base," an "allocation methodology [that] distributes the increase equitably to the classes while maintaining each class' deficiency or surplus contribution to return." Mr. Pirro testified that, in designing the proposed rates, Duke Energy Carolinas took into consideration "concern[s] regarding the size of the increase and . . . the impact of the [increase] on its customers" while "better reflect[ing] all customer-related costs" in order to reduce "customer cross-subsidization." According to Mr. Pirro, Duke Energy Carolinas' "current rates significantly understate the current cost of service related to the customer component of cost."

In Mr. Pirro's view, the proposed increase in Duke Energy Carolinas' residential Basic Facilities Charge would "better recover customer-related cost identified in the unit cost study for the residential rate

class." According to Mr. Pirro, "[c]ustomer-related costs are unaffected by changes in customer consumption and therefore should be paid by each participant, regardless of their consumption." Mr. Pirro asserted that "[r]esidential customer-related revenue not recovered in the Basic Facilit[ies] Charge is shifted to energy rates causing high usage customers to subsidize rates of lower usage customers," with a decision to leave these costs in the energy charges serving to "overinflate" the savings resulting from the energy-related component of the utility's rates. Mr. Pirro disputed the validity of any assertion that the proposed increase in the residential Basic Facilities Charge would discourage appropriate energy efficiency efforts in light of the fact that a failure "to properly recover customer-related cost via a fixed monthly charge provides an inappropriate price signal to customers and fails to adequately reflect cost causation" and that "[s]hifting customer-related cost to the [kilowatt-hour] energy rate [would] further exacerbate[ ] this concern and over-compensate[ ] energy efficiency and distributed generation for the cost avoided by their actions."

Mr. Pirro testified that the "goal" that Duke Energy Carolinas sought to achieve with its proposed rate design, which increased the residential Basic Facilities Charge by "approximately 50 percent of the difference between the current rate . . . and the customer-related cost . . . identified in the unit cost study," was to "use cost causation" along with "the concept of gradualism to effectively recover costs as they are incurred," with any decision to "defer[ ] a larger increase at this time merely shift[ing] the need to increase the Basic Facilit[ies] Charge to a future rate case proceeding." In addition, Mr. Pirro stated that, while the utility was "mindful of the impact of any rate increase on our customers, particularly low-income customers," it "applies cost causation principles to the extent possible" and believes that "[t]here are other means of addressing the financial needs of low-income customers which are more effective than biasing the rate design."

In light of the great deference that we owe to the Commission's decisions with respect to rate design issues, *North Carolina Textile Mfrs. Ass'n*, 313 N.C. at 222, 328 S.E.2d at 269, we hold that the record evidence is more than sufficient to support the Commission's decision to increase the residential Basic Facilities Charge from \$11.80 to \$14.00 in order to more accurately reflect cost-causation principles by removing a certain level of fixed costs from energy-related charges and assigning them among customers on a per customer rather than a per kilowatt hour basis. Although the environmental intervenors challenge the Commission's decision to approve the use of the Minimum

System Methodology for cost assignment purposes, the testimony of Ms. Hager provides ample justification for the decision in question. In deciding to approve the use of the Minimum System Methodology, the Commission "recognize[d] that any approach to classifying costs has virtues and vices" while noting that it "[was] not persuaded . . . that the minimum system analysis employed by [Duke Energy Carolinas] [was] flawed in a way that preclude[d] the Commission from accepting it as appropriate for cost allocation in this proceeding." Similarly, while the environmental intervenors urged the Commission to utilize a cost allocation methodology that assigned no portion of the utility's distribution system costs on a per customer, rather than a demand or energy-related basis, the Commission was well within the scope of its statutory authority in determining that a portion of the cost of its distribution system should be assigned on a per customer basis in light of the existence of record evidence tending to show that no customer could receive service in the absence of a minimal level of distribution facilities. The record also reflects that the Commission gave further heed to the concerns expressed by the environmental intervenors relating to the use of the Minimum System Methodology by concluding that "a more focused and explicit evaluation of options for distribution system cost allocation and an assessment of the extent to which any single allocation methodology is being consistently applied by the utilities" should be conducted in future general rate proceedings and directing the Public Staff "to facilitate discussions with the electric utilities to evaluate and document a basis for continued use of minimum system," "to identify specific changes and recommendations as appropriate," and to "submit a report on its findings and recommendations to the Commission" by the end of the first quarter of 2019.

At the end of the day, "[i]t is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom," with this being, instead, "the duty of the Commission which has special knowledge, experience and training best suited to make such determinations." *State ex rel. Utils. Comm'n v. Carolina Utility Customers Ass'n*, 323 N.C. 238, 251, 372 S.E.2d 692, 699–700 (1988). In the event that this Court was to determine, as a matter of law, that the Commission is required to adopt a cost allocation methodology that refrained from assigning a portion of the cost of Duke Energy Carolinas' distribution system on a customer-related, rather than a demand or energy-related basis, on the basis of the evidentiary record developed in this case, we would be trespassing into territory that the General Assembly has assigned to the Commission and depriving that body of its statutorily-required

opportunity to use its expertise in determining such technical issues as whether a portion of the cost of the utility's distribution system should be treated as customer-related or demand-related costs and how best to assign those costs among the various components of individual rate schedules at the conclusion of the ratemaking process. As a result of the fact that the arguments for and against the use of the Minimum System Methodology "are essentially fact based and are more properly made to the Commission than to this Court," *id.* at 251, 372 S.E.2d at 699, we find no error of law in the Commission's decision to use that approach in designing Duke Energy Carolinas' residential Basic Facilities Charge.

The environmental intervenors' remaining challenges to the Commission's decision to approve an increase in the residential Basic Facilities Charge are equally unavailing. Although the General Assembly has stated that "it is declared to be the policy of the State of North Carolina" to "promote adequate, reliable, and economical utility service, N.C.G.S. § 62-2(a)(3); to "avoid[ ] wasteful, uneconomic, and inefficient use of energy," N.C.G.S. § 62-2(a)(4); to "encourage and promote harmony between public utilities, their users, and the environment," N.C.G.S. § 62-2(5); and "to conserve energy through efficient utilization of all resources," N.C.G.S. § 62-155(a), the General Assembly has also stated that it is the policy of the State of North Carolina to "[t]o provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences, or advantages," N.C.G.S. § 62-2(4). An examination of the relevant statutory provisions, which are couched as policy pronouncements rather than specific statutory mandates, demonstrates that the Commission is required to attempt to further multiple, potentially conflicting, policy goals in carrying out its work. In view of the fact that the Commission is frequently called upon to choose between regulatory alternatives that further differing policy objectives, the ultimate question is whether the Commission appropriately balanced the competing regulatory policy goals that it is required to further in exercising its regulatory discretion given the state of the evidentiary record rather than whether its decision furthered a particular policy goal to the maximum extent possible. Thus, the Commission would not have committed any error of law in the event that it elected, based upon adequate evidentiary support, to place principal emphasis upon the need to eliminate existing cross-subsidies among customers and customer classes as compared to placing maximum price pressure upon energy use in making any particular ratemaking decision.

In addition, the Commission did not commit any error of law by adopting a specific dollar figure for Duke Energy Carolinas' residential

Basic Facilities Charge that was not advocated for by any particular party to this proceeding. In this case, the record reflects that the $14.00 per month figure to which the environmental intervenors object had the effect of moving the utility's residential Basic Facilities Charge what the Commission believed to a more cost-justified level in a gradual way in an attempt to reduce the amount of cross-subsidization inherent in the existing rate structure while mitigating the practical concerns that led the environmental intervenors to object to Duke Energy Carolinas' original proposal. The adoption of such an approach is well within the confines of the Commission's statutory authority. Similarly, the fact that the exact dollar figure at which the Commission established Duke Energy Carolinas' residential Basic Facilities Charge was identical to the dollar value set out in the stipulation between Duke Energy Progress and the Public Staff does not show the existence of any legal defect in the Commission's decision given that the evidence would have supported a higher residential Basic Facilities Charge than the Commission actually adopted and given that the figure chosen by the Commission represented a gradual increase in the residential Basic Facilities Charge toward a more cost-justified level in an effort to effectuate multiple regulatory goals, including the avoidance of overly drastic changes in a utility's rate structure at any single point in time.

As the Commission's decision to refrain from setting the utility's residential Basic Facilities Charge at the exact figure shown in the cost of service study suggests, the Commission's order demonstrates that it was well aware of the potential impact of this rate change upon certain categories of residential customers, particularly low-income customers. However, the determination that the benefits to be obtained as the result of the establishment of what it believed to be a more cost-justified rate schedule outweigh other relevant considerations is a decision that the Commission, in the exercise of its regulatory discretion, is entitled to make as long as its order contains adequate findings and conclusions and as long as those findings and conclusions have sufficient evidentiary support. In further recognition of the concerns expressed by the environmental intervenors, the Commission also concluded that there are "more effective" means of managing low-income customers' needs and "encourage[d] [Duke Energy Carolinas] . . . to identify low-income customers" who were likely to have difficulty with the increased rates "in order to provide assistance." As a result, the record reflects that the Commission adequately considered the interests of adversely affected customers in deciding to approve the establishment of a $14.00 per month Basic Facilities Charge for Duke Energy Carolinas' residential customers.

The Commission also adequately addressed the environmental intervenors' argument that its decision to increase the residential Basic Facilities Charge while leaving the Basic Facilities Charges for other customer classes unchanged was unduly discriminatory in violation of N.C.G.S. § 62-140. In response to this contention, the Commission noted that the utility's non-residential rate schedules were more complex than its residential rate schedules, with this statement being supported by evidence tending to show that many non-residential rate schedules contain a "demand charge" that reflects the "kilo-watt . . . capacity the power company must maintain to meet the [maximum] demand or requirement of the customer, though not used." *State ex rel. Utils. Comm'n v. Carolinas Committee for Industrial Power Rates*, *etc.*, 257 N.C. 560, 562, 126 S.E.2d 325, 327 (1962). Aside from making non-residential rate schedules more complex than residential rate schedules, the Commission noted that the use of a demand charge may serve to align non-residential rates more closely with cost-causation considerations than residential rates. In addition, the Commission found that the same divergence between appropriate cost-causation principles and the actual design of the utility's residential rates reflected in Duke Energy Carolinas' existing residential Basic Facilities Charge was not present in the utility's non-residential rates given that those rates generally included a demand, as well as a customer-related, component. As a result, for all of these reasons, we hold that the Commission did not commit any error of law by approving an increase in Duke Energy Carolinas' residential Basic Facilities Charge.[24]

III. Conclusion

Thus, for all of these reasons, we conclude that the Commission did not err by: (1) allowing the inclusion of a large majority of the utilities' coal ash costs in the cost of service used for the purpose of establishing the utilities' North Carolina retail rates; (2) interpreting N.C.G.S. § 62-133(d) to authorize the Commission, in the exercise of its discretion, to allow a return on the unamortized balance of the deferred operating expenses; and (3) increasing Duke Energy Carolinas' residential Basic Facilities Charge from $11.80 to $14.00. On the other hand, we hold that the Commission erred by rejecting the Public Staff's equitable

24. Although we affirm the Commission's conclusions with respect to this issue in this case, we note that the Commission's rate design decisions do not have *res judicata* effect and may be revisited in future general rate proceedings. *Duke Power Co. I*, 285 N.C. at 395, 206 S.E.2d at 281; *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978); *Thornburg I*, 325 N.C. at 469, 385 N.C. at 454.

sharing proposal without properly considering and making findings and conclusions concerning "all other material facts" as required by N.C.G.S. § 62-133(d). As a result, we affirm the Commission's decisions, in part, and reverse and remand the Commissions' decisions for further proceedings not inconsistent with this decision, in part.

AFFIRMED, IN PART; REVERSED AND REMANDED, IN PART.

Justice NEWBY concurring in part and dissenting in part.

I agree with most of the majority's analysis. I disagree, however, with the majority's conclusion that the Commission erred by rejecting the Public Staff's equitable sharing proposal in both the Duke Energy Progress (DEP) rate case and the Duke Energy Carolinas (DEC) rate case without, in the majority's view, properly considering and making findings and conclusions concerning "all other material facts" pursuant to N.C.G.S. § 62-133(d), specifically including the alleged environmental violations. To the contrary, the Utilities Commission considered all the evidence and chose not to assess further penalties, other than the $100,000,000 that it had already imposed, against the utilities in the respective orders. As such, the Utilities Commission did not abuse its discretion when choosing to reject the Public Staff's proposal. Moreover, the majority's approach seems to untether the Utilities Commission from its statutorily delineated discretion to make these determinations, which raises separation of powers concerns. Essentially, the majority seems to promulgate an unbridled approach contrary to the statutorily defined discretion and authority afforded to the Utilities Commission in its own, unique capacity. Therefore, I concur with the majority's opinion in part and dissent in part.

The Utilities Commission did not abuse its discretion in rejecting the Public Staff's equitable sharing proposal in both of its orders, the DEP Order as well as in the DEC Order. Notably, the Utilities Commission's discretionary determination is reviewed by this Court for an abuse of discretion. *See State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n*, 123 N.C. App. 623, 627, 473 S.E.2d 661, 664 (1996) ("Exercise of discretionary powers of the Commission will not be reversed by reviewing courts except upon a showing of 'capricious, unreasonable, or arbitrary action or disregard of law.' " (quoting *State ex rel. North Carolina Utils. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 391, 134 S.E.2d 689, 695 (1964))). Moreover, "the weighing of the evidence and the exercise of judgment thereon within the scope of [the Utilities Commission] authority are matters for the Commission."

Carolina Coach Co., 261 N.C. at 391, 134 S.E.2d at 695 (citing *State ex rel. Utils. Comm'n v. Fredrickson Motor Express*, 232 N.C. 180, 59 S.E.2d 582 (1950)). Simply put, a reviewing court's authority is limited. *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.*, 281 N.C. 318, 336–37, 189 S.E.2d 705, 717 (1972).

"Neither such finding of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence." *Id.* at 337, 189 S.E.2d at 717 (citing *State ex rel. Utils. Comm'n v. Morgan, Att'y Gen.*, 277 N.C. 255, 177 S.E.2d 405 (1970); *State ex rel. North Carolina Utils. Comm'n v. Southern Railway Co.*, 267 N.C. 317, 148 S.E.2d 210 (1966); *State ex rel. Utils. Comm'n v. S. Ry. Co.*, 254 N.C. 73, 118 S.E.2d 21 (1961); *State ex rel. Utils. Comm'n v. Gulf-Atl. Towing Corp.*, 251 N.C. 105, 110 S.E.2d 886 (1959)). While the Commission certainly must consider all statutory enumerated elements, "[t]he Legislature has . . . designated the Commission to do the weighing of these elements, and the reviewing court may not set aside the Commission's determination of 'fair value' merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different 'fair value.' " *Id.* at 339, 189 S.E.2d at 719 (quoting *Morgan, Att'y Gen.*, 277 N.C. at 267, 177 S.E.2d at 413; then citing *State ex rel. Utils. Comm'n v. State and Utils. Comm'n v. Tel. Co.*, 239 N.C. 333, 344, 349, 80 S.E.2d 133, 140–141, 144 (1954); and then citing *State ex rel. North Carolina Utils. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 457, 146 S.E.2d 487, 491–92 (1966)).

Under the proper abuse of discretion standard of review, it cannot be said that the Utilities Commission's decision was so arbitrary that it could not be the result of a reasoned decision. The Utilities Commission's thorough orders demonstrate that it knew and was well aware of the alleged environmental violations. While the Utilities Commission need not and could not decide the merits of the alleged violations, it certainly took the underlying facts into account. The evidence admitted and the resulting orders show that the Utilities Commission properly considered all of the allegations. The Commission even noted it was "unable to find DEP faultless in the dilemma." The Commission stated that these circumstances of mismanagement resulted in its decision to impose $70,000,000 and $30,000,000 management penalties in the two orders.

Specifically, in the DEP rate case, the Commission decided to allow amortization of the deferred costs "over five years with a full return on the unamortized balance," but it did so after making a downward

adjustment for a management penalty. Moreover, in the DEC rate case, the Utilities Commission explained that, other than adjusting for a management penalty, it would not be appropriate for the Commission to exercise its discretion to make a further downward adjustment. In doing so, the Commission explained its decision:

> No witness argues that the Commission lacks the discretion to follow the precedent it established in [early rate cases,] where it addressed the issue of amortizing deferred ARO CCR remediation costs over five years and a return on the unamortized balance. No witness argues that the law forbids the Commission to authorize a return on the unamortized balance. The Commission chooses to exercise its discretion and authority under N.C.[G.S.] § 63-133(d) and follow its precedent here—amortize the ARO costs over five years and authorize a return on the unamortized balance . . . . The Commission will not accept the Public Staff equitable sharing argument primarily because the Commission determines in its discretion that amortization of the deferred ARO costs over 25 years is inequitable . . . .

The Commission clearly explained that, despite recognizing the alleged fault of the Utilities in their management of these situations, when considering rate setting, rates that do not allow a utility to recoup reasonable costs jeopardizes the financial strength of the utility, which results in higher rates for ratepayers over time and diminished quality of services that the utility must provide. Thus, the Commission's decisions certainly were not without reason and explanation; it therefore cannot be said that the Commission abused its discretion in allowing a downward adjustment in imposing management penalties, just not to the extent and in the way that the Public Staff requested. To the extent that the applicable statute gave the Utilities Commission a degree of discretion, it understood that it possessed the discretion and exercised the discretion appropriately, explaining its choice to do so.

Neither the Public Staff nor the majority can point to a factor that was not considered in either order. Instead, the Public Staff recommended that the Utilities Commission disallow the Utilities from recovering 50% of the coal ash closure costs in the DEP rate case, and 51% of costs in the DEC rate case. The Public Staff could offer no explanation for selecting the 50% and 51% disallowances. Contrary to the Public Staff's inability to explain its recommended percentages for disallowances, the

Commission did explain why the Public Staff's recommendation of a 51% disallowance in the Duke Energy Carolinas rate case was arbitrary:

> [T]he concept is standard-less, and, therefore, from the Commission's view arbitrary for purposes of disallowing identifiable costs—there is no rationale that supports a substantially large 51% disallowance. The Public Staff chose a desirable equitable sharing ratio, then backed into the mechanism to achieve that level of disallowance, leaving the allocation subject to an arbitrary and capricious attack, particularly as it provides no explanation as to why the "equitable" split for DEP in the 2018 DEP Case was in its view 50-50, while the "equitable" split in this case is 51-49. As the Commission held in the 2018 DEP Case, the "Public Staff provides insufficient justification for the 50/50 [split] as opposed to 60/40 or 80/20 . . . ." 2018 DEP Rate Order, p. 189.

Therefore, it does not appear that the Utilities Commission thought it lacked the authority to weigh all factors presented, nor do the Commission's orders show a willful decision to ignore the Public Staff's argument with regard to the environmental concerns. To the contrary, after carefully considering the Public Staff's recommendations as a whole, the Utilities Commission rejected the Public Staff's recommendation since the Commission already imposed a downward adjustment in the form of management penalties. Therefore, contrary to the majority's conclusion, these cases need not be remanded to the Utilities Commission because it did not abuse its discretion.

Further, the majority's approach in remanding the case to consider additional factors broadens the statutorily delineated discretion that the Utilities Commission has, thereby raising constitutional concerns about separation of powers. By statute, the Utilities Commission does not have unbridled discretion. When the General Assembly delegated some of its legislative authority to the Utilities Commission, the legislature properly set forth "adequate guiding standards to govern the exercise of the delegated powers." *Adams v. N.C. Dep't of Nat. and Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978). "In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of government." *Gen. Tel. Co. of Southeast*, 281 N.C. at 336, 189 S.E.2d at 717. The General Assembly, however, limited the Utilities Commission's discretion by setting forth specifically enumerated factors to consider when fixing rates, stated in section 62-133 of the General Statutes. The Commission must comply with the statutory requirements. *Id.* at 336, 189 S.E.2d at 717.

In addition to the specifically enumerated factors set forth in section 62-133, the statute also provides that "[t]he Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." N.C.G.S. § 62-133(d) (2019). The Utilities Commission should set forth the factors considered "so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as 'relevant to the present fair value.' The statute does not contemplate that the Commission may 'roam at large in an unfenced field' in the selection of such 'other facts.' " *Gen. Tel. Co. of Southeast*, 281 N.C. at 340, 189 S.E.2d at 719 (quoting *State ex rel. Utils. Comm'n v. Pub. Serv. Co.*, 257 N.C. 233, 237, 125 S.E.2d 457, 460 (1962)). While the Commission must consider the factors as enumerated in the statute, and failure to do so warrants reversal, so long as it does so, determining the weight given to those factors when reaching its conclusion is certainly within the Commission's authority and is not the role of a reviewing court. *Id.* at 358–59, 189 S.E.2d at 731.

Here the Commission held over a month of hearings and considered testimony and thousands of pages of exhibits. While the General Assembly has instructed that the Commission shall consider all material facts, this instruction must be read in the context of the entire statute, part of which directs the Commission to follow a specific formula when it sets rates for public utilities. *See* N.C.G.S. § 62-133(b), (c) (2019). These statutory guiding principles enable the Utilities Commission to constitutionally fulfill its role. The Public Staff's position, which essentially asks the Commission to deny a fair rate of return in its unbridled discretion, simply cannot be adopted without the Utilities Commission roaming outside the clear statutory requirements. Thus, allowing the Utilities Commission this type of unfettered discretion implicates separation-of-powers principles, which require that the legislature give specific, detailed guidelines to the Utilities Commission in exercising its legislative function of setting rates. Notably, the Commission reasoned that adopting unsupported percentages as set forth by the Public Staff would equate to the Commission acting arbitrarily and capriciously, which the Commission cannot do.[1] Therefore, the Commission's decision to

1. Moreover, the Utilities Commission certainly knew and understood the decision it made in *Dominion*, where it agreed to the Public Staff's stipulation about Dominion's ability to recover costs and receive a rate of return. *In re Application of Va. Elec. & Power Co., d/b/a Dominion N.C. Power, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C.*, *Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532 (December 22, 2016) (available through https://starw1.ncuc.net/NCUC/page/Orders/portal.aspx by searching docket number and date). If the Utilities Commission decides this case differently, the Commission could be charged with making an arbitrary and capricious decision, departing from a prior decision with very similar facts.

reject the Public Staff's recommendation was within its statutorily defined discretion.[2]

Thus, I disagree with the majority's conclusion that the Commission erred by rejecting the Public Staff's equitable sharing proposal without, in its view, properly considering and making findings and conclusions concerning "all other material facts." Both orders should be affirmed. Therefore, I respectfully concur in part and dissent in part.

Justice EARLS concurring in part and dissenting in part.

Starting for a moment with the basics of what this case involves, the law of North Carolina tasks us with the duty to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b) (2019). In so doing, this Court may:

> affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

2. The Commission reached its decision by thoroughly explaining its reliance on *Thornburg I* and *Thornburg II*, both of which dealt at least in part with plants that were never used at all. *See State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989) (*Thornburg I*); *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989) (*Thornburg II*). This Court on appeal concluded that the Utilities Commission did not have the authority to effectuate any sort of "equitable sharing" position in its decision; either the plants and the relevant equipment were used and useful, and therefore should be included in rate base, or they were not. Therefore, the Utilities Commission here acted within the appropriate scope when determining that, after allowing a management penalty, that certain costs should be allowed based on the statutory criteria that control the Utilities Commission's ability to act.

Id. Further, we must take into account the policy of the State described by the General Assembly in statute, as well as the purposes of the laws it writes. *See*, *e.g.*, *State ex rel. Utils. Com. v. Morgan*, 277 N.C. 255, 266, 177 S.E.2d 405, 412 (1970) (taking account of the "clear purpose of chapter 62 of the General Statutes" as well as that chapter's declaration of policy to reject an interpretation of N.C.G.S. § 62-133(b) proposed by a utility). To that end, I observe that it is "the policy of the State of North Carolina," *inter alia*, to "provide fair regulation of public utilities in the interest of the public" and to "encourage and promote harmony between public utilities, their users and the environment." N.C.G.S. § 62-2(a) (2019). "To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, [and their] services and operations . . . in the manner and in accordance with the policies set forth in this Chapter." *Id.* § 62-2(b). The Commission is required to "fix such rates as shall be fair both to the public utilities and to the consumer." *Id.* § 62-133(a).

In this case the intervenors allege that the utilities have caused significant harm to the environment through their operations. The majority has already described some of the history of that harm, including the 2014 incident at Dan River resulting in between 30,000 and 39,000 tons of coal ash being discharged into the river, as well as the nine criminal violations to which the utilities pleaded guilty in federal court. Against the backdrop of new legislation requiring the utilities to address discharges at their coal ash basins, close all of their unlined coal ash basins, and change their coal ash management practices, *see* N.C.G.S. § 130A-309.211–.214, the utilities petitioned the Commission for permission to defer their compliance expenses. The utilities noted that, if they were required instead to "write off billions of dollars of costs for accounting purposes," their investors would receive a return on their investment of approximately 7.5% rather than the approximately 10.3% they would otherwise receive. This is the context of the decision before us—whether to affirm orders from the Commission which place the weight of coal ash cleanup costs on North Carolina energy customers so that investors in Duke Energy Progress and Duke Energy Carolinas receive a higher return on their investment.

I concur in the majority's conclusion that the orders entered by the North Carolina Utilities Commission are sufficient to satisfy the requirements of N.C.G.S. § 62-79(a) (2019) because the orders are "sufficient in detail to enable the court on appeal to determine the controverted questions presented." *See* N.C.G.S. § 62-79(a). Further, I concur in the majority's conclusion that the decision to increase the Basic Facilities

Charge levied by Duke Energy Carolinas for some classes of customers is supported by sufficient evidence in the record.

I also agree, in part, with the majority's discussion of the Commission's conclusions with respect to cost recovery. The Commission ultimately found that the coal ash expenditures made by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, were reasonable and prudent within the meaning of the statute so as to permit cost recovery in rates. The intervenors argued that all of these costs should have been disallowed because the utilities unreasonably decided to store coal ash in unlined basins, and further mismanaged those basins, resulting in environmental damage and increased cost to consumers. While the intervenors make a strong policy argument, the majority was correct on the law to reject such a broad claim. I write separately on this point, however, because I disagree with the majority's ultimate conclusion. In my view, the Commission erred by determining that the intervenors failed to produce evidence sufficient to trigger the utilities' burdens of persuasion that the costs were reasonable.

Further, I disagree with the majority's analysis concerning the extent of the Commission's discretionary authority pursuant to N.C.G.S. § 62-133(d) (2019) to allow the utilities to earn a return on the unamortized portion of their deferred coal ash costs.[1] While I agree with the majority's ultimate determination that the Commission did not appropriately utilize its discretion, which is expressed in the majority's remand for a more fulsome consideration of the Public Staff's equitable sharing proposal, I would hold that the Commission's authority is limited by the express terms of that statute and does not extend so far as the majority allows. As a result, I respectfully dissent from that portion of the majority's opinion.

Cost recovery

When the Commission is setting rates for a public utility, part of what it must do is determine the utility's "reasonable operating expenses." N.C.G.S. § 62-133(b)(3). When the Commission calculates the total amount of revenue that the utility will be allowed to recover from consumers through rates, the reasonable operating expenses are included in that figure. *Id.* § 62-133(b)(5). However, a utility may only

1. No part of the majority's opinion suggests that the coal ash expenditures were properly included in rate base as property used and useful, and therefore entitled to a return. *See* N.C.G.S. § 62-133(b)(1), (4). While the majority does not discuss this aspect of the case in detail, I elaborate on the issue below.

recover those operating expenses which are reasonable and prudent. *See*, *e.g.*, *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 368, 358 S.E.2d 339, 355 (1987). While we presume that a utility's costs are reasonable, *State ex rel. Utils. Comm'n v. Conservation Council of N.C.*, 312 N.C. 59, 64, 320 S.E.2d 679, 683 (1984), the presumption is overcome if a challenger produces affirmative evidence that the costs "are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated companies for the same or similar goods or services," *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76–77, 286 S.E.2d 770, 779 (1982) (*Bent Creek*). If this happens, the utility must satisfy its burden of persuasion to show that the costs are reasonable. *Id.* at 75–76, 286 S.E.2d at 778–79.

The majority holds that the Commission did not err when it determined that the Attorney General and other intervenors did not produce evidence to overcome the presumption of reasonableness for the utilities' costs. This may be true on a broad basis, in the sense that the intervenors did not produce evidence which would indicate that all of the utilities' costs were imprudent. As it relates to the utilities' decisions to utilize unlined coal ash basins in the first place, the intervenors largely produced evidence suggesting that the utilities' practices were shortsighted, motivated by near-term profit, or insufficiently sensitive to environmental concerns. Certainly, history has demonstrated that the utilities were insufficiently concerned with the environmental impacts of their actions, as evidenced by the extensive record of groundwater seepage, coal ash spills, and other negative environmental effects of the utilities' practices. Further, the evidence demonstrated that, at least in some cases, the utilities ignored the risk of environmental harm. For example, the record in the Duke Energy Progress rate case includes a report, prepared in 2004, regarding a long-term strategy for coal ash at the utility's L.V. Sutton Steam Electric Plant. The report identified problems at the plant, including (1) that an unlined coal ash basin was nearing capacity and would be full within two years, (2) that a nearby test monitoring well was showing high levels of arsenic, and (3) that environmental regulatory pressure was increasing on coal ash storage practices. The report outlined a number of long-term solutions, none of which had been implemented as of 2014. However, the statutory definition of reasonable operating expenses does not relate to the general reasonableness of the overall course of action but only to the reasonableness of the costs incurred. *See Bent Creek*, 305 N.C. at 76-77, 286 S.E.2d at 779.

I conclude that the Commission did err in its reasonableness determination because there was specific evidence produced that the particular costs incurred were exorbitant. "For rate-making purposes, the reasonable operating expenses of the utility must be determined by the Commission." *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n.*, 309 N.C. 238, 239, 306 S.E.2d 113, 114 (1983) (per curiam) (citing N.C.G.S. § 62-133(b)). Where affirmative evidence is offered to challenge the reasonableness of incurred expenses, "[t]he Commission has the *obligation* to test the reasonableness of such expenses." *Bent Creek*, 305 N.C. at 76, 286 S.E.2d at 779. While the majority blesses wholesale the Commission's determinations that the intervenors failed to come forward with sufficient evidence, a closer examination of the record reveals that appropriate evidence was presented.

For example, consider the 2004 report in the record of the Duke Energy Progress rate case pertaining to coal ash management strategies at the L.V. Sutton Steam Electric Plant. The report noted that the plant was permitted for two coal ash basins, one of which was full and the other of which would be full within two years. The report also recognized that the basins "will eventually have to [be] emptied and placed in a lined containment to eliminate the leaching of the ash products into the ground water system." As noted previously, the report presented a number of long-term solutions for managing the facility's coal ash. These included the following options:

- doing nothing;
- increasing the capacity of the newer basin and building a new one in seven years;
- building a new basin more immediately;
- stacking dry ash at the facility and building a vertical dike to increase capacity at the plant;
- using the coal ash to build a golf course;
- using the coal ash to build a wildlife preserve and public park;
- using the coal ash to build an industrial park;
- stacking the dry ash and processing it for sale in cement manufacturing;
- shipping the ash to a landfill or storage facility; and

- using new technology to expand the capacity of the existing coal ash basins.

Significantly, the report also included a section labeled "Economic Analysis." That section stated the following for the "do nothing" approach:

> The economic components of this alternative are all negative and are a direct result of not having any available space in the existing ash pond. The cost figures are derived from the loss of generation from the plant until 2012, at which time the ash would be shipped for the DOT project and allow the plant to continue operation at that time.
>
> This alternative would not alleviate the potential emergent projects associated with the unlined 1983 ash pond, or the pre-ash pond disposal site, and the monitoring well issues. The economic evaluation for this alternative will reflect a negative impact based on the cost of these projects and the probability of their occurrence.

Out of the ten alternatives listed in the report, the "do nothing" approach was ranked very near the bottom of the list in an "Economical Ranking."

This is precisely the type of evidence that we identified in *Bent Creek* as "affirmative evidence [that] is offered by a party to the proceeding that challenges the reasonableness of expenses." *See Bent Creek*, 305 N.C. 62, 76–77, 286 S.E.2d 770, 779 (1982). Faced with evidence that the utilities identified and ignored problems which would lead to greater expenses in the future, the Commission was required to "test the reasonableness of such expenses" when they were presented by the utilities for cost recovery. *Id.* at 76, 286 S.E.2d at 779.

The Commission did not take the approach required of it to determine whether the expenses that the utilities sought to recover were reasonably incurred. A more appropriate approach is demonstrated in the dissents of Commissioner Clodfelter in both the Duke Energy Progress and Duke Energy Carolinas rate cases, where he examined the evidence pertaining to each facility to determine whether the utilities had incurred reasonable costs. As Commissioner Brown-Bland noted in her dissent to the Duke Energy Progress order, the approach taken by the Commission, "without further analysis, does not reasonably assure that the rates fixed for the Company's service are 'fair to both the public utility[y] and to the consumer,' and that the rate set by the Commission and to be received by the Company is just and reasonable." The Commission and the majority of this Court, by failing to undertake a detailed consideration of the

costs proposed by the utilities, wrongly ignore the 2004 report and other evidence suggesting that the costs proposed for recovery by the utilities were not reasonably incurred.

The majority states that it agrees with the Commission's determination that the intervenors failed to quantify the specific effect of these improprieties. However, neither the Commission nor the majority cite authority from this Court or the General Statutes for such a requirement. Having been presented with evidence that the utilities' expenses were unreasonable, the Commission should have required the utilities to prove that they were entitled to cost recovery. *Bent Creek*, 305 N.C. at 76, 286 S.E.2d at 779. For that reason, I dissent from the majority's conclusions that the intervenors did not satisfy the burden of production.

Investment return

Property used and useful

While the Commission allowed a return on the unamortized balance of the utilities' coal ash expenditures, such a return was not permitted as a result of the expenditures' inclusion in the utilities' rate base. *See, e.g.*, N.C.G.S. § 62-133(b)(1) (defining rate base to include the "original cost or the fair value under G.S. 62-133.1A of the public utility's property used and useful"); *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 475, 385 S.E.2d 451, 458 (1989) (*Thornburg I*) (explaining that a utility may receive a return on property used and useful, but may not receive a return on reasonable operating expenses). Upon review of the Commission's orders in this case, I am convinced that further clarification is needed on what, in an ordinary ratemaking case, is properly included in rate base and reasonable operating expenses, respectively.

When calculating the rates that a utility may charge the public, the Commission must first determine the total revenues that the utility is entitled to obtain through rates charged to customers. N.C.G.S. § 62-133(b). In other words, the Commission has to figure out how much total money the utility gets from people who are paying for (in this case) electricity. To do this, the Commission uses a formula that has been prescribed by the General Assembly through statute. We have previously explained the formula:

> This statute requires the Commission to determine the utility's rate base (RB), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components

> are then combined according to a formula which can be expressed as follows:
>
> (RB X RR) + OE = REVENUE REQUIREMENTS

Thornburg I, 325 N.C. at 467 n.2, 385 S.E.2d at 453 n.2. "[R]ate base," we explained, "is the reasonable cost of the utility's property which is used and useful in providing service to the public, minus accumulated depreciation, and plus the reasonable cost of the investment in construction work in progress." *Id.* So, when the Commission is determining how much money a utility can charge to consumers, the first thing that it must do is figure out how much "used and useful" property (otherwise known as rate base) the utility has, and to multiply the value of that property by a fair rate of return. This is what it means to say that a utility receives a rate of return on its property used and useful. However, the utility does not receive a rate of return on its reasonable operating expenses, which the statute distinguishes from property used and useful. *See* N.C.G.S. § 62-133(b); *accord Thornburg I*, 325 N.C. at 475, 385 S.E.2d at 458 ("While this statute makes clear that the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S. § 62-133(b)(1), the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3).").

Our prior decisions have provided further clarity on what is and is not included in rate base, and therefore on what the Commission may allow a return. In one case, we considered whether the Commission erred in allowing a utility to include amounts invested in plant facilities servicing abandoned power generation units. *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 486, 385 S.E.2d 463, 464 (1989) (*Thornburg II*). There, the utility had built a facility with four nuclear generation power units while it turned out that only one was necessary to meet the needs of its customers. *Id.* at 487, 385 S.E.2d at 464. Determining that the Commission had erred by including the costs of the abandoned power generation units in rate base and allowing a return, we noted:

> The statute sets out a two-part test for the Commission to use in deciding what goes into the *rate base* for all costs except costs of construction work in progress. The Commission must: (1) determine the *reasonable* original cost of the property and (2) determine if the property is "used and useful, or to be used and useful within a reasonable time after the test period." If the costs in question

> do not meet both parts of the test, the costs may not be included in the *rate base* for ratemaking purposes.

Id. at 491, 385 S.E.2d at 466–67 (citations omitted). Because the amount that the utility sought to include in rate base "was spent to build *excess* common facilities," we concluded that they could not be included in rate base. *Id.* at 495, 385 S.E.2d at 469. This was because "[i]f the facilities are *excess*, as a matter of law, they cannot be considered 'used and useful' as that term is used in N.C.G.S. § 62-133(b)(1)." *Id.*

Similarly, we considered in another case whether a wastewater treatment plant that "was not in service at the end of the test year and, in fact, would never again be in service" was includable in rate base. *State ex rel. Utils. Comm'n v. Carolina Water Serv.*, 335 N.C. 493, 507, 439 S.E.2d 127, 135 (1994) (*Carolina Water*). We stated, reviewing our prior decisions:

> If facilities are not used and useful, they cannot be included in rate base. Including costs in rate base allows the company to earn a return on its investment at the expense of the ratepayers. We do not allow such a return for property that will not be used or useful within the near future. Costs for abandoned property may be recovered as operating expenses through amortization, but a return on the investment may not be recovered by including the unamortized portion of the property in rate base.

Id. at 508, 439 S.E.2d at 135 (citations omitted). We concluded that the wastewater treatment plant was no longer used and useful and held that "no portion of its costs may be included in rate base." *Id.*

Where a pipeline built to serve a former customer was later used as a storage facility, to the benefit of current customers, we have determined that the property was used and useful and properly included in rate base. *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n*, 313 N.C. 215, 229–30, 328 S.E.2d 264, 273 (1985). Moreover, where a generating unit "is needed to enable [a utility] to meet the load on its system, and does not represent excess generating capacity," *Eddleman*, 320 N.C. at 355, 358 S.E.2d at 347, the unit is appropriately included in rate base as property used and useful, *Id.* at 362, 358 S.E.2d at 351–52.

In each case where we consider whether property is used and useful, the delineating factor is whether that property is currently useful for the provision of current service to customers. In *Thornburg II*, we concluded that excess common facilities should be excluded from rate

base because they were not being used to provide service to customers. 325 N.C. at 495, 385 S.E.2d at 469. Similarly, in *Carolina Water*, a wastewater treatment plant was not properly included in rate base because it was no longer being used to provide service to customers and would not be used in the future. 335 N.C. at 507–08, 439 S.E.2d at 135. By contrast, in *Textile Manufacturers Association*, we determined that a pipeline was properly included in rate base because it was being used as a storage facility, benefiting customers, notwithstanding the fact that it was not being used to its full capacity. 313 N.C. at 229-30, 328 S.E.2d at 273. Finally, in *Eddleman*, we determined that a generating unit that was being used as reserve capacity to handle the peak energy use of current customers was properly included in rate base as property used and useful. 320 N.C. at 355–60, 358 S.E. 2d at 347–50. Moreover, in each case, we considered whether *property* could be included in rate base. *See* N.C.G.S. § 62-133(b)(1) (including "the reasonable original cost or the fair value . . . of the public utility's property used and useful" in the calculation of rate base).

The Commission seems to have confused this analysis. For example, the Commission writes in its Duke Energy Carolinas order:

> Costs are not recoverable simply because they are incurred by the utility. The utility must show that the costs it seeks to recover are (1) "known and measurable"; (2) "reasonable and prudent"; and (3) where included in rate base "used and useful" in the provision of service to customers. . . . But once it has shown that these metrics are met, the utility should have the opportunity to recover the costs so incurred. This is what North Carolina's ratemaking statute requires. . ., and to do otherwise would amount to an unconstitutional taking.

Later, the Commission writes that "if the expenditures [of a utility] do support and provide service to customers, the costs are 'used and useful.' "

However, the Commission's references to "costs" and "expenditures" are broader than the General Assembly has prescribed, and broader than any case from this Court has previously allowed. Only "the cost of the public utility's property" receives a rate of return under the statutory ratemaking formula. N.C.G.S. § 62-133(b)(5). Similarly, our decisions on rate base have stated the figure includes "the reasonable cost of the utility's property which is used and useful in providing service to the public." *Thornburg I*, 325 N.C. at 467 n.2, 385 S.E.2d at 453 n.2; *accord Carolina*

Water, 335 N.C. at 508, 439 S.E.2d at 135 ("There is no statutory authority for including in rate base costs from a completed plant that is no longer used and useful within the meaning of this term as determined by our case law."). As a result, to the extent that the Commission determined that the utilities coal ash expenditures were includable in rate base as property used and useful, it erred as a matter of law.

Discretionary authority pursuant to N.C.G.S. § 62-133(d)

While the foregoing applies to the ordinary ratemaking case, the majority notes that the rate cases below involved extraordinary and unusual circumstances, triggering the Commission's obligation to "consider all other material facts of record that will enable it to determine what are reasonable and just rates." *See* N.C.G.S. § 62-133(d). The majority sets out a new, four-part test to evaluate the Commission's use of discretion pursuant to that provision. The majority holds that the Commission may utilize its authority under N.C.G.S. § 62-133(d) to "consider other material facts of record" in its determination of "reasonable and just rates" when (1) the rate case involves unusual, extraordinary, or complex circumstances not adequately addressed by the remainder of the statute, (2) the Commission reasonably concludes that a departure from the ordinary ratemaking process is justified, (3) the Commission determines that it must consider "other facts" to produce reasonable and just rates, and (4) the Commission makes sufficient factual findings and legal conclusions supported by substantial record evidence on a review of the whole record which explain (a) why the Commission is diverging from the usual ratemaking process and (b) why its adopted approach is reasonable and just to the utility and consumers.

This is an admirable procedural rule which the Commission must now follow before utilizing its discretionary authority under the statute. The rule helpfully states the categories of information that the Commission must include in its order. However, the majority's new rule provides no guidance on the substantive limits of the Commission's discretionary authority.[2] It also provides the Commission with little

2. The majority's analysis on this point highlights the extent to which the test could be improved as a guiding tool. The majority, analyzing the Commission's orders, notes only that the Commission appropriately identified the utilities' rate cases as unusual and that it contained detailed findings of fact and conclusions of law. According to the majority's test, such a finding triggers the use of the Commission's discretionary authority under N.C.G.S. § 62-133(d). It does not, however, explain why the Commission's particular use of its discretionary authority, here the decision to allow a rate of return on extraordinary operating costs, was appropriate. I also note that the majority's conclusion that "the Commission did not err in approving the basic ratemaking approach that was utilized in these proceedings" directly conflicts with the majority's later holding, that the Commission erred in rejecting

guidance as to when the Commission may appropriately use its discretionary authority to adjust the traditional ratemaking process, providing only the undefined standard of "unusual, extraordinary, or complex circumstances." As I read our prior decisions, the Commission's authority pursuant to N.C.G.S. § 62-133(d) is informed and limited by the remainder of that statute.

In *State ex rel. Utilities Commission v. Duke Power Company*, we held that the Commission acted within its statutory power when, pursuant to N.C.G.S. § 62-133(d), it reduced a utility's rate base to offset accumulated depreciation expense, avoiding "a windfall to [the utility] and a penalty to its customers." 305 N.C. 1, 19, 287 S.E.2d 786, 797 (1982). This adjustment, we explained, was necessary to preserve "the overall scheme of G.S. § 62-133." *Id.* at 15, 287 S.E.2d at 794.

In *Thornburg I*, we blessed the Commission's decision, pursuant to N.C.G.S. § 62-133(d), to liberally construe the statutory provision allowing cost recovery of reasonable operating expenses to include abandonment losses. 325 N.C. at 476, 385 S.E.2d at 458. We noted that the Commission is permitted by that section of the statute "to consider 'all other material facts of record' beyond those specifically set forth in the statute," and stated that this authority meant that "the Commission would not be bound by a strict interpretation of" the other parts of the statute when it utilized this discretion. *Id.* at 478, 385 S.E.2d at 459.

In *State ex rel. Utilities Commission v. Carolina Power & Light Company*, we affirmed the Commission's exercise of discretionary authority pursuant to N.C.G.S. § 62-133(d) because the exercise of that authority gave effect to the intent of the legislature and was consistent with the explicit language of N.C.G.S. § 62-133(c). 320 N.C. 1, 13, 358 S.E.2d 35, 42 (1987).

In each of these cases, we affirmed the Commission's use of its discretionary authority under N.C.G.S. § 62-133(d) because doing so gave effect to the rest of the ratemaking statute. In each case, the Commission's exercise of discretion, while departing slightly from the straightforward calculation prescribed by the remainder of Section 62-133, nevertheless complemented the structure of that statute and was necessary to avoid the "defeat of the overall scheme of G.S. § 62-133." *Duke Power Co.*,

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the Public Staff's equitable sharing proposal. The proposal included disallowing a return on the unamortized portion of the coal ash expenditures. Both of the Commission's decisions (to allow a return and to reject the proposal) implicate the Commission's authority under N.C.G.S. § 62-133(d).

305 N.C. at 15, 287 S.E.2d at 794. This is consistent with our admonition that "N.C.G.S. § 62-133(d) has been construed as a device permitting the Commission to take action *consistent with the overall command of the general rate statutes, but not specifically mentioned in those portions of the statute under consideration in a given case*." *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 690–91, 332 S.E.2d 397, 442 (1985) (emphasis added). As a result, it is incorrect for the majority to state that the Commission's authority pursuant to N.C.G.S. § 62-133(d) is not limited by the rest of that statute. To the contrary, the Commission's use of N.C.G.S. § 62-133(d) must be consistent with the overall scheme of the ratemaking structure set out by the General Assembly.

Having discussed the overreaching nature of the general grant of authority the majority has given the Commission, I must emphasize that the specific outcome reached by the Commission below is in direct contradiction of both the statute and our prior decisions. Pursuant to the overall scheme of N.C.G.S. § 62-133, "the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S. § 62-133(b)(1)," and "the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3)." *Thornburg I*, 325 N.C. at 475, 385 S.E.2d at 458. "Including costs in rate base allows the company to earn a return on its investment at the expense of the ratepayers." *Carolina Water*, 335 N.C. at 508, 439 S.E.2d at 135. By concluding that the Commission may depart from these fundamental principles, the majority expands the discretionary authority permitted under N.C.G.S. § 62-133(d) beyond any semblance of the legislative intent evidenced by the text. Where the ratemaking statute specifically limits application of a rate of return to property used and useful, the Commission's discretion to consider other relevant facts cannot be interpreted so broadly as to achieve the opposite result. *State ex rel. Utils. Comm'n v. Gen. Tel. Co.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972) ("The Commission, however, does not have the full power of the Legislature but only that portion conferred upon it in G.S. Chapter 62. In fixing the rates to be charged by a public utility for its service, the Commission must, therefore, comply with the requirements of that chapter, more specifically, G.S. 62-133.").

Our decision in *Carolina Water* is particularly instructive. There, the Commission treated an out-of-service wastewater treatment plant "as an extraordinary property retirement," determining "that the unrecoverable costs should be amortized over ten years with the unamortized

portion being included in rate base." 335 N.C. at 507, 439 S.E.2d at 135. Similarly, here, the Commission permitted amortization over a period of time for a portion of the coal ash expenditures and a return on the unamortized portion. Our conclusion in *Carolina Water* that the unamortized portion of costs that did not represent used and useful property were not entitled to a return should control the decision here.

As the Commission wrote in its DEC order, "[i]f the North Carolina General Assembly had intended to give the Commission the authority to deny otherwise recoverable environmental compliance costs due to some punitive theory of causation, it could have said so—and it did not." Just the same, if the General Assembly had intended to give the Commission the authority to allow a rate of return on expenses rather than property, "it could have said so—and it did not." "The legislature does not operate in a vacuum," in the Commission's words. "Rather, it operates within the context of N.C. Gen. Stat. § 62-133 . . . [h]ad it intended to disavow the routine cost recovery standard, it can be expected that the legislature would have had to do so explicitly."

As a final note, the majority remands this case to the Commission for reconsideration of the Public Staff's equitable sharing proposal. Because the proposal is consistent with the overall structure of N.C.G.S. § 62-133, it would likely fall within the limits of the Commission's discretionary authority pursuant to subparagraph (d) of that section, as described in our precedents. Further, the Public Staff's proposal more closely conforms to the General Assembly's mandate that "the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer" than do the results reached in the Commission's orders that are being remanded now.

Returning to the basics of why this case matters, by constitutional mandate, it is the "the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry." N.C. Const. art. XIV, § 5. Although the Constitution provides particular prescriptions intended to achieve that goal, this provision illustrates the state's commitment to environmental protection and enshrines that commitment in our most fundamental source of state law. While the Commission is explicitly charged with "encouraging and promoting harmony between public utilities, their users and the environment," N.C.G.S. § 62-2(a)(5), that statutory mandate must also be read consistent with the state constitutional protections designed to ensure the State protects its lands and waters.

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