NORTH CAROLINA REPORTS

VOLUME 377

SUPREME COURT OF NORTH CAROLINA

19 MARCH 2021

11 JUNE 2021

RALEIGH
2022

CITE THIS VOLUME

377 N.C.

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

PAUL MARTIN NEWBY

Associate Justices

ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS
PHIL BERGER, JR.
TAMARA PATTERSON BARRINGER

Former Chief Justices

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

Former Justices

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

Clerk
AMY L. FUNDERBURK

Librarian
THOMAS P. DAVIS

Marshal
WILLIAM BOWMAN

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Andrew Heath

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

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

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole[1]	Hertford
	Eula Reid[2]	Elizabeth City
2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Alma L. Hinton[3]	Roanoke Rapids
	Norlan Graves[4]	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
	William D. Wolfe	Wilson
9	John Dunlow	Oxford
	Cindy Sturges	Louisburg
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.[5]	Hillsborough
	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
	Brian K. Wilks[6]	Durham
	Second Division	
3B	Joshua W. Wiley	New Bern
	Clinton D. Rowe	New Bern
4	Charles H. Henry	Jacksonville
	Henry L. Stevens	Wallace
5	Phyllis M. Gorham	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser	Whiteville
13B	Jason C. Disbrow	Southport
16B	James Gregory Bell	Lumberton
	Tiffany P. Powers	Lumberton
	Third Division	
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh

DISTRICT	JUDGES	ADDRESS
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mary Ann Tally[7]	Fayetteville
	Mark A. Sternlicht[8]	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	Vance Bradford Long	Asheboro
	James P. Hill	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	N. Hunt Gwyn	Monroe
	Fourth Division	
15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	Angela B. Puckett	Westfield
18	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
19C	Anna Mills Wagoner[9]	Salisbury
	Timothy Gould[10]	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton

DISTRICT	JUDGES	ADDRESS
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory
26	W. Robert Bell[11]	Charlotte
	Carla Archie[12]	Charlotte
	Lisa C. Bell	Charlotte
	Karen Eady-Williams	Charlotte
	Donnie Hoover	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Casey Viser	Charlotte
27A	Jesse B. Caldwell, III[13]	Gastonia
	David Phillips[14]	Gastonia
	Jesse B. Caldwell, IV[15]	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

SPECIAL JUDGES

Louis A. Bledsoe, III	Charlotte
Athena Brooks	Fletcher
J. Stanley Carmical	Lumberton
Adam M. Conrad	Charlotte
Craig Croom	Raleigh
Julianna T. Earp[16]	Greensboro
Mark A. Davis[17]	Raleigh
Andrew Heath	Raleigh
Gregory P. McGuire[18]	Raleigh
Michael L. Robinson	Winston-Salem
Steven R. Warren	Asheville

EMERGENCY JUDGES

Benjamin G. Alford	New Bern
Sharon T. Barrett	Asheville
Michael E. Beale	Rockingham
Christopher W. Bragg	Monroe
Allen Cobb	Wilmington
James E. Hardin, Jr.[19]	Durham
Julia Lynn Gullett[20]	Statesville
Henry W. Hight, Jr.	Henderson
Jack Hooks	Whiteville
Jeffrey P. Hunt	Brevard
Robert F. Johnson	Burlington

JUDGES	ADDRESS
Paul L. Jones	Kinston
Timothy S. Kincaid	Newton
W. David Lee	Monroe
Eric L. Levinson	Charlotte
Hugh Lewis	Charlotte
A. Moses Massey	Mount Airy
Jerry Cash Martin	Pilot Mountain
J. Douglas McCullough	Raleigh
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
Ronald E. Spivey	Winston-Salem
Joseph E. Turner	Greensboro
Tanya T. Wallace	Rockingham

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
James L. Gale	Greensboro
Walter Godwin[21]	Tarboro
Beecher R. Gray	Durham
Zoro J. Guice, Jr.	Hendersonville
Thomas D. Haigwood	Greenville
Robert H. Hobgood	Louisburg
Howard E. Manning, Jr.	Raleigh
John E. Nobles, Jr.	Morehead City
Marvin P. Pope[22]	Asheville
Thomas W. Seay	Spencer
John W. Smith	Raleigh
James C. Spencer	Burlington
Mary Ann Tally[23]	Fayetteville
Ralph A. Walker, Jr.	Raleigh
William Z. Wood, Jr.	Lewisville

[1]Retired 31 March 2021. [2]Sworn in 26 April 2021. [3]Retired 1 July 2021. [4]Sworn in and became Senior Resident Judge 29 September 2021. [5]Retired 1 May 2021. [6]Sworn in 1 September 2021. [7]Retired 31 March 2021. [8]Sworn in 28 May 2021. [9]Retired 31 May 2021. [10]Sworn in and became Senior Resident Judge 22 June 2021. [11]Retired 31 August 2021. [12]Became Senior Resident Judge 1 September 2021. [13]Retired 31 May 2021. [14]Became Senior Resident Judge 1 June 2021. [15]Sworn in 7 July 2021. [16]Sworn in 1 July 2021. [17]Sworn in 1 July 2021. [18]Resigned 1 July 2021. [19]Sworn in 20 July 2021. [20]Sworn in 1 June 2021. [21]Appointed 1 January 2021. [22]Appointed 1 February 2021. [23]Appointed 26 March 2021.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
2	Regina Rogers Parker (Chief)	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
	Keith B. Mason	Washington
3A	G. Galen Braddy (Chief)	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
3B	L. Walter Mills (Chief)	New Bern
	W. David McFadyen, III	New Bern
	Bob R. Cherry	Beaufort
	Paul J. Delamar	Bayboro
	Andrew Wigmore	Beaufort
4	Sarah Cowen Seaton (Chief)	Jacksonville
	James L. Moore	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles	Jacksonville
	Timothy W. Smith	Kenansville
	Christopher J. Welch	Jacksonville
	Mario M. White	Clinton
	James Walter Bateman, III	Jacksonville
	Robert H. Gilmore	Clinton
	William Shanahan	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
	James H. Faison, III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
	Pell C. Cooper	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson
	Joseph E. Brown, III	Wilson
	William R. Solomon	Rocky Mount

DISTRICT	JUDGES	ADDRESS
8	Elizabeth A. Heath (Chief)	Kinston
	Charles P. Gaylor, III	Goldsboro
	Ericka Y. James	Goldsboro
	Curtis Stackhouse	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
9	John W. Davis (Chief)	Louisburg
	Amanda Stevenson	Oxford
	John H. Stultz, III	Roxboro
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
10	Debra Ann Smith Sasser (Chief)	Raleigh
	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Michael J. Denning	Raleigh
	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle	Raleigh
	Vartan A. Davidian	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh P. Dunston	Raleigh
	J. Brian Ratledge	Raleigh
	David K. Baker, Sr.	Raleigh
	Julie L. Bell	Knightdale
	James R. Black	Raleigh
	Mark L. Stevens	Raleigh
11	Paul A. Holcombe (Chief)	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth, II	Erwin
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood	Selma
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
12	Toni S. King (Chief)	Fayetteville
	David H. Hasty	Fayetteville
	Francis M. McDuffie	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans	Fayetteville

DISTRICT	JUDGES	ADDRESS
13	Scott Ussery (Chief)	Elizabethtown
	Pauline Hankins	Tabor City
	C. Ashley Gore	Whiteville
	J. Calvin Chandler	Shallotte
	Quintin M. McGee	Leland
14	Patricia D. Evans (Chief)	Durham
	Brian C. Wilks	Durham
	Doretta Walker	Durham
	Shamieka L. Rhinehart	Durham
	Amanda L. Maris	Durham
	Clayton Jones	Durham
	Dave Hall	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	Kathryn W. Overby	Burlington
	Larry D. Brown	Graham
	Rick Champion	Burlington
15B	Samantha Cabe (Chief)	Chapel Hill
	Beverly A. Scarlett	Durham
	Sherri T. Murrell	Chapel Hill
	Hathaway S. Pendergrass	Chapel Hill
	Christopher T. Roper	Siler City
16A	Amanda L. Wilson (Chief)	Rockingham
	Regina M. Joe	Raeford
	Christopher W. Rhue	Laurinburg
	Sophie G. Crawford	Wadesboro
	Chevonne R. Wallace	Rockingham
16B	Angelica C. McIntyre (Chief)	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
	Brooke L. Clark	Lumberton
	Vanessa E. Burton	Lumberton
	Greg Bullard	Lumberton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
	Erica S. Brandon	Wentworth
17B	William F. Southern III (Chief)	King
	Spencer Gray Key, Jr.	Elkin
	Marion M. Boone	Dobson
	Gretchen H. Kirkman	Mt. Airy
	Thomas B. Langan	King
18	Theresa H. Vincent (Chief)	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	David Sherrill	Greensboro
	Jonathan G. Kreider	Greensboro
	Tonia A. Cutchin	Greensboro
	William B. Davis	Greensboro
	Marcus Shields	Greensboro
	Larry L. Archie	Greensboro

DISTRICT	JUDGES	ADDRESS
	Brian K. Tomlin	Greensboro
	Marc R. Tyrey	High Point
	Kevin D. Smith	Greensboro
	Ashley L. Watlington-Simms	Greensboro
	Caroline Tomlinson-Pemberton	Greensboro
19A	Christy E. Wilhelm (Chief)	Concord
	Brent Cloninger	Mount Pleasant
	Nathaniel E. Knust	Concord
	Juanita Boger-Allen	Concord
	Steve Grossman	Concord
	Michael G. Knox	Concord
19B	Lee W. Gavin (Chief)	Asheboro
	Scott C. Etheridge	Asheboro
	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
19D	Donald W. Creed, Jr. (Chief)	Asheboro
	Regina M. Joe	Raeford
	Warren McSweeney	Carthage
	Steve Bibey	Carthage
20A	John R. Nance (Chief)	Albemarle
	Thai Vang	Montgomery
	Phillip Cornett	Norwood
20B	William F. Helms, III (Chief)	Matthews
	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Erin S. Hucks	Monroe
	Matthew B. Smith	Monroe
21	Lisa V. L. Menefee (Chief)	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	Whit Davis	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville
22B	Jimmy L. Myers (Chief)	Advance
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	Carlos Jané	Lexington

DISTRICT	JUDGES	ADDRESS
23	David V. Byrd (Chief)	Wilkesboro
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
	Donna L. Shumate	Sparta
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Larry B. Leake	Marshall
25	Buford A. Cherry (Chief)	Hickory
	Sherrie Wilson Elliott	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
	Andrea C. Plyler	Hudson
26	Elizabeth Thornton Trosch (Chief)	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett	Charlotte
	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte
	Michael J. Standing	Charlotte
	Paulina N. Havelka	Charlotte
	Jonathon R. Marvel	Charlotte
	Reggie McKnight	Charlotte
	C. Renee Little	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
	Donald Rice	Cramerton
27B	Jeanette R. Reeves (Chief)	Shelby
	K. Dean Black	Denver
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
	Brad Champion	Lincolnton
	Jamie Hodges	Lincolnton

DISTRICT	JUDGES	ADDRESS
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	Robert K. Martelle (Chief)	Rutherfordton
	Laura Anne Powell	Rutherfordton
	Ellen Shelley	Marion
	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
29B	Thomas M. Brittain, Jr. (Chief)	Mills River
	Emily Cowan	Hendersonville
	Kimberly Gasperson-Justice	Hendersonville
	Gene B. Johnson	Hendersonville
30	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy
	Kaleb Wingate	Waynesville

EMERGENCY JUDGES

C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Robert M. Brady	Lenoir
David B. Brantley	Goldsboro
Jacqueline L. Brewer	Apex
Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
William M. Cameron	Richlands
H. Thomas Church	Statesville
Thomas G. Foster, Jr.	Pleasant Green
Nancy E. Gordon	Durham
Joyce A. Hamilton	Raleigh
Paul A. Hardison	Jacksonville
P. Gwynnett Hilburn	Greenville
James T. Hill	Durham
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
F. Warren Hughes	Burnsville
A. Elizabeth Keever	Fayetteville
David A. Leech	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander

JUDGES	ADDRESS
Ali B. Paksoy	Shelby
Dennis J. Redwing	Gastonia
Anne B. Salisbury	Cary
Joseph E. Setzer, Jr.	Franklinton
William G. Stewart	Wilson
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Sarah P. Bailey	Rocky Mount
J. Henry Banks	Henderson
George A. Bedsworth	Winston-Salem
Jacqueline L. Brewer	Apex
Samuel Cathey	Charlotte
Ronald L. Chapman	Charlotte
Albert A. Corbett, Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway	Roxboro
Samuel G. Grimes	Washington
Jane V. Harper	Charlotte
John H. Horne, Jr.	Laurinburg
William K. Hunter	High Point
Jerry A. Jolly	Tabor City
William C. Lawton	Raleigh
William L. Long	Chapel Hill
James E. Martin	Greenville
Fritz Y. Mercer, Jr.	Summerfield
Nancy C. Phillips	Elizabethtown
Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
R. Dale Stubbs	Clayton
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
JOSH STEIN

Chief of Staff
Seith Dearmin

First Assistant Attorney General and General Counsel
Swain Wood

Civil Bureau Chief
Reuben F. Young

Criminal Bureau Chief
Leslie Cooley Dismukes

Deputy Chief of Staff
Laura Brewer

Deputy General Counsel
Sripriya Narasimhan

Deputy General Counsel
Tiffany Lucas

Legislative Counsel
Bradford Sneeden

Senior Policy Counsel
Steve Mange

Solicitor General
Ryan Park

Senior Deputy Attorneys General

Kevin Anderson
M.A. Kelly Chambers
Dan Hirschman
Freeman E. Kirby, Jr.
Amar Majmundar
Alana Danielle Marquis-Elder
Elizabeth L. McKay
Donna D. Smith

Special Deputy Attorneys General

Jonathan P. Babb
Mary Carla Babb
James Batherson
Francisco Benzoni
Michael Berger
James Bernier
Marc D. Bernstein
Amy L. Bircher
Sarah Boyce
Lisa B. Bradley
Stephanie A. Brennan
Christopher Brooks
Robert Broughton
Anne J. Brown
Michael Bulleri
Kimberly Callahan
Sonya M. Calloway-Durham
Thomas Campbell
Keith Clayton
Lauren M. Clemmons
Coleen Crowley
Kimberley A. D'arruda
Neil C. Dalton
Jolynn Dellinger
James Doggett
Joseph Finarelli
Margaret A. Force
Tasha Gardner
John R. Green, Jr.
Melody R. Hairston
Arden Harris
Ernest Michael Heavner
Tamika Henderson
Isham Faison Hicks
Alexandra M. Hightower
Amy Kunstling Irene
Daniel S. Johnson
Kari Johnson
Sherri Lawrence
Gwenda Laws
Thomas Lawton
Mary L. Lucasse
Jonathan Marx
Steven Mcallister
Martin T. Mccracken
Jasmine Mcghee
Laura Mchenry
Brenda E. Menard
Ashley Morgan
Daniel Mosteller
Katherine Murphy
Carl Newman
John F. Oates
Daniel O'Brien
Elizabeth O'Brien
Sharon Patrick-Wilson
John A. Payne
Perry Pelaez
Matthew Petracca
Lareena Jones-Phillips
Sandra Postell
Kimberly D. Potter
Brian Rabinovitz
Phillip T. Reynolds
Kristine Ricketts
Orlando Rodriguez
Phillip Rubin
Stuart Saunders
Kathryn Shields
Scott T. Slusser
Marc X. Sneed
Daniel Spillman

M. Denise Stanford
Terence Steed
Scott Stroud
Kip D. Sturgis
Jessica Sutton
Melissa Taylor
Gary M. Teague
Vanessa N. Totten
Teresa L. Townsend
James Trachtman
Matthew Tulchin
Tamara Van Pala
Nancy Vecchia
Nicholaos G. Vlahos
Victoria L. Voight
Olga Vysotskaya
Alexander Walton
Margaret L. Weaver
Jeff Welty
Charles Whitehead
Michael Wood
Phillip K. Woods
Patrick Wooten
Benjamin Zellinger
Tamara S. Zmuda

Assistant Attorneys General

Rory Agan
Allison A. Angell
Steven A. Armstrong
Lisa Atwater
Rana Badwan
Alesia Balshakova
John Banaghan
John P. Barkley
Adrina Bass
Scott K. Beaver
Kerry Boehm
Sage Boyd
Juliane Bradshaw
Matthew Bream
Kayla Britt
Nicholas Brod
Brittany Brown
Chris Brown
Maria Bruner
Matthew Buckner
Bethany A. Burgon
Jason Caccamo
Gail Carelli
Chris Carreiro
Tien Cheng
Nathan Childs
Kunal Choksi
Sarah Cibik
John Congleton
Scott A. Conklin
Ameshia Cooper
Haley Cooper
Daniel Covas
Taylor Crabtree
Marsden Crawley
Regina Cucurullo
Amber Davis
Thomas Hill Davis
Adrian Dellinger
Torrey Dixon
Milind Dongre
Justin Eason
Brittany Edwards
Joseph E. Elder
Robert Ennis
Jonathan Evans
Forrest Fallanca
Thomas Felling
Lisa Finkelstein
Montgomery Fletcher
Elizabeth Forrest
Heather H. Freeman
Terrence D. Friedman
Marilyn Fuller
Erin Gibbs
Deborah Greene
Benjamin Gurlitz
Heather Haney
Donna Hart
Kathryne Hathcock
Andrew Hayes
Caden Hayes
Jessica Helms
Michael Henry
Martin Hodgins
Matthew Holloway
Erin Hukka
Eric Hunt
Derek Hunter
Joseph Hyde
Erika Jones
Colin Justice
Alvin Keller
Jaren Kelly
Anne E. Kirby
Brent D. Kiziah
Lewis Lamar
Catherine Laney
Donald Laton
Leeanne Lawrence
Kyu Eun Lee
Rebecca E. Lem
Wendy Lindberg
Jeremy Lindsley
Grace Linthicum
Stephanie Lloyd
Liliana Lopez
Jessica Macari
William Maddrey
Katherine McCraw
Kindelle McCullen
Neal McHenry
Alan McInnes
Erin McKee
Carolyn McLain
Christopher McLennan
Michael Shawn Maier
Mary Maloney
John Locke Milholland
Lee Miller
Kelly Ann Moore
Thomas H. Moore
Kimberly Murrell
Tracy Nayer
Ellen A. Newby
Bryan Nichols
Zachary Padget
Sondra C. Panico
Kyle Peterson
Stacey Phipps
Robert Pickett
John Prather
Rajeev K. Premakumar
Jessica Price
Kenzie Rakes
Kimberly Randolph
Mercedes Restucha-Klem
Yvonne B. Ricci
Nicholas Sanders
Wes Saunders
John Schaeffer
Jeffrey Jermaine Sellers
Joseph Shuford
Shelby Smith
William Smith
Matthew Sommer

Benjamin Spangler
Asher Spiller
Mary Ann Stone
Dylan Sugar
Matthew Sommer
Benjamin Szany
Sarah Tackett
Lisa Taylor
John Tillery
Phyllis A. Turner
Kristin Uicker
Victor Unnone
Janelle Varley
Melissa Walker
William Walton
Alexander Ward
James A. Webster
Elizabeth J. Weese
Travis Wiggs
Daniel Wilkes
Alex Williams
Kristen Wills
James Wilson
Dorian Woolaston
Narcisa Woods
Donna B. Wojcik
Christine Wright
Elly Young
Sarah Zambon
Ryan Zellar

DISTRICT ATTORNEYS

District	District Attorney	Address
1	Andy Womble	Elizabeth City
2	Seth Edwards	Washington
3	Faris Dixon	Greenville
4	Scott Thomas	New Bern
5	Ernie Lee	Jacksonville
6	Ben David	Wilmington
7	Valerie Asbell	Winton
8	Robert Evans	Rocky Mount
9	Matt Delbridge	Goldsboro
10	Lorrin Freeman	Raleigh
11	Mike Waters	Oxford
12	Suzanne Matthews	Lillington
13	Susan Doyle	Smithfield
14	Billy West	Fayetteville
15	Jon David	Bolivia
16	Satana Deberry	Durham
17	Sean Boone	Graham
18	Jim Woodall	Hillsborough
20	Matt Scott	Lumberton
21	Reece Saunders	Rockingham
22	Jason Ramey	Wentworth
23	Ricky Bowman	Dobson
24	Avery Crump	Greensboro
25	Roxann Vaneekhoven	Concord
26	Spencer Merriweather	Charlotte
27	Brandy Cook	Salisbury
28	Lynn Clodfelter	Albemarle
29	Mike Hardin	Carthage
30	Trey Robison	Monroe
31	Jim O'Neill	Winston-Salem
32	Sarah Kirkman	Statesville
33	Garry Frank	Lexington
34	Tom Horner	Wilkesboro
35	Seth Banks	Boone
36	Scott Reilly	Newton
37	Andy Gregson	Asheboro
38	Travis Page	Gastonia
39	Mike Miller	Shelby
40	Todd Williams	Asheville
41	Ted Bell	Rutherfordton
42	Andrew Murray	Hendersonville
43	Ashley Hornsby Welch	Franklin

PUBLIC DEFENDERS

District	District Attorney	Address
1	Thomas P. Routten	Elizabeth City
2	Thomas P. Routten	Washington
3A	Robert C. Kemp, III	Greenville
3B	Peter Mack	New Bern
5	Jennifer Harjo	Wilmington
10	Deonte L. Thomas	Raleigh
12	Cynthia Page Black	Fayetteville
14	Dawn Y. Baxton	Durham
15B	Woodrena Baker-Harrell	Hillsborough
16A	Jonathan L. McInnis	Laurinburg
16B	Ronald H. Foxworth	Lumberton
18	John F. Nieman	Greensboro
21	Paul James	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Stuart C. Higdon	Gastonia
28	Samuel A. Snead	Asheville
29A	Laura A. Powell	Rutherfordton
29B	Beth W. Stang	Hendersonville

CASES REPORTED

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CROSS-REFERENCE TABLE[1]

Case	N.C. Reports citation	Universal parallel citation
In re A.M.L.	377 N.C. 1	2021-NCSC-21
In re A.R.P.	377 N.C. 16	2021-NCSC-22
In re B.T.J.	377 N.C. 18	2021-NCSC-23
In re C.R.L.	377 N.C. 24	2021-NCSC-24
In re G.G.M.	377 N.C. 29	2021-NCSC-25
In re H.A.J.	377 N.C. 43	2021-NCSC-26
In re I.R.M.B.	377 N.C. 64	2021-NCSC-27
In re J.S.	377 N.C. 73	2021-NCSC-28
In re L.N.G.	377 N.C. 81	2021-NCSC-29
In re M.C.T.B.	377 N.C. 92	2021-NCSC-30
In re R.D.M.	377 N.C. 94	2021-NCSC-31
Curlee v. Johnson	377 N.C. 97	2021-NCSC-32
In re C.M.	377 N.C. 105	2021-NCSC-33
In re G.B.	377 N.C. 106	2021-NCSC-34
In re Foreclosure of George	377 N.C. 129	2021-NCSC-35
In re Brooks	377 N.C. 146	2021-NCSC-36
State v. Meader	377 N.C. 157	2021-NCSC-37
State v. Allen	377 N.C. 169	2021-NCSC-38
State v. Melvin	377 N.C. 187	2021-NCSC-39
State v. Prince	377 N.C. 198	2021-NCSC-40
State v. Scott	377 N.C. 199	2021-NCSC-41
In re A.M.	377 N.C. 220	2021-NCSC-42
In re A.R.W.	377 N.C. 234	2021-NCSC-43
In re A.W.	377 N.C. 238	2021-NCSC-44
In re D.A.A.R.	377 N.C. 258	2021-NCSC-45
In re G.D.H.	377 N.C. 282	2021-NCSC-46
In re J.E.	377 N.C. 285	2021-NCSC-47
In re J.M.	377 N.C. 298	2021-NCSC-48
In re L.R.L.B.	377 N.C. 311	2021-NCSC-49
In re M.J.B.	377 N.C. 328	2021-NCSC-50
In re M.L.B.	377 N.C. 335	2021-NCSC-51
In re M.S.A.	377 N.C. 343	2021-NCSC-52

1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019).

CROSS-REFERENCE TABLE

Case	N.C. Reports citation	Universal parallel citation
In re N.B.	377 N.C. 349	2021-NCSC-53
In re P.M.	377 N.C. 366	2021-NCSC-54
In re T.M.L.	377 N.C. 369	2021-NCSC-55
Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.	377 N.C. 384	2021-NCSC-56
Crazie Overstock Promotions, LLC v. State of North Carolina	377 N.C. 391	2021-NCSC-57
Deminski v. State Bd.of Educ.	377 N.C. 406	2021-NCSC-58
Diamond Candles, LLC v. Winter	377 N.C. 416	2021-NCSC-59
In re I.K.	377 N.C. 417	2021-NCSC-60
In re Pool	377 N.C. 442	2021-NCSC-61
In re M.J.R.B.	377 N.C. 453	2021-NCSC-62
McGuire v. LORD Corp.	377 N.C. 465	2021-NCSC-63
State v. Parker	377 N.C. 466	2021-NCSC-64
State v. Goins	377 N.C. 475	2021-NCSC-65
State v. Blagg	377 N.C. 482	2021-NCSC-66
State v. Hamer	377 N.C. 502	2021-NCSC-67
State v. Betts	377 N.C. 519	2021-NCSC-68
State v. Cheeks	377 N.C. 528	2021-NCSC-69
Window World of Baton Rouge, LLC v. Window World, Inc.	377 N.C. 551	2021-NCSC-70

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF A.M.L., G.J.L., B.J.B., J.E.B., T.R.B., JR.

No. 69A20

Filed 19 March 2021

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

The trial court properly terminated the parental rights of respondent-mother for willful failure to make reasonable progress to correct the conditions which led to the removal of the children where the evidence showed that respondent left the children in foster care for sixteen months, she never obtained the required substance abuse assessment (despite losing custody of the children due to substance abuse issues), she repeatedly failed drug screens, and she did not comply with any of the mental health aspects of the case plan.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 26 November 2019 by Judge Jeanie R. Houston in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 11 February 2021 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.

IN RE A.M.L.

[377 N.C. 1, 2021-NCSC-21]

Poyner Spruill LLP, by John Michael Durnovich and Christopher S. Dwight, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent-mother appeals from the trial court's 26 November 2019 orders terminating her parental rights in her minor children A.M.L. (Allie),[1] G.J.L. (Gregory), T.R.B., Jr. (Teddy), J.E.B. (Johnson), and B.J.B. (Braxton).[2] Upon careful consideration, we affirm the trial court's orders terminating respondent-mother's parental rights.

I. Factual and Procedural Background

¶ 2 The Wilkes County Department of Social Services (DSS) first became involved with respondent-mother almost a decade and a half before the ultimate termination of her parental rights. In July of 2005, DSS conducted a family assessment based on allegations of neglect. At that time, respondent-mother's eldest child, Allie, was barely one year old, while her little brother, Gregory, was only a few months old. Since that first assessment, respondent-mother has incurred more than a dozen subsequent DSS assessments, subjecting Allie and Gregory, as well as their younger brothers Teddy, Johnson, and Braxton, to multiple placements in foster care, three placements in case management, and numerous case decisions for services needed or services recommended.

¶ 3 On 25 January 2018, DSS received a report alleging drug use in respondent-mother's home while her five children—thirteen-year-old Allie, twelve-year-old Gregory, ten-year-old Teddy, three-year-old Johnson, and three-year-old Braxton—were locked in a room. DSS's investigation confirmed the allegations. Allie and Gregory reported that their parents invited strange men into the home, permitted drug use in the home, used drugs themselves, and locked the children in a room for hours at a time, leaving Allie to care for her younger siblings. Further, respondent-

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

2. While the parental rights of the children's fathers were also terminated, neither father appealed the trial court's termination orders nor are they parties to this appeal. The trial court terminated the parental rights of Teddy, Johnson, and Braxton's father in the same 26 November 2019 orders that terminated respondent-mother's parental rights. As for Allie and Gregory's father, the trial court terminated his parental rights by a different order entered in a separate termination hearing.

mother encouraged Allie and Gregory to use marijuana, and Gregory, influenced by the encouragement, used marijuana.

¶ 4 In response, DSS attempted to place the children in safety resource placements. However, both placements failed—the first caregiver was unable to care for the children and the second disregarded the safety plan and allowed the parents unsupervised time alone with the children. As a result, DSS obtained nonsecure custody of the children and filed juvenile petitions alleging that the children were neglected juveniles. After a hearing on 19 March 2018, the trial court entered a disposition order on 28 June 2018 adjudicating the children to be neglected juveniles, ordering custody of the children to remain with DSS, and granting supervised visitation to respondent-mother on the condition that she pass random drug screens.

¶ 5 DSS prepared a case plan that required respondent-mother to take parenting classes, complete a substance abuse assessment and follow any treatment recommendations, complete a mental health assessment and follow any treatment recommendations, participate in a recovery group, obtain and maintain appropriate housing and employment, complete random drug screens, attend a group designed to assist with special needs children, develop knowledge of Johnson's diagnosis and needs, attend all visitations, sign a voluntary support agreement, remain in contact and attend meetings with DSS, refrain from criminal activity, and provide written statements as to why the children were placed in DSS custody.

¶ 6 In the permanency planning and review orders entered after a 25 June 2018 hearing, the trial court found that respondent-mother had made no progress on her case plan. After signing the case plan, respondent-mother had failed two drug screens (testing positive for methamphetamine and OxyContin), been incarcerated twice in the prior three weeks, failed to comply with any of DSS's requests, maintained minimal contact with the social worker, and only visited once with all five children. In addition, since the children entered custody on 31 January 2018, respondent-mother had incurred twenty-six criminal charges. As a result, the trial court left custody of the children with DSS, set the primary plan for the children as adoption with a secondary plan of custody with an approved caregiver, and relieved DSS of further efforts towards reunification.

¶ 7 In an order filed following the next permanency-planning hearing on 4 February 2019, the trial court found that respondent-mother had made "very little progress" on her case plan and still "need[ed] significant sub-

stance abuse and mental health treatment." Due to its assessment, the trial court made no changes to custody, visitation, or the children's permanent plans.

¶ 8 On 4 March 2019, DSS filed petitions to terminate respondent-mother's parental rights due to her neglect and willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(1) and (2). In addition, DSS alleged that grounds existed to terminate respondent-mother's parental rights in Teddy, Johnson, and Braxton for dependency under N.C.G.S. § 7B-1111(a)(6). The trial court held the termination hearing on 13 June and 1 July 2019.

¶ 9 On 26 November 2019, the trial court entered orders terminating respondent-mother's parental rights. After making extensive findings of fact, the trial court concluded that grounds existed to terminate respondent-mother's parental rights in each child pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6) and that it was in each child's best interests to terminate respondent-mother's parental rights. Respondent-mother appeals from these termination orders.

II. Standard of Review

¶ 10 The Juvenile Code provides a two-step process for termination of parental rights consisting of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2019). During the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exists. N.C.G.S. § 7B-1109(e)–(f). If the petitioner meets this burden, the matter proceeds to the dispositional stage where the trial court must determine whether termination of parental rights is in the children's best interests. N.C.G.S. § 7B-1110(a).

¶ 11 This Court reviews the trial court's adjudication of grounds to terminate parental rights under N.C.G.S. § 7B-1111(a) "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re N.G.*, 374 N.C. 891, 895 (2020) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). If a finding of fact is supported by clear, cogent, and convincing evidence, it "is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Meanwhile, findings of fact "not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). Finally, this Court reviews de novo "whether a trial court's findings of fact support its conclusions of law." *In re J.S.*, 374 N.C. 811, 814 (2020).

III. Analysis

¶ 12 Respondent-mother challenges all three grounds for termination adjudicated by the trial court. Since "an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights," this Court need only uphold one of the statutory grounds adjudicated by the trial court. *In re L.M.M.*, 375 N.C. 346, 349 (2020).

¶ 13 The second ground adjudicated for the termination of respondent-mother's parental rights was for willfully leaving her children in foster care or placement outside the home without making reasonable progress, per N.C.G.S. § 7B-1111(a)(2). To terminate parental rights under this provision, the trial court must find that respondent-mother (1) "willfully left the juvenile[s] in foster care or placement outside the home for more than 12 months," and (2) respondent-mother did not show "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile[s]." N.C.G.S. § 7B-1111(a)(2) (2019).

¶ 14 In adjudicating grounds for the termination of respondent-mother's parental rights, the trial court made the following findings of fact:[3]

> 16. The minor child[ren have] remained in the care and custody of the Wilkes County Department of Social Services continuously since January 31, 2018 and therefore, [have] been in the care and custody of [DSS] for approximately sixteen (16) months at the time of this hearing.
>
> . . . .
>
> 18. Investigator Norwood spoke to [Allie] who indicated that there was active drug use in the home, some drug use in front of the children, Respondent Mother encouraged the older children to use marijuana, and [Allie] and her siblings were locked in a room while she was made to provide care for them.
>
> . . . .

3. The quoted language comes from the order terminating respondent-mother's parental rights in Allie. While the trial court entered separate orders for each child, the orders are nearly identical as to the findings and conclusions related to respondent-mother.

20. At the time of the report the family was living in a house on Boone Trail. [Allie] got an award from school and was excited to show her mother and step-father. She went into the bathroom and saw Mother with a needle in her arm and step-father with a cloth around his arm.

21. [Allie] confirmed that Respondent Mother and her step-father were aware that the children had been offered marijuana by a cousin and they allowed at least one of the children to use marijuana.

. . . .

26. After the minor child[ren] w[ere] placed into the care and custody of [DSS], a Family Services Case Plan was developed on February 27, 2018 for Respondent Mother to address the conditions that led to the minor child[ren]'s removal from the home specifically: substance abuse, parenting skills, and mental health.

27. Respondent Mother signed her Family Services Case Plans with [DSS] on May 1, 2018, after the minor child[ren] had been in care for over four months.

28. Prior to May 1, 2018 Respondent Mother was not cooperating with the agency, she was not maintaining contact with the Social Worker, and was not utilizing visitation with the minor child[ren].

. . . .

33. Subsequent to the minor child[ren] coming into the care of [DSS], Respondent Mother obtained 26 new criminal charges in four surrounding counties. These charges included breaking and entering, simple possession of controlled substances, and larceny. She spent some time in jail after initially being charged, but she did not have any lengthy period of incarceration.

. . . .

35. [DSS] sent referrals for substance abuse and mental health assessments to Daymark Recovery in May 2018. Respondent Mother did not complete assessments with Daymark until approximately March 2019 while in Case Management with her new child. This assessment appeared to be only a substance abuse assessment, and did not appear to include a mental health assessment.

36. Respondent Mother tested positive for buprenorphine at the time of her assessment with Daymark in March 2019. When questioned about being positive for buprenorphine, she told the assessors that she was participating in treatment with Rowan Psychiatric. Due to her reported compliance with Rowan Psychiatric, she was not given any recommendations by Daymark other than to continue in treatment.

37. [DSS] was unaware of the mother's participation with Rowan Psychiatric until receiving the assessment from Daymark Recovery. [DSS] cannot verify that the mother completed an assessment at Rowan Psychiatric, or that she was receiving the comprehensive treatment including medication and counseling.

38. The Social Worker requested Respondent Mother's records from Rowan Psychiatric. The Social Worker received records for Respondent Mother, but those records primarily consisted of drug screen results. Most screens were negative, but the records did indicate that the mother tested positive for oxymorphone in November 2018. Respondent Mother began attending Rowan Psychiatric in September 2018.

. . . .

46. Respondent Mother was requested to attend Recovery Seekers or a similar group for individuals in recovery. She has not participated in such a group.

47. Respondent Mother was to participate in random drug screens to demonstrate compliance with substance abuse treatment, and appropriate use of medication. Mother was called for approximately twenty-three random drug screens.

    a. She *failed to show* for screens eight times . . . .

    b. Respondent Mother appeared and *passed* drug screens nine times . . . .

    c. Respondent Mother appeared and *failed* drug screens five times on the following dates: February 6, 2018 failed for methamphetamine, July 16, 2018 failed for amphetamine, October 1, 2018 failed for oxymorphone, November 6, 2018 failed for oxymorphone, and May 16, 2019 failed for amphetamine and methamphetamine.

48. Respondent Mother asserted that she believed she failed the May 16, 2019 drug screen due to taking Zyrtec and Sudafed for allergies and congestion. The [c]ourt did not find this assertion compelling.

. . . .

55. Respondent Mother indicates that she attends Rowan Psychiatric for Subutex treatment, and states that she has appointments once a month to receive her medications, attend counseling, and see her doctor. She indicates that she is drug tested when she visits the doctor, and that she is receiving treatment for bi-polar as well.

56. Respondent Mother acknowledged that she did not inform the Social Worker about her participating in treatment at Rowan Psychiatric or the prescription medication(s) she received as part of that treatment.

. . . .

60. Respondent Mother claims to be drug free for 6 to 7 months, but failed drug screens in November 2018 and May 2019.

61. Respondent Mother tends to overstate her periods of sobriety. . . .

. . . .

64. Respondent Mother attributed [her] late start working on the Case Plan to not having a hard copy of the Case Plan to reference. The [c]ourt did not find this persuasive as Respondent Mother had participated in multiple cases of Case Management with [DSS] in the past and had always been able to complete those items timely.

65. Respondent Mother and her husband in fact completed their Voluntary Services Plan for their newest child within 60 days.

66. The minor child[ren] . . . have been in the care of [DSS] on two other occasions due to similar allegations regarding substance abuse. On both occasions Respondent Mother complied with her Family Services Case Plan and the children were returned to her care only to reenter care again due to the same or similar concerns of substance abuse.

67. Respondent Mother admitted that even without a hard copy Case Plan to reference, due to her past involvement with [DSS] she was aware that she would need to take parenting classes, and address her substance abuse concerns.

. . . .

69. Though Respondent Mother purports to have been working a substance abuse treatment plan through Rowan Psychiatric since September 2018, she has failed at least three drug screens since September 2018.

70. Respondent Mother reports that she is being treated for bipolar though her records received

> from Rowan Psychiatric do not reveal a mental health assessment or any mental health treatment.
>
> . . . .
>
> 72. Respondent Mother has not adequately addressed her substance abuse or mental health issues . . . .

¶ 15 After making these findings, the trial court concluded

> [t]hat upon clear, cogent, and convincing evidence that the minor child[ren have] been willfully left in foster care for more than twelve (12) months without Respondent Mother making reasonable progress to correct the conditions that led to [their] removal, specifically substance abuse, parenting skills, and mental health. Considering that Respondent Mother has made very little progress on her Family Services Case Plan, and there is no evidence she has adequately addressed these issues outside of a Case Plan, and she ultimately did not maintain a stable bond between herself and the minor child[ren]. Therefore, the Petitioner has shown that grounds exist pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate Respondent Mother's parental rights.

¶ 16 On appeal, respondent-mother concedes that she left her children in foster care for sixteen months, exceeding the twelve months required to terminate parental rights under N.C.G.S. § 7B-1111(a)(2). However, respondent-mother contests several of the trial court's findings of facts, as well as its conclusion to terminate her parental rights, arguing that she substantially complied with the case plan.

A. Challenge to the Trial Court's Finding That There Was Time Available for Respondent-Mother to Complete the Case Plan

¶ 17 Respondent-mother begins by challenging the trial court's findings concerning her lack of progress before signing the case plan on 1 May 2018. According to respondent-mother, she was not provided a copy of her case plan when DSS first created it on 27 February 2018. However, the trial court considered this assertion in its findings of fact, noting that respondent-mother had successfully completed two previous case plans and thus "was aware that she would need to take parenting classes[ ] and address her substance abuse concerns." Moreover, respondent-mother

testified that she knew from the beginning that, regardless of the case plan, she needed to address her substance abuse issues. Yet despite this knowledge, respondent-mother did not point to a single action taken prior to 1 May 2018 that addressed either her parenting or substance abuse issues.

¶ 18 Additionally, the trial court noted that respondent-mother's alleged "late start working on the Case Plan" was not persuasive because she had previously completed two other case plans in a timely manner. The record supports this determination. DSS created the case plan on 27 February 2018. Even if respondent-mother did not receive a copy of the case plan until 1 May 2018, she was without a physical copy for at most sixty-two days. In comparison, the termination hearing occurred a full year after 1 May 2018, on 13 June and 1 July 2019, giving respondent-mother ample time to comply with the case plan after she signed it. Accordingly, the trial court did not err by finding that respondent-mother had sufficient time—namely an entire yea—to make reasonable progress on the case plan, regardless of the two months she may have been without a physical copy.

¶ 19 In a similar vein, respondent-mother challenges finding of fact 28—that she was not cooperating with DSS, not maintaining contact with the social worker, and not visiting her children prior to 1 May 2018. This finding of fact has no impact on our analysis. Accordingly, we decline to address respondent-mother's assignment of error regarding finding of fact 28. As previously noted, even ignoring the two months that elapsed between the case plan's creation and the day it was signed, respondent-mother still had more than a full year to make reasonable progress on the case plan. Regardless of her behavior during the two months when she allegedly was unable to contact the social worker or visit the children, her actions during the next year were sufficient to support the trial court's finding that she failed to make reasonable progress on her case plan.

B. Challenge to the Trial Court's Finding That Respondent-Mother Did Not Make Progress on the Case Plan

¶ 20 Respondent-mother's primary argument is that her actions in the year before the termination hearing contradict the trial court's findings that she made very little progress on her case plan. However, the trial court acknowledged these actions in its findings of fact; they simply were not enough to comprise reasonable progress. After careful review, we hold that the trial court's conclusion that grounds for termination of respondent-mother's parental rights existed under N.C.G.S. § 7B-1111(a)(2) was supported by the findings of fact, and so we affirm.

¶ 21 As this Court has recognized, "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 (cleaned up) (quoting *In re B.O.A.*, 372 N.C. at 385). In this case, the nexus is respondent-mother's substance abuse, which directly led to the children's removal on 31 January 2018 and had previously led to her losing custody of the children on multiple other occasions. Accordingly, the case plan created by DSS was tailored to help respondent-mother overcome her substance abuse issues, as well as address her parenting skills and mental health struggles. While respondent-mother emphasizes the progress she made on the parenting skills portion of the case plan, the trial court's findings focused on the true gravamen of her case—her substance abuse—as well as her mental health struggles. Since "we review only those findings needed to sustain the trial court's adjudication," we address only her substance abuse and mental health issues. *See In re J.S.*, 374 N.C. at 814.

¶ 22 As previously noted, respondent-mother's substance abuse has resulted in DSS's recurring involvement with the family and the children's placement in DSS custody on multiple prior occasions. Respondent-mother testified that she had attempted recovery numerous times and agreed with Allie's testimony that she has been in a cycle of recovery and relapse. In its findings, the trial court noted that respondent-mother had been "in recovery on at least three prior occasions" and had "admit[ed] and acknowledged a history of substance abuse in her written statements as to why the children were brought into care, as well as during conversation with the Social Worker."

¶ 23 Although respondent-mother recognized that her substance abuse resulted in losing custody of her children, she failed to make adequate progress to address it during the sixteen months following the children's removal. Respondent-mother's case plan required her to complete a substance abuse assessment, submit to drug screens, and participate in a group recovery program. In May 2018, DSS referred respondent-mother to Daymark Recovery for a substance abuse assessment as part of the case plan concerning Allie, Gregory, Teddy, Johnson, and Braxton, but respondent-mother never went. Instead, it was not until she was completing her case plan regarding a different child, her infant born on 18 January 2019, that respondent-mother went to Daymark Recovery for an assessment in March 2019. In addition, although respondent-mother was required to attend a recovery group, she never participated in one.

¶ 24 Even more concerning, respondent-mother repeatedly failed drug screens throughout the pendency of her case, including one less than a month before the 13 June 2019 termination hearing. Of the more than twenty random drug screens DSS requested, respondent-mother failed five screens, did not show up for an additional eight screens, and passed only nine. Moreover, the trial court's findings reveal that out of the five drugs screens respondent-mother failed, three of them occurred after respondent-mother purported to have begun participating in substance abuse treatment through Rowan Psychiatric in September 2018.[4] The most recent failed screen—at which respondent-mother tested positive for amphetamine and methamphetamine—occurred on 16 May 2019, less than one month before the termination hearing. While respondent-mother asserted that this failed screen was due to taking Zyrtec and Sudafed for allergies and congestion, the trial court gave little weight to the explanation, specifically stating that it "did not find this assertion compelling."

¶ 25 Respondent-mother argues that she made such substantial progress in addressing her substance abuse that the trial court erred by finding sufficient grounds to terminate her parental rights. In support of this contention, respondent-mother relies on her own testimony that she completed a substance abuse assessment at Rowan Psychiatric and was participating in treatment. The trial court considered this evidence in making its decision. However, the trial court found respondent-mother's assertions were undermined by her failure to report any of this treatment to DSS—and, more importantly, the fact that DSS's record request to Rowan Psychiatric revealed primarily drug screen results.

¶ 26 According to the social worker's testimony, Rowan Psychiatric reported that respondent-mother was not participating in a full substance abuse program and had not completed a substance abuse assessment. Instead, respondent-mother was only participating in a methadone treatment program. Based on the social worker's testimony and the records Rowan Psychiatric provided DSS, which consisted primarily of drug screen results, the trial court found that DSS could not "verify that [respondent-mother] completed an assessment at Rowan Psychiatric, or that she was receiving comprehensive treatment."

¶ 27 The second focus of the trial court's findings was respondent-mother's mental health issues. On appeal, respondent-mother does not challenge any of the trial court's findings concerning her failure to make

4. The findings further show that two of respondent-mother's missed drug screens occurred after she purported to have been seeking treatment at Rowan Psychiatric.

reasonable progress toward improving her mental health. Therefore, these findings "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407.

¶ 28 While N.C.G.S. § 7B-1111(a)(2) does not require parents to "fully satisfy all elements of the case plan goals," they must at least make more than " 'extremely limited progress' in correcting the conditions leading to removal." *In re B.O.A.*, 372 N.C. at 385 (quoting *In re J.S.L.*, 177 N.C. App. 151, 160, 163 (2006)). The findings above show that despite respondent-mother recognizing that her substance abuse issues were the primary reason she kept losing custody of her children, she still failed to show reasonable progress under her case plan, particularly in correcting the conditions which led to the removal of her children. Respondent-mother frequently skipped drug screens; failed a number of the drug screens, including one less than a month before the termination hearing; did not participate in any support group; and, at best, participated in only limited treatment. These facts, combined with respondent-mother's noncompletion of any of the mental health aspects of the case plan, support the trial court's conclusion that she failed to make reasonable progress to remedy the conditions that led to the children's removal, regardless of respondent-mother's steps toward improving her parenting skills.

C. Challenge to the Trial Court's Finding of Willfulness

¶ 29 Respondent-mother also challenges the trial court's conclusion that her failure to make reasonable progress was willful. This Court has already established that "[t]he determination that respondent acted 'willfully' is a finding of fact rather than a conclusion of law." *In re J.S.*, 374 N.C. at 818. In addition, a "finding that a parent acted 'willfully' for [the] purposes of N.C.G.S. § 7B-1111(a)(2) does not require a showing of fault by the parent." *Id.* at 815 (cleaned up) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439 (1996)). It simply requires respondent-mother's "prolonged inability to improve her situation, despite some efforts in that direction." *Id.* (quoting *In re J.W.*, 173 N.C. App. 450, 465 (2005)).

¶ 30 The evidence reviewed above already establishes respondent-mother's prolonged failure to improve her situation. Further, respondent-mother's willfulness was confirmed by her ability to complete the case plan for her infant child. While respondent-mother argues that DSS's determination not to seek custody of that child contradicts the trial court's decision to terminate her parental rights in the rest of the children, it actually highlights her willfulness. After all, respondent-mother completed the case plan concerning her infant child, leading DSS to

not seek custody of the newborn. In contrast, as discussed above, respondent-mother did not make reasonable progress on the case plan concerning the rest of her children. Moreover, the trial court noted that on two previous occasions respondent-mother had timely completed her assigned case plans. Given this evidence, we uphold the portion of the trial court's orders finding that respondent-mother's failure to make progress on the case plan in this case demonstrated willfulness.

IV. Conclusion

¶ 31 The trial court did not err by terminating respondent-mother's parental rights. Contrary to respondent-mother's arguments, the trial court's findings involving the ample time respondent-mother had to make progress on her case plan, her failure to adequately address her substance abuse and mental health issues, and the willfulness of her actions were all supported by clear, cogent, and convincing evidence. When considered in conjunction with respondent-mother's admission that the children were in DSS custody for more than twelve months, the findings support the trial court's conclusion that grounds for termination existed under N.C.G.S. § 7B-1111(a)(2). Since respondent-mother has not challenged the trial court's determination that termination was in the best interests of the five children, the trial court properly terminated her parental rights in Allie, Gregory, Teddy, Johnson, and Braxton. As a result, we affirm the orders of the trial court.

AFFIRMED.

IN RE A.R.P.

[377 N.C. 16, 2021-NCSC-22]

IN THE MATTER OF A.R.P.

No. 308A20

Filed 19 March 2021

Termination of Parental Rights—no-merit brief—abandonment

The termination of a father's parental rights on grounds of abandonment was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 April 2020 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Sydney Batch for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to A.R.P. (Ansley).[1] 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 that the issues identified by counsel in respondent-father's brief as arguably supporting the appeal are meritless and therefore affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioner, Ansley's biological mother, to terminate the parental rights of respondent. Petitioner and respondent were married in January 2004, separated in July 2016, and divorced in September 2018. Ansley was the sole child born from their marriage.

¶ 3 On 29 April 2019, petitioner filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (2019). Petitioner alleged that respondent had "not seen [Ansley] in over two years despite the fact that [Ansley] and Petitioner still live in the same home which

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

[respondent] formerly occupied with them, and has paid no child support for [Ansley] in over that same period of time." Respondent filed an answer denying the material allegations of the petition.

¶ 4 Following a hearing held on 12 December 2019, the trial court entered an order on 7 April 2020 in which it determined grounds existed to terminate respondent-father's parental rights for abandonment. N.C.G.S. § 7B-1111(a)(7). The trial court further concluded it was in Ansley's best interests that respondent-father's parental rights be terminated. Accordingly, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

¶ 5 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 two issues that could arguably support an appeal but also explained why she believed these issues lack 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.

¶ 6 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 7 April 2020 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN RE B.T.J.

[377 N.C. 18, 2021-NCSC-23]

IN THE MATTER OF B.T.J.

No. 230A20

Filed 19 March 2021

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—substance abuse and unstable housing and employment

The trial court's termination of respondent-mother's parental rights based on neglect due to a likelihood of future neglect was affirmed where the child was previously adjudicated neglected, respondent had made only limited progress on the issues that led to the prior adjudication, her substance abuse continued after the child entered DSS custody, her housing situation remained unstable, and she was unable to maintain stable employment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 February 2020 by Judge Charlie Brown in District Court, Rowan County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

McGuireWoods LLP, by Anita Foss, for appellee Guardian ad Litem.

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

HUDSON, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her minor child B.T.J. (Blake).[1] Since we conclude that the trial court properly adjudicated at least one ground for termination, we affirm the termination order.

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

¶ 2 On 25 August 2017, the Rowan County Department of Social Services (DSS) filed a juvenile petition alleging that Blake was neglected and dependent. On that date, DSS responded to respondent-mother's hotel room after receiving a report that she had overdosed on heroin in Blake's presence. Eleven days earlier, respondent-mother had obtained a domestic violence protective order against Blake's father which also forbade him from having contact with Blake. As a result, neither of Blake's parents could provide care for him. DSS also alleged that Blake's parents both had an "intense and significant" history of substance abuse, which had previously necessitated a referral for in-home services on two occasions. DSS obtained nonsecure custody of Blake and placed him in foster care.

¶ 3 On 15 February 2018, the trial court, with the consent of all parties, entered an order adjudicating Blake as a neglected and dependent juvenile. Respondent-mother was ordered to maintain safe and stable housing, comply with the recommendations of her substance abuse and mental health assessments, submit to random drug screens, participate in Blake's treatment if recommended by Blake's therapist, and sign releases of information needed to monitor her treatment progress. The order also provided respondent-mother with one hour of supervised visitation per week.

¶ 4 On 4 April 2018, respondent-mother was found guilty of a felony drug charge, misdemeanor larceny, misdemeanor second-degree trespassing, and misdemeanor child abuse. She was placed on thirty months of supervised probation. On 18 May 2018, respondent-mother was incarcerated, and she remained so until she entered inpatient substance abuse treatment on 24 October 2018. After her release from treatment on 21 January 2019, she continued to test positive for various controlled substances on 4 February 2019, 18 February 2019, 7 June 2019, and 1 July 2019.

¶ 5 On 29 July 2019, DSS filed a petition seeking to terminate respondent-mother's parental rights on the grounds of neglect and willfully leaving Blake in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to his removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). In addition to chronicling respondent-mother's drug use, DSS also alleged that respondent-mother had difficulty maintaining consistent housing, employment, and visitation with Blake.

¶ 6 After a two-day hearing in early November 2019, the trial court entered an order on 18 February 2020 which terminated respondent-

mother's parental rights. The trial court concluded that DSS had proven both alleged grounds for termination and that termination was in Blake's best interests. Respondent-mother appealed.[2]

¶ 7 On appeal, respondent-mother challenges both grounds for termination found by the trial court. She argues that in light of the severity of her addiction and the amount of time she was incarcerated while this case progressed, the trial court failed to adequately credit the progress she made in remedying the problems which led to Blake's removal and the neglect adjudication.

¶ 8 When considering a petition to terminate parental rights, the trial court first makes an adjudicatory determination based on the alleged grounds for termination. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

¶ 9 We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 10 Subsection 7B-1111(a)(1) permits a trial court to terminate a parent's rights if that parent is neglecting their child. A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

---

2. Blake's father's parental rights were also terminated in the 18 February 2020 order, but he did not appeal the trial court's order and is therefore not a party to this appeal.

¶ 11 In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See*, *e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, in other instances, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (cleaned up). In such situations, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). After weighing this evidence, the trial court may find that neglect exists as a ground for termination if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 851 S.E.2d 17, 20 (N.C. 2020) (citation omitted). Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent's care. *Id.* at 20 n.3.

¶ 12 There were no allegations in this case that respondent-mother was currently neglecting Blake at the time of the termination hearing. However, it is undisputed that Blake was out of respondent-mother's custody for an extended period of time and that he was previously adjudicated to be a neglected juvenile. Thus, our review focuses on whether the trial court correctly determined that there is a likelihood of future neglect if Blake is returned to respondent-mother's care.

¶ 13 When assessing whether there is a likelihood of future neglect, "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). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.V.A.*, 373 N.C. at 212 (quoting *In re Ballard*, 311 N.C. at 715).

¶ 14 Blake was previously adjudicated to be a neglected juvenile after he witnessed respondent-mother overdose on heroin in the hotel room

where they were residing together, at which time he was in her care. In order to address the underlying causes of this adjudication, respondent-mother was ordered to complete a remediation plan which required her to participate in treatment for her drug addiction and stabilize her living situation. The termination order includes numerous unchallenged findings of fact clearly describing the limited progress respondent-mother made on this plan which are binding for purposes of appellate review. *In re T.N.H.*, 372 N.C. at 407. As described below, these binding factual findings reflect that respondent-mother had not adequately addressed her issues and at the time of the termination hearing, the likelihood of future neglect was "very high," as the trial court properly determined.

¶ 15 First, the unchallenged findings show that respondent-mother's substance abuse issues continued after Blake entered DSS custody. She was inconsistent in engaging in treatment until she entered Black Mountain Substance Abuse Treatment Center for inpatient treatment from 24 October 2018 to 21 January 2019. However, two weeks after respondent-mother completed this inpatient treatment program, she once again tested positive for controlled substances—and continued to do so. She tested positive for cocaine and marijuana on 4 February 2019, for buprenorphine without a prescription on 18 February 2019, for marijuana on 7 and 28 June 2019, for marijuana and alcohol on 1 July 2019, and for alcohol on the first day of the termination hearing on 7 November 2019. Thus, while respondent-mother had no positive drug screens for approximately four months before the termination hearing was held, she had multiple positive screens in the weeks and months prior to that period, including soon after her discharge from inpatient drug treatment. Moreover, the four-month period of sobriety immediately prior to the termination hearing corresponded with respondent-mother's regular attendance at Rowan Treatment Associates, where she was receiving methadone treatment.

¶ 16 The trial court's unchallenged findings also reflect that respondent-mother's housing situation remained unstable. The trial court found that respondent-mother "changed homes several times during the history of this case" and proceeded to list more than a half-dozen such changes. By the time of the termination hearing, respondent-mother had been living in a one-bedroom trailer with her new husband for about two months. This housing situation was unsuitable, however. Respondent-mother's lease for that trailer only permitted three individuals to live there, and her stepdaughter was living with her and her husband every other weekend. During those times, Blake could not also reside in the trailer without violating the terms of the lease. Thus, as the trial court properly

determined, respondent-mother's housing at the time of the termination hearing was inadequate.

¶ 17 The trial court's unchallenged findings also discuss other areas of concern. Respondent-mother was unable to maintain stable employment. She was fired from two separate jobs, with one of the firings resulting from her bringing her stepdaughter to work on a hot day without permission from her employer. Respondent-mother also withheld relevant information from DSS and her treatment provider. She did not inform DSS of her employment situation, her marriage, or her living situation, including that her stepdaughter stayed in her home on a regular basis. Respondent-mother did not sign a release of information for Rowan Treatment Associates, and she did not tell her treatment provider about her involvement with DSS or that a release was needed.

¶ 18 When the termination hearing occurred, Blake had been in foster care for more than twenty-six months. While respondent-mother can point to some signs of progress in the months immediately preceding the termination hearing, these were merely her first steps toward addressing her issues. Troublingly, respondent-mother had relapsed just two weeks after leaving inpatient drug treatment and repeatedly tested positive for a variety of controlled substances over a five-month period. At the time of the termination hearing, respondent-mother had only been consistent with a treatment regimen and gone without a positive drug screen for four months, and she had only been in her current housing for two months, which was inadequate. She had not established stable employment. The trial court properly determined that respondent-mother's tenuous, limited progress on the issues that directly led to Blake's prior adjudication was neither enough to rectify these issues nor enough to diminish the probability that Blake would likely be neglected again if he returned to her care. In *In re O.W.D.A.*, 375 N.C. 645 (2020), we noted that "evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect," 375 N.C. at 648 (quoting *Smith v. Alleghany Cnty. Dep't of Soc. Servs.*, 114 N.C. App. 727, 732 (1994)), and we held that although the respondent-father in that case may have made some recent, minimal progress on his case plan, "the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements . . . and to conclude that there was a probability of repetition of neglect." *Id.* at 654. The same reasoning applies here. Taken together, the trial court's unchallenged findings support its conclusion that "[t]he probability of a repetition of neglect of the juvenile if returned to the home or care of [respondent-mother] . . . is very high."

¶ 19 Therefore, we conclude the trial court properly determined that respondent-mother's parental rights could be terminated based on neglect. Because we conclude this termination ground is supported, we need not address respondent-mother's arguments as to N.C.G.S. § 7B-1111(a)(2), the remaining ground found by the trial court. *See In re A.R.A.*, 373 N.C. 190, 194 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . ."). We affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

IN THE MATTER OF C.R.L., K.W.D.

No. 196A20

Filed 19 March 2021

Termination of Parental Rights—delayed termination hearing—statutory violation—petition for a writ of mandamus—proper remedy

An order terminating respondent-father's parental rights to his two children on multiple grounds was affirmed where, even though the trial court committed reversible error by holding the termination hearing thirty-three months after the department of social services filed the termination petitions (which violates the requirement under N.C.G.S. § 7B-1109 to hold the hearing no later than ninety days after a petition is filed), respondent-father failed to file a petition for a writ of mandamus during that thirty-three-month delay to address the issue.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 10 February 2020 by Judge Roy Wijewickrama in District Court, Jackson County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee Jackson County Department of Social Services.

Leah D'Aurora Richardson for appellee Guardian ad Litem.

Peter Wood for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to his minor children C.R.L. (Craig) and K.W.D. (Kent).[1] He argues that the trial court committed reversible error by holding the termination hearing more than ninety days after the Jackson County Department of Social Services (DSS) filed its petitions to terminate his parental rights, in violation of N.C.G.S. § 7B-1109. After reviewing this claim, we conclude that the issue should have been addressed by the filing of a petition for writ of mandamus while the termination petitions were still pending; consequently, we affirm the termination order.

¶ 2 DSS became involved with this family after receiving a child protective services (CPS) report that the children's mother tested positive for both methamphetamine and amphetamine in the weeks prior to and at the time of Kent's birth. A DSS social worker investigating the CPS report learned that the parents previously had their parental rights to two older children terminated in New Jersey. The parents agreed to place Craig and Kent in a kinship placement with family friends. Kent suffered from multiple health problems as he went through withdrawal from the drugs to which he was exposed. On 28 May 2015, the family friends informed DSS that they would be unable to provide long-term kinship care for Craig and Kent.

¶ 3 On 8 June 2015, DSS filed juvenile petitions alleging that Craig was a neglected juvenile and Kent was an abused and neglected juvenile. In addition to the facts above, DSS alleged that both parents had recent positive drug screens, that they were living in a camper with the children's maternal grandparents, and that they were currently unemployed. On 26 August 2015, the trial court entered a consent adjudication order concluding that both children were neglected juveniles. On 26 October 2015, the trial court entered a disposition order which indicated that both parents had entered case plans with DSS and they were addressing the issues identified therein. Both parents were awarded supervised visitation three hours per week.

¶ 4 On 18 January 2017, the trial court entered a permanency planning review hearing order in which it found that respondent-father's whereabouts were no longer known to DSS and that DSS did not know how to

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

reach him. The trial court suspended visitation with respondent-father until he provided two consecutive negative drug screens. Although respondent-father was located by the next permanency planning review hearing, his visitation remained suspended as the neglect case progressed because the trial court repeatedly concluded that continuing the suspension was in the children's best interests.

¶ 5 DSS filed termination petitions on 22 March 2017, alleging that respondent-father's parental rights to Craig and Kent were subject to termination on three grounds: that respondent-father had neglected the children; that he willfully left the children in foster care or 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; and that his parental rights with respect to another child had been terminated involuntarily and he lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(1), (2), (9) (2019). After the petitions were filed, the trial court ordered DSS to notice the case for hearing in orders entered on 4 October 2017, 23 August 2018, 21 May 2019, and 25 July 2019. However, the termination petitions were not heard until 9 and 10 December 2019, approximately thirty-three months after they were filed.

¶ 6 On 10 February 2020, the trial court entered an order terminating respondent-father's parental rights.[2] The order included a finding noting that the matter came on for hearing more than ninety days after the filing of the petitions and attempting to provide an explanation for the delay. The trial court concluded that all three grounds for termination alleged by DSS existed and that termination was in Craig's and Kent's best interests. Respondent-father appealed.

¶ 7 Respondent-father's sole challenge to the termination order is that it was entered after a termination hearing that was conducted thirty-three months after DSS filed the termination petitions. He contends that this delay violated N.C.G.S. § 7B-1109, which sets out the following requirements for when a termination-of-parental-rights adjudicatory hearing shall occur:

> (a) The hearing on the termination of parental rights shall be conducted by the court sitting without a jury and shall be held in the district at such time and place

2. The order also terminated the parental rights of Craig and Kent's mother. She is not a party to this appeal.

> as the chief district court judge shall designate, but no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.
>
> . . . .
>
> (d) The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

N.C.G.S. § 7B-1109(a), (d). All of the parties agree that this statute was violated in this case, since the termination hearing was held well beyond ninety days after DSS filed the termination petitions and no continuances for extraordinary circumstances were requested or granted to permit this delay.[3] But, as this Court has previously held, this statutory violation should have been remedied *while it was occurring* by the filing of a petition for writ of mandamus. *See In re T.H.T.*, 362 N.C. 446, 454 (2008) ("Mandamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute.").

¶ 8 In *In re T.H.T.*, this Court emphasized the importance of swiftly resolving child welfare cases, noting that "in almost all cases, delay is directly contrary to the best interests of children, which is the 'polar star' of the North Carolina Juvenile Code." *Id.* at 450 (quoting *In re Montgomery*, 311 N.C. 101, 109 (1984)). The trial court in *In re T.H.T.*

---

3. In the termination order, the trial court made a finding of fact which attempted to explain why the hearing occurred more than ninety days after the petitions were filed. This finding is immaterial because it cannot cure the violation, which requires the issuance of written orders continuing the hearing during the period of delay, and no such orders were entered in this matter. *See* N.C.G.S. § 7B-1109(d) (2019).

had failed to enter adjudication and disposition orders before the statutory deadlines, and this Court concluded that the respondent's failure to file a petition for writ of mandamus during the delay was fatal to her appeal:

> We hold that in appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines, such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself. Thus, a new hearing serves no legitimate purpose and does not remedy the error. Indeed, a new hearing only exacerbates the error and causes further delay. Instead, a party seeking recourse for such error should petition for writ of mandamus.

Id. at 456. While in this case the error occurred prior to, rather than after, the hearing at issue, the reasoning underlying our holding in *In re T.H.T.* applies with equal force here. In both situations, "the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not 'sit back' and rely upon an appeal to cure all wrongs." *Id.* at 455. Moreover, unlike "a lengthy appeal" which "exacerbates the error and causes further delay[,]" "[m]andamus provides relatively swift enforcement of a party's already established legal rights." *Id.* at 455–56.

¶ 9 In this case, respondent-father failed to file a petition for writ of mandamus at any point during the thirty-three months between the filing of the termination petitions and the termination hearing, and he offers no explanation for this failure. Instead, he sat on his rights and allowed the delay to continue without objection. At this juncture, granting relief based only on this violation of the statutory deadline would merely exacerbate the delay below. As we noted in *In re T.H.T.*, "[w]hen the integrity of the trial court's decision is not in question, a new hearing serves no purpose, but only 'compounds the delay in obtaining permanence for the child.' " *Id.* at 453 (quoting *In re J.N.S.*, 180 N.C. App. 573, 580 (2006)).

¶ 10 Respondent-father argues that the violation of N.C.G.S. § 7B-1109 in this case created a delay that was so egregious that it should be considered presumptively prejudicial. He further argues that the significant delay necessarily diminished his bond with his sons while at the same time strengthening their bond with their foster family, which in turn impacted the trial court's determination of Craig's and Kent's best interests.

In making these arguments, respondent-father fails to grapple with both his own inaction while the alleged prejudice was occurring and this Court's decision in *In re T.H.T.*—a decision he does not acknowledge in his brief and thus makes no attempt to distinguish from this case. But respondent-father's disregard of this Court's precedent does not relieve us of our obligation to apply it: if respondent-father believed he was being harmed by the trial court's delay in violation of N.C.G.S. § 7B-1109, the proper recourse was a petition for writ of mandamus. *See In re T.H.T.*, 362 N.C. at 456. It is now too late to obtain relief from the statutory violation, and a new hearing would be both futile and unfair. This argument is overruled.

¶ 11 "In cases such as the present one in which the trial court fails to adhere to statutory time lines, mandamus is an appropriate and more timely alternative than an appeal." *Id.* at 455. Here, respondent-father did not file a petition for writ of mandamus while the termination petitions were pending, and therefore, he missed his opportunity to remedy the violation of N.C.G.S. § 7B-1109. Since respondent-father raises no other exceptions to the trial court's order, we affirm the order terminating his parental rights.

AFFIRMED.

IN THE MATTER OF G.G.M., S.M.

Nos. 248A20 and 249A20

Filed 19 March 2021

1. Termination of Parental Rights—grounds for termination—abandonment—willful intent—sufficiency of findings and evidence

The trial court properly terminated a father's rights to his two children on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the court's findings of fact—supported by clear, cogent, and convincing evidence—established that the father did not contact the children for five and a half years before the termination petition was filed (with the exception of one brief interaction) and provided no care or financial support during that time, which supported the court's conclusion that he intended to abandon the children. Although the father testified that he stopped seeing the children out of fear for their safety after he was injured in an unsolved shooting,

the weight and credibility of this evidence could not be reassessed on appeal.

2. Termination of Parental Rights—best interests of children—statutory factors—sufficiency of evidence—weight and credibility

The trial court did not abuse its discretion by determining that termination of a father's parental rights was in the best interests of his two children where the court's findings addressed the relevant dispositional factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence (which the court properly weighed and assessed for credibility). The court found the father willfully abandoned his children by having no contact with them for five and a half years, and the children lacked a bond with their father but had a close relationship with their grandparents, who had provided for all their educational, emotional, and financial needs in the father's absence and had filed a civil action seeking custody of the children.

3. Termination of Parental Rights—effective assistance of counsel—no showing of prejudice

Respondent-father's claim that he received ineffective assistance of counsel at a termination of parental rights hearing—arguing his counsel failed to make any objections during the hearing and failed to introduce certain evidence that could have helped his case—was rejected because he failed to show he was prejudiced as a result of his counsel's allegedly deficient conduct.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 March 2020 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Seth B. Weinshenker for petitioner-appellees.

Ashley A. Crowder for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent, the father of G.G.M. (George) and S.M. (Sarah)[1], appeals from the trial court's orders terminating his parental rights on the

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

grounds of neglect and willful abandonment. Because we hold the trial court did not err in concluding that grounds existed to terminate respondent's parental rights based on willful abandonment and that termination of his parental rights was in the children's best interests, we affirm the trial court's orders.

¶ 2 Petitioners are the maternal grandmother and step-grandfather of George and Sarah. Respondent and the children's mother met in high school. They were living together when George was born in May 2008 but they were never married. The parents' relationship ended in February 2009, and the mother and George moved in with petitioners. The mother was pregnant with Sarah at the time.

¶ 3 The parents initiated a Chapter 50 custody action, and in an order filed on 6 April 2010, the mother was granted primary custody of George with respondent having scheduled visitation. In a Temporary Order Modifying Visitation filed on 20 August 2010, the trial court modified respondent's visitation to allow only for supervised visits.

¶ 4 The mother moved out of petitioners' home with the children in October 2010. However, the mother had financial issues, and in October 2011 the children went to live with petitioners until the mother could improve her situation. The children have resided with petitioners ever since.

¶ 5 On 17 March 2011, the mother filed a petition to terminate respondent's parental rights to George. In an order filed on 9 December 2011, the trial court found grounds to terminate respondent's parental rights based on neglect and his willful failure to pay a reasonable portion of the cost of care for George but did not find that it was in George's best interests to terminate respondent's parental rights. Accordingly, the trial court did not terminate his parental rights at that time.

¶ 6 In November 2013, shots were fired into respondent's home while he was inside with his now fiancée. No one was injured, and the perpetrator was never caught. On the morning of 27 December 2013, respondent was shot multiple times while on his way to work. The perpetrators were never identified. After he was released from the hospital, respondent lived with his aunt in Atlanta, Georgia, for a few months before coming back to North Carolina, where he has remained.

¶ 7 Respondent did not have any contact with the children after he was released from the hospital in late December 2013 until 30 June 2019 when he came to petitioners' home with two police officers without any prior arrangement or notice that he was coming. The reason for his visit on

30 June 2019 was that he learned that the Cabarrus County Department of Human Services ("DHS") had opened an investigation of the mother for alleged physical abuse of George and Sarah. George came outside of the home, gave his father a hug, and spoke with him briefly, but petitioners did not allow respondent to take either child with him. In response to respondent's unannounced visit, petitioners obtained an *Ex Parte* Custody Order on 3 July 2019 which maintained physical custody with petitioners and ordered respondent to have no contact with the children.

¶ 8 Approximately one week after his 30 June 2019 visit, respondent again came to petitioners' home with a law enforcement officer and sought to take the children. Petitioners showed the officer the *Ex Parte* Custody Order, and respondent left the home without seeing either child.

¶ 9 On 16 July 2019, petitioners filed petitions seeking to terminate respondent's parental rights to George and Sarah on the grounds of neglect and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2019). On 15 August 2019, respondent filed an answer opposing the termination of his parental rights. Following a hearing held on 10 February 2020, the trial court entered orders on 9 March 2020 concluding that respondent's parental rights were subject to termination on both grounds alleged in the petitions and that termination of respondent's parental rights was in George's and Sarah's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed from both orders. On 9 June 2020, respondent filed a motion seeking to consolidate the appeals from the trial court's orders terminating his parental rights. We allowed the motion on 10 June 2020 and consolidated the cases for appeal.

I. Adjudication Stage Issues

¶ 10 **[1]** Respondent argues the trial court erred by concluding that grounds existed to terminate his parental rights based on neglect and willful abandonment. We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (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 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "Moreover, we review only those findings necessary to support the trial court's

determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. at 407 (citing *In re Moore*, 306 N.C. 394, 404 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019). "[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 (2019).

¶ 11 A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)). "[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 (1962).

¶ 12 "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re B.C.B.*, 374 N.C. 32, 35 (2020) (quoting *In re Adoption of Searle*, 82 N.C. App. at 276). "[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 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 13 In this case respondent's relevant conduct is essentially the same as it relates to each child. The trial court's findings of fact supporting its adjudications are essentially identical in each termination order, other than the juvenile's name. To examine the relevant matters pertaining to the adjudication of grounds involving both children, the discussion below refers to the findings of fact and conclusions of law as enumerated in the trial court's termination order entered in George's case but is equally applicable to Sarah.

¶ 14 Respondent first challenges finding of fact 16 as not being supported by the evidence. In finding of fact 16, the trial court found:

> Pursuant to [N.C.G.S. §] 7B-1111(a)(7), the Respondent has willfully abandoned the minor child . . . for a period of time of at least six months prior to the filing

> of Petitioners' Petition to Terminate the Parental Rights of the Respondent on July 16, 2019. The Findings of Fact above show that Respondent has willfully neglected and refused to perform the natural and legal obligations of parental care, support and maintenance for the minor child. The Findings of Fact above show that Respondent has willfully withheld his presence, his love, his care for the minor child, and the opportunity to display filial affection. The Findings of Fact above show that Respondent has shown a purpose and deliberation in his intent to abandon the minor child. The Findings of Fact above show that Respondent has willfully abdicated his parental role to the Petitioners since October 2011. This finding of willful abandonment is made by clear, cogent and convincing evidence.

¶ 15 Respondent acknowledges that he had no contact with the children from late December 2013 until 30 June 2019. However, respondent argues that his actions do not amount to willful abandonment because he "had neither the deliberate intent nor purpose to abandon the minor children." Respondent points to his testimony that his lack of contact with the children during the five and one-half year period was due to his fear for his safety and the safety of his children after he was injured in an unsolved shooting in December 2013. Respondent argues that he had a reasonable belief that the mother and her associates were the perpetrators of the shooting "given the tense nature of the relationship between [the m]other and [respondent]" and that the shooting was in "direct retaliation for his seeking to modify the Temporary Custody Order for the minor children." He argues that it was due to this "grave concern" that he did not seek visitation with the children following his release from the hospital. Therefore, he argues that finding of fact 16 was not supported by clear, cogent, and convincing evidence, and as a result, the trial court erred in concluding that grounds existed based on willful abandonment.

¶ 16 The trial court's findings of fact establish that respondent "made no attempt whatsoever to contact" the children or to participate in the children's lives from late December 2013 through 30 June 2019, a period of over five years. The trial court found that respondent did not send any cards or letters to the children or petitioners, did not send any gifts, did not purchase clothing or other items for the children, and did not provide any financial assistance to petitioners for the children's benefit. The trial court found that respondent knew where petitioners lived but

did not attempt to see the children from late December 2013 to 30 June 2019. The trial court also found that petitioners maintained the same phone number and email address since 2013; however, respondent never asked them for this information in order to contact the children. The trial court's findings indicate that, from December 2013 until the filing of the petition to terminate his parental rights in July 2019, respondent failed to provide support and maintenance, did not write or call his children, did not send them gifts, and did not otherwise act as a parent. These findings demonstrate that respondent "willfully withheld his love, care, and affection from [the children] and that his conduct during the determinative six-month period constituted willful abandonment." *In re C.B.C.*, 373 N.C. at 23.

¶ 17 Respondent contends that his lack of contact for the five and one-half year period following the December 2013 shooting was not "wholly inconsistent with a desire to maintain custody of the minor children." He argues that he "had neither the deliberate intent nor purpose to abandon the minor children" but rather "made a choice, albeit a very difficult and sacrificial choice, to keep his children safe and free from the fear of harm." Respondent relies on his testimony that he did not seek custody or visitation after being released from the hospital following the December 2013 shooting due to his fear for his safety and the safety of the children. He contends the trial court "did not doubt the veracity or credibility" of his testimony. Thus, he argues the evidence did not demonstrate that he willfully abandoned the children.

¶ 18 However, in reviewing a trial court's adjudication of grounds to terminate parental rights, our review 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 (quoting *In re Montgomery*, 311 N.C. at 111). 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. at 196 (alteration in original) (quoting *In re D.L.W.*, 368 N.C. 835, 843 (2016)). 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 (2019).

¶ 19 Here, the trial court weighed the evidence and ultimately determined that respondent's conduct during the determinative period showed his willful intention to abandon the children. *See In re K.N.K.*, 374 N.C. 50, 53 (2020) ("The willfulness of a parent's actions is a question of fact for the trial court."). The trial court made specific findings regarding the two

shootings in November and December 2013. Specifically, regarding the December shooting, the trial court found that

> [o]n December 27, 2013 the Respondent was shot with a firearm several times while on his way to work at approximately 7:00 a.m. The unidentified perpetrators were never caught. After getting out of the hospital, Respondent went to live with his Aunt in Atlanta, Georgia for a few months in 2014, and then came back to North Carolina. However, the Respondent did not attempt to contact the minor child[ren], or to re-establish his relationship with the minor child[ren] upon his return from Georgia.

This finding, along with the trial court's other findings, demonstrates that the trial court acknowledged that respondent had been injured in an unsolved shooting but ultimately determined that his failure to contact the minor children upon his return to North Carolina was willful and that his conduct during the determinative period constituted willful abandonment.

¶ 20 We hold the trial court's findings of fact support its ultimate finding and conclusion that respondent willfully abandoned the children. The trial court's findings demonstrate that respondent had no contact with the children for a period of over five years prior to the filing of the termination petition on 16 July 2019, with the exception of one brief interaction with one of the children. The trial court's findings also demonstrate that respondent provided no support to the children and withheld his love, care, and affection from the children. The trial court was entitled to consider respondent's years-long absence from the children's lives when determining respondent's credibility and intent to abandon his children during the six months preceding the filing of the petition. *See In re N.D.A.*, 373 N.C. at 77. Therefore, the trial court did not err by concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

II. Disposition Stage Issues

¶ 21 **[2]** Respondent also challenges the trial court's conclusions that it was in George's and Sarah's best interests to terminate his parental rights.

¶ 22 At the dispositional stage of a termination proceeding, the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In doing so, the trial 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.

Id. Although the trial court must consider each of the factors in N.C.G.S. § 7B-1110(a), written findings of fact are required only "if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court." *In re A.R.A.*, 373 N.C. at 199 (cleaned up) (quoting *In re H.D.*, 239 N.C. App. 318, 327 (2015)).

¶ 23 "The trial court's dispositional findings are binding on appeal if supported by any competent evidence. The trial court's determination of a child's best interests under N.C.G.S. § 7B-1110(a) is reviewed only for abuse of discretion." *In re J.S.*, 374 N.C. 811, 822 (2020) (citations omitted). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re K.N.K.*, 374 N.C. at 57.

¶ 24 Respondent does not challenge the trial court's findings regarding the children's ages and concedes that subsection (a)(3) is not applicable in this case because DHS is not involved and, therefore, there is no permanent plan for the children. Respondent does challenge the trial court's other dispositional findings of fact as not being supported by competent evidence.

¶ 25 Respondent first challenges finding of fact 18(2) regarding the children's likelihood of adoption. In both orders the trial court found the following: "Though there was no testimony regarding adoption, the [c]ourt takes judicial notice that there is a pending custody action by the Petitioners, in which they are seeking custody of the two minor children, [George and Sarah], from both the Respondent and the biological mother . . . ." Respondent contends this finding is not supported by competent evidence because there is no evidence in the record that petitioners are seeking adoption and "nothing in the record to support any likelihood of adoption of either minor child." However, the trial court did not find that there was a likelihood of adoption. Rather, the trial court recognized that no evidence was presented regarding adoption and took judicial notice of the pending civil custody action filed by petitioners seeking custody of the children. This finding is supported by competent evidence. The trial court is not required to find a likelihood of adoption in order for termination to be in a child's best interests. *See In re M.M.*, 200 N.C. App. 248, 258 (2009), ("[N]othing within [N.C.G.S.] § 7B-1110 . . . requires that termination lead to adoption in order for termination to be in a child's best interests."), *disc. review denied*, 364 N.C. 241 (2010).

¶ 26 Respondent next argues that finding of fact 18(4) regarding the children's bond with respondent is not supported by competent evidence. Respondent argues the finding is "solely a recital of the children's therapist['s] testimony" which was "clearly hearsay and does not fall within any exception." We disagree. Contrary to respondent's assertion, finding of fact 18(4) does not recite the therapist's testimony. The trial court specifically found that Sarah has no memory of respondent and that he is a stranger to her, and that George has some memory of respondent but does not have a bond with him. The trial court further found that the guardian *ad litem* (GAL) and the therapist "provided testimony in this regard," and that it found "such testimony to be credible." The finding demonstrates that the trial court considered the testimony of the GAL and the therapist, determined their testimony was credible, and made an independent finding regarding the children's bond with respondent based on that testimony. *See In re D.L.W.*, 368 N.C. at 843 (stating that it is the trial court's duty to consider all of the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Moreover, N.C.G.S. § 7B-1110(a) specifically allows the consideration of hearsay evidence in determining a child's best interests. N.C.G.S. § 7B-1110(a). Therefore, the trial court's finding is supported by competent evidence.

¶ 27 Respondent next challenges the portions of finding of fact 18(5) stating that he willfully abdicated his parenting role to petitioners since

October 2011. Respondent argues he did not make "a conscious and intentional decision to avoid his parental role" but rather that "he made the very difficult decision to put the safety of the minor children first before all other things." Therefore, he argues, this finding is not supported. However, as discussed previously, the trial court's findings demonstrate that respondent had no contact with the children for five and one-half years despite having the ability to do so. The trial court weighed the credibility of respondent's testimony and ultimately found that respondent willfully abandoned the children. Based on the evidence presented, the trial court made the reasonable inference that respondent abdicated his parenting role to petitioners by having no contact or involvement in the children's lives for over five years. We conclude that this finding is sufficiently supported by competent evidence.

¶ 28 Lastly, respondent challenges finding of fact 18(6) as not supported by competent evidence because the trial court relied heavily on the GAL's report and testimony. Respondent argues the GAL "did little to investigate [respondent]," did not visit his home or speak to his fiancée, and relied heavily on the therapist's opinion in writing her report. Respondent's challenge to the finding raises the question of whether the GAL had a sufficient basis for her testimony and is a challenge to the GAL's credibility as a witness. However, it is the duty of the trial court to determine the weight and credibility of the evidence. *In re A.R.A.*, 373 N.C. at 196. The trial court specifically found the testimony of the GAL and the therapist to be credible. Therefore, we conclude that there was sufficient competent evidence in the record to support this finding.

¶ 29 Respondent further contends the trial court abused its discretion in determining that termination of his parental rights was in the children's best interests. He argues that the findings of fact in this case are "almost identical" to the findings of fact found in *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994), where the Court of Appeals determined the trial court abused its discretion in terminating the respondent-father's parental rights.

¶ 30 In *Bost*, the trial court concluded that

> [g]iven that the children are thriving under their present circumstances, the presence of a complete family structure able to meet the emotional and economic needs of the children, the expressed desire of the children not to see their father, their desire to be adopted by Jim Bost and the pain and disruption involved with any attempt at reestablishing a relationship, the

> [c]ourt finds as a fact that it would not be in the best interest of the children to follow the Guardian Ad Litem's reccommendations [sic] and furthermore that termination is in their best interest.

Id. at 8 (alterations in original).

¶ 31 Respondent argues that here, similarly, the trial court found that Sarah expressed that she "wants no relationship whatsoever with the Respondent"; that George "later expressed fears and concerns for having his place of residence and way of life changed in any way because of the Respondent"; that the children have a close and loving relationship with petitioners "who have provided for all of the child[ren's] educational, emotional, physical and financial needs, with little to no contribution from either parent, since October 2011"; and that the therapist testified the children were concerned about their placement with petitioners being disrupted. He argues that these findings "were found to be insufficient by the Court [of Appeals] in *Bost* and the decision to terminate 'in light of the paramount rights of the natural parent to help raise and support his children' was found to be an abuse of discretion," quoting *Bost*, 117 N.C. App. at 13. Thus, he contends the same standard should apply in this case.

¶ 32 However, *Bost* is distinguishable from the present case. First, the Court of Appeals in *Bost* stated that "a finding that the children are well settled in their new family unit . . . does not *alone* support a finding that it is in the best interest of the children to terminate respondent's parental rights." *Bost*, 117 N.C. App. at 8 (emphasis added). Here, however, the finding that the children were doing well with petitioners was not the sole support for the trial court's conclusion that termination was in the children's best interests. Second, while the respondent-father in *Bost* once had been unable to maintain employment or relationships with the children because he was an alcoholic, the evidence also showed that the respondent-father had ceased using alcohol a couple of years before the petition to terminate his parental rights was filed, had paid large sums of back child support, and had begun to visit the children. *Id.* at 5–6. In contrast, here respondent had not had any contact with the children, had not provided any support for the children, and had not shown any desire to be a part of the children's lives from December 2013 until two weeks before the filing of the petition to terminate parental rights on 16 July 2019. Finally, in *Bost*, the GAL and the court-appointed psychologist thought it in the best interests of the children to *not* terminate the respondent-father's parental rights. *Id.* at 9. In the present case, the GAL recommended that it *would* be in in the children's best interests to

terminate respondent's parental rights. These are all significant distinctions that explain why the ultimate conclusion by the trial court in this case is not an abuse of discretion.

¶ 33 The trial court's findings demonstrate that it considered the relevant factors under N.C.G.S. § 7B-1110(a) and made a reasoned decision based on those findings. Specifically, the trial court made findings regarding the children's ages; the pending civil custody action filed by petitioners; the children's lack of a bond with respondent after his five and one-half year absence; the children's "close and loving relationship" with petitioners "who have provided for all of the child[ren's] education, emotional, physical and financial needs"; and the negative psychological impact on the children from respondent's sudden return into their lives. These findings, along with the trial court's other findings of fact, support its conclusion that termination of respondent's parental rights was in the children's best interests.

III. Ineffective Assistance of Counsel Claim

¶ 34 **[3]** Lastly, respondent contends he received ineffective assistance of counsel at the termination hearing. Respondent argues his trial counsel was ineffective because she failed to make any objections during the termination hearing and failed to introduce any evidence of petitioners' "retaliatory seeking [of] an *Ex Parte* Custody Order against [respondent]" or of DHS's investigation of the mother. Specifically, respondent argues his counsel failed to object to the introduction of the temporary custody order into evidence and failed to make any hearsay objections, most notably during the testimony of the children's therapist. Respondent asserts that "[g]iven the constitutionally protected rights at issue, [he] was denied a fair hearing as a result of his trial counsel's failure to perform at an objectively reasonable standard."

¶ 35 "Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282 (cleaned up) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 436 (1996)), *disc. review denied*, 361 N.C. 354 (2007); *see also* N.C.G.S. § 7B-1101.1 (2019). "Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless." *In re T.N.C.*, 375 N.C. 849, 854 (2020). "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 [him] of a fair hearing." *Id.* at 33 (cleaned up) (quoting *In re Bishop*, 92 N.C. App. 662, 664 (1989)). "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.' " *In re T.N.C.*, 375 N.C. at 854 (quoting *State v. Braswell*, 312 N.C. 553, 563 (1985)); *see also In re S.C.R.*, 198 N.C. App. 525, 531 ("A parent must also establish he suffered prejudice in order to show that he was denied a fair hearing."), *appeal dismissed*, 363 N.C. 654 (2009). Respondent has made no showing that he was prejudiced as a result of his counsel's alleged deficient performance. *See In re Dj.L.*, 184 N.C. App. 76, 87 (2007) (an ineffective assistance claim is meritless when "[i]t is difficult to see a defense on which respondent could have prevailed, and respondent cites no such theory on appeal."). In this case, respondent has failed to show that any of the alleged deficiencies in his counsel's performance or conduct, whether taken alone or collectively, would have resulted in a different outcome. Therefore, respondent cannot prevail on his claim of ineffective assistance of counsel.

IV. Conclusion

¶ 36 The trial court did not err in concluding that respondent's parental rights were subject to termination based on willful abandonment; nor did the trial court abuse its discretion by concluding that termination of respondent's parental rights was in the children's best interests. Respondent also failed to show he received ineffective assistance of counsel at the termination hearing. Accordingly, we affirm the trial court's orders terminating his parental rights to George and Sarah.

AFFIRMED.

IN RE H.A.J.

[377 N.C. 43, 2021-NCSC-26]

IN THE MATTER OF H.A.J. AND B.N.J.

No. 127A20

Filed 19 March 2021

1. Child Abuse, Dependency, and Neglect—permanency planning hearing—change in DSS recommendation—due process argument—notice

A respondent-mother was not materially prejudiced by the trial court's failure to continue a permanency planning review hearing after a department of social services and guardian ad litem requested a change to the permanent plan to cease reunification. Although respondent argued her due process rights were violated because she was not given sufficient notice of a new recommendation, respondent was necessarily on notice that the permanent plan could change at the hearing designated to review that plan, there was no requirement that she be given advance notice of a changed recommendation, and she failed to show how a continuance would have altered the result of the hearing.

2. Child Abuse, Dependency, and Neglect—permanency planning hearing—ceasing reunification efforts—required findings

The trial court's permanency planning order ceasing reunification efforts with respondent-mother was supported by its unchallenged findings of fact, made in accordance with the requirements of N.C.G.S. § 7B-906.2(d), which detailed respondent's lack of progress in securing stable housing and transportation, abstaining from alcohol use, attending visitation regularly, and demonstrating her participation in substance abuse treatment and domestic violence counseling.

3. Termination of Parental Rights—grounds for termination—neglect—likelihood of repetition of neglect—substance abuse

The trial court properly terminated respondent-mother's parental rights to her two children on the ground of neglect where its findings demonstrated a likelihood of the repetition of past neglect if the children were returned to respondent's care, based on her ongoing substance abuse, domestic violence between her and her partner, and lack of sustained progress on her case plan.

IN RE H.A.J.

[377 N.C. 43, 2021-NCSC-26]

4. Termination of Parental Rights—best interests of the child—statutory factors—weighing of factors

The trial court's conclusion that termination of respondent-mother's parental rights was in the best interest of her two children was supported by its unchallenged findings of fact, which addressed the statutory factors in N.C.G.S. § 7B-1110(a), and which demonstrated the court's careful consideration of the nature of the bond each child had with respondent as well as of each child's placement history as it pertained to the likelihood of being adopted. The court did not abuse its discretion by weighing certain factors more heavily than others in its final determination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 14 January 2020 by Judge Hal Harrison in District Court, Madison County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Michelle FormyDuval Lynch, for appellee Guardian ad Litem.

Deputy Parent Defender Annick Lenoir-Peek for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent, the mother of the juveniles H.A.J. and B.N.J. ("Holden" and "Bella")[1], appeals from the trial court's orders eliminating reunification as a permanent plan and terminating her parental rights. After careful review, we affirm the trial court's orders.

I. Background

¶ 2 On 14 August 2018, the Haywood County Department of Social Services (DSS) received a report alleging that Holden and Bella were being left alone while respondent-mother visited Mr. Scott[2], with whom she

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

2. Also a pseudonym, used in this opinion to preserve confidentiality.

was in a relationship. The report further alleged that Mr. Scott, who was in the hospital receiving treatment for abscesses due to intravenous drug use, had "gotten [respondent-mother] 'hooked' on Methamphetamine." Haywood County DSS contacted Madison County DSS seeking assistance, and Madison County DSS contacted the Madison County Sheriff's Office for assistance in locating Holden and Bella.

¶ 3 On or around 6 September 2018, the Madison County Sheriff's Office located Holden and Bella in Hot Springs, North Carolina, and notified Madison County DSS. Madison County DSS interviewed Holden and Bella, and the juveniles revealed they had been hiding and fleeing from law enforcement and DSS for multiple days to avoid being removed from respondent-mother's care. Holden and Bella disclosed that they had witnessed respondent-mother and Mr. Scott "shooting drugs with needles in their bodies." The juveniles also stated they had witnessed Mr. Scott "striking the respondent mother, slinging her on the bed[,] and the respondent mother screaming for [Holden and Bella] to call 911." Respondent-mother admitted to intravenous drug use and domestic violence between herself and Mr. Scott, including one occasion where Mr. Scott attempted to choke her in bed. Accordingly, on 7 September 2018, Madison County DSS filed petitions alleging that Holden and Bella were neglected and dependent juveniles and obtained nonsecure custody.

¶ 4 Following a hearing held on 15 October 2018, the trial court entered an order on 7 November 2018 adjudicating Holden and Bella neglected juveniles. The trial court entered an interim disposition order in which it placed the juveniles in the legal and physical custody of Madison County DSS and granted respondent-mother weekly supervised visitation. On 26 November 2018, the trial court entered a disposition order in which it set the permanent plan for the juveniles as reunification with a concurrent plan of guardianship. The trial court ordered respondent-mother to comply with the requirements of her DSS case plan, which included: (1) completing the Children in the Middle Parenting Course and Seeking Safety classes; (2) having no contact with Mr. Scott; (3) attending a substance abuse intensive outpatient treatment program (SAIOP); (4) a medical evaluation; and (5) random drug screens.

¶ 5 The trial court held a review hearing on 21 February 2019. In an order entered on 21 March 2019, the trial court found that respondent-mother: (1) had resolved pending criminal charges by pleading guilty to breaking and entering, and was placed on probation; (2) had a positive screen for alcohol; (3) had participated in a domestic violence class but had not received an assessment; (4) had completed the Children in the Middle Parenting Course but not the Seeking Safety class; and (5) need-

ed to complete SAIOP and submit to random drug and alcohol screening. The trial court also found that Holden and Bella were doing well in their foster care placements but had some behavioral issues.

¶ 6 A permanency planning review hearing was held on 4 April 2019. The trial court found as fact that: (1) respondent-mother had not yet secured housing; (2) she had completed SAIOP and intermediate treatment was recommended; (3) despite treatment, respondent-mother continued to have issues with alcohol consumption; (4) respondent-mother had not yet completed the Seeking Safety class; and (5) respondent-mother had not yet received a domestic violence assessment. The trial court further found as fact that Bella was experiencing behavioral issues that were the result of prior trauma. Consequently, the trial court directed that respondent-mother's visitation with Bella "occur as therapeutically recommended."

¶ 7 The trial court held another permanency planning review hearing on 16 May 2019. On the day of the hearing, the attorney for DSS requested a change in the permanent plan for Holden and Bella to adoption with a concurrent plan of guardianship, and the attorney for the guardian ad litem concurred. Respondent-mother objected to the requested change, citing a lack of notice and due process concerns because DSS and the guardian ad litem had recently filed reports in which they had not recommended such a change. The trial court directed DSS to proceed.

¶ 8 The trial court entered an order from the hearing on 8 August 2019. In the permanency planning review order, the trial court found that since the last hearing respondent-mother: (1) had not yet secured or maintained independent housing, had been kicked out of her prior residence, and was residing with her parents; (2) had missed scheduled visitations in April 2019 and on Mother's Day 2019; (3) was continuing to use alcohol in violation of a prior court order and had received a recent DWI charge which remained pending; (4) was currently on probation for breaking and entering; (5) did not have stable transportation; (6) had completed over ninety hours of SAIOP but had not participated in an aftercare program as recommended; (7) was substituting alcohol for methamphetamine use; (8) had not obtained a domestic violence assessment; and (9) had not started the Seeking Safety course. The trial court further found that the juveniles remained in licensed foster care and were doing well in their placement and in school. The trial court determined that the return of the juveniles to their home within six months was not likely and that further efforts at achieving reunification would be futile or inconsistent with the juveniles' need for a safe, permanent home within a reasonable period. Accordingly, the trial court relieved

DSS of further reunification efforts and changed the permanent plan for the juveniles to adoption with a concurrent plan of guardianship. Respondent-mother filed notice to preserve her right to appeal.

¶ 9 On 28 June 2019, DSS filed petitions to terminate respondent's parental rights. On 14 January 2020, the trial court entered an order in which it determined that grounds existed to terminate respondent's parental rights to both juveniles due to neglect. N.C.G.S. § 7B-1111(a)(1) (2019). The trial court further concluded it was in Holden's and Bella's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights.[3] Respondent-mother appeals.

II. Permanency Planning Review Order

¶ 10 **[1]** Respondent-mother first argues the trial court erred by denying her motion to continue the 16 May 2019 permanency planning review hearing. Respondent-mother contends that she relied on the representations made by DSS and the guardian ad litem in their written reports and was not provided sufficient notice that they would be requesting a change in the juveniles' permanent plan at the hearing. Respondent-mother argues that had she been aware that their recommendations would be changing, she would have had an opportunity to present evidence as to why reunification efforts should continue. Therefore, respondent-mother argues the trial court violated her constitutional right to due process.

¶ 11 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516–17 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24 (1995)). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *In re S.M.*, 375 N.C. 673, 679 (2020). "To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, [the] [respondent-mother] must show 'how [her] case would have been better prepared had the continuance been granted or that [s]he was materially prejudiced by the denial of h[er] motion.' " *State v. McCullers*, 341 N.C. 19, 31 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130 (1986)).

¶ 12 Here, the record demonstrates, and respondent-mother acknowledges in her brief, that the hearing was designated as a permanency

3. The district court's order also terminated the parental rights of the juveniles' fathers, including unknown fathers, but the fathers did not appeal and are not a party to the proceedings before this Court.

planning hearing. Thus, respondent-mother was on notice that the trial court could change the permanent plan for the juveniles. *See* N.C.G.S. § 7B-906.2(a) (2019) ("At *any* permanency planning hearing pursuant to G.S. 7B-906.1, the court shall adopt one or more of the following permanent plans the court finds is in the juvenile's best interests: (1) Reunification[;] (2) Adoption[;] (3) Guardianship[;] (4) Custody to a relative or other suitable person[;] (5) Another Planned Permanent Living Arrangement (APPLA)[; or] (6) Reinstatement of parental rights[.]") (emphasis added). Although respondent-mother argues that DSS and the guardian ad litem should be required to give notice of a change in recommendations in advance of the permanency planning hearing, such notice is not required by Chapter 7B. Furthermore, even if respondent-mother had been notified of the change in recommendations, as the Court of Appeals has observed, "North Carolina caselaw is replete with situations where the trial court declines to follow a DSS recommendation." *In re Rholetter*, 162 N.C. App. 653, 664 (2004).

¶ 13 We further note that after learning at the hearing that DSS and the guardian ad litem were seeking a change in the permanent plan for the juveniles, respondent-mother objected to the change in plan. While respondent-mother objected to the trial court changing the permanent plan for the juveniles at the hearing, the record does not reflect that counsel asked for the hearing to be continued. Even if we construe respondent-mother's objection as a request for a continuance, there is no evidence in the transcript demonstrating how respondent-mother was materially prejudiced by denial of the motion. *See In re A.L.S.*, 374 N.C. 515, 518 (2020) (concluding that respondent-mother failed to demonstrate prejudice where her "counsel offered only a vague description of the son's expected testimony and did not tender an affidavit or other offer of proof to demonstrate its significance."); *see also In re D.Q.W.*, 167 N.C. App. 38, 41 (2004) (concluding there was no prejudice where respondent did not explain why his counsel had inadequate time to prepare for the hearing; what specifically his counsel hoped to accomplish during the continuance; or how preparation would have been more complete had the continuance motion been granted). Respondent-mother also fails to identify in her brief any evidence, defenses, or testimony she was unable to present. Given the nature of a permanency planning hearing, as defined by statute, respondent was on notice that she needed to present all evidence relevant to her arguments concerning the proper disposition. Therefore, based upon the record before us, we conclude respondent-mother has failed to demonstrate prejudice. She has not demonstrated how her case would have been better prepared, or a different result obtained, had a continuance been granted. In these

circumstances, the trial court did not err by proceeding with the hearing and respondent-mother's due process rights were not violated.

¶ 14 **[2]** We next consider respondent-mother's arguments that the trial court erred by failing to make the factual findings required by N.C.G.S. § 7B-906.2 when eliminating reunification with respondent-mother from the juveniles' permanent plan. This Court's review of a permanency planning review order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re L.M.T.*, 367 N.C. 165, 168 (2013) (quoting *In re P.O.*, 207 N.C. App. 35, 41 (2010)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* (citing *In re P.O.*, 207 N.C. App. at 41). "At a permanency planning hearing, '[r]eunification shall be a primary or secondary plan unless,' *inter alia*, 'the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " *In re J.H.*, 373 N.C. 264, 267 (2020) (quoting N.C.G.S. § 7B-906.2(b) (2019)). When making such a determination, the trial court must make written findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d) (2019). While "use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language." *In re L.M.T.*, 367 N.C. at 167. Instead, "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *Id.* at 167–68 (cleaned up).

¶ 15 Here, despite respondent-mother's claims to the contrary, the trial court made written findings of fact in accordance with N.C.G.S. § 7B-906.2(d). The trial court found the following as fact:

> 6. That the Court has received testimony from Bethany Wyatt (Madison County DSS); the respondent mother; and has considered the DSS Report; the GAL Report; and other documentation; that since these matters were last reviewed, the juveniles have remained placed in licensed foster care in Madison County; are doing well in placement and school; referrals for therapy have been made; the respondent mother has not secured or maintained independent housing; currently resides with her parents; testified she was kicked out of her prior residence in March, 2019; missed scheduled visitation on 04/05/19; missed scheduled Mother's Day visitation; continues to use alcohol in violation of the prior Court Order; received a recent DWI charge that remains pending (0.15 on breathalyzer); is currently on probation for Breaking and Entering conviction; does not have stable transportation; previously completed over 90 hours of SAIOP at RHA but has not participated in the aftercare program as recommended; states that she has recently re-engaged in that therapy but the Court finds the documentation she has provided on this issue is not credible and the Court gives no weight to same; is now substituting alcohol for methamphetamine use; has not obtained a DV assessment (the respondent mother testified she has had difficulty finding a provider for this service although being ordered to do so since the dispositional hearing); states she has completed DV coursework; the Court does not find the same satisfies the requirement of the DV assessment and treatment; has not started the Seeking Safety course; has not completed the TRACES peer support program; . . . that the barrier to implementing the permanent plan remains [respondent-mother's] failure to complete [her] DSS case plan requirements[.]
>
> 7. That this matter came on for permanency planning hearing. . . [and] that the [c]ourt has considered all the evidence, including the progress made and the

> current barriers to implementing the designated permanent plan of reunification.
>
> . . . .
>
> 9. That the return of the juveniles to the home of [respondent-mother] immediately or within six months is not likely; that reunification is no longer the appropriate permanent plan for the juveniles[.]
>
> . . . .
>
> 11. That the following services have been provided by the Petitioner to prevent or eliminate the need for placement of the juveniles and to place the juveniles in a timely manner in accordance with the permanent plan: facilitation of visits for respondent mother; referral to RHA for respondent mother; [and] coordination with respondent mother and case planning activities[.]
>
> 12. That reasonable efforts have been made by the Petitioner to prevent or eliminate the need for placement of the juveniles but the return of the juveniles to the home of the respondent parents is contrary to their welfare and best interests at this time.
>
> 13. That further reasonable efforts [to] prevent or eliminate the need for placement of the juvenile[s] are no longer required as the same would be clearly futile or inconsistent with the juveniles' need for a safe, permanent home within a reasonable period of time and are no longer required.

Respondent-mother does not claim that these findings are unsupported by the evidence, and we are bound by them on appeal. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). Based on these findings of fact, the trial court relieved DSS of further reunification efforts and removed reunification from the juveniles' permanent plan.

¶ 16 The trial court's findings of fact establish that it addressed each of the factors specified in N.C.G.S. § 906.2(d). Finding of fact number 6 sets forth numerous details demonstrating that respondent-mother had not been making adequate progress or actively participating in her case plan

and had been acting in a manner inconsistent with the juveniles' health or safety. The trial court found as fact that respondent-mother had failed to maintain stable housing and transportation; had continued using alcohol in violation of prior court orders and as a substitute for methamphetamine use; had missed scheduled visitations; was recently charged with DWI and was on probation for a breaking and entering conviction; and had failed to provide documentation regarding her participation in substance abuse aftercare treatment and domestic violence counseling. *Cf.* N.C.G.S. § 7B-906.2(d)(1), (4) (2019). The trial court further found that the barrier to implementing the permanent plan of reunification was respondent-mother's failure to complete her case plan requirements. *Cf.* N.C.G.S. § 7B-906.2(d)(2) (2019). The trial court's additional findings, including the trial court's summation of respondent-mother's testimony, and its finding that DSS coordinated with respondent-mother when providing services aimed at eliminating the need for placement, demonstrated that respondent-mother remained available to the trial court and DSS. *Cf.* N.C.G.S. § 7B-906.2(d)(3) (2019). While the trial court's findings did not use the precise statutory language, the findings did address the necessary statutory factors "by showing 'that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]' " *In re L.E.W.*, 375 N.C. 124, 133 (2020) (quoting *In re L.M.T.*, 367 N.C. at 167–68). Therefore, we reject respondent-mother's argument that the trial court failed to make sufficient findings of fact when eliminating reunification from the juveniles' permanent plan, and we affirm the trial court's permanency planning review order.

III. Termination Order

¶ 17 **[3]** Respondent-mother next contends that the trial court erred in concluding 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 E.H.P.*,

372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, (2019).

¶ 18 The sole ground found by the trial court to support termination of respondent-mother's parental rights was neglect. *See* N.C.G.S. § 7B-1111(a)(1). A trial court may terminate parental rights pursuant to this statutory ground where it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. *Id.* 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). In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See*, *e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, in other instances, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019). In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). After weighing this evidence, the court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020). Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *Id.* at 841, n.3. In doing so, the trial court must consider evidence of changed circumstances that may have occurred between the period of prior neglect and the time of the termination hearing. *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715).

¶ 19 Here, the juveniles were adjudicated neglected on 7 November 2018. The trial court also found as fact in its termination order that DSS received a report regarding respondent-mother and the juveniles, and

during their first interview with respondent-mother "[s]he admitted to intravenous drug use, methamphetamine use, and domestic violence between she and [Mr. Scott]. She also admitted that [Mr. Scott] attempted to choke her in bed on one occasion." The trial court further found as fact that respondent-mother was given the opportunity to work toward reunification with the juveniles through compliance with a DSS case plan, but that she failed to comply. The trial court made the following findings of fact concerning respondent-mother's compliance with her case plan and concerning its determination that there would be a repetition of neglect should the juveniles be returned to respondent-mother's care:

> 24. At the time of the [May 16, 2019 permanency planning] hearing, the respondent mother had still not secured independent housing; had missed scheduled visitations with the juveniles five times from September 2018 until the court date; was using alcohol; had been charged with Driving While Impaired (DWI) in May of 2019 with a blood alcohol concentration of 0.15, eight (8) months after the children came into the care of the Petitioner's custody; was placed on probation for Felony Breaking and Entering stemming from an incident in December of 2018; had not completed substance abuse treatment but was engaged with intensive outpatient substance abuse treatment ("IOP") and was providing negative urine drug screens to her provider; and had not gotten her domestic violence assessment, but completed domestic violence coursework on November 15, 2018. She had also completed the Children in the Middle parenting class on November 1, 2018. The respondent mother was unable to complete the Seeking Safety course due to a lack of funding to pay for the class.
>
> 25. By March 29, 2019, [respondent-mother] completed over 100 hours of IOP. She subsequently relapsed and was charged with her DWI offense in May of 2019. She then completed 36 hours of intermediate substance abuse treatment as recommended aftercare, ending on August 19, 2019. The respondent mother provided negative urine drug screens through the substance abuse provider.
>
> . . . .

27. The respondent mother was on felony probation with a 6 to 17-month suspended sentence at the time she was charged with her pending DWI and was ordered not to consume alcohol as a probationary condition. She now has a pending felony probation violation as a result. The respondent mother was also engaged in substance abuse treatment for nine hours per week through RHA at the time of her DWI offense. The respondent mother testified that she does not currently have a driver's license and she anticipated she will lose her license once convicted of the DWI. Per the testimony of the respondent mother's probation officer, except for the violation relating to her pending DWI and possession of alcohol, the respondent mother is otherwise fully compliant and has provided consistent negative urine drug screens.

28. Since coming into the Petitioner's custody on September 7, 2018, the juvenile [Holden] has made disclosures of a long pattern of alcohol and substance abuse by the respondent mother as well as patterns of domestic violence in his presence between the respondent mother and her multiple romantic partners throughout his childhood. In addition to the initial disclosures regarding [Mr. Scott], [Holden] has described observing the respondent mother and [Bella's putative father, R.M.] getting drunk and fighting all the time, the respondent mother breaking a bottle over [R.M.'s] head, [R.M.] beating [Holden] with a belt with spikes, and receiving a beating from [R.M.] during an argument about eating beans that was so bad that [Holden] can no longer eat beans. The respondent mother acknowledged that [R.M.] did beat [Holden] because of beans and testified that this incident triggered her to leave [R.M.].

29. Both juveniles have been admitted for inpatient psychiatric treatment at Copestone since coming into the Petitioner's custody, in part as a result of behaviors exhibited in reaction to the respondent mother and the situations she has exposed them to.

30. The respondent mother . . . came to Copestone in April 2019 when [Bella] was being assessed for

admission. While at the hospital, a social worker from [DSS] smelled alcohol on the respondent mother and requested that she submit to a breathalyzer. The respondent mother agreed, then stated she was going to the restroom and left the premises without submitting to a breathalyzer and without waiting to see if [Bella] was going to be admitted. The following day, she acknowledged to [a] social work supervisor [ ] that she had been drinking.

31. The respondent mother [ ] has admitted to employees of the Petitioner that she replaced methamphetamine with alcohol after [DSS] took custody of the juveniles.

32. [Bella] was diagnosed with Static Encephalopathy, alcohol exposed, following testing by the Olsen Huff Center, which was caused by the respondent mother consuming alcohol while pregnant with [Bella]. The diagnosis indicates that [Bella] has suffered irreversible brain damage and will have life-long effects due to her exposure to substances while in utero.

33. [Holden] has been increasingly struggling with negative behaviors since coming into the custody of the Petitioner on September 6, 2018. He has had uncontrollable fits of crying and yelling; has run away from placement providers and had to be returned by law enforcement; and has had to be transported to a children's crisis center and a psychiatric inpatient unit due to his behaviors.

. . . .

35. [Holden] has increasingly resisted visiting with the respondent mother. He initially claimed sickness on his visitation days with the respondent mother and missed multiple visits from July until September 2019. At his last visit with the respondent mother in September 2019, he became extremely upset and engaged in self-harming behaviors including beating his head into the wall until he had to be taken outside and the visit ceased. He has directly stated to the respondent mother that he never wants to live with her and he blames her for the things she has put him through.

> 36. With the consent of all parties, the [c]ourt interviewed [Holden] in chambers . . . . [Holden] stated and the [c]ourt finds that [Holden] does not want to return to the custody of the respondent mother due to the experiences she has put him through.
>
> 37. [Bella] participates in therapy . . . weekly. The therapist does not support returning [Bella] to the care of respondent mother [ ] due to the behaviors exhibited by the juvenile and the unreliable environment provided by the respondent mother.
>
> 38. While the [c]ourt acknowledges that the respondent mother has made some progress on her case plan tasks, much of this progress occurred subsequent to the filing of the Petitions to terminate her parental rights in these causes. The respondent mother completed her domestic violence education classes prior to having an assessment of her level of need, and she has not completed additional classes after her assessment despite the assessment stating she is at high risk.
>
> 39. While the [c]ourt recognizes the respondent mother's recent participation in substance abuse treatment, her long-standing history of substance abuse and domestic violence with multiple partners in the presence of the children, her delayed participation in any meaningful treatment, her prior relapse while participating in similar services, the traumatic effects and impact on the children from her behaviors, and the diagnoses, behaviors, and wishes of the children all demonstrate the juveniles' continued neglect and the strong likelihood of neglect if returned to the respondent mother's custody.

To the extent these findings of fact are not challenged by respondent-mother, they are binding on appeal. *See In re T.N.H.*, 372 N.C. at 407.

¶ 20 Although respondent-mother does not argue that finding of fact 31 is unsupported by clear, cogent, and convincing evidence, she nonetheless contends the trial court's "concerns" about her substitution of alcohol for her prior drug use are unsupported. A review of the record shows that there is a factual basis for the trial court's concerns.

¶ 21 The record is replete with instances of respondent-mother's abuse of alcohol, both in the short-term and long-term. The trial court found that when Bella was being considered for admission to Copestone in April 2019, respondent-mother arrived smelling of alcohol, and despite agreeing to take a breathalyzer test, she left without taking one. Additionally, respondent-mother was arrested for DWI in May 2019, which also constituted a violation of the term of her probation requiring that she abstain from alcohol use. Holden also disclosed that respondent-mother had "a long pattern" of alcohol abuse. Furthermore, the trial court found that respondent-mother's history of alcohol abuse had a direct and deleterious impact on Bella. Bella was diagnosed with static encephalopathy, alcohol exposed, and suffered irreversible brain damage due to respondent-mother consuming alcohol while she was pregnant with Bella. Thus, the trial court could reasonably infer that respondent-mother had merely replaced her abuse of drugs with alcohol abuse. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

¶ 22 Respondent-mother additionally argues that the trial court relied solely on past circumstances and mistakenly discounted evidence of progress occurring after the filing of the petition to terminate her parental rights. Respondent-mother asserts that while she did not complete all aspects of her case plan, at the time of the termination hearing she had made sufficient progress towards being able to care for Holden and Bella.

¶ 23 It is apparent from the trial court's findings of fact that when determining whether there would be a likelihood of future neglect, the trial court placed heavy emphasis on incidents occurring prior to the filing of the petition to terminate respondent-mother's parental rights in June 2019. However, despite respondent-mother's arguments to the contrary, the trial court also specifically stated that it considered respondent-mother's "recent participation in substance abuse treatment" when determining that there likely would be a repetition of neglect. The trial court ultimately determined, however, that respondent-mother's last-minute progress was insufficient to outweigh her long-standing history of alcohol and substance abuse and domestic violence, as well as the impact these behaviors had on Holden and Bella. In these circumstances, we conclude that it was not error for the trial court to find that there likely would be a repetition of neglect in the future should Holden and Bella be returned to respondent-mother's care. *See In re O.W.D.A.*, 375 N.C. 645, 653–54 (2020) (stating that "evidence of changed conditions

must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect," and although a respondent may have made some recent, minimal progress, "the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements . . . and to conclude that there was a probability of repetition of neglect[.]"). Accordingly, we hold that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent-mother's parental rights.

¶ 24 **[4]** We next consider respondent-mother's argument that the trial court erred by finding that it was in Holden's and Bella's best interests to terminate her parental rights. If the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

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

N.C.G.S. § 7B-1110(a) (2019).

¶ 25 Here, the trial court made separate findings of fact addressing each juvenile's date of birth and then made the following findings concerning the factors set forth in N.C.G.S. § 7B-1110(a):

> 54. The juveniles' permanent plan has been designated [as] adoption, and there is a strong likelihood of adoption due to the age of the juveniles. Termination of the [respondent-mother's] parental rights would assist the Petitioner in achieving permanency for the juveniles and would eliminate this barrier to implementing the juveniles' permanent plan.

> 55. [Bella] has a bond with the Respondent Mother. [Bella] enjoys her visits with the Respondent Mother.
>
> 56. [Holden] is not bonded to the Respondent Mother and continues to actively resist having any contact with her, with his last visit occurring [in] July 2019.
>
> 57. The minor children were placed in a new foster home together on August 13, 2019. They remained in the same foster home until October 18, 2019, when [Holden] was removed to a separate home due to his behaviors. They now reside in separate foster homes, neither of which are pre-adoptive placements.
>
> 58. [DSS] is actively attempting to locate a new foster home for both children that will adopt them together, but no such home has been identified as of yet.
>
> 59. [Bella] was involuntarily committed into the Copestone mental health unit of Mission Hospital in April 2019, due to her behavior.
>
> 60. [Holden] was involuntarily committed into the Copestone mental health unit of Mission Hospital on July 26, 2019, due to his behavior. His hospitalization lasted for two weeks.

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 (2020). Dispositional findings not challenged by respondent-mother are "binding on appeal." *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

¶ 26 Respondent-mother contends that while the trial court "nominally" addressed the statutory factors set forth in N.C.G.S. § 7B-1110, the findings were "pro forma" and did not address the substance of the statutory requirements. Respondent-mother asserts that consideration of Holden's and Bella's best interests weigh strongly against termination of her parental rights. Respondent-mother cites the strong bond that she had with Bella, the trial court's failure to consider whether Holden would consent to adoption, and the fact that neither juvenile was in a pre-adoptive placement. Respondent-mother cites *In re J.A.O.*, 166 N.C. App. 222, 227 (2004) to support her contention that the trial court should not have terminated her parental rights because Holden and Bella were not adoptable.

¶ 27 However, in this case, the trial court's findings of fact were not merely "pro forma." The trial court did not simply recite the statutory fac-

tors but considered them along with the facts of this case. For example, the trial court noted that Holden did not have a bond with respondent-mother and "actively resists having any contact with her." The trial court also found that Bella did have a bond with respondent-mother and enjoyed her visits with her. Furthermore, while the trial court found that there was a strong likelihood of adoption and termination would aid in achieving permanency, the trial court also recognized that the juveniles were not in pre-adoptive placements and were residing in separate foster homes, while noting that DSS was attempting to locate a new foster home that would adopt both juveniles together. Thus, respondent-mother's contention that the trial court only nominally addressed the statutory factors set forth in N.C.G.S. § 7B-1110 is without merit.

¶ 28 Second, although respondent-mother does not challenge the trial court's finding of fact 54 that there was a strong likelihood of adoption as being unsupported by the evidence, she nonetheless argues that adoption would be difficult, noting the juveniles' multiple disrupted foster placements, the fact that no pre-adoptive home has been identified, and the fact that both juveniles had been involuntarily committed for being a danger to themselves and others. Respondent-mother also contends that the trial court failed to consider whether Holden would consent to adoption. *See* N.C.G.S. § 48-3-601(1) (2019) (providing that a minor over the age of twelve must consent to adoption unless consent is not required under N.C.G.S. § 48-3-603). However, even if we agreed with respondent-mother's contentions regarding the adoptability of the juveniles, this factor alone is not dispositive. We have stated that "the trial court need not find a likelihood of adoption in order to terminate parental rights." *In re C.B.*, 375 N.C. 556, 562 (2020); *see also In re A.R.A.*, 373 N.C. 190, 200 (2019) ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." (alteration in original) (quoting *In re D.H.*, 232 N.C. App. 217, 223 (2014))).

¶ 29 Furthermore, *In re J.A.O.*, cited by respondent-mother, is readily distinguishable from the instant case. In *In re J.A.O.*, the juvenile had "a history of being verbally and physically aggressive and threatening, and he ha[d] been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *In re J.A.O.* 166 N.C. App. at 228. The juvenile had "been placed in foster care since the age of eighteen months and ha[d] been shuffled through nineteen treatment centers over the last fourteen years." *Id.* at 227. As a result, the guardian ad litem argued at trial that the juvenile was unlikely

to be a candidate for adoption and that termination was not in the juvenile's best interests because it would "cut him off from any family that he might have." *Id.* at 228. Despite this evidence, and despite finding that there was only a "small 'possibility' " that the juvenile would be adopted, the trial court concluded that it was in the juvenile's best interests to terminate the mother's parental rights. *Id.* On appeal, the Court of Appeals reversed. The Court of Appeals balanced the minimal possibilities of adoption "against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring" and determined that rendering J.A.O. a legal orphan was not in his best interests. *Id.*

¶ 30 Here, the juveniles have only been in foster care for thirteen months, as opposed to the many years that J.A.O. spent being "shuffled" through various treatment centers. *Id.* at 227. Additionally, while the guardian ad litem in *J.A.O.* argued that the juvenile was unlikely to be adopted and termination was not in his best interests, the guardian ad litem here stated in its report that "there is potential for both children to be successfully adopted" and advocated for termination to achieve permanence for Holden and Bella. A social worker likewise testified that she had "every hope . . . that [Holden and Bella] can be adopted together." Furthermore, while Bella did have physiological issues and both juveniles had behavioral issues that required their involuntary commitment, there is no indication that their issues were as serious as those experienced by the juvenile in *J.A.O.* *Id.* at 228. We note that a social worker testified that Holden had been moved to a new foster home and "is doing great and [has] no behavior problems. He loves it there and he gets along great with the foster dad." Moreover, as noted previously, Bella's physiological issues and both juveniles' behavioral issues can be directly attributable to respondent-mother. Consequently, respondent-mother's argument concerning the likelihood of the juveniles' adoption and the significance of that consideration in the best interests' determination is unavailing.

¶ 31 Third, respondent-mother does not challenge the trial court's dispositional finding that Holden was not bonded to her as being unsupported by the evidence. Respondent-mother instead argues that a "more accurate finding would be that he was angry with his mother. If he wasn't bonded, he wouldn't have been angry – he wouldn't have cared." However, a social worker testified that Holden "blames his mom for everything that he's already been through and that he hates her and doesn't want to live with her." Based on this evidence, the trial court could reasonably infer that Holden had no bond with respondent-mother. *See In re D.L.W.*, 368 N.C. at 843 (stating that it is the trial judge's duty to con-

sider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

¶ 32 Additionally, while respondent-mother may have maintained a bond with Bella, this Court has repeatedly recognized that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437. This Court concluded in *In re Z.L.W.* that, based on the trial court's consideration of the other statutory factors and given the respondent's lack of progress on his case plan, "the trial court's determination that other factors outweighed [the] respondent's strong bond with [the juveniles] was not manifestly unsupported by reason." *Id.* at 438.

¶ 33 Similarly, here, it was not an abuse of discretion for the trial court to determine that other factors outweighed respondent-mother's bond with Bella. There was evidence to show that Bella is likely to be adopted, and that termination of respondent-mother's parental rights was necessary to achieve permanence. Accordingly, we conclude that the trial court properly considered the statutory factors set forth in N.C.G.S. § 7B-1110(a) and did not abuse its discretion by determining that termination of respondent-mother's parental rights was in the best interests of the juveniles.

IV. Conclusion

¶ 34 The trial court did not err by failing to grant respondent-mother a continuance of the 16 May 2019 permanency planning review hearing and the trial court made sufficient findings of fact when eliminating reunification from the juveniles' permanent plan. Furthermore, the trial court properly concluded that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). Finally, the trial court did not abuse its discretion by determining that termination of respondent-mother's parental rights was in the best interests of the juveniles. Accordingly, we affirm the trial court's orders.

AFFIRMED.

IN RE I.R.M.B.

[377 N.C. 64, 2021-NCSC-27]

IN THE MATTER OF I.R.M.B.

No. 91A20

Filed 19 March 2021

Termination of Parental Rights—grounds for termination—willful abandonment—incarceration and restraining order—no emotional or material support—domestic abuse

The trial court's order terminating the parental rights of respondent-father on the grounds of willful abandonment was affirmed where respondent was aware of his ability to seek legal custody and visitation rights (and how to obtain such relief) despite the limitations of his incarceration and a restraining order prohibiting contact with the child and her mother, he did not provide any emotional or material support during the determinative period although he could have done so, and his domestic abuse of the mother which led to the restraining order supported an inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 21 November 2019 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

J. Thomas Diepenbrock for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent-father appeals from the trial court's order entered on 21 November 2019 terminating the parental rights of respondent-father to I.R.M.B. (Isabel).[1] After a review of the record, we conclude that the trial court's unchallenged findings of fact support the trial court's conclusion to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (2019). Therefore, we affirm.

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

I. Factual and Procedural Background

¶ 2 In December 2013, Isabel was born to petitioner-mother and respondent-father in California. Petitioner-mother and respondent-father were never married but had an "on and off relationship" from the time Isabel was about three months old until she was a year old.

¶ 3 During their relationship, respondent-father committed at least eight acts of intimate partner violence against petitioner-mother and threatened bodily harm to petitioner-mother before and after Isabel was born. On 10 November 2014, petitioner-mother obtained a temporary restraining order from the Superior Court of California, County of Los Angeles, against respondent-father after he hit her in the face while she was driving with Isabel in the back seat. Later in November, respondent-father was incarcerated on charges unrelated to petitioner-mother and was not released until April 2017.

¶ 4 On 2 December 2014, the Superior Court of California, County of Los Angeles, issued a three-year restraining order. The restraining order prohibited respondent-father from, among other things, directly or indirectly contacting petitioner-mother or Isabel. The court also issued a child custody and visitation order granting petitioner-mother sole legal and physical custody of Isabel and prohibiting respondent-father from having visitation with Isabel.

¶ 5 On 26 December 2014, petitioner-mother and Isabel moved from California to North Carolina. Petitioner-mother and Isabel entered North Carolina's address confidentiality program, which shielded their physical address from respondent-father, and petitioner-mother discontinued her digital footprint.

¶ 6 On 14 October 2015, respondent-father, through counsel, filed a "Petition to Establish Parental Relationship" in California, seeking joint legal custody of Isabel and reasonable, supervised visitation with Isabel. On 3 December 2015, petitioner-mother filed a response to respondent-father's petition opposing joint custody and visitation.

¶ 7 On 20 June 2016, petitioner-mother filed a petition to terminate respondent-father's parental rights in District Court, Mecklenburg County. Petitioner-mother alleged that respondent-father had never exercised visitation with Isabel pursuant to an informal agreement between the parties, willfully failed to provide any financial support to Isabel and petitioner-mother, failed to provide consistent care to Isabel or petitioner-mother, never provided any emotional support to Isabel, and willfully abandoned Isabel.

¶ 8 On 12 October 2016, respondent-father filed a motion to dismiss the petition to terminate his parental rights pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. He argued that North Carolina did not have subject-matter jurisdiction, because the child custody order was still in effect in California and respondent-father's motion to modify the child custody order was still pending. On 23 May 2017, the District Court, Mecklenburg County issued an order staying the termination of parental rights proceeding "pending the complete adjudication of the subject-matter jurisdiction issue" in the California custody proceeding. Respondent-father was released from incarceration in April 2017. In September 2017, petitioner-mother obtained a five-year extension of the California restraining order.

¶ 9 On 13 June 2018 and 13 September 2018, hearings were held in the Superior Court of California, County of Los Angeles, on petitioner-mother's request for an order finding California a forum non-conveniens. On 23 October 2018, the California Superior Court ordered that California was an inconvenient forum for custody and visitation and ordered that all future proceedings should be filed in North Carolina. The parties' case was stayed pending North Carolina's determination of jurisdiction.

¶ 10 On 15 March 2019, petitioner-mother filed a motion to vacate District Court, Mecklenburg County's 23 May 2017 order staying the termination of parental rights proceeding and requested the trial court enter judgment assuming jurisdiction over the termination of parental rights proceeding. On 3 June 2019, the District Court, Mecklenburg County found that petitioner-mother and Isabel reside in North Carolina and have significant ties to the State and concluding that it had jurisdiction over the subject matter and parties. Petitioner-mother's motions were granted; the trial court lifted the stay and assumed jurisdiction.

¶ 11 Hearings for the petition to terminate respondent-father's parental rights were held on 10 and 11 October 2019. On 21 November 2019, the trial court entered an order concluding that grounds existed to terminate respondent-father's parental rights to Isabel pursuant to N.C.G.S. § 7B-1111(a)(7). The court also determined that it was in Isabel's best interests that respondent-father's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a). Respondent-father appealed.

II. Standard of Review

¶ 12 Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, 1110. At the adjudicatory stage for termination of

parental rights under N.C.G.S. § 7B-1111(a), the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds. N.C.G.S. § 7B-1109(e), (f). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 13 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 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). 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 (2019).

III. Analysis

¶ 14 On appeal, respondent-father contends that (1) the trial court made findings of fact that were not supported by the evidence; and (2) the trial court's findings were insufficient to support its conclusion that respondent-father willfully abandoned Isabel pursuant to N.C.G.S. § 7B-1111(a)(7).

¶ 15 Termination under N.C.G.S. § 7B-1111(a)(7) requires proof that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" As used in N.C.G.S. § 7B-1111(a)(7), abandonment requires a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]." *In re A.G.D.*, 374 N.C. 317, 319 (2020). The existence of willful intent "is an integral part of abandonment" and is determined according to the evidence before the trial court. *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). "[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 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 16 In support of its conclusion that grounds existed to terminate respondent-father's parental rights based on willful abandonment, the trial court made the following pertinent findings of fact:

> 19. During the course of [petitioner-mother and respondent-father's relationship], at least from pregnancy until approximately 6 November 2014,

Respondent[-father] committed at least eight acts of intimate partner violence against Petitioner[-mother].

. . . .

35. Respondent[-father]'s statements and conduct during that period of time [from Isabel's birth to August 2014] demonstrate that he was not only unwilling to initiate action to establish a relationship and bond with the juvenile, but that he would use power and control tactics to intimidate and threaten Petitioner[-mother]. Oftentimes his contact with Petitioner[-mother], while shrouded in a motivation to visit with juvenile, ultimately served the purpose of threatening and intimidating her.

. . . .

41. Respondent[-father] continued to initiate contact with Petitioner[-mother] by text message cursing her, and denigrating her actions . . . .

. . . .

44. In response, Petitioner[-mother] again stated in a text message that she didn't feel safe and felt that the juvenile was at risk of exposure to the violence.

45. Ultimately, on or about November 10, 2014, Petitioner[-mother] sought and obtained a temporary restraining order; Respondent[-father] was served with same on November 11, 2014.

46. A hearing was held on December 2, 2014, but Respondent[-father] did not attend because he was incarcerated and in the custody of law enforcement at the time of that hearing.

47. Petitioner[-mother] obtained a permanent restraining order that remained and was in effect for a period of three years.

48. Pursuant to that restraining order, Respondent[-father] was prohibited from having any contact with Petitioner[-mother] or with the juvenile. Respondent[-father] was also prohibited from having visitation with the juvenile.

49. While the order prohibited third-party efforts to obtain Petitioner[-mother]'s address or to establish contact with her, the order did not, or would not have prohibited Respondent[-father] from initiating court proceedings or seeking the assistance of legal counsel to establish a custody arrangement, or visitation with the juvenile.

50. On or about December 26, 2014, Petitioner[-mother] moved from the State of California where she and Respondent[-father] both lived, and where the juvenile was born; she did this in order to establish a safe home for the juvenile and also to establish herself in a location where she would have family support and be able to seek employment free from Respondent[-father]'s harassment and threats to disrupt her employment. She also sought and was granted protection through a victim protection program that shielded her address from Respondent[-father].

51. Respondent[-father] voluntarily submitted himself to a law enforcement entity to serve a prison sentence and he was incarcerated from November 2014 until sometime in April of 2017.

52. During the time while incarcerated, on or about 11 February 2015, Respondent[-father] sent Petitioner[-mother] and the juvenile a Valentine's Day card. It was sent to Petitioner[-mother]'s previous address she had in the State [of] California prior to moving in December 2014, and the card was forwarded to Petitioner[-mother]'s address in Charlotte, NC. That [was] the only attempt Respondent[-father] made to establish contact with the juvenile, or to facilitate a parental bond and relationship with her.

53. Respondent[-father], through legal counsel during and while incarcerated in the State of California, initiated an action for custody and to establish paternity in November 2015 in the State of California.

54. Petitioner[-mother] was served with a Summons and other legal documents from that action. She retained legal counsel and provided her address both

to her legal counsel, to the court, and to Respondent[-father]'s legal counsel.

55. The question of whether the State of California could or should exercise jurisdiction over this custody matter was at issue; but nevertheless Respondent[-father] through legal counsel made no efforts to inquire about the juvenile's wellbeing; to request an opportunity to establish a bond or relationship with her either through letters, photographs, or to provide support for the juvenile directly or through a third-party. There was no evidence that Respondent[-father] was unable to provide any kind of emotional or material support to the juvenile from November 2015, when he initiated the paternity and custody action in the State of California, until the petition to terminate his parental rights was filed in the State of North Carolina.

56. The court finds that Respondent[-father]'s conduct even after the petition to terminate his parental rights was filed is relevant because it infers willfulness in his failure to initiate contact, inquire about the wellbeing, to attempt to provide any kind of material or emotional support to the juvenile during the 6 months immediately preceding the filing of the petition.

57. Even after the petition to terminate parental rights was initiated and continuing until the date of trial, Respondent[-father] has never made any effort in any way to seek information about juvenile's wellbeing—i.e., about what she does, what she's interested in, whether she's in school, to understand her personality, to ascertain her needs. Indeed, he has made no effort to provide any kind of emotional support to her and/or any kind of material support to the juvenile, or to Petitioner[-mother].

58. Nor has Respondent[-father] demonstrated any efforts since his release from prison in 2017 that shows a desire to seize the opportunity to be in a relationship that inures to the biological connection that Respondent[-father] has with the juvenile.

59. Respondent[-father]'s conduct, even since his release from custody in 2017, demonstrates his failure to inquire about, his failure to seek a bond and connection with, or to provide any kind of emotional and material support for the juvenile during the six months immediately preceding the filing of the petition evinces a willfulness and that he willfully abandoned his opportunity to seize the parent/child relationship, and his duties to provide for her emotionally and materially.

Respondent[-father]'s Objection

60. Respondent[-father], through his attorney of record, objects to the court's findings that Respondent[-father] willfully refused to communicate or seek information about the juvenile while the Permanent Restraining Order was in effect.

Specific Finding in Response to Noted Objection

61. Respondent[-father]'s constraints to establishing a bond or maintaining contact with the juvenile were erected and created as a result of his own unlawful misconduct. Specifically, Respondent[-father] committed repeated acts of violence, harassment and intimidation against Petitioner[-mother] in [the] year 2014. And, as a result, Petitioner[-mother] sought a[nd] received a permanent domestic violence protective order against him. In addition, Respondent[-father]'s other criminal conduct resulted in his incarceration from November 2014 through April 2017. But, despite those constraints which were created as a result of his own misconduct, there were things Respondent[-father] could have done either through legal counsel or by pursuing other litigation to inquir[e] about or seek a bond with the juvenile that he did not do.

62. And, so this court finds and concludes as a matter of law that Petitioner[-mother] has proven by clear cogent and convincing evidence grounds to terminate Respondent[-father]'s parental rights by willful abandonment pursuant to N.C.G.[S.] § 7B-1111(a)(7).

¶ 17 First, we address respondent-father's preliminary argument that a portion of finding of fact 59 and finding of fact 62 are improperly characterized as findings of fact. We agree as to finding of fact 62. However, the challenged portion of finding of fact 59, stating that respondent-father's conduct "evinces a willfulness and that he willfully abandoned his opportunity to seize the parent/child relationship, and his duties to provide for [Isabel] emotionally and materially" is a finding of fact. This Court has recognized that when addressing termination of parental rights appeals, "[t]he willfulness of a parent's actions is a question of fact for the trial court." *See In re K.N.K.*, 374 N.C. 50, 53 (2020).

¶ 18 Next, we consider whether the unchallenged findings of fact support the trial court's conclusion to terminate his parental rights based on willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). Because we conclude the unchallenged findings of fact support the trial court's conclusion to terminate respondent-father's rights pursuant to N.C.G.S. § 7B-1111(a)(7), we need not consider respondent-father's challenge to findings of fact 56, 57, 58, and 59. Additionally, all the challenged findings of fact address respondent-father's action or inaction outside the determinative period—after the filing of the petition for termination of rights.

¶ 19 While respondent-father contends his conduct did not evince a settled purpose to forego all parental duties or to relinquish all parental claims to Isabel given that the restraining order precluded contact with Isabel and petitioner-mother, this argument is unavailing given the unchallenged findings of fact before the Court. As in *In re E.H.P.*, 372 N.C. 388, 394 (2019), the findings of fact show that respondent was aware of his ability to seek legal custody and visitation rights as Isabel's father and how to obtain such relief despite the limitations of the restraining order and his incarceration. He filed such a petition before the determinative period began on 20 December 2015 but took no further action during the determinative period.[2] He also did not provide any emotional or material support during the determinative period even though he could have. A respondent's action before the determinative period "are also relevant in interpreting whether his conduct during the window signified willful abandonment." *In re E.B.*, 375 N.C. 310, 320 (2020). Respondent-father's

2. While respondent-father argues his "actions of maintaining and pursuing the parentage, custody and visitation action he filed in October 2015 demonstrated his desire to have a relationship with his daughter," he has neither contested the relevant trial court findings of fact nor cited evidence presented at trial or testimony that support this argument. Petitioner-mother's undisputed testimony is that while respondent-father filed the referenced petition in California, it was taken off calendar and respondent-father took no further action to get the case back on the calendar or resolved. Petitioner-mother explained that all actions to reach a resolution were initiated by her.

actions as found by the trial court, which led to the entry of the restraining order, further supports a reasonable inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7). As a result, we affirm the trial court's order terminating respondent-father's parental rights.

IV. Conclusion

¶ 20 The trial court's unchallenged findings of fact supported the trial court's order terminating respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7). Accordingly, we affirm.

AFFIRMED.

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

No. 186A20

Filed 19 March 2021

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

The trial court's order terminating respondent-father's parental rights was affirmed where respondent's lengthy term of incarceration (which implicated a future likelihood of neglect since he could not provide proper care, supervision, and discipline to the children while incarcerated) combined with his history of drug use and incarcerations for drug offenses, his lack of care and attention to the children when he was not incarcerated, and a history of domestic abuse between respondent and the children's mother witnessed by the children, supported the trial court's conclusion that respondent's parental rights were subject to termination on the grounds of neglect due to a likelihood of future neglect.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 21 January 2020 by Judge Joseph Moody Buckner in District Court, Orange County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

IN RE J.S.

[377 N.C. 73, 2021-NCSC-28]

T. Richmond McPherson, III, for appellee Guardian ad Litem.

W. Michael Spivey for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent-father appeals from the orders terminating his parental rights regarding his children Brandon, Jason, and Belinda.[1] We affirm.

I. Background

¶ 2 Orange County Department of Social Services (DSS) first became involved with this family in April 2012, following a report that Jason and the children's mother, Natalie, tested positive for methadone and opiates at his birth. Natalie admitted to taking prescription pain medication that was not hers prior to coming to the hospital, abusing prescription pain medication between the birth of Brandon and Jason, and receiving methadone treatment. At the time of Jason's birth and initiation of the investigation, respondent was incarcerated following a conviction for felony drug trafficking offenses. He had been sentenced on 22 September 2009 to a term of thirty-five to forty-two months. In May 2012, the investigation was closed with services not recommended.

¶ 3 Upon his release from prison, respondent resumed selling narcotics. In March 2015, he was identified by the Orange County Sheriff's Office as a distributor of heroin, and a controlled purchase of heroin using a confidential informant was executed. In May 2015, he was arrested and charged with possession with intent to manufacture, sell, and/or distribute a schedule I substance and conspiracy to sell and/or deliver a schedule I substance. A convicted heroin supplier provided information to the FBI concerning respondent's involvement in his heroin distribution ring. During this time, respondent maintained a relationship with Natalie, and she became pregnant with Belinda.

¶ 4 DSS received another report following Belinda's birth in July 2017, as both Natalie and Belinda tested positive for benzodiazepines, cocaine, and opiates. The family was found to be in need of services, and the matter was transferred to in-home services in August 2017. Natalie later disclosed respondent gave her illicit substances, including Xanax and heroin, while she was pregnant with Belinda and during the time in-home services were being provided. Belinda remained in the hospital

1. Pseudonyms are used for the children and their mother throughout the opinion to protect identities and for ease of reading.

for approximately three months due to complications from withdrawal. Respondent rarely visited Belinda while she was in the hospital, until he was told it was necessary for him to do so in order for her to be discharged to him. Belinda was discharged to his care in October 2017.

¶ 5 Natalie was the primary caretaker of the children, under the supervision of her mother, until December 2017 when DSS received a report of a domestic violence incident between Natalie and her mother while Belinda was present. During the investigation of the incident, Brandon told DSS of prior domestic violence incidents between Natalie and respondent. The children subsequently lived with various relatives, including respondent and their maternal and paternal grandmothers.

¶ 6 In March 2018, law enforcement executed a search warrant at the house where respondent was residing with Brandon and Jason. Officers seized firearms, drugs, and drug paraphernalia. DSS filed petitions alleging all three children were neglected and obtained nonsecure custody on 7 March 2018. The children were first placed in foster care, but they were soon placed with their maternal uncle and aunt in April 2018, where they remained at the time of the termination hearing.

¶ 7 On 3 April 2018, respondent participated in an initial Child and Family Team (CFT) meeting. Respondent indicated he was "willing to do whatever" was needed to reunify with his children, though he denied the allegations and the reasons given for the children's removal. A case plan was created, identifying areas of need in parenting, substance abuse/mental health, and family relationships. The case plan recommended that respondent participate in a program to address family relationship needs, Pathways to Change, for which he did complete an assessment. However, he was unable to participate in the recommended programs because he was soon incarcerated. Respondent submitted to a drug test at the CFT meeting, and he tested positive for marijuana, heroin, and opiates.

¶ 8 Natalie attended a supervised visit with the children on 25 April 2018, where the social worker observed she had a black eye. She admitted it was caused by an altercation with respondent and also admitted to prior domestic violence incidents. Natalie obtained a domestic violence protective order on 27 April 2018.

¶ 9 Respondent was arrested on 1 May 2018 on federal charges of conspiracy to distribute heroin and fentanyl; possession with intent to distribute fentanyl; use of a communication facility to facilitate the distribution of a controlled substance; distribution of a controlled substance to a pregnant individual; possession of a firearm in furtherance

of a drug trafficking offense; and possession of a firearm by a previously convicted felon. Respondent was held without bond at the Alamance County Jail, and he remained incarcerated in various facilities throughout the juvenile proceedings. On 30 May 2018, the juvenile petition was amended to include allegations of respondent's arrest, drug use, and drug sales.

¶ 10 On 7 June 2018, the trial court held an adjudication and disposition hearing, at which the parties consented to the entry of an order upon stipulated facts adjudicating the children neglected. Respondent was permitted to have a weekly one-hour phone call with the children or a weekly one-hour supervised visit if he was released from jail. The trial court ordered respondent to provide all required information and signed releases to his social worker; submit to mental health and substance abuse assessments and comply with all recommendations; submit to random drug and alcohol screens; participate in a parenting class; and maintain sufficient legal income and appropriate housing for himself and the children.

¶ 11 At the time of the custody review hearing held on 1 November 2018, respondent was in custody at the Orange County Detention Center. He had pleaded guilty to his federal charges and was awaiting sentencing. Visitation remained unchanged, but the trial court removed the requirements that respondent submit to drug screens and maintain income and housing.

¶ 12 The matter came on for a permanency planning hearing on 21 February 2019. Respondent was incarcerated at the Alamance County Jail, awaiting his federal sentencing date of 11 March 2019. Respondent had met with his social worker while in jail for a CFT meeting and to review his case plan, but the trial court found he was unable to make progress on his case plan due to his incarceration. The court found that the children's reunification with respondent "would be unsuccessful or inconsistent with [their] health or safety and need for a safe, permanent home within a reasonable time" due to his impending, extended incarceration. The court ordered the permanent plan to be a primary plan of adoption with a concurrent, secondary plan of reunification. Respondent was allowed a weekly phone call of at least ten minutes with the children, with DSS having discretion to end the calls if respondent did not follow visitation rules or if the children's treatment team decided the calls were harmful. Respondent's case plan requirements remained unchanged.

¶ 13 The trial court held a second permanency planning hearing on 1 August 2019. Respondent was incarcerated at Williamsburg Federal

Correctional Institute following his 21 May 2019 sentencing hearing, where he was sentenced to 336 months' imprisonment for his federal convictions. Respondent was still allowed phone calls with the children, but the calls had become inconsistent after his sentencing and transfer out of state. Natalie had relinquished her parental rights in the children, and DSS had initiated termination proceedings against respondent. The permanent plan of adoption and reunification remained unchanged. Respondent was required to maintain monthly contact with his social worker and provide information as to what programs related to domestic violence and substance abuse he could participate in while incarcerated.

¶ 14 In its 20 June 2019 motions to terminate respondent's parental rights, DSS alleged two grounds for termination: neglect and willfully leaving the children in a placement outside the home for more than twelve months without a showing of reasonable progress. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2019). Subsequent to the termination hearing held 9 December 2019, the trial court entered orders on 21 January 2020 that adjudicated the existence of both grounds alleged in the motions, concluded it was in the children's best interests to terminate respondent's parental rights, and terminated respondent's parental rights in all three children. Respondent appeals.

II. Analysis

¶ 15 On appeal, respondent argues the trial court erroneously adjudicated grounds for termination when it did not make findings showing his lack of progress was willful and unreasonable under the circumstances. Respondent further contends the findings were deficient because they did not establish that he was neglecting his children at the time of the termination hearing or that he would be likely to neglect them in the future.

¶ 16 "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)). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306

N.C. 394, 404 (1982)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

¶ 17 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 the 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. 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). In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599-600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, for other forms of neglect, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019). In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). After weighing this evidence, the court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020) (citation omitted).

¶ 18 Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *Id.* at 841, n.3. *See also*, *In re K.N.*, 373 N.C. 274, 282 (2020) (citing *In re Ballard*, 311 N.C. 708, 715 (1984) ("When determining whether future neglect is likely, the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect.").

¶ 19 In this case, respondent does not dispute that there was a finding of prior neglect. However, he contends that the trial court's findings

failed to show either current neglect or a likelihood of future neglect. He asserts the trial court did not directly address whether he was doing everything he could within the limitations imposed by incarceration to care for his children, and he challenges the court's rationales for its conclusion that future neglect was likely, which were: (1) that he had not completed remedial programs and thus was likely to neglect the children if they were to return to his care; and (2) that he created the circumstances for his incarceration.

¶ 20 Specifically, respondent argues that since he will be incarcerated for the next twenty-eight years, it is neither likely nor probable that the children will be in his care again during their minority, and such "an extremely remote possibility . . . does not support a conclusion that neglect during physical care and custody of the children is likely to recur." He asserts the trial court should have assessed the issue of neglect in light of what respondent was capable of while incarcerated. He also asserts that his inability to complete remedial programs does not indicate his lack of interest in the children but instead shows a lack of access to such programs. He points out that the trial court made no findings that he declined to participate in any available programs. Finally, he argues that the trial court's finding that he was responsible for the circumstances of his incarceration only establishes a conclusion of past neglect, but does not establish a probability of future neglect, as the adjudication of neglect occurred after his commission of and his incarceration for the criminal acts.

¶ 21 "Our precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10 (2005), *aff'd per curiam*, 360 N.C. 360 (2006)). How this principle applies in each circumstance is less clear. While "respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect[,]" it "may be relevant to the determination of whether parental rights should be terminated[.]" *In re K.N.*, 373 N.C. at 282–83. "[T]he extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, *including the length of the parent's incarceration*." *Id.* at 283 (emphasis added).

¶ 22 In the absence of evidence or findings that respondent's circumstances might change, at the time of the termination hearing it was reasonable for the trial court to expect that respondent will likely be incarcerated for twenty-eight years, until well past the time his children

reach majority. This lengthy incarceration implicates a future likelihood of neglect, as respondent cannot provide "proper care, supervision, or discipline" while he is incarcerated, N.C.G.S. § 7B-101(15), and while not the only factor, is a relevant and necessary consideration in the trial court's finding of neglect. *See, e.g.*, *In re P.L.P.*, 173 N.C. App. at 10–11, 13 (concluding that the father's incarceration, which would continue until the child reached majority, considered along with other record evidence was sufficient to support a finding that he "would continue to neglect the minor child if the child was placed in his care"). Here, the trial court considered the length of respondent's incarceration and how it implicated a change in circumstances between the original adjudication of neglect and the time of the termination hearing, as respondent had been sentenced and was confined in federal prison instead of pre-trial detainment in local detention facilities.

¶ 23 Most significantly, the trial court made additional, unchallenged findings of fact that demonstrate a future likelihood of neglect in this particular case, even acknowledging, as we must, that constructive and positive parenting can occur, and parent/child bonds can be meaningful, while a parent is incarcerated. Those findings include: (1) respondent's history of incarceration for drug offenses; (2) respondent's lack of care and attention to the children when he was not incarcerated; (3) a history of domestic violence between respondent and the children's mother that was witnessed by the children, and the long-term psychological effects on the children as a result of being exposed to violence; (4) respondent's use of illicit substances while the children were in his care; (5) respondent's lack of progress in his case plan; (6) respondent's inappropriate promises to the children in his phone calls, and the children's behavioral regression subsequent to the calls; and (7) eight months of no phone calls following respondent's sentencing—all of which were incorporated under the trial court's finding of a likelihood of future neglect. *Cf. In re K.N.*, 373 N.C. at 284 (concluding the trial court made insufficient findings to support termination due to neglect, but acknowledging there was other evidence that could have supported a finding of future neglect, including the respondent's history of drug use, extensive criminal record of drug related offenses, the uncertainty of when he would be released from prison and how that would affect his future ability to care for his child, his lack of progress with his case plan, and an incident of domestic violence). The unchallenged findings in this case and the evidence of record support the trial court's determination that respondent neglected the juveniles and that there is a likelihood of the repetition of neglect, which supports the court's conclusion that respondent's pa-

rental rights in the children were subject to termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 24 Given 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 (2019), we need not review respondent's challenge to grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2). As respondent has not challenged the court's determination that termination of his parental rights in this case is in the juveniles' best interests, we affirm the trial court's termination order.

AFFIRMED.

IN THE MATTER OF L.N.G., L.P.G., AND L.A.D.

No. 252A20

Filed 19 March 2021

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—domestic violence

The trial court properly terminated a mother's parental rights to her children for failure to make reasonable progress in correcting the conditions that led to the children's removal from her home (N.C.G.S. § 7B-1111(a)(2)). The findings of fact challenged on appeal, which were supported by clear, cogent, and convincing evidence, showed that the mother failed to address domestic violence issues stemming from her relationship with her youngest child's father by continuing the relationship (even though he kept on perpetuating new incidents of domestic violence), repeatedly lying to the court about having ended the relationship, and failing to attend domestic violence counseling despite her means and ability to do so.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 March 2020 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE L.N.G.

[377 N.C 81, 2021-NCSC-29]

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Health and Human Services.

Everett Gaskins Hancock LLP, by Katherine A. King, for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children L.N.G. (Nicole), L.P.G. (Peter), and L.A.D. (Andrew).[1] After careful review, we conclude that the trial court properly adjudicated the existence of at least one ground for termination. Thus, we affirm the termination order.

I. Factual Background and Procedural History

¶ 2 This case was initiated on 15 December 2016, upon the filing of a petition by the Gaston County Department of Health and Human Services (DHHS) alleging that Nicole, Peter, and Andrew were neglected and dependent juveniles. In the petition, DHHS averred that it had been working with the family for several months due to a series of domestic violence incidents which had occurred between respondent-mother and Andrew's father, "Mr. D." Although respondent-mother and DHHS agreed to a case plan on 10 November 2016 in order to allow respondent-mother to address these matters, she and Mr. D. subsequently engaged in an argument in front of the children during which Mr. D. choked respondent-mother and spit in her mouth. Thereafter, DHHS obtained nonsecure custody of all three children.

¶ 3 On 28 February 2017, the trial court entered an order adjudicating Nicole, Peter, and Andrew as neglected and dependent juveniles after respondent-mother stipulated to the allegations in the petition. Two months later, the trial court entered a disposition order. The order established a case plan for respondent-mother which required her to complete domestic violence victim counseling, to complete parenting classes, to complete family counseling with Mr. D., to refrain from exposing the children to domestic violence, to attend and participate in any assessments with Nicole and Peter, and to comply with all recommendations resulting from therapeutic services for Nicole and Peter.

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

¶ 4 On 12 April 2017, respondent-mother filed a motion for review, seeking to have the juvenile case terminated and thereupon converted to a civil custody case under Chapter 50 of the General Statutes of North Carolina. *See* N.C.G.S. § 7B-911 (2019). In the motion, respondent-mother alleged that she had completed her case plan, that a home study had determined that respondent-mother's home was a safe and reasonable environment for her children, and that respondent-mother had ceased all communication with Mr. D. The trial court entered an order denying this motion on 27 February 2018.

¶ 5 The trial court held its first Review and Permanency Planning Hearing in the case on 23 May 2017. Based on respondent-mother's "significant progress" on her case plan, the primary permanent plan was set as reunification with a secondary permanent plan of guardianship. Respondent-mother was awarded ten hours of weekly unsupervised visitation with the children, which would increase to forty-eight hours weekly after the school year ended.

¶ 6 On 8 June 2017, DHHS filed a Motion for Review after Nicole made a report, following a visit which she had with respondent-mother, that Nicole believed Mr. D. was currently living with respondent-mother and that Mr. D. was in respondent-mother's home during the visit. When a DHHS social worker investigated these claims, Mr. D. admitted that Nicole's report was true. Consequently, DHHS asked the trial court to suspend respondent-mother's unsupervised visitation and instead to permit her to have two hours of weekly supervised visitation. At a subsequent motion hearing, respondent-mother denied that Mr. D. lived with her. On 19 September 2017, the trial court allowed DHHS's motion to change respondent-mother's visitation to two supervised hours per week.

¶ 7 At a Review and Permanency Planning Hearing conducted on 13 November 2018, DHHS presented additional evidence that challenged respondent-mother's claim that she had ended her relationship with Mr. D. In its resulting order, the trial court found that respondent-mother's neighbor had witnessed the presence of Mr. D. at respondent-mother's home repeatedly over a period of several months. It further found that a private investigator made similar observations over a ten-day period in September 2018. Hence, the primary permanent plan for the juveniles was changed to adoption with a secondary permanent plan of guardianship/reunification.

¶ 8 On 30 July 2019, DHHS filed a petition to terminate respondent-mother's parental rights to the juveniles alleging the grounds of neglect, willfully leaving her children in foster care or a placement outside

the home for more than twelve months without making reasonable progress toward correcting the conditions that led to their removal, and willfully failing to pay a reasonable portion of her children's cost of care for the six months preceding the filing of the petition. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). The petition also alleged that respondent-mother had relocated to New York and secured employment there.

¶ 9 The hearing on the termination of parental rights petition was conducted over a two-day period in January 2020. On 2 March 2020, the trial court entered an order terminating respondent-mother's parental rights. The trial court found that grounds existed for termination pursuant to N.C.G.S. § 7B-1111(a)(1)–(2), but it dismissed the third ground which was alleged under N.C.G.S. § 7B-1111(a)(3). At the disposition stage, the trial court concluded that termination of respondent-mother's parental rights was in the children's best interests. Respondent-mother appeals.

II. Standard of Review

¶ 10 When considering a petition to terminate parental rights, the trial court first adjudicates the existence of the alleged grounds for termination. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

¶ 11 This Court reviews a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

III. Willful Failure to Make Reasonable Progress

¶ 12 Pursuant to N.C.G.S. § 7B-1111(a)(2), termination of parental rights is permitted when "[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).

> According to N.C.G.S. § 7B-904(d1)(3), 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 (2019). "[A] trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* at 385 (quoting *In re S.N.*, 194 N.C. App. 142, 149 (2008)).

¶ 13 In this case, the children were removed from respondent-mother's care and adjudicated to be neglected and dependent based upon a series of serious domestic violence incidents perpetrated by Mr. D. during 2016. In order to correct the underlying causes of these circumstances, the trial court ordered respondent-mother to complete domestic violence victim counseling.

A. Challenged Findings of Fact

¶ 14 Respondent-mother first contends that the trial court erroneously determined that the ground of willful failure to make reasonable progress provided a basis for the termination of her parental rights because she "made substantial progress on or completed all components of her case plan." She challenges the following findings of fact,[2] either in whole or in part, which address her progress in rectifying the domestic violence issues that she experienced in her relationship with Mr. D.:

> 42. Respondent/mother failed to demonstrate the ability to protect the juveniles in that she has failed to take the necessary steps to remove herself from

2. "[W]e limit our review of challenged findings to those that are necessary to support the district court's determination that this ground of respondent-mother's willful failure to make reasonable progress existed in order to terminate her parental rights." *In re A.R.A.*, 373 N.C. 190, 195 (2019).

relationships involving domestic violence and she has not demonstrated an understanding of the traumatic impact of domestic violence in the home of the juveniles.

. . . .

47. Respondent/mother has continued a relationship with [Mr. D.] and there have been multiple documented incidents of Respondent/mother and [Mr. D.] continuing to maintain a relationship as well as additional incidents of domestic violence between them.

. . . .

64. Tony R[.], private investigator, did surveil Respondent/mother's home and did observe [Mr. D.] coming and going from Respondent/mother's home multiple times between September 20, 2018 and September 30, 2018.

. . . .

74. On November 13, 2018, Respondent/mother did attend a hearing on [DHHS's] Motion for Review regarding her visitation with the juveniles. Respondent/mother did testify under oath that she had contact with [Mr. D.] on three (3) occasions: July 2017, Christmas 2018 and September 2018. Respondent/mother did not inform the Court of having been with [Mr. D.] in November 2017 when she had a car accident. Respondent/mother did not inform the Court of [Mr. D.] being at her home on December 17, 2017 when [Mr. D.] did assault her. During her sworn testimony, Respondent/mother did not inform the Court of the incident that had occurred October 12, 2018, just one month prior to the hearing, during which [Mr. D.] did assault her and cause damage to the vehicle she was driving.

. . . .

98. The Court did not find on December 10, 2019 that Respondent/mother is unable to obtain said domestic violence victim's treatment due to her lack of funds and the Court did not order that [DHHS] pay for said treatment. Respondent/mother did testify

> and this Court does find that she has at all times been employed and does not have difficulty ensuring her bills are paid. Respondent/mother did have the means and ability to comply with domestic violence counseling but she was unwilling to make an effort despite actual knowledge that it was ordered by the Court on July 18, 2017.
>
> . . . .
>
> 101. Respondent/mother has willfully failed to participate in any further therapy for domestic violence though she was specifically ordered to do so by the Honorable Judge Pennie M. Thrower on July 18, 2017.
>
> 102. The Court also finds that after Respondent/mother completed domestic violence victims' treatment in early 2017, she continued to engage in a relationship with [Mr. D.] and multiple incidents of domestic violence between Respondent/mother and [Mr. D.] did occur. By her pattern of behavior, Respondent/mother has failed to demonstrate that she has developed the skills required to remove and protect herself and the juveniles from exposure to domestic violence.
>
> . . . .
>
> 104. The Court further finds that Respondent/mother continues to minimize the domestic violence that occurred between her and [Mr. D.].
>
> 105. The Court further finds that Respondent/mother does not fully appreciate or demonstrate concern about the negative lifelong impact that witnessing and being a part of a toxic domestic violence household has had on the juveniles.
>
> 106. The Court further finds that no reasonable progress has been made in correcting the conditions, specifically domestic violence, that brought the juveniles into [DHHS's] custody.

1. Finding of Fact 47

¶ 15 Finding of Fact 47, which states that respondent-mother maintained a relationship with Mr. D. and that it was marked by multiple new incidents

of domestic violence, was supported by several of the trial court's other findings of fact which respondent-mother has not challenged and therefore are binding on appeal. For example, the trial court found that: (1) Mr. D. assaulted respondent-mother on 15 February 2017; (2) Nicole saw Mr. D. in respondent-mother's home during a visit on 29 May 2017; (3) respondent-mother was in an automobile accident on 17 November 2017 while Mr. D. was a passenger; (4) Mr. D. assaulted respondent-mother at her home on 17 December 2017; (5) DHHS was informed in September 2018 that Mr. D. was living at respondent-mother's home; (6) respondent-mother was again driving with Mr. D. as a passenger on 12 October 2018 when they got into a physical and verbal altercation which resulted in Mr. D. punching respondent-mother in the face; and (7) Mr. D. attended respondent-mother's "launch party" in April 2019, and the two subsequently visited a museum together. Taken together, these unchallenged findings of fact amply support the trial court's Finding of Fact 47.

2. Findings of Fact 64 and 74

¶ 16 Findings of Fact 64 and 74 refer to specific additional contacts between respondent-mother and Mr. D. Private investigator Tony R. testified that he witnessed Mr. D.'s car parked near respondent-mother's apartment on 20 September 2018, that he witnessed Mr. D. and respondent-mother return together to respondent-mother's parking lot on 26 September 2018, that he witnessed Mr. D. leaving respondent-mother's parking lot on 28 September 2018, that Mr. D.'s vehicle was back in respondent-mother's parking lot on the evening of 28 September 2018, and that Mr. D.'s car was subsequently in respondent-mother's parking lot on 30 September 2018. This testimony from the private investigator fully supports Finding of Fact 64.

¶ 17 As to Finding of Fact 74, respondent-mother challenges as impossible the portion of the finding which states that respondent-mother testified on 13 November 2018 that she "had contact" with Mr. D. on Christmas 2018, since the date of 25 December 2018 had not occurred yet. Respondent-mother is correct that her testimony represented that she "invited [Mr. D.] to a Christmas party in December 2018." At the termination hearing, respondent-mother testified that the Christmas party actually occurred. While this testimony from respondent-mother herself, along with logical inferences which can be drawn therefrom, is evidence that could support the reference to respondent-mother's Christmas 2018 meeting with Mr. D., this detail in Finding of Fact 74 is unnecessary to support the trial court's ultimate determination that a ground existed which would allow the termination of respondent-mother's parental rights. Accordingly, we shall disregard the portion of Finding of Fact

74 that attributes contact between respondent-mother and Mr. D. on Christmas 2018 to respondent-mother's 13 November 2018 testimony.

3. Findings of Fact 98 and 101

¶ 18 Findings of Fact 98 and 101 address the additional domestic violence therapy that respondent-mother was ordered to undergo after it was determined that she was still involved with Mr. D. In the 13 October 2017 order referenced in the termination order,[3] the trial court ordered respondent-mother to "attend therapy to assist the juveniles with healing from the domestic violence they have witnessed and to develop a better understanding of the impact of domestic violence upon them." Respondent-mother submits that this language only requires additional *family* therapy, rather than her own individual therapy. Even assuming that respondent-mother's resourceful interpretation of the wording in the 13 October 2017 finding of fact is correct, there was still ample evidence presented at the hearing that respondent-mother was previously required to engage in additional individual domestic violence therapy and failed to do so. At the termination of parental rights hearing, a DHHS social worker specifically stated that the social worker's team had informed respondent-mother that the parent "needed to engage in further domestic violence counseling[.]" Additionally, respondent-mother does not challenge several of the other findings of the trial court on this issue, including a finding that respondent-mother had "acknowledged that she had been advised to engage in further domestic violence victims' treatment." This evidence supports the trial court's determination that respondent-mother failed to engage in further additional domestic violence therapy as required.

4. Findings of Fact 42, 102, 104, 105, and 106

¶ 19 Respondent-mother challenges Findings of Fact 42, 102, 104, 105, and 106 to the extent that they show that she failed to make reasonable progress in addressing her domestic violence issues stemming from her ongoing relationship with Mr. D. She argues that her early completion of domestic violence therapy and her months-long separation from Mr. D. after she moved to New York demonstrated that domestic violence was no longer an issue that interfered with her ability to care for her children.

¶ 20 While there is no dispute that respondent-mother completed a counseling program for domestic violence victims in early 2017, her

3. The termination of parental rights order references 18 July 2017—the date the underlying hearing occurred—but the resulting order was not entered until 13 October 2017.

subsequent behavior indicates that she failed to modify her behavior sufficiently as a result of the program. As previously noted, respondent-mother continued to maintain a relationship with Mr. D., despite the fact that he continued to perpetrate domestic violence against her. The trial court's findings reflect that Mr. D. was convicted of the criminal offense of simple assault on 17 October 2018 and the criminal offense of assault on a female on 6 December 2018, based on two separate incidents in which respondent-mother was the victim which occurred after she completed the domestic violence counseling. Respondent-mother did not report these incidents to DHHS or to the trial court. Despite receiving instructions from DHHS to attend additional domestic violence counseling, respondent-mother failed to do so. The trial court specifically found that respondent-mother "did have the means and ability to comply with domestic violence counseling but she was unwilling to make an effort."

¶ 21 The record reflects that respondent-mother repeatedly misrepresented the status of her relationship with Mr. D. The trial court's order includes seven unchallenged findings detailing respondent-mother's numerous attempts throughout the history of this case to falsely claim that her relationship with Mr. D. had ended. The trial court's findings of fact also reflect that respondent-mother was still socializing with Mr. D. as late as April 2019, which was twenty-eight months after her children entered DHHS custody and nine months before the termination of parental rights hearing.

¶ 22 Respondent-mother's false statements continued through the termination of parental rights hearing itself. The trial court, after evaluating respondent-mother's testimony, assessed her credibility as follows:

> The Court finds that Respondent/mother's testimony during this termination of parental rights hearing was not credible in that she was deceptive, manipulative and dishonest. The Court finds that Respondent/mother did repeatedly attempt to mislead the Court, she did exhibit selective memory and she did attempt to minimize and explain away her continued relationship with [Mr. D.]. The Court did caution Respondent/mother during her testimony of the consequences of perjury and contempt of court.

The trial court was pointedly clear that it did not believe respondent-mother's accounts of the character of the relationship which she shared with Mr. D. Respondent-mother's misrepresentations concerning her affiliation with her abuser, even offered in her testimony at the

termination of parental rights hearing, provided a further foundation for the tribunal's findings of fact in light of its determination of credibility, to which this Court must give deference.

¶ 23 The above-referenced evidence supports the trial court's determination that respondent-mother failed to understand or adequately address the traumatic impact of domestic violence on her children. Over the thirty-eight months that her children were in the custody of DHHS, respondent-mother failed to make meaningful progress to correct the causes of the domestic violence that led to the juveniles' removal from her home.

B. Adjudication Under N.C.G.S. § 7B-1111(a)(2)

¶ 24 As to the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2), it properly determined pursuant to the evidence presented during the two-day hearing in January 2020 that respondent-mother did not make a reasonable effort to correct the issues attributable to her relationship with Mr. D. and the prevalence of domestic violence that led to the children's removal from her care. Instead, respondent-mother prioritized her relationship with Mr. D. while falsely and repeatedly claiming that the relationship had ended. Based upon respondent-mother's willful failure to make reasonable progress in addressing her issues with domestic violence, the trial court properly concluded that her parental rights were subject to termination under N.C.G.S. § 7B-1111(a)(2).

IV. Conclusion

¶ 25 Based on the foregoing analysis, we conclude that the trial court properly determined that respondent-mother's parental rights could be terminated pursuant to N.C.G.S. § 7B-1111(a)(2). Since we have determined that this termination of parental rights ground is supported, we need not address respondent-mother's arguments as to the ground of neglect under N.C.G.S. § 7B-1111(a)(1), which is the other ground found by the trial court that could substantiate the termination of respondent-mother's parental rights. *See In re A.R.A.*, 373 N.C. 190, 194 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . ."). Moreover, respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in the juveniles' best interests. Consequently, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

IN RE M.C.T.B.

[377 N.C. 92, 2021-NCSC-30]

IN THE MATTER OF M.C.T.B.

No. 275A20

Filed 19 March 2021

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

The termination of a mother's parental rights for neglect and for failure to pay a reasonable portion of the costs for the child's care was affirmed where counsel for the mother filed a no-merit brief. The trial court's order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 13 February 2020 by Judge Christy E. Wilhelm in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Cynthia E. Everson for petitioner-appellee.

Sydney Batch for respondent-appellant mother.

PER CURIAM.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to M.C.T.B. (Mary).[1] Counsel for respondent-mother 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 an appeal are meritless and therefore affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioner, Mary's maternal grandmother, to terminate the parental rights of respondent-mother.[2] Mary was born prematurely at twenty-eight weeks and spent approximately two months in the neonatal intensive care

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

2. Petitioner also sought to terminate the parental rights of Mary's father, but he is not a party to this appeal.

unit (NICU) following her birth. At the time of Mary's birth, respondent-mother had received limited prenatal care, was homeless, had unaddressed mental health issues, and did not have a plan in place for Mary's eventual discharge from the hospital. Accordingly, the Suffolk County Department of Social Services (DSS) in New York filed a petition seeking the temporary removal of Mary from respondent-mother's care, and the Suffolk County Family Court placed Mary into petitioner's care following her release from the NICU.

¶ 3 Suffolk County DSS filed a petition alleging that Mary was neglected, and the trial court continued Mary's placement with petitioner on 21 December 2011 pending further proceedings. The family court adjudicated Mary neglected on 24 April 2012, and she remained in petitioner's care. Petitioner and respondent-mother entered into a consent order awarding petitioner permanent custody of Mary on 18 July 2013.[3]

¶ 4 Petitioner and Mary moved to North Carolina in 2013. On 14 September 2016, the Suffolk County Family Court determined North Carolina was "the appropriate [home state] for determination of issues of custody regarding" Mary and relinquished continuing, exclusive jurisdiction of the matter to North Carolina. Petitioner filed a petition to terminate respondent-mother's parental rights on 18 July 2019, alleging grounds for termination under N.C.G.S. § 7B-1111(a)(1)–(3). Petitioner alleged (1) that since the initial finding of neglect, respondent-mother had provided no evidence of compliance with the requirements of the Suffolk County Family Court's adjudication order; (2) respondent-mother had not had any contact with Mary since March 2015, nor had she sent any cards or gifts; (3) there was a risk of continued neglect if Mary was returned to respondent-mother's care; (4) respondent-mother willfully left Mary in a placement outside the home for more than twelve months without a showing of reasonable progress by failing to obtain a mental health evaluation, attend psychological counseling, or participate in a parenting skills program; and (5) respondent-mother had not paid anything toward the support of Mary since 31 December 2018. Respondent-mother filed an answer denying the material allegations of the petition.

¶ 5 Following a hearing held on 17 December 2019, the trial court entered an order on 13 February 2020 in which it determined grounds existed to terminate respondent mother's parental rights due to neglect and her failure to pay a reasonable portion of costs for Mary's care. N.C.G.S. § 7B-1111(a)(1), (3) (2019). The trial court further concluded it

3. Mary's father was also a party to the consent order.

was in Mary's best interests that respondent-mother's parental rights be terminated, and the trial court terminated respondent-mother's parental rights. Respondent-mother appealed.

¶ 6 Counsel for respondent-mother has filed a no-merit brief on her client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel identified two issues that could arguably support an appeal but also explained why she believed those issues lacked merit. Counsel advised respondent-mother of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent-mother has not submitted written arguments to this Court.

¶ 7 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 (2019). After conducting this review, we are satisfied that the trial court's 13 February 2020 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

IN THE MATTER OF R.D.M., Z.A.M., J.M.B., AND J.J.B.

No. 193A20

Filed 19 March 2021

Termination of Parental Rights—no-merit brief—termination on multiple grounds—both parents

The trial court's order terminating the parental rights of a mother based on neglect and willful failure to make reasonable progress and of a father based on neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of the children's care was affirmed where their attorneys filed no-merit briefs and the order was based on clear, cogent, and convincing evidence supporting the grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 9 March 2020 by Judge Monica M. Bousman in District Court, Wake

County. This matter was calendared in the Supreme Court on 11 February 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Boyce Wells for petitioner-appellee Wake County Human Services.

Kelsey V. Monk for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant mother.

Sean P. Vitrano for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondents, the mother of the four minor children, R.D.M., Z.A.M., J.M.B., and J.J.B.,[1] and the father of the two youngest children, R.D.M. and Z.A.M.,[2] appeal from the trial court's order terminating their parental rights. Counsel for each respondent have filed no-merit briefs pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by both counsel in respondents' briefs have no merit and therefore affirm the trial court's order.

¶ 2 On 10 July 2018, Wake County Human Services ("WCHS") obtained nonsecure custody of the children and filed juvenile petitions alleging they were neglected and dependent. WCHS alleged concerns related to respondent-mother's substance use and mental health, unstable housing, injurious environment, and respondents' failure to provide for the children's needs.

¶ 3 On 22 August 2018 and 2 October 2018, the trial court entered consent orders adjudicating the children to be neglected juveniles based on stipulations by respondent-mother. On 28 November 2018, the trial court adopted a primary permanent plan of reunification with a secondary permanent plan of adoption. Respondents were ordered to enter into, and comply with, case plans addressing the reasons for the children's removal.

¶ 4 Following a 14 October 2019 permanency planning hearing, the trial court entered an order on 6 November 2019 changing the permanent plan to adoption with a secondary plan of reunification. The court found

---

1. Initials are used to protect the juveniles' identities.

2. The fathers of J.M.B. and J.J.B. are not parties to this appeal.

that respondents were not participating in the services ordered by the court to facilitate reunification, were not making adequate progress toward reunification, and were not cooperating with WCHS, the guardian ad litem, or the court.

¶ 5 On 18 November 2019, WCHS filed a motion to terminate respondents' parental rights on the grounds of neglect, willfully leaving the children in foster care for more than twelve months without making reasonable progress to correct the conditions that led to the children's removal, and willfully failing to pay a reasonable portion of the cost of care. Following a hearing held on 12 February 2020 and 13 February 2020, the trial court entered an order on 9 March 2020 concluding that grounds existed to terminate respondent-mother's parental rights due to neglect and willful failure to make reasonable progress, and respondent-father's parental rights due to neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of the children's care. The trial court further concluded that termination of respondents' parental rights was in the children's best interests. Accordingly, the trial court terminated respondents' parental rights. Respondents appealed.

¶ 6 On 16 July 2020, respondent-father filed a petition for writ of certiorari recognizing that his notice of appeal was untimely and did not contain a certificate of service. On 30 December 2020, we allowed respondent-father's petition.

¶ 7 Counsel for respondents have filed no-merit briefs on their clients' behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. In their briefs, each counsel identified several issues that could arguably support an appeal but also explained why they believe those issues lack merit. Counsel also advised respondents of their right to file a pro se brief and provided them with the documents necessary to do so. Neither respondent has submitted a pro se brief to this Court.

¶ 8 We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). After considering the entire record and reviewing the issues identified in the no-merit briefs, we conclude that the 9 March 2020 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

CURLEE v. JOHNSON

[377 N.C. 97, 2021-NCSC-32]

RICKY CURLEE, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, KARINA BECERRA, AND KARINA BECERRA, INDIVIDUALLY
v.
JOHN C. JOHNSON, III, RAYMOND CRAVEN, AND STACEY TALADO

No. 238A20

Filed 16 April 2021

Animals—dog attack—landlord liability—prior knowledge of dangerous nature—summary judgment

A landlord was not liable for injuries caused in an attack by a dog owned by the landlord's tenants where there was no evidence that the landlord had any actual knowledge of prior attacks by the dog or otherwise knew the dog posed a danger. Although the tenants took certain precautions by keeping the dog on a chain and posting "Beware of Dog" signs, this evidence, standing alone, was not sufficient to demonstrate that the landlord had constructive notice that his tenant harbored a dog with dangerous propensities.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 657, 842 S.E.2d 604 (2020), affirming an order of summary judgment entered on 10 April 2019 by Judge Stephan R. Futrell in Superior Court, Johnston County. Heard in the Supreme Court on 16 February 2021.

The Law Office of Michael D. Maurer, P.A., by Michael D. Maurer, and Burton Law Firm, PLLC, by Jason Burton, for plaintiff-appellants.

Simpson Law, PLLC, by George L. Simpson, IV, and Denaa J. Griffin, for defendant-appellee John C. Johnson, III.

NEWBY, Chief Justice.

¶ 1 In this case we decide whether a landlord is liable for harm caused by his tenants' dog. A landlord owes no duty of care to third parties harmed by a tenant's animal unless, prior to the harm, the landlord (1) knew the animal posed a danger and (2) retained sufficient control to remove the animal from the premises. The landlord here had no knowledge that his tenants' dog posed a danger to visitors. As such, he is not liable for plaintiff's injuries. The decision of the Court of Appeals is affirmed.

¶ 2 Defendants Raymond Craven and Stacie Talada[1] (collectively, tenants) rented a single-family residential property from defendant John C. Johnson III (landlord). Tenants lived at the property with their children and their dog, Johnny. On 13 October 2014, a minor, P.K., visited the property to play with tenants' children. While all of the children were wrestling and playing with Johnny, the top of P.K.'s head collided with Johnny's mouth, causing "a little nick . . . about the size of [a] pinkie nail."

¶ 3 Chad Massengill, director of Johnston County Animal Services (JCAS), investigated the P.K. incident and characterized it as "a minor bite." Massengill concluded that Johnny did not satisfy the definition of either a "dangerous dog" or a "potentially dangerous dog" under N.C.G.S. § 67-4.1 (2019). Though not required by JCAS, tenants purchased three "Beware of Dog" signs and placed Johnny on a chain when children would come to play on the property.

¶ 4 Seven-year-old plaintiff Ricky Curlee Jr. lived with his parents, Karina Becerra and Ricky Curlee Sr., in a house near the end of tenants' driveway. On 17 March 2015, plaintiff visited the property to play with tenants' children. When it came time for plaintiff to return home, he walked inside the radius of Johnny's chain, and Johnny bit plaintiff's face, causing severe injuries.

¶ 5 Plaintiff, by and through his guardian *ad litem*, Becerra, and Becerra, individually, filed a complaint against tenants and landlord to recover for plaintiff's injuries.[2] When tenants, proceeding *pro se*, failed to file answers to the complaint, the Johnston County Clerk of Court entered a default judgment against them.[3] Despite the entry of default, Talada[4] provided the following unsworn, handwritten answers to plaintiff's requests for admission (RFAs):

> 9. Please admit that you owned a pit bull mix named Johnny which you kept on the property you leased at 132 Gower Circle ("the property").

---

1. Stacie Talada was incorrectly identified as "Stacey Talado" during the early stages of this matter, which is why her name appears incorrectly in the caption.

2. Becerra is also a plaintiff in this action in addition to serving as Curlee Jr.'s guardian *ad litem*. For ease of reading, we refer to Curlee Jr. as "plaintiff."

3. Tenants did not appeal.

4. Craven failed to answer plaintiff's RFAs because he mistakenly believed Talada was responding on his behalf. Talada handwrote her responses directly onto the original RFA document that was served on 8 March 2018.

> **RESPONSE:** never owned a pit bull
>
> 10. Please admit that this pit bull attacked ("the attack") and injured a child ("the child") on or about October 13, 2014 on the property.
>
> **RESPONSE:** never owned a pit bull
>
> . . . .
>
> 12. Please admit that you informed [landlord] of the attack, shortly after the attack.
>
> **RESPONSE:** yes

¶ 6 Talada, however, provided sworn testimony that refuted her unsworn, *pro se* answer in RFA 12. During Talada's deposition on 5 April 2017, landlord's counsel asked, "prior to [the 17 March 2015 bite], did you ever tell [landlord] about the incident with [P.K.]?" Talada responded, "[n]o, I did not." In another deposition on 7 August 2018, Talada stated "I never informed [landlord] of [the P.K. incident]." Further, all other relevant materials of record indicate that tenants did not inform landlord of the P.K. incident prior to the 17 March 2015 bite. In his deposition on 26 July 2018, Craven provided the following testimony:

> [LANDLORD'S COUNSEL:] When this incident occurred with [P.K.], did you call [landlord] and alert him to the situation?
>
> [CRAVEN:] No, I didn't.
>
> [LANDLORD'S COUNSEL:] Are you aware of whether or not anyone else notified [landlord] about this incident?
>
> [CRAVEN:] No, I'm not.

Landlord provided the following testimony during his deposition:

> [PLAINTIFF'S COUNSEL:] How did you come to learn about [the 17 March 2015 bite] from the get go?
>
> [LANDLORD:] I first learned there was an incident when I had been on vacation, I don't remember even where it was, I had gotten back and [Talada] had either texted me or called me and said she had the rent. This was sometime a week or two after the [17 March 2015 bite]. When I went to get the rent she said

> oh, by the way there was an incident, a dog bite, it has been taken care of. That was her exact words.
>
> . . . .
>
> [LANDLORD'S COUNSEL:] Were you aware at the time of the [17 March 2015] bite incident of any prior problems with any dogs owned by [tenants]?
>
> . . . .
>
> [LANDLORD:] There has never been an incident to my knowledge, anything.

¶ 7 Plaintiff's parents could not produce any evidence showing that landlord had been informed of the P.K. incident prior to the 17 March 2015 bite. Specifically, Becerra admitted that she did not have "any information or evidence to suggest [landlord] was notified by the sheriff or by Animal Control or by anybody else about the [P.K. incident]." Additionally, Curlee Sr. admitted that he had "no proof or evidence that [landlord] knew about the [P.K. incident]."

¶ 8 Landlord moved for summary judgment, arguing that he did not breach any duty owed to plaintiff. The trial court decided that there was no genuine issue of material fact and thus granted summary judgment in landlord's favor.

¶ 9 A divided panel of the Court of Appeals affirmed. *Curlee v. Johnson*, 270 N.C. App. 657, 666, 842 S.E.2d 604, 611 (2020). The Court of Appeals cited the following rule:

> In order to hold a landlord liable for injuries caused by a tenant's dog to a visitor, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party."

Id. at 661, 842 S.E.2d at 608 (quoting *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014) (citing *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 504, 508, 597 S.E.2d 710, 712–13, 715 (2004))). The Court of Appeals reasoned that "within this context, 'posed a danger' is not a generalized or amorphous standard, but ties directly back to our common-law standard for liability in dog-attack cases: 'that the landlord had knowledge of the dogs' previous attacks and dangerous

propensities.' " *Curlee*, 270 N.C. App. at 661, 842 S.E.2d at 608 (quoting *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 (citing *Holcomb*, 358 N.C. at 504, 597 S.E.2d at 712–13)). The Court of Appeals held

> [a] review of the admissible evidence presented at the motion hearing and before this Court points merely to [landlord's] knowledge that his tenants owned a dog, while they were staying on the [p]roperty. A refuted, unsworn, *pro se* and inadmissible statement does not create a genuine issue of material fact.

Curlee, 270 N.C. App. at 665, 842 S.E.2d at 610. As such, the Court of Appeals concluded that plaintiff failed to present "a genuine issue of material fact admissible at trial to satisfy the first prong of *Stephens* to prove 'the landlord had knowledge that a tenant's dog posed a danger.' " *Id.* (quoting *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255).

¶ 10 The dissent, however, asserted that landlord would not be entitled to summary judgment because a genuine issue of material fact exists as to whether landlord knew Johnny posed a danger. *Curlee*, 270 N.C. App. at 674, 842 S.E.2d at 615 (Brook, J., dissenting). In addition to addressing landlord's knowledge, the dissent would have reached the control element. Specifically, the dissent opined that "[landlord] has not met his burden of establishing that no genuine issue of material fact exists regarding his control over [tenants'] dog." *Id.* at 673, 842 S.E.2d at 615. Plaintiff appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 11 Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278 (2015) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Ussery*, 368 N.C. at 335, 777 S.E.2d at 278–79 (citation omitted) (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482, 843 S.E.2d 72, 76 (2020). In a premises liability action, however, summary judgment

for the defendant is proper when "the pleadings, affidavits, and other materials of record fail to establish that [the defendant] owed [the] plaintiff a legal duty . . . ." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 67, 376 S.E.2d 425, 427 (1989).

¶ 12 To prevail on an ordinary negligence claim, a plaintiff must present sufficient evidence to prove

> (1) that there has been a failure to exercise proper care in the performance of some legal duty which [the] defendant owed to [the] plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984). A landlord has no duty to protect third parties from harm caused by a tenant's animal unless, prior to the harm, the landlord (1) "had knowledge that a tenant's dog posed a danger," and (2) "had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 (citing *Holcomb*, 358 N.C. at 504, 508, 597 S.E.2d at 712–13, 715).

¶ 13 In *Holcomb* we considered "whether a landlord can be held liable for negligence when [a] tenant's dogs injure a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. There the landlord knew of two prior incidents where a tenant's dogs injured third parties on the property. *Id.* at 504, 597 S.E.2d at 712–13. According to the relevant lease, the landlord had the authority to "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." *Id.* at 503, 597 S.E.2d at 712 (alteration in original). The plaintiff argued the landlord

> failed to use ordinary care by failing to require the [tenant] to restrain his Rottweiler dogs, or remove them from the premises when [the landlord] knew, or in the exercise of reasonable care, should have known, *from the dogs' past conduct*, that they were likely, if not restrained, to do an act from which a reasonable person in the position of [the landlord] could foresee that an injury to the person of another would be likely to result.

Id. at 507, 597 S.E.2d at 715 (emphasis added). We held the landlord, who knew from the two prior attacks that the dogs posed a danger, could be liable for a subsequent dog-caused injury because he "retain[ed] control over [the] tenant's dogs" through a provision of the lease. *Id.* at 508–09, 597 S.E.2d at 715.

¶ 14 In *Stephens* the landlord knew his tenants were keeping a dog on the property. *Stephens*, 232 N.C. App. at 498, 754 S.E.2d at 254. As a precaution, the tenants kept the dog in a fenced area with "Beware of Dog" and "No Trespassing" signs posted. *Id.* The plaintiff, who was eight years old, visited the property to play with the tenants' children. *Id.* When the plaintiff entered the fenced area, the dog bit him on his leg and shoulder, leading to the plaintiff's suit. *Id.* Unlike the landlord in *Holcomb*, however, the landlord in *Stephens* had no knowledge of any prior attacks by the dog. *Id.* at 500, 754 S.E.2d at 255. The Court of Appeals stated:

> [P]ursuant to *Holcomb* and the cases cited therein, a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party.

Id. (citing *Holcomb*, 358 N.C. at 504, 508, 597 S.E.2d at 712–13, 715). Accordingly, the Court of Appeals held the trial court correctly granted the landlord's motion for summary judgment because "[i]n the light most favorable to [the] plaintiff, the evidence fail[ed] to show that [the landlord] knew that [the dog] had dangerous propensities prior to his attack on [the] plaintiff." *Stephens*, 232 N.C. App. at 501, 754 S.E.2d at 256.

¶ 15 The Court of Appeals' decision in *Stephens* provides an instructive framework for the present analysis. Like in *Stephens*, the question here is whether a genuine issue of material fact exists regarding landlord's prior knowledge of Johnny's alleged dangerous propensities. The record evidence clearly and consistently indicates that landlord had no prior knowledge of the P.K. incident. Tenants both provided sworn testimony that they never informed landlord of the P.K. incident; landlord testified that he had no prior knowledge of the P.K. incident; and plaintiff's parents admitted they had no proof that landlord was ever informed of the P.K. incident. Further, Talada's RFA 12 response and Craven's failure to answer the RFAs do not constitute admissible evidence against landlord to present a genuine issue of material fact. These "admissions" are hearsay, made by parties unrelated to landlord that meet no exception to the hearsay rule. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218, 706 S.E.2d

310, 314 (2011) ("Thus, '[h]earsay matters . . . should not be considered by a trial court in entertaining a party's motion for summary judgment.' " (alterations in original) (quoting *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998))). Therefore, there is no genuine issue of material fact as to whether landlord had actual knowledge of the P.K. incident before the 17 March 2015 bite.

¶ 16 Moreover, we find unpersuasive plaintiff's argument that landlord should have known Johnny posed a danger based upon the "Beware of Dog" signs and chain in tenants' yard. To support this contention, plaintiff relies solely on the following deposition testimony from a property management expert, Daryl Greenberg:

> [A] landlord that sees a tenant sign that says "Beware of Dog" is a flashing red light to the landlord that they've got a potential problem there, a negligence problem, a risk problem of harm, and that they have a duty to inspect and take additional steps under the area of safety.

Plaintiff's theory, however, has no basis in our case law. Unlike the landlord in *Holcomb*, landlord here had no actual knowledge of any prior attacks by Johnny. Rather, like the landlord in *Stephens*, landlord only knew that his tenants kept a dog on the property and had taken the precautions of restraining the dog and posting "Beware of Dog" signs. Evidence of such precautions alone is not sufficient to give a reasonable landlord constructive notice that his tenant is harboring a dog with dangerous propensities. Landlord therefore had no reason to know Johnny posed a danger. Because we hold that plaintiff has not forecast sufficient evidence to establish landlord's knowledge, we need not address the control element.

¶ 17 Landlord has met his burden of showing through discovery that plaintiff cannot produce substantial evidence to support an essential element of his claim—i.e., that landlord knew Johnny posed a danger before the 17 March 2015 bite. Thus, plaintiff has failed to show that a genuine issue of material fact exists for trial. As such, landlord is entitled to judgment as a matter of law. The Court of Appeals' decision affirming the trial court's grant of summary judgment is affirmed.

AFFIRMED.

IN RE C.M.

[377 N.C. 105, 2021-NCSC-33]

IN THE MATTER OF C.M., K.S., J.S., M.A.S., AND K.S.

No. 436A20

Filed 16 April 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 848 S.E.2d 749 (2020), affirming an order entered on 13 May 2019 by Judge Wayne L. Michael in District Court, Davie County. Heard in the Supreme Court on 23 March 2021.

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

Matthew D. Wunsche for appellee Guardian ad Litem.

Garron T. Michael, for respondent-appellant.

PER CURIAM.

AFFIRMED.

IN RE G.B.

[377 N.C. 106, 2021-NCSC-34]

IN THE MATTER OF G.B., M.B., AND A.O.J.

No. 438A19

Filed 16 April 2021

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

The trial court properly terminated respondent-father's parental rights to his children on the basis that he willfully failed to make reasonable progress to correct the conditions that led to the children's removal where the findings, supported by evidence, demonstrated that respondent, who was incarcerated throughout the pendency of the case, repeatedly made voluntary choices which delayed his release date, limited his options, and hindered his ability to comply with different aspects of his case plan.

2. Termination of Parental Rights—best interests of the child—incarcerated father—release imminent

The trial court did not abuse its discretion by determining that termination of respondent-father's parental rights was in the best interests of the children where respondent's only challenge to the determination was to emphasize that he was scheduled to be released from incarceration shortly after the completion of the termination hearing and had a strong desire to maintain his parental relationship with the children.

3. Termination of Parental Rights—best interests of the child—standard of review—abuse of discretion analysis

The Supreme Court reaffirmed that the standard of review for a best interest determination in a termination of parental rights proceeding is abuse of discretion, and upheld the trial court's conclusion, which was supported by specific findings that addressed the factors in N.C.G.S. § 7B-1110(a), that termination of respondent-mother's parental rights was in the best interests of her children.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 August 2019 by Judge Monica M. Bousman in District Court, Wake County. This matter was heard in the Supreme Court on 13 January 2021.

IN RE G.B.

[377 N.C. 106, 2021-NCSC-34]

Mary Boyce Wells, Office of the Wake County Attorney, for petitioner-appellee Wake County Human Services.

Michelle FormyDuval Lynch and Reginald O'Rourke for appellee guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

Sean Paul Vitrano for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-mother and respondent-father appeal from the trial court's order terminating their parental rights to their minor children M.B. (Mark), who was born in November 2013, and G.B. (Gail), who was born in July 2016. Respondent-mother also appeals from the portion of the same order which terminated her parental rights to her minor daughter from a previous relationship, A.O.J. (Ann), who was born in December 2005.[1] Ann's father is not a party to this appeal. After careful review, we conclude that the trial court properly adjudicated at least one ground for termination and did not abuse its discretion in determining that termination of respondents' parental rights was in the children's best interests. Accordingly, we affirm the termination of parental rights order.

I. Factual Background and Procedural History

¶ 2 In November 2016, all three children were living with respondents. On 30 November 2016, respondent-father became incarcerated and remained in this capacity throughout the proceedings in this case. After respondent-father's incarceration, respondent-mother became involved in a romantic relationship with Deyonte Galloway, a nineteen-year-old with several felony convictions on his record.

¶ 3 In April 2017, officers with the Fuquay-Varina Police Department found Mark, who was three years old at the time, wandering outside alone and only wearing a diaper. After investigating this circumstance by going door-to-door in the neighborhood, the officers located respondent-mother's home. When questioned, respondent-mother responded that no one in the home had realized that Mark was outdoors. Between April

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

and June 2017, Mark experienced several injuries, including three black eyes and bruising that appeared to have been made by fingers. On 5 June 2017, Mark suffered a broken arm, but respondent-mother did not seek care for her son until two days later. After Mark received a cast for the broken limb on 7 June 2017, respondent-mother left Mark in the bathtub, causing the cast to get wet and requiring a new cast to be created for Mark's arm on the following day.

¶ 4 At some point, petitioner Wake County Human Services (WCHS) received reports that respondent-mother and Galloway had substance abuse issues and that they engaged in domestic violence in the presence of the children, including incidents that left holes in the walls of respondent-mother's home and other occasions during which Galloway damaged respondent-mother and Ann's cellular telephones to prevent them from contacting help. In August 2017, respondent-mother tested positive for cocaine and marijuana; in another instance, respondent-mother refused to provide a hair sample for a drug screen after having admitted that she had previously used urine obtained from Ann in order to favorably affect her drug screen results. WCHS also received reports that respondent-mother (1) had thrown a shoe at Mark, striking his head; (2) had been moving the children from hotel to hotel along with Galloway—a known gang member with multiple outstanding arrest warrants—in order to avoid Galloway's arrest; (3) was verbally abused by Galloway when she made telephone calls; and (4) failed to use a voucher that she received to obtain free eyeglasses for Ann, who is legally blind as a result of a degenerative eye disease.

¶ 5 On 13 October 2017, WCHS filed a petition alleging that Gail, Mark, and Ann were abused and neglected juveniles. A nonsecure custody order was entered by the trial court on the same date. On 20 October 2017, an amended petition was filed which added allegations regarding (1) a sexual assault committed against Ann by Galloway's brother and (2) respondent-mother's use of Ann to provide urine samples for respondent-mother's drug screen. Pursuant to the trial court's nonsecure custody order, Mark and Gail were placed with their paternal grandparents and Ann was placed in foster care. At an adjudication hearing held on 14 November 2017, respondents entered into a consent order in which they admitted that all three children were neglected juveniles and that Mark was an abused juvenile in that "the child's parent, guardian, custodian or caretaker has inflicted or allowed to be inflicted on the child a serious physical injury by other than accidental means and has created or allowed to be created a substantial risk of physical injury by other than accidental means."

¶ 6 Respondent-mother agreed to a case plan under which she would (1) have supervised visitation with the children for one hour per week, (2) obtain and maintain safe, stable housing for herself and her children, (3) not allow Galloway in the vicinity of her children, (4) obtain and maintain legal and sufficient income for herself and her children, (5) provide documentation to verify her income once a month, (6) complete a psychological evaluation and comply with any resulting recommendations, (7) complete a substance abuse assessment and comply with any resulting recommendations, (8) submit to random drug screens upon the request of WCHS and treatment providers, (9) complete a parenting education program and demonstrate skills and lessons learned, (10) complete a domestic violence assessment and any program or services which were recommended, and (11) successfully complete a non-offending caregiver program and demonstrate lessons learned. Under his own case plan, respondent-father agreed to (1) establish legal paternity of Mark, (2) complete a substance abuse assessment and comply with all resulting recommendations, (3) submit to random drug screens upon the request of WCHS and treatment providers, (4) complete a mental health assessment and comply with all resulting recommendations, (5) obtain and maintain safe, stable housing, and (6) maintain lawful income sufficient to meet the needs of his family and provide monthly verification of it to WCHS.

¶ 7 At a review hearing in February 2018, respondent-mother represented that she was living with an aunt in Holly Springs and that she was no longer in a relationship with Galloway. However, family members reported that respondent-mother had simply left her belongings with the aunt and was not actually staying in the aunt's home. In addition, respondent-father, who had been scheduled for release from incarceration in March 2018, had been charged with illegally possessing a cellular telephone while incarcerated, had received an additional 11-23 months of active time, and had subsequently lost his right to visitation with Mark and Gail. Furthermore, the children's maternal grandmother, with whom Mark and Gail had been living, had reported to WCHS that the grandmother needed medical treatment due to her cancer diagnosis and could not provide further care for the children at the time. Consequently, Mark and Gail were placed with foster parents. All three children were reported to be doing well in their respective foster placements.

¶ 8 At a subsequent permanency planning review hearing in August 2018, the trial court found that respondent-mother was unemployed and living with her mother. Respondent-mother had also been charged with possession of marijuana, possession of drug paraphernalia, and carry-

ing a concealed weapon after being discovered engaging in sexual activity in a car with Galloway in June 2018. When a WCHS social worker interviewed respondent-mother about the incident, respondent-mother was untruthful, stating that she had been pulled over in a friend's car while alone in the vehicle. Respondent-father had been transferred to Mountain View Correctional Institution (MVCI) in June 2018 upon having received six infraction reports while incarcerated at his previous penal facility, Franklin Correctional Center. Respondent-father was transferred again in August 2018, going to Avery-Mitchell Correctional Institution. While at this facility, he received numerous infractions for disobeying orders, obtaining tattoos, assaulting and threatening staff, and making false accusations.

¶ 9 At a February 2019 permanency planning review hearing, the trial court found that respondent-mother continued to test positive for the presence of impairing substances and continued to be involved with Galloway, who attended at least one visitation with the children in violation of the visitation agreement. The case's guardian ad litem (GAL) recommended that the primary plan become adoption because the children could not return to the care of respondents within a reasonable time, noting that since the previous permanency planning hearing, respondent-father had received twelve infractions while incarcerated and had advised the social worker that he was going "to continue to receive infractions." The trial court changed the children's primary plan to adoption.

¶ 10 On 22 March 2019, WCHS filed a motion to terminate the parental rights of both respondents, alleging the existence of the following grounds: (1) neglect, (2) that respondents "willfully left the juvenile[s] in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made in correcting the conditions that led to the removal of the" children, and (3) that the children had been in the custody of WCHS during which respondents, for a period of six months preceding the filing of the motion, willfully failed for such period "to pay a reasonable portion of the cost of the care for the [children] although physically and financially able to do so." *See* N.C.G.S. § 7B-1111(1), (2), and (3) (2019). A hearing on the motion to terminate the parental rights of both respondents was held in June 2019, by which time the children had been in the custody of WCHS for more than eighteen months. After the hearing, the trial court found the existence of all three alleged grounds to terminate the parental rights of each respondent. The trial court went on to conclude that termination of both respondents' parental rights was in the best interests of the chil-

dren. Both respondents appeal from the order terminating their respective parental rights.

II. Standards of Review

¶ 11 When considering a petition to terminate parental rights, the trial court must first adjudicate the existence of the grounds for termination which have been alleged. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f)). This Court reviews a trial court's adjudication of the existence of grounds to terminate parental rights in order "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). All findings of fact which are not challenged by a respondent are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 12 If the trial court finds that at least one ground to terminate parental rights under N.C.G.S. § 7B-1111(a) exists, "it then proceeds to the dispositional stage," *In re A.U.D.*, 373 N.C. at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In making that determination, the trial

> 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.

Id. § 7B-1110(a). In reviewing a trial court's dispositional determination, we evaluate the trial court's conclusion that a termination of parental

rights would be in the best interests of the child under an abuse of discretion standard. *In re E.H.P.*, 372 N.C. 388, 392 (2019). "Abuse of discretion results when 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 Z.L.W.*, 372 N.C. 432, 435 (2019).

III. Respondent-father's Appeal

¶ 13 Respondent-father contends that the trial court erred both in finding the existence of at least one ground for the termination of his parental rights to Mark and Gail and in determining that the termination of his parental rights would be in the children's best interests. We disagree with both contentions.

A. Adjudication

¶ 14 **[1]** Respondent-father first challenges the trial court's conclusion that the ground existed to terminate his parental rights to Mark and Gail based upon his willful failure to make reasonable progress in correcting the circumstances that led to their removal from respondent-mother's home. *See* N.C.G.S. § 7B-1111(a)(2) ("The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."). We conclude that the trial court did not err in finding the existence of this ground for the termination of respondent-father's parental rights.

¶ 15 Respondent-father argues that the trial court erroneously considered the circumstance of his incarceration in two ways: by finding that his incarceration was a factor that caused his children to be placed in foster care and by failing to take into account the limitations that incarceration imposed upon respondent-father's ability to comply with his case plan. Respondent-father notes that he was incarcerated at the time that the children were taken into WCHS custody and asserts that the conditions which led to the children being taken into the custody of WCHS were substance abuse, domestic violence, and failure to address medical needs—conditions created or caused by respondent-mother and Galloway, and thus unrelated to respondent-father's incarceration. Respondent-father further contends that "the court was obligated to consider the limitations the incarceration imposed on his ability to comply with the case plan, as well as other relevant factors."

¶ 16 We do not subscribe to respondent-father's view of these considerations. To the contrary, our review of the case reveals that the trial

court carefully considered evidence about respondent-father's ability to achieve his case plan requirements despite his incarceration, as well as the impact of respondent-father's acts and decisions while incarcerated, in making its findings of fact and ultimately in determining that respondent-father had failed to make reasonable progress.

¶ 17 While "[a] parent's incarceration is a circumstance that the trial court must consider in determining whether the parent has made reasonable progress toward correcting those conditions which led to removal of the juvenile," *In re C.W.*, 182 N.C. App. 214, 226 (2007) (quotation marks omitted), "incarceration, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care." *In re Harris*, 87 N.C. App. 179, 184 (1987). Here, the trial court observed that respondent-father was incarcerated when the children were removed from respondent-mother's home and recognized it as an occurrence which resulted in the children's placement in foster care. However, the trial court did not rely upon the fact of respondent-father's incarceration, standing *alone*, to conclude that the children needed to be placed in foster care or that respondent-father had failed to make reasonable progress. Concomitantly, the trial court did not ignore the impact of respondent-father's incarceration in assessing his ability to follow his case plan and to make reasonable progress through compliance with it.

¶ 18 In our view, the trial court properly considered evidence regarding respondent-father's initial incarceration at the time that the children were removed from the home and properly evaluated areas in which respondent-father made some progress on his case plan—such as his attenuated attendance at Narcotics Anonymous meetings and his attainment of several negative drug screens—along with respondent-father's unfortunate choices and actions while incarcerated which were demonstrably detrimental to respondent-father's ability to complete his case plan. Such choices and actions resulted in a lengthy delay in respondent-father's projected release date from incarceration and significantly limited his access to classes, programs, services, and employment which directly related to his case plan. For example, the trial court specifically found that:

- respondent-father, at the time of the filing of the petition, "was housed in a local facility" and had a projected release date within three to four months;
- respondent-father had the opportunity to work in a job at the sign plant which would have allowed him to earn money to aid in the care of his children and which would have earned

him "gain time" to push forward his release date, but despite the ability to do the job, respondent-father chose to forego the opportunity because he did not want the job;

- respondent-father "received nineteen infractions during his incarceration" and "was placed in restricted confinement six times" as a result;
- respondent-father, having been relocated to a different correctional facility due in some measure to his infractions of penal rules, was unable to enroll in desired classes, which would have reduced the period of incarceration which he was required to serve;
- respondent-father, at the time of the termination hearing, was held in solitary confinement by his own request following the stabbing of respondent-father by gang members;
- respondent-father had tattoos identifying him as a gang member although he denied being actively involved in a gang;
- respondent-father's "lengthy incarceration limited his ability to participate in the services necessary to put him in a position to reunify with his children";
- respondent-father illegally obtained a cellular telephone while incarcerated which resulted in an additional sentence, extending his potential release date; and
- respondent-father's "repeated criminal activity and other decision making" in prison "resulted in his absence from his children's lives for at least sixteen months longer than anticipated at the time of adjudication."

¶ 19 The dissent prefers to cast a view which diminishes the harmful impact upon the children of the last two cited findings of fact which the trial court made regarding the elongation of respondent-father's time of incarceration due to the parent's voluntary choices. The dissent endeavors to buttress this stance by isolating respondent-father's cellular telephone offense to the exclusion of respondent-father's other deleterious decisions, while incorrectly elevating the role of this conviction among the plentiful considerations which resulted in the termination of respondent-father's parental rights. However, "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." N.C.G.S. § 7B-100(5) (emphasis added); *see also In re N.G.*, 374 N.C. 891, 907 (2020).

¶ 20 In his appeal to this Court, respondent-father has acknowledged the negative effect of his relocation from Franklin Correctional Center—a facility where he was able to receive drug screens, participate in Narcotics Anonymous, and have access to an approved parenting program in pursuit of the satisfactory completion of his case plan—to MVCI, the facility to which he was transferred upon his aggregation of infractions and where the above-referenced opportunities were either unavailable or more difficult to obtain. Also, respondent-father did not complete a mental health assessment, which was another element of his case plan, in part because once he was transferred to MVCI respondent-father was "mostly in isolation" and often could not receive visits, even from a mental health professional. Further, the trial court disapproved of visits between respondent-father and the children at MVCI because of the distance that the children would have to travel.

¶ 21 We agree with respondent-father that his ability to comply with his case plan was hampered by his movement to certain penal institutions and the limited options offered by those institutions to fulfill his case plan, as opposed to those more plentiful resources which were available at the facilities to which he was previously assigned. There were also restrictions on programs made available to respondent-father due to his specific incarceration status. However, the evidence in this case shows that respondent-father chose to engage in activities during his incarceration which created these obstacles for him and also decided to reject beneficial opportunities which were made available to him. Respondent-father himself constructed the very barriers to the achievement of his case plan goals about which he now complains. Accordingly, we determine that there is no error in the trial court's findings of fact regarding respondent-father's failures in accomplishing his case plan, most of which resulted from circumstances for which respondent-father was responsible.

¶ 22 In sum, respondent-father repeatedly elected to engage in behaviors which significantly extended his incarceration, greatly limited his options, and frequently eliminated his opportunities, thus rendering him unavailable as a potential placement for Mark and Gail and also eradicating his prospect of visits with the children. These findings of fact which are supported by the evidence in turn support the ultimate determination by the trial court that respondent-father failed to make reasonable progress on his case plan. As such, we affirm the trial court's conclusion that the ground existed to terminate respondent-father's parental

rights for failure to make reasonable progress under the circumstances in correcting the conditions that led to removal pursuant to N.C.G.S. § 7B-1111(a)(2). Because the existence of only one ground as identified by N.C.G.S. § 7B-1111 is required to support termination of parental rights, we do not address respondent-father's arguments as to the remaining two additional grounds for termination of his parental rights which were found by the trial court.

B. Disposition

¶ 23 **[2]** Respondent-father argues that the trial court abused its discretion in determining that termination of respondent-father's parental rights was in the best interests of the juveniles Mark and Gail. Specifically, respondent-father asserts that "in light of [his] imminent completion of his sentence, the skills he had acquired in prison, his ability and desire to support the children, and his interest in remaining their father, termination was contrary to their best interests." This assertion is unpersuasive.

¶ 24 The dissenting view takes sweeping liberties to construct its conclusion that this Court affirms the trial court's order which terminates the parental rights of respondent-father merely because he is incarcerated. In creating this narrative, the dissent has devised propositions that are conclusory, deduced theories that are illusory, and ultimately developed positions that are contradictory. Although the opposing opinion characterizes our decision as being premised solely upon respondent-father's incarceration, a deeper analysis demonstrates that respondent-father's voluntary failure to fulfill the requirements of his case plan and his repeated unwillingness to engage in identified available opportunities consistent with his case plan are the overarching components in his failure to make reasonable progress under the circumstances in correcting the conditions that led to removal of the children from the home.

¶ 25 Due to being riveted by respondent-father's incarceration, and combined with this Court's determination that the ground of failure to make reasonable progress was sufficiently proven to exist at the trial level, so as to lead to termination of respondent-father's parental rights, the dissent unfortunately conflates its perceived view that termination of respondent-father's parental rights occurred *because* he was incarcerated with our actual view that respondent-father failed to make reasonable progress and the trial court concluded that it was in the children's best interests to terminate respondent-father's parental rights *because* he consistently engaged in activities on a voluntary basis while incarcerated which inhibited his ability to satisfy his case plan and consequently

experienced negative consequences for his negative behavior which further compromised his opportunities to fulfill his case plan. Although respondent-father happened to be incarcerated as these circumstances were transpiring, his lack of freedom did not uniquely distinguish him from parents with court-ordered case plans who are not incarcerated who likewise consistently engage in activities on a voluntary basis which inhibit their abilities to satisfy their respective case plans, consequently experience negative consequences for their negative behavior, and ultimately have their parental rights terminated as a result.

¶ 26 "Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10 (2005), *aff'd per curiam*, 360 N.C. 360 (2006)) (citation omitted); *see also In re T.N.H.*, 372 N.C. at 412; *see also In re S.D.*, 374 N.C. 67, 75 (2020). While the dissent attempts to cast our decision to affirm the trial court's order terminating respondent-father's parental rights as an outcome which utilizes respondent-father's incarceration as a sword against him, it is ironic that the dissent in the present case trumpets the employment of respondent-father's incarceration alone as a shield to protect him from the adverse consequences of his failure to satisfactorily complete his case plan.

¶ 27 As noted previously, a trial court's decision to terminate parental rights is reviewed only for abuse of discretion. Respondent-father does not take issue with the analysis employed here by the trial court but only accentuates that he was scheduled to be released shortly after the end of the termination of parental rights hearing, that he had plans for housing and employment upon his release, and that he had a strong desire to maintain his relationship with his children. While we acknowledge respondent-father's desire to retain his parental rights, he has not demonstrated that the trial court's disposition was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *In re Z.L.W.*, 372 N.C. at 435. Therefore, we affirm the trial court's order terminating respondent-father's parental rights.

IV. Respondent-mother's Appeal

¶ 28 **[3]** Respondent-mother challenges only the trial court's dispositional determination that termination of her parental rights was in the children's best interests. Specifically, she notes that "this Court stated in a . . . recent opinion that the abuse of discretion standard of review applies on appeal when determining if termination of parental rights is in the best interests of the child," citing *In re D.L.W.*, 368 N.C. 835, 842 (2016). However, respondent-mother contends that "this Court [should] apply a

de novo standard of review for the legal conclusion that termination of parental rights is in a child's best interest since a trial court is required to make certain written findings of fact to support its conclusion of law." We disagree with this assertion.

¶ 29 Respondent-mother cites our decision in *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517 (2004) for the proposition that "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." She then asserts that because N.C.G.S. § 7B-1110 was amended in 2011 to require trial courts at the disposition stage to consider the criteria enumerated in N.C.G.S. § 7B-1110(a), which we previously referenced, and to make written findings regarding those criteria that are relevant in any case, an appellate court should conduct de novo review of a trial court's best interests determination instead of utilizing an abuse of discretion standard. However, respondent-mother cites no authority to support her argument and further fails to address any of the numerous cases decided by this Court in which we have applied an abuse of discretion standard at the disposition stage of a termination of parental rights case. *See, e.g.*, *In re D.L.W.*, 368 N.C. at 842; *In re L.M.T.*, 367 N.C. 165, 171 (2013). Decades ago, this Court in *In re Montgomery* designated the trial court's determination at the disposition stage of a termination of parental rights hearing as discretionary. 311 N.C. 101, 108 (1984) ("[W]here there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given *discretion* not to terminate rights." (emphasis added)). At no point during this interim time period, including the 2011 amendment raised by respondent-mother, has the Legislature chosen to amend the pertinent statute to alter our holding in *In re Montgomery* by explicitly establishing a de novo standard of review at the disposition stage of a termination of parental rights proceeding. *See Raeford Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 317 (1913) (holding that we presume that the Legislature acts with full knowledge of prior and existing law and its construction by the courts.).

¶ 30 More recently, in *In re C.V.D.C.*, 374 N.C. 525 (2020), we considered and rejected the exact argument advanced here by respondent-mother "regarding the appropriate standard of appellate review for a disposition entered under N.C.G.S. § 7B-1110(a)." *Id.* at 528–29 (discussing but declining to accept a respondent-parent's assertion that de novo review is appropriate at the disposition stage based upon the respondent-parent's contention that "our deferential posture [is] a vestige of such decisions as *In re Montgomery*, . . . which predate the amendments to N.C.G.S.

§ 7B-1110(a) enacted by the legislature in 2005 and 2011 to safeguard the rights of parents"). *See also In re Z.L.W.*, 372 N.C. at 435 ("The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion."). As in that case, "we again reaffirm our application of the abuse of discretion standard when reviewing the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest' under N.C.G.S. § 7B-1110(a)." *In re C.V.D.C.*, 374 N.C. at 529; *see also In re K.S.D-F.*, 375 N.C. 626, 636 (2020) (citing *In re C.V.D.C.* for the proposition that an "argument that each of the N.C.G.S. § 7B-1110(a) factors weighs against termination in this matter when reviewed under a de novo standard cannot prevail").

¶ 31 In the present case, where the trial court made specific findings regarding the relevant criteria identified in section 7B-1110 and where respondent-mother has not argued that the dispositional determination of the trial court is not "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision," *In re Z.L.W.*, 372 N.C. at 435, we hold that the trial court did not abuse its discretion under N.C.G.S. § 7B-1110(a). We therefore affirm the order of the trial court terminating respondent-mother's parental rights.

AFFIRMED.

Justice EARLS dissenting.

¶ 32 Respondent-father was incarcerated and his two children were in the custody of their mother when the events occurred which led to the children being adjudicated abused and neglected and taken into care in October 2017. He was still incarcerated when the trial court held hearings on 5, 6 and 27 June 2019 on the petition for termination of parental rights, although the trial court made a finding that he was due to be released "in late July 2019." Publicly available records indicate respondent was indeed released from custody on 26 July 2019 and he was therefore no longer in prison by the time the trial court entered its order terminating his parental rights on 7 August 2019. The trial court's findings of fact as they relate to respondent-father do not support the conclusion that he failed to make reasonable progress in correcting the conditions that led to the children being taken into care and his parental rights should not be terminated on that basis. Instead, the majority makes its own findings. North Carolina is not a jurisdiction which provides for the termination of parental rights merely because a parent is incarcerated. The trial court's order should be reversed as to respondent-father.

¶ 33 States vary widely in how incarceration of a parent impacts the determination of whether a parent's rights to a child should be terminated. *See* Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 Seton Hall L. Rev. 312, 325 (1998) (categorizing state statutes). *See also* Stuart M. Jones, *Not Perfect, but Better than Most: South Carolina's TPR Process and Its Surprisingly Fair Treatment of Incarcerated Parents*, 62 S.C. L. Rev. 697, 700 (2011) ("By 2005, TPR statutes in thirty-six states listed a parent's incarceration as an element to be considered in a TPR proceeding. Twenty-five of these states use the length of the parent's prison sentence as a determining factor in whether incarceration is grounds for a TPR action. Some of these states specify exactly how long a parent must be imprisoned, while others speak in broader terms.").

¶ 34 Some states allow incarceration as a ground for the termination of parental rights. *See*, *e.g.*, Alaska Stat. § 47.10.080 (o)(1) (2020) (incarceration may be a sufficient ground for termination if the term of incarceration is "significant" in light of the child's age and need for adult supervision); Colo. Rev. Stat. § 19-3-604(b)(III) (2020) (permitting termination of parental rights if the parent will be incarcerated for more than six years from the date the child was adjudicated dependent or neglected); Ky. Rev. Stat. Ann. §§ 600.020(2)(b), 610.127(1) (2021) (reasonable efforts to reunify a child do not need to be made when parent will be incarcerated for more than a year beyond the date the child is taken into care); N.D. Cent. Code § 27-20-02 (2021) (reasonable efforts to reunify a family not necessary if a parent is incarcerated for a specific length of time measured by the child's age). Other states only allow incarceration for certain offenses to be a ground for termination of parental rights. *See*, *e.g.*, Ind. Code §§ 31-35-3, -4 (2021) (a conviction for certain crimes, including murder, involuntary manslaughter, or rape, can be grounds for termination of parental rights).

¶ 35 On the other end of the spectrum are states with statutes that specifically say that incarceration alone is not a basis for termination of parental rights. *See*, *e.g.*, Mass. Gen. Laws ch. 210, § 3(c)(xiii) (2021) ("Incarceration in and of itself shall not be grounds for termination of parental rights;"); Mo. Laws § 211.447(7)(6) (2020) (same); Neb. Rev. Stat. § 43-292.02(2)(b) (2021) (state shall not file petition for termination of parental rights if the sole basis for the petition is that the parent or parents are incarcerated). Other states have specifically created statutory exceptions to the general time limits on how long reasonable efforts must be made to reunify a family when a parent is incarcerated. *See*, *e.g.*, Colo. Rev. Stat. § 19-3-604(2)(k)(IV) (2020); N.M. Stat. Ann. § 32A-4-29(G)(9) (2021).

¶ 36 What matters for this case is that the North Carolina General Assembly has not provided for incarceration as a ground for termination of parental rights. Therefore it is inappropriate for this Court to create such a basis. Yet that is precisely what the majority opinion effectively accomplishes through the back door of basing termination here on respondent-father's decisions "to engage in behaviors which significantly extended his incarceration, greatly limited his options, and frequently eliminated his opportunities, thus rendering him unavailable as a potential placement for Mark and Gail and also eradicating his prospect of visits with the children." These statements are equally true of every parent who is incarcerated, and cannot, under North Carolina law, support a determination that the incarcerated parent should lose their parental rights.

¶ 37 This legal error is compounded by the majority's willingness to find its own facts where the trial court's order is deficient. Our task when reviewing a trial court's order terminating the rights of a parent to their child is "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re K.H.*, 375 N.C. 610, 612 (2020) (quoting *In re Z.A.M.*, 374 N.C. 88, 94 (2020)). The majority's opinion goes beyond this task and supplements the trial court's order with new factual findings. The trial court's findings do not support its ultimate conclusion that respondent-father willfully failed to make reasonable progress to correct the conditions leading to his children's removal from their home. As a result, this is not a legally permissible ground for termination of respondent's parental rights in this case.

¶ 38 Respondent-father was incarcerated on 30 November 2016. Almost a year later, while he was serving his sentence, Mark and Gail were removed from the home of respondent-mother and her boyfriend because, as the trial court found, "the children were exposed to domestic violence" perpetrated by the boyfriend against respondent-mother, respondent-mother's boyfriend had intentionally injured Mark, Mark's medical needs "were not being met in a timely manner," respondent-mother and her boyfriend "were engaged in substance abuse," and respondent-father was in prison. Plainly, the only circumstance identified by the trial court that pertained to respondent-father—rather than to respondent-mother and her abusive boyfriend—and resulted in the children's removal from the home was that respondent-father was incarcerated.

¶ 39 As the majority notes, respondent-father subsequently entered into a case plan with Wake County Human Services which required him to (1) establish legal paternity of Mark, (2) complete a substance abuse-

assessment and comply with recommendations, (3) submit to random urine and hair sample drug screens, (4) complete a mental health assessment and comply with any recommendations, (5) obtain and maintain safe, stable housing, and (6) obtain and maintain lawful income sufficient to meet the needs of his family and provide monthly verification of the same.

¶ 40 The trial court's findings do not establish that respondent-father failed to comply with this case plan. *See In re A.J.P.*, 375 N.C. 516, 525 (2020) ("[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) . . . as long as the objectives sought to be achieved by the case plan" address the circumstances that resulted in the children's removal from the home.). Rather than finding that respondent-father did not comply with his case plan, the trial court's findings pertaining to respondent-father focus almost exclusively on the fact of his incarceration. Of eleven factual findings, one (Finding of Fact #31) addresses the fact that respondent-father established paternity of Mark, two (Findings of Fact #36 and #37) address the fact that respondent-father quit his job while in prison, and the remaining eight have to do with respondent-father being incarcerated.

¶ 41 In Finding of Fact #32, the trial court states that respondent-father does not make decisions that are in the best interests of his children, which appears to be a conclusory finding premised upon the findings which follow it. In Findings of Fact #33 and #34, the trial court states that respondent-father has been incarcerated since 30 November 2016, before the incidents which led to the children's removal from the home, and that he was convicted of illegally possessing a cellphone, which extended his release date. In Finding of Fact #35, the trial court states that respondent-father wanted to participate in classes that would reduce the amount of time that he was incarcerated, but that he "was unable to enroll in classes at the facilities where he was housed." In Findings of Fact #36 and #37, the trial court states that respondent-father was able to work, but chose not to, and that respondent-father might have had an earlier release date if he chose to work. The trial court stated in Finding of Fact #38 that respondent-father had received infractions while incarcerated and that he has been placed in solitary confinement "which he reports is by his choice for his own protection, as gang members stabbed him in March 2019, when he refused to carry out an assault as directed by a higher-ranking gang member in the prison." In Finding of Fact #39, the trial court found that respondent-father denied active involvement in a gang but acknowledged having gang tattoos. In Finding

of Fact #40, the trial court found that respondent-father had a limited ability to participate in services as a result of his lengthy incarceration. Finally, in Finding of Fact #41, the trial court found that respondent-father's decisions resulted in incarceration, and a resulting absence from his children's lives "for at least sixteen months longer than anticipated at the time of adjudication."

¶ 42 The trial court's order is devoid of findings related to respondent-father's completion of a substance abuse assessment and compliance with any recommendations, respondent-father's submission to random drug screens, respondent-father's completion of a mental health assessment and compliance with any recommendations, whether respondent-father had safe and stable housing prepared for his pending release from incarceration, or whether respondent-father had similarly made plans for obtaining lawful income sufficient to meet the needs of his family. The only trial court finding relating directly to respondent-father's case plan states that respondent-father established paternity of Mark, which suggests compliance with his case plan. The only other aspect of the case plan which might arguably be addressed in the trial court's findings is the requirement that respondent-father obtain and maintain lawful income sufficient to meet the needs of his family—the trial court found that respondent-father "would have earned some amount of money while working a job in prison," but does not find—and indeed, it is implausible to assume—that this would have been close to sufficient to meet the needs of respondent-father's children.

¶ 43 The trial court's findings also fail to establish that respondent-father failed to make "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile[s]." N.C.G.S. § 7B-1111(a)(2) (2019). A parent need not "completely remediate the conditions that led to the children's removal" nor "render herself capable of being reunified with her children" to avoid termination of parental rights under N.C.G.S. § 7B-1111(a)(2). *In re J.S.*, 374 N.C. 811, 819–20 (2020). "Only reasonable progress in correcting the conditions must be shown." *Id.* at 819 (quoting *In re L.C.R.*, 226 N.C. App. 249, 252 (2013)). Further, a trial court "must consider" a parent's incarceration "in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile.' " *In re A.J.P.*, 375 N.C. at 530 (quoting *In re C.W.*, 182 N.C. App. 214, 226 (2007)).

¶ 44 As noted previously, the children were removed from the home of respondent-mother and her boyfriend primarily because respondent-mother and her boyfriend exposed the children to domestic violence,

substance abuse, and physical abuse and failed to address the children's medical needs. However, a parent in a termination of parental rights action cannot be held responsible for the actions of others. Natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child" which "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In recognition of this interest, this Court has long held that only the parent's "conduct inconsistent with the parent's protected status" or a finding that the parent is unfit will warrant application of the best interests of the child standard to award custody to a nonparent over the parent. *Price v. Howard*, 346 N.C. 68, 79 (1997); *see also Owenby v. Young*, 357 N.C. 142, 145 (2003). ("Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution."). This standard of conduct is lower than that warranting termination of parental rights pursuant to statute. *Price*, 346 N.C. at 79. It follows, then, that if a determination that a parent has acted inconsistently with his or her constitutionally protected status as a parent must be based on the conduct of that parent, the higher standard of conduct warranting termination of parental rights cannot be based on the conduct of another, for which the parent would be less culpable. *C.f. In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (affirming trial court's decision to terminate the parental rights of a mother where the facts showed that her boyfriend likely caused a child's injuries because the mother reestablished a relationship with the boyfriend, hid the relationship from social services, and refused "to make a realistic attempt to understand how [the child] was injured or to acknowledge how her relationships affect her children's wellbeing"). Instead, a parent's progress, or lack thereof, in ameliorating the conditions which led to a child's removal must relate to the conditions for which the parent is responsible.

¶ 45 Even assuming that respondent-father could be held responsible for ameliorating the conditions which were caused by respondent-mother and her boyfriend, the trial court's findings do not, at any point, reference respondent-father's progress or lack thereof in addressing these circumstances. For example, the trial court's findings do not address respondent-father's plans for his children after his incarceration was to end—whether he planned to shield them from abuse by respondent-mother and her boyfriend, whether he had made progress toward being capable of addressing their medical needs, or whether he himself was engaging in substance abuse or domestic violence. As a result, the trial

court's findings do not at all address, with respect to respondent-father, what the trial court found to be the principal circumstances that led to the children's removal, even while the trial court's order terminates respondent-father's parental rights for failing to correct the conditions which led to the children's removal.

¶ 46 Taken together, the trial court's findings establish that respondent-father was incarcerated and, as a result, not present to care for his children, and that respondent-father possessed a cellphone while incarcerated, which lengthened his incarceration. The trial court describes this as "repeated criminal activity and other decision making [which] resulted in [respondent-father's] absence from his children's lives for at least sixteen months longer than anticipated at the time of adjudication." While it may be true that respondent-father's conduct in prison resulted in a longer period of incarceration, I fail to see the justice, much less the legal basis, for terminating a father's rights in his children because he possessed a contraband cellphone while incarcerated. In any case, a parent's incarceration does not by itself support a trial court's decision to terminate the parent's rights to a child. *In re S.D.*, 374 N.C. 67, 75 (2020) ("Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." (cleaned up)).

¶ 47 The majority, in an attempt to shore up the trial court's thin basis for termination, posits that the trial court neither relied upon respondent-father's incarceration nor ignored it in reaching the determination that respondent-father's rights were subject to termination. The majority reaches this conclusion, however, by supplementing the trial court's order with its own facts. For example, the majority writes that the trial court "properly evaluated areas in which respondent-father made some progress on his case plan," referencing attendance at Narcotics Anonymous meetings and attaining several negative drug screens. However, neither those facts nor any evidence of their consideration appears in the trial court's order. The majority also states that respondent-father's "choices and actions . . . significantly limited his access to classes, programs, services, and employment which directly related to his case plan." Again, this does not appear in the trial court's order. Instead, the trial court found that respondent-father's "lengthy incarceration limited his ability to participate in the services necessary to put him in a position to reunify with his children." However, this conclusory statement does nothing to support a finding that respondent-father willfully failed to complete his case plan. Indeed, the trial court's order makes no reference to the substance abuse, mental health, housing, or income needs which were the subject of respondent-father's case plan. Moreover, while the majority

seems to have found as a fact that respondent-father was "relocated to a different correctional facility" without classes that would have reduced respondent-father's period of incarceration "due in some measure to his infractions of penal rules," such a finding is not contained in the trial court's order. In fact, the trial court's order does not even suggest, as the majority does, that respondent-father was responsible for his inability to participate in classes, stating only that respondent-father "wanted to participate in classes" but was "unable to enroll in classes at the facilities where he was housed."

¶ 48 Regardless of the majority's assertions to the contrary, the trial court here did not weigh all of the evidence and come to a reasoned conclusion that, taking into account the barriers imposed by respondent-father's incarceration, respondent-father nevertheless willfully failed to ameliorate the conditions which led to the children's removal from their home despite respondent-father's ability to do so. Rather, the trial court's findings clearly demonstrate that the trial court terminated respondent-father's parental rights because he was incarcerated and, while incarcerated, delayed his release by possessing a cellphone. The trial court made no reference to the substance abuse, domestic abuse, physical abuse, and lack of medical care that resulted in the children's removal, likely because those circumstances were not attributable to respondent-father. The trial court did not even make reference to respondent-father's case plan, except to note that he had entered into one.

¶ 49 The majority also relies upon "the best interests of the juvenile" in its defense of the trial court's determination that grounds existed to terminate respondent-father's parental rights, citing N.C.G.S. § 7B-100(5) (stating that one purpose of the "Abuse, Neglect, Dependency" subchapter of the Juvenile Code is to ensure "that the best interests of the juvenile are of paramount consideration by the court"). However, in termination of parental rights proceedings, the best interests of the juvenile are considered at the *dispositional* stage. N.C.G.S. § 7B-1110(a) (2019) ("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."). At the adjudicatory stage, the only question for the trial court is whether grounds exist to terminate the respondent's parental rights. N.C.G.S. § 7B-1109(e) (2019) ("The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent."). *See, e.g.*, *In re D.L.W.*, 368 N.C. 835, 842 (2016) ("The procedure for termination of parental rights involves a two-step

process. In the initial adjudication stage, the trial court must determine whether grounds exist pursuant to N.C.G.S. § 7B-1111 to terminate parental rights. If it determines that one or more grounds listed in section 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 to terminate parental rights." (citations omitted)). *See also In re Mashburn*, 162 N.C. App. 386, 396 (2004) (stating that it is improper for a trial court to consider "best interests" testimony during adjudication). It is contrary to the statutory scheme to insert the best interests determination into the adjudication of whether grounds exist to terminate respondent's parental rights.

¶ 50 In some circumstances, this Court remands for further factual findings when the trial court's findings are lacking. *See*, *e.g.*, *In re C.L.H.*, 2021-NCSC-1, ¶ 20 (vacating and remanding for further proceedings where the trial court's findings did not establish the existence of a child support order enforceable during the relevant period); *In re R.D.*, 376 N.C. 244, 264 (2020) (vacating and remanding for entry of a new dispositional order where the disposition was premised on a factual finding without record support); *In re N.K.*, 375 N.C. 805, 825 (2020) (remanding "for further proceedings" where the record did not indicate whether the trial court complied with the notice provisions of the Indian Child Welfare Act); *In re K.C.T.*, 375 N.C. 592, 602, (2020) (reversing and remanding for entry of a new order "containing proper findings and conclusions" where the trial court did not find willful intent on the part of a parent when terminating parental rights pursuant to N.C.G.S. § 7B-1111(a)(7)); *In re K.R.C.*, 374 N.C. 849, 865 (2020) (vacating and remanding for the entry of additional findings and conclusions where "the trial court erred in its failure to enter sufficient findings of ultimate fact and conclusions of law" to support its dismissal of a petition for termination of parental rights); *In re K.N.*, 373 N.C. 274, 284–85 (2020) (vacating and remanding for further proceedings, "including the entry of a new order containing appropriate findings of fact and conclusions of law on the issue of whether grounds exist to support the termination of respondent's parental rights" where the trial court's adjudicatory findings were insufficient but the record contained evidence that could have supported the trial court's conclusion that termination was appropriate); *In re N.D.A.*, 373 N.C. 71, 84 (2019) (same); *Coble v. Coble*, 300 N.C. 708, 714–15 (1980) (vacating and remanding for further evidentiary findings where findings did not establish that plaintiff was in need of financial assistance from the defendant but where evidence in the record could support such findings in an appeal from an order requiring defendant to provide partial child support); *see also In re K.H.*, 375 N.C.

610, 618 n.5 (2020) (suggesting that the proper disposition is reversal rather than remand where the Court does "not find such evidence in the record . . . that could support findings of fact necessary to conclude that" a respondent's parental rights are subject to termination under grounds identified by the trial court). The significance of these cases here is the strong precedent they set contrary to the notion that this Court can fill in the gaps when a trial court's order fails to make the required factual findings to support termination of parental rights.

¶ 51 The United States Supreme Court has recognized that parenting is a fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 66–67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). For that reason, due process requires that a "clear and convincing evidence" standard of proof is required in order to "strike[ ] a fair balance between the rights of the natural parents and the State's legitimate concerns." *Santosky*, 455 U.S. at 769. Here, the trial court did not make adequate findings of fact based on that standard of proof, and this Court should not make its own findings. Respondent-father should not, in North Carolina, have his parental rights terminated merely because of his incarceration. The instant case is not one in which the trial court's findings justify severing the constitutionally protected bond between parent and child. I respectfully dissent from the majority's decision to affirm the trial court's order as to respondent-father.

IN RE FORECLOSURE OF GEORGE

[377 N.C. 129, 2021-NCSC-35]

IN THE MATTER OF THE PROPOSED FORECLOSURE OF A CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS AYERS DORTCH & LYONS, P.A., TRUSTEE

No. 77A19

Filed 16 April 2021

Real Property—foreclosure sale—deficient service—grossly inadequate sale price—good faith purchasers for value

In a case involving a non-judicial foreclosure based on a claim of lien for unpaid homeowners association fees (in the amount of $204.75), the trial court did not abuse its discretion when it concluded that two purchasers were not entitled to good faith purchaser for value status or protections allowed by N.C.G.S. § 1-108, because the initial purchaser paid a grossly inadequate price ($2,650.22 for a house that was sold to the second purchaser for $150,000) and there was evidence showing that both purchasers, who had a history of dealing in foreclosed properties with each other, had reason to be on notice that the homeowners had not received adequate notice of the foreclosure proceeding. The matter was remanded for the trial court to consider whether an award of restitution pursuant to section 1-108 would be appropriate.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 264 N.C. App. 38 (2019), dismissing, in part; affirming, in part; and reversing and remanding, in part, an order entered on 15 March 2018 by Judge Nathaniel J. Poovey in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 January 2021.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for petitioner-appellants.

Derek P. Adler for intervenor-appellee National Indemnity Group.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, for intervenor-appellee KPC Holdings.

No brief for respondent-appellee Sellers, Ayers, Dortch & Lyons, P.A.

IN RE FORECLOSURE OF GEORGE

[377 N.C. 129, 2021-NCSC-35]

Legal Aid of North Carolina, Inc., by Celia Pistolis and Johnnie Larrie; Karen Fisher Moskowitz for Charlotte Center for Legal Advocacy; Jason A. Pikler for North Carolina Justice Center; and Maria D. McIntyre for Financial Protection Law Center, amici curiae.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the trial court abused its discretion in concluding that two purchasers, the first of whom bought a tract of property at a non-judicial foreclosure sale and the second of whom purchased the property from the initial purchaser, were not good faith purchasers for value. After a hearing concerning the issues raised by the property owners' motion for relief from a foreclosure order, the trial court determined that the transfers to both subsequent purchasers should be declared null and void given that the court lacked jurisdiction over the person of one of the property owners as the result of insufficient notice and deficient service of process. After a separate hearing that was held for the purpose of addressing the purchasers' motion for relief from the order voiding the initial foreclosure order and the resulting property transfers, the trial court determined that the subsequent purchasers were not entitled to good faith purchaser for value status or to the benefit of the protections afforded to subsequent good faith purchasers for value by N.C.G.S. § 1-108. On appeal, the Court of Appeals held that, even though the initial foreclosure order had been invalid on the grounds of insufficient notice, the property owner had received constitutionally sufficient notice and that both of the subsequent purchasers were entitled to good faith purchaser for value status. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals, in part; reverse that decision, in part; and remand this case to the Superior Court, Mecklenburg County, for consideration of the extent, if any, to which an order of restitution should be entered pursuant to the applicable law.

¶ 2 Respondents Calmore George and his wife, Hygiena Jennifer George, owned a house in Charlotte that is located in the Crossings Community subdivision. The Georges decided to purchase the tract of property in question because their "daughters at that time were approaching college age and the first daughter decided that she wanted to come to North Carolina." After three of the Georges' younger daughters followed their older sister to North Carolina for their college education, the Georges

decided to buy a house in which their daughters could live while obtaining their degrees.

¶ 3 The Georges lived in St. Croix in the United States Virgin Islands, where Ms. George worked as a teacher and an accounting clerk while Mr. George performed various jobs, including property maintenance. The couple's combined adjusted gross income in 2016 was $26,420.00. Although the Georges were full-time residents of St. Croix, they typically visited their daughters at the Charlotte property approximately once or twice each year. More specifically, Ms. George would typically visit the Charlotte property for approximately one month during the summertime, when she was on break from her teaching responsibilities, while both Mr. and Ms. George would visit the property for a few weeks around Christmas. The members of the family who lived in the home full-time took care of paying the bills and addressing other issues relating to the property, including paying the water and energy bills that were mailed to the house.

¶ 4 On 22 August 2016, the Crossings Community Association, which served as the homeowners' association for the development in which the Georges' house was located, filed a claim of lien against the property relating to unpaid homeowners' association fees in the amount of $204.75. In its claim of lien, the Association stated that, if the outstanding fees remained unpaid, it would initiate foreclosure proceedings in accordance with the applicable provisions of North Carolina law. However, the Georges did not pay the outstanding homeowners' association fees.

¶ 5 On 11 October 2016, the trustee for the Association filed a notice of hearing stating that the Association intended to foreclose upon the property for the purpose of collecting the unpaid fees. The Association attempted to serve this notice of foreclosure upon the Georges in a variety of ways, including the use of both regular and certified mail, return receipt requested, directed to the St. Croix address listed on the deed by means of which the Georges had acquired the property and by both regular mail and certified mail directed to the address of the Charlotte property. However, the Association did not successfully effectuate service upon the Georges through the use of the mails because there was no mail receptacle at the St. Croix address and because the receipts for the mailings to the Charlotte address were never returned.

¶ 6 In addition, the Association attempted to effectuate personal service upon the Georges at the Charlotte property. On 12 October 2016, Deputy Sheriff Shakita Barnes of the Mecklenburg County Sheriff's Office personally served the notice of foreclosure upon a woman who

identified herself as Hygiena Jennifer George at the Charlotte property and completed returns of service in which she stated that she had personally served Ms. George and that she had served Mr. George by leaving copies with Ms. George, a person of suitable age and discretion who resided at Mr. George's dwelling house or usual place of abode. The person upon whom Deputy Barnes actually effectuated service was, however, the Georges' eldest daughter, Jeanine George, who had claimed to be Ms. George at the time that she was served with the notice of foreclosure by Deputy Barnes. On 13 October 2016, the trustee filed the returns of service completed by Deputy Barnes and an affidavit indicating that the Crossings Community Association had unsuccessfully attempted to serve the Georges by mail.

¶ 7 On 9 December 2016, the office of the Clerk of Superior Court, Mecklenburg County, entered an order permitting the nonjudicial foreclosure sale to go forward, and scheduling a foreclosure sale relating to the property for 12 January 2017. On 12 January 2017, KPC Holdings purchased the property at auction for $2,650.22. On 3 February 2017, the trustee executed a foreclosure deed transferring ownership of the property to KPC Holdings. On 21 March 2017, KPC Holdings executed a special warranty deed conveying the property to National Indemnity Group, an entity owned by Laura Schoening for property development purposes, with the sale of the property from KPC Holdings to National Indemnity having been secured by a promissory note and deed of trust in the amount of $150,000.00.

¶ 8 The Georges claimed to have had no notice of the unpaid homeowners' association fees and subsequent foreclosure proceeding until 10 March 2017, when one of their daughters called them for the purpose of reporting that they had been ordered to vacate the property. Upon receiving this information, Ms. George sent an e-mail to the Association's attorney in which she claimed that she and Mr. George did not understand why they were being dispossessed of their property and expressed the belief that she and Mr. George did not have any outstanding mortgage payments or owe any other debts associated with the property.

¶ 9 On 18 April 2017, the Georges filed a motion pursuant to N.C.G.S. § 1A-1, Rule 60(c), in which they sought to have the order of foreclosure and all other related proceedings and transactions declared null and void. In their motion for relief from judgment, the Georges claimed that they had not received the notice that was statutorily required in foreclosure proceedings, that the return of service completed by Deputy Barnes was erroneous, and that the order authorizing the foreclosure sale and the subsequent conveyances should be vacated. On 17 July

2017, the trial court entered an order allowing an intervention motion filed by National Indemnity and making both National Indemnity and KPC Holdings parties to this proceeding.

¶ 10 On 17 July 2017, the trial court held a hearing for the purpose of considering the issues raised by the Georges' motion for relief from judgment, at which it heard testimony from the Georges and Ms. Schoening, who testified that she had purchased the property from KPC Holdings after having driven past the property and having conducted online research that included an inspection of the applicable property tax payment and prior foreclosure records. Among other things, Ms. Schoening testified that she had learned from the public record that the Georges had purchased the property at a previous foreclosure sale for an amount in excess of $130,000.00 and that, at the time of the foreclosure that was at issue in this case, they owned the property free and clear of any indebtedness, with the exception of the $204.75 amount that was allegedly owed to the Association. In addition, Ms. Schoening testified that her purchase of the property had been secured by a note and deed of trust in the amount of $150,000.00 that was payable to KPC Holdings, that she had invested approximately $50,000.00 in the course of renovating the property as of the date of the hearing, and that she planned to sell the property for $240,000.00 after it had become "retail ready."

¶ 11 On 9 August 2017, the trial court entered an order concluding that Mr. George had not been properly served with the notice of foreclosure given that the property was not his dwelling or usual place of abode. In addition, the trial court further determined that the foreclosure sale had been allowed to proceed despite the lack of personal jurisdiction over Mr. George, so that the foreclosure sale and subsequent conveyances should be invalidated. As a result, the trial court granted the Georges' motion for relief from judgment and declared the deeds transferring the property from the trustee to KPC Holdings and from KPC Holdings to National Indemnity to be null and void. National Indemnity and KPC Holdings noted appeals to the Court of Appeals from the trial court's order granting the Georges' motion for relief from judgment.

¶ 12 On 3 November 2017, KPC Holdings and National Indemnity filed a motion for relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), in which they requested the trial court to vacate the earlier order granting the Georges' motion for relief from judgment on the grounds that they were both good faith purchasers for value and that the Georges had received constitutionally sufficient service of the notice of foreclosure in accordance with the Court of Appeals' then-recent decision in *In re Ackah*, 255 N.C. App. 284 (2017), *aff'd per curiam*, 370 N.C.

594 (2018). On the same date, KPC Holdings and National Indemnity filed a motion with the Court of Appeals in which they requested that this case be remanded to the trial court for the purpose of permitting it to make an indicative ruling concerning whether their motion for relief from the trial court's earlier order should be allowed or denied. The Court of Appeals granted this remand motion on 22 November 2017. On 15 March 2018, the trial court entered an order concluding that neither KPC Holdings nor National Indemnity qualified as a good faith purchaser for value for purposes of N.C.G.S. § 1-108 and that their motion for relief from judgment was denied. KPC Holdings and National Indemnity noted appeals to the Court of Appeals from the trial court's indicative decision.

¶ 13 In seeking relief from the trial court's orders before the Court of Appeals, KPC Holdings and National Indemnity argued that the trial court had erred by failing to join the trustee under the deed of trust between the two of them,[1] by determining that the Georges had not received sufficient notice of the foreclosure sale, and by determining that neither KPC Holdings nor National Indemnity was a good faith purchaser for value. *In re George*, 264 N.C. App. 38, 41 (2019). In addressing the notice-related argument advanced by KPC Holdings and National Indemnity, the Court of Appeals began by recognizing that adequate notice must be provided to the record owners of a tract of property before a foreclosure is permissible and that, in the absence of such notice and "valid service of process, a court does not acquire personal jurisdiction over the [owner] and the [foreclosure] action must be dismissed." *Id.* at 45 (quoting *Glover v. Farmer*, 127 N.C. App. 488, 490 (1997)). The Court of Appeals noted that the valid methods for the service of a notice of foreclosure include the following:

> a. . . . [D]elivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
>
> . . . .
>
> c. . . . [M]ailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

1. As a result of the fact that KPC Holdings and National Indemnity have not brought their claim relating to the trial court's failure to join the trustee as a party forward for our consideration, we will refrain from discussing that issue any further in this opinion.

In re George, 264 N.C. App. at 45–46 (third alteration in original) (quoting N.C.G.S § 1A-1, Rule 4(j)(1)(a), (c) (2017)), the Court of Appeals expressed agreement with the trial court's determination that the trustee had failed to properly serve the notice of foreclosure as required by N.C.G.S. § 1A-1, Rule 4, given that the attempted service "upon [Mr.] George by leaving a copy at the Mecklenburg County property was inadequate because the property was not his dwelling house or usual place of abode." *In re George*, 264 N.C. App. at 47. As a result, the Court of Appeals concluded that "the trial court correctly determined that the foreclosure sale was void due to lack of personal jurisdiction over [Mr.] George." *Id.* at 48.

¶ 14 At that point, the Court of Appeals turned to the argument advanced by KPC Holdings and National Indemnity that they both qualified as good faith purchasers for value entitled to the protections available pursuant to N.C.G.S. § 1-108. *Id.* The Court of Appeals recognized that, if "a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure[,] . . . such restitution may be compelled as the court directs," with "[t]itle to property sold under such judgment to a purchaser in good faith . . . not [being] thereby affected." *Id.* (quoting N.C.G.S § 1-108 (2017)). According to the Court of Appeals, a party qualifies as a good faith purchaser for value for purposes of N.C.G.S. § 1-108 when it "purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith," *id.* at 49 (quoting *Morehead v. Harris*, 262 N.C. 330, 338 (1964)), with this Court's decision in *Swindell v. Overton*, 310 N.C. 707, 713, (1984), serving to establish that a gross inadequacy of purchase price is insufficient, in and of itself, to support a determination that a subsequent purchaser of foreclosed-upon property did not act in good faith. *In re George*, 264 N.C. App. at 49.

¶ 15 In resolving this aspect of the challenge lodged by KPC Holdings and National Indemnity to the trial court's indicative decision, the Court of Appeals relied upon *In re Ackah*, 255 N.C. App. at 288, for the proposition that, even though a property owner cannot normally be divested of his or her property without sufficient notice, he or she can be deprived of the property in question as the result of a foreclosure sale if he or she had "constitutionally sufficient notice" of the pendency of the foreclosure proceeding and the subsequent purchaser was a good faith purchaser for value for purposes of N.C.G.S. § 1-108. *In re George*, 264 N.C. App. at 52. In the Court of Appeals' view, *In re Ackah* held that "constitutional due process does not require that the property owner receive *actual* notice" and that, "where notice sent by certified mail is returned 'unclaimed,' due process requires only that the sender must take *some* reasonable

follow-up measure to provide other notice where it is practicable to do so." *Id.* at 50 (quoting *In re Ackah*, 255 N.C. App. at 288).

¶ 16 A majority of the Court of Appeals applied these principles to the facts of this case by holding that KPC Holdings was a good faith purchaser for value and that the trial court had erred by vacating the foreclosure sale and subsequent transfer from the trustee to KPC Holdings.[2] *In re George*, 264 N.C. App. at 52. In concluding that KPC Holdings was entitled to good faith purchaser for value status, the Court of Appeals noted that:

> No record evidence exists that either KPC Holdings or National Indemnity had actual knowledge or constructive notice of the improper service of the foreclosure notice. No infirmities or irregularities existed in the foreclosure record that would reasonably put KPC Holdings or any other prospective purchaser on notice that service was improper. The sheriff's return of service indicated that personal service was made upon [Ms.] George and that substitute service was accomplished for Calmore George by leaving copies with [Ms.] George. KPC Holdings was entitled to rely upon that record in purchasing the property at the foreclosure sale.

Id. at 50–51. In addition, a majority of the Court of Appeals held that, "[w]hile [Mr.] George did not receive proper Rule 4 notice of the foreclosure sale of the property, as explained above, the Georges did receive constitutionally sufficient notice," noting the fact that the trustee had made multiple attempts to notify the Georges of the pendency of foreclosure proceeding, including attempted personal service, attempted service by certified mail, and e-mail exchanges. *Id.* at 52. Based upon these determinations, the Court of Appeals held that the trial court had abused its discretion by vacating the order authorizing the trustee to conduct a foreclosure sale and the subsequent deeds transferring the property from the trustee to KPC Holdings and from KPC Holdings to National Indemnity. *Id.*

---

2. After determining that, given KPC Holdings' status as a good faith purchaser for value, the trial court had erred by invalidating the deed from the trustee to KPC Holdings, the Court of Appeals noted that it did not need to reach the issue of whether National Indemnity was a good faith purchaser for value as defined by N.C.G.S. § 1-108 in order to necessitate the reversal of the challenged trial court order. *In re George*, 264 N.C. App. 38, 51 (2019).

¶ 17 In a separate concurring opinion, Judge Dillon opined that the purchaser at a foreclosure sale need not pay "valuable consideration" in order to be entitled to the benefit of the protections afforded by N.C.G.S. § 1-108 and, on the contrary, merely needed to "believe[ ] in good faith that the sale was properly conducted." *Id.* at 55 (Dillon, J., concurring). Similarly, Judge Dillon noted that a low purchase price did not suffice, standing alone, to support a decision to overturn a foreclosure sale, citing *Swindell*, 310 N.C. at 713, and asserted that nothing in the record tended to show that KPC Holdings had not purchased the property in good faith. *In re George*, 264 N.C. App. at 55.

¶ 18 In a dissenting opinion, Judge Bryant opined that neither KPC Holdings nor National Indemnity qualified as good faith purchasers for value for purposes of N.C.G.S § 1-108. *Id.* at 55–56 (Bryant, J., concurring in part and dissenting in part). In reaching this conclusion, Judge Bryant recognized that a "gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Id.* at 56 (quoting *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37 (1950)). According to Judge Bryant, the exceedingly low purchase price at which the property had been purchased from the trustee and the lack of proper notice to the Georges sufficed, when taken in combination, to support the trial court's decision to vacate the underlying foreclosure order and the resulting property transfers. *Id.* at 57. In support of her determination that KPC Holdings and National Indemnity had notice of the risk that the notice of foreclosure had not been properly served upon the Georges, Judge Bryant pointed to the fact that, while the record contained adequate evidence relating to the Association's claim of lien against the Georges, "KPC Holdings was on reasonable notice that there were no other liens when it placed a bid of $2,650.22" despite the fact that the property was worth approximately $150,000.00. *Id.* at 56–57. In addition, Judge Bryant noted the existence of "questionable evidence of wrongdoing" on the part of KPC Holdings and National Indemnity and stated that neither party had satisfied its burden of proving that it was an innocent purchaser for value given that KPC Holdings and National Indemnity "were colleagues, dealt with each other in the past, and both made a substantial profit with their respective conveyances of the property." *Id.* at 57. The Georges noted an appeal to this Court from the Court of Appeals' decision based upon Judge Bryant's dissent.

¶ 19 In seeking to persuade us to overturn the Court of Appeals' decision, the Georges have argued that the Court of Appeals majority had

erred by determining that the trial court had abused its discretion by concluding that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to protection pursuant to N.C.G.S. § 1-108.[3] According to the Georges, the "trial court was in the best position to weigh the evidence, determine the credibility of witnesses — including [Ms.] Schoening — and the weight to be given the testimony of the witnesses." In the Georges' view, the information available to KPC Holdings and National Indemnity from an examination of the public records, which included the lack of any deed of trust or other encumbrance applicable to the property other than the Association's claim of lien, and the fact that the Georges did not contest the foreclosure proceeding, sufficed to put KPC Holdings and National Indemnity on constructive notice that the Georges did not know of the existence of the foreclosure proceeding. In addition, the Georges assert that it was "obvious to the trial court" that the owner of National Indemnity had failed to testify honestly and that an "appellate court should not override a trial court's credibility determination absent an abuse of discretion."

¶ 20 According to the Georges, KPC Holdings and National Indemnity are not entitled to the protections available pursuant to N.C.G.S. § 1-108 given that they did not purchase the property "without notice, actual or constructive, of any infirmity" and had not paid valuable consideration for it in good faith, quoting *Goodson v. Goodson*, 145 N.C. App. 356, 363 (2001). The Georges contend that the available public records, including the deed to their property, showed that the Georges had a St. Croix address and owned their property free and clear of any liens and encumbrances, with the exception of the Association's claim of lien, which amounted to only $204.75. In light of this publicly available information, the Georges claim that KPC Holdings and National Indemnity had ample basis for questioning the sufficiency of the service of the foreclosure notice on the grounds that "[s]omeone who otherwise owns a property free and clear of liens or encumbrances would not allow that property to be sold at a foreclosure sale for less than three thousand dollars unless there was a potential problem, e.g., with service," with this case being distinguishable from *In re Ackah* on the grounds that KPC Holdings and National Indemnity had failed to either pay valuable consideration or establish that they had acted in good faith.

---

3. In addition, the Georges argue that the Court of Appeals had erred by distinguishing between constitutionally sufficient notice and sufficient notice for purposes of N.C.G.S. § 1A-1, Rule 4, and finding that they had received constitutionally sufficient notice of the foreclosure proceeding. In view of our determination that neither KPC Holdings nor National Indemnity were good faith purchasers for value entitled to the protections of N.C.G.S. § 1-108, we need not address the merits of the Georges' notice-related arguments.

¶ 21 In seeking to persuade us to uphold the Court of Appeals' decision, KPC Holdings argues that, when a purchaser lacks actual notice of a defect in the underlying foreclosure proceeding, it "may rely on the facial validity of the record in determining that there are no defects in title to the land in question," citing *Goodson*, 145 N.C. App. at 363. In addition, KPC Holdings asserts that a foreclosure proceeding, including service of process, should be presumed effective when "the return shows legal service by an authorized officer, nothing else appearing," quoting *Harrington v. Rice*, 245 N.C. 640, 642 (1957). In view of the fact that the return of service completed by Deputy Barnes indicated that the notice of foreclosure had been personally served upon Ms. George, KPC Holdings argues that it "was entitled to rely on the record's facial validity to purchase the Property with the highest bid at the nonjudicial foreclosure sale." On the other hand, KPC Holdings claims that the Georges' argument that neither KPC Holdings nor National Indemnity are entitled to innocent purchaser for value status "because [the Georges] had too much equity in the Property for which KPC Holdings purportedly bid too little at the sale . . . contravenes applicable precedent." Finally, KPC Holdings claims that acceptance of the Georges' contention that it and National Indemnity had constructive notice that the Georges did not know of the existence of the proceeding "would mean that no one could ever bid on real property in a nonjudicial foreclosure proceeding initiated in this State to satisfy a lien constituting a fraction of the property's value" and would "defy the General Assembly's intent behind Chapter 45 of the North Carolina General Statutes and subvert basic economic and free-market principles."

¶ 22 Similarly, National Indemnity argues that it was a good faith purchaser for value such that its title to the property cannot be disturbed by means of an order granting a motion for relief from judgment. National Indemnity asserts that, even if this Court determines that KPC Holdings was not a good faith purchaser entitled to the protections available pursuant to N.C.G.S. § 1-108, "KPC Holdings' designation as a good faith purchaser is irrelevant where National Indemnity Group was a subsequent good faith purchaser that paid valuable consideration" and National Indemnity "took no part in the foreclosure sale and purchased the property for a $150,000 note secured by a recorded deed of trust." In National Indemnity's view, the Georges' argument "ask[s] bidders at foreclosure sales to perform greater due diligence than the foreclosing entity and the Sheriff." Finally, National Indemnity contends that N.C.G.S. § 1-108, as interpreted in *In re Ackah*, "constrains the court from undoing good faith conveyances" and claims that the Georges have failed to direct the Court's attention to any instance in which a subse-

quent conveyance was invalidated in the absence of an allegation and proof of fraud.

¶ 23 N.C.G.S. § 1A-1, Rule 60(b), allows a party to obtain relief from a final judgment or order on a number of different grounds, including instances in which "[t]he judgment is void" or "[a]ny other reason justifying relief from the operation of the judgment" exists. N.C.G.S § 1A-1, Rule 60(b)(4), (6) (2019). The authority granted to a trial judge by N.C.G.S. § 1A-1, Rule 60(b) "is equitable in nature and authorizes the trial court to exercise its discretion in granting or denying the relief sought." *Howell v. Howell*, 321 N.C. 87, 91 (1987) (citing *Kennedy v. Starr*, 62 N.C. App. 182 (1983)). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion," *Sink v. Easter*, 288 N.C. 183, 198 (1975), with such an abuse of discretion having occurred only when the trial court's determinations are "manifestly unsupported by reason," *Davis v. Davis*, 360 N.C. 518, 523 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129 (1980)). As a result, "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Davis*, 360 N.C. at 523 (quoting *White v. White*, 312 N.C. 770, 777 (1985)).

¶ 24 N.C.G.S. § 1-108 provides that

> [i]f a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected.

N.C.G.S. § 1-108 (2019). A "purchaser in good faith" or an "innocent purchaser" is a person who "purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead*, 262 N.C. at 338 (quoting *Lockridge v. Smith*, 206 N.C. 174, 181 (1934)). An innocent purchaser lacks notice of any infirmity or defect in the underlying sale when "(a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect[s]." *Swindell*, 310 N.C. at 714–15 (quoting Osborne, Nelson & Whitman, Real Estate Finance Law § 7.20 (1st ed. 1979)). "The burden of proof of the 'innocent

purchaser' issue is upon those claiming the benefit of this principle. . . ." *Morehead*, 262 N.C. at 338 (citing *Hughes v. Fields*, 168 N.C. 520 (1915)).

¶ 25 Although this Court has clearly held that "mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, . . . where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity." *Foust*, 233 N.C. at 37. In *Williams v. Chas. F. Dunn & Sons Co.*, 163 N.C. 206, 213 (1913), the purchaser at a foreclosure sale bought the tract of property in question at approximately one-eighth of its actual value following a sale that was affected by several deficiencies and irregularities. In that instance, we determined that the discrepancy between the purchase price and the value of the relevant property was "calculated to cause surprise and to make one exclaim: 'Why, he got it for nothing! There must have been some fraud or connivance about it,' " *id.* (quoting *Worthy v. Caddell*, 76 N.C. 82, 86 (1877)), and held that "[s]uch an apparently unfair sale should not be permitted to stand unless the strict right of the purchaser, under the law, requires us to sustain it," *Williams*, 163 N.C. at 213.

¶ 26 Similarly, in *Swindell*, 310 N.C. 707, the prior property owners challenged the validity of the sale of the relevant property in connection with a foreclosure proceeding by alleging that the sale had resulted from an upset bid of $47,980.00 in spite of the fact that the property had a fair market value that was closer to $70,000.00. In addition, the prior property owners argued that the trustee had failed to properly conduct the resulting foreclosure sale given that the trustee had sold the multi-tract parcel as a single entity even though higher bids would have resulted from a decision to sell each tract separately. *Id.* at 713–14. In analyzing this set of circumstances, we stated that

> [a]llegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale. *Foust* stands for the proposition that it is the materiality of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity.

Id. at 713 (citations omitted), before holding that the "defect in [the] foreclosure sale render[ed] the sale voidable," *id.* at 714, and stating that the purchaser of the property was not entitled to good faith purchaser for value status given that he or she "had notice of the significant defect in the proceeding" based upon the fact that the "advertisement of sale itself disclosed separate debts secured by two separate deeds of trust on two separate tracts of land," *id.* at 715.

¶ 27 A careful analysis of our prior decisions relating to the issue of when a party to a foreclosure sale is and is not entitled to good faith purchaser for value status demonstrates that, in order for a subsequent purchaser to be denied access to the benefits that are otherwise available to good faith purchasers for value, the record must show the existence of some additional irregularity or defect in the proceedings leading to the challenged foreclosure sale in addition to an inadequacy of the price that was paid by the purchaser. Although KPC Holdings and National Indemnity argue that no such additional procedural defect exists in this instance given that they were entitled to rely on the facial validity of the return of service completed by Deputy Barnes, which indicated that service had been effectuated upon the Georges by personal service upon Ms. George and that the trial court had no justification for concluding that either subsequent purchaser had actual or constructive notice of any other irregularity or defect in the sale, we do not find these arguments persuasive.

¶ 28 In the order granting the motion for relief from judgment filed by KPC Holdings and National Indemnity, the trial court found as a fact that

> 6. The Property was not encumbered by any other liens or mortgages at the time the Association conducted the foreclosure sale.
>
> 7. . . . [T]he January 12, 2017 non-judicial foreclosure sale occurred without proper service on Mr. George.
>
> 8. KPC Holdings purchased the Property for $2,650.22 at the January 12, 2017 non-judicial foreclosure sale.
>
> . . . .
>
> 10. The respective principals of KPC Holdings and National Indemnity Group are colleagues that have known each other for several years and have had transactions in the past. . . .

> 11. The consideration National Indemnity Group provided to KPC Holdings for the conveyance of the Property was a $150,000.00 promissory note. . . .
>
> 12. National Indemnity Group planned to sell the Property for $240,000.00.

According to the record developed before the trial court upon which these findings of fact rested, Ms. Schoening testified that she had viewed the "special proceedings file" in this case, which indicated that the property was not encumbered by any lien or mortgage other than the Association's claim of lien before agreeing to purchase the property from KPC Holdings. At the conclusion of the hearing, the trial court stated that

> I have a hard time believing [Ms. Schoening]. When she was asked questions about the terms of this Note she couldn't—she couldn't remember. I don't believe that one minute. It has, in fact, cast[ ] a cloud over her entire testimony. I'm not sure if I would believe her if she said it were daylight right now outside. So this notion that she's innocent, this notion that she's not being treated fairly, I have a hard time swallowing that pill.

In addition, the trial court noted that it did not believe Ms. Schoening's testimony regarding the nature and extent of her relationship with the owner of KPC Holdings or her statement that she could not recall how many properties she had purchased. In reaching this conclusion, the trial court opined that, "[w]hen it was an answer that would potentially benefit her it was right out," but when the answer would not benefit her, Ms. Schoening would claim an inability to remember the relevant facts.

¶ 29 A careful examination of the trial court's findings of fact and the evidence contained in the record satisfies us that the trial court did not abuse its discretion in determining that KPC Holdings and National Indemnity were not entitled to good faith purchaser for value status. In spite of the fact that the trial court did not explain in so many words why it concluded that KPC Holdings and National Indemnity did not qualify as good faith purchasers for value entitled to protection pursuant to N.C.G.S. § 1-108, the record provides ample support for this conclusion.

¶ 30 Although the return of service completed by Deputy Barnes indicated that Mr. George had been served when a copy of the notice of fore-

closure was delivered to a person of suitable age and discretion at his "dwelling house or usual place of abode," the deed by which the Georges obtained title to the property showed that they resided in St. Croix. In addition, the affidavit that the trustee executed for the purpose of establishing that valid service had been effectuated upon the Georges indicated that, even though copies of the notice of foreclosure had been sent to them using both regular and certified mail, return receipt requested, at their St. Croix address, neither of these mailings had reached their designated recipients. Thus, there was ample basis upon the face of the record for questioning whether the delivery of a copy of the notice of foreclosure to someone other than Mr. George at the Charlotte property constituted valid service upon Ms. George.

¶ 31 In addition, an inspection of the information available on the public record showed that the Georges owned the property free and clear of any encumbrance other than the $204.75 amount that they owed to the Association. After testifying that she was familiar with the foreclosure process and that she had purchased property at foreclosure sales "[m]any times" in the past, Ms. Schoening asserted that she typically performed online research relating to the relevant properties before agreeing to purchase them in foreclosure proceedings, with her research having typically included an examination of the relevant property tax and prior foreclosure records, and that she had conducted such research prior to purchasing the Georges' property from KPC Holdings. In addition, Ms. Schoening acknowledged that she could have gleaned from the record that the Georges had previously purchased the home for more than $100,000.00 and had allowed it to be foreclosed upon without opposition based upon an apparent failure to pay the relatively small amount of $204.75. Finally, Ms. Schoening testified that the owner of KPC Holdings was someone whom she considered a "colleague," that she had periodically purchased property that had been foreclosed upon from KPC Holdings, that she considered the owner of KPC Holdings to be a "respected real estate professional," and that it was possible that she had sold properties to him in the past but she could not recall. As we understand the record, the testimony before the trial court clearly suggests that a grossly inadequate price had been paid for the property at the hearing and that KPC Holdings and National Indemnity had a history of dealing in foreclosed upon properties together. The nature of the prior dealings between KPC Holdings and National Indemnity, the fact that the Georges appeared to have "lost" the property over $204.75, and Ms. Schoening's lack of credibility provide further indication that KPC Holdings and National Indemnity had reason to question the sufficiency of the notice that the Georges had received.

¶ 32 As a result, a careful review of the record shows that the trial court had a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and that both KPC Holdings and National Indemnity had ample reason to question the sufficiency of the notice of the pendency of the foreclosure proceeding that the Georges had received. In light of this state of the record, we are unable to say that the trial court's decision to find that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to the protections enunciated in N.C.G.S. § 1-108 lacked any reasonable basis. As a result, we hold that, while the Court of Appeals correctly affirmed the trial court's determination that proper service of process had not been effectuated upon Mr. George, *In re George*, 264 N.C. App. at 47, it erred by concluding that the trial court had abused its discretion by determining that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to the protections available pursuant to N.C.G.S. § 1-108. On the other hand, however, the trial court did err by failing to consider the issue of whether, given its decision to invalidate the results of the foreclosure proceeding and the resulting property transfers between the trustee, KPC Holdings, and National Indemnity, an order requiring the payment of restitution as authorized by N.C.G.S. § 1-108 should have been entered. As a result, for all of these reasons, the decision of the Court of Appeals is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for consideration of the issue of whether an award of restitution as authorized by N.C.G.S. § 1-108 would be appropriate and the entry of an appropriate order embodying its resolution of that issue.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

IN RE BROOKS

[377 N.C. 146, 2021-NCSC-36]

IN RE INQUIRY CONCERNING A JUDGE, NO. 19-225
WILLIAM F. BROOKS, RESPONDENT

No. 480A20

Filed 16 April 2021

Judges—misconduct—serving as executor for non-relatives' estates—failure to report substantial extra-judicial income —suspension

The Supreme Court suspended a district court judge from office for one month where he violated Canons 1, 2A, 5D, and 6C of the Code of Judicial Conduct by serving as executor for the estates of two former clients who were not members of his family, collecting substantial fees as a result, and failing to properly report that extra-judicial income. The Court held that the judge's conduct constituted willful misconduct that was prejudicial to the administration of justice and that brought the judicial office into disrepute.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 27 October 2020 that respondent William F. Brooks, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Three, be censured for conduct in violation of Canons 1, 2A, 5D, and 6C; and for conduct prejudicial to the administration of justice and for willful misconduct in office in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court on 17 February 2021 without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No counsel for Judicial Standards Commission or Respondent.

ORDER OF SUSPENSION

¶ 1 The Judicial Standards Commission has unanimously recommended that this Court should censure Judge William F. Brooks for violations of Canons 1, 2A, 5D, and 6C amounting to conduct that was prejudicial to the administration of justice and that constituted willful misconduct in office. Pursuant to N.C.G.S. § 7A-376 and -377, it is our duty first to independently review the record to determine whether the Commission's findings of fact are supported by clear and convincing evidence and whether the findings support the conclusions of law; and then to exercise our independent judgment to consider whether the Commission's proposed sanctions are appropriate. *See In re Murphy*, 376 N.C. 219, 235 (2020) (citing *In re Badgett*, 362 N.C. 202, 207 (2008)).

¶ 2 On 17 January 2020, Counsel for the Commission filed a Statement of Charges against respondent alleging that he engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office "by serving as executor for the estates of two former clients that were not members of respondent's family, collecting substantial fees or commissions for such service, and failing to properly report that income." The Commission charged that these actions in general violated Canons 1 and 2A of the North Carolina Code of Judicial Conduct. The Commission further charged that respondent's actions in serving as executor of the estates for people not members of his family violated Canon 5D and that his failure to report extra-judicial income in excess of $2,000 violated Canon 6C.

¶ 3 Respondent filed a response on 5 March 2020 admitting that he served as a personal representative for the estates of two former family friends, who were clients, not members of his family; that he collected fees for such service; and that he inadvertently failed to disclose the receipt of said fees on his 2016 Judicial Income Report and his Statement of Economic Interest for the same year. On 13 May 2020, Counsel for the Commission and Counsel for respondent filed a Stipulation and Agreement for Stated Disposition which contained the following stipulated facts:

> 1. On or about April 3, 2009, Respondent, prior to his appointment as District Court Judge and while still in engaged in the private practice of law, prepared and executed wills for two clients, Robert and Mary Grace Crawford. Each will also designated the Respondent as the executor of the respective will. Respondent had no familial relationship with either Robert or Mary Grace Crawford.
>
> 2. On or about October 2, 2013, Respondent was appointed to serve as a District Court Judge in Judicial District 23. Respondent received a copy of the Code of Judicial Conduct and ethics training during Orientation for New District Court Judges in early December 2013.
>
> 3. On or about March 9, 2014, Robert Crawford passed away. Mary Grace Crawford subsequently died on November 29, 2014. While serving as District Court Judge, Respondent also served as executor of both wills. In that capacity,

Respondent admitted both wills to probate and filed inventories and accountings with Wilkes County Clerk of Superior Court until both estates were closed in 2017.

4. At the time Respondent carried out his functions as the executor of the Crawford estates, Respondent knew or should have known that the Code of Judicial Conduct prohibited him from serving as the executor or any type of fiduciary for individuals other than members of Respondent's family. Respondent had known the Crawfords for many years and considered them to be like family, but acknowledges he was not related to them by blood or marriage.

5. During the week of March 14, 2016, Respondent was compensated with a $2,550 commission for serving as executor of Robert Crawford's estate and a $85,320.77 commission for serving as executor of Mary Grace Crawford's estate.

6. Respondent failed to disclose the extra-judicial income he earned from serving as the executor for Robert Crawford and Mary Grace Crawford in 2016 on his Canon 6 Extra-Judicial Income report for the 2016 calendar year and on his Statement of Economic Interest (SEI) filed with the State Ethics Commission for the 2016 calendar year.

7. Respondent knew or should have known that he was required to report the extra-judicial income he received from serving as an executor on both his Canon 6 and SEI disclosures. Respondent has now amended both his Canon 6 and Extra-judicial Income Report and SEI for 2016 calendar year to reflect his additional income.

8. The parties stipulate that the foregoing findings are established by clear and convincing evidence and agree that the factual and evidentiary stipulations shall constitute the entire evidentiary record in this matter for consideration by the

hearing panel and that no other evidence will be introduced at the disciplinary recommendation hearing by either party.

The parties further made the following Stipulations of Violations of the Code of Judicial Conduct:

1. Respondent acknowledges that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that he violated the following provisions of the North Carolina Code of Judicial Conduct:

    a. he failed to personally observe appropriate standards of conduct to ensure that integrity of judiciary is preserved in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

    b. he failed to respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A North Carolina Code of Judicial Conduct;

    c. he served as executor, administrator, trustee, guardian, or other fiduciary for estates of people who were not a member of Respondent's family in violation of Canon 5D of the North Carolina Code of Judicial Conduct; and

    d. he failed to report extra-judicial income in excess of $2,000 in violation of Canon 6C of North Carolina Code of Judicial Conduct.

2. Respondent further acknowledges that the stipulations contained herein are sufficient to prove by clear and convincing evidence that his actions constitute willful misconduct in office and that he willfully engaged in misconduct prejudicial to the administration of justice which brought the judicial office in disrepute in violation of N.C. Gen. Stat.§ 7A-376.

¶ 4 The Judicial Standards Commission held a hearing in this matter on 11 September 2020 at which the above stipulations were read into the record by the Commission's counsel. Respondent, who was present and represented by counsel, made a brief statement accepting responsibility for his actions, acknowledging they were wrong, and apologizing for his actions while also explaining that "I just did not realize for whatever reason that this could not be done."

¶ 5 The Commission issued its Recommendation of Judicial Discipline on 27 October 2020. Based on the stipulated facts and the associated exhibits, the Commission made findings of fact that include verbatim the stipulated facts as well as additional detail about respondent's completion of the required Canon 6 Report and SEI. Specifically, the Commission found that in his Canon 6 Report, respondent "affirmatively indicated 'None' in the column asking him to identify any source of extra-judicial income of more than $2,000 for 2016. On his SEI "No Change Form" for the calendar year 2016, respondent "affirmatively acknowledged that he read and understood N.C.G.S. § 138A-26 regarding concealing or failing to disclose material information and further acknowledged that knowingly concealing or failing to disclose information that is required to be disclosed is a Class I misdemeanor."

¶ 6 Based on these findings of fact, the Commission made the following Conclusions of Law:

> 1. Canon 5D of the Code of Judicial Conduct expressly prohibits judges from serving as "the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties." The Commission concludes that Respondent violated Canon 5D by serving as the executor of the two Crawford estates notwithstanding that fact that he knew or should have known that such service was expressly prohibited.
>
> 2. Canon 6C of the Code of Judicial Conduct requires judges to make a public report each year of "the name and nature of any source or activity from which the judge received more than $2,000 in income during the calendar year for which the report is filed." Canon 6C ensures "transparency in a judge's financial and remunerative activities outside of the judicial

office to ascertain potential conflicts of interest, avoid corruption and maintain public confidence in the impartiality, integrity and independence of the state's judiciary." *In re Mack*, 369 N.C. 236, 242, 794 S.E.2d 266, 270 (2016) (adopting the Commission's findings and conclusions). The Commission concludes that Respondent violated Canon 6C by affirmatively representing on his Canon 6 Report that he had no outside income to report for 2016 when he knew that he had received nearly $90,000 in outside income due to his service as the executor of the Crawford estates.

3. Canon 2A of the Code of Judicial Conduct requires that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." As a judge of the General Court of Justice, Respondent is a "covered person" under the State Government Ethics Act and is required to file a Statement of Economic Interest (SEI) with the State Ethics Commission by April 15 of each year. *See* N.C.G.S. §138A-3(21), § 138A-22. In executing his SEI "No Change Form" on March 31, 2017 under penalty of perjury, Respondent affirmatively represented that he had no changes in income to report for 2016, acknowledged that he read and understood N.C.G.S. §138A-26 regarding concealing or failing to disclose material information and further acknowledged that knowingly concealing or failing to disclose information that is required to be disclosed is a Class 1 misdemeanor. At the time Respondent made those representations, he knew he had earned nearly $90,000 in additional income in 2016. By failing to disclose his outside income on the SEI as required by state law, Respondent failed to "respect and comply with the law" and further failed to conduct himself "in a manner that promotes public confidence in the integrity . . . of the judiciary" and therefore violated Canon 2A of the Code of Judicial Conduct.

4. Canon 1 of the Code of Judicial Conduct requires that a judge must "participate in establishing,

maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved." The Commission concludes that Respondent violated Canon 1 because he failed to observe appropriate standards of conduct to preserve the integrity of the judiciary when he failed to disclose his significant outside income in 2016 on both his Canon 6 Form and SEI when he knew that such reporting was required under the Code of Judicial Conduct and state law, respectively.

5. The Preamble to the Code of Judicial Conduct provides that a "violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina." In addition, Respondent has stipulated not only to his violations of the Code of Judicial Conduct, but also to a finding that his conduct amounted to conduct prejudicial to the administration of justice and willful misconduct in office. The Commission in its independent review of the stipulated facts and exhibits and the governing law also concludes that Respondent's conduct rises to the level of conduct prejudicial to the administration of justice and willful misconduct in office.

6. The Supreme Court defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." *Id.* at 305, 226 S.E.2d at 9. As such, rather than evaluate the motives of the judge, a finding of conduct prejudicial to the administration of justice requires an objective review of "the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *Id.* at 306, 226 S.E.2d at 9 (internal citations

and quotations omitted). Respondent's objective conduct in impermissibly serving as an executor for the Crawford estates, collecting nearly $90,000 in fees for such service and then affirmatively representing on his Canon 6 Report that he had no outside income to report, as well as his action in affirmatively filing a "No Change Form" with the State Ethics Commission that concealed his income, constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Such conduct could reasonably be perceived as an attempt to hide from public scrutiny the significant income he received from engaging in an activity expressly prohibited by the Code of Judicial Conduct.

7. The Supreme Court in *In re Edens* defined willful misconduct in office as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, those elements need not necessarily be present." 290 N.C. at 305, 226 S.E.2d at 9. As further set forth by the Supreme Court in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), a judge's "specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." 293 N.C. at 248, 237 S.E.2d at 255 (internal citations omitted). The undisputed facts at issue in this matter establish that Respondent's conduct was the result of more than a mere error of judgment or act of negligence. Even assuming Respondent did not act in bad faith in violating Canon 5D (notwithstanding his admission that he received a copy of the Code of Judicial Conduct and attended training on it as a new judge), Respondent without question knew that as a judge of the General Court of Justice, the duties of his judicial office required him to file annual reports that would disclose for public scrutiny his sources of outside income. Despite earning nearly $90,000 in extra income in 2016, Respondent

> in his capacity as a judicial officer affirmatively and knowingly represented in public financial disclosure that he had no new reportable income. Such conduct amounts to willful misconduct in office.

As mitigating factors, the Commission found that respondent cooperated, admitted error and showed remorse. Additionally, as the Commission found, the conduct at issue here appears to be a single event and not a pattern of recurring misconduct. Subsequent to the Statement of Charges, Respondent amended the public reports at issue to reflect his outside income for 2016. The Commission found as aggravating factors the fact that the amount of outside income was large, making his failure to disclose it particularly egregious, and the fact that the income came from activity expressly prohibited in Canon 5D of the Code of Judicial Conduct. In light of the findings of fact and conclusions of law, and taking into account the mitigating and aggravating factors, the Commission recommended that respondent be censured.

¶ 7 In this matter, we proceed as a court of original jurisdiction rather than an appellate court. *In re Clontz*, 376 N.C. 128, 140 (2020) (citing *In re Hill*, 357 N.C. 559, 564 (2003)). We are not bound by the Commission's recommendations, but rather must exercise our own independent judgment when considering the evidence. *Id.* (citing *In re Nowell*, 293 N.C. 235, 244 (1977)). Here, the Commission's findings were based on stipulated facts and exhibits, and they are uncontested. After reviewing the full record, we conclude that the Commission's findings of fact are supported by clear and convincing evidence, and we adopt them as our own without exception.

¶ 8 We also adopt the Commission's conclusions of law as appropriately supported by those facts. Both the prohibition on serving as a personal representative for the estate of a non-family member and the reporting requirements for extra-judicial income are explicit in the relevant governing authorities and respondent's failure to abide by them constitutes "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b).

¶ 9 Where we depart from the Commission is in the determination of an appropriate resolution. We agree with the Commission that a public reprimand is not appropriate because the misconduct in this matter is not "minor." *See* N.C.G.S. § 7A-374.2(7) (public reprimand appropriate where misconduct is minor). And we appreciate the mitigating factors that exist here, particularly concerning defendant's cooperation with the

Commission and his near-immediate acknowledgment of the impropriety of his conduct.

¶ 10 Nevertheless, we must view this matter keeping in mind that the central purpose of the Code of Judicial Conduct, as articulated in the Preamble, is to uphold an "independent and honorable judiciary" for the people of North Carolina. In *In re Mack*, 369 N.C. 236 (2016), where the respondent judge was publicly reprimanded for failing to report non-judicial income, the activity the judge engaged in, namely renting residential property, was not an activity that itself is prohibited conduct. Judges are permitted under the Code of Judicial Conduct to own and realize a profit from rents, so long as the income is properly disclosed. Here, the Code of Judicial Conduct explicitly prohibits the activity that produced the non-reported income. Further, the estates were settled in respondent's own judicial district with respondent seeking and receiving a significant commission for serving as executor. This is an additional aggravating factor that created the appearance of a lack of judicial independence. *Cf. In re Badgett*, 362 N.C. 202, 209 (2008) (imposing a sixty-day suspension where some of the conduct occurred in the courtroom "which gave rise to the unavoidable inference that [the judge] sought to use the powers of his position to obtain a personal favor which was beyond the legitimate exercise of his authority."). Respondent's conduct here was a willful violation that was prejudicial to the administration of justice and brought the judicial office into disrepute.

¶ 11 In *In re Chapman*, 371 N.C. 486 (2018), this Court imposed a thirty-day suspension even though the conduct in question did not result in a financial gain for the judge, and where the judge cooperated with the Commission, entered into a stipulation of facts, took responsibility for his actions, and expressed remorse. *Id.*, 371 N.C. at 496. Nevertheless, by unreasonably delaying for five years his ruling on a motion for permanent child support, the judge in that case committed egregious misconduct requiring more than a censure.

¶ 12 Similarly, in *In re Badgett*, this Court went beyond the Commission's recommendation of censure to impose a suspension because the judge's misconduct was "of a significantly greater magnitude than that present in other recent cases where we have held censure to be appropriate." 362 N.C. at 208; *see also In re Hill*, 357 N.C. 559 (2003) (censuring judge for verbally abusing an attorney and for sexual comments and horseplay); *In re Brown*, 356 N.C. 278 (2002) (censuring judge when on two occasions, the judge caused his signature to be stamped on orders for

which he did not ascertain the contents and effect); *In re Stephenson*, 354 N.C. 201 (2001) (censure imposed when the judge solicited votes for his reelection from the bench); *In re Brown*, 351 N.C. 601 (2000) (censure appropriate when the judge consistently issued improper verdicts).

¶ 13 In the circumstances of this case it is our judgment that, after weighing the severity of defendant's conduct with his candor, cooperation, remorse, and otherwise good character, a one-month suspension is appropriate. At the conclusion of the suspension, respondent may resume the duties of his office.

¶ 14 The Supreme Court of North Carolina orders that respondent William F. Brooks be, and is hereby, SUSPENDED without compensation from office as a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Three, for THIRTY DAYS from the entry of this order for conduct in violation of Canons 1, 2A, 5D, and 6C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 16th day of April 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

STATE v. MEADER

[377 N.C. 157, 2021-NCSC-37]

STATE OF NORTH CAROLINA
v.
FAYE LARKIN MEADER

No. 49A20

Filed 16 April 2021

Criminal Law—defenses—voluntary intoxication—jury instructions

In a trial for felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen property, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication where, although defendant appeared to be intoxicated and her actions were periodically unusual at the time of her arrest, there was no substantial evidence that she was utterly incapable of forming specific intent. Defendant did not slur her speech, was able to give biographical information, made appropriate responses to a law enforcement officer's questions, was able to walk under her own power and navigate a flight of stairs with her hands cuffed behind her back, and was able to follow directions.

Justice HUDSON dissenting.

Justices MORGAN and EARLS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 446, 838 S.E.2d 643 (2020), finding no error after appeal from judgments entered on 19 December 2018 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, *Attorney General*, *by Matthew Baptiste Holloway*, *Assistant Attorney General*, *for the State-appellee.*

Bonnie Keith Green for defendant-appellant.

BERGER, Justice.

¶ 1 On December 19, 2018, a Guilford County jury found defendant Faye Larkin Meader guilty of felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen

property.[1] Defendant received a split sentence, and she was placed on supervised probation. The Court of Appeals determined that the trial court did not err when it declined to instruct the jury on voluntary intoxication. Defendant appeals.

I. Factual and Procedural Background

¶ 2 At approximately 2:00 p.m. on November 22, 2017, defendant arrived at a mental health counseling center in Greensboro, North Carolina. Law enforcement was contacted, and dispatch was informed that defendant was behaving as if she was intoxicated.

¶ 3 Earlier that afternoon, a family arrived for an appointment at the same counseling center. When the family returned to their vehicle after the appointment, they noticed that the driver's side door was open, and items were missing from their vehicle. Among the missing items were an ammunition clip, a pair of sunglasses, and a drink koozie. In addition, a soda can, which did not belong to any of the family members, had been placed in a cupholder. The husband called law enforcement to report the incident. The wife returned to the counseling center, where she observed defendant drinking soda out of a cup. The wife recognized defendant because they had attended school together.

¶ 4 The husband returned to the counseling center and informed an employee that someone had broken into his vehicle. He asked if anyone had "seen anything weird." Defendant, who was still in the lobby of the counseling center at the time, "stood up and came over to where [the family was] and started talking" to them. Defendant informed the husband that she knew who broke into the car and provided him with a name. When the husband informed defendant that law enforcement had been contacted, defendant got "irate" and said, "no cops."

¶ 5 When the husband walked past defendant to exit the counseling center, he "smelled alcohol somewhere." Two other witnesses stated that defendant "appeared to be" or "seemed" intoxicated.

¶ 6 Caterina Sanchez, a therapist at the counseling center, testified that defendant "was disruptive in terms of not wanting to leave and not really listening to us [b]ut she . . . wasn't misbehaving or anything like that." Ms. Sanchez testified that because of defendant's behavior, Ms. Sanchez decided to call law enforcement and Chris Faulkner, the owner of the counseling center.

---

1. The trial court arrested judgment on the possession of stolen goods conviction.

¶ 7 Mr. Faulkner testified that, although defendant was "agitated," she "was answering the [law enforcement officers'] questions . . . [and was being] fairly cooperative." Mr. Faulkner advised defendant that she was banned from the property; when asked if she understood, defendant replied, "yes, sir."

¶ 8 When officers arrived at the counseling center, they asked defendant why she was there. Defendant told them her father passed away the previous month and that she had been the victim of a domestic violence incident the day before. Defendant removed her pants to show officers a bruise on her thigh.

¶ 9 As officers escorted defendant from the center, she became agitated and stated that she needed to collect her shoes, bra, and purse. When defendant failed to leave the premises as instructed, defendant was handcuffed and escorted out. Defendant navigated a flight of stairs without assistance while her arms were handcuffed behind her back.

¶ 10 A search of the premises failed to reveal missing property, and officers were prepared to release defendant when they noticed a shiny object in defendant's jacket pocket. Defendant told officers that the object was a cellphone, but she pulled the missing ammunition clip from her pocket. Defendant was then arrested for felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen property. Once at the police station, the stolen drink koozie was located in defendant's jacket pocket and the stolen sunglasses were found on the floorboard of the patrol car.

¶ 11 On September 24, 2018, defendant was indicted on one count of felony breaking or entering a motor vehicle, one count of misdemeanor larceny, and one count of misdemeanor possession of stolen property. On December 7, 2018, defendant gave notice of her intent to offer the defense of voluntary intoxication. On December 17, 2018, defendant's case came on for trial. The trial court denied defendant's request for a voluntary intoxication jury instruction. On December 19, 2018, the jury found defendant guilty on all charges. Defendant entered notice of appeal.

¶ 12 In denying defendant's request for the instruction on voluntary intoxication, the trial court stated:

> That will be denied[.] . . . [T]he [c]ourt has listened to all of the testimony intently. I also reviewed State's Exhibit Number 1, which was admitted without objection. And—and there are three videos on State's 1. The first video clearly shows the Defendant, and I

understand that the witnesses in the light most favorable to the Defendant have testified that the Defendant was intoxicated. However, during the course of the video, I could hear the Defendant's words. She was not slurring her words. She was speaking in easily understandable English. There were many questions that were asked of her to which she was responsive. It was clear that she was responsive and was aware of what was going on around her.

For instance, they asked her how she got there, and she said, well, they brought me. It was an appropriate response to the question. She later identified, or attempted to identify the name of the people that brought her, but in any event, there are many other indications that she was responsive and aware of what was going on.

For instance, on the video you clearly hear Mr. Faulkner, the owner of the business at issue, "You are not allowed to come here any longer. You understand?" And her response was, "Yes, sir." At one point one law enforcement officer, I believe it was a law enforcement officer, asked her for her name, and she clearly indicated it was Faye Larkin Meader. It was easily understandable. It was an appropriate response, a direct response to the question asked.

Although she was escorted out of the business at issue by law enforcement officers, she was able to walk under her own power. In other words, the officers didn't have to carry her, did not have to put her in some type of wheelchair, simply directed her to leave, and that's what she did.

At one point, when she was sitting in the patrol car, she was directed or requested by the officer to put your feet back in there for me, and the Defendant immediately complied, indicating she understood, was responsive and aware of what was going on. At one point, when she was attempting to articulate what happened, and how she got to the predicament she was in, she was complaining of another person selling marijuana and oxycontin. Oxycontin is not

> a—it's not a tongue-twister, but for someone that was so completely intoxicated and without the ability to form intent, it would—it would seem to me to be very hard to articulate such a word very clearly and easily, as she did, as I witnessed in the video. At one point, she indicated she wanted her coat because it was cold outside. Again, the point is she was aware of what was going on, that it was cold, and that when you're cold, you need a jacket. That's exactly what she indicated.
>
> At one point, she was asked on the video what happened to the laptop computer, or words to that effect, and the Defendant immediately said she had no idea what the officer was talking about, which was, in fact, an accurate statement based on the facts of this case. Again, the Defendant was responsive and aware of what was going on around her, and answered that question immediately, appropriately, and, as it turns out, accurately.
>
> She was also—the Defendant was also aware of what was going on around her because she knew she was interacting with law enforcement officers. At one point she said, "God bless you all. You all have a hard job." In any event, there is ample evidence to show that, again, she was responsive and aware of what was going on around her.
>
> . . . .
>
> No one in this case testified that the Defendant was, in fact, drunk. Although the testimony was that she was impaired or intoxicated on some type of substance. The substance has been unidentified.

¶ 13 In an opinion filed January 21, 2020, the Court of Appeals held that the trial court did not err when it declined to instruct the jury on voluntary intoxication because defendant failed to produce sufficient evidence of voluntary intoxication. *State v. Meader*, 269 N.C. App. 446, 450, 838 S.E.2d 643, 646 (2020). The dissenting judge argued that substantial evidence was presented to support a voluntary intoxication instruction and the failure to instruct the jury on voluntary intoxication constituted prejudicial error which requires a new trial. *Id.* at 451–56, 838 S.E.2d at 646–50 (Brook, J., dissenting).

¶ 14 Defendant argues that substantial evidence was presented to require a voluntary intoxication instruction. We disagree.

II. Standard of Review

¶ 15 To determine whether a defendant is entitled to a requested instruction on voluntary intoxication, this Court reviews de novo whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

III. Analysis

¶ 16 "[T]he doctrine [of voluntary intoxication] should be applied with great caution." *State v. Murphy*, 157 N.C. 614, 617–18, 72 S.E. 1075, 1076–77 (1911). A defendant is not entitled to an instruction on voluntary intoxication "in every case in which a defendant . . . consum[es] intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992).

¶ 17 To obtain a voluntary intoxication instruction, a defendant

> must produce substantial evidence which would support a conclusion by the judge that [s]he was so intoxicated that [s]he could not form [the specific] intent . . . . The evidence must show that at the time of the [crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

Mash, 323 N.C. at 346, 372 S.E.2d at 536 (cleaned up). "[T]here must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *State v. Cureton*, 218 N.C. 491, 495, 11 S.E.2d 469, 471 (1940). "A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol . . . has the burden of producing evidence, or relying on evidence produced by the [S]tate, of his intoxication." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Id.* at 346, 372 S.E.2d at 536.

¶ 18 Defendant argues that witnesses testified about her bizarre behavior, that she appeared to be intoxicated, and that there was an odor of alcohol in the counseling center. In addition, defendant argues that testimony and police body camera footage established that she was out of touch with reality, hallucinating, talking to people who were not present, and unaware of her surroundings. However, while defendant's actions were periodically unusual, the mere fact that "[a] person may be excited, intoxicated and emotionally upset" does not negate "the capability to formulate the necessary" intent. *Id.* at 347, 372 S.E.2d at 537 (cleaned up). Defendant has failed to present substantial evidence that she was "utterly incapable" of forming specific intent. *Id.* at 346, 372 S.E.2d at 536.

¶ 19 The record reflects that defendant did not slur her speech or hesitate when asked to provide biographical information, and defendant gave appropriate responses to the law enforcement officers' questions when prompted. As the trial court stated, defendant "was not slurring her words. She was speaking in easily understandable English. There were many questions that were asked of her to which she was responsive." In addition, when police arrived and arrested defendant, she was able to navigate a flight of stairs with her hands cuffed behind her back. As the trial court noted, defendant "was able to walk under her own power" and "officers did[not] have to carry her, did not have to put her in some type of wheelchair, simply directed her to leave, and that's what she did." Thus, even in the light most favorable to defendant, defendant has demonstrated, at best, mere intoxication.

¶ 20 In *State v. Goodman*, 298 N.C. 1, 14, 257 S.E.2d 569, 579 (1979), the defendant was charged with first-degree murder, robbery with a dangerous weapon, and kidnapping. Defendant argued that his voluntary intoxication prevented him from premeditation and deliberation necessary for a conviction of first-degree murder.

¶ 21 In that case, the defendant shared a six pack of beer with two other men, consumed more beer at a bar less than thirty minutes before the victim got in the car with the defendant, and there was beer in the car the defendant was driving. *Id.* at 13–14, 257 S.E.2d at 579. However, this Court stated that "[w]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions; no inference of the absence of deliberation and premeditation arises as a matter of law from intoxication." *Id.* at 12, 257 S.E.2d at 578 (citation omitted). This Court determined that, despite evidence that the defendant had been drinking, the defendant "was capable of premeditation and deliberation and could form the specific intent." *Id.* at 14, 257 S.E.2d at 579. This Court went on to conclude that the trial court did

not err when it declined to give an instruction on voluntary intoxication because there was "no evidence which showed that defendant's capacity to think and plan was affected by drunkenness [at the time he shot the victim]."[2] *Id.* at 14, 257 S.E.2d at 579.

¶ 22 Such is the case here. The undisputed evidence tended to show that defendant was aware of her surroundings, and in control of her faculties, both before and after the police arrived. When the husband asked if anyone had "seen anything weird," defendant stood up, walked over to the family whose vehicle had been broken into, and started talking to them. Defendant informed the husband that she knew who broke into the car and provided him with a name. When the husband informed defendant that law enforcement had been contacted, defendant became "irate" and said, "no cops."

¶ 23 Defendant understood that involving law enforcement was detrimental to her interests. To conceal her involvement in the crime, she fabricated a story about another individual's involvement. Based on these facts, viewed in the light most favorable to defendant, she cannot demonstrate that her "mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536 (cleaned up).

¶ 24 Because a voluntary intoxication instruction is only appropriate when the record contains evidence that permits the jury to determine that the defendant is unable to form the specific intent necessary to support a conviction for the crime charged, the trial court did not err when it declined to instruct the jury on voluntary intoxication.

AFFIRMED.

Justice HUDSON dissenting.

¶ 25 Because I would hold that the evidence, when taken in the light most favorable to defendant, was sufficient to warrant a jury instruction on voluntary intoxication, I respectfully dissent.

---

2. One could argue that *Goodman* presents an even stronger argument for an involuntary intoxication instruction than the case *sub judice* in light of the amount of alcohol that the defendant was shown to have consumed. That an instruction was not required on the facts in *Goodman* provides support for this Court's admonition that "the doctrine [of voluntary intoxication] should be applied with great caution." *Murphy*, 157 N.C. at 617–18, 72 S.E. at 1076–77.

¶ 26 A defendant is entitled to have the jury instructed on voluntary intoxication when there is substantial evidence that the defendant was so intoxicated that he or she could not form the requisite intent. *State v. Mash*, 323 N.C. 339, 346 (1988). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Id.* at 348. In addition, all reasonable inferences from that evidence must be drawn in defendant's favor. *Cf. State v. Chevallier*, 264 N.C. App. 204, 214 (2019) ("In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State.").

¶ 27 In the light most favorable to defendant, the evidence here tends to show that she was intoxicated and that she was unaware that she had taken another's property. A rational trier of fact could conclude that defendant was so intoxicated that she could not form the requisite intent to commit the offenses charged.

¶ 28 At trial, the jury heard testimony from various witnesses who observed defendant at the counseling center. In addition, jurors were shown footage from the responding officers' bodycams and so were able to observe defendant's behavior for themselves. This evidence tended to show that defendant was intoxicated at the time of the alleged crime. On the day of the incident, there were two calls to 911; the first call was by a therapist at the counseling center to report an "intoxicated person," and the second call was by the vehicle owner to report a break-in to his vehicle. The first person who called 911 testified that defendant appeared to be intoxicated. Officer Fulp, who was on the team that responded to the first 911 call, testified that defendant appeared to be intoxicated or impaired by an illegal substance. And, at the scene, a witness told an officer that he smelled alcohol on defendant.

¶ 29 There was also evidence, much of which has not been mentioned in the majority opinion, that defendant was acting in a manner consistent with intoxication. When Officer Fulp first approached defendant, she "started talking about getting beat up the night before by a guy named Sebastian," and then defendant pulled down her pants in front of everyone. While speaking with the officers, defendant asked someone named Omar for her wallet, but no one named Omar was present at the time. When the owner of the counseling center asked the officers if they would continue their investigation outside, defendant "became loud" and had to be handcuffed. While the officers escorted defendant from the building, defendant claimed that she needed to get her bra from the bedroom,

but the counseling center had no bedrooms. When she was in the police vehicle being questioned by the officers, defendant lost control of her faculties and urinated on herself. She then refused to get out of the police vehicle. Once the officers coaxed her into exiting the vehicle, she produced a stolen ammunition magazine from her pocket saying it was her cell phone. Officer Fulp then placed defendant back in handcuffs and took her to the jail. From the jail, defendant phoned her aunt, who testified that she "sounded delirious." We are required to consider the evidence and draw all reasonable inferences in the light most favorable to defendant. Accordingly, I would conclude there was substantial evidence that defendant was intoxicated at the time of the alleged crime.

¶ 30 The majority is correct that "[e]vidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Mash*, 323 N.C. at 346. "[T]he defense of voluntary intoxication depends not on the amount of alcohol consumed, but on its effect on the defendant's ability to form the specific intent [required by the statute]." *State v. Cagle*, 346 N.C. 497, 508 (1997). Evidence of exactly what substance defendant consumed, in what quantity she consumed it, and over what period of time it was consumed, is not required or dispositive. A defendant is only required to show that her intoxication rendered her unable to form the requisite intent to commit the crimes charged. *Mash*, 323 N.C. at 346.

¶ 31 Cases in which a voluntary intoxication instruction has been denied have involved either evidence of purposefulness despite intoxication or a complete absence of evidence of the effects of intoxication on the defendant's functioning. In *Cagle*, for example, we concluded that the trial court had committed no error in refusing to give an instruction on voluntary intoxication when the defendant had consumed significant amounts of alcohol and smoked marijuana but had discussed his plan to rob the victim, took steps to follow that plan, repeatedly said, "go finish him, go kill him," and planned an alibi. 346 N.C. at 508–09; *see also State v. Geddie*, 345 N.C. 73, 95 (1996) ("[E]vidence showed only that defendant drank some liquor. There was no evidence indicating that defendant was so intoxicated as to be utterly incapable of forming the intent to kill."); *State v. Long*, 354 N.C. 534, 538–39 (2001) (holding that, despite being "substantially impaired," actions taken to hide his involvement in the crime demonstrated defendant could think rationally); *State v. Robbins*, 319 N.C. 465, 509 (1987) ("[N]o evidence was presented showing that the defendant's capacity to think and plan was affected or impaired by intoxication.").

¶ 32 Likewise, in *State v. Goodman*, 298 N.C. 1, 12 (1979), we held that intoxication alone does not automatically lead to the inference that a

defendant cannot form the requisite intent. There, we concluded that the trial court had not erred by refusing to give an instruction on voluntary intoxication because the evidence showed that despite defendant's consumption of alcohol, he was able to drive, give directions, lead a group on a search through a neighborhood looking for items that had been stolen from his car, and participate in planning a scheme for disposing of the victim's body. *Id.* at 14. In addition, witnesses testified that defendant was "not in a drunken condition" and we concluded that "[t]here was no evidence which showed that defendant's capacity to think and plan was affected by drunkenness." *Id.*

¶ 33 Unlike those cases, from the evidence here one could infer that defendant was so intoxicated that she could not form the requisite intent to commit the crimes alleged. A reasonable juror could infer from the evidence that defendant was unaware of her surroundings, was completely unaware that she had taken items from the vehicle, and that her capacity to think and plan was affected by intoxication. For example, when the owner of the vehicle discovered the break-in and asked if anyone had seen anything, defendant approached the owner and told an unrelated story involving a man jumping from a third floor to punch her. Also, when the police arrived at the counseling center, defendant believed they had come to help her rather than to remove her from the premises.

¶ 34 Additionally, defendant made no effort to conceal her actions. During a conversation with the officers, she told them she did not have a cell phone. But a few minutes later, when an officer asked her about a bulge in her pocket, she told the officer the bulge was her cell phone. She then proceeded to grab the bulge and hand it over to the officer without reservation or reluctance. In fact, she had handed the officer an ammunition magazine—an item reported missing from the vehicle that had been broken into. When the officers reacted to the ammunition magazine as evidence of a potential crime, defendant got upset and seemed to believe all of a sudden that she had handed them a weapon. She said, "I didn't know [it was a gun]; I would have never handed it to you if I would have known it was a gun." She also wore the sunglasses she was later charged with stealing in her shirt in plain sight of the officers and other witnesses. Although evidence of defendant being an unskilled criminal does not entitle her to a voluntary intoxication instruction, in the light most favorable to defendant this evidence tends to show that she could not have formed the intent to commit the offenses charged. This evidence goes beyond defendant being "excited, intoxicated and emotionally upset," *Mash*, 323 N.C. at 347 (quoting *State v. Hamby*, 276 N.C. 674, 678 (1970)), and could support an inference of a real inability to comprehend the surroundings and events around her.

¶ 35 Pointing to evidence that defendant walked down a stairway while handcuffed, provided biographical information, did not slur her words, and responded to the officers' questions, the majority concludes that this is not a " 'very clear case[ ]' [where] the intoxication was so severe that it could have negated [ ] defendant's ability to form specific intent."[1] But the sum of the evidence here is, at best, equivocal. Substantial evidence supports the opposite conclusion, and our courts are required to consider the evidence in the light most favorable to defendant; in doing so, I would hold that the jury should have been instructed on voluntary intoxication.

¶ 36 Finally, I would conclude that the trial court's failure to deliver the voluntary intoxication instruction to the jury was prejudicial. Having been given no instruction on voluntary intoxication, the jury was initially split regarding defendant's intent and had to be reminded that they must reach a unanimous verdict. The jury continued to deliberate before eventually requesting the definition of "utterly incapable," a term that pertains to the voluntary intoxication defense. The trial court's response was that "utterly incapable" had no legal significance in this case. Ultimately, the jury returned guilty verdicts. Because the jury seemed particularly concerned with defendant's ability to form the requisite intent, I would conclude that there is a reasonable possibility that had a voluntary intoxication instruction been given, the jury would have reached a different result.

¶ 37 When taken in the light most favorable to defendant, there is substantial evidence from which a reasonable juror could have found that defendant was so intoxicated that she could not form the specific intent to commit the offenses charged. In addition, the trial court's failure to deliver the instruction was prejudicial.

¶ 38 For the foregoing reasons, I respectfully dissent.

Justice MORGAN and Justice EARLS join in this dissenting opinion.

---

1. I also note that our law does not require that a voluntary intoxication instruction be given only in "very clear cases." The majority quotes from *State v. Absher*, 226 N.C. 656, 660 (1946), where our Court quoted from a jury instruction on voluntary intoxication. In that instruction, the trial court said, "[a]s the doctrine [of voluntary intoxication] is one that is dangerous in its application, it is allowed only in very clear cases." *Id.* at 660. Far from establishing a threshold requirement that the voluntary intoxication jury instruction only be given in very clear cases, our Court was merely quoting from a case in which the trial court determined there was sufficient evidence to warrant instructions on voluntary intoxication. The trial court then gave that instruction to the jury, warning the jury that the defense should only apply in clear cases.

STATE v. ALLEN

[377 N.C. 169, 2021-NCSC-38]

STATE OF NORTH CAROLINA
v.
HARLEY AARON ALLEN

No. 8A20

Filed 16 April 2021

Constitutional Law—due process—competency to stand trial—sua sponte competency hearing

In a case involving multiple drug offenses and habitual felon status, the trial court did not err by failing to sua sponte initiate an inquiry into defendant's competence at the time of trial where—although defendant had twice been determined to be incompetent—six months prior to trial the trial court, after interviewing defendant and his counsel and relying on a medical evaluation, determined defendant to be competent to stand trial. Because there was nothing in the record which occurred after that determination or before the end of the trial to raise a substantial doubt about defendant's continued competence, the trial court was entitled to rely on the correctness of the pre-trial competency determination and was not required to conduct an additional competency inquiry.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 24 (2019), remanding judgments entered on 9 February 2018 by Judge Alan Z. Thornburg in Superior Court, Mitchell County, for a hearing to determine defendant's competency at the time of trial and to correct clerical errors. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Assistant Solicitor General, and Ryan Y. Park, Deputy Solicitor General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

¶ 1 The issue before us in this case addresses whether defendant Harley Aaron Allen was subjected to a deprivation of his right to liberty without due process of law on the grounds that he was tried for and convicted of committing a criminal offense at a time when he "lack[ed] the capacity

to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The Court of Appeals determined that the trial court had erred by failing to hold a second hearing for the purpose of inquiring into defendant's competence immediately prior to trial even though defendant had been found to be competent at a hearing held six months earlier. After careful consideration of the State's challenge to the Court of Appeals' decision, we hold that the trial court did not err by failing to hold a second competency hearing immediately prior to the beginning of defendant's trial on its own motion. As a result, we reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the validity of the trial court's judgments.

¶ 2 On 22 July 2015, defendant sold a pill containing a derivative of opium known as buprenorphine to a confidential informant. On 22 October 2015, a warrant for arrest charging defendant with selling Subutex, delivering Subutex, and maintain a vehicle for the purpose of keeping or selling Subutex was issued. On 22 February 2016, the Mitchell County grand jury returned bills of indictment charging defendant with possession of Subutex with the intent to sell or deliver and having attained habitual felon status.

¶ 3 On 2 September 2016, defendant's trial counsel filed a motion seeking to have a forensic evaluator appointed for the purpose of assessing defendant's capacity to proceed. On the same day, Judge R. Gregory Horne entered an order allowing defendant's motion. However, defendant was involuntarily committed to Mission Hospital before the required forensic evaluation could be completed, with this being one of the two instances during 2016 in which defendant's parents petitioned to have defendant involuntarily committed after he "appeared to lose behavioral control, threatening suicide and becoming confrontational" while under the influence of methamphetamine. At the time of defendant's November 2016 hospitalization, the attending medical professionals developed the opinion that substance abuse underlay many of defendant's psychiatric, medical, and social stressors.

¶ 4 During defendant's November 2016 involuntary commitment, forensic psychologist Paul Freedman evaluated defendant in accordance with Judge Horne's order. Based upon information obtained during his evaluation, Mr. Freedman described defendant as "hav[ing] substantial deficits regarding his overall fund of knowledge."[1] More specifically, Mr.

1. According to Mr. Freedman, a person's "fund of knowledge" is "the historically accumulated and culturally developed bodies of knowledge and skills essential for household or individual functioning and well-being."

Freedman noted that defendant had a very low IQ of approximately 60, had been awarded disability payments as the result of an intellectual disability, and was unable to manage his overall finances, including his disability payments, without assistance. As a result, Mr. Freedman found that defendant suffered from an intellectual disability, memory impairment, and overall neurological dysfunction.

¶ 5 In addition, Mr. Freedman reported that defendant had "acknowledged that he had previously signed plea agreements without having an understanding of what they contained," with it being unclear to Mr. Freedman "whether [defendant] knew he was facing multiple felony charges in two counties." Furthermore, Mr. Freedman stated that defendant exhibited a serious lack of understanding of the judicial system, having described a judge as "the man you gotta stand in front of" and being unable to say whether the defense attorney was "on his side."

¶ 6 In the course of a phone conversation that Mr. Freedman had with defendant's adoptive mother, defendant's adoptive mother stated that she and her husband had adopted defendant as an infant after he had experienced almost two years of extreme abuse and neglect. In Mr. Freedman's view, the "abuse, detailed to this examiner, that the defendant suffered as an infant necessarily leaves a permanent, tragic, and irrevocable mark," with defendant's cognitive deficits, which had "been with him since early childhood," being conditions that he would "likely struggle with [ ] for the remainder of his life." In light of "the nature of his impairments," Mr. Freedman felt "that [defendant's] prospects of restorability are limited." At the conclusion of his evaluation, Mr. Freedman opined that defendant was not capable of proceeding to trial.

¶ 7 After defendant had been released from Mission Hospital, the State moved on 17 January 2017 that defendant be committed to Butner Central Regional Hospital for a second evaluation of his capacity to proceed. On the same date, Judge Gary M. Gavenus entered an order granting the State's motion. On 20 February 2017, Dr. Bruce Berger, a forensic psychiatrist, completed a second evaluation of defendant's capacity to proceed.

¶ 8 After the completion of his evaluation, Dr. Berger concluded that defendant had a "profound lack of knowledge" of the court system and that defendant's adaptive functioning was significantly impaired. In Dr. Berger's view, defendant's limited adaptive functioning, when taken "in combination with [defendant's] attention deficits, learning deficits[,] difficult[ies] in moderating his behavior, mood disorder, and possible decrease of day-to-day structure since his marriage, all contribute to him

being more impaired than IQ scores alone . . . would suggest." Dr. Berger noted that, when asked what a prosecutor did, defendant had replied that "[h]e and the judge work together," and that, when asked what a "plea bargain" was, defendant had said that it meant that you "[s]ign something." As a result, Dr. Berger determined that defendant was not capable of proceeding to trial.

¶ 9 On 19 April 2017, following the completion of Dr. Berger's competency evaluation, Judge Gavenus entered an order committing defendant to Broughton Hospital for temporary custody and mental health treatment. On 18 May 2017, Monisha Berkowskie, Ph.D., a Senior Psychologist at Broughton Hospital, wrote a letter stating that, in the opinion of defendant's treatment team, defendant had developed a "strong foundation of rational and factual knowledge of the legal system" following a course of treatment that included medication, educational sessions focused upon the development of an understanding of courtroom procedures, and attendance at Alcoholics Anonymous meetings that were intended to assist defendant in combating his substance abuse problems. In light of these developments, Dr. Berkowskie requested that another capacity evaluation be performed.

¶ 10 On 1 June 2017, Dr. Berger conducted another capacity evaluation of defendant at Broughton Hospital. Dr. Berger noted that, since beginning treatment at Broughton Hospital, defendant had become able to "follow unit routine, advocate for his needs, interact with peers and staff appropriately, and successfully complete activities of daily living independently." In addition, Dr. Berger reported that defendant was able to identify the specific charges that had been lodged against him and understood that he would be sent to prison if found guilty. Similarly, Dr. Berger stated that defendant comprehended the nature of the plea negotiation process and had the ability to explain the roles that defense attorneys, prosecutors, judges, juries, and witnesses played in the judicial system. At the conclusion of his evaluation, Dr. Berger opined that defendant had an improved and nuanced understanding of the court system and was capable of proceeding to trial.

¶ 11 On 23 August 2017, a pre-trial competency hearing was held before Judge Gavenus. In the course of the competency hearing, Judge Gavenus asked defendant's trial counsel whether he agreed with Dr. Berger's conclusion that defendant was now competent to stand trial. In response, defendant's trial counsel stated that:

> Your Honor, I don't agree that he's necessarily capable. . . . [H]e goes in two or three different directions

> sometimes as far as -- as far as talking to him. He does understand the charges now. . . . He does understand what he is facing as far as the felonies, and when he was here the first time he didn't understand that. I think that . . . they have improved his capability. . . . I'm not a doctor. I mean, there is some question in my mind because I've dealt with [defendant] for a number of years. . . .
>
> I don't really feel like I'm in a position to judge necessarily if I -- I'm not a doctor to judge his condition. But we just ask the Court to look at the report and make a determination, to make a finding on -- based on that. There's really, there's really nothing specific that I can disagree with in the report because I have seen some improvement in his condition.

In addition, Judge Gavenus had the following colloquy with defendant:

> THE COURT: All right, [defendant], you having any trouble thinking today? Do you feel confused in anyway today?
>
> DEFENDANT: No, sir.
>
> THE COURT: You been able to talk with your attorney about your case?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Has your attorney gone over the [second] report of Dr. Berger with you?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you in agreement with that report?
>
> DEFENDANT: Yeah, yes, sir.

At the conclusion of the hearing, Judge Gavenus determined that defendant was capable of proceeding to trial.

¶ 12 On 13 November 2017, the Mitchell County grand jury returned original and superseding indictments charging defendant with selling buprenorphine, delivering buprenorphine, maintaining a vehicle for the purpose of selling buprenorphine, possession of buprenorphine with the intent to sell or deliver, and having attained habitual felon status. The charges against defendant came on for trial before the trial court

and a jury at the 5 February 2018 criminal session of the Superior Court, Mitchell, County. On 9 February 2018, the jury returned verdicts convicting defendant of selling buprenorphine, delivering buprenorphine, and possessing buprenorphine with the intent to sell or deliver and acquitting defendant of maintaining a vehicle for the purpose of selling buprenorphine.

¶ 13 After the jury returned these verdicts, defendant entered a guilty plea to having attained habitual felon status. In the course of accepting defendant's guilty plea, the trial court directly addressed defendant for the purpose of ensuring that he was acting in a knowing and voluntary manner. Among other things, the trial court inquired whether defendant was "under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" and received a negative answer. In addition, the trial court had the following discussion with defendant concerning the plea negotiation process:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] Yes, sir.
>
> THE COURT: You are pleading guilty – you pled guilty to attaining the status of habitual felon, but was there actually a plea arrangement?
>
> [DEFENDANT:] No.
>
> [DEFENSE COUNSEL:] There's not a plea arrangement, Your Honor.
>
> THE COURT: So let me ask you that again. Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] No, sir.

At the conclusion of its inquiry into the voluntariness of defendant's decision to enter a plea of guilty to having attained habitual felon status, the trial court accepted defendant's plea.

¶ 14 At the ensuing sentencing hearing, defendant's trial counsel requested and received permission for defendant to address the court. At that point, defendant stated that:

> Your Honor, I've made a lot of mistakes, and just like [defendant's trial counsel] said, I've not been into nothing since we went through this, and I show up to court all the time. Not even probation officers have

> to worry about me, because I'm always there. I show up, I pay my fines. Never failed a drug test. . . . If you would take it into consideration, give me another chance, . . . you won't be sorry for your decision if you do. Let me have a probationary sentence. I'll do what I have to to get it done. You'll never see my face back here again. I want to apologize to everybody here.

After finding as mitigating circumstances that defendant suffered from "a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense" and that defendant "had a support system in the community," the trial court entered a judgment based upon defendant's convictions for selling buprenorphine after having attained the status of a habitual felon sentencing defendant to a term of 58 to 80 months imprisonment and entered a second judgment based upon defendant's conviction for possession of buprenorphine with the intent to sell or deliver sentencing defendant to a concurrent term of 8 to 19 months imprisonment.[2] Defendant noted an appeal to the Court of Appeals from the trial court's judgments.[3]

¶ 15 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by failing to hold another competency hearing before the beginning of defendant's trial and by denying defendant's motion to dismiss the charges that had been lodged against him for insufficiency of the evidence.[4] A majority of the Court of Appeals panel that had been assigned to hear and decide this case agreed with the first of defendant's contentions, holding that the trial court had erred by failing to determine whether defendant was competent to proceed prior to the beginning of defendant's trial. *State v. Allen*, 269 N.C. App. 24, 26–27 (2019).

---

2. Although the trial court orally arrested judgment in connection with defendant's conviction for delivering buprenorphine, a written order that the trial court entered at the conclusion of defendant's trial reflected that judgment had been arrested in connection with defendant's conviction for selling buprenorphine. The Court of Appeals unanimously determined that this discrepancy constituted a clerical error and remanded this case to the Superior Court, Mitchell County, for the correction of this and another, separate clerical error.

3. In view of the fact that the notice of appeal that defendant, who was proceeding pro se at that point, filed with the Clerk of Superior Court, Mitchell County, was procedurally defective, defendant filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's judgments on the merits with the Court of Appeals on 3 January 2019. The Court of Appeals allowed defendant's certiorari petition on 10 July 2019.

4. Neither the majority nor the dissenting opinions at the Court of Appeals discussed the merits of defendant's challenge to the denial of his motion to dismiss for insufficiency of the evidence.

¶ 16 According to the Court of Appeals, a criminal defendant cannot be tried or convicted "for a crime when by reason of mental illness or defect [the defendant] is unable to understand the nature and object of the proceedings against him," *Id.* at 27 (quoting N.C. Gen. Stat. § 15A-1001(a) (2017)), with "defendant's competency [to be] assessed at the time of trial" given that "a defendant's capacity to stand trial is not necessarily static." *Id.* (quoting *State v. Mobley*, 251 N.C. App. 665, 675 (2017)). In addition, the Court of Appeals noted that the trial court has a constitutional duty to initiate a competency hearing on its own motion if the record contains "substantial evidence" tending to show that the defendant might not be competent to stand trial. *Id.* (citing *Mobley*, 251 N.C. App. at 668).

¶ 17 In the Court of Appeals' view, "there was substantial evidence before the trial court that [d]efendant might have been incompetent to stand trial," *id.*, with this evidence having included defendant's three involuntary commitments during the period between his arrest and trial, the fact that defendant had been diagnosed as suffering from a number of mental health conditions,[5] his history of noncompliance with mental health treatment, his significant intellectual disabilities and cognitive defects, and the fact that two out of the three competency evaluations conducted prior to trial resulted in a finding of incompetence. *Id.* at 28–29. In addition, the Court of Appeals noted that defendant's trial counsel had expressed concern about defendant's competence to stand trial during the pre-trial hearing that was held before Judge Gavenus, at which point defendant's trial counsel stated that he did not necessarily agree with Dr. Berger's decision to find defendant to be competent to stand trial and that, at an earlier point in time, defendant had not understood the manner in which the judicial system functioned and had continuously asked his trial counsel to explain what was occurring. *Id.* at 30–31.

¶ 18 Furthermore, the Court of Appeals stated that the mistaken responses to certain questions that the trial court had posed to defendant during the process leading to the acceptance of defendant's plea of guilty to having attained habitual felon status cast further doubt upon defendant's ability to understand the proceedings in which he was involved. *Id.* at 33. More specifically, the Court of Appeals pointed out that, when asked if he was under the influence of alcohol, drugs, narcotics,

---

5. The mental health diagnoses noted by the Court of Appeals included severe methamphetamine use disorder, severe opioid use disorder, adjustment disorder with depressed mood, antisocial personality disorder, attention deficit hyperactivity disorder, an unspecified mood disorder, an unspecified personality disorder, and polysubstance dependence. 269 N.C. at 28.

medicines, pills, or other intoxicants, defendant had responded in the negative. According to the Court of Appeals, this answer should have raised concerns on the part of the trial court about the extent to which defendant was taking the medications that had been prescribed for him in connection with the "intensive outpatient" mental health treatment that defendant had been receiving. *Id.* In the same vein, the Court of Appeals emphasized that, when asked if he had agreed to a plea arrangement in connection with the entry of his plea of guilty to having attained habitual felon status, defendant had mistakenly responded in the affirmative before correcting his answer both prior to and after receiving clarification from his trial counsel. *Id.*

¶ 19 After reviewing the information contained in the record, the Court of Appeals reiterated that "the trial court must evaluate the defendant's competency to proceed *at the time of trial*" in light of possible fluctuations in a defendant's competence to stand trial, *id.* at 34 (citing *State v. Cooper*, 286 N.C. 549, 565 (1975)). In view of the fact that defendant's most recent psychiatric evaluation, which had been conducted in June 2017, "was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018" given that defendant's competence could have deteriorated over the course of the ensuing eight-month period, *id.*, and the fact that the pre-trial competency hearing that had been conducted before Judge Gavenus occurred six months before defendant's trial, the Court of Appeals held that "the trial court erred in failing to determine whether, *at the time of trial*, [d]efendant was competent to proceed." *Id.* at 35. As a result, the Court of Appeals remanded this case to the Superior Court, Mitchell County, for the purpose of determining whether defendant had been competent at the time of trial, with defendant to be granted a new trial in the event that the trial court could not determine on remand that defendant had been competent while the trial was in progress. *Id.* at 35–36.

¶ 20 In a dissenting opinion, Judge Dillon expressed the opinion that the trial court had not erred by failing to hold a second competency hearing prior to the beginning of defendant's trial. *Id.* at 36. After noting that the trial court was only required to initiate a competency hearing on its own motion in the event that the record contained "substantial evidence" tending to show that the defendant might be incompetent, *id.* (citing *State v. Badgett*, 361 N.C. 234, 259 (2006)), Judge Dillon pointed out that a trial court was not required to initiate a hearing for the purpose of evaluating a defendant's competence to stand trial after an earlier hearing stemming from an expression of concern about the defendant's competence raised by the defendant's trial counsel two months prior to

trial had resulted in a determination that the defendant was competent to stand trial. *Id.* at 37 (citing *State v. Young*, 291 N.C. 562, 568 (1977) (stating that, "where, as here, the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings").

¶ 21 According to Judge Dillon, the record contained no indication at the time that defendant's trial began that defendant lacked the capacity to proceed, that neither defendant's trial counsel nor anyone else had expressed any concern about defendant's capacity to proceed during defendant's trial, and that nothing had occurred during defendant's trial that sufficed to raise questions about defendant's capacity to proceed. *Allen*, 269 N.C. App. at 37–38. In Judge Dillon's view, defendant's denial that he was "under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" at the time that he entered his plea of guilty to having attained habitual felon status should be understood as an indication that defendant was not currently using any illegal substances or impaired in any way that would have prevented him from understanding the nature and consequences of his decision to plead guilty, rather than as an indication that he was not taking his medication as directed. *Id.* at 38. In addition, Judge Dillon concluded that defendant's initial response to the trial court's inquiry concerning the extent, if any, to which he was entering a guilty plea pursuant to a plea arrangement with the State reflected a response to the first portion of the trial court's question, during which the trial court asked if defendant was pleading guilty, *id.*, and that defendant had immediately corrected his answer upon further inquiry. *Id.* at 38–39. The State noted an appeal to this Court from the Court of Appeals' decision based upon Judge Dillon's dissent.

¶ 22 In seeking to persuade us to overturn the Court of Appeals decision, the State argues that the record does not contain a substantial basis for questioning defendant's competence to stand trial in the aftermath of Judge Gavenus' finding that defendant was competent. After noting that the relevant inquiry "depends on the totality of the circumstances" and that a court "must review the entire record," citing *State v. Heptinstall*, 309 N.C. 231, 236–37 (1983), the State directs our attention to *Young*, 291 N.C. at 568, in which this Court held that, when a "defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings." According to the State, de-

fendant's most recent psychiatric evaluation found that he was competent, neither defendant nor his trial counsel disputed the contents of the evaluator's finding of competency at the pre-trial competency hearing held before Judge Gavenus, and nothing in the record tended to show that defendant had become incompetent between the date of the pre-trial competency hearing and the date of defendant's trial.

¶ 23 In addition, the State argues that the Court of Appeals' holding rested upon nothing more than speculation that defendant's mental capabilities might have deteriorated between the pre-trial competency hearing and the trial in spite of the fact that the record contained no indication that anything of the sort had occurred and that such speculation does not suffice to raise a bona fide doubt concerning defendant's competence. On the contrary, the State contends that the record contains substantial justification for the opposite conclusion given that defendant's condition had improved after two earlier evaluations found him to be incapable of proceeding, that defendant had received intensive psychiatric treatment that had resulted in improvements to his mental condition, and that defendant's decision to take responsibility for the crimes that he had committed at the sentencing hearing demonstrated that he comprehended the nature of the proceedings in which he was involved.

¶ 24 The State contends that the Court of Appeals misinterpreted the information contained in the record in concluding that defendant might have become incompetent by the time of trial. In the State's view, the Court of Appeals erred by relying upon defendant's intellectual disability and low IQ scores in determining that he might have become incompetent given that a competency determination requires evaluation of the extent to which a defendant is able to understand the proceedings that have been initiated against him and to assist in his defense, citing *Godinez v. Moran*, 509 U.S. 389, 396 (1993). Similarly, the State claims that the Court of Appeals erred by relying upon the statements that defendant's trial counsel made at the competency hearing held before Judge Gavenus given that defendant's trial counsel requested the trial court to "make a finding" concerning defendant's competency and did not dispute Judge Gavenus' determination that defendant was capable of proceeding. Finally, the State argues that the Court of Appeals erred by relying upon certain statements that defendant made during the habitual felon status plea acceptance and sentencing phases of the proceeding as tending to show defendant's incompetence given that defendant's denial that he was under the influence of any drugs or medication could readily be understood as an assertion that he had not consumed any illegal drugs or other substances that might impair his judgment rather than as

an admission that he had stopped complying with the course of mental health treatment that had been prescribed for him and given that defendant's mistaken statement that he had entered his plea of guilty to having attained habitual felon status as part of a plea arrangement represented nothing more than an acknowledgement that he was pleading guilty and given that his error in making this statement had been quickly corrected.

¶ 25 In seeking to persuade us to uphold the Court of Appeals decision, defendant asserts that a trial court has a constitutional duty to initiate a competency hearing on its own motion in the event that the evidence "raises a 'bona fide doubt' as to a defendant's competence to stand trial," citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966). According to defendant, the trial court had a duty to evaluate his competency to proceed at the time of trial and that, "[d]ue to the nature of [his] limitations, the trial court could not assume the stability of [his] competence when a substantial period of time elapsed between the finding of competence and the commencement of trial." In defendant's view, defendant's (1) well-documented disabilities; (2) short- and long-term memory deficits and impaired ability to recall information; (3) profound deficits in his fund of knowledge; and (4) various mental illnesses and conditions all raised questions about the extent to which defendant was competent to stand trial. As a result of the fact that his competency was "transient in nature, tenuous, and extremely fragile," and that a period of eight months had elapsed between his most recent psychiatric evaluation and the time of trial, defendant argues that the trial court had erroneously relied upon a "stale competency determination" that failed to reflect his present ability to stand trial.

¶ 26 In addition, defendant argues that his responses during the plea colloquy and sentencing phase demonstrate that he failed to understand the nature and consequences of the proceedings against him. In defendant's view, our decision in *Young* stands for the proposition that "a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent" and does not create a presumption of ongoing competency in the event that the defendant was found to be competent at the time of his or her most recent psychiatric evaluation.

¶ 27 "A criminal defendant may not be tried unless he is competent," *Godinez*, 509 U.S. at 396 (citing *Pate*, 383 U.S. 375, 378 (1966)), with a defendant having been deprived of his right to avoid being deprived of liberty without due process of law in the event that his conviction resulted from a trial during which he was incompetent. *Pate*, 383 U.S. at 378. A

defendant is deemed to be incapable of standing trial when he "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S. at 171; see also N.C.G.S. § 15A-1001(a) (providing that "[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner"). A defendant's competence to stand trial may be raised at any time during trial, with "the court [being required to] hold a hearing to determine the defendant's capacity to proceed" in the event that a challenge to the defendant's competence is asserted. N.C.G.S. § 15A-1002(b)(1) (2019). In addition, a trial court in this jurisdiction has a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Heptinstall*, 309 N.C. at 236 (1983) (quoting *Young*, 291 N.C. at 568).

¶ 28 The "substantial evidence" sufficient to require a trial court to initiate a competency hearing on its own motion exists in situations in which the record raises a "bona fide doubt" concerning the defendant's competence. *Pate*, 383 U.S. at 385. In determining whether the evidence is sufficient to raise a bona fide doubt concerning the defendant's competence, a trial court is entitled to consider, among other things, the

> defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial . . . but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope, 420 U.S. at 180. "The relevant period of time for judging a defendant's competence to stand trial is 'at the time of trial.' " *State v. Hollars*, 376 N.C. 432, 442 (2020) (quoting *Cooper*, 286 N.C. at 565). Moreover, "even when the defendant is deemed competent to stand trial at the commencement of the proceedings, circumstances may arise during trial 'suggesting a change that would render the accused unable to meet the standards of competence to stand trial.' " *Hollars*, 376 N.C. at 442 (quoting *Drope*, 420 U.S. at 181).

¶ 29 The mere existence of evidence tending to show that the defendant has exhibited certain signs of mental disorder in the past or has engaged in what might be deemed unusual behavior during trial does not necessarily require the trial court to inquire into the defendant's competence to proceed on his own motion. For example, we have previously stated that, where "the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing." *Young*, 291 N.C. at 568. Similarly, in a case in which the trial judge made inquiry of the defendant's trial counsel prior to the commencement of the defendant's trial for first-degree murder if the defendant's competence had been evaluated and in which the defendant's trial counsel responded by stating that the defendant had previously received mental health services for the purpose of treating his depression following a suicide attempt, we determined that

> there is some evidence in the record indicating that defendant had received precautionary treatment for depression and suicidal tendencies several months before trial. However, this evidence of past treatment, standing alone, does not constitute "substantial evidence" before the trial court, indicating that defendant "lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" at the time his trial commenced.

State v. King, 353 N.C. 456, 467 (2001) (citation omitted) (first quoting *Young*, 291 N.C. at 568; and then quoting *Drope*, 420 U.S. at 171). Finally, in *Badgett*, 361 N.C. at 259–60, this Court determined that the fact that the defendant had told the jury that he wished to be sentenced to death and verbally attacked the prosecutor during an emotional outburst "did not constitute 'substantial evidence' requiring the trial court to institute a competency hearing." As a result, the fact that a defendant has received mental health treatment in the past or acts in an unusual or emotional manner during trial does not, without more, suffice to require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion.

¶ 30 A careful review of the record before the trial court at the time of defendant's trial indicates that he had been involuntarily committed on four occasions during the two-year period between the date upon which defendant was arrested and the date upon which this case was called for trial. During this period, three different evaluations were

conducted for the purpose of determining whether defendant was competent to stand trial. In the first of these evaluations, which was conducted during November 2016, Mr. Freedman found that defendant was not competent to stand trial given the existence of profound deficits in his fund of knowledge, his low IQ scores, his intellectual disabilities, and his near-complete failure to understand the judicial process. In addition, defendant's treatment team diagnosed him as suffering from severe methamphetamine use disorder, severe opioid use disorder, adjustment disorder with depressed mood, antisocial personality disorder, and suicidal ideation and Mr. Freedman noted that defendant had previously been diagnosed as suffering from attention deficit/hyperactivity disorder, mood disorder, polysubstance dependence, and personality disorder.

¶ 31 At the time of defendant's second evaluation, which was conducted in February 2017, Dr. Berger opined that, while defendant was not capable of proceeding to trial at that time, the extent to which he might be competent to stand trial in the future would depend upon the extent to which defendant could develop an understanding of the judicial process and the nature and extent of the charges that had been lodged against him. According to Dr. Berger, any improvement in the likelihood that defendant would be found competent to stand trial depended upon the extent to which defendant successfully participated in the competency restoration classes that were available at Broughton Hospital. In the course of his commitment to Broughton Hospital, defendant received various treatments that were designed to improve his mental health and comprehension, including the administration of medication for the purpose of addressing anxiety and improving his sleep, participation in educational groups focused upon improving his understanding of courtroom procedures, and attendance at Alcoholics Anonymous meetings.

¶ 32 After defendant had received treatment at Broughton Hospital for about a month, Dr. Berger conducted another evaluation of defendant's competence to stand trial. At that time, defendant was only diagnosed as suffering from intellectual disability and opiate use disorder in sustained remission. Dr. Berger reported that, according to the treatment team, defendant had cooperated with the educational and treatment process, had not presented any behavioral management challenges, had been able to advocate for his own needs, had interacted with his peers and hospital staff in an appropriate manner, and had been able to independently complete tasks associated with daily living. In addition, Dr. Berger noted that defendant was able to identify his attorney; name the specific charges that had been lodged against him; state that, in the

event that he was found guilty of committing a felony, he would receive a prison sentence; and was able to provide a basic explanation of the plea negotiation process. According to Dr. Berger, defendant was able to provide "reality-based and accurate" explanations of the roles played by defense attorneys, prosecutors, judges, members of the jury, and witnesses during the trial process and had informed Dr. Berger that he was ready to proceed to trial and believed that he would be treated fairly in the judicial system. As a result, Dr. Berger concluded that defendant's competency had been restored and that he was capable of proceeding to trial.

¶ 33 At the pre-trial competency hearing that was held before Judge Gavenus, defendant's trial counsel did express reservations about whether defendant's competency had been "restored" during his time at Broughton Hospital, stating "I don't agree that he's necessarily capable" and indicating that "there is some question in my mind" about defendant's competency "because I've dealt with [defendant] for a number of years." On the other hand, defendant's trial counsel admitted he was not "a doctor to judge [defendant's] condition" and asked Judge Gavenus to carefully examine Dr. Berger's report, thoroughly consider the evidence, and make a determination concerning defendant's competence to stand trial. After reading Dr. Berger's second forensic evaluation and asking defendant several questions, Judge Gavenus determined that defendant was competent to proceed.

¶ 34 At the time that this case was called for trial, neither party made any attempt to revisit the issue of defendant's competence. In addition, neither party raised the issue of defendant's competence at any point during the course of the trial. Finally, no witness testified in such a manner as to question defendant's competence and nothing else occurred during the trial that tended to suggest that defendant had become incompetent since Judge Gavenus had found that defendant was capable of standing trial. As a result, since defendant had previously been "committed and examined relevant to his capacity to proceed" and since "all evidence before the court indicate[d] that he ha[d] that capacity," *Young*, 291 N.C. at 568, we conclude that the trial court did not err by failing to initiate an inquiry into the issue of defendant's competence on its own motion.

¶ 35 In support of his argument, defendant points to certain statements that he and his trial counsel made during the post-verdict proceedings that resulted in the acceptance of defendant's guilty plea to having attained habitual felon status and the imposition of the trial court's judgments. A careful review of the statements upon which defendant relies, in the context in which they were made, satisfies us that defendant's

arguments lack persuasive force. For example, we are unable to understand defendant's negative response to the trial court's inquiry concerning whether defendant was "now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" as a suggestion that he had ceased taking the mental health medications that had been prescribed for him, particularly given defendant's subsequent claim that he had "not been into nothing" illegal in the recent past and had "[n]ever failed a drug test" that had been administered by his probation officers and given defendant's claim that he had been receiving "intensive outpatient" services from an organization associated with Broughton Hospital. Instead, defendant's negative answer to the trial court's question seems to us to be little more than a denial that his mental faculties were adversely affected at the time of the entry of his guilty plea as a result of the consumption of an impairing substance. Similarly, we are unable to understand defendant's initial error in stating that he was entering a plea of guilty to having attained habitual felon status pursuant to a plea agreement with the prosecutor as casting doubt upon defendant's competence given that the question actually posed by the trial court inquired as to whether defendant had "agreed to plead guilty as part of a plea arrangement" and given that defendant immediately withdrew his misstatement both before and after an intervention by his trial counsel. In other words, defendant's error looks like nothing more than a simple mistake. Moreover, even though defendant's trial counsel stated at the sentencing hearing that defendant was "on disability," that he was "a very low-functioning individual" with an IQ around 82, and that "he was found to be incompetent and then found to be competent at a later date,"[6] this argument was, on its face, nothing more than a successful attempt to persuade the trial court to find the existence of the statutory mitigating factor set out in N.C.G.S. § 15A-1340.16(e)(3) (establishing a statutory mitigating factor available in situations in which "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense"). Finally, defendant's request for the entry of a judgment placing him on probation strikes us as, in essence, a cry for mercy rather than an indication that defendant failed to understand the nature of the proceedings in which he was participating. As a result, we conclude that none of these statements, taken either individually or in conjunction with each other, suffice to raise a substantial question about defendant's competence to stand trial.

---

6. As has been noted elsewhere in this opinion, Mr. Freedman reported that defendant's reported IQ was approximately 60.

¶ 36 Ultimately, defendant's challenge to the trial court's failure to inquire into defendant's competence to stand trial on its own motion rests upon the fact that defendant had significant cognitive deficiencies and the fact that a person's competence is subject to change. Although a defendant's competence must be evaluated "at the time of trial" and although events that occur during trial may place the trial court on notice that a defendant's competence has become subject to question, *Hollars*, 376 N.C. at 442, a trial court is also entitled to rely upon the correctness of a pre-trial competency determination in the absence of a specific basis for believing that the defendant's competence is subject to legitimate question. In view of our determination that nothing tending to raise a substantial doubt about defendant's continued competence occurred after the entry of Judge Gavenus' order finding defendant to be competent to stand trial and before the end of the trial, we hold that the trial court did not err by failing to conduct an inquiry into defendant's competence upon its own motion and that the Court of Appeals erred by reaching a contrary conclusion. As a result, the Court of Appeals' decision is reversed and this case is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion, including consideration of defendant's challenge to the trial court's decision to deny his motion to dismiss the charges that had been lodged against him for insufficiency of the evidence.

REVERSED AND REMANDED.

STATE v. MELVIN

[377 N.C. 187, 2021-NCSC-39]

STATE OF NORTH CAROLINA
v.
JAMELL CHA MELVIN AND JAVEAL AARON BAKER

No. 486PA19

Filed 16 April 2021

Criminal Law—joinder—of defendants—objection—preservation for appellate review

Defendant properly preserved for appellate review his claim that he should not have been tried jointly with another defendant because they had antagonistic defenses, where defendant objected to the joinder before trial, moved to sever during trial, renewed his motion to sever at the close of the State's evidence and at the close of all evidence, and finally moved again to sever after closing arguments.

Justice BERGER concurring in result only.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA18-843, 2019 WL 6134204 (N.C. Ct. App. 2019), finding no error in part and vacating and remanding in part judgments entered on 4 August 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Benjamin O. Zellinger, Special Deputy Attorney General, for the State-appellee.

Sarah Holladay for defendant-appellant Jamell Cha Melvin.

EARLS, Justice.

¶ 1 In the summer of 2015, armed robbers stole nearly half a million dollars from Raleigh's Walnut Creek Amphitheater. The narrow question in this appeal is whether one of the defendants in this case, Jamell Cha Melvin, properly preserved for appellate review his claim that he should not have been tried jointly with another defendant because the two had antagonistic defenses at trial. Three defendants, Mr. Melvin, Javeal Aaron Baker, and Kianna Baker, were tried together as co-defendants

for their involvement in the crime after their motions for separate trials were denied. Following their convictions, Mr. Melvin and Mr. Javeal Baker appealed to the Court of Appeals, arguing that the trial court should have granted their motions for severance. The Court of Appeals concluded that their claims had not been properly preserved for appeal because the grounds for severance argued at the beginning of the trial were not the same as the grounds relied upon by defendants on appeal. However, the Court of Appeals erroneously analyzed the case as one involving severance of offenses rather than severance of defendants. Mr. Melvin sought and was allowed discretionary review by this Court. We reverse and remand to the Court of Appeals for consideration on the merits of Mr. Melvin's claim for severance of defendants.[1]

I. Background

¶ 2 At trial, the State presented evidence that three armed men entered the Walnut Creek Amphitheater in Raleigh, North Carolina, on 13 July 2015. The men were wearing dark clothing, except for one who was wearing a tan coat, and all three men had their faces concealed. The assailants corralled five employees in one or two offices, holding them all at gunpoint and threatening to shoot them. After forcing one of the employees, a supervisor, to call the general manager, the men compelled the general manager to open the safe. Two of the armed men then began packing money into bags while the third moved some of the employees into a walk-in freezer. The men stole approximately $497,000 and then fled the scene. The State alleged that Mr. Melvin was the driver of a car that transported the three men who robbed the amphitheater.

¶ 3 On 8 June 2017, the State filed motions (1) to join for trial the offenses of six counts of robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, and five counts of

1. The Court of Appeals also considered arguments from Mr. Baker and Mr. Melvin that (1) the trial court erred when, in response to a jury request for available information on Crime Stopper tips, the trial court failed to repeat a limiting instruction regarding anonymous tips; and (2) the trial committed plain error by instructing the jury that it could find Mr. Baker and Mr. Melvin guilty on six separate counts of robbery. *State v. Melvin*, No. COA18-843, 2019 WL 6134204, at *5–7 (N.C. Ct. App. Nov. 19, 2019) (unpublished). It rejected these arguments. *Id.* The Court of Appeals also rejected Mr. Baker's argument that the record did not contain any evidence that Mr. Baker had constructive possession of money found in a storage unit and rejected Mr. Melvin's argument that cumulative error warranted a new trial and his argument that the trial court erred when it entered a judgment for restitution. *Id.* at *7–9. Finally, the Court of Appeals concluded that the trial court erred in entering a civil judgment for attorneys' fees against Mr. Melvin because the trial court failed to provide Mr. Melvin with an opportunity to be heard. *Id.* at *9. Our decision leaves undisturbed these portions of the Court of Appeals decision.

second degree kidnapping against each of four defendants (Mr. Melvin, Mr. Baker, Shymale Robertson, and Adjani Bryant); and (2) to join for trial six defendants (Mr. Melvin, Mr. Javeal Baker, Shymale Robertson, Adjani Bryant, Ms. Kianna Baker, and Lorenzo McNeil) on the theory that the offenses charged against each defendant were all part of a common scheme or plan. The motion for joinder of offenses and the motion for joinder of defendants were included in the same document for each defendant, titled "Motion and Order for Joinder." The record contains a subsequent motion by the State, made 28 June 2017, that sought to join all of the same defendants with the exception of Adjani Bryant, who testified against Mr. Melvin and Mr. Baker at trial.

¶ 4 At a hearing to consider the State's motions for joinder, the defendants made various arguments about why they should be tried separately. Counsel for Mr. Robertson argued, in part, that Mr. Robertson's case should be severed because he intended to call a witness named Chicago Smith who would provide information, in the form of a statement from Mr. Melvin, that was potentially exculpatory for Mr. Robertson and potentially incriminating for Mr. Baker and Mr. Melvin. Mr. Robertson's counsel also argued that much of the evidence expected to be presented in the case did not pertain to Mr. Robertson, that he intended to elicit information from one of the State's witnesses that would likely be prejudicial to the other defendants and to Mr. Melvin in particular, that the other defendants (and Mr. Melvin particularly) were more culpable than Mr. Robertson, and that Mr. Robertson might be convicted on the basis of his association with the other defendants rather than on the basis of his guilt.

¶ 5 Mr. Baker's counsel asked for Mr. Baker's trial to be severed from Mr. Robertson's trial because of Mr. Robertson's plan to call Chicago Smith, arguing that if they were tried jointly, he would be unable to cross-examine Mr. Melvin, a co-defendant who was the source of Chicago Smith's information. However, Mr. Baker's counsel suggested that the problem could be solved if Mr. Baker's and Mr. Melvin's trials were severed from each other. Mr. Baker's counsel also requested severance from Ms. Kianna Baker (Mr. Baker's mother) and Mr. Melvin (Ms. Baker's partner), on the basis that he might be convicted based on the conduct of Ms. Baker and Mr. Melvin. Mr. Baker's counsel argued that the dearth of direct evidence related to his client and the more substantial evidence forecast to be presented against Mr. Melvin and Ms. Kianna Baker made it more likely that he might be convicted as a result of his relationship to Mr. Melvin and Ms. Baker.

¶ 6 Mr. Melvin's counsel argued that Mr. Robertson's trial should be severed because Chicago Smith's testimony, expected to be elicited by Mr. Robertson, was likely to conflict with the State's evidence presented through the testimony of Adjani Bryant. On his own motion to sever, Mr. Melvin's counsel argued that, because the State alleged that Mr. Melvin was the driver rather than one of the three armed men who robbed the amphitheater, Mr. Melvin should be tried separately to avoid confusing the jury.

¶ 7 Ms. Kianna Baker's counsel argued that she should be tried separately because (1) Ms. Baker was charged as an accessory after the fact rather than a principal, and (2) Ms. Baker was likely to be convicted on the basis of her associations rather than on the evidence. Mr. McNeil's counsel did not make any arguments as to joinder in anticipation that Mr. McNeil's case would be resolved before the trial began.

¶ 8 After taking the motions under advisement, the trial court ultimately granted the State's motion to join the defendants and offenses for trial as to Mr. Baker, Mr. Melvin, Ms. Kianna Baker, and Mr. McNeil. As to Mr. Robertson, the trial court denied the State's motion to join him as a defendant for trial, but granted the State's motion to join his charged offenses. The joint trial of Mr. Melvin, Ms. Kianna Baker, and Mr. Javeal Baker began on 10 July 2017.

¶ 9 During the joint trial, Mr. Melvin moved to sever defendants an additional five times. First, Mr. Melvin asked to be heard following direct examination testimony by Kelly Ann Kinney, a detective with the Raleigh Police Department. Mr. Melvin argued that the detective had testified to statements made by Ms. Baker to Detective Kinney indicating that Mr. Melvin sold marijuana and had purchased two vehicles. Mr. Melvin argued that he had "wanted to sever for these particular reasons" and renewed his motion to sever the defendants, which was denied. Second, Mr. Melvin renewed his objection to joinder of defendants, without further explanation, at the close of the State's evidence. Third, Mr. Melvin renewed his objection to joinder of defendants, again without further argument, at the close of all evidence.

¶ 10 Mr. Melvin's final two objections to joinder of the defendants came after the parties' closing arguments. The first of the two objections, Mr. Melvin's fifth overall objection to the defendants' joinder, came at the end of the jury's first day of deliberations. After the trial court dismissed the jury for the evening, the trial court asked whether there were any additional objections from counsel regarding instructions that had been provided. Mr. Melvin's counsel stated, "Nothing as to that. I did want

to revisit a matter and renew my objection to the joinder of this matter based on [Mr. Baker's counsel's] comments in his closing arguments." The trial court denied the motion. The following day, the jury returned its verdicts. The day after that, before the trial court conducted sentencing, Mr. Melvin's counsel asked to be heard and explained that his objection after the closing argument from Mr. Baker's counsel was because Mr. Melvin "not only had to contest [the State] but had to contest [Mr. Baker]." In the view of Mr. Melvin's counsel, this was in violation of Mr. Melvin's rights under the United States and North Carolina constitutions.

¶ 11 During his closing argument, Mr. Baker's counsel had argued to the jury that Mr. Melvin had committed the actual robbery, stating:

> The Walnut Creek Amphitheater was robbed. Those six victims were robbed. Those six victims were then kidnapped in the sense of being put in a cooler or left in the cash room. The question is who did that? And the defense that we've been trying to present to you through the questions is that it wasn't Javeal Baker, but it was Adjani Bryant, who you know did go into this robbery, and it was Jamell Melvin, and it was Lorenzo [McNeil].

Mr. Baker's counsel then emphasized that "the evidence that [he'd] tried to present" through his questions was that the robbery "was committed by Adjani Bryant, by Jamell Melvin, and by Lorenzo [McNeil]."[2] Mr. Baker's counsel went on to assert that Mr. Melvin (rather than Mr. Baker) had been in the building committing the robbery, arguing that Mr. Melvin matched the physical description of one of the robbers and that Mr. Melvin was more closely associated with the other suspects in the case.

¶ 12 At the trial's conclusion, Mr. Melvin and Mr. Baker were each convicted of six counts of robbery with a dangerous weapon, five counts of second-degree kidnapping, and one count of conspiracy to commit

---

2. A review of the trial transcript reveals the efforts of Mr. Baker's trial counsel in this regard. For example, Mr. Baker's counsel used cross-examination to elicit information regarding a violent assault by Mr. Melvin; ties between Mr. Melvin and Adjani Bryant (who admitted involvement in the robbery); and Mr. Melvin's history of working at the amphitheater, contrasting the lack of a similar history on Mr. Baker's part. It was also Mr. Baker's counsel who elicited testimony regarding Mr. Melvin's height, which he later argued was evidence that Mr. Melvin and not Mr. Baker had entered the amphitheater to commit the robbery. While these examples are not every instance of Mr. Baker's counsel referring to Mr. Melvin, they indicate that the alleged conflict did not first appear during closing arguments.

robbery with a dangerous weapon.[3] The trial court entered judgment, and they both appealed their judgments to the Court of Appeals.

¶ 13 On appeal to the Court of Appeals, Mr. Melvin and Mr. Baker primarily argued that the trial court should have severed their cases and tried them separately. *State v. Melvin*, No. COA18-843, 2019 WL 6134204, at *1 (N.C. Ct. App. Nov. 19, 2019) (unpublished). They asserted that they had put on antagonistic defenses at trial. *Id.* at *2. The Court of Appeals did not address the merits of this argument, holding instead that it was unpreserved because neither Mr. Melvin nor Mr. Baker had argued before trial that they planned to present antagonistic defenses. *Id.* at *2–5. After rejecting most of the defendants' other arguments as being without merit, the Court of Appeals found no error in the judgments of conviction but vacated and remanded the civil judgment of attorneys' fees against Mr. Melvin. *Id.* at *9. Mr. Melvin sought discretionary review in this Court, asking that we review that portion of the Court of Appeals decision which addressed his objection to the joinder of his trial with that of Mr. Baker. We allowed the petition on 26 February 2020.

II. Standard of Review

¶ 14 "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Golder*, 374 N.C. 238, 244 (2020) (quoting *State v. Melton*, 371 N.C. 750, 756 (2018)). As to the trial court's grant of the State's motion for joinder, consolidating the trials of defendants alleged to be responsible for the same behavior is preferred as a matter of public policy. *State v. Tirado*, 358 N.C. 551, 564 (2004) (citing *State v. Nelson*, 298 N.C. 573, 586 (1979)). Therefore, "[a] trial court's ruling on a motion for joinder is reviewed for abuse of discretion in light of the circumstances of the case, and the ruling will not be disturbed on appeal absent a showing that the joinder caused the defendant to be deprived of a fair trial." *Id.* (citing *State v. Golphin*, 352 N.C. 364, 399 (2000)); *see also State v. Slade*, 291 N.C. 275, 281–82 (1976). We will reverse a trial court for abuse of discretion "only upon a showing that its actions are manifestly unsupported by reason" or where the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985). However, such an abuse of discretion is established when the trial court makes an error of law. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)); *State v. Rhodes*, 366 N.C. 532, 536 (2013); *accord Lamm v. Lorbacher*, 235 N.C. 728, 732 (1952) (stating

3. Ms. Kianna Baker, who was not a party to the appeal below, was convicted of accessory after the fact of robbery with a dangerous weapon.

that "a matter resting in the sound discretion of the trial court . . . is not reviewable on appeal" absent "a palpable abuse of such discretion" or "some imputed error of law or legal inference" (first quoting *Johnston v. Johnston*, 213 N.C. 255, 257 (1938); then quoting *Hughes v. Oliver*, 228 N.C. 680, 685 (1948); then quoting *Johnston*, 213 N.C. at 257)).

III. Severance of Defendants for Trial

¶ 15 The Court of Appeals erred by considering only the pretrial motions for severance. Instead, it should have considered each of the motions made by Mr. Melvin's counsel and decided on the merits whether the trial court was required to sever the defendants' trials.

¶ 16 Section 15A-927 of the General Statutes governs objections to the joinder of defendants for trial. The statute provides that a trial court "must deny a joinder for trial or grant a severance of defendants whenever" (1) the trial court finds before trial that severance is necessary to protect a defendant's speedy trial right or to promote a fair determination of guilt or innocence, or (2) the trial court finds during trial that severance is "necessary to achieve a fair determination" of guilt or innocence. N.C.G.S. § 15A-927(c)(2) (2019). If during trial, the motion to sever must be made by the severing defendant or by the prosecutor with the severing defendant's consent. N.C.G.S. § 15A-927(c)(2)(b). Thus, the statute contemplates that defendants may object to joinder or move for severance both "before trial" and "during trial." N.C.G.S. § 15A-927(c)(2). Further, the statute does not limit such objections or motions to the period of time before trial or before the close of the State's evidence. *See id.* Instead, the trial court "must deny a joinder for trial or grant a severance of defendants whenever . . . it is found necessary to achieve a fair determination of the guilt or innocence of [the severing] defendant." *Id.* Defendants may preserve for appellate review, then, a claim for severance of defendants by objecting to joinder or moving for severance of defendants at any point during the trial. *See*, *e.g.*, *State v. Evans*, 346 N.C. 221, 231–32 (1997) (considering the merits of a defendant's argument that the trial court erred by denying his motion to sever the defendant's case for trial based in part on evidence presented during a co-defendant's case-in-chief); *State v. Workman*, 344 N.C. 482, 492–96 (1996) (considering the merits of a defendant's argument that the trial court erred by denying his motion to sever the defendant's case for trial based only on occurrences after the State rested its case-in-chief). There is no part of the statute which would support a conclusion to the contrary.

¶ 17 The Court of Appeals concluded that Mr. Melvin's argument for severance was not preserved and stated that "[t]o preserve an argument

concerning joinder or severance for appellate review, the defendant must assert that specific argument to the trial court before trial or, if the ground for severance arises only after the trial begins, immediately after that ground becomes apparent." *Melvin*, 2019 WL 6134204, at *2 (citing *State v. Walters*, 357 N.C. 68, 79 (2003)). This is true as to severance of offenses. *See* N.C.G.S. § 15A-927(a)(1) ("A defendant's motion for severance of offenses must be made before trial as provided in G.S. 15A-952, except as provided in G.S. 15A-953, and except that a motion for severance may be made before or at the close of the State's evidence if based upon a ground not previously known."); *accord Walters*, 357 N.C. at 79 ("Pursuant to N.C.G.S. § 15A-927(a), a defendant must make a motion for severance of offenses before trial unless the basis for the motion is a ground not previously known. Under such a situation, the defendant may move for severance during trial but no later than the close of the State's evidence."). However, the statute contains no similar requirement for the timing of a motion for severance of defendants. *See generally* N.C.G.S. § 15A-927.

¶ 18 Indeed, this Court has previously addressed the merits of an argument for severance of defendants against a similar procedural backdrop. In *State v. Pickens*, 335 N.C. 717 (1994), the two co-defendants "filed motions to sever prior to trial" which were denied. *Id.* at 724. Both defendants renewed their motions throughout the trial and were denied. *Id.* In that decision, we gave no indication that we were limiting our analysis to the arguments made prior to trial. Instead, we considered the "numerous evidentiary rulings" identified by the co-defendants "which they contend[ed] resulted in the denial of a fair trial for each of them." *Id.*; *see also Nelson*, 298 N.C. at 586–87 (considering testimony of co-defendants, which necessarily occurred after the close of the State's evidence, to determine whether motions of severance of defendants were properly denied). In the decision below, the Court of Appeals relied on two of our prior decisions to conclude that the arguments of Mr. Melvin and Mr. Baker were unpreserved. *See Melvin*, 2019 WL 6134204, at *2 (citing *Walters*, 357 N.C. at 79); *Id.* at *4 (citing *State v. Silva*, 304 N.C. 122, 127 (1981)). However, both of those decisions pertained to severance of offenses rather than severance of defendants. *See Walters*, 357 N.C. at 79 (considering preservation of the defendant's argument that the trial court erred by consolidating "the murders and related charges regarding" multiple victims); *Silva*, 304 N.C. at 126 (considering preservation of the defendant's argument that the trial court erred by consolidating charges of robbery, larceny, and conspiracy).

¶ 19 On these facts, where Mr. Melvin objected to joinder prior to trial, moved to sever during trial when he perceived that testimony relating

a co-defendant's statements prejudiced him, renewed the motion to sever at the close of the State's evidence and at the close of all evidence, and again moved to sever on the basis of a co-defendant arguing during closing that Mr. Melvin was guilty, we hold that Mr. Melvin sufficiently preserved for appellate review his motion to sever his trial from that of his co-defendants on the basis of antagonistic defenses. The Court of Appeals erred by applying the preservation standard for severance of offenses rather than the standard applicable to severance of defendants and erroneously limited its consideration to only Mr. Melvin's pretrial arguments for severance. As a result, we reverse the Court of Appeals decision holding that Mr. Melvin did not adequately preserve his argument and remand to that court for consideration of Mr. Melvin's claim on the merits.

REVERSED AND REMANDED.

Justice BERGER concurring in result only.

¶ 20 I agree with the majority that the Court of Appeals applied the wrong statute when it analyzed this case. Rather than applying N.C.G.S. § 15A-927(c)–severance of defendants–the Court of Appeals applied N.C.G.S. § 15A-927(a)(1)–(2)–severance of offenses. However, I concur in result only because this case should simply be remanded for the Court of Appeals to apply N.C.G.S. § 15A-927(c) and to analyze preservation under the appropriate statute, rather than this Court making the determination in the first instance.

¶ 21 Instead, the majority has issued an opinion concerning preservation which could be misinterpreted as removing Rule 10's requirement for specific grounds in cases involving joinder or severance of defendants. Given the plain language of Rule 10, the majority could not have intended for an objection to joinder on *Bruton* grounds to preserve an antagonistic defenses argument on appeal. It is more likely that the majority intended to convey that defendant's objection prior to sentencing preserved for appellate review his antagonistic defenses argument.

¶ 22 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a). Defendant's sole motion to sever based on antagonistic defenses was his sixth objection to joinder, made after the jury verdict and prior to sentencing. A misreading of the majority opinion could allow defendants to argue one ground for severance at trial but still

preserve wholly unrelated arguments for appeal. This would undermine the purpose of requiring a party to state the specific grounds for a motion or an objection and obtain a ruling from the trial court.

¶ 23 N.C.G.S. § 15A-927(c) sets forth specific grounds for severance of defendants: when (1) "a defendant objects to joinder of charges against two or more defendants for trial because of an out-of-court statement of a codefendant makes reference to him but is not admissible against him," (2) "if before trial it is found necessary to protect a defendant's right to a speedy trial," or (3) either before or during trial, it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants. *See* N.C.G.S. § 15A-927(c)(1)–(3) (2019). The issue of antagonistic defenses is one of several circumstances in which severance may be related to promoting a fair determination of guilt or innocence, pursuant to N.C.G.S. § 15A-927(c)(2). *See State v. Pickens*, 335 N.C. 717, 725, 440 S.E.2d 552, 556 (1994) ("The test [for antagonistic defenses] is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." (cleaned up)).

¶ 24 Here, defendant only raised the specific ground of antagonistic defenses in his sixth objection to joinder. Defendant's other objections either concerned *Bruton* issues or were simply renewals of prior objections. As such, defendant's five earlier objections did not preserve the issue of antagonistic defenses for appellate review. *See State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980) ("A specific objection, if overruled, will be effective only to the extent of the grounds specified.").

¶ 25 During the pre-trial hearing, defendant first objected to joinder, arguing that there was a *Bruton* issue with potential witness Chicago Smith. During trial, defendant renewed his motion to sever based on *Bruton* because of a statement that defendant was a drug dealer. Counsel for defendant stated that he was renewing his motion to sever "for these particular reasons." Defendant's next two objections, made at the close of the State's evidence and the close of all of the evidence, were renewals of his prior objections. None of these objections mentioned antagonistic defenses, and there was no argument made by defendant related to antagonistic defenses.

¶ 26 After closing arguments, defendant's counsel again attempted to sever; this time based on comments counsel for co-defendant Baker made during closing arguments. However, defense counsel stated that he was "renew[ing his] objection to the joinder of this matter." Defendant failed to direct the court to the specific comments made by Baker's counsel

during closing arguments to which he was objecting, and he never objected based on antagonistic defenses.

¶ 27 Following the entry of the jury's verdicts, defense counsel finally articulated an objection related to antagonistic defenses. Defense counsel stated:

> during the course of the trial, I renewed my objection to the court joining these defendants for trial. I just want to make sure that it's on the record as to why. As you recall, Mr. Wilkinson gave a closing, and my client, Mr. Melvin, not only had to contest Mr. Waller but had to contest Mr. Wilkinson, and I think that's a violation of his constitutional rights, both under North Carolina and the U.S. Constitution. So I want to put that on the record.

¶ 28 This was the only time defendant argued for severance based on the possibility of antagonistic defenses and a fair determination of guilt or innocence.

¶ 29 The majority holds that:

> where [defendant] objected to joinder prior to trial, moved to sever during trial when he perceived that testimony relating a co-defendant's statements prejudiced him, renewed the motion to sever at the close of the State's evidence and at the close of all evidence, and again moved to sever on the basis of a co-defendant arguing during closing that [defendant] was guilty, we hold that [defendant] sufficiently preserved for appellate review his motion to sever his trial from that of his co-defendants on the basis of antagonistic defenses.

This could be read as holding that defendant's sixth objection preserved his antagonistic defense argument. Or, the majority opinion could be viewed, contrary to Rule 10, as permitting a defendant to object to joinder on one ground, but nevertheless preserve a different issue for our review.[1] The majority's approach, however, overlooks the fact that defendant abandoned many of his joinder arguments. *See* N.C. Rule App. P. 28(a)

1. Such a procedure would be equivalent to allowing an argument that a particular statement is not a present sense impression under Rule 803(1) of the North Carolina Rules of Evidence to then preserve for appellate review every potential hearsay objection that could have been made by a party.

("Issues not presented and discussed in a party's brief are deemed abandoned."). It seems incongruent to find preservation where a party has abandoned the issue on appeal.

¶ 30 While I agree with the majority that the Court of Appeals opinion was premised on the wrong statute, this matter should be remanded for the Court of Appeals to apply N.C.G.S. § 15A-927(c) and review preservation of defendant's antagonistic defenses argument under that section.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion.

STATE OF NORTH CAROLINA
v.
ROBERT PRINCE

No. 225A20

Filed 16 April 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 843 S.E.2d 700 (N.C. Ct. App. 2020), vacating a judgment entered on 10 July 2018 by Judge Nathaniel J. Poovey in Superior Court, Gates County, and remanding for resentencing. Heard in the Supreme Court on 24 March 2021.

Joshua H. Stein, Attorney General, by Terence Steed, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Emily Holmes Davis, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

¶ 1 Justice BERGER did not participate in the consideration or decision of this case. As to the appeal of right based on the dissenting opinion, the remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g.*, *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *State v. Pastuer*, 365 N.C. 287, 715 S.E.2d 850 (2011).

AFFIRMED.

STATE v. SCOTT

[377 N.C. 199, 2021-NCSC-41]

STATE OF NORTH CAROLINA
v.
WILLIAM LEE SCOTT

No. 78A20

Filed 16 April 2021

Appeal and Error—criminal law—constitutional violation—standard for determining prejudicial error—burden of proof

In a second-degree murder case arising out of an automobile wreck where the Court of Appeals held that the trial court erred by denying defendant's motion to suppress (which sought to exclude blood test results) but that—in light of defendant's high speed, reckless driving, and prior record—there remained substantial evidence to show malice to support a second-degree murder conviction and, therefore, defendant failed to show prejudicial error in the denial of the motion to suppress, the Court of Appeals erred by applying the wrong legal standard for determining prejudice and by wrongly placing the burden on defendant to show prejudice. Because a federal constitutional error occurred, the State had the burden of proving the error was harmless beyond a reasonable doubt and the case was remanded to the Court of Appeals for consideration in light of the correct standard of review.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 457 (2020), finding no prejudicial error after appeal from a judgment entered on 23 July 2018 by Judge Paul C. Ridgeway in Superior Court, Alamance County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State-appellee.

M. Gordon Widenhouse Jr. for defendant-appellant.

BARRINGER, Justice.

¶ 1 To address this appeal, this Court must decide whether the Court of Appeals erred by not deciding whether an error was harmless beyond a reasonable doubt and by placing the burden on defendant to show the error was prejudicial. We conclude the Court of Appeals erred. Thus, we reverse the Court of Appeals' decision and remand to the Court of Appeals to apply the proper standard.

I. Background

¶ 2 On 21 June 2013, defendant's car collided with another vehicle. The driver of the other vehicle was pronounced dead at the scene. Defendant was transported to Moses Cone Hospital where he was treated and released. The State filed an application for an order for Moses Cone Hospital medical records, seeking medical records and the defendant's blood from his 21 June 2013 admission to the hospital. The trial court issued an order directing Moses Cone Hospital to provide defendant's medical records and blood. The North Carolina State Crime Laboratory issued a report containing the analysis of blood testing on defendant's blood on 29 July 2013. The laboratory report contained the analyst's opinion that the blood alcohol concentration of defendant's blood was .22 grams of alcohol per 100 milliliters of blood.

¶ 3 Subsequently, in September 2013, the State obtained a grand jury indictment against defendant for second-degree murder, felony death by vehicle, and misdemeanor death by vehicle. Before trial, defendant filed a motion to suppress. In the motion, defendant sought to exclude evidence generated from defendant's blood, arguing the blood was obtained in violation of the Constitutions of the United States and of North Carolina. The trial court denied defendant's motion to suppress.

¶ 4 At trial, the State introduced, and the trial court admitted into evidence the laboratory report and testimony from its expert that the blood alcohol concentration of defendant's blood was .22 grams of alcohol per 100 milliliters of blood (collectively, blood test results). Defendant preserved his objection to the admission of the blood test results during trial.

¶ 5 The jury returned a verdict of guilty of second-degree murder and felony death by motor vehicle. The trial court subsequently entered judgment on second-degree murder and arrested judgment on felony death by vehicle. Defendant appealed.

¶ 6 On appeal, the Court of Appeals held that the trial court erred by denying defendant's motion to suppress and by not excluding the blood test results. *State v. Scott*, 269 N.C. App. 457, 465 (2020). The Court of Appeals' decision stated in pertinent part:

> Here, no allegation or indication of Defendant's purported intoxication was asserted in the record or in the Application for Order [for provision of Defendant's blood]. None of the officers, firefighters, or paramedics on the scene, nurses, physicians, or investigating officers in close and direct contact with

Defendant at the hospital noticed any signs of impairment at the time of the collision or thereafter.

The first and only indication of Defendant's intoxication were results of tests on Defendant's blood samples taken from the Hospital and tested over a week later at the [State Bureau of Investigation] laboratory. . . .

. . . .

. . . [T]he trial court's order [for provision of Defendant's blood] does not base its reasoning upon exigent circumstances to draw blood without a warrant from an incapacitated person, who is under suspicion for drunk driving. "The natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *State v. Romano*, 369 N.C. 678, 687, 800 S.E.2d 644, 656 (2017) (quoting *Missouri v. McNeely*, 569 U.S. 141, 165, [133 S. Ct. 1552,] 185 L. Ed. 2d 696, 715 (2013)).

The State's reliance on *State v. Smith* is also inapposite. The facts in *Smith* involved a search warrant for the defendant's test results and did not involve whether the search warrant was supported by sufficient probable cause. [*State v.*] *Smith*, 248 N.C. App. [804,] 815, 789 S.E.2d [873,] 879 [(2016)]. This Court concluded the "identifiable health information" in [N.C.G.S.] § 90-21.2[0]B(a1)(3) requires a search warrant or judicial order that "specifies the information sought." *Id.*

However, a valid order remains subject to the reasonable suspicion standard required by our Supreme Court's opinion in *In re Superior Court Order*, 315 N.C. [378,] 382, 338 S.E.2d [307, 310 (1986)]. A search warrant remains subject to the probable cause standard contained in N.C.[G.S.] § 15A-244 (2017). As noted above, the order before us is not based upon either reasonable suspicion or probable cause.

. . . Defendant's motion to suppress should have been sustained and the blood test results should have been excluded. Defendant's second-degree murder

> conviction cannot be supported on a theory of intoxication to provide the required element of malice.

Id. at 463–65 (cleaned up). The Court of Appeals' decision then addressed the prejudicial effect of the error. *Id.* at 465–66. The Court of Appeals held:

> The State provided substantial evidence of both Defendant's high speed and his reckless driving, together with his prior record, to show malice to support Defendant's conviction for second-degree murder.
>
> Defendant has failed to carry his burden to show any prejudicial error in the denial of the motion to suppress.

Id. at 467.

¶ 7 The dissent joined a portion of the majority decision, concurring "in the holding that Defendant's motion to suppress this evidence should have been granted." *Id.* at 467 (Brook, J., concurring in part and dissenting in part). However, the dissent disagreed with the portion of the majority decision holding that the admission of the blood test results did not constitute prejudicial error. *Id.* at 467–68. The dissent observed that the majority decision "seems to be based on a misapplication of the applicable legal standard." *Id.* at 472. The dissent identified the standard as "whether [the court] can 'declare a belief that [the federal constitutional error] was harmless beyond a reasonable doubt.' " *Id.* (second alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 513 (2012)). The dissent applied that standard and concluded he could not state that the admission of the blood test results was harmless beyond a reasonable doubt. *Id.* at 472–73.

II. Analysis

¶ 8 "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Davis v. Ayala*, 576 U.S. 257, 267 (2015); N.C.G.S. § 15A-1443(b) (2019).[1] The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); *Chapman*, 386 U.S. at 24; *Lawrence*, 365 N.C. at 513.

---

1. Subsection 15A-1443(b) of the General Statutes of North Carolina "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." N.C.G.S. § 15A-1443 official cmt. (2019).

¶ 9 In this case, the Court of Appeals held that the motion to suppress should have been sustained. *Scott*, 269 N.C. App. at 465. In reaching this conclusion, the Court of Appeals held that the order resulting in the production of the blood to the State was not based on either probable cause or exigent circumstances. *Id.* at 464–65. Since the absence of probable cause and exigent circumstances for a search or seizure[2] violates the Constitution of the United States absent a warrant or another exception to the warrant requirement, the Court of Appeals effectively held that a federal constitutional error occurred. *See* U.S. Const. amend. IV; *State v. Welch*, 316 N.C. 578, 587 (1986) (interpreting the balancing test set forth in *Schmerber v. California*, 384 U.S. 757, 770–72 (1966), as "forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample"). As a result, the Court of Appeals should have applied the aforementioned standard for federal constitutional errors in this case. *See State v. Ortiz-Zape*, 367 N.C. 1, 13 (2013) ("When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." (quoting *Lawrence*, 365 N.C. at 513)); *State v. Autry*, 321 N.C. 392, 399 (1988) ("Assuming *arguendo* that the search violated defendant's constitutional rights and that the evidence therefrom was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt.").

¶ 10 Therefore, we conclude that the Court of Appeals erred. The Court of Appeals did not apply the correct standard that the error was harmless beyond a reasonable doubt and wrongly placed the burden on defendant to show prejudice as reflected in its analysis and conclusion. *Scott*, 269 N.C. App. at 465–67.

III. Conclusion

¶ 11 The Court of Appeals applied the wrong standard for determining prejudice resulting from a violation of defendant's rights under the Constitution of the United States. Accordingly, we reverse the decision of the Court of Appeals and remand to the Court of Appeals to apply the proper standard and review this matter in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

---

2. "[D]rawing blood from a person constitutes a search under both the Federal and North Carolina Constitutions." *State v. Romano*, 369 N.C. 678, 685 (2017) (citations omitted).

ARMSTRONG v. STATE OF NORTH CAROLINA

[377 N.C. 204 (2021)]

ARTHUR O. ARMSTRONG	)	
	)	
v.	)	WILSON COUNTY
	)	
STATE OF NORTH CAROLINA, ET AL.	)	

No. 41P17-8

ORDER

Defendant's motions for relief filed on 9 and 11 March 2021 are dismissed.

By order of this Court in Conference, this 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

DAWN REYNOLDS-DOUGLASS	)	
	)	
v.	)	From Wake County
	)	
KARI TERHARK	)	

No. 43A21

ORDER

Defendant-appellant's petition for discretionary review of additional issues is denied as to Issues I, II, and III and dismissed as moot as to Issues IV and V.

Accordingly, the new brief of the Defendant-appellant shall be filed with this Court not more than 30 days from the date of this order. Subsequent briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 14(d)(1).

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of April, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

SPECIAL ORDER

Defendant's petition for writ of certiorari is allowed as to the following issues:

I. Whether defendant preserved his claim that the prosecutor impermissibly struck a juror on the basis of gender.

II. If the claim is preserved, whether the trial court properly decided that there was no intentional gender discrimination, including whether the "dual motivation" standard applies.

III. If the claim is preserved and the trial court erred, is the record sufficient to rule on the merits, or should the matter be remanded to the trial court for an evidentiary hearing.

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE v. BENNETT

[377 N.C. 207 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Sampson County
	)	
CORY DION BENNETT	)	

No. 406PA18

ORDER

The Court, on its own motion, remands this case to the Court of Appeals with instructions to examine the order that was entered by the trial court on remand on 9 February 2021 and to conduct any further review of that order that it deems to be appropriate, including requiring, in its discretion, the filing of supplemental briefs and the holding of oral argument, with any decision that it might make at the conclusion of this process being subject to possible future review by this Court in accordance with any applicable provisions of North Carolina law.

By order of the Court in conference, this the 14th day of April 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. TUCKER

[377 N.C. 208 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Forsyth County
	)	
RUSSELL WILLIAM TUCKER	)	

No. 113A96-4

SPECIAL ORDER

Defendant's petition for writ of certiorari is allowed as to Issue I, Issue II, and Issue III and denied as to Issue IV.

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

6P14-2	State v. Daniel Harrison Brennick	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/06/2021**
20P19-2	State v. Utaris Mandrell Reid	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-205) 2. Def's Motion to Amend PDR	1. Allowed 2. Dismissed as moot **Berger, J., recused**
20P21	Radiator Specialty Company v. Arrowood Indemnity Company (as Successor to Guaranty National Insurance Company, Royal Indemnity Company, and Royal Indemnity Company of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc., (as Successor to American Reinsurance Company); Mutual Fire, Marine and Inland Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company (as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	Plt's Motion to Admit Jonathan G. Hardin Pro Hac Vice	Allowed **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

32P21	State v. Jemar Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1147)	Denied **Berger, J., recused**
40P21-2	Charlie L. Hardin v. Todd E. Ishee, et al.	1. Plt's Pro Se Motion for Redress of Grievances 2. Plt's Pro Se Motion for Violations of U.S. Constitutional Amendments Rights 3. Plt's Pro Se Petition for Writ of Certiorari 4. Plt's Pro Se Motion to Submit Grievance 5. Plt's Pro Se Motion for Complaint f or Violations	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
41P17-8	Arthur O. Armstrong v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 2. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint 3. Plt's Pro Se Motion for Relief - Defamation of Character Complaint 4. Plt's Pro Se Motion for Relief - Complaint 5. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 6. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 7. Plt's Pro Se Motion for Relief - Complaint 8. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint 9. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint 10. Plt's Pro Se Motion for Relief - Complaint 11. Plt's Pro Se Motion for Relief - Defamation of Character Complaint 12. Plt's Pro Se Petition for Writ of Certiorari	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order 6. Special Order 7. Special Order 8. Special Order 9. Special Order 10. Special Order 11. Special Order 12. Dismissed
43A21	Dawn Reynolds-Douglass v. Kari Terhark	1. Def's Pro Se Notice of Appeal Based Upon a Dissent (COA20-112) 2. Def's Pro Se PDR as to Additional Issues	1. --- 2. Special Order

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

53P21	Michael E. Williams v. Susan L. McDonald	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-10)	Denied
57A21	State v. Calvin Lee Miller	1. Def's Notice of Appeal Based Upon a Dissent (COA19-1083) 2. Def's PDR as to Additional Issues 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
73P21	State v. Jalen M. Anderson	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	Dismissed
74P21	William Jernigan, Jr. v. Sam Page, Sheriff, Lt. Brown, Matthew Cockman, District Attorney for Rockingham County, NC, Individually and in their Official Capacities, et al.	Plt's Pro Se Petition for Writ of Mandamus	Dismissed
77A19	In the Matter of the Proposed Foreclosure of a Claim of Lien Filed on Calmore George and Hygiena Jennifer George by the Crossings Community Association, Inc. Dated August 22, 2016, Recorded in Docket No. 16-M-6465 in the Office of the Clerk of Court of Superior Court for Mecklenburg County Registry by Sellers, Ayers, Dortch & Lyons, P.A. Trustee	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA18-611) 2. Petitioners' Notice of Appeal Based Upon a Constitutional Question 3. Respondents' Motion to Dismiss Appeal 4. Charlotte Center for Legal Advocacy, Financial Protection Law Center, North Carolina Justice Center, and Legal Aid of North Carolina, Inc.'s Motion to File Amicus Curiae Brief 5. Charlotte Center for Legal Advocacy, Financial Protection Law Center, North Carolina Justice Center, and Legal Aid of North Carolina, Inc.'s Motion to File Amended Amici Curiae Brief	1. --- 2. Dismissed *ex mero motu* 3. Dismissed as moot 4. Allowed **07/16/2020** 5. Allowed **07/17/2020**
77P21	Nancy Ann Fuller v. Rafael E. Negron-Medina, M.D., in His Individual and Official Capacity	1. Plt's Motion for Temporary Stay (COA19-492) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/12/2021 Dissolved 04/14/2021** 2. Denied 3. Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

79P19-3	William Paul James v. Rumana Rabbani	1. Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court (COAP19-156) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Motion for Expedited Review 4. Plt's Pro Se Motion for Temporary Stay	1. Denied **03/11/2021** 2. Denied **03/11/2021** 3. Dismissed as moot **03/11/2021** 4. Denied **03/11/2021**
79P21	State v. Luis E. Mendez	Def's Pro Se Motion for Speedy Trial and 5th Amendment Guarantees	Dismissed
86A02-2	State v. Bryan Christopher Bell	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013 3. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Special Order 2. Special Order **04/29/2020** **3.** Denied **08/13/2020**
89P21	State v. O'Kiera Donnell Myers	1. Def's Pro Se Motion to Withdraw Counsel 2. Def's Pro Se Motion to Grant Two Public Defender Counsel	1. Dismissed without prejudice 2. Dismissed without prejudice
96P21	State v. Karl Lafayette Johnson	1. Def's Pro Se Motion for Appeal (COA20-110) 2. Def's Pro Se Motion to Dismiss State Appointed Representative	1. Dismissed 2. Dismissed
97P21	State v. Charlie James Harris, III	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-617)	Dismissed
98P21	State v. Corey Tashombae Hines	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

108A21	Volvo Group North America, LLC d/b/a Volvo Trucks North America, a Delaware Limited Liability Company; and Mack Trucks, Inc., a Pennsylvania Corporation v. Roberts Truck Center, Ltd., a Texas Limited Partnership, Roberts Truck Center of Kansas, LLC, a Kansas Limited Liability Company; and Roberts Truck Center Holding Company, LLC, a Texas Limited Liability Company	1. Defendants' Motion to Admit Patrick R. Barnes Pro Hac Vice 2. Defendants' Motion to Admit James T. Drakely Pro Hac Vice	1. Allowed **04/08/2021** 2. Allowed **04/08/2021**
110P21	State v. Anthony Wayne Yates	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/30/2021**
113A96-4	State v. Russell William Tucker	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County 2. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Special Order 2. Denied
118P21	State v. Breanna Regina Dezara Moore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-85) 2. Def's Motion to Amend PDR	1. 2. Allowed **04/08/2021**
119P21	State v. Maderkis Deyawn Rollinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-42) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Review as a Petition for Writ of Certiorari 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas	1. 2. 3. 4. Allowed **04/08/2021** 5.
122P21	State v. Enrique Elizalde Lozanon	Def's Pro Se Motion for Supreme Court of North Carolina to Take Action and Remove Restraint on Liberty	Denied **04/12/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

131P16-17	State v. Somchai Noonsab	Def's Pro Se Petition for Writ of Mandamus	Dismissed
204A20	James C. McGuine, Employee v. National Copier Logistics, LLC, Employer, and Travelers Insurance Company of Illinois, Carrier, and/or NCL Transportation, LLC, Employer, Non-Insured and the North Carolina Industrial Commission v. NCL Transportation, LLC, Non-Insured Employer, and Thomas E. Prince, Individually Defs'	Motion to Continue Oral Argument	Allowed **04/14/2021**
228P07-3	State v. Raymond C. Marshall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/31/2021**
238A20	Ricky Curlee, a Minor, by and through his Guardian ad Litem, Karina Becerra, and Karina Becerra, Individually v. John C. Johnson, III, Raymond Craven, and Stacey Talado Def's (John C. Johnson, III)	Motion to Strike Plaintiffs' Supplement to the Record on Appeal	Dismissed as moot
242A20	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Judy Lunsford	Plt's Motion to Reschedule Oral Argument	Dismissed as moot **04/01/2021**
256P16-5	State v. Jonathan James Newell	Def's Pro Se Motion for PDR	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

306A20	Sound Rivers, Inc. and North Carolina Coastal Federation, Inc., Petitioners v. N.C. Department of Environmental Quality, Division of Water Resources, Respondent, Martin Marietta Materials, Inc., Respondent-Intervenor	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA18-712) 2. Respondent-Intervenor's PDR Under N.C.G.S. § 7A-31 3. Joint Motion to Extend Time and Set Briefing Schedule 4. Petitioners' Motion to Amend Response to PDR	1. --- 2. Allowed 3. Allowed **07/27/2020** 4. Allowed **Berger, J., recused**
325P19-2	Paula Saunders v. Hull Property Group, LLC and Blue Ridge Mall, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-728) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief 4. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
327P02-12	State v. Guy Tobias LeGrande	Def's Pro Se Motion for Actual Innocence Appropriate Relief	Dismissed **Ervin, J., recused**
337A20	Loretta Nobel v. Foxmoor Group, LLC, Mark Griffis, David Robertson	Plt's Motion of Counsel for Extension of Time to File Secured Leave Designation	Allowed **03/19/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Attorney General's Motion for Temporary Stay (COA17-1374-2) 2. Attorney General's Petition for Writ of Supersedeas 3. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) Petition for Writ of Supersedeas 4. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) Notice of Appeal Based Upon a Dissent 5. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) PDR as to Additional Issues 6. Attorney General's Notice of Appeal Based Upon a Dissent 7. Attorney General's PDR as to Additional Issues 8. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2020** 2. Allowed 3. Allowed 4. --- 5. Dismissed as moot 6. --- 7. Allowed 8. Allowed **Berger, J., recused**
362P20	Curtis Lambert v. Town of Sylva	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-727) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Leave to File Amended Notice of Appeal (Constitutional Question) and PDR 4. Plt's Amended Notice of Appeal Based Upon a Constitutional Question 5. Plt's Amended PDR Under N.C.G.S. § 7A-31 6. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **08/14/2020** 4. --- 5. Denied 6. Allowed
367P05-2	State v. Steven Dixon Prentice	Def's Pro Se Motion for Notice of Appeal (COAP20-371)	Dismissed
373P20	State v. Bradrick Kentae Bennett	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1122)	Denied **Berger, J., recused**
377P19-2	State v. Dmarlo Levonne Faulk Johnson	Def's Pro Se Motion for Notice of Appeal (COA19-191)	Dismissed as moot **03/18/2021** **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

377P20-2	State v. Andrew Ellis	Def's Pro Se Motion for Release Without Paying Money	Dismissed **03/18/2021**
379A20	State v. Ramon Perry Givens	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-40) 2. Def's Motion to Amend Certificate of Service 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
382P19-2	Wymon Griffin v. Ashley Place Apartments	1. Plt's Pro Se Motion to Vacate and Set Aside the Orders Entered on August 12, 2020 Dismissing the Appellant's Appeal 2. Plt's Pro Se Motion for Appropriate Relief 3. Plt's Pro Se Motion to Amend Both the Original Complaint and Motion to Vacate and Set Aside Orders	1. Dismissed as moot 2. Dismissed 3. Dismissed as moot
406PA18	State v. Cory Dion Bennett	Responses to Order Requesting Procedural Suggestions	Special Order **Berger, J., recused**
406A19	Dennis D. Chisum, Individually and Derivatively on Behalf of Judges Road Industrial Park, LLC, Carolina Coast Holdings, LLC, and Parkway Business Park, LLC v. Rocco J. Campagna, Ricard J. Campagna, Judges Road Industrial Park, LLC, Carolina Coast Holdings, LLC, and Parkway Business Park, LLC	Defs' Petition for Rehearing	Denied **04/14/2021** **Berger, J., recused** **Barringer, J., recused**
436A19	Window World of Baton Rouge, LLC, et al. v. Window World, Inc., et al. ——— Window World of St. Louis, Inc., et al. v. Window World, Inc., et al.	Plts' Motion to Admit John P. Wolff, III Pro Hac Vice	Allowed **03/16/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

455P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay (COA19-427) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** 2. Allowed 3. Allowed
473A20	In the Matter of D.M. & A.H.	Respondent's Motion to Amend the Filed Record on Appeal	Allowed **03/16/2021**
475P20	State v. Solomon Nimrod Butler	Def's Pro Se Motion for PDR (COAP18-746)	Dismissed without prejudice
488P20	Mary Cooper Falls Wing v. Goldman Sachs Trust Company, N.A., et al. ——— Ralph L. Falls III, et al. v. Goldman Sachs Trust Company, N.A., et al.	1. Def's (Goldman Sachs Trust Company, N.A.) PDR Under N.C.G.S. § 7A-31 (COA19-1007) 2. Defs' (Dianne C. Sellers, Louise Falls Cone, Toby Michael Cone, Gillian Falls Cone, and Katherine Lenox Cone) PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
502P20	State v. Denzel Rashad Dancy	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-70) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
510P20-2	State v. Johnny M. Cook	Def's Pro Se Motion for Complaint	Dismissed
513P20	State v. Thomas Sonny Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA19-983)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

519P20	Nyamedze Quaicoe, by and through His Guardian ad Litem, Sally A. Lawing, Fafanyo Asiseh, and Obed Quaicoe v. The Moses H. Cone Memorial Hospital Operating Corporation, d/b/a Moses Cone Health System, d/b/a Women's Hospital; Jody Bovard Stuckert, M.D.; Piedmont Healthcare for Women, P.A. d/b/a Greensboro OB/GYN Associates	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-233)	Denied
520P20	Derrick Dunbar v. ACME Southern, Employer, Hartford Underwriters Insurance Company (The Hartford), Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1153) 2. Plt's Notice of Appeal Based Upon a Constitutional Question	1. Denied 2. Dismissed *ex mero motu*
537P20	Joyce Williams, as Personal Representative of the Estate of Ruth Hedgecock-Jones v. Maryfield, Inc. d/b/a Pennybyrn at Maryfield	Def's PDR Under N.C.G.S. § 7A-31 (COA19-804)	Denied **Berger, J., recused**
580P05-21	In re David Lee Smith	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion to Amend Petition 3. Def's Pro Se Motion for Fair Amendment of Pro Se Habeas Petition 4. Def's Pro Se Motion to Amend Pro Se Petition 5. Def's Pro Se Petition for Writ of Mandamus	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied **Ervin, J., recused**

IN RE A.M.

[377 N.C. 220, 2021-NCSC-42]

IN THE MATTER OF A.M. AND E.M.

No. 380A20

Filed 23 April 2021

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

The trial court properly determined that grounds existed to terminate respondent-mother's parental rights based on her failure to make reasonable progress to correct the conditions that led to the removal of the children—substance abuse, domestic violence, and homelessness—where, although respondent had acquired a structurally safe and appropriate residence and had participated in substance abuse support groups and abstained from using marijuana for a year, the unchallenged findings of fact showed respondent had multiple positive drug tests, consistently failed to comply with drug screens, failed to complete substance abuse treatment and domestic violence counseling, and was involved in repeated acts of domestic violence involving the consumption of alcohol.

2. Termination of Parental Rights—best interests of the child—bond with mother—abuse of discretion analysis

The trial court did not abuse its discretion by determining that it was in the best interests of the children to terminate respondent-mother's parental rights where, although respondent claimed and the court found that the children were bonded with respondent, the court also found that the children felt safe in their placements, respondent did not provide healthy parental boundaries and she threatened physical violence during visitation sessions, there was a high likelihood that the children would be adopted by their caregivers, the children were thriving in their placements, and respondent's testimony that she would not use drugs or consume alcohol if the children were returned to her was not credible.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 15 May 2020 by Judge V.A. Davidian III in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 19 March 2021, but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE A.M.

[377 N.C. 220, 2021-NCSC-42]

Mary Boyce Wells, Senior County Attorney, for petitioner-appellee Wake County Human Services.

Coats+Bennett, PLLC, by Gavin B. Parsons, for appellee Guardian ad Litem.

Dorothy Hairston Mitchell for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals the order terminating her parental rights to her minor children "Adam," born in October 2011, and "Efia," born in March 2014.[1] Because clear, cogent, and convincing evidence supported at least one ground for the termination of respondent-mother's parental rights, and because it was not an abuse of discretion for the trial court to determine that termination of respondent-mother's parental rights was in the best interests of the children, we affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 Respondent-mother, the father, and their son Adam have been involved with Wake County Human Services (WCHS) since 2012. In 2013 and 2014, WCHS received reports which detailed the parents' instances of substance abuse, as well as respondent-mother's physical confrontations with the childcare providers for Adam and Efia. When Efia was born in 2014, both she and respondent-mother tested positive for marijuana. In April 2015, WCHS received a report that the parents were homeless and that the children's maternal grandparents, who themselves had been the subject of several prior child protective services (CPS) reports regarding the care of Efia, were allowing Adam and Efia to reside with them. The parties agreed that the children would continue to reside with the maternal grandparents pursuant to a safety assessment, and WCHS closed the case in May 2015 with services recommended.

¶ 3 In March 2016, WCHS received a report indicating that respondent-mother was arrested and charged with assault after she "drunkenly confronted the father with a knife while pushing [Efia] in a stroller." Respondent-mother had failed to comply with a medication regimen prescribed for her depression and had expressed thoughts of

1. We use pseudonyms to protect the identities of the minor children and for ease of reading.

suicidal ideation. WCHS initiated in-home services for the family and requested that respondent-mother comply with a substance abuse assessment. While respondent-mother initially engaged in residential substance abuse treatment with the children, she was discharged from the program for noncompliance in September 2016. Following the discharge, a maternal relative came forward to provide support for the juveniles, and WCHS closed its case in November 2016.

¶ 4 WCHS received a report on 20 April 2017 that respondent-mother and the maternal grandmother had physically assaulted each other in front of Adam and Efia, prompting respondent-mother and the children to move into a Salvation Army shelter with the assistance of CPS. Shortly thereafter, respondent-mother and the father participated in another affray which occurred in front of the children. This fracas resulted in respondent-mother's arrest. While respondent-mother was incarcerated, the children resided with the father for a few days before returning to their maternal grandmother's home.

¶ 5 Following respondent-mother's release from incarceration, a social worker met with respondent-mother and the children at the home of the maternal grandmother. Respondent-mother was "visibly impaired and smelled of alcohol," and "accused the [maternal] grandmother of substance abuse" before producing drug paraphernalia from the maternal grandmother's cigarette pack. WCHS removed the juveniles from the home, as efforts to consult with the parents concerning a proper familial placement for the children were unsuccessful. WCHS filed juvenile petitions on 19 June 2017 alleging that the children were neglected juveniles, and WCHS subsequently filed an amended juvenile petition regarding both children on 28 June 2017. The trial court entered orders granting nonsecure custody of the children to WCHS on 19 June 2017 pursuant to the first juvenile petitions and authorizing WCHS to place the children in a licensed foster care home.

¶ 6 On 13 September 2017, respondent-mother and the father consented to an adjudication that the children were "neglected juveniles" as defined by N.C.G.S. § 7B-101(15). In its consent order on adjudication and disposition which was issued on the same date as the adjudication, the trial court allowed WCHS to retain legal custody of the children and ordered respondent-mother to: (1) follow all recommendations of a substance abuse assessment; (2) refrain from the use of illegal or impairing substances and submit to random drug screens; (3) obtain and maintain housing sufficient for herself and her children that is free of transient household members and substance abuse, and provide proof of such housing; (4) obtain and maintain legal income sufficient to meet

her needs and the needs of her children, and provide proof of such income to WCHS on at least a monthly basis; (5) engage in a domestic violence assessment through Interact and follow all recommendations; (6) complete a psychological evaluation and follow all recommendations; (7) follow the terms of her probation and refrain from further illegal activity; (8) comply with a visitation agreement during her visits with the children; and (9) maintain regular contact with the social worker at WCHS, notifying WCHS of any change in situation or circumstances within five business days. The trial court further ordered WCHS to continue to make reasonable efforts to eliminate the need for placement of the children outside of the home.

¶ 7 Following an April 2018 permanency planning hearing, the trial court entered a 24 May 2018 order in which it found that respondent-mother and the father had been incarcerated from February to mid-March 2018. The trial court acknowledged that respondent-mother was pregnant at the time of the hearing, and determined that after respondent-mother and the father's respective releases from incarceration, the parents were residing together in a boarding house that was not appropriate for the children. Respondent-mother had been diagnosed with severe alcohol use disorder and severe cannabis use disorder in early remission, as well as post-traumatic stress disorder, anxiety, and depression. While respondent-mother denied using marijuana since her release from incarceration and upon learning that she was pregnant, the trial court noted that she had tested positive for marijuana twice in April 2018 and had admitted to consuming alcohol since her release from jail. The trial court established that "[n]either parent has consistently demonstrated a willingness to address the chronic substance abuse and domestic violence that has dominated their family for quite some time." As for the children's current placements, the trial court found that the placements were appropriate and were meeting the needs of the juveniles. The tribunal also found that the children had bonded with their caregivers, who were willing to provide long-term care for both children. The trial court concluded that a primary plan of adoption with a secondary plan of reunification would serve the children's best interests.

¶ 8 On 3 July 2018, WCHS filed a motion to terminate the parental rights of respondent-mother and the father to the children, asserting, under N.C.G.S. § 7B-1111(a)(1), (2), and (3), the grounds of (1) neglect, (2) failure to show reasonable progress in correcting the conditions which initially led to the removal of the children from the home, and (3) willfully failing to pay a reasonable portion of the cost of care for the children despite the ability to do so.

¶ 9 Following an April 2019 permanency planning hearing, the trial court entered a 2 May 2019 order in which it found that respondent-mother had acquired a residence which was structurally sufficient for a child. However, a GAL volunteer visiting the residence observed a person in the living room who was visibly impaired to the point of unconsciousness, and the GAL volunteer likewise noticed that the parents also appeared to be impaired. Nevertheless, the family exhibited a strong bond during visitations with the children, and the parents exhibited an ability to provide appropriate care for the juveniles for short periods of time in structured, supervised settings. The trial court changed the primary plan for the children from adoption to guardianship with the secondary plan remaining reunification.

¶ 10 In a 19 September 2019 order which was entered following a July 2019 permanency planning hearing, the trial court found that respondent-mother maintained adequate housing, did not receive consistent income, attended weekly therapy sessions and met with a psychiatrist to receive treatment for her mental health issues, and missed three random drug screens in March and May 2019. On 14 April 2019, law enforcement officers responded twice to reports of domestic violence at respondent-mother's residence, which resulted in law enforcement officers removing the father from the home. The trial court also found that "any progress made by either parent [wa]s generally short-lived. Neither parent ha[d] made adequate progress in a reasonable period of time to alleviate the conditions that led to the children's initial removal from the home." The trial court further found that Adam was doing well in his placement, that Efia was receiving services appropriate for her needs, and that each child's respective caregiver intended to adopt when possible. The trial court changed the primary plan for the children from guardianship back to adoption with the secondary plan remaining reunification.

¶ 11 On 9 January and 4 February 2020, the trial court conducted a hearing on WCHS's motion to terminate respondent-mother's and the father's parental rights to the children. In an order entered 15 May 2020, the trial court found the existence of grounds to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1), (2), and (3), and further concluded that it was in the children's best interests to terminate respondent-mother's parental rights. *See* N.C.G.S. § 7B-1110(a) (2019).[2] Accordingly, the trial court granted WCHS's motion to terminate respondent-mother's parental rights to the juveniles in the 15 May 2020 order, from which respondent-mother appeals to this Court.

---

2. The father relinquished his parental rights to the children and is not a party to this appeal.

¶ 12 On appeal, respondent-mother challenges each of the three grounds which were found to exist by the trial court as a basis upon which to terminate her parental rights. Respondent-mother likewise opposes the trial court's conclusion that termination of her parental rights was in the children's best interests.

II. Legal Standard

¶ 13 The North Carolina General Statutes set forth a two-step process for the termination of parental rights. After the filing of a petition for the termination of parental rights, a trial court conducts a hearing to adjudicate the existence or nonexistence of any grounds alleged in the petition as set forth under N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e) (2019). Then, following an adjudication that at least one ground exists to terminate the parental rights of a respondent-parent, the trial court will determine whether terminating the parental rights of the respondent-parent is in the child's best interests. N.C.G.S. § 7B-1110(a).

¶ 14 We review a trial court's adjudication that a ground exists to terminate parental rights 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 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Unchallenged findings of fact 'are deemed supported by competent evidence and are binding on appeal.' " *In re J.S.*, 374 N.C. 811, 814 (2020) (quoting *In re T.N.H.*, 372 N.C. 403, 407 (2019)). "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order." *Id.* at 815 (first citing *In re B.O.A.*, 372 N.C. 372, 380 (2019); then citing *In re Moore*, 306 N.C. 394, 404 (1982)).

¶ 15 In the present case, the trial court concluded that clear, cogent, and convincing evidence established the existence of all three alleged grounds to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1)–(3).

¶ 16 Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights upon a finding that "[t]he parent has willfully left the [child] 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 [child]." N.C.G.S. § 7B-1111(a)(2) (2019). "Only reasonable progress in correcting the conditions must be shown." *In re J.S.*, 374 N.C. at 819 (quoting *In re L.C.R.*, 226 N.C. App. 249, 252 (2013)). "[T]he nature and extent of the parent's reasonable

progress . . . is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *Id.* at 815 (emphasis omitted) (quoting *In re A.C.F.*, 176 N.C. App. 520, 528 (2006)); *see also In re Ballard*, 311 N.C. 708, 715 (1984) ("The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.").

¶ 17 A factor consistently recognized as relevant in the determination of whether grounds exist for the termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) is whether a parent has complied with a judicially adopted case plan. *See In re B.O.A.*, 372 N.C. at 384. Generally speaking, we have held 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 S.M.*, 375 N.C. 673, 685 (2020) (extraneity omitted) (quoting *In re B.O.A.*, 372 N.C. at 385). However, a respondent-parent's " 'extremely limited progress' in correcting the conditions leading to removal" of the children from their care in the first place, especially when the remedy for such conditions is memorialized in the respondent-parent's case plan, will support a trial court's ultimate determination that grounds exist to terminate that parent's rights under N.C.G.S. § 7B-1111(a)(2). *In re A.B.C.*, 374 N.C. 752, 760 (2020) (quoting *In re B.O.A.*, 372 N.C. at 385).

¶ 18 "If [the trial court] determines that one or more grounds listed in section 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 to terminate parental rights." *In re A.R.A.*, 373 N.C. 190, 194 (2019) (extraneity omitted) (quoting *In re D.L.W.*, 368 N.C. 835, 842 (2016)). We review the trial court's assessment of a child's best interests for abuse of discretion. *In re A.R.A.*, 373 N.C. at 199. A trial court's determination will remain undisturbed under an abuse of discretion standard so long as that determination is not "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. 3, 6–7 (2019) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

III. Adjudication

¶ 19 **[1]** Respondent-mother does not challenge any of the findings of fact made by the trial court in its determination that grounds existed for the termination of respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). On the other hand, respondent-mother argues that although she "did not correct *all* the conditions that led to the children's

removal, she . . . made 'reasonable progress under the circumstances.' " We disagree with respondent-mother's depiction of her compliance with her case plan.

¶ 20 In its unchallenged Findings of Fact 15–22, the trial court detailed the conditions which led to the children's removal from the home; namely, "substance abuse, domestic violence and homelessness." In its 13 September 2017 consent order, the trial court ordered respondent-mother to comply with a case plan referred to as the "Out of Home Family Services Agreement" to address the reasons for the children's removal from her care. In unchallenged Finding of Fact 27, the trial court delineated the terms of the Agreement relating to the conditions which led to the removal of the juveniles from respondent-mother's home:

> 27. [In its 13 September 2017 consent order,] [t]he [court] ordered [respondent-]mother to comply with the following conditions:
>
> a. Follow all recommendations from a substance abuse assessment through [WCHS].
>
> b. Refrain from using illegal or impairing substances and submit to random drug screens.
>
> c. Obtain and maintain housing sufficient for herself and the children free of transient household members and substance use.
>
> . . . .
>
> e. Complete a domestic violence assessment through Interact and follow recommendations.

A review of the record convinces us of the nexus between the court-ordered conditions and the bases for the children's removal. *See In re E.B.*, 375 N.C. 310, 323–24 (2020) ("There must be a nexus between the components of the court-approved case plan with which respondent failed to comply and the conditions which led to the juvenile's removal from the parental home." (extraneity omitted) (quoting *In re B.O.A.*, 372 N.C. at 385)).

¶ 21 The trial court's unchallenged findings of fact also describe respondent-mother's failures to comply with the conditions set forth in the 13 September 2017 consent order during the almost twenty-eight-month period between entry of the order and the 9 January 2020 hearing on WCHS's motion to terminate respondent-mother's parental rights:

30. . . . . [Respondent-]mother twice tested positive for marijuana in April [2018] while pregnant [with a third child] and admitted that she continued to drink alcohol.

. . . .

32. Throughout 2018, [respondent-]mother did not consistently comply with random drug screens or provide information to WCHS to verify her treatment progress or participation in . . . domestic violence education. . . .

. . . .

35. [Respondent-]mother moved into an apartment . . . in March 2019. . . . [But] during a home visit in 2019, the GAL volunteer observed a person in the home that was visibly impaired to the point of unconsciousness while [respondent-]mother . . . w[as] present.

36. . . . . [Respondent-]mother continued to attend therapy sessions, but consistently refused to comply with random drug screens.

37. On April 14, 2019, Raleigh police responded to two domestic violence calls at [respondent-]mother's home. . . .

38. On August 5, 2019, [respondent-]mother was involved in a physical altercation with the children's maternal grandmother . . . .

39. On September 14, 2019, Raleigh police again responded to a report of domestic violence at [respondent-]mother's residence . . . . Tellingly, [respondent-]mother was openly drinking alcohol while talking to the police. When asked about the alcohol by the police officer, [respondent-]mother simply explained that she could hold her liquor.

. . . .

42. On September 19, 2019, [respondent-]mother completed another substance abuse assessment. During the interview with the assessor, [respondent-]mother insisted that she had not used drugs or alcohol

> for three years despite testing positive for marijuana the month prior. [Respondent-]mother had refused to comply with any additional drug screens. . . .
>
> 42.[3] On December 11, 2019, Raleigh police once again responded to [respondent-]mother's home after [respondent-]mother reported that she had been physically assaulted by her houseguest. [Respondent-]mother knowingly allowed a male gang member to stay in her home for a few days. After drinking some amount of alcohol, she confronted the guy and demanded that he leave the home. [Respondent-]mother stated that the man became upset when she asked him to leave and jumped on top of her while holding a knife to her cheek. She hit him in the head with a glass bottle and was able to call 911. The houseguest, on the other hand, told police that [respondent-]mother pulled a knife on him and bit him in the face.
>
> . . . .
>
> 44. [Respondent-]mother has not complied with domestic violence counseling or educational programs . . . as previously ordered by the [c]ourt. Additionally, there is no evidence before the [c]ourt that [respondent-]mother has completed substance abuse treatment . . . .

¶ 22 While the trial court recognized that respondent-mother was able to acquire a structurally safe and appropriate residence, the trial court simultaneously found that the father—who was a frequent focus of the domestic violence issues within the family—"spent a significant amount of time in the home" and that both parents continued to "exhibit concerning judgment and behaviors" within that environment, as evidenced by the aforementioned GAL volunteer who discovered an unidentified, unconscious, and impaired person in respondent-mother's apartment. Further, law enforcement officers responded to respondent-mother's apartment on three occasions for domestic violence incidents involving the father after respondent-mother's acquisition of the structurally appropriate housing. Just one month prior to the termination hearing, respondent-mother allowed a male gang member to reside

3. The trial court's order reflects two findings of fact numbered 42.

with her, precipitating yet another domestic violence incident when respondent-mother became intoxicated and asked the male to leave.

¶ 23 Although respondent-mother testified that she had participated in substance abuse support groups and had abstained from marijuana use for at least a year, the trial court's unchallenged findings of fact detail respondent-mother's multiple positive tests for marijuana, her consistent refusal to comply with drug screens, her failure to complete substance abuse treatment and domestic violence counseling programs, and repeated acts of domestic violence involving her which incorporated the consumption of alcohol.

¶ 24 Despite respondent-mother's contention on appeal that "it is clear that [she] made reasonable progress in correcting the conditions that led to the children's removal," the recounted findings of fact of the trial court support the conclusion that, even crediting respondent-mother's inconsistent engagement with a few court-ordered resources, she failed to make reasonable progress toward correcting the substance abuse and domestic violence issues which led to the removal of the children from her care. *See In re J.S.*, 374 N.C. at 815 ("A respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of lack of progress sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." (extraneity omitted) (quoting *In re J.W.*, 173 N.C. App. 450, 465–66 (2005), *aff'd per curiam*, 360 N.C. 361 (2006))); *In re Z.A.M.*, 374 N.C. 88, 99 (2020) (upholding a termination of parental rights based on N.C.G.S. § 7B-1111(a)(2) when "viewing the evidence as a whole, it appear[ed] that the trial court correctly concluded that respondent-father's three-month period of sobriety was outweighed by his continuous pattern of relapse" over a twenty-two-month period). Therefore, the trial court's adjudication that the ground exists, as embodied in N.C.G.S. § 7B-1111(a)(2), that respondent-mother has willfully left her children 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 juveniles is supported by clear, cogent, and convincing evidence. As a result, we affirm the trial court's determination as to the existence of at least one ground upon which to terminate respondent-mother's parental rights.

¶ 25 "In light of our conclusion that the trial court properly adjudicated a ground for terminating respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2), we deem it unnecessary to address respondent-mother's contentions" regarding the grounds of neglect and failure to pay a rea-

sonable portion of the cost of care under N.C.G.S. § 7B-1111(a)(1) and (3), respectively. *In re S.M.*, 375 N.C. at 687 (citing *In re A.R.A.*, 373 N.C. at 194).

IV. Disposition

¶ 26 **[2]** Respondent-mother also challenges the trial court's conclusion that termination of her parental rights was in the children's best interests. In her sole argument before this Court concerning the best interests determination, respondent-mother contends that the trial court "completely disregarded the strong bond between [her] and the children in favor of the alleged bond between the children and their foster parents." In support of this contention, respondent-mother directs our attention to portions of the trial court's Findings of Fact 53 and 55 which state that "the children are bonded with their mother" and "love their mother," along with several examples in the record which acknowledge the positive reactions of the children upon their reunions with respondent-mother during visitation sessions.

¶ 27 If a trial court adjudicates the existence of one or more grounds for terminating parental rights, it then progresses to the dispositional phase of the proceedings where it "shall determine whether terminating the parent's rights is in the juvenile's best interest[s]" and shall consider the following criteria:

> (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 shall then make written findings of fact as to those criteria which are relevant to its determination. *In re Z.A.M.*, 374 N.C. at 99. We review a trial court's assessment of a child's best interests for abuse of discretion. *See In re A.R.A.*, 373 N.C. at 199. "[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.* (alteration in original) (quoting *In re T.L.H.*, 368 N.C. at 107).

¶ 28 In making its best interests determination, the trial court must consider all of the factors in N.C.G.S. § 7B-1110(a), even though it is not required to expressly make written findings as to each. *See In re A.R.A.*, 373 N.C. at 199 ("It is clear that a district court must consider all of the factors in section 7B-1110(a). The statute does not, however, explicitly require written findings as to each factor." (extraneity omitted) (quoting *In re A.U.D.*, 373 N.C. at 10)).

¶ 29 At the conclusion of the termination of parental rights hearing on 4 February 2020, the trial court acknowledged each of the six factors set forth in N.C.G.S. § 7B-1110(a) and reasoned that the matter would be resolved by its evaluation of the quality of the bond between the children and respondent-mother, and the quality of the bond between the children and the proposed adoptive parents. In its subsequent 15 May 2020 order terminating respondent-mother's parental rights, the trial court made findings of fact which addressed individually the six factors enumerated in N.C.G.S. § 7B-1110(a)(1)–(6). Once again, respondent-mother fails to challenge the trial court's findings of fact, which are therefore deemed to be supported by competent evidence and hence are binding on appeal. *See In re J.S.*, 374 N.C. at 814.

¶ 30 While respondent-mother argues that the trial court disregarded the bond between herself and the children in favor of the bond between the children and their foster parents, "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019); *see also In re A.J.T.*, 374 N.C. 504, 512 (2020) (upholding a trial court's decision to terminate the respondent-parent's parental rights to a child despite the trial court's finding that the child "is very bonded" with respondent-mother when "[i]t [wa]s clear . . . [the trial court] considered several factors in making the best interests determination").

¶ 31 Here, in accordance with its requirement to consider the bond between the children and respondent-mother as a relevant factor in the determination of the juveniles' best interests regarding the issue of the termination of respondent-mother's parental rights, the trial court found that "[b]oth children acknowledge and love their mother, but both children have stated that they feel safe and secure in their current placements." The trial court also found that, despite the existence of a bond between respondent-mother and the children, "[respondent-]mother

does not provide healthy parental boundaries" as evidenced by threats of physical violence which were made by respondent-mother during her visitation sessions with the juveniles. Contrary to respondent-mother's contention that the trial court "completely disregarded" this factor which is contained in N.C.G.S. § 7B-1110(a)(4), it appears that the trial court weighed the evidence in the record which it considered to be relevant to the factor, recognized the bond between respondent-mother and the children through referencing the bond in its findings of fact, and ultimately assigned greater weight to other factors identified in N.C.G.S. § 7B-1110(a) in concluding that the termination of respondent-mother's parental rights would serve the best interests of the children. This evaluation of the factors which are listed in N.C.G.S. § 7B-1110(a) has been recognized by this Court to properly be within the purview of the trial court. *See In re Z.L.W.*, 372 N.C. at 437; *In re A.J.T.*, 374 N.C. at 512.

¶ 32 Notably, the trial court addressed N.C.G.S. § 7B-1110(a)(1)–(2) by recognizing the age of each child and finding that there was "a high likelihood that both children w[ould] be adopted" because Adam and Efia were placed with a caregiver who "intend[ed] to adopt as soon as possible." In conformance with N.C.G.S. § 7B-1110(a)(3), the trial court found that "[t]erminating the rights of [respondent-]mother w[ould] help accomplish the primary plan of adoption for these children and help achieve permanence . . . following years of uncertainty and instability." As to the quality of the relationship between the children and their proposed adoptive parents which is the factor embodied in N.C.G.S. § 7B-1110(a)(5), the trial court found that "[Efia] ha[d] developed a strong bond with her [caregiver] and the other children in the home and [wa]s considered a part of the family." Adam was also seen as thriving in his placement, and despite being placed in separate homes, the children were able to spend significant time together due to the efforts of their respective families. As to other relevant considerations, the trial court found, in accordance with N.C.G.S. § 7B-1110(a)(6), that between October 2019 and the termination of parental rights hearing on 9 January and 4 February 2020, respondent-mother missed several visits with the children without explanation. Within its fact-finding responsibility, the trial court determined that despite respondent-mother's testimony that she would not use drugs or consume alcohol if the children were returned to her care, "her actions speak volumes louder than her words and the [trial court] finds that her pronouncements are not credible." *See In re D.L.W.*, 368 N.C. at 843 ("The trial judge had the 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." (extraneity omitted) (quoting *Knutton v. Cofield*, 273 N.C.

355, 359 (1968))). Consequently, we are not inclined to view the trial court's conclusion that the best interests of the juveniles were served by the termination of respondent-mother's parental rights as an outcome which was arbitrary or manifestly unsupported by reason. *See In re A.U.D.*, 373 N.C. at 6. In our analysis, the trial court appropriately exercised its discretion to weigh the statutory factors contained in N.C.G.S. § 7B-1110(a) in order to properly conclude that it was in the best interests of the children to terminate the parental rights of respondent-mother.

V. Conclusion

¶ 33 We are satisfied that the trial court's determination that grounds existed to terminate the parental rights of respondent-mother under N.C.G.S. § 7B-1111(a)(2) was supported by clear, cogent, and convincing evidence. Further, we are convinced that the trial court's conclusion that the termination of the parental rights of respondent-mother was in the best interests of the children was neither arbitrary nor manifestly unsupported by reason. Therefore, we affirm the trial court's 15 May 2020 order terminating respondent-mother's parental rights.

AFFIRMED.

IN THE MATTER OF A.R.W., H.N.W., AND S.L.W.

No. 271A20

Filed 23 April 2021

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

The termination of the incarcerated respondent-father's parental rights on the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, and willful abandonment was affirmed where respondent's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 12 March 2020 by Judge Monica M. Bousman in District Court, Wake

County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Robin E. Strickland for petitioner-appellees.

Leslie Rawls for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent, the biological father of the minor children, A.R.W. (Amy), H.N.W. (Hazel), and S.L.W. (Susan)[1], appeals from the trial court's order terminating his parental rights. Counsel for respondent has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in respondent's brief are meritless and therefore affirm the trial court's order.

¶ 2 This is a private termination of parental rights action filed by the children's legal custodians, Mr. and Mrs. W (petitioners). On 20 December 2013, Wake County Human Services (WCHS) filed a petition alleging that Amy and Hazel were neglected and dependent juveniles. The petition alleged that on or about 12 March 2013, WCHS received a report that respondent assaulted the mother in the presence of the children. Respondent was "reported to have kicked and choked [the mother] and pulled her out of the car by her hair." The mother entered into a Safety Plan placing the children in the maternal great-grandmother's home.

¶ 3 On 28 January 2014, respondent consented to the entry of an order adjudicating Amy and Hazel to be neglected juveniles based on their living in an injurious environment due to the parents' domestic violence and substance abuse issues. The trial court ordered respondent to enter into and comply with an Out of Home Services Agreement to address the reasons for the children's removal. The trial court ordered respondent to have one hour of supervised visitation every other week.

¶ 4 Following a hearing on 21 April 2014, the trial court entered an order adopting a permanent plan of reunification.

¶ 5 On 25 September 2014, when the mother was eight months pregnant with Susan, she reported that respondent abducted, assaulted, and raped her at gunpoint. Respondent later pled guilty to first-degree kid-

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

napping and is currently serving a sentence of a minimum of eight years to a maximum of ten years, eight months in custody. His projected release date is 23 September 2022.

¶ 6 In September 2014, Amy and Hazel were removed from the maternal great-grandmother's home due to her poor health, and they were placed with petitioners, who are licensed foster parents. Subsequently, the trial court suspended respondent's visitation on 14 November 2014. The trial court found that respondent was not in compliance with his Out of Home Services Agreement. On 5 February 2015, the trial court ceased reunification efforts with respondent.

¶ 7 In March 2015, Amy and Hazel were returned to the mother's home. Petitioners visited with Amy and Hazel "from time to time" and provided childcare when requested by the mother. On 21 September 2016, the mother passed away from an apparent heroin overdose. Following the mother's death, Amy, Hazel, and Susan went to live with the maternal great-grandmother until November 2016, when she was admitted to the hospital. Thereafter, petitioners assumed fulltime care of all three children. The children have resided with petitioners since November 2016.

¶ 8 The maternal grandfather and his wife filed a complaint for custody of the children in District Court, Wake County, and petitioners intervened. On 27 February 2017, the trial court entered a Temporary Custody Order granting petitioners temporary physical and legal custody of the children. Following a hearing on 27 November 2017, the trial court entered an order on 17 May 2018 granting petitioners permanent physical and legal custody of the children. Nevertheless, petitioners and the children have maintained relationships with the maternal grandparents.

¶ 9 On 12 July 2019, petitioners filed petitions to terminate respondent's parental rights to the children alleging the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (7) (2019). Following a hearing held on 13 February 2020, the trial court entered an order on 12 March 2020 terminating respondent's parental rights. The trial court concluded grounds existed to terminate his parental rights based on the grounds of neglect and willful failure to make reasonable progress. The court noted that despite the earlier order requiring respondent to demonstrate changes learned relating to domestic violence, to resolve criminal matters, and to be of lawful behavior, respondent was found guilty of multiple infractions during his incarceration. These infractions included gang behavior, as-

sault on staff, possessing a weapon, and coordinating an assault. The trial court further concluded it was in the children's best interests that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appealed from the termination order.

¶ 10 Counsel for respondent has filed a no-merit brief on respondent's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In her brief, counsel identified four issues that could arguably support an appeal but also explained why she believed these issues lacked merit. Counsel also advised respondent of his right to file *pro se* written arguments on his own behalf and provided him with the documents necessary to do so. Respondent filed a *pro se* brief asking this Court to reverse the trial court order terminating his parental rights and reiterating some of his testimony at the termination hearing. Specifically, respondent stated that he loves his children, he took classes while incarcerated to become a better parent and person, he wrote and called his children while he was incarcerated, petitioners hung up the phone when he tried to call the children the last time, and he has been incarcerated for most of the children's lives. Respondent noted his aunt as a potential caregiver for the children, an argument that the trial court previously considered at length and rejected in its order. Respondent did not, however, present any reviewable legal arguments in his brief.

¶ 11 We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After considering the entire record and respondent's *pro se* brief and reviewing the issues identified in the no-merit brief, we conclude that the 12 March 2020 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE A.W.

[377 N.C. 238, 2021-NCSC-44]

IN THE MATTER OF A.W.

No. 24A20

Filed 23 April 2021

1. Child Abuse, Dependency, and Neglect—adjudication of neglect—sibling died from suspected abuse—evidence and findings

The trial court properly adjudicated a child neglected upon sufficient evidence and findings that, after a sibling died in the home of suspected abuse, the parents coordinated their stories, provided an implausible explanation regarding the cause of the sibling's injuries, and planned to deceive the court about the nature of their relationship and to conceal the true cause of the sibling's injuries. The findings supported the court's determination that respondent-mother's home was an injurious environment where the child was at substantial risk of impairment.

2. Child Abuse, Dependency, and Neglect—adjudication of dependency—sibling died from suspected abuse—sufficiency of findings

The trial court properly adjudicated a child dependent upon sufficient evidence and findings that multiple experts reviewed the parents' explanation of the cause of fatal injuries to a sibling in the home and concluded the attributed cause could not have resulted in the injuries sustained by the sibling; that, because all the potential caregivers named by the parents believed the sibling died by accidental means, they could not provide a safe home for the child; and that respondent-mother herself could not care for the child based on her denial that the sibling died from abuse.

3. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—notice—sufficiency of findings

In a consolidated adjudication and disposition and termination of parental rights proceeding, respondent-mother necessarily had sufficient notice that the permanent plan would be under review. The trial court's order ceasing reunification efforts between respondent-mother and her child was supported by sufficient evidence and findings that respondent-mother worked with respondent-father to conceal the cause of injuries sustained by a sibling in the home (which led to the sibling's death), that respondent-mother refused to acknowledge the sibling suffered abuse, and that the parents'

proposed alternative placements were inappropriate because none of the potential caregivers believed the sibling was abused.

4. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sibling died of suspected abuse

The trial court properly terminated respondent-mother's parental rights to her child based on neglect where, after a sibling suffered injuries in the home that led to her death from likely abuse, respondent-mother failed to acknowledge the non-accidental cause of the sibling's injuries, provided an implausible explanation for those injuries, and maintained a relationship with respondent-father. The court's findings supported its conclusion that neglect was likely to reoccur if the child were returned to respondent-mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 19 November 2019 by Judge Benjamin S. Hunter in District Court, Franklin County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Gena Walling McCray for petitioner-appellee Franklin County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother appeals from the trial court's order adjudicating her child A.W. (Abigail)[1] a neglected and dependent juvenile and the trial court's order terminating her parental rights in Abigail based on neglect and dependency. After careful review, we affirm the trial court's orders.

Background

¶ 2 In January 2017, A.M.W. (Anna)[2] was born to respondents. In March 2017, the Franklin County Department of Social Services (DSS) received

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

2. Anna is not a subject of this appeal.

a Child Protective Services (CPS) report that Anna was admitted to the emergency room on 11 March 2017 with significant, unexplained injuries. Anna suffered a severe traumatic brain injury, "bleeding around the brain, subdural hemorrhages, as well as some other fluid collections which [were] indicative of old hematomas[.]" In addition, she had fractured ribs in various stages of healing, a ruptured spleen, internal bleeding, and a fracture in one of her legs. Neither respondent provided an explanation that could account for Anna's injuries. On 15 March 2017, Anna died as a result of blunt force injuries to her head. Her autopsy ruled her death a homicide.

¶ 3 Dr. Benjamin Alexander, an expert in pediatrics and pediatric abuse, treated Anna prior to her death and concluded as follows:

> The pattern and nature of this unfortunate infant's injuries are characteristic of those seen in young infants who are abused by adult caregivers. Injuries this severe are due to very high forces such as might typically be seen in a high-velocity motor vehicle accident, or a fall from a second story window. This assortment of injuries does not occur due to any disease or condition—they are obviously traumatic. Without any history of trauma offered, it must be concluded that this child was abused by an adult who is concealing the truth.
>
> The pattern of lateral rib fractures in conjunction with subdural hematomas is typically seen in infants who have been grasped around the chest and violently shaken. In addition, the bilateral skull fractures indicate that the infant's head was smashed against a hard object.
>
> Rupture of the spleen, in the absence of rare infections or malignancy (which this child does not have), is due to a traumatic cause. The infant was most likely struck forcefully in the upper abdomen or back to cause this injury.
>
> The metaphyseal fracture seen in the distal tibia is typically associated with a forceful, violent twisting force applied to the foot or lower leg.
>
> Because the rib fractures and distal tibia fracture demonstrate some early evidence of healing, which

> is not normally seen before seven days after an injury and therefore before the onset of neurologic symptoms associated with the current head injury, I believe this child was abused on multiple occasions. Also the presence of low-density fluid collections, as would be seen with resorbing blood, may also be an indicator of multiple episodes of shaking.

¶ 4 In March 2018, Abigail was born to respondents. On 16 March 2018, DSS obtained nonsecure custody of Abigail and filed a petition alleging her to be a neglected and dependent juvenile. The petition alleged that Abigail was a neglected juvenile in that her sibling, Anna, died in the care of respondents as a result of suspected abuse and neglect. Respondents reported they were the only caregivers and gave no explanation for Anna's injuries. Respondent-father was incarcerated on charges related to Anna's death, and respondent-mother's involvement in Anna's death had not been ruled out. Because of the nature of Anna's injuries and death, Abigail was at substantial risk of abuse and neglect if she remained in respondents' care and supervision. The petition also alleged that respondents were unable to provide for Abigail's care or supervision because of the aforementioned neglect and lacked an appropriate alternative childcare arrangement. DSS later amended the petition to add allegations that after Anna's death, respondent-father reported that the family dog had caused Anna's injuries. However, respondent-father's account did not explain Anna's injuries. In addition, respondent-mother remained in a relationship with respondent-father after Anna's death, became pregnant with Abigail, and regularly visited respondent-father in jail.

¶ 5 On 29 August 2018, DSS filed a motion to terminate respondent-mother's parental rights in Abigail. DSS alleged that respondent-mother had neglected Abigail, and there was no indication that she was willing or able to correct the conditions that lead to Anna's death and the injurious environment that was present in her home, *see* N.C.G.S. § 7B-1111(a)(1) (2019), and respondent-mother was incapable of providing for the proper care and supervision of Abigail such that Abigail was a dependent juvenile, *see* N.C.G.S. § 7B-1111(a)(6) (2019).

¶ 6 Both the juvenile petition and motion to terminate respondent-mother's parental rights in Abigail came on for hearing eight times between January and August 2019. On 19 November 2019, the trial court entered orders concluding that Abigail was a neglected and dependent juvenile and finding that any efforts toward reunification with respondent-mother would be unsuccessful and contrary to Abigail's health, safety,

and need for a permanent home within a reasonable period of time. The trial court ordered that Abigail remain in the custody of DSS and set the primary permanent plan as adoption with a secondary plan of custody with a court approved caretaker. Also, on 19 November 2019, the trial court entered a separate order concluding that grounds existed to terminate respondent-mother's parental rights in Abigail pursuant to N.C.G.S. § 7B-1111(a)(1) and (6). The trial court determined that it was in Abigail's best interests that respondent-mother's parental rights be terminated, and the court terminated her parental rights. *See* N.C.G.S. § 7B-1110(a) (2019).

¶ 7 On 13 December 2019, respondent-mother entered notice of appeal to the Court of Appeals of North Carolina from the 19 November 2019 adjudication and disposition orders and to this Court from the 19 November 2019 order terminating her parental rights. On 12 March 2020, respondent-mother filed a motion in this Court for consolidation of the actions on appeal and, alternatively, a petition for discretionary review of the adjudication and disposition orders. By order entered 18 March 2020, this Court allowed the motion for consolidation of the actions on appeal and dismissed as moot the petition for discretionary review.

Analysis

¶ 8 On appeal, respondent-mother argues the trial court erred in adjudicating Abigail a neglected and dependent juvenile. She also argues that the trial court erred in ceasing reunification efforts and failing to make reunification part of Abigail's permanent plan. Respondent-mother further contends that the trial court erred by adjudicating grounds for termination of her parental rights based on neglect and dependency. We address each argument in turn.

I. Adjudication of Neglect and Dependency

Standard of Review

¶ 9 We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sustain the trial court's adjudication. The issue of whether a trial court's findings of fact support

> its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order.

In re J.S., 374 N.C. 811, 814–15, 845 S.E.2d 66, 70–71 (2020) (cleaned up).

Adjudication of Neglect

¶ 10 **[1]** A "neglected juvenile" is defined, in pertinent part, as a child

> whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.] . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect[.]

N.C.G.S. § 7B-101(15) (2019). "In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a *substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (cleaned up) (emphasis added).

¶ 11 Respondent-mother challenges several findings of fact as not being supported by the evidence. Respondent-mother contests the following portions of the trial court's findings 17, 24, 28, 30, 34, and 36, which provide that she and respondent-father worked together to develop an explanation for Anna's injuries:

> 17. On May 24, 2017, the respondent[s] offered to law enforcement an explanation of [Anna's] injuries that defies all medical evidence, and it is clear to the Court that the *respondents worked together to develop the explanation*. Through video-taped statements and reenactments, the respondent[s] indicated that [Anna's] head injuries were caused when the parents' dog, a large Great Dane, jumped on the respondent-father's arm while he was holding [Anna], causing him to lose his grip on [Anna]. [Anna] started to fall, and although [respondent-father] caught her before he fully dropped her, [Anna's] head hit the tiled floor in the kitchen. *[Respondents] both stated that the*

mother was asleep in the next room when this incident occurred.

. . . .

24. During this trial, all three experts, including the respondent-mother's expert, Dr. Owens, reviewed the reenactments and statements the parents provided to law enforcement and the Department, and each confidently concluded that the injuries that [Anna] sustained to her head could not have been caused by *the event described by the parents*. Each also confidently concluded that there were still no explanations given for the leg fracture and the left rib fractures showing signs of healing. All three experts agreed that the skull fractures were similar to what you might see from a severe automobile accident, a drop from a second-story window or by something broad hitting or crushing the baby's skull. The parents presented no evidence that offered a plausible explanation for the severe head injuries. The parents presented no evidence that offered any explanations for the injuries to the left ribs and the leg which occurred 7 to 14 days before the head injuries. Dr. Alexander and Dr. Douglas ruled out any medical condition which would have accounted for the broken bones. There was no evidence presented on medical conditions that might account for the broken bones.

. . . .

28. [Respondent-mother] presented evidence on July 10, 2019 of the hardness of the floor, pictures of the size of the Great Dane compared to [the] size of [respondent-father], and [respondent-mother] brought the dog to Court as evidence of the dog's size and disposition. *[Respondent-mother], throughout this trial, presented evidence that [Anna] died because of the dog.*

. . . .

30. No explanation by either parent accounts for the multiple injuries over time or the injuries that caused [Anna]'s death. [Anna]'s death was caused by an act

of one or both of the respondents. From March 11, 2017 to May 24, 2017, the parents provided no explanation of what happened to [Anna]. When the parents presented an explanation on May 24, 2017, it defied all medical evidence and it defied all reason. *It is clear that the parents were coordinating their statements.* In March 2018, the father altered his explanation in ways that he thought would conform to the child's injuries, but it did not explain the injuries. The parents' have remained unified in their stance that their dog caused the head injury, and they still have not provided an explanation for the other injuries. *The parents have been consistently unified in not revealing to law enforcement, [DSS], or this Court, what happened to [Anna].*

. . . .

34. There are other indications, in addition to [Anna]'s death, that the environment is injurious. The mother admitted taking Concerta and other prescription drugs that were not prescribed to her, and neither the mother, nor the mother's close friend, believe that this was concerning or inappropriate. The mother admitted allowing a heroin addict to live with her while [respondent-father] was incarcerated, and indicated that if he died of an [overdose] while in her home, she would conceal the body from law enforcement. The father indicated in conversations with the mother that he was acquainted with heroin use. *The mother and father showed a willingness and plan to deceive authorities in these proceedings.*

. . . .

36. Based upon the foregoing, aggravating factors exist that prevent reunification with either parent in this matter in that the juvenile's sibling died in the home due to abuse, and *the mother and father have consistently worked together to conceal what happened to [Anna].* This conduct increases the enormity and adds to the consequences of the neglect of [Abigail] because there is no means by which this

> Court can address what caused the death of [Anna] and thereby [e]nsure the safety of [Abigail].

Specifically, respondent-mother asserts that she did not and could not have offered an explanation of the events causing Anna's injuries because she was asleep in another room at the time Anna was injured.

¶ 12 The foregoing portions of the challenged findings are supported by clear and convincing evidence in the record. In a 14 March 2017 interview with law enforcement, respondent-mother recounted her suggestion to a doctor who treated Anna that Anna's injuries could have been caused by respondents' large dog, a Great Dane. At the adjudicatory hearing, respondent-mother rejected the medical examiner's conclusion in Anna's autopsy report that her death was a homicide. She testified that she personally believed that respondent-father "was holding her wrong, and getting the bottle made, and he wasn't holding her right, and holding her with his one arm, and she slipped out of his arms. That's what I think." Furthermore, she introduced a video of the tile floor in her house where Anna's injuries allegedly occurred to demonstrate that it was "hard as a rock" and brought her Great Dane to the courthouse to demonstrate its size and that "accidents can happen." This evidence provides ample support for the trial court's determination that respondent-mother offered an explanation, one involving respondents' Great Dane, for the source of Anna's injuries. *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) (stating that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

¶ 13 In addition, the trial court's findings that respondents coordinated their stories with one another in an attempt to conceal what really caused Anna's injuries is supported by the evidence. During respondent-mother's 14 March 2017 interview with law enforcement, she reported that after a doctor detailed the extent of Anna's numerous injuries, she spoke with respondent-father:

> And I'm like well how did it happen? And he's like I don't know. I'm like can it be from our dog, you know. Like we have – we have some dogs and our biggest dog's a Great Dane and he's jumped on – jumped on the bed and has cracked me in my nose to where I'd be screaming for [respondent-father] to come in. And one time I wound up bleeding but he never broke my nose.

Considering respondents' conversation, in light of the unchallenged findings that Anna was severely abused while she resided in respondents' care and Dr. Alexander's conclusion that Anna was abused by an "adult who is concealing the truth," the trial court made the reasonable inference that respondents worked together to develop an explanation for Anna's injuries in an attempt to conceal the truth.

¶ 14 Respondent-mother also contests the portion of finding of fact 27, which provides that "[t]he conversation between [respondents] in December 2018 showed an intent to collude to deceive this Court about their relationship and that they were coordinating their testimony for Court." She argues that there is no evidence that she was conspiring with respondent-father to provide false testimony. The record demonstrates otherwise. In a December 2018 conversation between respondents, respondent-mother informed respondent-father that she was "going to take off my ring for the trial" and explain that they are taking a "break to, you know, think about things and stuff[,]" and respondent-father accepted her plan. Yet, at the time of the termination hearing, respondent-mother admitted that respondents continued to be in a relationship. Thus, the challenged portion of the trial court's finding of fact 27 is supported by clear and convincing evidence.

¶ 15 Respondent-mother argues that the trial court's finding of fact 31, which provides that Abigail was "born into the same injurious environment that resulted in [Anna]'s death[,]" is not supported by clear and convincing evidence. Yet, the trial court's unchallenged findings that no explanation by either parent accounted for Anna's injuries, Anna's death was caused by an act by one or both respondents, respondents were still together and planned to remain together, and Abigail's proposed caregivers would not protect her or follow a safety plan for Abigail support the trial court's finding that Abigail was born into the same injurious environment as Anna.

¶ 16 Respondent-mother challenges the portions of finding of fact 34 in which the trial court found that there were other factors besides Anna's death that indicated the existence of an injurious environment, namely respondent-mother's use of non-prescribed drugs, and allowing a heroin addict to live in the home while respondent-father was incarcerated. Respondent-mother contends that she only took Concerta twice to help her study and that she had only taken Gabapentin twice. She argues that there was no evidence that she was caring for Anna or Abigail at the times when she took these drugs and that her use of these drugs was not sufficient in and of itself to support an adjudication of neglect. She also argues that allowing a friend of respondent-father to live with her for a

month does not show that her home was an injurious environment for Abigail. Because, as we detail below, the contested portions of finding of fact 34 relating to respondent-mother's drug use and allowing a heroin addict to live in her home are not necessary to support the trial court's adjudication of neglect, we decline to review respondent-mother's challenges. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 132, 133 (1982)).

¶ 17 Next, respondent-mother argues that the trial court's findings of fact do not support its adjudication that Abigail was a neglected juvenile. She contends that Abigail was not at substantial risk of impairment living in a home with respondent-mother. We are not convinced.

¶ 18 This Court has held that

> [a] court may not adjudicate a juvenile neglected solely based upon previous [DSS] involvement relating to other children. Rather, in concluding that a juvenile "lives in an environment injurious to the juvenile's welfare," N.C.G.S. § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile.

In re J.A.M., 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019). "In neglect cases involving newborns, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *Id.* at 9, 822 S.E.2d at 698–99 (citation omitted).

¶ 19 Here, although the trial court considered the fact that Abigail lived in the same home where Anna died as a result of an act of one or both respondents, this was not the sole basis for the trial court's conclusion that Abigail was a neglected juvenile. Rather, the trial court also found the presence of other factors demonstrating that Abigail presently faced a substantial risk in her living environment: respondent-mother continued to provide the implausible explanation that her dog caused Anna's head injury; respondent-mother failed to provide an explanation that accounted for Anna's other injuries; there were no means by which the court could determine what caused Anna's death and "thereby insure the safety of [Abigail]"; respondent-mother continued to be in a relationship with respondent-father; and respondents colluded to deceive the court about the status of their relationship. In conjunction with the fact that Anna died in the home at the hands of one or both respondents, the

findings of respondent-mother's ongoing failure to recognize and accept the cause of Anna's injuries and resulting death, and her continued relationship with respondent-father, establish that respondent-mother was unable to ensure Abigail's safety and that Abigail was at a substantial risk of impairment. Respondent-mother did not remedy the injurious environment that existed for Anna, and the trial court properly concluded that Abigail was a neglected juvenile.

Adjudication of Dependency

¶ 20 **[2]** 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). "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 K.D.C.*, 375 N.C. 784, 795, 850 S.E.2d 911, 920 (2020) (quoting *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007)).

¶ 21 First, respondent-mother challenges the portion of finding of fact 24, which states that "all three experts, including the respondent-mother's expert, Dr. Owens, reviewed the reenactments and statements the parents provided to law enforcement and [DSS], and each confidently concluded that the injuries that [Anna] sustained to her head could not have been caused by the events described by [respondents]." She argues that Dr. Owens testified that while the explanation provided by respondent-father was unlikely to have caused Anna's injuries, it was not impossible. Dr. Owens, a forensic pathologist initially testified that the explanation that respondents' dog jumped on respondent-father and caused Anna's head to hit the floor was "not likely" to explain the fractures to Anna's head. However, Dr. Owens subsequently explained that the force of Anna's head hitting the floor while respondent-father was holding her did not explain the head fractures she sustained. Dr. Owens also testified that "[i]t would require a more accelerated force or a fall from a greater height[.]" Thus, the trial court's finding of fact 24 is supported by the evidence. *See In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (stating that "[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.").

¶ 22 Respondent-mother also contends that finding of fact 33 is not supported by the evidence. This finding provides as follows:

> 33. Despite the clear medical evidence presented that [Anna] died of non-accidental means and that no explanation given by either parent matches the injuries, all potential caregivers identified by the parents assert that [Anna] died by accidental means. Not one of them believed that [Anna] was abused. Each family member and friend believed and testified that [Anna] died from an accident, even after being presented with clear and convincing medical evidence that contradicted their belief. One caregiver summarized the overall attitude of all of the parents' family and friends when he said, "If [respondent-mother] said it, I believe it." Based upon their testimonies, it is clear that the proposed caregivers would not protect [Abigail] and would not follow a safety plan for [Abigail.]"

¶ 23 Four individuals, including Abigail's paternal uncle and three of respondents' friends, testified during the adjudicatory phase of the hearing. The paternal uncle testified that he did not believe respondent-father "murder[ed Anna] intentionally." Two of respondents' friends testified that they believed Anna's injuries were accidental. A fourth individual testified that she believed respondents' explanation of the cause of Anna's injuries "could have been true" and "the story kind of made sense." Because none of these individuals believed Anna had been abused, the trial court reasonably inferred that they would not follow a safety plan for Abigail. Accordingly, the trial court's finding of fact 33 is supported by the evidence.

¶ 24 Respondent-mother also challenges that the following portion of the trial court's finding of fact 35: "There is no protective parent and no protective relative or kinship provider that could provide a safe home for [Abigail]." Specifically, respondent-mother argues that any of the potential placements would provide a home where respondent-father would not be present. This argument, however, disregards an important aspect of why the trial court reasoned no protective relative or kinship provider could provide a safe home for Abigail – the fact that no potential caregivers identified by respondents believed that Anna had been abused. The trial court reasonably inferred from the evidence that the potential caregivers' failure to acknowledge the intentional nature of

Anna's injuries and death would impede their ability to provide a safe environment for Abigail.

¶ 25 Next, respondent-mother argues that the trial court erred by adjudicating Abigail a dependent juvenile because she was able to care for Abigail herself, and alternatively, if respondent-mother could not provide care, Abigail was not dependent because she provided appropriate alternative child care options. Her arguments are unpersuasive.

¶ 26 Here, the trial court reasonably found that respondent-mother was unable to properly care for and supervise Abigail because Anna died in the home due to abuse, and respondents worked together to conceal what happened to Anna. Thus, there was "no means by which this Court can address what caused the death of [Anna] and thereby [e]nsure the safety of [Abigail]." Moreover, respondent-mother planned to remain in a romantic relationship with respondent-father while he was in jail on charges related to Anna's death. As previously discussed, the trial court also made findings, which were supported by the evidence or reasonable inferences drawn from the evidence, that the potential caregivers respondents offered were inappropriate because none of them believed that Anna was abused, that they would not protect Abigail, and that they would not follow a safety plan for Abigail. These findings support the trial court's conclusion that Abigail was a dependent juvenile.

II. Reunification

¶ 27 **[3]** Respondent-mother argues that the trial court erred in ceasing reunification efforts with her and failing to make reunification part of Abigail's permanency plan. Her arguments are meritless.

¶ 28 "When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42." N.C.G.S. § 7B-1102(c) (2019). Under Rule 42, "when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions[.]" N.C.G.S. § 1A-1, Rule 42(a) (2019). Here, the juvenile neglect and dependency proceeding was pending when the motion to terminate respondent-mother's parental rights was filed. *See In re R.B.B.*, 187 N.C. App. 639, 644, 654 S.E.2d 514, 518, *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2007) (stating that "the juvenile code presents no obstacle to simultaneous hearings on an abuse, neglect, and dependency petition and a termination of parental rights petition.").

¶ 29 First, respondent-mother argues that she had no notice that the permanent plan would be one of the subjects of the consolidated adjudication and disposition and termination of parental rights hearing. Yet, the record confirms that in a "Statutory Notice and Motion for Termination of Parental Rights", filed 29 August 2018 and sent to respondent-mother, she was notified that DSS was recommending the permanent plan be adoption. We also agree with the guardian *ad litem* that in a hearing where a parents' rights in their child are subject to termination, the parent has necessarily been informed that the child's permanent plan is at issue.

¶ 30 Next, respondent-mother argues that the trial court erred in ceasing reunification efforts and failing to make sufficient findings to support removing reunification from the permanent plan. N.C.G.S. § 7B-901(c) provides that

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> > (1) A court of competent jurisdiction determines or has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
> >
> > . . . .
> >
> > > f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

N.C.G.S. § 7B-901(c)(1) (2019).

¶ 31 Here, the trial court made the following findings in its disposition order:

> 3. Based upon the evidence presented in the adjudication phase of this case and the additional evidence presented in the disposition phase of this case,

> aggravating factors exist that prevent reunification with either parent in this matter in that [Abigail's] sibling died in the home due to abuse, and the mother and father have consistently worked together to conceal what happened to [Anna]. This conduct increases the enormity and adds to the consequences of the neglect of [Abigail] because there is no means by which this Court can address what caused the death of [Anna] and thereby [e]nsure the safety of [Abigail].
>
> 4. Any effort to reunify the parents with this juvenile would be clearly unsuccessful and inconsistent with the juvenile's health and safety and need for a safe, permanent home within a reasonable period of time.

¶ 32 Respondent-mother challenges finding of fact 3. She does not contest the finding that Anna died in the home due to abuse. Rather, she argues that there was no evidence presented that she worked with respondent-father to conceal what happened to Anna. As previously discussed, however, there is sufficient evidence in the record that respondents continued to provide an implausible explanation for Anna's injuries and death and worked together to conceal the truth. Under these circumstances—respondent-mother's failure to acknowledge that Anna died due to abuse, her involvement with respondent-father to conceal the truth, and her continuing romantic relationship with respondent-father—the trial court's finding that respondent-mother's conduct increased the enormity and added to the consequences of neglect is supported by the evidence. Therefore, the trial court properly determined that reasonable efforts for reunification would be unsuccessful and inconsistent with Abigail's welfare.

¶ 33 Lastly, respondent-mother reiterates many of her prior arguments that the trial court should have placed Abigail in a kinship or nonrelative kinship placement. As previously discussed, however, the trial court appropriately declined to place Abigail in respondents' proposed alternative placements because not one of them believed Anna had been abused, and the trial court reasonably inferred that their failure to acknowledge the intentional nature of Anna's injuries and death would hinder their ability to provide a safe environment for Abigail.

III. Grounds for Termination

¶ 34 **[4]** 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, 839 S.E.2d 792, 796–97 (2000) (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)). "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. at 379, 831 S.E.2d at 310. 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). "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).

¶ 35 Here, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect and dependency. N.C.G.S. § 7B-1111(a)(1), (6) (2019). Because "an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order," we need only examine whether grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). *In re J.S.*, 374 N.C. at 814–15, 845 S.E.2d at 70–71.

Neglect

¶ 36 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) (2019). In certain circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600, 850 S.E.2d 330, 336 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, for other forms of neglect, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80, 833 S.E.2d 768, 775 (2019) (cleaned up). In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light

of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 231 (1984); *see also* N.C.G.S. § 7B-101(15) ("In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect[.]"). After weighing this evidence, the court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020). Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *Id.* at 838, 851 S.E.2d at 20 n.3.

¶ 37 In the present case, Abigail was not in respondent-mother's physical custody at the time of the termination hearing which began on 31 January 2019. DSS obtained nonsecure custody of Abigail on 16 March 2018, shortly after her birth. In terminating respondent-mother's parental rights, the trial court relied upon: the abuse and neglect of Anna while in respondents' care; respondent-mother's failure to provide a plausible explanation for Anna's injuries; respondents' coordination of their statements explaining Anna's injuries and their combined actions in concealing the truth about what happened to Anna; and respondent-mother's continued romantic relationship with respondent-father and her intent to deceive the court about their relationship. The trial court found that Anna's death in respondents' home and respondents' joint concealment of what caused Anna's injuries and death "increases the enormity and adds to the consequences of the neglect of [Abigail] because there is no means by which this Court can address what caused the death of [Anna] and thereby [e]nsure the safety of [Abigail]." The trial court further found that any efforts to reunify respondents with Abigail would be unsuccessful and inconsistent with Abigail's health, safety, and need for a safe, permanent home within a reasonable time, and found that there was a probability of abuse or a repetition of neglect in respondents' home. The trial court concluded that respondent-mother had neglected Abigail in that she created an environment injurious to Abigail's welfare and "there is no indication or evidence that the mother is willing or able to correct the circumstances that lead to the death of [Anna] and the injurious environment of the juvenile."

¶ 38 Respondent-mother challenges multiple findings of fact made by the trial court as not being supported by the evidence. The trial court's findings of fact 7 through 40 in its termination order, however, are identical

to the trial court's findings of fact 5 through 38 in its order adjudicating Abigail a neglected and dependent juvenile, and respondent-mother reasserts challenges to the same findings of fact that we have already addressed above.

¶ 39 Respondent-mother next argues that the findings of fact do not adequately support the trial court's conclusion that grounds had been proven to terminate her parental rights based on neglect. She asserts that the present case is distinguishable from *In re D.W.P.*, 373 N.C. 327, 838 S.E.2d 396 (2020).

¶ 40 In *In re D.W.P.*, this Court affirmed an order terminating a mother's parental rights on the basis of neglect. The mother's eleven-month-old son was treated for a broken femur and had numerous other factures that were in the process of healing. The mother attributed his fractured femur to the family's seventy-pound dog and suggested the children's biological father had inflicted the older injuries. *Id.* at 328, 838 S.E.2d at 399. Based upon the boy's young age and multiple fractures for which the mother and her fiancé could provide no plausible explanation, the Guilford County Department of Health and Human Services (GCDHHS) filed a petition and obtained nonsecure custody of both children. *Id.* at 328, 838 S.E.2d at 399. The trial court terminated the mother's parental rights, concluding that "her neglect continued, and . . . she was likely to neglect the children in the future." *Id.* at 329, 838 S.E.2d at 400. The trial court focused on the mother's refusal to honestly report how her son's injuries occurred and believed GCDHHS was unable to provide a plan to ensure that injuries would not occur in the future without knowing the cause of the injuries. *Id.* at 329, 838 S.E.2d at 400.

¶ 41 In affirming the trial court's conclusion that neglect was likely to reoccur if the children were returned to the mother's care, this Court noted in *D.W.P.* the troublesome nature of the mother's "continued failure to acknowledge the likely cause of [her son's] injuries." *Id.* at 339, 838 S.E.2d at 406. This Court also noted that despite the mother's recognition that her fiancé could have caused her son's injuries, she re-established a relationship with him that resulted in domestic violence and "refuse[d] to make a realistic attempt to understand how [her son] was injured or to acknowledge how her relationships affect her children's wellbeing." *Id.* at 340, 838 S.E.2d at 406.

¶ 42 Respondent-mother contends that respondent-father is incarcerated and does not pose a threat; that the historic injuries suffered by the son in *In re D.W.P.* were more extensive than those suffered by Anna; that respondent-mother was not criminally charged in relation to Anna's

injuries like the mother in *In re D.W.P.*; and that respondent-mother recognized that the respondent-father must not be allowed back in the home with Abigail.

¶ 43 Here, as in *In re D.W.P.*, respondent-mother failed to acknowledge the intentional nature of Anna's injuries, never provided a plausible explanation for Anna's injuries and resulting death, and continued to be in a romantic relationship with respondent-father with the intentions to remain together. In addition, DSS could not provide a plan to ensure that injuries would not occur in the future without respondent-mother's acknowledgement that Anna's death was not accidental. Accordingly, the trial court's conclusion, that neglect was likely to reoccur because there was no indication respondent-mother was willing or able to correct the circumstances that led to Anna's death or Abigail's injurious environment, is supported by the evidence and findings of fact.

¶ 44 Because the evidence supports the findings of fact and the findings of fact support at least one ground for termination of respondent-mother's parental rights, we need not address termination of respondent-mother's parental rights based on dependency. *In re B.O.A.*, 372 N.C. at 380, 831 S.E.2d at 311. Furthermore, respondent-mother does not contest the trial court's dispositional determination that it was in Abigail's best interests to terminate her parental rights. The trial court's order terminating respondent-mother's parental rights in Abigail is affirmed.

AFFIRMED.

IN RE D.A.A.R.

[377 N.C. 258, 2021-NCSC-45]

IN THE MATTER OF D.A.A.R., S.A.L.R.

No. 224A20

Filed 23 April 2021

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—compliance with majority of case plan

An order terminating a mother's parental rights to her son was reversed where the trial court's findings of fact did not support its conclusion that she willfully failed to make reasonable progress in correcting the conditions leading to the child's removal from the home. Although the trial court properly considered the mother's partial noncompliance with the "parenting skills" component of her case plan with the Department of Health and Human Services, the court's remaining findings showed the mother had made reasonable progress by fully complying with the remaining components of her case plan, including those addressing her substance abuse, domestic violence issues, mental health, and housing situation.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 6 February 2020 by Judge William B. Davis in District Court, Guilford County. This matter was calendared in the Supreme Court on 19 March 2021 but was determined on 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 & Human Services.

Wyrick Robbins Yates & Ponton LLP, by Sean S. Planchard, for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Amanda R. appeals from the trial court's order terminating her parental rights in D.A.A.R.,[1] a minor child born in May

1. "D.A.A.R." will be referred to throughout the remainder of this opinion as "Daniel," which is a pseudonym used to protect his identity and for ease of reading. Daniel's older

2013.[2] After careful consideration of respondent-mother's challenges 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 reversed.

I. Factual and Procedural Background

¶ 2 On 26 July 2017, the Guilford County Department of Health and Human Services filed juvenile petitions alleging that Daniel and Sara were neglected and dependent juveniles and obtained the entry of orders taking them into nonsecure custody. The process that led to the filing of these juvenile petitions began when DHHS received a child protective services report on 7 April 2017 describing an incident of domestic violence between the parents during which the father held a gun to respondent-mother's head. In the course of the ensuing investigation, DHHS learned of substance abuse by both parents, having been told, among other things, that respondent-mother "was selling her Suboxone medication and buying urine to pass drug screens in order to receive more Suboxone." In addition, the parents failed to attend scheduled meetings with DHHS personnel and vacated their residence without informing DHHS that they intended to do so. On 30 May 2017, the father was charged with the commission of numerous felonies, including robbery with a dangerous weapon and possession of a firearm by a felon.[3]

¶ 3 After leaving Sara in the care of a family friend for what was supposed to be a single night, respondent-mother was "nowhere to be found" when the friend attempted to return Sara to her on the following day. In addition, respondent-mother was reported to be homeless and living in a hotel. However, respondent-mother was ultimately found with Daniel in the home of a former neighbor after DHHS received a report that respondent-mother and the former neighbor had been engaging in substance abuse in Daniel's presence. On 24 July 2017, respondent-mother was arrested and taken into custody by officers of the High Point Police Department at the neighbor's residence. Although respondent-mother agreed to place Daniel with her grandmother pending her release from the Guilford County Detention Center and to participate in a child and

---

sister, "S.A.L.R.," was also a subject of the trial court's order and will be referred to using the pseudonym "Sara" throughout the remainder of this opinion for the same reasons.

2. The challenged trial court order also terminated the parental rights of the father Jesse B. in both children. Although the father noted an appeal to this Court from the trial court's termination order, he subsequently sought leave from this Court to withdraw his appeal, a request that this Court allowed on 15 July 2020.

3. The father was eventually convicted of committing serious criminal offenses and was serving a lengthy prison sentence at the time of the termination hearing.

family team meeting with DHHS, she failed to attend the child and family team meeting, which had been scheduled for 26 July 2017.

¶ 4 After a hearing held on 16 November 2017 for the purpose of considering the issues raised by the neglect and dependency petitions, Judge Angela C. Foster entered an order on 8 January 2018 finding that Daniel and Sara were neglected and dependent juveniles and continued them in DHHS custody. Judge Foster's order determined that the barriers to the children's reunification with the parents included their "volatile relationship and history of domestic violence," their untreated "mental health and substance abuse issues," and the lack of stable housing that was suitable for them and the children. Judge Foster noted that, even though respondent-mother had been participating in weekly visitation sessions with the children, she had not attended the adjudication hearing, with her current location being unknown. As a result, Judge Foster ordered respondent-mother to enter into a service agreement with DHHS "and [to] begin complying with the terms and conditions of that agreement, if she desires reunification." Respondent-mother was authorized to have one hour of supervised visitation with the children each week.

¶ 5 Respondent-mother finally entered into a family services agreement with DHHS on 26 January 2018. The family services agreement between DHHS and respondent-mother was intended to address issues relating to substance abuse; domestic violence; emotional and mental health; housing, environmental, and basic physical needs; and parenting skills.

¶ 6 Following a hearing held on 8 February 2018, Judge Foster entered a permanency planning order on 26 March 2018 in which she established a primary permanent plan for the children of reunification with the parents and a secondary plan of adoption. After a hearing held on 8 March 2018, Judge Foster authorized Daniel and Sara to visit their maternal aunt and uncle in another state[4] pending final approval of the aunt and uncle's residence pursuant to the Interstate Compact on the Placement of Children. The children arrived at their aunt and uncle's residence on 30 March 2018 and were allowed to remain in this out-of-state placement after DHHS presented the approved ICPC home study to Judge Foster on 5 April 2018.

---

4. The trial court granted respondent-mother's request that her current state of residence, which is the same as the state in which the children's maternal aunt and uncle live, not be disclosed to respondent-father. As a result, we will refrain in this opinion from specifying the state to which respondent-mother relocated after leaving North Carolina in May 2018 and in which the maternal aunt and uncle reside.

¶ 7 At the next permanency planning hearing, which was held on 3 May 2018, DHHS advised Judge Foster that it had not heard from respondent-mother since the February hearing and that her current location remained a mystery. In light of respondent-mother's failure to make any progress toward satisfying the requirements of her family services plan and the father's apparent lack of interest in the children, Judge Foster entered an order on 2 July 2018 in which she changed the primary permanent plan for the children to one of adoption, with a secondary plan of reunification. In addition, Judge Foster suspended respondent-mother's visitation with the children and directed DHHS to initiate termination of parental rights proceedings against respondents within the next sixty days.

¶ 8 On 4 May 2018, respondent-mother entered a six-month residential substance abuse treatment program in the state in which the children were living with their maternal aunt and uncle. Sara was returned to North Carolina on 25 June 2018 and lived in an emergency shelter on a temporary basis. In a consent order entered on 25 July 2018, Judge Foster allowed respondent-mother to have fifteen minutes of supervised telephone contact with Sara twice each week. On 8 August 2018, Sara was placed with her maternal great aunt and uncle in Rowan County, with Daniel having joined Sara in this placement on 9 August 2018. Throughout this period of time, respondent-mother remained in the residential substance abuse treatment program which she had entered on 4 May 2018.

¶ 9 At the next permanency planning hearing, which was held on 20 September 2018, respondent-mother reported that she was scheduled to complete in-patient substance abuse treatment on 30 October 2018, had been attending weekly parenting classes and individual and group therapy, and intended to take a domestic violence education course. In a permanency planning order entered on 21 November 2018, Judge Foster found that, while respondent-mother had "begun to maintain regular contact with [DHHS,]" she had yet to begin paying child support relating to the children. In light of her progress in substance abuse treatment, respondent-mother asked Judge Foster to stay the initiation of termination of parental rights proceedings. In view of respondent-mother's delay in entering into a family services agreement with DHHS and a determination that respondent-mother "ha[d] not begun to fully engage with the components," Judge Foster denied respondent-mother's request and determined that "[i]t is in the best interest of the juveniles that termination of parental rights be pursued by the Department against the parents[.]"

¶ 10 On 29 January 2019, respondent-mother filed motions seeking to have her visitation rights with Daniel and Sara reinstated and to have the initiation of the termination of the parental rights proceeding stayed. In support of this motion, respondent-mother provided information concerning her progress toward satisfying the conditions of her family services agreement, which included the completion of a six-month inpatient substance abuse rehabilitation program; the completion of a sixty-day intensive outpatient substance abuse treatment program; the submission of negative drug screens on a consistent basis since 26 June 2018; her ongoing attendance in substance abuse intensive outpatient treatment; the completion of a four-hour domestic violence course; the completion of parenting classes; and the leasing of a rent-subsidized residence that was suitable for the children as of 20 November 2018. Respondent-mother asserted that she had "maintained her sobriety since April 2018" and had demonstrated overall "stability for several months" and claimed that her supervised phone calls with Sara "appear to be going well."

¶ 11 On 30 April 2019, before respondent-mother's motions had been heard and decided, DHHS filed a petition seeking to have the parents' parental rights in Daniel and Sara terminated. According to the allegations set out in the termination petition, respondent-mother's parental rights in the children were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willfully leaving the children in a placement outside the home for more than twelve months without making 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).

¶ 12 Judge Foster held another permanency planning hearing on 2 May 2019 and, in an order entered on 22 July 2019, maintained the children's primary permanent plan of adoption. After making findings that acknowledged respondent-mother's progress toward satisfying the requirements of her family services agreement, Judge Foster determined that "[t]he conditions that [had] led to the juveniles coming into custody have not been corrected," that respondent-mother "is not in full compliance with the components [of] her service agreement," and that respondent-mother had "not made adequate progress with the components of that agreement within a reasonable period of time." Among other things, Judge Foster held that respondent-mother had not seen Daniel since "on or about February 8, 2018"; that she "is unemployed, and . . . does not have a source of income"; and that she "has significant mental health and substance abuse issues, and . . . needs to demonstrate her ability to maintain her sobriety." Although Judge Foster denied respondent-mother's motion to stay the termination of parental rights

proceeding, she precluded the termination hearing from beginning prior to a permanency planning hearing scheduled for 22 August 2019. Judge Foster also granted respondent-mother an additional two-hour visitation session with Sara each month[5] while ordering that respondent-mother's visitation with Daniel should "remain[ ] suspended until such time as visits are recommended by the juvenile's therapist."

¶ 13 On 15 May 2019, the guardian ad litem filed a motion for review in which she sought to have all contact between respondent-mother and the children suspended in response to unauthorized contact that had occurred between respondent-mother and Sara. After holding a hearing for the purpose of considering the issues raised by the guardian ad litem's motion for review on 30 May 2019, Judge Foster entered an order suspending all "visitation, phone calls or any other form of communication or contact between [respondent-mother] and the juveniles" on 27 June 2019. In her order, Judge Foster found that Sara, along with several other children, had run away from the group home in which she had been placed with several other juveniles on 12 May 2019; that the employees of the group home had filed a missing person's report and notified DHHS of Sara's unauthorized departure from her placement without permission on 13 May 2019; and that DHHS had notified respondent-mother of Sara's disappearance by e-mail before inquiring if respondent-mother had heard from Sara. Judge Foster further found that respondent-mother had responded to a social worker's e-mail by stating that "she had not heard from her daughter" and that respondent-mother had remained in contact with the social worker until 5:42 p.m. on 13 May 2019, at which point respondent-mother asked the social worker to "keep [her] posted." In addition, Judge Foster found that, unbeknownst to DHHS,[6] respondent-mother "was present in North Carolina on May 13, 2019 due to a criminal court appearance in Davidson County" and that, after receiving a phone call from Sara, respondent-mother had arranged to meet Sara and the other juveniles at approximately 7:00 p.m. on 13 May 2019 for the ostensible purpose of "pick[ing] up all the children, feed[ing] them and tak[ing] them some-

---

5. In spite of the fact that Judge Foster had formally authorized the resumption of respondent-mother's visitations with Sara at the 2 May 2019 permanency planning hearing, the record reflects that respondent-mother participated in supervised visits with Sara on 9 March 2019, 6 April 2019, and 4 May 2019.

6. As respondent-mother pointed out at the termination hearing, the written report submitted by the guardian ad litem in advance of the 2 May 2019 permanency planning hearing stated that "[respondent-mother] currently has pending charges in Davidson County with an upcoming court date of May 13, 2019."

where." Judge Foster found that, "[w]ithin ten to twenty minutes of the phone call," respondent-mother had arrived at the location at which she had arranged to meet Sara in a vehicle driven by her pastor, Joseph Divinsky, that was also occupied by Sara's maternal grandmother, and "physically forced [Sara] into [the] vehicle[.]" Judge Foster also found that, instead of contacting DHHS, law enforcement officers, or employees of the group home for the purpose of alerting them about the juveniles' location, respondent-mother had taken Sara to buy clothes and eat dinner before staying with Sara overnight in a Salisbury hotel. Finally, Judge Foster found that respondent-mother had only contacted DHHS for the purpose of having Sara returned to her placement after missing two phone calls from the social worker on the morning of 14 May 2019.[7] Based upon these findings, Judge Foster determined that respondent-mother had "violated the Court's prior orders by having contact with [Sara] outside of the court-ordered visitation and by having Joseph . . . in the presence of [Sara]" and suspended all visitation and other forms of contact between respondent-mother and Sara.

¶ 14 The trial court held a pre-trial hearing in the termination proceeding on 8 July 2019 and set the matter for hearing on 30 September 2019. On the afternoon of 8 July 2019, respondent-mother filed a motion in which she sought review of the children's permanent plan on the grounds that she had maintained stable housing and sobriety for more than eight months, had "renewed her cosmetology license and expect[ed] to have employment soon," and had obtained a favorable result from an ICPC home study. Judge Foster denied respondent-mother's motion for review by means of an order entered on 12 September 2019.

¶ 15 Another permanency planning hearing commenced on 22 August 2019 and concluded on 20 September 2019. In an order entered on 17 October 2019, Judge Foster found that the ICPC home study that had been ordered for respondent-mother's residence had been denied on or about 9 August 2019 and that respondent-mother remained unemployed and lacked a source of income. Judge Foster noted that respondent-mother "had previously reported that she was receiving financial assistance from [Joseph's] Everlasting Arms Ministry" and "is currently engaged to Joseph[.]" Based upon these and other findings,

---

7. Although the trial court found in the termination order that respondent-mother had contacted DHHS on 15 May 2019, the undisputed evidence established that respondent-mother had phoned the social worker on the morning of 14 May 2019, a fact that suggests that the trial court's reference to initial contact having been made on 15 May 2019 is nothing more than a clerical error.

Judge Foster ordered DHHS to "pursue termination of parental rights against [the parents] as soon as possible."

¶ 16 The trial court held a three-day termination of parental rights hearing between 30 September 2019 and 28 October 2019 and entered an order terminating the parents' parental rights in Daniel and Sara on 6 February 2020. In its termination order, the trial court determined that respondent-mother's parental rights in the children were subject to termination on the grounds that she had willfully left them in an out-of-home placement for more than twelve months without making reasonable progress toward correcting the conditions that led to their removal from her home, N.C.G.S. § 7B-1111(a)(2),[8] and that DHHS had failed to establish that respondent-mother's parental rights in the children were subject to termination on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1). After considering the statutory dispositional factors delineated in N.C.G.S. § 7B-1110(a), the trial court concluded that, while the termination of respondent-mother's parental rights would be in Daniel's best interests, the same would not be true with respect to Sara.[9] As a result, the trial court terminated respondent-mother's parental rights in Daniel while leaving her parental rights in Sara intact. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Substantive Legal Analysis

¶ 17 In seeking relief from the trial court's termination order before this Court, respondent-mother contends that the trial court erred by concluding that her parental rights in Daniel were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2). We believe that respondent-mother's contention has merit.

A. Relevant Legal Principles

¶ 18 According to well-established North Carolina law,

> [w]e review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of

8. The trial court determined that respondent-father's parental rights in the children were subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to their removal from the family home, N.C.G.S. § 7B-1111(a)(2); failure to establish paternity, N.C.G.S. § 7B-1111(a)(5); and abandonment, N.C.G.S. § 7B-1111(a) (7).

9. The trial court concluded that the termination of the father's parental rights would be in both children's best interests.

> law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. . . .
>
> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. . . .

In re J.S., 374 N.C. 811, 814–15 (2020) (cleaned up). As a result, the ultimate issue raised by respondent-mother's challenge to the trial court's termination order is whether the findings of fact that the trial court made in the course of determining that respondent-mother's parental rights in Daniel were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) have adequate record support and whether the trial court's properly supported findings of fact establish that respondent-mother had willfully failed to make reasonable progress toward correcting the conditions that had resulted in Daniel's removal from the family home.

¶ 19 According to N.C.G.S. § 7B-1111(a)(2), a parent's parental rights in a child are subject to termination in the event that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). "[A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be left in foster care or placement outside the home pursuant to a court order for more than a year at the time the petition to terminate parental rights is filed," *In re J.S.*, 374 N.C. at 815 (cleaned up), with the reasonableness of the parent's progress to be assessed as of the date of termination hearing. *Id.*

¶ 20 As this Court has previously stated,

> a finding that a parent acted willfully . . . does not require a showing of fault by the parent. A respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights.

In re J.S., 374 N.C. at 815 (cleaned up). On the other hand, "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 A.B.C.*, 374 N.C. 752, 760 (2020) (quoting *In re B.O.A.*, 372 N.C. 372, 385 (2019)). Moreover, while a parent's "compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)[,]" *In re B.O.A.*, 372 N.C. at 384,

> the issue of whether or not the parent is in a position to actually regain custody of the children at the time of the termination hearing is not a relevant consideration under N.C.G.S. § 7B-1111(a)(2), since there is no requirement for the respondent-parent to regain custody to avoid termination under that ground. Instead, the court must only determine whether the respondent-parent had made "reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). Accordingly, the conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown.

In re J.S., 374 N.C. at 819, 845 S.E.2d at 73 (cleaned up).

B. Analysis of the Trial Court's Findings of Fact

¶ 21 The trial court made the following uncontested findings of fact concerning the circumstances that led to the children's placement outside the family home and the initial response that respondent-mother made to the children's placement in DHHS custody:

2. . . . [L]egal and physical custody of the juveniles has remained with [DHHS] continuously since July 26, 2017.

> 3. . . . [In a]pproximately, May 2018, [respondent-mother] left the state of North Carolina for various purposes and reasons, including seeking residential treatment placement in the state where [she] currently resides, being that it was closer to her children, who were placed at the time in the state where the mother currently resides, and removing herself from close geographic proximity to any location where she may encounter [respondent-father]. . . .
>
> . . . .

> 9. The conditions which led to the juveniles coming into custody include but are not limited to domestic violence between the parents, prior Child Protective Services (CPS) history in Randolph County, the mother's mental health issues, the parents' history of unstable housing, and the parents' substance abuse issues.
>
> . . . .
>
> 12. The mother has had an opportunity to correct the conditions that led to the juveniles' removal from the home, including but not limited to being offered a service agreement with the Department. [Respondent-mother] willfully delayed entering into a service agreement because she insisted on entering into the agreement along with [respondent-father]. Due to [respondents'] history of domestic violence, the Department would not allow a dual service agreement.

According to the trial court, respondent-mother "ultimately entered into the service agreement with the Department on January 26, 2018, and it was last updated in January 2019."

¶ 22 Next, the trial court made findings that detailed the progress that respondent-mother had made in addressing the five components of the family services agreement that she entered into with DHHS. The trial court's findings with respect to each of these issues can be summarized as follows:

1. Substance abuse

¶ 23 The trial court found that respondent-mother had enrolled in a six-month residential substance abuse program on 4 May 2018, had successfully completed the program on 30 October 2018, had "enrolled herself into an intensive outpatient substance abuse program" after completing inpatient treatment, and had completed all three phases of intensive outpatient treatment by 30 April 2019. In addition, the trial court found that respondent-mother "continues to work with Baptist Health regarding her ongoing mental health treatment and therapy" and had submitted a sufficient number of consecutive negative drug screens to satisfy DHHS that the drug screening process could be discontinued. As a result, the trial court determined that "[respondent-mother was] in compliance with this component of her case plan."

2. Domestic violence

¶ 24 The trial court found respondent-mother had left North Carolina in early May 2018 for the purpose, at least in part, of "remov[ing] herself from close geographic proximity to any location where she may encounter [the father]." In addition to extricating herself from her relationship with the father, the trial court found that respondent-mother had completed a four-hour domestic violence course in her current state of residence in October 2018, that she had completed "an eight-hour domestic violence class and counseling" on 5 April 2019, and that "[n]o other domestic violence courses were recommended" for respondent-mother. As a result of her participation in this educational and treatment process and the fact that she had not been involved in any incidents of domestic violence since leaving North Carolina, the trial court found that respondent-mother was "in compliance with this portion of her case plan."

3. Emotional and Mental Health Needs

¶ 25 The trial court found that respondent-mother "is actively engaged in therapy and treatment regularly and has consistently done so from the time she left the State of North Carolina, up to and through the date of this hearing." As a result, the trial court concluded that respondent-mother was "in compliance with this component of her case plan."

4. Housing, Environment, and Basic Physical Needs

¶ 26 The trial court made the following findings of fact with respect to issues relating to housing, the environment in which respondent-mother lived, and respondent-mother's ability to satisfy her basic physical needs and those of the children:

> [Respondent-mother] was ordered to obtain and maintain a suitable home for the juveniles and . . . maintain all utilities without service interruption for 6 months and pay the rent each month on time . . . .
>
> In approximately May of 2018, [respondent-mother] . . . entered into a residential treatment program for approximately six months. At the completion of the program, [she] . . . obtained housing on November 20, 2018 in her current state of residence. [Respondent-mother] provided [DHHS] Social Worker [Aricia Ross-Clayton] with a copy of her lease as proof of residence with the juveniles' names on the lease. She

currently receives a stipend to help with utilities from the state [where] she resides as well as clothes, food and financial assistance from a local charity. An ICPC home study request was completed by the County Department of Human Services in the state where she is currently residing on August 27, 2019. The ICPC home study was completed and the home was appropriate with working utilities. However, the ICPC home study was denied due to [respondent-mother's] current criminal history. The local authorities were notified that [respondent-mother] was the biological parent and they denied the ICPC home study contrary to their policies for a biological parent on the basis of previous criminal history.

Approximately one week after the hearing held on October 1, 2019, Social Worker Ross-Clayton received a letter from Jessica Doherty with the Department of Social Services in [respondent-mother's] current state of residence regarding exceptions to the ICPC home study policy in regard to biological parents. Ms. Doherty indicated that their Department would be willing to monitor the mother's home, due to her being the biological parent, despite prior CPS or criminal history.

However, this error was not discovered within a sufficient period of time to be corrected without requiring the execution of a completely new ICPC Home Study, which could take several months. The juveniles have been in the custody of [DHHS] for a period in excess of two years and continuing custody for the purpose of conducting a new ICPC home study will continue to prolong the juveniles' placement with [DHHS] without permanence.

. . . .

. . . [Respondent-mother] is in compliance of this component of her case plan. The only caution by the Court is that [she] is not currently earning sufficient income to maintain housing independently without external assistance, but . . . there is no reason to

> think the home is not stable for the indefinite period in the future.

As a result of the fact that no party to this proceeding has challenged the sufficiency of the evidentiary support for these findings, they are binding upon us for purposes of appellate review. *See Koufman v. Koufman*, 330 N.C. 93, 97 (1991).

¶ 27 On the other hand, respondent-mother does challenge the sufficiency of the evidentiary support for the portion of Finding of Fact No. 20(a)(1) stating that she had "fail[ed] to provide housing currently acceptable and appropriate for the juveniles to have any possibility of being placed in her care" lacks sufficient evidentiary support. According to both the record evidence and the trial court's findings of evidentiary fact, however, respondent-mother had leased a residence that was suitable for herself and the children and had working utilities since November 2018. As of the time of the termination hearing, respondent-mother had maintained occupancy of this residence for a period of almost one year. For that reason, the trial court expressly found that respondent-mother was "in compliance of this component of her case plan" and that "there [was] no reason to think the home is not stable for the indefinite period in the future."

¶ 28 As is reflected in its findings of fact, the trial court's concern about the stability and sufficiency of respondent-mother's housing arrangements did not stem from any deficiency in the condition of the premises that respondent-mother occupied or respondent-mother's ability to continue leasing those premises. Instead, the trial court's concern about respondent-mother's housing arrangements rested solely upon the unfavorable result of the ICPC home study. However, the unfavorable result in question rested upon an error made by the relevant agency in the state in which respondent-mother resided coupled with the trial court's unwillingness to tolerate the additional delay in achieving permanency for the children that would inevitably result from the performance of another ICPC home study. In other words, the trial court's findings indicate that the necessity for the second home study resulted from an error made by the relevant agency in the state in which respondent-mother resided rather than from respondent-mother's conduct. As a result, we conclude that the challenged portion of Finding of Fact No. 20(a)(1) relating to respondent-mother's failure to provide acceptable housing lacks sufficient evidentiary support, so that we will disregard the relevant portion of that finding of fact in evaluating whether the trial court's findings of fact support its determination that respondent-mother's pa-

rental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).[10] *See In re S.D.*, 374 N.C. 67, 75 (2020).

5. Parenting Skills

¶ 29 The trial court found that respondent-mother was in "partial compliance" with the component of her family services agreement that was intended to address issues relating to parenting skills. The trial court found that, while respondent-mother had failed to complete the Parenting Assessment Training Education Program prior to leaving North Carolina, she had completed "a parenting class through . . . an agency in her state and county of residence . . . on October 29, 2018," "[i]n lieu of the PATE program." In addition, the trial court found that respondent-mother had completed a "Nurturing Parenting Program" on 20 February 2019. According to the trial court, the parenting courses that respondent-mother had completed provided "no opportunity for the instructor to observe [her] directly interact with the [children] in order to evaluate her ability to put the skills and knowledge she learned into action in an actual parenting situation."

¶ 30 In addition, the trial court found that respondent-mother had obtained a "parenting psychological assessment through [a provider] located in her current state of residence" on 22 April 2019. According to the trial court, no treatment had been recommended for respondent-mother, with the assessor having reported that respondent-mother "shows no problematic concerns regarding her current parenting or past substance abuse history."

¶ 31 The trial court further found that respondent-mother had not visited Daniel since February 2018 and that her visitation with the children remained in a state of suspension at the time of the termination hearing. In spite of the fact that respondent-mother had been allowed to visit with the children in the aftermath of their removal from the family home, the trial court found that she had "stopped showing up to her visits and subsequently her visits with the [children] were suspended from May 3,

---

10. In its brief before this Court, DHHS posits that respondent-mother might not be able to renew her subsidized lease at the expiration of her current lease term. The trial court expressly found, however, that there was "no reason to think the home is not stable" for the foreseeable future. As the Court of Appeals has correctly determined, reliance upon such speculative concerns does not suffice to demonstrate a lack of reasonable progress for purposes of N.C.G.S. § 7B-1111(a)(2). *See In re Nesbitt*, 147 N.C. App. 349, 359 (2001) ("conclud[ing] that the petitioner has failed to meet its burden of demonstrating by clear, cogent and convincing evidence the absence of reasonable progress related to housing to support termination of [the respondent-mother's] parental rights").

2018 until March 7, 2019, when her visitation with [Sara] was reinstated on a monthly basis. Although the trial court found "no evidence of concern" in connection with the supervised visits that respondent-mother had with Sara in March, April, and May 2019, those visits were suspended on 30 May 2019 "due to [her] actions in response to [Sara] running away from Nazareth Children's Home."

¶ 32 Respondent-mother argues that a portion of Finding of Fact No. 12(a) that describes her handling of the "runaway incident" during 13–14 May 2019 lacks sufficient evidentiary support. Even though respondent-mother has not disputed the sufficiency of the evidence to support the manner in which the trial court described her actions during the "runaway incident" or its finding that her "contact with [Sara] during that time violated the existing court orders that limited her to specifically scheduled and supervised visitations" and prohibited Sara from "being in the presence of [Joseph,]" respondent-mother objects to the trial court's determination that the manner in which she responded to this situation "indicates clear issues related to [respondent-mother's] parenting skills, reflecting that [she] is not in full compliance with this component of her case plan."

¶ 33 As an initial matter, we note that the trial court did not find "clear issues related to [respondent-mother's] parenting skills" based solely upon her decision to keep Sara in her custody overnight on 13–14 May 2019 instead of immediately notifying law enforcement officials, DHHS, and employees of the group home that she had located Sara and was providing care for her. Among other things, the trial court also pointed to respondent-mother's actions after the children entered DHHS custody, including "the suspension of her visitation *on two separate occasions*," as indicating the existence of unaddressed deficiencies in respondent-mother's parenting skills. (Emphasis added). Aside from the fact that respondent-mother does not challenge the sufficiency of the evidence to support the trial court's findings concerning the initial suspension of her visitation rights at the time of the 3 May 2018 permanency planning hearing, we note that the 2 July 2018 permanency planning order reflects dissatisfaction with respondent-mother's ongoing substance abuse problems and the absence of any meaningful progress toward satisfying the requirements of her family services plan.

¶ 34 As far as the "runaway incident" is concerned, we are not unsympathetic to respondent-mother's contention that her primary concern at the time that she arranged to meet her daughter on the evening of

13 May 2019 was for Sara's physical and emotional well-being.[11] On the other hand, we are prohibited by well-established principles of North Carolina law from looking behind the trial court's determination that respondent-mother's failure to contact DHHS until the following morning reflected poor judgment on respondent-mother's part and violated prior court orders given that the trial court's evaluation of respondent-mother's conduct is reasonable and constitutes nothing more than permissible fact-finding that has adequate evidentiary support. *See generally In re D.L.W.*, 368 N.C. 835, 843 (2016) (recognizing that the trial court has the responsibility, acting in its capacity as the trier of fact, to weigh and draw reasonable inferences from the evidence).

¶ 35 Similarly, we reject respondent-mother's contention that the trial court erred by considering the "emergency decisions regarding her runaway teenage daughter" and her initial "delay in entering a case plan" after the children had been taken into DHHS custody to be relevant to the issue of whether respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2). As far as the first of these two objections is concerned, it is clear to us that the making of "emergency decisions" is an inherent part of parenting and may appropriately be considered by a trial court in the course of evaluating a parent's parenting skills. In addition, we note that, instead of faulting respondent-mother for making a split-second decision under the influence of the stress of Sara's disappearance, the trial court's findings reflect a failure of judgment on the part of respondent-mother that occurred over a period of more than twelve hours, during which respondent-mother withheld information concerning Sara's locations from her lawful custodians.

¶ 36 In the same vein, we hold that a parent's delay in signing a case plan or attempting to address the conditions leading to a child's removal from the home has indisputable relevance to an evaluation of the willfulness of a parent's conduct and the reasonableness of that parent's progress in correcting the conditions that had led to a child's removal from the family home for purposes of N.C.G.S. § 7B-1111(a)(2). *See In re I.G.C.*, 373 N.C. 201, 206 (2019) (affirming a trial court's determination that a parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) on the grounds that the trial court's findings demonstrat-

11. As an aside, we note that the trial court did not find that respondent-mother had been in contact with Sara prior to respondent-mother's last e-mail exchange with the social worker at 5:42 p.m. on 13 May 2019.

ed that "respondent-mother waited too long to begin working on her case plan and that, as a result, she had not made reasonable progress toward correcting the conditions that led to the children's removal by the time of the termination hearing"); *In re Moore*, 306 N.C. 394, 405 (1982) (affirming a trial court's determination that a parent's parental rights were subject to termination for failure to make reasonable progress where the "respondent left the children in foster care for more than four years," "did not visit or communicate with them or make any serious effort to do so" during the first three years of their time in foster care, and "made arrangements to visit the children and manifested some efforts to arrange a place for the children to live with her" only after the termination petition had been filed). Although the trial court is, of course, required to consider any progress that the parent might have made up to and including the date of the termination hearing in determining the reasonableness of his or her efforts to eliminate the conditions that had led to a child's removal from the family home, *see In re I.G.C.*, 373 N.C. at 206, it should also evaluate the reasonableness of any progress that the parent has made in light of the amount of time that the parent had been given to make that progress. *See In re J.S.*, 374 N.C. 811, 820–21 (2020) (stating that, "[i]n light of . . . the fact that respondent was afforded almost three years to achieve a home environment suitable for her children, we conclude that the trial court did not err by finding that respondent failed to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) under these conditions and by finding that her failure to do so was willful").

¶ 37 Finally, we have no hesitation in rejecting respondent-mother's suggestion that the trial court was not entitled to evaluate the parenting decisions that she made relating to Sara in evaluating the reasonableness of her progress with regard to Daniel. As the trial court's findings reflect, the conditions that led to the children's removal from the family home and the requirements set out in respondent-mother's family services agreement with DHHS were not child-specific. As a result, to the extent that respondent-mother's interactions with Sara shed light upon the nature and extent of her parenting skills, evidence concerning those interactions was equally relevant to an evaluation of the progress that respondent-mother had made in correcting the conditions that had led to Daniel's removal from the family home for purposes of N.C.G.S. § 7B-1111(a)(2). *Cf. In re Allred*, 122 N.C. App. 561, 564 (1996) (concluding that the parent's prior neglect of four older children was admissible for the purpose of shedding light upon the issue of whether a different child was likely to be neglected in the event that that child was returned to the parent's care); *cf. also* N.C.G.S. § 7B-101(15) (2019) (providing

that, "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home"). The relevance of respondent-mother's inactions with Sara is particularly obvious in this case given the absence of any interactions between respondent-mother and Daniel since February 2018. As a result, we reject respondent-mother's challenge to the relevant portion of the trial court's findings.

C. Reasonableness of Respondent-Mother's Progress

¶ 38 In light of our determinations with respect to respondent-mother's challenges to the trial court's findings of evidentiary fact, we move to a consideration of her contention that the trial court's findings do not support its determination that she willfully failed to make reasonable progress toward correcting the conditions that had led to the children's removal from her home pursuant to N.C.G.S. § 7B-1111(a)(2). Although this Court and the Court of Appeals have previously characterized this and related grounds for termination as both an "ultimate finding" and a "conclusion" of law, we review the sufficiency of the trial court's findings to support its determination that a parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) using a de novo standard of review regardless of the manner in which the trial court's decision is ultimately characterized. *See In re A.B.C.*, 374 N.C. at 761 (holding that the "unchallenged findings of fact support the trial court's conclusion that respondent failed to make reasonable progress to correct the conditions that led to the removal of [the juvenile] from her care" (footnote omitted)); *In re W.K.*, 376 N.C. 269, 273 (2020) (characterizing a trial court's determination of "neglect" for purposes of N.C.G.S. § 7B-1111(a)(1) as an "ultimate finding"); *see also In re Z.D.*, 258 N.C. App. 441, 449 (2018) (stating that, "[b]ecause the evidence and findings were insufficient to support the trial court's ultimate finding that Respondent failed to make reasonable progress, we hold the findings do not support the conclusion that grounds existed pursuant to N.C.[G.S.] § 7B-1111(a)(2) to terminate Respondent's parental rights"); *In re J.S.L.*, 177 N.C. App. 151, 163 (2006) (stating that "[t]he trial court failed to make findings of fact to support a conclusion that respondent father 'willfully left the [children] in foster care for more than 12 months without showing . . . reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the [children]' " (alterations in original) (quoting N.C.G.S. § 7B-1111(a)(2))).

¶ 39 In its termination order, the trial court stated that respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) because:

> The mother has willfully left the juveniles in foster care or placement outside of the home for more than 12 months without showing to the satisfaction of the Court that reasonable progress under the circumstances ha[s] been made in correcting those conditions, which led to the removal of the juveniles. This finding is not based on the reason that the mother cannot care for the juveniles on the account of poverty, but is based solely on the fact [of] the mother's delayed engagement in her case plan as noted in this order[;] the failure of her to provide housing currently acceptable and appropriate for the juveniles to have any possibility of being placed in her care[; t]he likelihood, that if this ground were not found, and this case continues under the current circumstances, the juveniles will simply remain in the custody of [DHHS] indefinitely with no ability to make progress towards any reunification nor adoption, and would not be able to make progress on any existing permanent plan; as well as the evidence concerning the mother's parental decision making from the runaway incident set forth in the findings of fact.

For the reasons set forth above, we will disregard the trial court's reference to respondent-mother's supposed "failure . . . to provide housing currently acceptable and appropriate for the juveniles to have any possibility of being placed in her care," *see In re S.D.*, 374 N.C. at 83, in evaluating the validity of the trial court's determination that respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 40 According to respondent-mother, "the record and undisputed findings of fact establish that [she] made significant and reasonable progress in resolving the conditions that brought the children into DHHS custody." We are unable to dispute the validity of this argument given that the record evidence and the trial court's findings establish that respondent-mother had made consistent and sustained progress toward correcting the conditions that had led to the children's removal from the family home beginning in May 2018, when she left North Carolina and en-

tered residential substance abuse treatment in the state in which the children were, at that time, residing. Among other things, respondent-mother removed herself from proximity to respondent-father, an action that had the effect of significantly reducing the likelihood of continued domestic violence between the parents. By the time of the termination hearing, respondent-mother had maintained her sobriety for approximately seventeen months and had maintained housing that was suitable for herself and the children for approximately twelve months. During the same period of time, respondent-mother had availed herself of multiple opportunities to obtain education and treatment relating to her substance abuse, mental and emotional health, domestic violence, and parenting skills problems. As a result, the record evidence and the trial court's findings establish that respondent-mother had addressed each of the direct or indirect causes for the children's removal from her home. *Cf. In re K.D.C.*, 375 N.C. 784, 794–95 (2020) (reversing a trial court determination that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) on the grounds that the record failed to show that the parent had failed to comply with the provisions of her case plan that were intended to address her substance abuse problems and established that the parent's failure to complete parenting classes was mitigated by her completion of a "Mothering class"). As a result, after conducting the required de novo review, we hold that the trial court's findings of fact simply do not support a determination that respondent-mother had willfully left the child in foster care or a placement outside the home without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions that had led to the child's removal pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 41 In urging this Court to affirm the trial court's order, the guardian ad litem emphasizes the fact that Daniel had been in DHHS custody for twenty-seven months as of the time of the termination hearing and argues that this case is similar to *In re I.G.C.*, in which, even though the parent had been given two years within which to correct the conditions that had resulted in the child's removal from the home, the bulk of her progress had been made "between the court's cessation of reunification efforts and the termination hearing." 373 N.C. at 204. The guardian ad litem notes that, in upholding the trial court's determination that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) in *In re I.G.C.*, we pointed to the presence of "findings which showed that respondent-mother *waited too long* to begin working on her case plan and that, as a result, she had not made reasonable progress toward correcting the conditions that led to the children's removal by the time of the termination hearing." *Id.* at 206 (emphasis added).

¶ 42 The facts in this case are, however, clearly distinguishable from those at issue in *In re I.G.C.* The trial court's findings in this case show that respondent-mother began to make significant progress in May 2018 and had continued to do so up to the time of the termination hearing, making her actions quite unlike the "limited achievements" of the parent in *I.G.C.*, who "failed to complete the recommended treatment needed to fully address the core issues of substance abuse and domestic violence which had played the largest roles in the children's removal." *In re I.G.C.*, 373 N.C. at 205. In addition, the parent in *In re I.G.C.* "failed to obtain stable housing for at least six months[,]" *id.* at 205, 835 S.E.2d at 435, and acknowledged at the termination hearing that "she would not feel comfortable having the children returned to her care for another 'year, year and a half' because she feared the possibility that she would relapse." *Id.* at 205. Simply put, this case simply does not involve last-minute, limited steps taken by a parent faced with the looming prospect of having his or her parental rights terminated of the type that existed in *I.G.C*, *cf. In re O.W.D.A.*, 375 N.C. 645, 653–54 (2020) (concluding that a parent's "eleventh-hour efforts" that resulted in "some minimal progress during his most recent incarceration" were insufficient to "outweigh the evidence of his persistent failures to make improvements while not incarcerated" for the purpose of determining the "probability of repetition of neglect" under N.C.G.S. § 7B-1111(a)(1)); "[e]xtremely limited progress" by a parent, *In re Nolen*, 117 N.C. App. 693, 700 (1995), or the "prolonged inability" of a parent "to improve her situation, despite some efforts in that direction[,]" *In re B.S.D.S.*, 163 N.C. App. 540, 546 (2004). On the contrary, the trial court's properly supported findings demonstrate the existence of sustained and largely successful efforts by respondent-mother to satisfy the requirements of her case plan.

¶ 43 As both DHHS and the guardian ad litem point out, an analysis of the trial court's findings reflects that the sole unresolved issue that respondent-mother faced at the time of the termination hearing involved her failure to fully demonstrate sufficient improvement in her parenting skills. Admittedly, respondent-mother had not visited Daniel since February 2018. For that reason, respondent-mother had not been able to show, in a practical setting, that she had been able to actually achieve the positive results that one might have predicted based upon her successful completion of parenting courses in October 2018 and February 2019 and the favorable parenting assessment that she received in April 2019. On the other hand, the record reflects that respondent-mother unsuccessfully requested the trial court to reinstate her visitation rights relating to Daniel in January 2019 in light of the substantial progress that she claimed to have made in satisfying the requirements of her family

services agreement and that she lacked the ability to require the trial court to allow her to visit with Daniel. *See In re K.L.T.*, 374 N.C. 826, 840, (2020). Moreover, as respondent-mother notes in her reply brief, the trial court had been amenable to allowing the resumption of her visits with Daniel at the time of the 2 May 2019 permanency planning hearing in the event that Daniel's therapist viewed the prospect of such visits in a favorable light, an event that had not occurred as of 30 May 2019, when Judge Foster suspended her contact with the children in the aftermath of the "runaway incident." Finally, the record contains no indication that Daniel's therapist had any concerns about respondent-mother's progress in satisfying the requirements of her family service agreement or her parenting skills or any indication that anything untoward had occurred during respondent-mother's three supervised visits with Sara in March, April, and May 2019.

¶ 44 Although the trial court was, as we have already indicated, fully entitled to consider respondent-mother's actions during the "runaway incident" in assessing whether her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2), her actions on that occasion must be viewed in the context of her overall success in addressing the principal causes for the children's removal from her home, including her problems with substance abuse, domestic violence, mental health, and housing instability, and her partial success in satisfying the parenting skills component of her family services agreement. *See In re K.D.C.*, 375 N.C. at 794–95. After considering the trial court's properly supported findings in their entirety, we conclude that respondent-mother's serious error of judgment at the time of the "runaway incident" is not sufficient, without more, to support the trial court's conclusion that respondent-mother had willfully failed to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home. As a result, the trial court's properly supported findings of fact, considered in their entirety, simply do not suffice to support its determination that respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 45 Our decision that the trial court's termination order should be reversed is bolstered by the trial court's determination that respondent-mother's parental rights in the children were not subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in view of DHHS' failure to prove that the children would probably experience future neglect if they were returned to respondent-mother's care. In view of the fact that respondent-mother was not required to show that her

immediate reunification with the children would be appropriate in order to preclude a determination that her parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2), *see In re J.S.*, 374 N.C. at 819–20,[12] the trial court's conclusion that DHHS had failed to show a likelihood of further neglect tends to suggest that respondent-mother had, in fact, made adequate progress in correcting the conditions that had led to the children's removal from the family home. As a result, for all of these reasons, the trial court's order terminating respondent-mother's parental rights in Daniel is reversed.

REVERSED.

12. We do not, of course, wish to be understood as holding that a parent could never be required to be able to immediately reunify with the children in order to avoid a finding that his or her parental rights in the children were not subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2); we simply hold that, no such requirement could have been appropriately imposed in this case.

IN RE G.D.H.

[377 N.C. 282, 2021-NCSC-46]

IN THE MATTER OF G.D.H., J.X.W.

No. 351A20

Filed 23 April 2021

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

The termination of a mother's parental rights on the grounds of neglect and willful failure to make reasonable progress was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 6 April 2020 by Judge V.A. Davidian III in District Court, Wake County. This matter was calendared in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mary Boyce Wells, Senior County Attorney, for petitioner-appellee Wake County Human Services.

Cranfill Sumner & Hartzog LLP, by Laura E. Dean, for appellee guardian ad litem.

Mary McCullers Reece for respondent-appellant mother.

PER CURIAM.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children G.D.H. (Glen)[1] and J.X.W. (Jermaine).[2] Counsel for respondent-mother has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel as arguably supporting the appeal are meritless, and therefore we affirm the trial court's order.

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

2. The trial court also terminated the parental rights of Glen and Jermaine's father. However, he is not a party to this appeal.

¶ 2 On 4 October 2018, Wake County Human Services (WCHS) obtained nonsecure custody of Glen, Jermaine, and their older sibling T.I.R. (Thomas)[3]. WCHS filed a juvenile petition alleging that the children were neglected in that they did not receive proper care, supervision, or discipline; they were not provided necessary medical care; and they lived in an environment injurious to their welfare. The petition further alleged that WCHS had an extensive history with respondent-mother and her nine children dating back to 1995, having received twenty-seven Child Protective Services (CPS) reports with concerns of respondent-mother's chronic vagrancy, failure to provide for her children's basic needs, and improper discipline. WCHS received the most recent CPS report on 26 July 2018. The report alleged that respondent-mother had improperly disciplined Thomas by intentionally closing a car door on his leg and hitting him on the head with a hammer. Respondent-mother's actions raised concerns about her mental health and her ability to care for the children. The petition also alleged that WCHS continued to have serious concerns about respondent-mother's improper discipline, care, and supervision of the children; respondent-mother's unstable housing and income; the children's missed medical appointments; the children's excessive absences from school; and the children's poor hygiene. The petition went on to allege that respondent-mother had arranged for the children to live with relatives at various times while she attempted to obtain appropriate housing. However, respondent-mother failed to obtain such appropriate housing even when she had ample opportunities to do so; consequently, the relatives who had provided care for the children were no longer either willing or able to continue to do so. WCHS had also received reports of concerns about the commission of substance abuse by respondent-mother.

¶ 3 On 2 May 2019, the trial court entered an order adjudicating the children to be neglected juveniles. The children remained in the custody of WCHS. The trial court ordered respondent-mother to enter into and to comply with an Out of Home Family Services Agreement with WCHS that included requirements for respondent-mother to: (1) comply with recommendations of a substance abuse assessment, including random drug screens; (2) complete a psychological evaluation and follow recommendations; (3) engage in parenting education and demonstrate learned skills in visits with the children and in her decision making; (4) maintain and provide verification of lawful income sufficient to meet her needs and the needs of the children; (5) obtain, maintain, and provide verification of suitable housing; (6) resolve pending legal matters and

3. Thomas is not a subject of this appeal.

refrain from further criminal activity; (7) establish, and comply with, a visitation agreement; (8) maintain contact with WCHS and timely notify WCHS of changes in circumstances. The trial court also authorized respondent-mother to have supervised visitation with the children for a minimum of one hour per week.

¶ 4 In a permanency planning order entered after a 12 June 2019 hearing, the trial court set the primary permanent plan for the children as reunification with a concurrent permanent plan of adoption. However, in a permanency planning order entered after the next hearing, which was conducted on 23 September 2019, the trial court changed the primary permanent plan for the juveniles to adoption with a secondary plan of reunification upon finding that respondent-mother had not cooperated with recommended services or made progress toward reunification. Specifically, the trial court found that respondent-mother failed to follow through with parenting classes and was dismissed from her parenting program; submitted to substance abuse assessments but had not complied with recommended services or requested drug screens; had not provided documentation of her reported employment; failed to turn herself in for a probation violation, which resulted in her arrest; failed to follow through with mental health assessments and appointments; had been released from the DOSE program for domestic violence due to nonattendance; and had fabricated the death of her mother as an excuse to miss a review meeting on 21 August 2019.

¶ 5 On 31 October 2019, WCHS filed a motion to terminate respondent-mother's parental rights to Glen and Jermaine for neglect and for willful failure to make reasonable progress. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). The termination motion was heard on 19 February 2020 and 2 March 2020. In an order entered on 6 April 2020, the trial court determined that both grounds existed to terminate respondent-mother's parental rights as alleged in the motion. The trial court also concluded that termination of respondent-mother's parental rights was in the children's best interests. Accordingly, the trial court terminated respondent-mother's parental rights to Glen and Jermaine. Respondent appealed.

¶ 6 Due to the incorrect identification contained in respondent-mother's initial notice of appeal of the court to which she was appealing and of the order from which she was appealing, coupled with the untimeliness of her amended notice of appeal, respondent-mother filed a petition for writ of certiorari on 3 September 2020. We allowed respondent-mother's petition for writ of certiorari on 5 October 2020 in order to review the termination of parental rights order.

¶ 7 Counsel for respondent-mother has filed a no-merit brief on respondent-mother's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. In the brief, counsel identified two issues that could arguably support an appeal but also offered explanations for counsel's belief that these issues lacked merit. Counsel also advised respondent-mother of the right to file pro se written arguments on respondent-mother's own behalf and provided the parent with the documents necessary to do so. Respondent-mother has not submitted written arguments to this Court.

¶ 8 This Court independently reviews issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). After considering the entire record and reviewing the issues identified by counsel in the no-merit brief, we are satisfied that the 6 April 2020 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating the parental rights of respondent-mother.

AFFIRMED.

IN THE MATTER OF J.E., F.E., D.E.

No. 262A20

Filed 23 April 2021

1. Termination of Parental Rights—denial of motion to continue—abuse of discretion analysis—due process

In a termination of parental rights action, the trial court did not abuse its discretion in denying respondent-father's counsel's motion to continue the termination hearing due to respondent's absence where the hearing had previously been continued twice because the parents were absent, it had been five months since the filing of the petition, respondent's unexplained absence did not amount to an extraordinary circumstance meriting a further continuance beyond the 90-day time-fame set out in N.C.G.S. § 7B-1109(d), respondent could not show he was prejudiced by the denial given his counsel's advocacy, and—based on the unchallenged findings—it was unlikely that the result would have been different had the hearing been continued.

IN RE J.E.

[377 N.C. 285, 2021-NCSC-47]

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

The trial court's termination of respondent-father's parental rights based on neglect was affirmed where the children had been previously adjudicated to be neglected and the unchallenged findings established a lack of changed circumstances and a likelihood of repeated neglect. Although respondent was incarcerated or absconding for much of the time after the original adjudication of neglect, he was not incarcerated for the entirety of the case and his incarceration was not the sole evidence of neglect. Respondent failed to complete his case plan addressing the issues that led to the adjudication of neglect (substance abuse, mental health, and housing) or to remain in contact with DSS, he failed to regularly visit the children or check on their well-being, and his probation violations and criminal activity continued up until the month before the hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 4 March 2020 by Judge Charlie Brown in District Court, Rowan County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Alston & Bird, LLP, by Caitlin C. Van Hoy, for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent, the father of the minor juveniles J.E. (Jeff),[1] F.E. (Fred), and D.E. (Dan), appeals from the trial court's order terminating his parental rights.[2] Upon careful review of the record and arguments, we affirm.

---

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

2. The order also terminates the parental rights of the children's mother. However, she is not a party to this appeal.

I. Factual and Procedural Background

¶ 2 On 8 December 2017, the Rowan County Department of Social Services (DSS) filed a juvenile petition alleging that Jeff, Fred, and Dan were neglected and dependent juveniles and obtained nonsecure custody of the children. The juvenile petition also contained allegations concerning the children's mother's oldest child, D.P. (Doug).[3] The petition alleged that DSS received a report on 6 December 2017 with concerns regarding the welfare and safety of Doug and Fred after the parents left them in the care of a neighbor in Rowan County on 5 December 2017 to attend a court date in Wilmington. The parents later called the neighbor asking the neighbor to care for the children overnight, and the neighbor called law enforcement on 6 December 2017 reporting that he could not reach the parents and could no longer care for the children. It was reported that law enforcement responded and found Doug and Fred present at the home where the family had been squatting, which was "in very poor condition." Specifically, the home smelled strongly of feces and rotten food; there were dirty diapers, coke bottles containing a yellow bubbly substance, sticky carpet, and visible mold throughout the home; drug paraphernalia was in plain sight; and a 55-gallon drum with fermenting mash was located in the kitchen. It was also reported that Doug and Fred smelled strongly of urine, body odor, and filth; Doug's hair was "severely cut short in the front"; and Fred suffered from severe diaper rash requiring an antibiotic and had numerous scratches on his neck and torso.

¶ 3 The petition further alleged that the parents returned from Wilmington on 7 December 2017, dropped Jeff and Dan off with their aunt, and told the aunt that they were concerned they would be arrested for child abuse and did not have money to make bond; the parents told a social worker that they were both suffering from mental health issues, the mother was severely depressed, respondent's health was declining, and they were struggling to care for the four children; the parents had acknowledged their house was a "wreck"; the parents indicated they did not plan to return to Rowan County until they could afford to make bond; the mother had previously been hospitalized for mental health issues and had been diagnosed with bipolar disorder and post-traumatic stress disorder; respondent is hostile and aggressive with authority figures and bullies and threatens people to get what he wants; and both parents have drug issues.

---

3. Respondent is not Doug's father, and therefore this appeal does not concern Doug.

¶ 4 The petition also indicated the parents had a significant history with child protective services in Rowan County, Anson County, and Union County and had previously faced criminal charges. The petition provided that DSS had received nine reports since the family moved to Rowan County in June 2016 with concerns including: lack of supervision; failure to take Doug to counseling and to provide him with proper schooling; domestic violence between the parents in front of the children; safety hazards for the children at the home; the parents driving without licenses; and failure to follow up with critical medical appointments for the children. The petition also alleged the parents were charged with misdemeanor child abuse, possession of marijuana, and possession of drug paraphernalia in May 2016; respondent was additionally charged with traffic offenses; and respondent was on probation after pleading guilty to "several offenses" in July 2017. Lastly, the petition alleged the children have been negatively impacted by their unsafe, unhealthy, and unstable home environment.

¶ 5 An Out of Home Family Services Agreement (case plan) was developed for and signed by respondent at a Child and Family Team Meeting on 23 February 2018. The case plan included requirements for respondent to address his substance abuse and mental health issues, complete parenting education, obtain and maintain appropriate housing, and demonstrate the ability to care for the children and meet their needs.

¶ 6 After the hearing on the juvenile petition was continued on 1 March 2018 and 12 April 2018, the juvenile petition came on for hearing on 17 May 2018. On that date, the parents stipulated that the children were neglected and dependent juveniles based on the allegations in the juvenile petition. As part of the stipulations, respondent again agreed to terms and conditions consistent with his case plan.

¶ 7 On 3 July 2018, an adjudication and disposition order was entered adjudicating the children to be neglected and dependent juveniles based upon the parents' stipulations. In addition to the stipulations, the trial court found that the parents were on probation after pleading guilty to child abuse charges in January 2018, and respondent was charged with driving while license revoked on 22 February 2018. The trial court's findings also acknowledged respondent's entry into the case plan and detailed his participation in initial assessments which resulted in recommendations for services, but the trial court found that respondent had either refused or had yet to follow through with recommended services and DSS could not confirm respondent's participation in services for which respondent reported participation. The trial court continued custody of the children with DSS, ordered that the initial permanent plan

be set at the first permanency planning review hearing, and allowed the parents supervised visitation "at a minimum of twice per month for two hours." Furthermore, in accordance with respondent's case plan, the trial court ordered respondent to abide by the conditions of his probation/parole; follow all recommendations from his substance abuse, mental health, and any psychiatric or psychological assessments; obtain and maintain safe, sanitary, and stable housing and provide proof of such to DSS and the guardian ad litem (GAL); make diligent efforts to obtain and/or maintain stable employment and provide proof of such to DSS and the GAL; participate in medication management services and take medication as prescribed; submit to random drug screens; participate in recommended services for the children; enroll in and complete a parenting education program approved by DSS; and sign releases of information to DSS, the GAL, and the trial court.

¶ 8 The matter came on for the first permanency planning review hearing on 13 September 2018. In an order entered on 31 October 2018, the trial court found respondent had been arrested on 18 June 2018 for three counts of misdemeanor probation violation and was presently incarcerated. DSS retained custody of the children, and the trial court set the primary permanent plan for the children as reunification with a secondary plan of adoption. Respondent's visitation was not changed.

¶ 9 After the matter came back on for another permanency planning review hearing on 24 January 2019, the trial court entered an order on 21 March 2019 that changed the primary permanent plan for the children to adoption with a secondary plan of reunification. The trial court found respondent had not made any further progress on his case plan and had been absconding or incarcerated for much of the case.

¶ 10 On 2 July 2019, DSS filed a petition to terminate the parents' parental rights to Jeff, Fred, and Dan. DSS alleged that grounds existed to terminate respondent's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2). On 15 August 2019, respondent filed a response to the petition opposing the termination of his parental rights.

¶ 11 After continuances on 26 September 2019 and 7 November 2019, the termination petition was heard on 2 December 2019 after the trial court denied the parents' motions to further continue the matter. On 4 March 2020, the trial court entered an order terminating respondent's and the mother's parental rights. The trial court concluded that both grounds alleged in the petition existed to terminate respondent's parental rights, *see* N.C.G.S. § 7B-1111(a)(1)–(2) (2019), and that it was in the

best interests of the children to terminate respondent's parental rights. Respondent appeals.

II. Analysis

A. Motion to Continue

¶ 12 **[1]** Respondent first argues the trial court erred in denying his motion to continue the termination hearing on 2 December 2019 and proceeding in his absence. "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516–17 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24 (1995)). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *In re S.M.*, 375 N.C. 673, 679 (2020) (quoting *State v. Jones*, 342 N.C. 523, 530–31 (1996)).

¶ 13 On appeal, respondent contends the denial of his motion to continue deprived him of a fair hearing under the circumstances. Respondent seeks de novo review arguing that he was deprived of a fundamentally fair hearing in violation of his right to due process. He emphasizes his participation in the juvenile proceedings up to the termination hearing and argues, "[c]onsidering the fact that [he] had consistently participated in the proceedings prior to the termination hearing and the likelihood that he did not know the hearing was taking place, he had a critical need for procedural protection and his attorney's motion to continue should have been granted."

¶ 14 However, there is no indication in the record that respondent's counsel moved to continue the termination hearing in order to protect respondent's constitutional rights. There is no mention of the need to continue due to a lack of notice or in order to ensure due process. Although the transcript of the proceedings is incomplete, the transcript shows that upon inquiry from the trial court respondent's counsel confirmed that his only objection to proceeding with the termination hearing was respondent's absence. A parent's absence from termination proceedings does not itself amount to a violation of due process. *See In re C.M.P.*, 254 N.C. App. 647, 652 (2017) ("[T]his court has held that a parent's due process rights are not violated when parental rights are terminated at a hearing at which the parent is not present."); *In re Murphy*, 105 N.C. App. 651, 656–57 (holding a parent's due process rights were not violated when the termination hearing was conducted in the parent's absence), *aff'd per curiam*, 332 N.C. 663 (1992). Accordingly, respondent has waived any argument that the denial of the motion to continue

violated his constitutional rights, and we review solely for an abuse of discretion. *In re S.M.*, 375 N.C. at 679 (citing *In re A.L.S.*, 374 N.C. at 516–17).

> "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Moreover, "[r]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *Walls*, 342 N.C. at 24–25, 463 S.E.2d at 748.

In re A.L.S., 374 N.C. at 517.

¶ 15 In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2019). "Furthermore, '[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.' " *In re S.M.*, 375 N.C. at 680 (alteration in original) (quoting *In re D.W.*, 202 N.C. App. 624, 627 (2010)).

¶ 16 The termination petition was filed in this case on 2 July 2019, and respondent was served with the petition in person in court on 11 July 2019. Prior to the termination petition being called for hearing on 2 December 2019, the termination hearing had been continued twice upon motions of the parents on 26 September 2019 and 7 November 2019 due to the parents' absences. At the time of the last continuance on 7 November 2019, counsel for both parents agreed to the special setting of the termination hearing on 2 December 2019. Respondent, who was incarcerated at the time, was transported to court for the hearing on 7 November 2019 but was not brought into the courtroom because the matter was continued.

¶ 17 When the termination petition came on for hearing on 2 December 2019, exactly five months after the petition was filed, counsel for each parent was present, but neither parent was present in court. Based on the trial court's findings of fact, we are satisfied the trial court did not abuse its discretion in determining respondent's unexplained absence did

not amount to an extraordinary circumstance, as required by N.C.G.S. § 7B-1109(d), to merit continuing the termination hearing further beyond the 90-day timeframe set forth in the Juvenile Code. Respondent's attempt on appeal to explain his absence by asserting it was "likely" he did not know the hearing date is not convincing. Respondent never affirmatively asserts he did not have notice of the hearing. Furthermore, respondent does not contest the trial court's findings regarding efforts by counsel and DSS to contact him, and he offers no explanation for his lack of contact with his counsel and DSS despite him knowing that the termination hearing was pending.

¶ 18 Additionally, respondent has failed to argue, let alone establish, how he was prejudiced by the trial court's denial of his motion to continue. Given respondent's counsel's advocacy on behalf of respondent at the termination hearing and the unchallenged findings of fact supporting the termination of his parental rights discussed below, we believe it is unlikely that the result of the termination proceedings would have been different had the hearing been continued.

¶ 19 Respondent has failed to establish that the trial court abused its discretion in denying his motion to continue and that he was prejudiced thereby. Accordingly, we overrule respondent's argument that the trial court erred in denying any further continuance of the termination proceedings.

B. Grounds to Terminate Parental Rights

¶ 20 **[2]** Respondent also challenges the trial court's adjudication of the existence of grounds to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). The Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudication stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" that one or more grounds for termination exists under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 21 "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.' " *Id.* at 392 (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that

grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citations omitted). "The trial court's conclusions of law are reviewed de novo." *In re M.C.*, 374 N.C. 882, 886 (2020).

¶ 22 A trial court may terminate parental rights for neglect 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 as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). As we have recently explained:

> 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. 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 R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 23 In this case, the trial court found that the children were previously adjudicated to be neglected and dependent juveniles. It also issued findings that detailed DSS's history of involvement with the family, the circumstances leading to the prior adjudication, the requirements of respondent's case plan that he agreed to and was ordered to complete to remedy those conditions, and respondent's failure to comply with the requirements of his case plan and to remain in contact with DSS. The trial court ultimately determined "[t]he probability of a repetition of neglect of the juveniles if returned to the home or care of [the mother] and [respondent] is very high" and concluded grounds existed to terminate respondent's parental rights for neglect.

¶ 24 Respondent now argues the trial court's conclusion that grounds existed to terminate his parental rights for neglect was "not supported by competent and sufficient findings of fact." Respondent challenges very few of the trial court's findings and instead argues the findings do not account for his circumstances at the time of the termination hearing and do not support the trial court's determination that there was a very high probability of a repetition of neglect. We disagree.

¶ 25 The trial court made the following relevant findings of fact:

> 10. In his written answer to the TPR petition, [respondent] admits that he and [the mother] have significant child protective services history in Rowan, Anson, and Union counties. He admits that nine reports were made to [DSS] beginning in June 2016, the month that he and [the mother] and the children moved to Rowan County from Anson County. He admits that the [nine] reports contained concerns including a lack of proper supervision, failure of the parents to provide proper medical attention to the children, exposure to domestic violence, untreated substance abuse and mental health issues, and an injurious, unstable, and unsanitary living environment for the children. . . .
>
> . . . .
>
> 12. On December 6, 2017, [the parents] left the county to attend a court date in Wilmington, NC. They left two of the four children with a neighbor. The neighbor called law enforcement stating that he could not get in touch with the parents, and he could no longer care for the children. [The parents'] home was in very poor condition. [Fred] was born prematurely and addicted to marijuana. He had multiple bruises and scratches and had severe diaper rash. Both parents signed a stipulation document at adjudication agreeing that the allegations were true. The children were adjudicated neglected.
>
> 13. The parents were ordered to complete substance abuse treatment and parenting education, to obtain appropriate housing, to participate in therapy for the children, to complete mental health treatment, and to comply with [DSS]. Neither parent has met any of those requirements to date. Both parents admitted to [DSS] that they have mental health issues . . . .
>
> . . . .
>
> 15. [The parents] plead[ed] guilty to child abuse charges in January 2018 and were both placed on probation. [The parents'] relationship was on and off during the case. [Respondent] was an emotional

mess and obsessive about [the mother]. . . . [He] often made statements to social workers that made [DSS] question his veracity and/or lucidity. . . . [He] would write fairy tales to be given to the children. . . . [DSS] reviewed the writings and did not find them to be appropriate for the children. [Respondent and the mother] moved around from place to place and had no stable housing. . . .

16. By May 2018, neither parent was compliant with [DSS]. [Respondent] was living out of his car. . . . [He] had some visits with the children [between December 2017 and May 2018]. He would often show up late to visits[,] . . . or he would no show to visits. He would sometimes come to visits dirty and had to use [DSS's] restroom to clean himself up. [Respondent] was engaged with the children during visits, but he would cry and would often be very tearful and emotional.

17. [A new social worker] took over the case in May 2018 but did not have any communication with the parents until July 2018. Several attempts were made to locate [the parents]. . . . [Respondent] was arrested in June 2018. . . .

. . . .

19. Around the time of the January 24, 2019 court hearing, [respondent] agreed that he and [the mother] had substance abuse and mental health issues. He said he did not have a plan to reengage in a relationship with [the mother] and wanted to get his life together. [Respondent] no showed to a scheduled meeting at [DSS] on April 21, 2019. In July 2019, [respondent] contacted [the social worker] wanting to reengage in services.

. . . .

21. [A new social worker] took over the case in August 2019 and has made efforts to contact and locate [the parents] with no success. [The social worker] contacted all phone numbers listed for the parents and sent out letters to the parents' attorneys. All phone numbers were invalid. [The social worker]

> called [respondent's] employer on September 23, 2019 and October 15, 2019. On September 23, 2019, [respondent's] employer stated that [respondent] was still technically employed, but he had not spoken with [respondent] in two weeks. [The social worker] reached out to the Mecklenburg County Police Department and received documentation that [respondent] had been arrested twice. [The social worker] has been unable to have any contact with either parent.
>
> 22. [Respondent] was charged with vehicle theft on August 30, 2019, and on September 3, 2019, he was arrested for larceny of a motor vehicle. [The mother] was with him at the time[ ] . . . . [Respondent] posted bail but was arrested again on November 3, 2019 for drug paraphernalia possession and bonded out on November 14, 2019. Neither parent has made any effort to make contact with the agency or the foster parents in regards to the well-being of their children.
>
> 23. . . . [The parents] are not in a position to care for the juveniles due to their lack of responsible decision making, incarcerations, mental health issues, substance abuse issues, positive drug screens, parenting issues, failure to communicate consistently, and lack of overall stability. Both parents have expressed their plans and desires on multiple occasions to get themselves together, but each has failed to follow through with services ordered by the court to help them reach their goals.
>
> 24. The barriers to a safe reunification with either parent are numerous and include the fact that both parents continue to have unaddressed substance abuse and mental health issues, they have been frequently incarcerated throughout the life of this case, they have not maintained stable housing or employment, and they have not visited regularly with the children or even checked on the children's well-being.

These findings are unchallenged by respondent and are binding on appeal. *See In re T.N.H.*, 372 N.C. at 407.

¶ 26 The above unchallenged findings of fact detail the historical facts of the case and demonstrate that, at the time of the termination hearing, respondent had failed to complete the requirements of his case plan designed to address the issues that previously resulted in the adjudication of the children as neglected juveniles. The findings also make clear that respondent's incarceration was not the sole evidence of neglect, but that his incarceration was considered along with his failure to complete his case plan requirements for substance abuse, mental health, and housing, and his failure to regularly visit with the children or check on their wellbeing. Moreover, respondent was not incarcerated for the entirety of the case, and his incarceration for much of the case was the result of his probation violations and criminal activity that continued up until the month before the termination hearing, which itself is evidence supporting a likelihood of repeated neglect.

¶ 27 Upon review of the termination order, we are satisfied that the unchallenged findings which establish a lack of changed circumstances fully support the trial court's determination that there was very high probability of a repetition of neglect if the children were returned to respondent's care. *See In re M.A.*, 374 N.C. 865, 870 (2020) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect.") (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)); *In re J.M.J.-J.*, 374 N.C. 553, 566 (2020) (upholding termination based on neglect where "the trial court's findings of fact demonstrate that respondent's circumstances had not changed so as to render him fit to care for [the child] at the time of the termination hearing"). In turn, the combination of the trial court's finding that the children were previously adjudicated to be neglected juveniles and its determination that there was very high probability of future neglect supports the conclusion that grounds existed to terminate respondent's parental rights to the children for neglect under N.C.G.S. § 7B-1111(a)(1).

III. Conclusion

¶ 28 Having held the trial court did not abuse its discretion in denying respondent's counsel's motion to continue the termination hearing and did not err in adjudicating grounds to terminate respondent's parental rights, and because respondent does not challenge the trial court's best interests determination at the dispositional stage, we affirm the trial court's order terminating respondent's parental rights to Jeff, Fred, and Dan.

AFFIRMED.

IN RE J.M.

[377 N.C. 298, 2021-NCSC-48]

IN THE MATTER OF J.M. & J.M.

No. 363PA17-2

Filed 23 April 2021

1. Termination of Parental Rights—subject matter jurisdiction—during pendency of appeal—order void

The trial court lacked subject matter jurisdiction to proceed with the termination of a father's parental rights in his daughter while his appeal of the adjudicatory and dispositional orders (which had been entered on remand from the Court of Appeals) was pending, so the order was void. The Supreme Court rejected the guardian ad litem's argument that the father should be required to prove prejudice in order to prevail on appeal.

2. Appeal and Error—Rule 2—untimely pro se brief—termination of parental rights

In a termination of parental rights case, the Supreme Court exercised its authority under Appellate Rule 2 to consider a father's untimely pro se brief where his counsel filed a no-merit brief but failed to inform him of the exact deadline for submitting a pro se brief.

3. Termination of Parental Rights—no-merit brief—pro se brief—weight of evidence

Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument asking the Court to reweigh the evidence.

4. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—incarceration—no contribution

Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument challenging the trial court's conclusion that the grounds of willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) existed to terminate his parental rights. Although he was incarcerated, he earned some money working and received some from friends and family, yet he contributed nothing to the cost of his child's care during the relevant six-month time period.

5. Termination of Parental Rights—effective assistance of counsel—failure to advise—appeal of termination case—meritless

Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument alleging that he received ineffective assistance of counsel. Even assuming counsel rendered deficient performance by failing to notify the father that he needed to contribute to the cost of his child's care, the father could not establish prejudice because ignorance did not excuse his failure to fulfill his inherent parental duty to provide support; further, there was no merit in his argument that counsel should have pursued a second appeal in his son's termination case, because his son's case was not before the trial court on remand (only his daughter's case was).

6. Termination of Parental Rights—no-merit brief—failure to pay a reasonable portion of the cost of care

The termination of a father's parental rights on the grounds of willful failure to pay a reasonable portion of the cost of care was affirmed where counsel filed a no-merit brief and the termination order was supported by competent evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 January 2020 by Judge Shamieka L. Rhinehart in District Court, Durham County. This matter was calendared in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, Esq., for petitioner-appellee Durham County Department of Social Services.

Matthew D. Wunsche, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-father appeals from orders entered by the trial court terminating his parental rights to his daughter J.M. (Jazmin)[1] and to his

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

son J.M. (James). After careful review, we vacate the order terminating respondent-father's parental rights to Jazmin and affirm the order terminating respondent-father's parental rights to James.

I. Factual and Procedural Background

¶ 2 On 11 September 2015, Durham County Department of Social Services (DSS) filed a juvenile petition alleging that twenty-three-month-old Jazmin and two-month-old James were abused, neglected, and dependent juveniles. On the same day, DSS obtained nonsecure custody of the children, and the trial court approved DSS's placement of the children with their maternal grandparents, who lived in New York but regularly visited Durham.

¶ 3 The juvenile petition alleged that the mother had previously claimed, but later denied, that respondent-father hit Jazmin, and that the family had received in-home services since March 2015 due to a finding of improper care based on the mother's allegations. Months later, marks were observed on James's neck when the mother took him to a well-baby checkup on 8 September 2015. James was sent to UNC hospitals for further testing, which revealed that James had healing fractures to his ribs, tibia, and fibula; bruising to his ear and tongue; subconjunctival hemorrhages; and excoriation under his chin. The mother told the following to DSS: (1) she witnessed respondent-father "flicking" James in the chin and punching James in the stomach; (2) she witnessed respondent-father excessively discipline Jazmin by hitting her with a back scratcher and hitting her in the face; (3) there had been domestic violence between respondent-father and herself in the presence of the children; (4) respondent-father smoked marijuana in the presence of the children; and (5) she had not been forthcoming during the prior Child Protective Services investigation in February 2015. Additionally, the petition alleged James "had a history of poor weight gain due to . . . not being fed on a regular schedule[,]"and both the mother and respondent-father had mental health diagnoses.

¶ 4 In October 2015, respondent-father was arrested for child abuse related to James. In April 2017, respondent-father was convicted of felony child abuse inflicting serious injury upon James and sentenced to 92 to 123 months' imprisonment. Respondent-father's conviction was upheld on appeal. *State v. Martin*, 833 S.E.2d 263, 2019 WL 5219970 (N.C. Ct. App. 2019) (unpublished), *appeal dismissed and disc. review denied*, 374 N.C. 750 (2020).

¶ 5 Prior to the criminal proceedings, the juvenile petition was heard on 12 July 2016. In an adjudication, disposition, and permanency planning

order entered on 21 November 2016, the trial court adjudicated Jazmin to be a "seriously neglected" juvenile "due to inappropriate discipline by the father and inaction by the mother[,]" and it adjudicated James to be an abused juvenile in that respondent-father "inflicts on the child[ ] . . . serious physical injury by other than accidental means" and the mother "allows to be inflicted on the child[ ] . . . a serious physical injury by other than accidental means." The trial court continued custody of Jazmin and James in DSS with their placement with their maternal grandparents, ceased reunification efforts with the parents, suspended the parents' visitation with the children, and set the primary permanent plan for the children as guardianship with a secondary plan for adoption.

¶ 6 The children's mother relinquished her parental rights on 1 December 2016. Respondent-father appealed the adjudication, disposition, and permanency planning order on 21 December 2016.

¶ 7 In an opinion issued on 19 September 2017, the Court of Appeals: (1) affirmed the adjudication of James as an abused juvenile, given that "[t]he binding findings of fact establish[ed] that [James] sustained multiple non-accidental injuries and [r]espondent-father was responsible for the injuries[,]" *In re J.M.*, 255 N.C. App. 483, 495 (2017); (2) reversed and remanded the adjudication of Jazmin as a seriously neglected juvenile, holding that the trial court acted under a misapprehension of the law as "[t]he term 'serious neglect' pertains only to placement of an individual on the responsible individuals' list and is not included as an option for adjudication in an abuse, neglect, or dependency action[,]" *id.* at 497; and (3) vacated the portion of the order relieving DSS from making further reunification efforts because the trial court failed to follow the statutory requirements of N.C.G.S. § 7B-901(c) in the initial disposition order, *id.* at 500. This Court initially granted respondent-father's petition for discretionary review on 7 December 2017, *In re J.M.*, 370 N.C. 383 (2017), but later, on 8 June 2018, determined discretionary review was improvidently allowed. *In re J.M.*, 371 N.C. 132 (2018).

¶ 8 The trial court continued to conduct permanency planning review hearings while respondent-father's appeals were pending, but DSS was unable to proceed with the Court of Appeals' remand related to Jazmin while respondent-father's petition for discretionary review to this Court was pending.

¶ 9 On 6 August 2019, the children's guardian *ad litem* (GAL) filed separate motions to terminate respondent-father's parental rights to Jazmin and James. The motion to terminate respondent-father's parental rights to Jazmin alleged grounds existed to terminate parental rights

for neglect, willful failure to pay a reasonable portion of the cost of care, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (3), (7) (2019). The motion to terminate respondent-father's parental rights to James alleged grounds existed to terminate parental rights for neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of the cost of care, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (7) (2019).

¶ 10 On 8 August 2019, the initial juvenile petition came back on for hearing in the trial court pursuant to the Court of Appeals' remand related to Jazmin. The hearing was conducted over the course of 8, 9, and 12 August 2019. On 1 November 2019, the trial court entered adjudicatory and dispositional orders (the "remand orders") that adjudicated Jazmin to be a neglected juvenile, continued her custody in DSS, suspended respondent-father's visitation, and set the permanent plan for Jazmin as adoption with secondary plans for reunification or guardianship.

¶ 11 Although the remand orders were entered on 1 November 2019, they were not served until 27 November 2019. On 9 December 2019, respondent-father filed timely notice of appeal from the remand orders to the Court of Appeals.[2] *See* N.C.G.S. § 7B-1001(b) (2019).

¶ 12 Also on 9 December 2019, after respondent-father filed his notice of appeal from the remand orders, the GAL's motions to terminate respondent-father's parental rights to Jazmin and James came on for hearing. The termination hearing was conducted over the course of 9 and 10 December 2019, and the trial court entered separate orders terminating respondent-father's parental rights to Jazmin and James on 22 January 2020. In one order, the court concluded grounds existed to terminate respondent-father's parental rights to Jazmin pursuant to N.C.G.S. § 7B-1111(a)(1), (3), and (7), and it was in Jazmin's best interests to terminate parental rights. In the other order, the trial court concluded grounds existed to terminate respondent-father's parental rights to James pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and (7), and it was in James's best interests to terminate parental rights. Respondent-father appealed from both termination orders.

---

2. Respondent-father's notice of appeal included the names of Jazmin and James and the file numbers for both of their juvenile cases. However, before the appeal was docketed in the Court of Appeals, the trial court entered an order on 24 January 2020 that dismissed any appeal related to James because there were no appealable orders entered on 1 November 2019 concerning James.

II. Analysis

A. Termination of Parental Rights to Jazmin

¶ 13 **[1]** On appeal from the order terminating respondent-father's parental rights to Jazmin, respondent-father argues the trial court lacked subject matter jurisdiction to proceed with termination of his parental rights while he appealed the remand orders. We agree the trial court exceeded the statutory limits placed on the trial court's subject matter jurisdiction and hold the order terminating respondent-father's parental rights to Jazmin is void.

¶ 14 "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *In re T.R.P.*, 360 N.C. 588, 590 (2006) (citing *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90 (1956)). "Because a court must have subject matter jurisdiction in order to adjudicate the case before it, 'a court's lack of subject matter jurisdiction is not waivable and can be raised at any time.' " *In re L.T.*, 374 N.C. 567, 569 (2020) (quoting *In re K.J.L.*, 363 N.C. 343, 346 (2009)).

¶ 15 "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. at 345. Therefore, "the General Assembly can, within the bounds of the Constitution, set whatever limits it wishes on the possession or exercise of that jurisdiction, including limits on jurisdiction during a pending appeal." *In re M.I.W.*, 365 N.C. 374, 377 (2012).

¶ 16 As we explained in *In re M.I.W.*, "[g]enerally, N.C.G.S. § 1-294 operates to stay further proceedings in the trial court upon perfection of an appeal." *Id.* However, "[g]iven the unique nature of the Juvenile Code, with its overarching focus on the best interest of the child[,]" and in recognition "that the needs of the child may change while legal proceedings are pending on appeal[,]" the General Assembly enacted a modified approach for juvenile cases in N.C.G.S. § 7B-1003, which allows the trial court to continue to exercise jurisdiction and hold hearings pending disposition of an appeal, except that the trial court may not proceed with termination of parental rights under Article 11 of the Juvenile Code. *Id.* at 378–79. Specifically, the statute provides:

> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the

> exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C.G.S. § 7B-1003(b) (2019).[3]

¶ 17 In *In re M.I.W.*, we considered whether the trial court had subject matter jurisdiction over a motion to terminate parental rights that was filed while the parents' appeals of a disposition order were pending. *In re M.I.W.*, 365 N.C. at 376. In analyzing N.C.G.S. § 7B-1003(b), we noted the difference between having jurisdiction and exercising jurisdiction:

> Exercising jurisdiction, in the context of the Juvenile Code, requires putting the court's jurisdiction into action by holding hearings, entering substantive orders or decrees, or making substantive decisions on the issues before it. In contrast, having jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the court.

Id. at 379. We explained that N.C.G.S. § 7B-1003(b) does not divest the court of jurisdiction in termination proceedings during an appeal but does unambiguously prohibit the trial court from exercising jurisdiction in termination proceedings while disposition of an appeal is pending. *Id.* at 375, 378–79. The "issuance of the mandate by the appellate court," upon the conclusion of the appeal, "returns the power to exercise subject matter jurisdiction to the trial court." *Id.* at 375. Accordingly, we affirmed the termination of parental rights in *In re M.I.W.* where the motion to terminate parental rights was filed during the pendency of the parents' appeal, but the trial court did not exercise subject matter jurisdiction over the termination motion until after the mandate in the appeal had issued and the period for the parents to petition for discretionary review had expired. *Id.* at 380.

¶ 18 Unlike *In re M.I.W.*, the issue in the instant case is the trial court's exercise of subject matter jurisdiction to conduct the termination hearing pending the disposition of respondent-father's appeal from the remand orders in Jazmin's case. Here, the GAL filed the termination motion on

---

3. Subsection (c) of N.C.G.S. § 7B-1003 governs the trial court's exercise of jurisdiction pending disposition of an appeal of a termination order entered under Article 11 of the Juvenile Code, and it is irrelevant to the issues presented in this case.

6 August 2019. There was no appeal pending at that time. The remand orders adjudicating Jazmin to be a neglected juvenile were later entered on 1 November 2019, and respondent-father filed notice of appeal from the remand orders on 9 December 2019.[4] Minutes after the notice of appeal was filed, the trial court commenced the termination hearing. It is evident that the trial court was aware respondent-father had filed notice of appeal from the remand orders, as the trial court indicated near the beginning of the termination hearing that the notice of appeal was in the court file. Nevertheless, the trial court continued with the termination hearing.

¶ 19 There is no question the trial court violated N.C.G.S. § 7B-1003(b) by exercising jurisdiction to conduct the hearing on the motion to terminate respondent-father's parental rights to Jazmin while disposition of his appeal from the remand orders was pending and by entering the order terminating respondent-father's parental rights to Jazmin on 22 January 2020. Both DSS and the GAL agree that the trial court violated N.C.G.S. § 7B-1003(b). The contested issue on appeal is the effect of the violation.

¶ 20 Respondent-father argues the trial court's exercise of subject matter jurisdiction to conduct the termination hearing in violation of N.C.G.S. § 7B-1003(b) renders the order terminating his parental rights to Jazmin void. DSS concedes the issue and agrees with respondent-father that the termination order must be vacated. The GAL, however, argues respondent-father should be required to demonstrate prejudice resulting from the trial court's erroneous exercise of jurisdiction, just as a showing of prejudice is generally required to prevail on claims that the trial court violated a statutory mandate. The GAL relies on this Court's distinction between "having jurisdiction" and "exercising jurisdiction" in *In re M.I.W.* and this Court's holding that N.C.G.S. § 7B-1003 prohibits only the exercise of jurisdiction and does not remove jurisdiction. *In re M.I.W.*, 365 N.C. at 379.

¶ 21 We decline to adopt the GAL's position here. While we again acknowledge that N.C.G.S. § 7B-1003(b) does not divest the trial court of

4. We take judicial notice that respondent-father's appeal from the remand orders entered in Jazmin's case was docketed and perfected in the Court of Appeals in file number COA20-153 on 2 March 2020, when the record on appeal was filed. *See State v. Thompson*, 349 N.C. 483, 497 (1998) ("This Court may take judicial notice of the public records of other courts within the state judicial system."). Once an appeal is docketed, the perfection of the appeal relates back to filing of notice of appeal. *Swilling v. Swilling*, 329 N.C. 219, 225 (1991).

subject matter jurisdiction over the juvenile proceeding as a whole, we emphasize that N.C.G.S. § 7B-1003(b) does constrain the trial court's exercise of its subject matter jurisdiction in termination proceedings. Specifically, "the relevant statutory language unambiguously prohibits the trial court from doing . . . two things regarding termination proceedings while an appeal is pending: exercising jurisdiction and conducting hearings." *Id.* at 378–79. "Where jurisdiction is statutory and the [General Assembly] requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. at 590 (quoting *Eudy v. Eudy*, 288 N.C. 71, 75 (1975). Here, respondent-father properly perfected his appeal, and with knowledge of that appeal, the trial court proceeded with a hearing for termination of respondent-father's parental rights. Thus, the trial court clearly acted beyond the limitations statutorily placed on its subject matter jurisdiction.

¶ 22 When addressing appeals controlled by N.C.G.S. § 1-294, this Court has not assessed whether an appealing party was prejudiced by orders entered after a notice of appeal for civil cases. *See generally Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981). Rather, we have held that orders entered after the notice of the appeal "are void for want of jurisdiction." *Id.* The GAL has not identified any case law or statutory language that compels us to conclude anything different in this case when addressing the jurisdictional limits under N.C.G.S. § 7B-1003(b).

¶ 23 Here, where the trial court conducted the hearing on the motion to terminate respondent-father's parental rights to Jazmin while the disposition of respondent-father's appeal from the remand orders in Jazmin's case was pending, we hold the trial court acted in excess of the statutory limits on its subject matter jurisdiction set forth in N.C.G.S. § 7B-1003(b), and the resulting termination order is thus void. Accordingly, we vacate the trial court's 22 January 2020 order terminating respondent-father's parental rights in Jazmin.

B. Termination of Parental Rights to James

¶ 24 **[2]** On appeal from the order terminating respondent-father's parental rights to James, counsel for respondent-father has filed a no-merit brief on respondent-father's behalf pursuant to N.C. R. App. P. 3.1(e) (2020). Counsel identified three issues that could arguably support an appeal but also explained why he believed those issues lacked merit. Counsel also advised respondent-father of his right to file pro se written arguments on

his own behalf and provided him with the necessary documents to do so. Respondent-father has submitted a pro se brief to this Court, but he did so some sixty days after the filing of the no-merit brief, making his brief untimely. *Id.* ("The appellant . . . may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief."). Nevertheless, because counsel did not precisely inform respondent-father of the deadline to file his pro se brief, *see id.* ("Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief."), but instead only advised respondent-father to submit his pro se brief "immediately" if he intended to do so, we exercise our authority under N.C. R. App. P. 2 and consider respondent-father's arguments.

¶ 25 **[3]** Respondent-father spends a considerable portion of his pro se brief rearguing the evidence which led to James's removal from the home. Based on his own version of the facts, respondent-father denies any responsibility for James's injuries, challenges James's prior adjudication as an abused juvenile, and pleads for a second chance to parent James. We see no merit in respondent-father's arguments. This Court's role on appeal is not to reweigh the evidence. *In re A.J.T.*, 374 N.C. 504, 510 (2020) (citing *In re J.A.M.*, 372 N.C. 1, 11 (2019)). Furthermore, the trial court's prior adjudication of James as an abused juvenile and its findings of fact in support of the adjudication were upheld on appeal. *In re J.M.*, 255 N.C. App. 483 (2017), *disc. review improvidently allowed*, 371 N.C. 132 (2018). The prior decision on appeal is binding as the law of the case. *In re J.A.M.*, 375 N.C. 325, 332 (2020) (explaining that the Court's prior decision on appeal from an adjudication of neglect "constitutes 'the law of the case' and is binding as to the issues decided therein" during a subsequent appeal of a termination order).

¶ 26 **[4]** Respondent-father also challenges the trial court's adjudication of grounds to terminate his parental rights to James under N.C.G.S. § 7B-1111(a)(1)–(3) and (7). Respondent-father presents few cognizable legal arguments, and he cites no authority in his brief to support his contentions.

¶ 27 This Court reviews the trial court's adjudication of grounds to terminate parental rights under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re C.B.C.*, 373 N.C. 16, 19 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *Id.* The adjudication of only one ground is necessary to terminate parental rights. *Id.* at 23.

¶ 28 Grounds exist to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) if

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

¶ 29 N.C.G.S. § 7B-1111(a)(3) (2019). This Court has long recognized that "[a] parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604 (1981). Where a parent has the ability to pay some amount greater than zero but pays nothing, the parent has failed to pay a reasonable portion of the cost of care within the meaning of N.C.G.S. § 7B-1111(a)(3). *See In re J.A.E.W.*, 375 N.C. 112, 117–18 (2020).

¶ 30 In James's case, the trial court concluded:

> [g]rounds exist to terminate [respondent-father's] parental rights . . . to [James] under N.C.G.S. § 7B-1111(a)(3) in that [James] was placed in the custody of DCDSS and for the six months preceding the filing of the petition, [respondent-]father willfully failed to pay a reasonable portion of the cost of care for [James] although physically and financially able to do so.

¶ 31 In support of the conclusion, the trial court made findings regarding James's placement in DSS's custody and the cost of his care. The trial court also found that respondent-father was able to work while incarcerated and did in fact work various jobs while incarcerated; in the six months preceding the filing of the termination motion on 6 August 2019, respondent-father earned $60.78 from work and received $655.00 in deposits into his account from friends and family. Yet, respondent-father "contributed nothing whatsoever to the cost [of James's] care" during the relevant six-month period.

¶ 32 Respondent-father does not challenge the evidentiary basis for the trial court's findings, and the findings are thus "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

¶ 33 We hold the trial court's findings support the conclusion that grounds exist under N.C.G.S. § 7B-1111(a)(3) to terminate respondent-father's parental rights to James. "The trial court's conclusion that one ground existed to terminate parental rights 'is sufficient in and of itself to support termination of . . . parental rights[.]' " *In re S.E.*, 373 N.C. 360, 367 (2020) (quoting *In re T.N.H.*, 372 N.C. at 413). Therefore, we do not address the other grounds adjudicated by the trial court for termination.

¶ 34 **[5]** Lastly, respondent-father asserts allegations of ineffective assistance of counsel.

> Parents have a right to counsel in all proceedings dedicated to the termination of parental rights. Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. 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 him of a fair hearing. 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.

In re G.G.M., 2021-NCSC-25, ¶ 35.

¶ 35 Respondent-father contends his counsel was ineffective in that counsel allegedly failed to advise him of what he needed to do to regain custody of James, including the need for him to contribute to James's cost of care while respondent-father was incarcerated in order to avoid termination pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent-father also faults counsel for allegedly informing the court that he consented to guardianship and for not challenging the primary permanent plan of guardianship with a secondary plan of adoption. Lastly, respondent-father contends counsel was ineffective to the extent counsel did not further pursue a second appeal of James's adjudication as an abused juvenile following the trial court's entry of the remand orders on 1 November 2019.

¶ 36 Respondent-father has not met his burden in this case to establish ineffective assistance of counsel. As to respondent-father's assertions of ineffective assistance of counsel related to the adjudication of grounds for termination, even if respondent-father's allegations of deficient performance by counsel are true, he is unable to establish the required prejudice. *See Braswell*, 312 N.C. at 563 ("[I]f a reviewing court can determine at the outset that there is no reasonable probability that

in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient."). As explained above, the trial court's adjudication that grounds exist to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) was sufficient to support termination. Given that parents have an inherent duty to provide support for their children and ignorance of the duty does not excuse a parent's failure to provide support, *see In re S.E.*, 373 N.C. at 366, respondent-father has not established prejudice based on counsel's alleged failure to advise him of his inherent duty to contribute to James's cost of care. Additionally, to the extent respondent-father contends counsel was ineffective in failing to further pursue a second appeal in James's case from the remand orders, respondent-father has not established deficient performance. Because the Court of Appeals affirmed the trial court's 21 November 2016 adjudication of James as an abused juvenile and only remanded the matter as to Jazmin's case in *In re J.M.*, 255 N.C. App. at 495, 497, James's case was not before the trial court on remand, and there was nothing in the 1 November 2019 remand orders to be appealed in James's case. There is no merit to respondent-father's ineffective assistance of counsel arguments, and, overall, we hold respondent-father's pro se arguments are meritless.

¶ 37 **[6]** In addition to reviewing respondent-father's pro se arguments, we have independently reviewed the three issues identified in the no-merit brief submitted by respondent-father's counsel under Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). Upon careful consideration of those issues in light of the entire record, we are satisfied that the trial court's 22 January 2020 order terminating respondent-father's parental rights in James was supported by competent evidence and based on proper legal grounds. Accordingly, we affirm the termination of respondent-father's parental rights in James.

III. Conclusion

¶ 38 Therefore, we vacate the trial court's 22 January 2020 order terminating respondent-father's parental rights in Jazmin, and affirm the termination of respondent-father's parental rights in James.

VACATED IN PART; AFFIRMED IN PART.

Justice BERGER did not participate in the consideration or decision of this case.

IN RE L.R.L.B.

[377 N.C. 311, 2021-NCSC-49]

IN THE MATTER OF L.R.L.B.

No. 289A20

Filed 23 April 2021

1. Termination of Parental Rights—permanency planning—findings of fact—challenged on appeal

On appeal from the trial court's order terminating a mother's parental rights and from an earlier permanency planning order, the mother's challenges to several portions of a finding of fact in the permanency planning order—regarding her positive tests for alcohol, her lack of compliance with drug screens, her failure to maintain stable housing, and incidents of domestic violence—were rejected. The trial court's error in finding that she received three—rather than two—sanctions in drug treatment court was harmless where the evidence established two sanctions.

2. Termination of Parental Rights—permanency planning—required findings—insufficient—remedy

The trial court erred in a permanency planning order by failing to make all the written findings required by N.C.G.S. § 7B-906.2(d); specifically, even though there were sufficient findings addressing subsections (d)(1), (2), and (4), there were no findings concerning subsection (d)(3)—whether the mother "remain[ed] available to the court, the department, and the guardian ad litem." Where the trial court substantially complied with the statute, the appropriate remedy was to remand the matter for entry of the necessary findings and determination of whether those findings affected the decision to eliminate reunification from the permanent plan (rather than vacation or reversal of the permanency planning order or termination order).

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 31 March 2020 and 15 November 2019 by Judge Hal G. Harrison in District Court, Yancey County. This matter was calendared in the Supreme Court on 19 March 2021, but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee Yancey County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo and Deputy Parent Defender Annick Lenoir-Peek for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her son "Liam,"[1] and from the trial court's earlier permanency planning order which eliminated reunification from Liam's permanent plan. *See* N.C.G.S. § 7B-1001(a1)(1)–(2) (2019). The termination order also terminated the parental rights of Liam's father, who is not a party to this appeal. Due to our conclusion that the permanency planning order lacked findings which address one of the four issues contemplated by N.C.G.S. § 7B-906.2(d) (2019), we remand to the trial court for the entry of additional findings. However, because the resolution of respondent-mother's claim of error concerning the trial court's permanency planning order is accomplished by remand, instead of by vacation or reversal of the permanency planning order at issue as authorized by N.C.G.S. § 7B-1001(a2), it is presently premature for this Court to consider the trial court's order terminating respondent-mother's parental rights.

I. Factual and Procedural Background

¶ 2 On 29 August 2018, Yancey County Department of Social Services (DSS) obtained nonsecure custody of Liam, who was born almost a year earlier in September 2017. DSS filed a juvenile petition seeking an adjudication that Liam was neglected. The petition alleged that DSS had received a report in July 2018 that respondent-mother had been arrested for driving while impaired as Liam rode with her in the car. In a second report dated 25 July 2018, respondent-mother accused Liam's father of engaging in domestic violence against her and sexually molesting Liam. While a DSS investigation and a forensic examination of Liam would subsequently result in a determination that no sexual abuse had occurred, DSS's first visit with the family following the receipt of the second report occurred while both parents were intoxicated and resulted in respondent-mother and Liam moving into a domestic violence shelter on the same day.

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

¶ 3 The petition further alleged that, following respondent-mother's transition to the domestic violence shelter, DSS received a series of telephone calls during the week of 20 August 2018 reporting changes in respondent-mother's behavior that raised concerns about Liam's safety. Shelter staff workers and Liam's father described respondent-mother as exhibiting "extreme paranoia, uncontrollable crying, [and] lapses in memory[,]" including occasions when she left Liam "completely unattended causing alarm to shelter staff and the agency." When DSS attempted to assist respondent-mother, she refused to cooperate with the social worker and treatment providers. Respondent-mother also refused to submit to a drug screen. Liam's father was excluded as a placement option "due to recent domestic violence incidents and ongoing concerns, a criminal history and an active substance abuse issue."

¶ 4 Respondent-mother obtained a comprehensive clinical assessment at RHA Health Services on 13 September 2018; she signed a Family Services Agreement (FSA) with DSS the following day. As part of her FSA, respondent-mother agreed to follow the recommendations of her comprehensive clinical assessment, including engaging in intermediate-level mental health and substance abuse services, along with parenting classes. Respondent-mother also agreed to obtain stable housing and employment in order to demonstrate her ability to provide for Liam's needs.

¶ 5 After adjudicatory and dispositional hearings on 15 November and 12 December 2018, the trial court entered orders on 19 February 2019 adjudicating Liam as neglected and ordering DSS to maintain custody of the child. In ordering respondent-mother to comply with the requirements of her FSA, the trial court specifically mentioned respondent-mother's compliance with requested drug screens and granted her three hours of weekly supervised visitation with Liam. At an initial review hearing on 11 March 2019, the trial court found that respondent-mother had resumed living with Liam's father and ordered both parents to submit to a domestic violence assessment and to follow any resulting recommendations in addition to complying with the existing requirements of their respective case plans.

¶ 6 The trial court held a permanency planning hearing on 14 June 2019 during which it established a primary plan of reunification for Liam with a concurrent plan of adoption. At the next review hearing on 9 August 2019, the trial court found that, while respondent-mother had "completed some portions of her case plan" including parenting classes, she had tested positive for alcohol and amphetamines, and continued to exhibit inappropriate behaviors. Specifically, the trial court noted that

respondent-mother had "acted in a disrespectful way to DSS workers and [did] not appreciate the DSS role in protecting the health, safety and welfare of her minor child[.]" The trial court ordered DSS to "promptly arrange a psychological evaluation for the respondent-mother through Grandis." Respondent-mother was admonished by the trial court and was directed to "adopt a better attitude." She was ordered to cooperate with DSS, to abstain from using illicit substances, and to "make significant progress on her DSS case plan[.]" Despite the identified concerns, the trial court maintained Liam's permanent plan as reunification with a concurrent plan of adoption.

¶ 7 Following the next review hearing on 11 October 2019, the trial court entered a permanency planning order on 15 November 2019 which relieved DSS of further reunification efforts and changed Liam's permanent plan to adoption. On 13 January 2020, respondent-mother filed notice pursuant to N.C.G.S. § 7B-1001(a1)(2)(a) (2019) to preserve her right to appeal the order eliminating reunification from the permanent plan[2].

¶ 8 On 8 January 2020, DSS filed a petition to terminate the parental rights of respondent-mother and Liam's father. The trial court held a hearing to address the petition on 12 March 2020 and entered an order terminating the parental rights of both parents on 31 March 2020. The trial court adjudicated the existence of grounds for termination under N.C.G.S. § 7B-1111(a)(1)–(2) (2019), based on respondent-mother's neglect of Liam and on her willful failure to make reasonable progress to correct the conditions that led to the juvenile's removal from the home in August 2018. After considering the dispositional factors enumerated in N.C.G.S. § 7B-1110(a) (2019), the trial court concluded that it was in Liam's best interests for the rights of both parents to be terminated.

II. Respondent-mother's Appeal

¶ 9 Respondent-mother filed her notice of appeal from the 15 November 2019 permanency planning order which eliminated reunification from Liam's permanent plan and from the 31 March 2020 termination order which terminated respondent-mother's parental rights. *See* N.C.G.S.

2. Although respondent-mother filed her notice beyond the required thirty days as established by N.C.G.S. § 7B-1001(a1)(2)(a) & (b) (2019), after entry and service of the order, nonetheless we allowed respondent-mother's petition for writ of certiorari to review the permanency planning order along with the order terminating her parental rights entered on 18 December 2020. *See generally In re S.C.R.*, 198 N.C. App. 525, 531 (holding respondent-parent waived appellate review under former statute authorizing appeal from order ceasing reunification efforts by failing to give timely notice of his intent to appeal), *appeal dismissed*, 363 N.C. 654 (2009).

§ 7B-1001(a1) (2019). Pursuant to N.C.G.S. § 7B-1001(a2) (2019), we "review the order eliminating reunification together with an appeal of the order terminating parental rights."

¶ 10 Respondent-mother limits her appeal to challenges to the trial court's 15 November 2019 permanency planning order. Although she does not identify any error in the order terminating her parental rights, respondent-mother contends that the alleged reversible errors in the permanency planning order require us to vacate the termination order under N.C.G.S. § 7B-1001(a2), which provides that "[i]f the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated."

A. Standard of review

¶ 11 Our review of a permanency planning order " 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re L.M.T.*, 367 N.C. 165, 168 (2013) (alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41 (2010)). The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed only for abuse of discretion, as those decisions are based upon the trial court's assessment of the child's best interests. *See In re J.H.*, 373 N.C. 264, 267–68 (2020).

B. Challenged findings

¶ 12 **[1]** Respondent-mother challenges several portions of the trial court's Finding of Fact 6 in its permanency planning order, claiming that those portions are "either not supported or contrary to the evidence." Although respondent-mother offers no argument or discussion about the significance of these asserted errors, we address each of her challenges to the trial court's findings in turn. Finding of Fact 6 states, in pertinent part:

> that since the matter was last reviewed, the juvenile has remained in foster care placement; that the respondent parents have signed DSS case plans; that respondent mother has completed Triple P Parenting; obtained her [comprehensive clinical assessment]; completed intensive outpatient substance abuse treatment; is now engaged in the intermediate SA program; reports that she attends AA/NA weekly; has provided clean drug screens through RHA but has tested positive on two (2) occasions for alcohol; has participated

> in peer support and medication management through RHA; has not complied with DSS requested drug screens; has not maintained stable residence; has not maintained stable employment; has received three (3) separate sanctions through Yancey Drug Court (one (1) occasion for missed appointment and two (2) occasions for failed screens for alcohol); has not obtained her psychological evaluation (delayed scheduling the evaluation until recently); that the respondent father . . . has a pending criminal charge for assault (respondent mother is the alleged victim); . . . the respondent parents (despite current Release Order in the pending criminal matter) are currently residing with each other; that there have been recent incidents of domestic violence and continued alcohol abuse; that the parents recently were evicted from their prior residence; that the juvenile was removed from the care of the respondent parents as a result of domestic violence and substance abuse issues; that the parents have not made reasonable progress on their DSS case plan to eliminate the issues the juvenile [sic] came into custody . . . .

All portions of this finding which are not specifically contested by respondent-mother are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97 (1991).

¶ 13 Respondent-mother first objects to the trial court's determination that she tested positive for alcohol on two occasions, asserting that "those [positive tests] occurred several months prior to the 11 October 2019 hearing, on 22 March 2019 and 27 May 2019." While respondent-mother accurately characterizes the evidence, her observation does not undercut the evidentiary support for the trial court's finding in any way. Finding of Fact 6 reflects the trial court's summary of respondent-mother's progress through the entirety of the case, as reflected by the determinations that she had signed a DSS case plan, obtained a comprehensive clinical assessment, and completed parenting classes. The evidence introduced at the hearing showed that respondent-mother had five positive drug screens at RHA between 6 March 2019 and 2 July 2019, four of which included a positive result for alcohol. While the trial court did find that Liam had remained in his foster placement "since the matter was last reviewed," it did not purport to limit its remaining findings to that sole time interval. Therefore, the trial court's unconditional determination

that respondent-mother "tested positive on two (2) occasions for alcohol" is supported by competent evidence and is binding on appeal.

¶ 14 Respondent-mother next challenges the determination within Finding of Fact 6 that she "has not complied with DSS requested drug screens[.]" Respondent-mother represents that she submitted to drug screens as requested by DSS on 30 July 2019 and on 7 and 14 August 2019, "in addition to the multiple screens she undertook with RHA and Drug Treatment Court." However, competent evidence supports the challenged portion of the finding. DSS social worker Tammy Carpenter testified at the hearing that respondent-mother failed to comply with the agency's call-in system for drug screens, through which parents are assigned "dates and times they need to call" to be notified as to whether to appear for a drug screen that day. DSS also introduced a log of respondent-mother's call schedule for a period of time between 8 and 31 July 2019 which reflected that respondent-mother placed telephone calls to DSS on only three of the fifteen days that she was assigned to contact DSS through its call-in system. While the evidence does show that negative drug screens for respondent-mother were registered on the three dates listed by her, other competent evidence supports the finding that she was not fully compliant with DSS's drug screen requests. This challenged portion of the trial court's Finding of Fact 6 is thus binding on appeal. *See In re L.M.T.*, 367 N.C. at 168.

¶ 15 Respondent-mother also disputes the determination that she failed to maintain stable housing because the evidence "show[ed] that she had lived at the same address for over a year prior to her eviction." However, respondent-mother's argument is contradictory. As respondent-mother acknowledged in her testimony, she and Liam's father were evicted from their apartment in the weeks leading up to the 11 October 2019 permanency planning hearing. Respondent-mother testified that she stayed with her mother for a period of time thereafter, but moved into a new apartment with Liam's father two weeks before the hearing date. DSS social worker Carpenter testified that she had "no idea" where respondent-mother had resided since respondent-mother's eviction and that respondent-mother had not complied with the housing component of respondent-mother's case plan. Respondent-mother's admission that she was evicted from her home after some period of time exceeding just more than one year, followed by her two different residences shortly before the permanency planning hearing date of 11 October 2019, does not comport with the maintenance of stable housing by respondent-mother. These circumstances coupled with the testimony of the DSS social worker concerning the stability of respondent-mother's housing provide

ample credence to the trial court's determination contained in Finding of Fact 6 that respondent-mother "has not maintained stable residence."

¶ 16 Respondent-mother next challenges the trial court's finding that she received "three . . . separate sanctions" in drug treatment court. Respondent-mother correctly notes that the hearing testimony established two, rather than three, occasions for which respondent-mother was sanctioned in drug court: once for missing an appointment and once for a positive alcohol screen. We shall disregard the trial court's erroneous finding of a third sanction, which we deem to be a harmless error in light of the unequivocal existence of two separate sanctions. *See In re B.E.*, 375 N.C. 730 (2020).

¶ 17 Finally, respondent-mother likewise takes issue with the trial court's determination "that there have been recent incidents of domestic violence and continued alcohol abuse," contending that the evidence showed only one additional incident of domestic violence between her and Liam's father. As support for her stance, respondent-mother points to the arrest warrant included in the record on appeal which charges Liam's father with an assault on respondent-mother which was allegedly committed on 26 September 2019.

¶ 18 Assuming *arguendo* that the evidence showed only a single episode of domestic violence between respondent-mother and Liam's father, which was recent at the time of the trial court's determination, we discern no error. Respondent-mother's argument is based upon her convenient construction of the trial court's phraseology in its determination and does not constitute a substantive objection. We believe the phrase "recent incidents of domestic violence and continued alcohol abuse" may be fairly interpreted to combine one or more recent incidents of domestic violence with one or more recent incidents of continued alcohol abuse. We further note that, in addition to the evidence that Liam's father allegedly assaulted respondent-mother on 26 September 2019, DSS social worker Carpenter testified that the couple's landlord reported that the eviction of respondent-mother and Liam's father from their apartment transpired "because of domestic violence, yelling, arguing, people call[ing] and telling him that [respondent-mother and Liam's father] were making a fuss all the time[,] and due to finding lots of alcohol, liquor bottles outside of the residence." This testimony tends to establish a series of occurrences of domestic violence and alcohol abuse rather than, as respondent-mother contends, one solitary additional incident. Consequently, the trial court's reference to multiple "incidents" is properly supported and binding on appeal. *In re L.M.T.*, 367 N.C. at 168.

C. Sufficiency of Findings

¶ 19 **[2]** Respondent-mother claims that the trial court erred in eliminating reunification from Liam's permanent plan without making the findings of fact which are required by N.C.G.S. § 7B-906.2(d) (2019).[3] While the trial court complied with the majority of N.C.G.S. § 7B-906.2(d)'s mandate regarding the establishment of specific findings of fact which the trial court must reduce to writing as a preface to the elimination of reunification from the permanent plan, we agree with respondent-mother that the trial court's findings are sufficiently inadequate so as to compel us to remand the case to the trial court for the entry of additional findings consistent with the mandate of N.C.G.S. § 7B-906.2(d).

¶ 20 Under N.C.G.S. § 7B-906.2(b) (2019), the trial court may eliminate reunification from a child's permanent plan if the trial court "makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id.* Subsection (d) of the statute further provides that, in making its determination about the appropriate permanent plan,

> the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d).

---

3. Respondent-mother notes that the trial court's failure to include a secondary permanent plan in the 15 November 2019 permanency planning order would appear to violate N.C.G.S. § 7B-906.2(a1) and (b) (2019), under which the trial court must designate concurrent permanent plans "until a permanent plan is or has been achieved." Respondent-mother concedes, however, that the trial court established concurrent plans of adoption and guardianship at the next permanency planning hearing on 13 January 2020, "thereby rendering [her] argument moot."

¶ 21 We have held that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. at 168 (interpreting former N.C.G.S. § 7B-507(b)(1) (2011)). "Instead, 'the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.' " *In re L.E.W.*, 375 N.C. 124, 129–30 (2020) (quoting *In re L.M.T.*, 367 N.C. at 168).

¶ 22 Moreover, when reviewing an order that eliminates reunification from the permanent plan in conjunction with an order terminating parental rights pursuant to N.C.G.S. § 7B-1001(a1)(2), "we consider both orders 'together' " as provided in N.C.G.S. § 7B-1001(a2). *In re L.M.T.*, 367 N.C. at 170. Based on this statutory directive, we concluded in *In re L.M.T.* that "incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order."[4] *Id.* Although respondent-mother contends that a 2017 amendment to N.C.G.S. § 7B-1001 "abrogated" our ruling in *In re L.M.T.* on this issue, we find her argument unpersuasive.

¶ 23 In Session Law 2017-41, § 8, 2017 N.C. Sess. Laws 214, 233, the General Assembly amended N.C.G.S. § 7B-1001 to transfer appellate jurisdiction in termination of parental rights cases from the Court of Appeals to this Court effective 1 January 2019. The session law deleted a portion of N.C.G.S. § 7B-1001(a)(5) requiring the Court of Appeals to "review the order eliminating reunification as a permanent plan together with an appeal of the termination of parental rights order[,]" and inserted the following text in a revised version of N.C.G.S. § 7B-1001(a2):

> In an appeal filed pursuant to subdivision (a1)(2) of this section, the Supreme Court shall review the order eliminating reunification *together* with an appeal of the order terminating parental rights. *If the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated.*

---

4. At the time of our decision in *In re L.M.T.*, a parent's right to appeal from a permanency planning order was triggered by the trial court's cessation of reunification efforts rather than its elimination of reunification from the permanent plan as in current N.C.G.S. § 7B-1001(a)(5) and (a1)(2) (2019). *In re L.M.T.*, 367 N.C. at 167–70 (discussing former N.C.G.S. §§ 7B-507(b)(1) and 7B-1001(a)(5) (2011)). Section 7B-906.2 now directs the trial court to "order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans" until permanence is achieved. N.C.G.S. § 7B-906.2(b).

S.L. 2017-41, § 8(a), 2017 N.C. Sess. Laws at 233 (emphasis added). The amended statute thus retained the requirement that the appellate court review the two orders "together" while adding language to require that if this Court vacates or reverses the order eliminating reunification from the permanent plan, we must also vacate the termination of parental rights order. *Id.*

¶ 24 As opposed to respondent-mother's interpretation, we do not construe the 2017 amendment to N.C.G.S. § 7B-1001 to alter the approach that we adopted in *In re L.M.T.*; the amendment, on its face, merely precludes a determination by this Court that a harmful error in an order eliminating reunification from a permanent plan can be rendered moot solely by the subsequent entry of an order terminating parental rights. *Cf.*, *e.g.*, *In re H.N.D.*, 265 N.C. App. 10, 19 (2019) ("hold[ing] that the question of whether the trial court erred in ceasing reunification efforts was rendered moot by the proper termination order").[5] For this reason, we reject the argument of the guardian ad litem in the present case that the order terminating respondent-mother's parental rights "moots [respondent-mother's] arguments about the order ceasing reunification efforts." As for respondent-mother's construction of the 2017 legislative amendment and her view of the amendment's impact on *In re L.M.T.*, respondent-mother erroneously conflates a fatally defective order eliminating reunification from a permanent plan, which cannot be cured by the subsequent termination order, with an incomplete order with insufficient findings of fact, which may be cured under *In re L.M.T.* by findings of fact in the termination order.

¶ 25 In light of these observations, we recognize that the trial court's 15 November 2019 permanency planning order includes findings "that reunification is no longer the appropriate permanent plan for the juvenile" and "[t]hat further reasonable efforts to prevent or eliminate the need for placement of the juvenile are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time." The trial court thus made the finding required by N.C.G.S. § 7B-906.2(b) to eliminate reunification from the permanent plan. *See In re L.E.W.*, 375 N.C. at 133. However, with regard to N.C.G.S. § 7B-906.2(d), although the trial court's findings of fact adequately address the issues reflected in N.C.G.S. § 7B-906.2(d)(1), (2), and (4), the

5. The Court of Appeals exercised its jurisdiction in the case of *In re H.N.D.* prior to the transfer of appellate jurisdiction in termination of parental rights cases from the Court of Appeals to this Court and revision of N.C.G.S. § 7B-1001(a)(2) which was accomplished by the General Assembly in Session Law 2017-41, § 8, 2017 N.C. Sess. Laws 214, 233.

tribunal's findings fail to address the issue in N.C.G.S. § 7B-906.2(d)(3), "[w]hether the parent remains available to the court, the department, and the guardian ad litem for the juvenile." As a result, we deem it to be appropriate to remand this matter to the trial court in order to rectify the order's deficiencies.

¶ 26 Consistent with N.C.G.S. § 7B-906.2(d)(1), the trial court addresses in Finding of Fact 6 whether each parent is making adequate progress within a reasonable time under the permanent plan by detailing their achievements and shortcomings in meeting the conditions of their respective case plans. The trial court goes on to make an express finding "that the parents have not made reasonable progress on their DSS case plan to eliminate the issues [since] the juvenile came into custody[.]" The trial court's determinations contained in Finding of Fact 6 also note that Liam had been in DSS custody for more than twelve months and identify "the parents' failure to comply with their case plan requirements" as "the barrier to . . . reunification[.]" To the extent that respondent-mother contends that Finding of Fact 6 shows that she "made adequate progress" by obtaining a comprehensive clinical assessment, completing parenting classes, participating in substance abuse treatment, and providing several clean drug screens, we conclude that the trial court's contrary evaluation is a reasonable view of the evidence and is therefore binding on appeal. *See generally In re D.L.W.*, 368 N.C. 835, 843 (2016) (recognizing the trial court's authority as fact-finder to weigh competing evidence and draw reasonable inferences therefrom); *see also In re J.H.*, 373 N.C. at 270 (finding "ample evidentiary support for the trial court's finding that respondent only made 'some progress' with respect to her parenting skills").

¶ 27 Similarly, with regard to N.C.G.S. § 7B-906.2(d)(2), Finding of Fact 6, in addressing whether the parents are actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile, adequately describes respondent-mother's degree of participation with her case plan and indicates her non-cooperation with DSS drug screens. This portion of the finding of fact featured the evidence adduced at the hearing of respondent-mother's inability to address the domestic violence, housing, and substance abuse issues which resulted in Liam's removal from her care. These determinations by the trial court satisfy the requirements of Section 7B-906.2(d)(2), and are analogous to the trial court's findings which were deemed to have satisfactorily addressed this subsection of the statute by the Court of Appeals in *In re N.T.*, 264 N.C. App. 753, 2019 WL 1471147, *6 (2019) (unpublished).

¶ 28 Although the trial court made no specific finding as to whether respondent-mother was "acting in a manner inconsistent with the health or safety of the juvenile" under the exact language of N.C.G.S. § 7B-906.2(d)(4), the trial court found that respondent-mother and Liam's father were residing together despite "recent incidents of domestic violence and continued alcohol abuse"—the very problems that necessitated Liam's removal from the home; that Liam's father had yet to complete his court-ordered domestic violence assessment; and that returning Liam to his parents' home would be "contrary to his welfare and best interests at this time." The trial court also concluded in its 15 November 2019 permanency planning order that further efforts to "eliminate the need for placement" of Liam outside of the home would be "inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time." Further, the termination order contains additional uncontested findings that respondent-mother failed to maintain stable housing; that she "never obtained her [court-ordered] psychological evaluation" and "was kicked out of the [drug treatment court program] for noncompliance"; and that the failure of respondent-mother and Liam's father to "eliminate those reasons the juvenile came into custody demonstrates their continued neglect of [Liam] and the probability of future neglect if [Liam] is returned to their care." *See generally In re Stumbo*, 357 N.C. 279, 283 (2003) ("requir[ing] that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment" in order for a parent's conduct to constitute "neglect"). We conclude that these findings by the trial court adequately address the substance and concerns of N.C.G.S. § 7B-906.2(d)(4) through the application of the principle in *In re L.M.T.*, 367 N.C. at 168, in which we recognized earlier that the trial court is not required to quote the exact language of N.C.G.S. § 7B-906.2(d)(4) as long as the trial court's written findings address the statute's concerns.

¶ 29 However, we agree with respondent-mother that the trial court failed to make the findings required by N.C.G.S. § 7B-906.2(d)(3), as to whether respondent-mother "remains available to the court, the department, and the guardian ad litem[.]" Aside from acknowledging respondent-mother's attendance at the 11 October 2019 permanency planning hearing and referencing her absence from the termination hearing on 12 March 2020, the trial court found no facts addressing the issue embodied in Section 7B-906.2(d)(3) with regard to respondent-mother.[6] *In re L.M.T.*, 367 N.C.

6. The permanency planning order includes a finding that Liam's father "has not maintained consistent contact with DSS[,]" thereby addressing at least part of the statutory mandate as to him.

at 168. While the record contains little evidence presented by the parties on the issue of respondent-mother's availability as contemplated by the statute, we note that DSS's written report to the trial court for the permanency planning hearing includes information about respondent-mother's attendance at court dates and scheduled visitations, as well as her failure to attend child and family team (CFT) meetings. The report submitted by the guardian ad litem also alludes to respondent-mother's failure to attend CFT meetings and states that "[t]he GAL has spoken to the parents three times but . . . has had no significant interactions in the last six months." This information contained in the respective reports of DSS and the GAL, however, does not satisfy the trial court's statutory obligation to fulfill the requirements of N.C.G.S. § 7B-906.2(d)(3) by making written findings on the issue of respondent-mother's availability.

¶ 30 Having concluded that the trial court failed to make the findings of fact required by N.C.G.S. § 7B-906.2(d)(3), the identification of the appropriate remedy for the omission has provided the next determination for this Court. In citing N.C.G.S. § 7B-1001(a2) for her assertion that the trial court's noncompliance with N.C.G.S. § 7B-906.2(d) in the order eliminating reunification from the permanent plan "requires reversal of both [the permanency planning order] and the resulting termination order," respondent-mother identifies two cases in which the Court of Appeals vacated a permanency planning order because " 'the trial court failed to make the requisite findings required to cease reunification efforts' under Section 7B-906.2(d)." *In re J.M.*, 843 S.E.2d 668, 676 (N.C. Ct. App. 2020) (quoting *In re D.A.*, 258 N.C. App. 247, 254 (2018)).

¶ 31 It is axiomatic that "this Court is not bound by precedent of our Court of Appeals[.]" *In re B.L.H.*, 376 N.C. 118, 126 (2020). Moreover, as we discuss below, we find neither *In re J.M.* nor *In re D.A.* to be instructive in our determination regarding the implementation of the directive in N.C.G.S. § 7B-1001(a2) that, "[i]f the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated." N.C.G.S. § 7B-1001(a2).

¶ 32 In *In re J.M.*, the respondent-mother appealed from a permanency planning order that placed her child in the guardianship of the juvenile's foster parents, waived further review hearings, and relieved DSS of reunification efforts. 843 S.E.2d at 670, 676; *see also* N.C.G.S. § 7B-1001(a)(4). Hence, the appeal was taken from a single order which transferred the child's legal custody, *see* N.C.G.S. § 7B-1001(a)(4) (2019), and did not address a subsequent order terminating the respondent's parental rights. The Court of Appeals vacated the portion of the order ceasing reunification efforts due to the trial court's failure to make findings un-

der N.C.G.S. § 7B-906.2(d)(2)–(3), while affirming the order in part as to the guardianship provisions and the waiver of further review hearings. *Id.* at 676.

¶ 33 In *In re D.A.*, the Court of Appeals vacated a permanency planning order that granted custody of the respondents' child to the juvenile's foster parents. 258 N.C. App. at 248. As in *In re J.M.*, the appeal was taken from a single order transferring the legal custody of the child. The Court of Appeals held that the trial court's findings did not support its conclusion that the father had acted inconsistently with his constitutionally protected status as a parent, the *sine qua non* of an award of permanent custody of the child to a non-parent. *Id.* at 252. While the Court of Appeals also concluded that "[t]he trial court failed to make findings related to whether [r]espondents were acting in a manner inconsistent with D.A.'s health or safety" under N.C.G.S. § 7B-906.2(d)(4), the lower appellate court further held that the trial court made "no findings that embrace the requisite ultimate finding that 'reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety' " as required to eliminate reunification from the child's permanent plan under N.C.G.S. § 7B-906.2(b). *Id.* at 254. The deficiencies in the order in *In re D.A.* materially exceeded the mere lack of findings under one of the specified issues of N.C.G.S. § 7B-906.2(d), and therefore justified the vacation of the order in the case. *Id.*; *see also In re D.C.*, 852 S.E.2d 694, 698–99 (N.C. Ct. App. 2020) ("Because the trial court ceased reunification efforts without making sufficient findings pertinent to section 7B-906.2(d) and the ultimate finding required by section 7B-906.2(b), we vacate the trial court's orders and remand for further proceedings.").

¶ 34 Due to these critical distinctions, neither *In re J.M.* nor *In re D.A.* presents this Court with correlating examples of the manner in which to settle an order's termination of a respondent's parental rights when an earlier permanency planning order does not include sufficient written findings as to one of the four issues—but does include findings on the ultimate issue—which must be addressed as a preface to the elimination of reunification from the permanent plan, where this Court must consider both orders together, adhere to N.C.G.S. § 7B-1001 (a1)(2) and the amended § 7B-1001(a2), and comply with our precedent in *In re L.M.T.*

¶ 35 We do not discern that the Legislature enacted N.C.G.S. § 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under N.C.G.S. § 7B-906.2(d)(1)–(4) from its trial court order which eliminates reunification from a child's permanent plan. Unlike

the specific finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety" which is required by N.C.G.S. § 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under N.C.G.S. § 7B-906.2(d)(3) is required to support the trial court's decision. N.C.G.S. § 7B-906.2(d) merely requires the trial court to make "written findings as to each of the" issues enumerated in N.C.G.S. § 7B-906.2(d)(1)–(4), and to consider whether the issues "demonstrate the [parent's] degree of success or failure toward reunification[.]" N.C.G.S. § 7B-906.2(d). A finding that the parent has remained available to the trial court and other parties under N.C.G.S. § 7B-906.2(d)(3) does not preclude the trial court from eliminating reunification from the permanent plan based on the other factors in N.C.G.S. § 7B-906.2(d). *Cf. In re R.D.*, 376 N.C. 244, 259 (2020) (concluding that the balancing of the six dispositional factors in N.C.G.S. § 7B-1110(a) "is uniquely reserved to the trial court and will not be disturbed by this Court on appeal").

¶ 36 "[T]o obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *In re L.E.W.*, 375 N.C. at 128. It is the trial court's authority as the finder of fact to assign weight to various pieces of evidence, *In re D.L.W.*, 368 N.C. at 843, in exercising "its discretion [to] determin[e] that ceasing reunification [is] in the best interests of the child[,]" *In re J.H.*, 373 N.C. at 270. Upon considering the trial court's order that eliminated reunification from the permanent plan together with its order terminating parental rights, and determining that the trial court's order eliminating reunification may be cured upon remand to the trial court—pursuant to the application of *In re L.M.T.*—due to insufficient findings of fact contained in the order because it does not address the issue embodied in N.C.G.S. § 7B-906.2(d)(3) as to "whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile," we conclude that respondent-mother has not shown that the trial court's error was material and prejudicial so as to warrant vacating and reversing the permanency planning order at issue and vacating the termination of parental rights order.

¶ 37 We therefore believe that the appropriate remedy for the trial court's error here is to remand this matter to the trial court for the entry of additional findings in contemplation of N.C.G.S. § 7B-906.2(d)(3). *Cf. In re N.K.*, 375 N.C. 805, 825 (2020) (remanding for findings on the trial court's compliance with the Indian Child Welfare Act (ICWA)); *State v. Peterson*, 344 N.C. 172, 177–178 (1996) (holding no error in part as to

the judgment but remanding in part for further findings on suppression issue). This Court's precedent, especially our express determination in *In re L.M.T.* regarding the relationship between incomplete findings in an order which ceases reunification efforts and the findings of fact in a subsequent termination of parental rights order, authorizes such a remedy. In the event that the trial court concludes, after making additional findings, that its decision to eliminate reunification from the juvenile Liam's permanent plan in its 15 November 2019 permanency planning order was in error, then the trial court shall vacate said order as well as vacate the order terminating respondent-mother's parental rights, enter a new permanent plan for the juvenile that includes reunification, and resume the permanency planning review process. *See* N.C.G.S. § 7B-1001(a2); *cf. In re N.K.*, 375 N.C. at 825 ("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." (extraneity omitted)). If the trial court's additional findings under N.C.G.S. § 7B-906.2(d)(3) do not alter its finding under N.C.G.S. § 7B-906.2(b) that further reunification efforts "are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time[,]" then the trial court may simply amend its permanency planning order to include the additional findings, and the 31 March 2020 order terminating respondent-mother's parental rights may remain undisturbed. *Cf. In re N.K.*, 375 N.C. at 825 ("[If] the trial court concludes upon remand, after making any necessary findings or conclusions, that the notice requirements of ICWA were properly complied with . . . , it shall reaffirm the trial court's termination order.").

III. Conclusion

¶ 38 Respondent-mother does not identify any error in the order terminating her parental rights as to the child Liam, and we do not consider the termination order in this decision. With regard to the order eliminating reunification from Liam's permanent plan, competent evidence supports all of the trial court's findings of fact except for its finding that respondent-mother was sanctioned three times in drug treatment court; in determining from the evidence that respondent-mother was sanctioned on two occasions in drug treatment court rather than on three occasions as the trial court erroneously found, we conclude that this constitutes harmless error by the trial court. We further hold that the trial court sufficiently addressed the majority of the issues mandated by N.C.G.S. § 7B-906.2, and that this substantial compliance with the statute obviates the need for vacation or reversal of the trial court's or-

der eliminating reunification from the permanent plan, since there is the availability of a sanctioned remedy which is less drastic and more plausible. Consequently, in light of the trial court's failure to make written findings as required by N.C.G.S. § 7B-906.2(d)(3), we remand to the District Court, Yancey County, to enter such necessary findings and to determine whether those findings affect its decision to eliminate reunification from the permanent plan pursuant to N.C.G.S. § 7B-906.2(b). The trial court may receive additional evidence upon this remand as it deems appropriate within its sound discretion, and shall enter new or amended orders consistent with this opinion. *See In re K.R.C.*, 374 N.C. 849, 865 (2020).

REMANDED.

IN THE MATTER OF M.J.B. III, G.M.B., AND J.A.B.

No. 280A20

Filed 23 April 2021

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

The trial court properly terminated respondent-mother's rights to her children on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) where its findings of fact, including those regarding respondent's lack of progress in her parenting skills and the children's trauma under respondent's care, were supported by clear, cogent, and convincing evidence. The evidence and findings amply demonstrated a likelihood of future neglect, based on respondent's history of failing to meet her children's basic needs, her inability to protect them from physical and sexual abuse, and her lack of progress in resolving those issues.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 30 March 2020 by Judge Regina R. Parker in District Court, Beaufort County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE M.J.B.

[377 N.C. 328, 2021-NCSC-50]

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Beaufort County Department of Social Services.

Tasneem A. Dharamsi for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent-mother appeals from the trial court's 30 March 2020 orders terminating her parental rights in her minor children M.J.B. III (Mark),[1] G.M.B. (Gerry), and J.A.B. (James).[2] Upon careful consideration, we affirm the trial court's orders terminating respondent-mother's parental rights.

I. Factual and Procedural Background

¶ 2 On 28 June 2019, the Beaufort County Department of Social Services (DSS) filed juvenile petitions alleging that ten-year-old Mark, eight-year-old Gerry, and six-year-old James were neglected juveniles. The juvenile petitions outlined DSS's years of involvement with respondent-mother and her failure to properly feed, bathe, and clothe her children or protect them from harm. Throughout the children's lives, respondent-mother had been financially and emotionally dependent on various males, placing herself at risk of abuse. In addition, respondent-mother's boyfriend, who subsequently became her husband, physically abused the children. After obtaining custody of the children, DSS placed them together in a licensed therapeutic foster home due to their special needs and the substantial trauma they had experienced.

¶ 3 The juvenile petitions were heard on 30 October 2019, and the children were adjudicated to be neglected juveniles. In its adjudication order, the trial court made findings of fact consistent with the allegations in the juvenile petitions (summarized above). Accordingly, the trial court set the permanent plan for the children as reunification with a concurrent plan of adoption.

---

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

2. While the trial court also terminated the parental rights of the children's father, he is not a party in this case. Thus, this decision does not address the trial court's findings and orders concerning the children's father.

¶ 4 Following a permanency-planning hearing on 8 January 2020, the trial court found that respondent-mother had not made substantial progress toward resolving the need for DSS intervention. Among other things, the trial court found that the children had revealed new information about the abuse they had suffered while under respondent-mother's care—including being hit, struck, and beaten by family members and being sexually abused by respondent-mother's boyfriends, including her now husband. Therefore, the trial court changed the children's permanent plan to adoption with a concurrent plan of reunification.

¶ 5 On 22 January 2020, DSS filed a motion to terminate the parental rights of respondent-mother on grounds of neglect and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (6) (2019). The termination motion was heard on 4 March 2020. On 30 March 2020, the trial court entered an adjudication order, concluding that both grounds for termination alleged in the motion existed; and a disposition order, concluding that it was in the best interests of the children to terminate respondent-mother's parental rights. Accordingly, the trial court terminated respondent-mother's parental rights. Respondent-mother now appeals.

II. Analysis

¶ 6 Respondent-mother challenges the trial court's adjudication of the existence of grounds to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (6). Since "a finding of only one ground is necessary to support a termination of parental rights," we address only respondent-mother's challenge to the adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). *In re A.R.A.*, 373 N.C. 190, 194 (2019). After careful review, we conclude that the unchallenged findings in this case combined with the challenged findings that are supported by clear, cogent, and convincing evidence are more than sufficient to support the trial court's determination that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). Accordingly, we affirm the orders terminating respondent-mother's parental rights.

¶ 7 The Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. N.C.G.S. §§ 7B-1109 to -1110 (2019). During the adjudicatory stage, "[t]he burden in these proceedings is on the petitioner or movant to prove the facts justifying the termination by clear and convincing evidence." N.C.G.S. § 7B-1111(b); *see also id.* § 7B-1109(e)–(f). If one or more grounds exist, the trial court then proceeds to the dispositional stage where it determines whether termination of parental rights is in the children's best interests. N.C.G.S.

§ 7B-1110(a). On appeal, respondent-mother does not challenge the trial court's determination in the dispositional stage that termination was in the children's best interests.

A. Standard of Review

¶ 8 "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 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citations omitted). As for the trial court's conclusions of law, this Court reviews them de novo. *In re M.C.*, 374 N.C. 882, 886 (2020).

B. Neglect

¶ 9 A trial court may terminate parental rights for neglect if it concludes the parent has neglected the juvenile such 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). A neglected juvenile is defined, in pertinent part, as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020). However, such a showing is not required if, as in this case, the child is not in the parent's custody at the time of the termination hearing. *In re N.D.A.*, 373 N.C. 71, 80 (2019). Instead, the trial court looks to "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect" as well as "any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* "After weighing this evidence, the trial court may find that neglect exists as a ground for termination

if it concludes the evidence demonstrates 'a likelihood of future neglect by the parent.' " *In re B.T.J.*, 2021-NCSC-23, ¶ 11 (quoting *In re R.L.D.*, 375 N.C. 838, 841 (2020)).

C. Challenges to Specific Findings of Fact

¶ 10 On appeal, respondent-mother challenges several of the specific factual findings made by the trial court and then argues that the remaining findings do not support a finding that there was a likelihood of future neglect. Below, we address only those challenges that are necessary to support the trial court's adjudication that neglect existed as a ground for termination. While respondent-mother challenges other findings of fact, those findings are unnecessary to determine that there was a likelihood of future neglect, so we do not address them.

¶ 11 Respondent-mother's first relevant challenge is to finding of fact 53: "[Respondent-mother] has participated in parenting classes, but she has been unable to make any progress. Her pre-test and post-test indicate that she did not learn anything during the entirety of the classes provided." Relying on parenting-profile evaluations completed approximately one month apart in August and September of 2019, respondent-mother contends that the trial court's finding of a lack of progress is not supported by the evidence. To the extent this contention involves the "pre-test and post-test," we agree that the evidence does not support a finding that respondent-mother "did not learn anything." Rather, the record reflects that respondent-mother's pre-test and post-test showed slight improvements in each of the five parenting constructs evaluated. Thus, we disregard that portion of the finding. *See In re J.M.*, 373 N.C. 352, 358 (2020) (disregarding a finding not supported by the evidence).

¶ 12 However, the record contains sufficient evidence to support the finding that respondent-mother has been "unable to make any progress" in her parenting skills. Regarding the tests, respondent-mother only improved her scores by one to two points, leaving her in the medium risk range for all five categories. According to the social worker, this did not indicate demonstrable change. More concerningly, the social worker testified that respondent-mother did not use any of the parenting skills taught in the class when she visited with her children. Respondent-mother does not challenge the trial court's finding that each visit "was a retraumatizing episode [for the children] evidenced by anxiety, visible tremors, nightmares, insomnia, recurrence of selective mutism, refusing to eat [and] loss of appetite, encopresis, enuresis, aggressive behaviors towards siblings, and self-injurious behaviors." Further, respondent-mother stated that she could not remember what

she learned in her parenting class other than to not raise her voice, talk calmly, and let the children help out with meals. We conclude this evidence supports the trial court's finding that respondent-mother was unable to make any progress in her parenting skills.

¶ 13 Respondent-mother's second relevant challenge is to the following emphasized portion of finding of fact 82: "Due to [respondent-mother's] . . . parental deficiencies, the juveniles have been exposed to many incidents of traumatic physical, sexual[,] and emotional abuse. *The juveniles' trauma is such that they will never likely be able to properly function if returned to* [*respondent-mother's*] . . . *care.*" (Emphasis added.) Respondent-mother contends that the therapist never made this determination and that the record otherwise lacks evidence that would support it.

¶ 14 However, the unchallenged findings of fact show that the children incurred significant trauma from the physical and sexual abuse they experienced under respondent-mother's care, as well as from her inability to provide for their physical needs like health, nutrition, and hygiene. As a result, the children exhibited substantial trauma-related behaviors. For the children to overcome their trauma and properly function, the trial court found that they would need many years of therapeutic care. Additionally, the therapist testified that they needed time in a safe environment. The unchallenged findings of fact reveal that respondent-mother failed to provide either a safe environment or even a minimally competent level of care prior to the children entering DSS custody. At the time of the termination hearing, respondent-mother still had not provided a safe environment but instead chose to maintain a romantic relationship with one of her children's abusers and live with another one of them. In addition, even if respondent-mother had progressed in her parenting skills—which she had not—she also did not believe her children had been abused, completely undermining her ability to help the children heal from that abuse. And that does not even include the therapist's testimony concerning the traumatic reactions the kids displayed after attending visitations with respondent-mother. Thus, finding of fact 82, that the children would "never likely be able to properly function" if returned to respondent-mother's care, was supported by clear, cogent, and convincing evidence.

¶ 15 Further, respondent-mother argues that finding of fact 82 is related to the trial court's best interests determination, not its adjudication of neglect. But the fact that the children would never be able to properly function if returned to respondent-mother's care establishes that returning the children to her care would place them into an environment in-

jurious to their welfare—one of the definitions of neglect. *See* N.C.G.S. § 7B-101(15). Accordingly, the trial court did not err in making this finding during the adjudicatory stage.

D. Argument Concerning Likelihood of Future Neglect

¶ 16 Respondent-mother further argues that the evidence presented at the termination hearing does not support the trial court's finding that a likelihood of future neglect existed should the children return to respondent-mother's care. However, as discussed above, the relevant findings that respondent-mother challenged were supported by competent evidence, and so we treat them as conclusive on appeal. In addition, the record contained numerous other unchallenged findings that when combined with the facts discussed above are more than sufficient to demonstrate a likelihood of future neglect.

¶ 17 Starting first with evidence of past neglect, we note that respondent-mother does not challenge any of the trial court's findings concerning her history with the children before DSS obtained custody. Accordingly, we accept as binding the trial court's findings that respondent-mother repeatedly failed to provide for her children's basic needs, including food, shelter, clothing, and hygiene. In addition, respondent-mother failed to protect the children from physical or sexual abuse, even when she knew it was occurring. This evidence is more than sufficient to support a finding of past neglect.

¶ 18 Likewise, while respondent-mother contends that she had changed her circumstances since the children entered DSS custody, the evidence presented at the termination hearing supports the trial court's finding that respondent-mother would likely neglect the children in the future if they returned to her care. As discussed above, this evidence included the fact that respondent-mother had not made any progress in her parenting skills, did not believe that her children had been abused, and continued to associate with their abusers. Accordingly, if returned to her care, the children would remain at risk of physical and sexual abuse, have unmet physical needs, and never heal from the trauma they had already endured. These facts are more than sufficient to establish a likelihood of future neglect.

III. Conclusion

¶ 19 The trial court did not err by adjudicating that grounds existed to terminate respondent-mother's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Since the trial court needed to find only one of the grounds in N.C.G.S. § 7B-1111(a) to terminate respondent-mother's

parental rights, we need not address its adjudication of dependency as a ground for termination. *See In re A.R.A.*, 373 N.C. at 194. Having determined that grounds existed for termination and because respondent-mother does not challenge the trial court's determination of the children's best interests at the dispositional stage, we affirm the trial court's orders terminating respondent-mother's parental rights to Mark, Gerry, and James.

AFFIRMED.

IN THE MATTER OF M.L.B.

No. 243A20

Filed 23 April 2021

1. Termination of Parental Rights—findings of fact—sufficiency of competent evidence—exhibit not admitted during hearing

The trial court's order terminating respondents' parental rights to their daughter on multiple grounds was reversed where the court's findings were not supported by clear, cogent, and convincing evidence. Although the department of social services tendered three witnesses who gave testimony, the challenged findings of fact contained information not from their testimony but from an exhibit which was not admitted into evidence during the hearing and which was presumed to be inadmissible incompetent evidence for purposes of the appeal.

2. Native Americans—Indian Child Welfare Act—termination of parental rights—inquiry required

In a termination of parental rights case, the trial court erred by conducting a hearing without complying with the inquiry requirements of the Indian Child Welfare Act and related federal regulations. The court was directed on remand to ensure compliance with the Act.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 March 2020 by Judge William J. Moore in District Court, Robeson County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager Jr. for petitioner-appellee Robeson County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Jacky Brammer, Assistant Parent Defender, for respondent-appellant father.

Robert W. Ewing for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondents appeal from the trial court's order terminating their parental rights to M.L.B. (Mary).[1] After careful review, we reverse the termination-of-parental-rights order and remand to the trial court for further proceedings not inconsistent with this opinion.

I. Background

¶ 2 The involvement of Robeson County Department of Social Services (DSS) with respondents and Mary commenced in February 2014. DSS had received information concerning respondents' substance abuse and ongoing domestic violence in respondents' home. As these issues continued, Mary was placed in kinship care in May 2014. DSS filed a petition alleging that Mary was a neglected juvenile on 10 December 2014. An order granting nonsecure custody to DSS was entered on 10 December 2014. On 28 April 2015, the trial court entered an order adjudicating Mary a neglected juvenile.

¶ 3 In April 2019, the trial court changed the permanent plan to adoption with a concurrent plan of guardianship. DSS filed a termination-of-parental-rights petition on 28 May 2019. DSS alleged that grounds existed to terminate respondents' parental rights pursuant to neglect, failure to make reasonable progress in correcting the conditions which led to removal, failure to pay a reasonable portion of the cost of care, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). DSS alleged as an additional ground that the parental rights of respondent-mother with respect to her other children had been terminated involuntarily by a court

1. The pseudonym "Mary" is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

of competent jurisdiction and she lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(9).

¶ 4 The trial court held the termination-of-parental-rights hearing on 12 February 2020. At the hearing on termination of parental rights, the transcript reflects that DSS's counsel called as DSS's first witness the social worker for Mary's case from January 2019 until April 2019. During the testimony of this social worker, the transcript reflects the colloquy between DSS's counsel, the social worker, respondent-mother's counsel, and the trial court regarding a document entitled Termination of Parental Rights Timeline (Timeline):

> [DSS'S COUNSEL]: Have you, along with [another] social worker, . . . prepared an exhibit for the [c]ourt today?
>
> [SOCIAL WORKER]: I did.
>
> [DSS'S COUNSEL]: Is it true and accurate, to the best of your ability?
>
> [SOCIAL WORKER]: It is.
>
> [DSS'S COUNSEL]: Does it outline [DSS's] efforts with regard to the minor child [Mary]?
>
> [SOCIAL WORKER]: It does.
>
> [DSS'S COUNSEL]: Your Honor, we'd ask the [c]ourt to accept this witness as a —
>
> [RESPONDENT-MOTHER'S COUNSEL]: I'm going to object for the record, Your Honor.
>
> THE COURT: (Inaudible)

¶ 5 DSS called three additional witnesses, a domestic violence case worker at a healthcare facility that worked with respondent-mother from 14 November 2019 to 5 December 2019, a substance abuse counselor at a healthcare facility that oversaw a program respondent-mother commenced on 6 February 2019, and a social worker working on Mary's case since April or May 2019. The transcript does not reflect the admission of any evidence by DSS other than the testimony of the aforesaid three witnesses during the adjudicatory phase of the termination-of-parental-rights hearing.

¶ 6 On 18 March 2020, the trial court entered an order in which it determined that each ground alleged in the 28 May 2019 petition existed to

terminate respondents' parental rights and concluded it was in Mary's best interests to do so. Respondents appealed.

II. Timeline

¶ 7 **[1]** Both respondent-mother and respondent-father argue that the trial court's reliance on the Timeline referenced during the termination-of-parental-rights hearing was an error. The trial court in the termination-of-parental-rights order stated in paragraph 40 that "[t]he [c]ourt relies on and accepts into evidence the Timeline, in making these findings and finds the said report to [be] both credible and reliable."[2] Respondents both contend that the trial court's pervasive reliance on the Timeline is reflected in the findings of fact and conclusions of law in the termination-of-parental-rights order, rendering the termination-of-parental-rights order tainted and unreviewable. DSS argues that a trial court is presumed to disregard incompetent evidence in a bench trial and that there is competent evidence besides the Timeline to support the termination-of-parental-rights order.

¶ 8 DSS has neither argued that the Timeline was admissible evidence nor that respondents waived their objection to the Timeline's admissibility. Therefore, we do not address whether the Timeline was inadmissible hearsay. Instead, we presume the Timeline was inadmissible and not properly considered by the trial court. Thus, we next consider whether other evidence admitted during the termination-of-parental-rights hearing provides the bases for the trial court's findings of fact. "If either of the . . . grounds [for termination of parental rights found by the trial court are] supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed." *In re Moore*, 306 N.C. 394, 404 (1982). When a judge sits without a jury, this Court presumes that the trial court disregards any incompetent evidence and will affirm the judgment or order if the trial court's findings are supported by competent evidence. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694 (1981).

¶ 9 DSS argues that there was overwhelming, unrebutted evidence to support the termination of parental rights, reciting the testimony of the witnesses DSS tendered at the termination-of-parental-rights hearing. However, after a thorough review of the testimony presented at the termination-of-parental-rights hearing, we cannot conclude that the testimony alone provides clear, cogent, and convincing evidence support-

2. As summarized in the background section of this opinion, the transcript does not establish that the Timeline was admitted into evidence during the termination-of-parental-rights hearing.

ing the challenged findings of fact of the trial court necessary to support its conclusions of law for any ground for termination. *See In re Moore*, 306 N.C. at 404. DSS's first witness, a social worker, testified that Mary had been in DSS care and custody since 11 December 2014. There was also testimony regarding the case plans signed by respondents, respondents' compliance with the case plans, and their progress on the conditions that led to Mary's removal from their home, among other things.

¶ 10 Yet, as highlighted by respondents in their briefs, the challenged findings of fact include a substantial amount of information that cannot be discerned from the testimony presented at the termination-of-parental-rights hearing. This information is in the Timeline. For purposes of this appeal, however, the Timeline is inadmissible incompetent evidence on which the trial court should not have relied. Therefore, the order terminating respondents' parental rights must be reversed; the testimony at the termination-of-parental-rights hearing does not provide clear, cogent, and convincing evidence supporting the challenged findings of fact of the trial court necessary to support the trial court's conclusions of law for any ground for termination.

III. Indian Child Welfare Act Proceedings

¶ 11 **[2]** Respondent-father argues that the trial court failed to comply with the Indian Child Welfare Act (ICWA) and asks this Court to vacate and remand for compliance with the ICWA. DSS concedes the record is silent as to whether the trial court considered the impact of the ICWA on this case and that the matter should be remanded to the trial court as a result. The guardian ad litem agrees that the matter should be remanded for the trial court to comply with the ICWA. We agree that the record does not reflect compliance with the ICWA, and thus we instruct the trial court on remand to comply with the ICWA.

¶ 12 In 2016, the United States Department of the Interior promulgated regulations to promote the uniform application of the ICWA codified at subpart I of 25 C.F.R. pt. 23. Indian Child Welfare Act Proceedings, 25 C.F.R. §§ 23.101–.144 (2019); Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38,777, 38,782 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23); *see also In re E.J.B.*, 375 N.C. 95, 101 (2020).

¶ 13 The provisions under subpart I do not affect proceedings initiated prior to 12 December 2016, but the provisions "apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." 25 C.F.R. § 23.143. A child custody proceeding includes "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii).

¶ 14 Pursuant to 25 C.F.R. § 23.107(a),

> [s]tate courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

25 C.F.R. § 23.107(a).

¶ 15 As defined in 25 U.S.C. § 1903(4), " 'Indian child' means 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). " 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43." 25 U.S.C. § 1903(8); *see* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554, 7,554 (Jan. 29, 2021).

¶ 16 "The inquiry into whether a child is an 'Indian child' under ICWA is focused on only two circumstances: (1) Whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,804. The inquiry "is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe [as defined in 25 U.S.C. § 1903]." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,806; *see also* Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,801 (" 'Indian child' is defined based on the child's political affiliation with a federally recognized Indian Tribe.").

¶ 17 Paragraph (c) of 25 C.F.R. § 23.107 states:

> (c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c).

¶ 18 As the termination-of-parental-rights hearing occurred after 12 December 2016 and the trial court did not ask the participants on the record whether the participants knew or had reason to know that Mary is an Indian child, the trial court did not comply with 25 C.F.R. § 23.107(a). Since the trial court did not comply with 25 C.F.R. § 23.107(a), the trial court could not comply with 25 C.F.R. § 23.107(c) and could not determine whether it had reason to know Mary is an Indian child. *See* 25 C.F.R. § 23.107(c) ("A court, *upon conducting the inquiry required in paragraph (a) of this section*, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if . . . .").

¶ 19 Therefore, on remand, the trial court "must ask each participant in [the termination-of-parental-rights proceeding] whether the participant knows or has reason to know that the child is an Indian child" on the record and receive the participants' responses on the record. 25 C.F.R. § 23.107(a). The trial court "must instruct the parties to inform the court if they subsequently receive information that provides reason to know

the child is an Indian child." *Id.* This should be done promptly upon remand before holding a new termination-of-parental-rights hearing. If there is reason to know that Mary is an Indian child, the trial court must comply with 25 C.F.R. § 23.107(b), and DSS, as the party seeking termination of parental rights, must comply with 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111(d). *See In re E.J.B.*, 375 N.C. at 104–05 (discussing notice requirements under 25 U.S.C. § 1912 and 25 C.F.R. § 23.111(d)).[3]

IV. Conclusion

¶ 20 For the reasons set forth in this opinion, we reverse the termination-of-parental-rights order and remand this case to the trial court to conduct a new hearing on termination of respondents' parental rights and to comply with the requirements of ICWA. Given our disposition of this appeal, we decline to address respondents' remaining arguments on appeal.

REVERSED AND REMANDED.

3. All participants should become familiar with the Indian Child Welfare Act of 1978, codified at 25 U.S.C. ch. 21, and the corresponding regulations, including but not limited to the regulations codified at 25 C.F.R. §§ 23.101–.144, to ensure compliance with the ICWA and to assert objections on the record if compliance in a proceeding has not occurred.

IN RE M.S.A.

[377 N.C. 343, 2021-NCSC-52]

IN THE MATTER OF M.S.A.

No. 332A20

Filed 23 April 2021

Termination of Parental Rights—grounds for termination—willful abandonment—incarceration—failure to contact child

The trial court properly determined that a father's parental rights were subject to termination on the grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where it was undisputed that the father, who had been incarcerated for approximately six years when the termination petition was filed, had made no contact with his daughter during his incarceration. He failed to seek his daughter's contact information from relatives (other than a single unsuccessful attempt to ask the sister of his daughter's caregiver for the caregiver's phone number—years outside the determinative period) or to otherwise display any interest in her welfare. The father's incarceration and alleged ignorance of how to contact his child could not negate the willfulness of his abandonment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 February 2020 by Judge Jimmy L. Myers in District Court, Davidson County. This matter was calendared in the Supreme Court on 19 March 2021, 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.

Edward Eldred for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to his minor child, M.S.A. (Mary[1]). In his sole argument on appeal, respondent-father asserts that his voluntary lack of communication with Mary from the inception of the period of his incarceration in November 2012 through the December 2019 private termination of parental rights hearing could not serve as a basis for the trial court's conclusion that grounds existed to terminate his parental

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

rights due to abandonment under N.C.G.S. § 7B-1111(a)(7) because the trial court did not find, nor does the evidence support a finding, that respondent-father's failure to contact Mary was willful. Because we conclude that clear, cogent, and convincing evidence is contained in the record to show that respondent-father admittedly ignored his ability to contact his daughter or her caretaker, we affirm the termination order.

I. Factual and Procedural Background

¶ 2 This private termination action began on 12 December 2018 when petitioner, who is Mary's maternal great, great aunt, filed a petition seeking to terminate the parental rights of both of Mary's parents.[2] On 1 March 2019, petitioner filed an amended petition alleging that Mary had resided with her continuously from October 2010 until the filing of the petition, and that she had exercised sole legal and physical custody of Mary since June 2011. Petitioner claimed that she had provided for Mary's financial, medical, emotional, and physical needs during this time of Mary's habitation with petitioner, and that petitioner would continue to be able to do so. Petitioner further alleged that respondent-father was incarcerated at the time of the filing of the petition, that he had not visited with or seen Mary since 2011, and that he had not provided financial support nor sent any gifts or correspondence to Mary for at least five years. Petitioner filed her action in order to seek the termination of the parental rights of respondent-father on the basis of willful abandonment under N.C.G.S. § 7B-1111(a)(7) (2019). Respondent-father filed an answer denying petitioner's material allegations.

¶ 3 The petition was heard during the 19 December 2019 session of District Court, Davidson County. Respondent-father did not contest petitioner's allegations that he had previously demonstrated the ability to communicate with Mary's mother and family members while incarcerated[3], but offered testimony that he did not possess actual knowledge of the information that he needed to reach Mary or petitioner. On 6 February

---

2. Mary's mother is not a party to this appeal.

3. Respondent-father takes exception with the trial court's finding that he was also in regular contact with his attorney, arguing that he had simply testified that he knew how to get in contact with his attorney while incarcerated. Such an admission would appear to be detrimental to respondent-father's contention that the evidence in the record could not establish his ability to contact Mary or petitioner, as it appears that respondent-father knew how to contact a person who presumably possessed the wherewithal to obtain and relay the information to respondent-father which was necessary to contact Mary and petitioner. As explained below, however, this contested finding by the trial court is unnecessary to support the trial court's ultimate conclusion and is therefore excluded by us from any consideration.

2020, the trial court entered an order terminating respondent-father's parental rights, concluding that respondent-father had willfully abandoned Mary pursuant to N.C.G.S. § 7B-1111(a)(7) and that termination of respondent-father's parental rights was in Mary's best interests. Respondent-father appeals the trial court's order, asking this Court to decide "whether an incarcerated parent who has not had contact with his child for eight years and does not know how to contact his child may lose his parental rights on the ground of abandonment."

II. Analysis

¶ 4 The North Carolina General Statutes set forth a two-step process for the termination of parental rights. After the filing of a petition for the termination of parental rights, a trial court conducts a hearing to adjudicate the existence or nonexistence of any grounds alleged in the petition as set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e) (2019). The petitioner carries the burden of proving by clear, cogent, and convincing evidence that grounds exist under N.C.G.S. § 7B-1111(a) to terminate a respondent-parent's parental rights. *In re A.U.D.*, 373 N.C. 3, 5–6, (2019). Upon an adjudication that at least one ground exists to terminate the parental rights of a respondent-parent, the trial court will then decide whether terminating the parental rights of the respondent-parent is in the child's best interests. N.C.G.S. § 7B-1110(a).

¶ 5 N.C.G.S. § 7B-1111(a)(7) states, in pertinent part, that the court may terminate parental rights upon a finding that the parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition. The only argument being voiced by respondent-father on this appeal concerns the trial court's adjudication that respondent-father *willfully* abandoned Mary. He contends that the trial court's findings of fact do not support its ultimate conclusion of law that he willfully abandoned Mary pursuant to N.C.G.S. § 7B-1111(a)(7).

¶ 6 When reviewing the trial court's adjudication of the existence of a ground to terminate the parental rights of a respondent-parent, we examine whether the trial court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). Any factual findings of the trial court left unchallenged by an appellant are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, (2019). We review the trial court's conclusions of law under a de novo standard. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 7 Section 7B-1111(a)(7) permits the trial court to terminate a parent's rights when that "parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." *Id.* "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 (2020) (quoting *In re Young*, 346 N.C. 244, 251 (1997)). We have held that abandonment is evident when 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[.]" *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). "Although 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 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 8 Respondent-father does not challenge the trial court's findings of fact which reflect that respondent-father "has never written letters," has never "sent gifts or cards," has never "provided financially" for Mary, and has never contacted petitioner "to inquire as to [Mary]'s well-being . . ." from the time of his incarceration in November 2012 until the filing of the amended termination petition on 1 March 2019. Nor does respondent-father dispute the trial court's findings that respondent-father had neither "made an effort to ensure that he has a relationship with the minor child," nor "reached out to [p]etitioner to inquire as to the minor child's well-being since the minor child came into [p]etitioner's custody." Instead, respondent-father contends that the trial court's remaining findings of fact do not establish the willfulness of the total nonperformance of his parental duties toward Mary, both during the relevant six-month period and in prior years.

¶ 9 In two respects, respondent-father contests the following portion of the trial court's Finding of Fact 14, which he considers to be the linchpin of the trial court's willfulness determination:

> While incarcerated, [r]espondent/father has always had the resources and ability to contact outside individuals, either through writing letters or by telephone. In fact, respondent/father stays in frequent contact with his family members and lawyers and has been in contact with respondent/mother. Respondent/father has never asked these individuals to assist him in getting in contact with Petitioner to inquire as to the

> minor child's well-being, nor has he asked for their help in maintaining a relationship with the minor child, despite having opportunities to do so.

First, respondent-father argues that he was not in "frequent contact" with his lawyers and that he had not contacted Mary's mother since 2012. Second, respondent-father contends that it is untrue that he *never* asked any family member for petitioner's contact information, as he testified at the hearing that he asked petitioner's sister for petitioner's telephone number and "she wouldn't give [respondent-father] that." However, respondent-father concedes that Finding of Fact 14 is otherwise accurate to the extent that it shows that he "was in frequent contact with *some* of his family members and never asked those family members to help him contact [petitioner]." Respondent-father's further admission that "he wrote [the mother] one letter in 2012 and did not hear back from [the mother]" is susceptible to the reasonable interpretation reflected in the trial court's finding that "[r]espondent-father ha[d] been in contact with respondent[-]mother." Further, although respondent-father offered uncontested testimony that he asked petitioner's sister for the telephone number of petitioner in 2012, nevertheless this evidence does not dilute the veracity of the portion of the trial court's Finding of Fact 14 that respondent-father had "never asked these individuals to assist him in getting in contact with [p]etitioner *to inquire as to the minor child's well-being*." A thorough analysis of the application of the provisions of N.C.G.S. § 7B-1111(a)(7) regarding the ground of abandonment to Finding of Fact 14 illustrates that respondent-father admits the validity of several of the circumstances which the trial court determined in the finding and that respondent-father's strongest example to support his interest in contacting petitioner—the request for her telephone number—occurred years outside of the determinative six-month statutory period. Respondent-father's assertions are largely irrelevant to the gravamen of the ground of abandonment as to whether he manifested a "willful determination to forego all parental duties and relinquish all parental claims to the child." *In re B.C.B.*, 374 N.C. at 35.

¶ 10 This Court limits its "review to those challenged findings that are necessary to support the trial court's determination that . . . parental rights should be terminated[.]" *In re N.G.*, 374 N.C. 891, 900 (2020). Thus, even after disregarding the remaining segment of the trial court's Finding of Fact 14 which is vigorously disputed by respondent-father that he "stays in frequent contact with his . . . lawyers," the remainder of the trial court's finding amply supports its conclusion that respondent-father willfully abandoned Mary.

¶ 11 Respondent-father claims that, even though he "had the ability to contact people on the outside and that he did not ask those people to help contact [petitioner]," it does not follow that he willfully abandoned Mary. This assertion suggests that respondent-father is introducing his incarceration as a mechanism by which to absolve his parental duty toward Mary and to allow him therefore to refrain from undertaking the effort to pursue parental involvement with Mary through contact with those persons with whom he communicated during his incarceration. We have previously rejected such representations which respondent-father appears to foment:

> Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. Although a parent's options for showing affection while incarcerated are greatly limited, a parent will not be excused from showing interest in the child's welfare by whatever means available.

In re C.B.C., 373 N.C. at 19–20 (quoting *In re D.E.M.*, 257 N.C. App. 618, 621 (2018)) (extraneity omitted).

¶ 12 Here, it is undisputed that respondent-father, at a minimum, possessed the ability to seek Mary's contact information from his relatives but declined to do so for a number of years. The trial court's unchallenged findings reflect that respondent-father did not utilize "whatever means available" to display his interest in Mary's welfare during his incarceration. *In re C.B.C.*, 373 N.C. at 19–20. Instead, respondent-father withheld his love, care, and filial affection from Mary, both in the statutorily relevant six-month period prior to the filing of the petition to terminate parental rights and in the years preceding that time span. *See Pratt*, 257 N.C. at 501. As this constitutes willful abandonment, the trial court did not err in adjudicating the existence of this ground pursuant to N.C.G.S. § 7B-1111(a)(7) in terminating respondent-father's parental rights.

III. Conclusion

¶ 13 Based on the foregoing, we conclude that the trial court properly determined that the parental rights of respondent-father were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(7). Respondent-father does not challenge the trial court's conclusion that termination of his parental rights was in Mary's best interests. Consequently, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN RE N.B.

[377 N.C. 349, 2021-NCSC-53]

IN THE MATTER OF N.B., N.M.B., M.R.

No. 291A20

Filed 23 April 2021

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

The trial court properly determined respondent-mother's parental rights were subject to termination on the basis of neglect where the children had been previously adjudicated to be neglected (due to respondent's housing instability, her drug use and incarceration, domestic violence, and her leaving the children with inappropriate caretakers who subjected the children to physical and sexual abuse) and where—although respondent had made some progress towards satisfying the requirements of her case plan—there was a likelihood of future neglect due to respondent's failure to establish stable housing free from substance abuse, her lack of contact with the children, and her inability to meet the children's trauma-related needs.

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

The trial court's termination of respondent-father's parental rights on the basis of neglect due to a likely repetition of neglect was affirmed where respondent was incarcerated, the child had been placed in foster care due to neglect caused by domestic violence and respondent's use and distribution of drugs while the child was in respondent's care prior to his incarceration, respondent was only involved in the child's life in a limited way when he was not incarcerated, and he made no attempt to contact the child during his incarceration except for a single letter and had limited contact with DSS.

3. Constitutional Law—effective assistance of counsel—termination of parental rights—failure to show prejudice

Respondent-father was not entitled to relief from the trial court's order terminating his parental rights where he claimed to have received ineffective assistance of counsel. Respondent failed to show any prejudice resulting from counsel's allegedly deficient performance and there was nothing counsel could have done to overcome the undisputed evidence of neglect.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 March 2020 by Judge Joseph Moody Buckner in District Court, Orange

County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Angenette Stephenson, for petitioner-appellee Orange County Department of Social Services.

Olabisi A. Ofunniyin and Matthew W. Wolfe for appellee Guardian ad Litem.

Dorothy Hairston Mitchell for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-mother Stacey W. appeals from the trial court's orders terminating her parental rights in N.B., N.M.B., and M.R., while respondent-father Jerald B. appeals from the trial court's order terminating his parental rights in N.B.[1] After careful review of the record in light of the applicable law, we affirm the trial court's orders.

I. Factual Background

¶ 2 On 25 July 2017, a child protective services agency in Hagerstown, Maryland, received a referral expressing concern that Natasha and Nylah had been neglected by a woman with whom they had lived in Maryland during a time in which respondent-mother had been incarcerated. At the time of the making of this referral, Natasha, Nylah, and Merise were residing in Chapel Hill with the sister of a woman that respondent-mother described as her "foster mother" and that the children referred to as their "great-aunt" despite the absence of any biological relationship between this individual and either respondent-mother or the children. The children had begun living with this individual in January 2017, when this individual had traveled to Maryland and retrieved the children in light of respondent-mother's incarceration and the inability of the persons with whom the children had initially been left to provide adequate care for them.

1. N.B., N.M.B., and M.R., respectively, will be referred to throughout the remainder of this opinion as Natasha, Nylah, and Merise, which are pseudonyms used for ease of reading and to protect the juveniles' privacy.

¶ 3 Upon learning that the children had been living in Chapel Hill for the last six months, the Maryland child protective services agency contacted the Orange County Department of Social Services, which undertook responsibility for investigating the report. At the time that DSS became involved with the children, respondent-mother, who had been released on parole, had been unable to establish consistent employment or housing while respondent-father was incarcerated.

¶ 4 In the course of the investigation, Natasha and Nylah reported that respondent-mother had frequently been incarcerated and that they had been subjected to inappropriate discipline by caretakers, had been exposed to illegal drugs, and had endured inappropriate touching. In light of these allegations of abuse, a child medical evaluation was conducted upon Natasha and Nylah on 14 September 2017. At the conclusion of the examination, the examiner expressed concern that both Natasha and Nylah had been physically and sexually abused.

¶ 5 On 3 November 2017, DSS filed juvenile petitions alleging that Natasha, Nylah, and Merise were abused, neglected, and dependent juveniles. In its petitions, DSS asserted that respondent-mother had a history of incarceration, during which the children had lived with multiple caretakers who subjected the children to excessive discipline, failed to provide the children with adequate food, and failed to provide the children with an adequate level of care. In addition, DSS alleged that the children had been physically and sexually abused while in respondent-mother's care and that respondent-mother had been released from incarceration and was threatening to remove the children from the home of their current caretaker. In order to prevent respondent-mother from taking the children into her care, DSS sought and obtained the entry of an order placing the children into nonsecure custody and allowing them to continue living with their current caretaker. Eventually, the children's caretaker became unable to care for them, so that the children entered foster care.

¶ 6 After an adjudicatory hearing held on 15 February 2018, the trial court entered an order on 26 March 2018 finding that the children were neglected and dependent juveniles. The trial court ordered that the custody of the children remain with DSS, required respondent-mother to comply with a family services agreement, and authorized respondent-mother to engage in supervised visitation with the children. In view of the fact that respondent-father continued to be incarcerated, the trial court ordered him to provide DSS with a specific release date.

¶ 7 On 19 July 2018, the trial court held an initial permanency planning hearing. On 31 August 2018, the trial court entered a permanency planning order in which it found that, while DSS had made reasonable efforts to reunify the children with their parents, neither respondent-mother nor respondent-father had been actively attempting to successfully reunify with the children or making themselves available to DSS. As a result, the trial court adopted a primary permanent plan of adoption, with a secondary permanent plan of reunification, and authorized DSS to seek the termination of the parents' parental rights in the children.

¶ 8 On 21 October 2019, DSS filed separate motions seeking to have respondent-mother's parental rights in all three children terminated 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 the children's placement in DSS custody, N.C.G.S. § 7B-1111(a)(2). In addition, DSS alleged that respondent-mother's parental rights in Natasha were subject to termination based upon abandonment, N.C.G.S. § 7B-1111(a)(7). Similarly, DSS filed a motion seeking to have respondent-father's parental rights in Natasha terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to Natasha's placement in DSS custody, N.C.G.S. § 7B-1111(a)(2); and dependency. N.C.G.S. § 7B-1111(a)(6).

¶ 9 On 28 November 2018, after a hearing held on 1 November 2018, Judge Beverly Scarlett entered a permanency planning order in which she found that DSS continued to have difficulty in communicating with respondent-mother, that respondent-mother had sent clothing to the children on three occasions, and that respondent-father continued to be incarcerated. In addition, Judge Scarlett reiterated the trial court's earlier conclusion that neither parent was making adequate progress toward reunification with the children. As a result, Judge Scarlett retained the existing primary permanent plan of adoption and secondary permanent plan of reunification.

¶ 10 After a hearing held on 6 February 2020, the trial court entered orders on 9 March 2020 in which it determined that respondent-mother's parental rights in all three children and respondent-father's parental rights in Natasha 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 the children's placement in DSS custody, N.C.G.S. § 7B-1111(a)(2); that respondent-mother's parental rights in Natasha were subject to termination based upon abandonment, N.C.G.S. § 7B-1111(a)(7); and that respondent-father's parental

rights in Natasha were subject to termination for dependency, N.C.G.S. § 7B-1111(a)(6). In addition, the trial court concluded that the children's bests interests would be served by the termination of respondent-mother's parental rights in all three children and that Natasha's best interests would be served by the termination of respondent-father's parental rights.[2] Respondent-mother and respondent-father noted appeals to this Court from the trial court's termination orders.

II. Substantive Legal Analysis

A. Respondent-Mother's Appeal

¶ 11 **[1]** In seeking relief from the trial court's termination orders before this Court, respondent-mother contends that the trial court erred by concluding that her parental rights in the children were subject to termination. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f) (2019). This Court reviews a trial court's adjudicatory decision "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404 (1982)). In the event that the petitioner was able to prove the existence of one or more grounds for termination, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 12 A trial court may terminate parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that it concludes that the parent has neglected the 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 defined, in per-

2. At the time of the termination hearing, paternity for Nylah had not been established. As a result, a proceeding to terminate the unknown father's parental rights in Nylah had been initiated and service of the unknown father by publication was in process. Although paternity for Merise had not yet been established either, a putative father had been identified and DSS was making efforts to determine whether that individual was actually Merise's father.

tinent 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). Although the trial court is authorized to terminate a parent's parental rights in a juvenile based upon neglect that is occurring at the time of the termination hearing, *see, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) (stating that "this Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment"), the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (cleaned up). In such a situation, "evidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect — is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). As a result, the trial court is also entitled to find that the parent's parental rights are subject to termination on the basis of neglect if it concludes that the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020). As a result, even if the record is devoid of any evidence tending to show the existence of current neglect, the trial court may find that a parent's parental rights are subject to termination based upon a determination of past neglect and a showing that a repetition of neglect is likely if the child is returned to the parent's care, *id.*, at 841, n.3, with the trial court being required to evaluate the likelihood of future neglect on the basis of an analysis of any "evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715).

¶ 13 The record reflects that the trial court found that the children were neglected in an adjudication order that was entered on 26 March 2018. In addition, the trial court found that, prior to the children's placement in DSS custody, there was a "pattern of neglect due to housing instability; substance abuse, specifically cocaine; leaving the juvenile[s] with inappropriate caretakers . . . ; and domestic violence between Respondent parents." In addition, the trial court found that, prior to the time at which DSS obtained custody of the children and while she was pregnant with Merise, respondent-mother and the children had resided at a Salvation Army shelter; that, after respondent-mother's incarceration for drug vio-

lations, she had failed to make proper arrangements for the children's care; that Merise, when she was an infant, had been "found alone in a car outside a courthouse"; that, following respondent-mother's release from incarceration, she had failed to visit with the children or provide financial assistance for their care; that respondent-mother lived in a half-way house while on parole and had failed to establish safe, stable, and suitable housing for the juveniles; that a child medical examination had resulted in a determination that Natasha and Nylah had been physically and sexually abused and that they had suffered trauma because of respondent-mother's failure to protect them; and that respondent-mother had exposed Natasha and Nylah to "multiple unsafe situations involving but not limited to inappropriate discipline, inappropriate supervision resulting in abuse, and inadequate food." Based upon these findings of fact, the trial court determined in all three termination orders that:

> Much of the neglect experienced by the juvenile[s] is directly related to Respondent mother's instability, drug use, incarcerations, and placement with multiple caretakers to whom Respondent mother entrusted that subjected the juvenile[s] to physical and sexual abuse as well as neglect.

¶ 14 According to respondent-mother, the quoted finding demonstrates that the trial court relied upon a showing of past neglect rather than upon an analysis of the circumstances that existed at the time of the termination hearing in determining that her parental rights in the children were subject to termination on the basis of neglect. Instead of evidencing a determination that respondent-mother's parental rights in the children should be terminated based solely upon evidence of past neglect, however, we interpret the quoted language as nothing more than a summary of the prior neglect to which the children had been subjected. In reaching this conclusion, we particularly note the trial court's findings that, after DSS obtained custody of the children, respondent-mother had failed to maintain consistent contact with them and did not understand or acknowledge the negative impact that the manner in which she had chosen to live and the identity of the caretakers with whom she had placed the children had had upon them.

¶ 15 The trial court's findings also reflect that respondent-mother did not enter into a case plan with DSS until 1 November 2018, which was more than a year after they had been placed in DSS custody. The trial court found that the terms and conditions set out in respondent-mother's court-ordered case plan required her to comply with a visitation agreement; resolve all of her pending legal matters; obtain and maintain hous-

ing that was sufficient for herself and the juveniles; provide verification of the stability of her housing arrangements through the provision of a lease agreement; obtain and maintain lawful employment that produced sufficient income to meet her own needs and those of the children; verify the nature and amount of her income by providing copies of pay stubs; refrain from the use of illegal or impairing substances and submit to random drug screens; comply with the requirements of her parole; obtain comprehensive mental health and substance abuse assessments and comply with any resulting recommendations; complete parenting education and demonstrate the ability to use the skills that she had learned as the result of that process; maintain consistent contact with DSS; sign releases authorizing the provision of information allowing DSS to verify her compliance with the components of her case plan; and provide certificates showing that she had satisfied the conditions of her release on parole and her compliance with the other provisions of her case plans. In addressing the extent of respondent-mother's compliance with the provisions of her case plan, the trial court made the following unchallenged findings of fact:[3]

> 54. [DSS] has had ongoing difficulty in Respondent mother signing releases for service[] providers or obtaining documentation about completed services.
>
> . . . .
>
> 59. A letter from Alternative Drug and Alcohol Counseling, LLC was admitted and received by the Court to Respondent mother's parole officer indicating successful completion of treatment. She did not previously provide this documentation. Documentation of completed drug screens was never received.
>
> 60. While on probation, Respondent mother was engaged in Potomoc Case Management Services. She did not provide documentation to or sign releases for [DSS] to obtain information about

3. There are minor variations in the numbering of the findings of fact contained in the separate different orders that the trial court entered with respect to each of the juveniles. In the interests of brevity and for ease of reference, we will quote the trial court's findings as set out in the order terminating respondent-mother's parental rights in Natasha in the text of this opinion. As a result of the fact that respondent-mother has failed to challenge any of these findings as lacking in sufficient evidentiary support, they are binding upon us for purposes of appellate review. *In re T.N.H.*, 372 N.C. 403, 407 (2019).

engagement in services or services offered by the agency.

. . . .

62. Due to lack of releases or documentation, it cannot be determined whether Respondent mother completed a comprehensive mental health assessment or whether engagement in case management services adequately addressed her mental health needs.

63. After completing parole in Maryland, Respondent mother relocated to Yonkers, New York where the maternal grandmother resides.

. . . .

65. Despite the distance from the juvenile[s], Respondent mother could have consistently communicated with [DSS], executed releases for providers, provided verification of engagement in services, and appropriately participate[d] in case planning.

. . . .

67. In June 2019, Respondent mother provided a drug and alcohol counseling letter for Alssaro Counseling Services in New York; however, [DSS] was unable to confirm that Respondent mother was engaged in their services.

68. Respondent mother subsequently indicated that she did not use Alssaro Counseling Services due to insurance issues and having to find another provider.

69. Respondent mother reports being drug tested, but she has not provided any documentation of completed negative drug screens.

70. On August 1, 2019, when Respondent mother was present for a Permanency Planning Review Hearing, [DSS] referred Respondent mother for a hair follicle drug screen.

> 71. Respondent mother failed to complete the requested hair follicle drug screen.
>
> 72. Respondent mother provided the results of a blood test from Empire City Laboratories completed on January 2, 2020; however, the test appears to be related to immunizations and communicable diseases. The test did not screen for substances.
>
> . . . .
>
> 75. Respondent mother has not completed a parenting curriculum and applied learned knowledge of skills to address her deficits.
>
> 76. Respondent mother continues to have housing instability. She reports renting a room or subletting an apartment; however, she has not provided an address to [DSS] or a copy of a lease or other housing agreement. Respondent mother receives her mail at the maternal grandmother's home.

Based upon these findings of evidentiary fact, the trial court determined that:

> Respondent mother's continued failure to maintain a safe and stable home, and her failure to assure that the juvenile[s] received proper supervision and necessary care subjects the juvenile[s] to the risks of physical and emotional harm and creates an environment injurious to [their] welfare.

The trial court also noted that Natasha and Nylah had "heightened trauma-related therapeutic needs due to Respondent mother's neglect" and that Nylah had required residential treatment for the purpose of addressing her mental health problems and accompanying behaviors. According to the trial court, the neglect that the juveniles had suffered in the past was likely to "repeat or continue" in the event that the juveniles were returned to respondent-mother's care, with this determination resting upon evidence concerning the prior neglect that the juveniles had experienced coupled with respondent-mother's failure to establish a "safe, stable, substance-free home"; her lack of contact with the juveniles; and her inability to address the juveniles' trauma-related needs.

¶ 16 In response, respondent-mother asserts that the trial court's findings do little more than restate earlier findings and that certain of them lack sufficient evidentiary support. However, the record does not support respondent-mother's contentions. For example, respondent-mother conceded that, at the time of the termination hearing, she was subletting a single room for herself, admitted that she did not have a lease, and acknowledged having lived with a friend before beginning to rent the room that she occupied at the time of the termination hearing. In light of this evidence, the trial court could have properly determined that respondent-mother had failed to establish stable housing that was suitable for both herself and the juveniles. *See In re D.L.W.*, 368 N.C. at 843 (stating that it is the trial court's duty to consider all of the evidence, to pass upon the credibility of the witnesses, and to determine the inferences that should be drawn from that evidence).

¶ 17 In addition, the record reflects that respondent-mother's case plan required her to submit to random drug screens. According to a social worker who testified at the termination hearing, respondent-mother never submitted to random drug screens. The same social worker testified that, even though DSS had requested that respondent-mother submit to a hair follicle screen when she was in North Carolina in August 2019, she failed to do so. For that reason, the social worker testified that DSS had been unable to verify that respondent-mother had maintained sobriety. As a result, the trial court had ample justification for concluding that respondent-mother had failed to overcome her substance abuse problems.

¶ 18 As far as the issue of visitation is concerned, the record reflects that Natasha did not wish to have any contact with respondent-mother, whom she blamed for causing the circumstances in which the children found themselves. In addition, the record contains evidence tending to show that, for a period of time, Nylah lacked the stability to permit visitation with respondent-mother. A social worker testified that respondent-mother had a "strained relationship" with Merise in light of respondent-mother's "lack of involvement" with the child and asserted that respondent-mother had not seen Merise since her incarceration, which had occurred when Merise was four months old, and that Merise did not recognize respondent-mother. On the one occasion when she actually visited with Merise, respondent-mother only spent half of her allotted visitation time with the child. For all of these reasons, we hold that the record contains ample support for the trial court's determination that there had been little contact between respondent-mother and the children.

¶ 19 The record also contains sufficient evidence to support the trial court's determination that respondent-mother had failed to demonstrate the ability to deal with the juveniles' "trauma-related needs and accompanying behavior[s]." Although respondent-mother testified that she was being treated for depression, she never provided any verification that tended to show the completion of a comprehensive mental health assessment or that she had been complying with any resulting treatment recommendations. In addition, a social worker and a social work supervisor both testified that respondent-mother had a limited understanding of the mental health problems from which the children suffered. According to both the social worker and the social work supervisor, respondent-mother believed that the children "just want to come home." Moreover, the social worker testified that, in light of Natasha and Nylah's special needs, both children needed a caretaker who thoroughly understood their mental health diagnoses and related treatment needs and that respondent-mother did not appear to have these attributes. Finally, a social worker testified that she had been unable to verify that respondent-mother had completed the parenting class required by her case plan. As a result, the trial court had ample justification for concluding that respondent-mother was not prepared to address the juveniles' trauma-related needs.

¶ 20 Although respondent-mother contends that the trial court failed to give proper consideration to the progress that she had made and the extent to which her circumstances had changed since her release from incarceration and that the trial court's determination that "[t]he risk [to the juveniles of] continued mental, physical, and emotion[al] impairment if [they were] in Respondent mother's custody remains" lacked sufficient record support, we are not persuaded by this argument. The trial court's orders contain numerous findings describing the components of her case plan that respondent-mother successfully completed. For example, the trial court found that respondent-mother had successfully satisfied the terms and conditions of her parole and that respondent-mother had obtained gainful employment. According to well-established North Carolina law, however, respondent-mother's compliance with a portion of her case plan "does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 184 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (2010) (acknowledging that a "case plan is not just a check list" and that "parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"). Although respondent-mother had made some progress toward satisfying the requirements of her case plan, the trial court could reasonably

determine, based upon the prior neglect that the children had experienced, respondent-mother's failure to establish stable housing that was free from substance abuse, respondent-mother's lack of contact with the juveniles, and respondent-mother's inability to meet the children's trauma-related needs, that future neglect was likely in the event that they were returned to her care, *see In re M.A.*, 374 N.C. 865, 870 (2020) (holding that, even though the respondent claimed to have made reasonable progress toward satisfying the requirements of his case plan, the trial court's findings relating to his failure to adequately address the issue of domestic violence, which had been the primary reason for the children's removal from the family home, were, "standing alone, sufficient to support a determination that there was a likelihood of future neglect"), and that respondent-mother's parental rights in the children were subject to termination on the basis of neglect. As a result, since the trial court's conclusion that a single ground for termination exists is sufficient, in and of itself, to support termination of respondent-mother's parental rights, *In re E.H.P.*, 372 N.C. at 395, and since respondent-mother has not argued that the trial court's determination that termination of her parental rights would be in the children's best interests constituted an abuse of discretion, *see* N.C.G.S. § 7B-1110(a) (2019), we affirm the trial court's orders terminating respondent-mother's parental rights in all three children.

B. Respondent-Father's Appeal

¶ 21 **[2]** Similarly, respondent-father argues that the trial court erred by concluding that his parental rights in Natasha were subject to termination. In determining that respondent-father's parental rights in Natasha were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(i), the trial court made findings of fact describing the circumstances that led to Natasha's placement in DSS custody and noting that respondent-father had been incarcerated and had failed to take any action to facilitate a placement for Natasha when she entered foster care. In addition, the trial court found that:

> 41. Respondent father is incarcerated . . . [in] Huntingdon, Pennsylvania. He has a tentative release date in 2021.
>
> 42. Respondent father has not provided any tangible items for the juvenile or otherwise provided financial assistance to support the juvenile. His ability is limited by incarceration.

> 43. Respondent father did not remain in consistent contact with [DSS] while the juvenile has been in foster care.
>
> 44. Recently, contact with Respondent father has improved. He has acknowledged and expressed remorse for his inability to protect the juvenile from abuse and neglect due to multiple inappropriate caretakers.
>
> 45. Respondent father did not correspond or sen[d] letters to the juvenile until a recent letter in which he expressed how much he cared for the juvenile and to ask for forgiveness.

¶ 22 In his initial challenge to the trial court's termination order, respondent-father argues that Finding of Fact No. 42 lacks sufficient evidentiary support. After conceding that a social worker had testified that he had failed to provide any financial assistance to Natasha's caretaker, respondent-father directs our attention to the report relating to Natasha's child medical examination, in which Natasha's caretaker had stated that respondent-father was "help[ing] out materially and financially to provide for . . . [Natasha]." As we have previously noted, however, the trial court is responsible for resolving such contradictions in the record evidence. *See In re D.L.W.*, 368 N.C. at 843. As a result, we hold that Finding of Fact No. 42 has sufficient record support.

¶ 23 Secondly, respondent-father contends that Finding of Fact No. 43 conflicts with the record evidence. In support of this contention, respondent-father points to evidence that (1) he contacted the guardian ad litem on 9 November 2017 for the purpose of offering to assume responsibility for caring for Natasha and Nylah following his release from incarceration; (2) that DSS had noted in a February 2018 court report that respondent-father had signed and returned the information release and consent forms that DSS had sent to him; and (3) that respondent-father had informed DSS on 25 October 2018 that he might be released prior to his tentative release date, that he did not wish to relinquish his parental rights, that he hoped to reunify with Natasha, and that he wanted a social worker to tell Natasha that he loved and missed her.

¶ 24 Although the record clearly reflects that respondent-father had some contact with DSS, it also supports the trial court's finding that his contacts with DSS had been inconsistent. For example, the record evidence tends to show that respondent-father had not had any contact with DSS between late 2018 and the preparation of a court report in February

2020, in which DSS had stated that "[c]ontact with [respondent-father] has been inconsistent until recently when he reached out wanting to discuss his case[.]" The court report further indicated that DSS had been able to maintain contact with respondent-father in recent months and that he had expressed remorse about his inability to care for and protect Natasha when she needed his help. Although respondent-father did send Natasha a letter in which he asked for her forgiveness and made clear how much he cared for her, the letter in question had been his first contact with Natasha after her entry into DSS custody. As a result, the record adequately supports the trial court's finding concerning the inconsistency of respondent-father's contacts with DSS.[4]

¶ 25 The trial court further found that the neglect that Natasha had experienced was likely to "repeat or continue" in the event that she was returned to respondent-father's care, with the trial court having based this finding upon the evidence concerning the neglect that Natasha had previously suffered, the fact that the neglect that led to Natasha's placement in DSS custody had occurred while he was incarcerated, and the fact that Natasha had been temporarily placed in foster care while in respondent-father's custody in 2007. In addition, the trial court found that, because of his lack of regular contact with Natasha and the fact of his incarceration, respondent-father had failed to ensure that Natasha had received appropriate care and supervision. The trial court further found that respondent-father's "criminal activity and absence from the juvenile's life constitutes abandonment resulting in his inability to protect her from abuse and neglect [which] subject[ed] the juvenile to physical and emotional harm." Finally, the trial court found that respondent-father remained incarcerated, that it was "unclear whether reentry upon release will be successful[,]" and that respondent-father "does not have the present or near future ability to establish a safe home for the juvenile."

¶ 26 In respondent-father's view, the record did not contain sufficient evidence to support a finding that Natasha experienced neglect while in his care, with the only support for this assertion consisting of references contained in child protective services reports from 2007 to 2016. According to respondent-father, the statements in question constituted mere allegations and were, for the most part, directed toward conduct in which respondent-mother had engaged. A careful review of the record reflects, however, that a social worker had testified that, in 2007,

4. We also note that the trial court softened the import of Finding of Fact No. 43 in Finding of Fact No. 44 by noting the recent improvements in the level of contact between respondent-father and DSS.

Natasha had been placed in foster care as the result of concerns relating to domestic violence, drug distribution, and respondent-father's use of drugs. In light of this evidence, the trial court was entitled to infer that neglect by respondent-father had resulted in Natasha's placement in foster care in 2007. *See In re D.L.W.*, 368 N.C. at 843.[5]

¶ 27 In addition, respondent-father argues that the trial court's references to his incarceration as having resulted in neglect or abandonment rested upon a misapprehension of law given that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision," *In re Yocum*, 158 N.C. App. 198, 207–08, *aff'd* 357 N.C. 568 (2003), with the trial court having erroneously predicated its determination that he had neglected Natasha upon the mere fact of his incarceration. *Id.* Although the trial court did find that respondent-father had failed to send any tangible items for Natasha's benefit or to provide her caretakers with financial assistance, it acknowledged that respondent-father's incarceration limited his ability to do so. *Cf. In re A.J.P.*, 375 N.C. 516, 530 (2020) (stating that "[a] parent's incarceration is a circumstance that the trial court must consider in determining whether the parent has made reasonable progress toward correcting those conditions which led to the removal of the juvenile" (cleaned up)). The trial court also found that, during his period of incarceration, respondent-father made no attempt to contact Natasha, with the exception of sending a single letter, and that he had had limited contact with DSS. *See In re S.D.*, 374 N.C. 67, 75–76 (2020) (stating that "incarceration does not negate a father's neglect of his child because the sacrifices which parenthood often requires are not forfeited when the parent is in custody," so that, "while incarceration may limit a parent's ability to show affection, it is not an excuse for a parent's failure to show interest in a child's welfare by whatever means available" (cleaned up)). Finally, the trial court made the unchallenged finding that, when respondent-father was not incarcerated, "he was only involved in the juvenile's life in a limited way[.]" As a result, while the trial court did refer to respondent-father's incarceration in its findings of fact, it did so only in the context of acknowledging the limitations upon his ability to take certain steps that would have helped him develop and maintain a relationship with Natasha that resulted from his

5. Even if this finding lacked sufficient evidentiary support, any such defect would not fatally undermine the trial court's order given the absence of any dispute about whether Natasha had been adjudicated to be a neglected juvenile in 2018. *See In re M.A.W.*, 370 N.C. 149, 153 (2017) (holding that a prior adjudication of neglect based on a mother's substance abuse and mental health issues was "appropriately considered" by the trial court as "relevant evidence" in proceedings to terminate the parental rights of a father who was incarcerated at the time of the prior adjudication).

incarceration rather than basing its finding of neglect solely upon the fact that he was incarcerated. As a result, after a careful examination of the record, we hold that the trial court did not err by concluding that a repetition of neglect was likely, *see In re O.W.D.A.*, 375 N.C. 645, 653–54 (2020) (stating that "evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect" and that, although respondent-father had made some recent, minimal progress in attempting to reunify with Natasha, "the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements . . . and to conclude that there was a probability of repetition of neglect" (citation omitted)), and that respondent-father's parental rights in Natasha were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 28 **[3]** Secondly, respondent-father contends that he received ineffective assistance of counsel at the termination hearing. In respondent-father's view, the failure of his trial counsel to ensure that he was able to attend the termination hearing on a remote basis and the fact that his trial counsel failed to present evidence, cross-examine witnesses, lodge any objections, or advance any arguments on respondent-father's behalf constituted deficient performance that prejudiced his chances for a more favorable outcome at the termination hearing. We do not find respondent-father's argument persuasive.

¶ 29 A "parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right," in a termination of parental rights proceeding. 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." *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 33 (2020). "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 [him] of a fair hearing." *Id.* (cleaned up). "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.' " *Id.* (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985)).

¶ 30 A careful examination of respondent-father's brief clearly demonstrates that he has failed to show that he suffered any prejudice as a result of the allegedly deficient performance of his trial counsel. Simply put, nothing in the record suggests that there was anything that respondent-father's trial counsel could have done to overcome the ob-

stacles that he faced in this case arising from the undisputed evidence that respondent father had failed to make any significant effort to prevent Natasha from entering into DSS custody and had failed to take significant steps to develop and maintain a relationship with Natasha or to remain in consistent contact with DSS once Natasha had entered DSS custody. Thus, we hold that respondent-father is not entitled to relief from the trial court's termination order on the basis of ineffective assistance of counsel. As a result, given that the trial court's determination that a single ground for termination exists is sufficient, in and of itself, to support the termination of respondent-father's parental rights in Natasha, *In re E.H.P.*, 372 N.C. at 395; the fact that respondent-father has not argued that the trial court's determination that the termination of his parental rights would be in Natasha's best interests constituted an abuse of discretion; and the fact that respondent-father's challenge to the quality of the representation that he received from his trial counsel lacks merit, we affirm the trial court's order terminating respondent-father' parental rights in Natasha as well.

AFFIRMED.

IN THE MATTER OF P.M., A.M., N.M.

No. 321A20

Filed 23 April 2021

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

The termination of a father's parental rights to his three children—on the grounds of neglect and willful failure to make reasonable progress in correcting the conditions that led to the children's removal—was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 April 2020 by Judge Joseph Moody Buckner in District Court, Orange County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE P.M.

[377 N.C. 366, 2021-NCSC-54]

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Q Byrd Law, by Quintin D. Byrd, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

PER CURIAM.

¶ 1 Respondent-father appeals from the trial court's orders terminating his parental rights to the minor children P.M. (Peter), A.M. (Alice), and N.M. (Nathan) (collectively "the children").[1] Counsel for respondent-father has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel as arguably supporting the appeal are meritless, and therefore, we affirm the trial court's orders.

¶ 2 On 23 March 2018, the Orange County Department of Social Services (DSS) obtained nonsecure custody of the children and filed petitions alleging that the children were neglected and dependent juveniles. The petitions alleged that DSS "was previously involved with the family in 2013 due to concerns [of] improper care" after the parents "left the children in the care of the maternal grandmother who was unable to provide for the children's basic needs." In February 2018, DSS became involved with the family due to concerns of sexual abuse, improper care, an injurious environment, and substance abuse. Specifically, there were concerns that two of the children were sexually abused by their paternal uncle. In addition, the children's mother[2] had "a history of heroin use[,] and the children . . . witness[ed] her suffer[ ] withdrawal symptoms."

¶ 3 Further, the petitions alleged that the parents fled North Carolina with the children to avoid criminal charges but were arrested in Illinois. The children's maternal grandmother retrieved the children from Illinois and brought them back to North Carolina. Moreover, the petitions alleged that the children "disclosed a history of domestic violence" between the parents and that the children had been "exposed . . . to [respondent-parent's] illegal activities." At the time the juvenile petitions were filed, respondent-father was serving a six-year prison sentence in the State of Illinois.

---

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

2. The children's mother is not a party to this appeal.

¶ 4 On 9 July 2018, the trial court adjudicated the children to be neglected and dependent juveniles. Custody of the children remained with DSS. Respondent-father was ordered to complete a mental health assessment and follow recommendations, comply with random drug and alcohol screens, participate in a parenting class, maintain contact with DSS and notify DSS of any changes in circumstances within five business days, complete a substance abuse assessment and follow recommendations, obtain and maintain sufficient legal income for himself and the children, obtain and maintain sufficient housing for himself and the children, and enroll in and complete a domestic violence class or program.

¶ 5 Following a permanency-planning hearing on 21 March 2019, the trial court entered an order on 30 April 2019. The trial court found that respondent-father was due to be released from incarceration in Illinois on 1 June 2020 and that he would be subject to post-release supervision until 1 June 2023. He was enrolled in anger management classes, parenting classes, and substance abuse treatment. However, the trial court found that respondent-father's ability to complete the courses may be impacted as a result of him securing employment. While respondent-father accepted responsibility for the impact of his substance abuse on the children, he continued to deny any instance of domestic violence. The trial court changed the children's primary permanent plan to adoption with a secondary permanent plan of reunification and ordered DSS to pursue termination of parental rights.

¶ 6 On 4 September 2019, DSS filed petitions to terminate respondent-father's parental rights on the grounds of (1) neglect and (2) willfully leaving the children in foster care or placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). Following a hearing on 5 March 2020, the trial court entered orders on 9 April 2020 concluding that grounds existed to terminate respondent-father's parental rights to the children based on both grounds alleged by DSS. The trial court further concluded that termination of respondent-father's parental rights was in the children's best interests. Accordingly, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

¶ 7 Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In his brief, counsel identified three issues that could arguably support an appeal but also explained why he 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.

¶ 8 We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting a review of the entire record and the issues identified by counsel in the no-merit brief, we are satisfied the trial court's 9 April 2020 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 in the children.

AFFIRMED.

IN THE MATTER OF T.M.L. AND A.R.L.

No. 232A20

Filed 23 April 2021

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—relevant time period—poverty exception

An order terminating a father's parental rights was affirmed where the trial court's findings of fact supported a conclusion that he willfully failed to make reasonable progress in correcting the conditions leading to his children's removal (N.C.G.S. § 7B-1111(a)(2)). The order contained sufficient findings regarding the father's lack of progress up to the date of the termination hearing (the relevant time period under the statute), and the "poverty exception" in section 7B-1111(a)(2) did not require the court to enter specific findings addressing whether poverty was the "sole reason" for the father's failure to make reasonable progress where the father presented no evidence that he was impoverished.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 7 February 2020 by Judge Larry Leake in District Court, Mitchell County.[1] This matter was calendared for argument in the Supreme

1. Although the termination orders indicate they were filed in Yancey County, the entirety of the record otherwise confirms Mitchell County to be their county of origin.

Court on 19 March 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee Mitchell County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

BERGER, Justice.

¶ 1 Respondent-father appeals from orders terminating his parental rights in the minor children "Troy" and "Ava."[2] The children's mother died during the course of the underlying juvenile proceedings and is not a party to this appeal. Based on our review of the record and respondent-father's arguments, we hold the trial court properly considered respondent-father's progress up to the time of the termination hearing before concluding that he willfully failed to make reasonable progress to correct the conditions that led to the children's removal from the home. *See* N.C.G.S. § 7B-1111(a)(2) (2019). We further hold the trial court did not err by failing to consider whether poverty was the "sole reason" for respondent-father's failure to correct the conditions which led to removal. *See id.* Accordingly, we affirm the trial court's orders.

I. Facts and Procedural History

¶ 2 Petitioner Mitchell County Department of Social Services (DSS) obtained nonsecure custody of the children on September 14, 2017, and filed juvenile petitions alleging that the children were neglected and dependent juveniles. The trial court adjudicated the children to be neglected and dependent juveniles on January 11, 2018. The trial court found that the mother and respondent-father had a history of substance abuse and domestic violence which had previously resulted in the children being removed from the home and placed in DSS custody. At the time the petitions were filed, the mother had removed the children from their DSS-approved safety placement with their maternal grandmother. When DSS later found the mother with the children at a medical clinic,

2. We use pseudonyms to protect the juveniles' privacy.

she was in a disoriented condition and had multiple syringes and empty pill bottles in her possession.

¶ 3 In its initial adjudication and disposition order entered on January 11, 2018, the trial court ordered respondent-father to develop a case plan with DSS and delayed any visitation by respondent-father with the children "pending the signing of his DSS case plan and random clean drug screens." Respondent-father did not sign his DSS case plan until July 18, 2018. The case plan required him to address issues of substance abuse, domestic violence, parenting skills, and housing and employment stability.

¶ 4 On November 20, 2019, DSS filed petitions to terminate respondent-father's parental rights in Troy and Ava on the ground that he had willfully left them in an out-of-home placement for a period of at least twelve months without making reasonable progress to correct the conditions which led to their removal on September 14, 2017. *See* N.C.G.S. § 7B-1111(a)(2). Respondent-father failed to file an answer to the TPR petitions within the period prescribed by N.C.G.S. § 7B-1107 (2019). The trial court held a hearing on the petitions on January 3, 2020, and entered orders terminating respondent-father's parental rights in the children on February 7, 2020. Respondent-father gave timely notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019).

II. Adjudication Under N.C.G.S. § 7B-1111(a)(2)

¶ 5 Respondent-father now claims the trial court erred in adjudicating grounds for the termination of his parental rights for his willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). As a general matter, 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, with the trial court's conclusions of law being subject to de novo review on appeal. Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights.

In re M.A., 374 N.C. 865, 869, 844 S.E.2d 916, 920 (2020) (cleaned up).

¶ 6 The statute at issue authorizes the trial court to terminate parental rights if the respondent-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). It further provides that "[n]o parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." *Id.*

A. Respondent-father's progress as of the termination hearing date

¶ 7 Respondent-father first claims the trial court erred by "fail[ing] to consider evidence of [his] progress through the date of [the] hearing" in determining whether he had made reasonable progress in correcting the conditions which led to the children's removal from the home. "While the trial court was correct in making findings of fact about [his] lack of progress in the year prior to the filing of the petition to terminate parental rights," respondent-father contends the trial court "cannot discount the progress he made from August 2019 through the date of the hearing" on January 3, 2020.

¶ 8 "[A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be left in foster care or placement outside the home pursuant to a court order for more than a year at the time the petition to terminate parental rights is filed." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (cleaned up). However, the reasonableness of the parent's progress "is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *Id.* (quoting *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006)).

¶ 9 The trial court's findings of fact[3] refute respondent-father's assertion that the court failed to consider his progress up to the date of the termination hearing. Among the trial court's findings in support of its adjudication under N.C.G.S. § 7B-1111(a)(2) are the following:

> [B]y the time the respondent father signed his DSS case plan in July, 2018 his housing was inadequate for the [children] and had no running water; *the respondent father has made no progress in the [c]ourt's judgment* to remedy that problem; the respondent father testified *he could now remedy the housing problem* by either renting a home from $500–$600 per month or saving money for the

3. The trial court's orders are identical in all respects pertinent to respondent-father's arguments on appeal.

> purchase of a $60,000 home; the [c]ourt finds that approach by the *respondent father . . . does not provide any credible evidence to support he has any meaningful chance of securing suitable housing for the juvenile[s]*; as for employment, the respondent father has testified *he has worked "most of the time"* while not in prison; however, *the most recent employment he described began in November, 2019 at 35–40 hours per week* is inconsistent with his other testimony in which he acknowledged "no, I had not been employed by someone all the time"; . . . the [c]ourt finds *the respondent father has not obtained and maintained the necessary employment* as required by the DSS case plan; . . . the respondent father testified *he has participated in Triple P Parenting [classes] although he has provided no documentation* regarding the same; . . . the respondent father has testified *he has called approximately 50 times to DSS* to express his concerns about the juvenile[s] and gain information regarding the case; *the [c]ourt finds that testimony not credible; . . . that DSS workers have regularly and consistently reached out to the respondent father* to let him know about the juvenile[s]; that the respondent father's contact with . . . DSS . . . or efforts to comply with the DSS case plan *has been essentially nonexistent*; that the *respondent father continues to reside in his residence* in Cleveland County with his girlfriend; [and] the same *still has no running water* . . . .

(Emphases added.) The suggestion that the trial court failed to consider respondent-father's circumstances as of the termination hearing has no merit.

¶ 10 Respondent-father also accuses the trial court of "discrediting any progress [he] made . . . in the six months leading up to the termination hearing." Although respondent-father makes no reference to the trial court's actual discussion of the issue—whether in open court at the termination hearing or in its written order—our own review of the record confirms the trial court's mistaken view of the time period pertinent to an adjudication under N.C.G.S. § 7B-1111(a)(2).

¶ 11 After hearing the parties' evidence and closing arguments, the trial court announced as follows:

> The [c]ourt finds and accepts that it is charged by law with evaluating whether the Respondent-Father has made reasonable effort to accomplish the plan goals and to eliminate those barriers or matters which led to the children being taken into the custody of [DSS] in that 12-month time period between November 21, 2018, and November 20 of 2019, the time of the filing of this action. The [c]ourt has heard evidence, events both before . . . November 21, 2018, and after November 20, 2019, and makes findings relative to those events, only as they might shed light on the events and significance of what occurred in the year preceding the filing of the termination petition by [DSS].

¶ 12 The trial court included similar language in its written orders as part of finding of fact 10:

> [I]n evaluating whether the respondent father has made reasonable efforts to accomplish the plan goals and to eliminate the reasons the juvenile[s] came into DSS custody, the [c]ourt has focused on the barriers that led to the [children] being placed in DSS custody and that 12 month time period between 11/21/18 and 11/20/19 (when the TPR Petition[s] w[ere] filed); the [c]ourt has also heard evidence as to events, both before and after those dates, and made findings as to those events as may shed light on the events and significance [sic] in the year previous to the TPR Petition[s] being filed by Mitchell [County] DSS . . . .

By focusing on respondent-father's progress during the twelve-month period that preceded the filing of the TPR petitions, rather the entirety of his progress up to the date of the termination hearing, the trial court applied an incorrect standard in adjudicating the existence of grounds for terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(2). *See In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (requiring consideration of parent's progress "up to the hearing on the motion or petition to terminate parental rights" (quoting *In re A.C.F.*, 176 N.C. App. at 528, 626 S.E.2d at 735)).

¶ 13 Our conclusion that the trial court erred does not end our inquiry. "An appellant must not only show error; he must show that the error was prejudicial." *Rudd v. Am. Fid. & Cas. Co.*, 202 N.C. 779, 782, 164

S.E. 345, 347 (1932). Moreover, this Court has long held that "a correct decision of the lower court will not be disturbed because the court gave a wrong or insufficient reason therefor." *Temple v. Temple*, 246 N.C. 334, 336, 98 S.E.2d 314, 315 (1957).

¶ 14 The record shows the trial court mistakenly believed that N.C.G.S. § 7B-1111(a)(2) required it to assess respondent-father's progress during the twelve-month period between November 2018 and November 2019. However, the trial court also made findings of fact that account for respondent-father's progress up to the date of the termination hearing—albeit only in order to "shed light on the events and significance of what occurred in the year preceding the filing of the termination petition[s]." Regardless of the trial court's purpose in making these findings, they are sufficient to permit a determination of the existence of grounds for terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(2) because they reflect the totality of respondent-father's progress in correcting the conditions which led to the children's removal from the home up to the date of the termination hearing. *See In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

¶ 15 This Court reviews de novo the issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a). *In re M.A.*, 374 N.C. at 869, 844 S.E.2d at 920. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re C.V.D.C.*, 374 N.C. 525, 530, 843 S.E.2d 202, 205 (2020) (alteration in original) (quoting *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

¶ 16 Here, conclusion of law 3 states as follows:

> [R]espondent father has willfully left the [children] in foster care or placement outside the home for a period of more than 12 months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the [children] as prescribed by [N.C.G.S. §] 7B-1111(a)(2).

¶ 17 Reviewing this issue de novo, we hold the trial court's findings of fact support a conclusion that respondent-father had willfully failed to make reasonable progress *at the time of the termination hearing* to correct the conditions which led to the children's removal from the home.

¶ 18 At the time of the January 3, 2020 hearing, respondent-father had been provided more than twenty-seven months to correct the conditions which led to the children's removal from the home. In his brief, respondent-father provides the following description of his DSS case plan signed on July 18, 2018:

> The plan required him to take parenting classes due to his limited parenting experiences. Because of [his] prior substance use, he was expected to complete a CCA (Comprehensive Clinical Assessment) and follow recommendations, as well as comply with requests for drug screens from DSS. [He] was to obtain a steady job to support himself and the children as well as housing appropriate for himself and the children. He would address any domestic violence concerns and follow recommendations from the CCA and attend the Batterers Intervention Program ("BIP").

¶ 19 As found by the trial court, respondent-father failed to comply with the domestic violence component of his case plan by completing BIP. Respondent-father acknowledged he was dismissed from BIP for non-attendance in late 2018. Although he purported to have signed up for the program a second time in mid-November 2019, he testified he had completed just one-third of the required classes and would need "[t]hree or four months" of additional regular attendance in order to complete the program.

¶ 20 Respondent-father argues that his failure to complete the BIP "matters only if he had not addressed the cause of the domestic violence concerns" arising from his history of domestic violence with the children's mother, which included a 2017 conviction for assault on a female against her. This argument has no merit. The trial court was empowered to require respondent-father to obtain treatment for domestic violence as a condition of his case plan. *See In re D.L.W.*, 368 N.C. 835, 845, 788 S.E.2d 162, 168 (2016) ("Subdivision 7B-904(d1)(3) authorizes the trial court to order that a parent '[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.' " (alteration in original) (quoting N.C.G.S. § 7B-904(d1)(3) (2015))). Moreover, respondent-father's failure to complete the services prescribed by his case plan is probative of his lack of reasonable progress. *See In re D.L.W.*, 368 N.C. at 844, 788 S.E.2d at 168 (holding "the Court of Appeals incorrectly concluded that re-

spondent's failure to comply with these [case plan] requirements could not justify the termination of her parental rights" pursuant to N.C.G.S. § 7B-1111(a)(2)).

¶ 21 Respondent-father's observation that he and the children's mother "were no longer together" at the time of the termination hearing is undoubtedly true, given the mother's death in 2017. However, the death of the children's mother did not absolve respondent-father of obtaining the treatment prescribed by his case plan to address his domestic violence history. *See generally In re J.S.*, 374 N.C. at 815–16, 845 S.E.2d at 71 (requiring only "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 order for noncompliance to support termination under N.C.G.S. § 7B-1111(a)(2) (cleaned up) (quoting *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019))). Nor was respondent-father relieved of complying with his case plan by the fact that DSS offered no evidence of additional acts of domestic violence between respondent-father and his current girlfriend. *See id.*

¶ 22 The trial court also found respondent-father had "made no progress" to "obtain housing appropriate for himself and the children" as required by his case plan. The evidence showed respondent-father and his girlfriend had resided since 2018 in a 350-square-foot structure without bedrooms or plumbing—which DSS and the trial court had found to be inadequate.

¶ 23 As for stable employment, the trial court found respondent-father reported having full-time employment with a construction company since mid-November 2019, a period of less than two months at the time of the hearing. Respondent-father characterized his previous employment as "fairly steady" and involving "home improvements and side jobs." However, he acknowledged having been convicted of possession of a stolen firearm in March 2019, which resulted in the revocation of his probation for his 2017 conviction for assault on a female and five months of incarceration from March to July 2019. In addition, the trial court found he "has not obtained and maintained the necessary employment as required by the DSS case plan" because respondent-father admitted to lacking stable employment before DSS filed the petitions to terminate his parental rights and provided no documentation of his employment or income.

¶ 24 Respondent-father suggests his failure to maintain stable employment "was an important factor only if his lack of employment flowed

from or led to his substance abuse." To the contrary, as explained in his case plan, stable employment was important in order to allow respondent-father "to be able to support himself and the children."

¶ 25 Regarding the substance abuse component of his case plan, the trial court found respondent-father obtained a CCA on August 12, 2019, but did so "unbeknownst to DSS" and "after DSS was relieved" of reunification efforts. Although the DSS social worker received a copy of the CCA at the termination hearing,[4] she testified she had not previously seen the document, and respondent-father had provided no documentation indicating his compliance with the CCA's recommendations as required by his case plan. Respondent-father did not claim to have complied with the CCA's recommendations during his testimony at the termination hearing.

¶ 26 The trial court found respondent-father tested positive for marijuana at a drug screen performed on a court date in October 2018 and refused additional drug screens requested by DSS in October and November 2018, after which the trial court relieved DSS of reunification efforts. The trial court also found respondent-father refused a drug screen requested by DSS in December 2018, advising the social worker that "he did not have the financial means to comply."

¶ 27 Respondent-father does not contest these findings and in fact "stipulate[s] that he tested positive for marijuana when tested twice in court and admitted he would have tested positive a third time."[5] He instead implies that his continued drug use while the children were in DSS custody is insignificant because "he was not caring for the children at the time." Respondent-father likewise downplays his refusal to submit to DSS's drug screens, citing the fact that he was on criminal probation throughout the course of the juvenile proceedings and submitting to drug screens was a requirement of his probation. Respondent-father contends DSS presented no evidence contradicting his testimony "that his drug test results with probation were negative as supported by the fact that he was not violated for using drugs while on probation."

¶ 28 We offer no comment concerning the relevance of respondent-father's success in satisfying the requirements of his probation as proof of his progress in addressing the issue of substance abuse while simultaneous-

4. The CCA was not admitted into evidence at the termination hearing, and no witness described its contents.

5. During his testimony at the termination hearing, respondent-father admitted he attended previous court hearings while drunk.

ly stipulating to using marijuana and to submitting to multiple positive drug screens during the same period. The trial court could reasonably construe respondent-father's positive drug screens and refusal of requested screens as noncompliance with this component of his case plan. Moreover, it appears respondent-father never submitted the negative drug screens required to be allowed visitation with the children as provided in the initial adjudication and disposition order.

¶ 29 As for the parenting skills portion of his case plan, respondent-father appears to take issue with the trial court's finding that he "testified he has participated in Triple P Parenting [classes] although he has provided no documentation regarding the same." One DSS social worker acknowledged having "been given a copy of a certificate for a Triple P online parenting course with today's date" on the day of the hearing, indicating respondent-father's completion of the course. However, the transcript does not reflect that either DSS or respondent-father tendered this document to the trial court as evidence. We assume *arguendo* that, consistent with the testimony from the termination hearing, respondent-father had not completed any parenting classes at the time DSS filed its TPR petitions in November 2019 but had recently completed an online parenting course at the time of the termination hearing. Accordingly, we disregard the trial court's finding to the contrary for purposes of our review. *See In re S.D.*, 374 N.C. 67, 83, 839 S.E.2d 315, 328 (2020).

¶ 30 The trial court found that "[t]he failure of the respondent father to comply with the DSS case plan[ ] and eliminate the reasons the [children] came into DSS custody demonstrates his failure to make reasonable progress to correct the conditions leading to the removal of the [children] from his home." We have held that "parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)" provided that "the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re B.O.A.*, 372 N.C. at 384, 831 S.E.2d at 313–14.

¶ 31 Here, respondent-father's failure to meaningfully engage with the case plan objectives related to substance abuse, domestic violence, and suitable housing, despite being given more than twenty-seven months to do so, supports the trial court's conclusion that he willfully failed to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). Respondent-father's claim that he had "addressed the areas of concern listed in his case plan, even if the trial court did not approve of the exact

manner or timeliness with which he did so" is not borne out by the record or by the trial court's uncontested findings.

¶ 32 Although the record shows respondent-father made some last-minute attempts to comply with the case plan by the time of the termination hearing—including completing a CCA, completing an online parenting course, obtaining full-time employment, and reenrolling in domestic violence treatment—he still had not completed domestic violence treatment or addressed his substance abuse issues, and he remained in housing unsuitable for the children. Respondent-father's partial steps—undertaken after DSS had filed petitions to terminate his parental rights and two years or more after the children's removal from the home—are insufficient to constitute reasonable progress under N.C.G.S. § 7B-1111(a)(2).[6] *See, e.g.*, *In re I.G.C.*, 373 N.C. 201, 206, 835 S.E.2d 432, 435 (2019) (affirming adjudication under N.C.G.S. § 7B-1111(a)(2) when the "respondent-mother waited too long to begin working on her case plan and that, as a result, she had not made reasonable progress toward correcting the conditions that led to the children's removal by the time of the termination hearing").

B. The poverty exception in N.C.G.S. § 7B-1111(a)(2)

¶ 33 Respondent-father also challenges the trial court's adjudication on the ground that the court "failed to consider whether poverty was a factor in his inability to complete his case plan." He bases his argument on the qualifying language that appears at the conclusion of N.C.G.S. § 7B-1111(a)(2): "No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." N.C.G.S. § 7B-1111(a)(2) (2019).

---

6. Respondent-father asserts he "was not required to have fully complied with his case plan by the time of the termination hearing" in order to meet the "reasonable progress" standard in N.C.G.S. § 7B-1111(a)(2). As a statement of general principle, this is true. *See In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314 (cautioning 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" (cleaned up) (quoting *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006))). However, the parent's progress must be "reasonable" under the circumstances, including the amount of time the parent has enjoyed to correct the conditions at issue. *See In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (2020) ("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 . . . ." (cleaned up) (quoting *In re J.W.*, 173 N.C. App. 450, 465–66, 619 S.E.2d 534, 545 (2005))).

¶ 34 However, respondent-father did not file an answer to the TPR petitions, and so he did not assert poverty or any other potential defense to the grounds for termination alleged under N.C.G.S. § 7B-1111(a)(2). *See generally* N.C.G.S. § 7B-1107 (2019) (authorizing the trial court upon a parent's failure to file a responsive pleading to "issue an order terminating all parental and custodial rights of that parent with respect to the juvenile; provided the court shall order a hearing . . . on [the facts alleged in] the petition or motion"). Nor did respondent-father raise the issue of poverty to the trial court during the termination hearing as a potential basis to avoid termination of his parental rights.

¶ 35 "Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof." *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998); *see also* N.C.G.S. § 1A-1, Rule 8(c) (2019). However, we have not previously classified a parent's poverty as an affirmative defense and decline to do so here.

¶ 36 The precise nature of respondent-father's argument is unclear. A portion of his brief may be fairly read as asserting that an adjudication under N.C.G.S. § 7B-1111(a)(2) requires a finding by the trial court to the effect that poverty is not the cause of the parent's failure to correct the conditions which led to the children's removal. In fact, respondent-father "challenges the trial court's failure to make a required statutory finding." In support of this argument, respondent-father quotes the poverty exception in N.C.G.S. § 7B-1111(a)(2) and asserts that "[t]he trial court's failure to address this factor at all requires this Court to reverse the termination order[s]." Elsewhere, however, respondent-father appears to contend the trial court failed to make findings evincing that it considered the evidence in light of the statutory language barring termination of parental rights under N.C.G.S. § 7B-1111(a)(2) based solely on the parent's inability to care for the children on account of the parent's poverty.

¶ 37 To the extent respondent-father argues that N.C.G.S. § 7B-1111(a)(2) requires an affirmative finding by the trial court that poverty is not the sole reason of a parent's inability to care for a child as an element or "factor" of the adjudication, we find no merit to his argument.

¶ 38 Subsection (a)(2) begins by defining one of the eleven grounds authorized by N.C.G.S. § 7B-1111 for terminating parental rights:

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

> circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C.G.S. § 7B-1111(a)(2). It concludes with the following qualifier: "No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." *Id.*

¶ 39 The poverty exception in N.C.G.S. § 7B-1111(a)(2) does not define the "elements" of this statutory ground for terminating parental rights. The exception instead establishes what is *not* a willful failure to make reasonable progress under the circumstances for purposes of N.C.G.S. § 7B-1111(a)(2). Therefore, to the extent respondent-father "challenges the trial court's failure to make a required statutory finding" about poverty or its effect on his ability to care for the children, his argument is overruled.

¶ 40 To the extent respondent-father instead complains that the trial court's findings fail to reflect its consideration of the poverty exception in N.C.G.S. § 7B-1111(a)(2), we conclude his argument is without merit.

¶ 41 Because the statutory poverty exception does not create an affirmative element or factor required to support an adjudication under N.C.G.S. § 7B-1111(a)(2), the trial court has no obligation to make specific findings on the issue in the absence of evidence tending to show that poverty is the sole reason for a parent's inability to care for the child.

¶ 42 A review of the transcript from the termination hearing shows respondent-father did not claim and the trial court heard no evidence that poverty was the "sole reason" respondent-father failed to correct the conditions which led to the children's removal from the home. N.C.G.S. § 7B-1111(a)(2). Respondent-father did not purport to provide an accounting of his income and expenses during the period between September 2017 and January 2020[7], nor did he testify he was financially unable to care for his children or comply with his case plan. His counsel likewise made no mention of poverty in his motion to dismiss at the conclusion of the evidence or in his closing argument to the trial court.

¶ 43 Respondent-father contends the trial court should have considered whether poverty was "*a factor*" or "*an issue* that affected [his] ability to remedy the conditions causing the children's removal" or "*may have*

---

7. Respondent-father stated he was currently earning $400 to $450 per week at the job he had obtained in mid-November 2019. He described his previous employment as "fairly steady" but did not provide specific information about his earnings.

interfered with [his] ability to" do so. None of these formulations are consistent with the statutory standard. We conclude the trial court's findings accurately reflect the evidence of respondent-father's circumstances and fully support the trial court's determination that his lack of progress was willful. *Compare In re N.K.*, 375 N.C. 805, 816, 851 S.E.2d 321, 330 (2020) ("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 [the child] did not stem solely from her poverty."), *with In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015) ("The only other factor which could support the trial court's conclusion [that respondent failed to make reasonable progress] was respondent's meager income, but again, poverty alone cannot be a basis for termination of parental rights.").

III. Conclusion

¶ 44 The trial court's findings of fact support its conclusion that grounds exist for the termination of respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Respondent-father does not contest the trial court's conclusion under N.C.G.S. § 7B-1110(a) that termination of his parental rights was in the children's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's orders.

AFFIRMED.

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC
v.
RESCO PRODUCTS, INC., AND PIEDMONT MINERALS COMPANY, INC.

No. 326PA19

Filed 11 June 2021

Constitutional Law—state and federal—freedom of speech—right to petition the government—public rezoning hearings

Where a land developer backed out of a deal to purchase property from a real estate company (plaintiff) based on statements made by the owners of a neighboring open-quarry mine (defendants) at local public rezoning hearings, the trial court properly dismissed plaintiff's action against defendants for tortious interference with a prospective economic advantage because defendants' statements constituted protected petitioning activity under the First Amendment of the U.S. Constitution and Article I, Section 12 of the North Carolina Constitution. The Supreme Court reversed the Court of Appeals' decision reversing the trial court's order granting dismissal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 266 N.C. App. 255, 831 S.E.2d 395 (2019), reversing an order granting defendants' motion to dismiss entered on 1 October 2018 by Judge Michael J. O'Foghludha in Superior Court, Orange County. Heard in the Supreme Court on 12 January 2021.

Manning Fulton & Skinner, P.A., by J. Whitfield Gibson and Charles L. Steel, IV, for plaintiff.

Weaver, Bennett & Bland, P.A., by Abbey M. Krysak, and McGuireWoods, LLP, by Bradley R. Kutrow, for defendants.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Assistant Solicitor General, Ryan Y. Park, Solicitor General, and K. D. Sturgis, Special Deputy Attorney General, amicus curiae.

NEWBY, Chief Justice.

¶ 1 Expressing one's views to government officials is foundational to our political system. This fundamental right to petition the government is protected by both the United States and North Carolina Constitutions. Lawsuits that seek to impose liability based on petitioning activity in-

evitably chill the exercise of this fundamental right. Here defendants exercised their constitutional right to petition the government when speaking at the public zoning hearings, a political process. We hold that the First Amendment of the United States Constitution and Article I, Section 12 of the North Carolina Constitution explicitly protect petitioning activity, including defendants' speech in this case. Therefore, we reverse the decision of the Court of Appeals.

¶ 2 Because this case involves a motion to dismiss, we take the following allegations as true from plaintiff's complaint. In the summer of 2013, Cheryl Lloyd Humphrey Land Investment Company, LLC (plaintiff), began negotiations with a third party, Braddock Park Homes, Inc. (Braddock Park), to sell approximately 45 acres of land located in Hillsborough. Braddock Park planned to develop the land into a 118-unit subdivision of townhomes. A five-and-a-half acre portion of the property, referred to as Enoe Mountain Village (EMV Property), is located adjacent to the open-quarry mine that Resco Products, Inc. and Piedmont Minerals Company, Inc. (together, defendants) jointly own.

¶ 3 The property could not be developed as planned unless the Town of Hillsborough (Town) annexed the land and rezoned[1] it as "Multi-Family Special Use." In the fall of 2013, the Town began a series of hearings to allow the public to express their views about the rezoning petition. Defendants' representatives attended the public hearings and opposed the rezoning of the EMV Property. Defendants' representatives told the Town that (1) they operate an active mine adjacent to the EMV Property; (2) they regularly engage in explosive blasting at the mine; and (3) they conduct the explosive blasting operations roughly 300 feet from the EMV Property. Defendants' representatives "maliciously, intentionally and without justification misrepresented" that future residents living on the EMV Property could be endangered by fly rock, excessive air blasts, and excessive ground vibrations from the blasting operations. When questioned, defendants admitted that they had not reported any violations of ground vibration or air blast limits or the occurrence of fly rock beyond the mine's permitted areas since the date of their last mining permit. Further, defendants conceded they could conduct their operations without endangering the future improvements to or residents of the EMV Property. They admitted that doing so would require additional safety precautions, increasing their costs. Despite the opposition expressed

1. We refer to the annexation and rezoning of plaintiff's land collectively as "rezoning." Further, we refer to the body deciding whether to rezone plaintiff's land and before which defendants made their contested statements as the "Town."

by defendants' representatives, the Town rezoned all of the land as residential and issued the necessary permit in early February of 2014.

¶ 4 Thereafter, plaintiff and Braddock Park entered into a Purchase and Sale Agreement, whereby Braddock Park would purchase the entire 45-acre parcel. However, in the agreement, Braddock Park reserved the right to exclude the EMV Property from the purchase. Later Braddock Park exercised this contractual right to exclude the EMV Property from the purchase, citing the dangers that defendants' representatives reported to the Town—i.e., fly rock and damage to the foundations of homes.

¶ 5 Plaintiff thereafter filed its complaint alleging that "[b]y virtue of their intentional and malicious misrepresentations made to the Town of Hillsborough, the Defendants tortiously interfered with the Plaintiff's prospective economic advantage by inducing Braddock Park Homes, Inc., not to perform [the purchase of the EMV Property]." Defendants moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing they were immune from liability because their statements to the Town were constitutionally protected petitioning activity. The trial court granted defendants' motion to dismiss. Plaintiff appealed.

¶ 6 The Court of Appeals reversed, reasoning that this case involves the applicability of the *Noerr-Pennington* doctrine under the United States Constitution, which provides immunity from antitrust liability based on petitioning activity. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.*, 266 N.C. App. 255, 258–59, 831 S.E.2d 395, 398 (2019). Given the apparent limitations of *Noerr-Pennington*, the Court of Appeals reasoned that defendants' conduct—speaking in opposition to the rezoning of plaintiff's land—would fall outside of the doctrine's protections. *Id.* at 263, 831 S.E.2d at 401. The Court of Appeals then determined that defendants may have overstated the dangerousness of their blasting activity, despite the classification of blasting as ultrahazardous under North Carolina law. *Id.* at 265, 831 S.E.2d at 402–03. Further, the Court of Appeals concluded that the statements inducing Braddock Park to exercise their contractual right to exclude the EMV Property were sufficient to show interference in a business relationship. *Id.* at 268–69, 831 S.E.2d at 403–05. Thus, the Court of Appeals determined that plaintiff's complaint adequately alleged tortious interference with prospective economic advantage to survive dismissal under Rule 12(b)(6). *Id.* at 270, 831 S.E.2d at 405.

¶ 7 Defendants sought review, which this Court allowed, to determine whether defendants must defend a lawsuit premised on statements

made while speaking at the public rezoning hearings. The right to petition the government, protected by both the First Amendment to the United States Constitution and Article I, Section 12 of the North Carolina Constitution, prevents a person from being subjected to a lawsuit based on that person's petitioning activity. Here plaintiff's suit is based on defendants' presentation at the rezoning hearings, which is protected petitioning activity. We hold that defendants' petitioning is protected by the First Amendment and Article I, Section 12.

¶ 8 This Court reviews a trial court's order on a motion to dismiss de novo, *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013), and considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory," *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

¶ 9 The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances*." U.S. Const. amend. I (emphasis added). "The right of petitioning is an ancient right. It is the cornerstone of the Anglo-American constitutional system." Norman B. Smith, "*Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986). The Magna Carta of 1215, "the fundamental source of Anglo-American liberties," states that if the king's officials were " 'at fault toward anyone,' " then the barons could " 'lay[ ] the transgression before [the king], [and] petition to have the transgression redressed without delay.' " *Id.* at 1155 (emphasis omitted) (quoting William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 467 (2d ed. 1914)).

> In 1689, the [English] Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the

> Subjects to petition the King." This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances.

McDonald v. Smith, 472 U.S. 479, 482–83, 105 S. Ct. 2787, 2790 (1985) (second alteration in original) (citations omitted).

¶ 10 The United States Supreme Court has often addressed the right to petition as a defense to antitrust liability. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 81 S. Ct. 523, 529–30 (1961) (holding the right to petition precluded antitrust liability under the Sherman Act); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671, 85 S. Ct. 1585, 1594 (1965) (reiterating the holding of *Noerr*). Although the holdings from *Noerr* and its progeny—the *Noerr-Pennington* doctrine—originated in the antitrust context, the First Amendment principles upon which the doctrine rests are foundational to our political system. Therefore, the protections afforded by the right to petition, recognized in the First Amendment, are not limited to antitrust matters. *See Prof'l. Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59, 113 S. Ct. 1920, 1927 (1993) (acknowledging the right to petition functions in "other contexts," not solely "as an antitrust doctrine"); *see also McDonald*, 472 U.S. at 485, 105 S. Ct. at 2791 (holding that the right to petition, while not absolute, provides the same protection in defamation actions as the freedoms of speech, press, and assembly).

¶ 11 Rather, the right to petition protects efforts to influence the actions of government officials, whether in the legislative, executive, or judicial branch. *See* Congressional Research Service, S. Doc. 99-16, *The Constitution of The United States of America: Analysis and Interpretation*, 1141–45 (Johnny H. Killian & Leland E. Beck eds., 1982). Protected petitioning activity includes lobbying local officials regarding a zoning ordinance. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 382, 111 S. Ct. 1344, 1355 (1991) (holding that the right to petition precluded liability for lobbying in favor of a local zoning ordinance). The right to petition protects petitioning activity "regardless of intent or purpose" because whether "a private party's political motives are selfish is irrelevant[.]" *Id.* at 380, 111 S. Ct. at 1354 (citing *Pennington*, 381 U.S. at 670, 85 S. Ct. at 1593). In a political process meant to address public concerns, a commitment to "free and open

debate" means other parties are free to counter selfish or misleading speech with speech of their own. *Connick v. Meyers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983) (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 571–72, 88 S. Ct. 1731, 1736 (1968)).

¶ 12 Predating the federal Bill of Rights, the North Carolina Constitution has protected the right to petition since 1776. *See* N.C. Const. art. I, § 12; N.C. Const. of 1868, art. I, § 25; N.C. Const. of 1776, Declaration of Rights § 18. Article I, Section 12 provides that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. Provisions like Article I, Section 12 in state declarations of rights served as a model for the Bill of Rights. *See* Smith, *Shall Make No Law Abridging*, at 1174 (noting that state declarations of rights "expressly included the right to petition" prior to the Bill of Rights). Because the General Assembly "delegate[s] a portion of [its] power to municipalities," petitioning activity can occur at the local government level. *King v. Town of Chapel Hill*, 367 N.C. 400, 406, 758 S.E.2d 364, 370 (2014); *see High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965) (stating the General Assembly "strengthen[ed] local self-government by providing for the delegation of local matters by general laws to local authorities" (emphasis omitted)).

¶ 13 These local governments are "[l]ocal political subdivisions [that] are 'mere instrumentalities of the State for the more convenient administration of local government[.]' " *Town of Boone v. State*, 369 N.C. 126, 131, 794 S.E.2d 710, 714 (2016) (quoting *Holmes v. City of Fayetteville*, 197 N.C. 740, 746, 150 S.E. 624, 627 (1929)); *see also King*, 367 N.C. at 404, 758 S.E.2d at 369 ("[The Town of Chapel Hill is] a mere creation of the legislature[.]" (citing *Pleasants*, 264 N.C. at 654, 142 S.E.2d at 701)). The right to petition protected by Article I, Section 12 is "connect[ed] with the mechanics of popular sovereignty" which can occur before these local political subdivisions. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 58 (2d ed. 2013). Article I, Section 12 thus protects petitioning activity before "local political subdivisions" such as a town.

¶ 14 Protecting the right to petition requires early dismissal of lawsuits that impermissibly seek to infringe on the right and thus chill petitioning activity occurring in these political contexts. *See Bill Johnson Rests. v. NLRB*, 461 U.S. 731, 740–41, 103 S. Ct. 2161, 2168 (1983) ("A lawsuit no doubt may be used by [a party] as a powerful instrument of coercion or retaliation . . . . [T]he [opposing party] will most likely have to retain

counsel and incur substantial legal expenses to defend against it." (citing *Power Sys., Inc.*, 239 N.L.R.B. 445, 449–50 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979))). "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the [right to petition] cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278, 84 S. Ct. 710, 725 (1964). When a lawsuit is premised on a party's petitioning activity, the First Amendment and Article I, Section 12 mandate early dismissal.

¶ 15 The question here is whether defendants' speech constitutes protected petitioning activity. Taking the allegations of plaintiff's complaint as true, defendants "maliciously, intentionally and without justification" made misrepresentations regarding the dangers of fly rock, excessive air blasts, and ground vibrations from their own mining activity. Defendants, however, made these statements during a public zoning process before the Town. The Town is a clear example of a local political subdivision with delegated authority from the General Assembly. Zoning is a political process by which a local government seeks citizen input to make informed decisions for the good of the whole. Neither the maliciousness nor the falsity of the statements has any bearing on our analysis. Rather than subjecting to civil liability misleading or malicious speech made before a local political subdivision during a public zoning process, our constitutions protect free and open debate so that citizens may voice their concerns to the government without fear of retribution. Plaintiff's remedy is to expose the falsity of the statements and submit alternative evidence, as plaintiff did here. During the process, defendants' misstatements of the current risk associated with their mining activities and their financial incentives were exposed. The evidence taken as a whole convinced the Town to rezone the EMV Property over defendants' objections. That Braddock Park declined to purchase the EMV Property, to plaintiff's economic disadvantage, does not remove protection from defendants' speech. Therefore, defendants' statements during the zoning process constitute protected petitioning activity.

¶ 16 The right to petition the government is a fundamental right. Here defendants' testimony during the public zoning process constitutes petitioning activity. Because early dismissal is necessary to protect the exercise of this fundamental right, the trial court properly granted defendants' motion to dismiss plaintiff's lawsuit. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

CRAZIE OVERSTOCK PROMOTIONS, LLC v. STATE OF NORTH CAROLINA

[377 N.C. 391, 2021-NCSC-57]

CRAZIE OVERSTOCK PROMOTIONS, LLC
v.
STATE OF NORTH CAROLINA; AND MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT DIVISION

No. 345PA19

Filed 11 June 2021

Gambling—retail customer rewards program—electronic games—section 14-306.4—game of chance versus game of skill

In a declaratory judgment action brought by a company selling discount goods, where the company ran a rewards program through which customers could earn cash prizes by playing two electronic games, the trial court correctly determined that the program constituted an unlawful sweepstakes under N.C.G.S. § 14-306.4, which prohibits the operation of electronic gaming machines that allow users the opportunity to win prizes through games based on chance rather than "skill or dexterity." Although the second game required some skill and dexterity, the amount of cash customers could win by playing it depended on how many points they won when playing the first game, which was entirely chance-driven. The Supreme Court affirmed (as modified) the Court of Appeals' decision upholding the trial court's ruling on this matter.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 266 N.C. App. 1 (2019), affirming, in part, and reversing and remanding, in part, an order entered on 7 August 2018 by Judge Vince M. Rozier, Jr., in the Superior Court, Alamance County. Heard in the Supreme Court on 23 March 2021.

Morningstar Law Group, by Keith P. Anthony and William J. Brian, Jr., for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga E. Vysotskaya de Brito, Special Deputy Attorney General; Ryan Y. Park, Solicitor General; and James W. Doggett, Deputy Solicitor General, for the State-appellees.

Edmond W. Caldwell, Jr., and Matthew L. Boyatt for North Carolina Sheriffs' Association; Fred P. Baggett for North Carolina Association of Chiefs of Police; and Jim O'Neill for North Carolina Conference of District Attorneys, amici curiae.

ERVIN, Justice.

¶ 1 This case arises from an enterprise developed and operated by plaintiff Crazie Overstock, LLC, which has sought in this litigation to enjoin enforcement measures taken by the State and certain members of the State's Alcohol and Law Enforcement Division[1] stemming from the belief that a Rewards Program encompassed within the operation of Crazie Overstock's enterprise violates various provisions contained in Article 37 of Chapter 14 of the North Carolina General Statutes. For the reasons set forth in more detail below, we modify and affirm the decision of the Court of Appeals.

¶ 2 Crazie Overstock sells discount goods, such as furniture, jewelry, kitchen goods, movies, music, and electronics on its website and through licensed retail establishments which are operated by independent owners. Although Crazie Overstock's customers have the ability to view the goods that are offered for sale, both in these retail establishments and on Crazie Overstock's website, the goods in question may only be purchased through its website.

¶ 3 The retail establishments through which Crazie Overstock operates feature a "showroom" in which samples of the goods that are available through Crazie Overstock's website are displayed. In addition, these retail establishments contain computers, which Crazie Overstock refers to as "order stations," that are connected to the internet and through which customers have the ability to order products from Crazie Overstock's website. In addition, customers are also entitled to place orders through Crazie Overstock's website from any location at which an internet connection is available. Crazie Overstock's customers have the ability to either order goods through the website using a credit card or to purchase electronic gift certificates at retail establishments which the customer can use to purchase goods through Crazie Overstock's website.

¶ 4 The customers who purchase gift certificates at the retail establishments through which Crazie Overstock operates pay $1.00 for each $1.00 of credit that is available in connection with a particular gift certificate. Each customer who purchases a gift certificate receives a receipt bearing a number which can be registered with and credited to the customer's

---

1. More specifically, Crazie Overstock has sought relief in this case against Mark J., Senter, individually and in his official capacity as Director of the Alcohol Law Enforcement Division, and Iris L. Redd, Kelly J. McMurray, Chris Poole, and Brian Doward, each of whom are agents of the Alcohol Law Enforcement Division; in their official and individual capacities.

account, which, in turn, can be accessed using an individual username and password at an order station or on any device that is connected to the Crazie Overstock website through the internet. In view of the fact that the value of any gift certificate that a customer may purchase is not automatically loaded into the customer's account, gift certificates may be freely transferred from the customer to other persons. Although customers may utilize gift certificates to purchase goods through the Crazie Overstock website, any such purchases involve separately stated shipping and handling charges that the customer must cover using a credit card.

¶ 5 The portion of Crazie Overstock's enterprise that underlies this case is known as the Rewards Program and revolves around the use of gift certificates to play two electronic games. In order to play these games, a customer is required to obtain Game Points by either (1) purchasing a gift certificate, with 100 Games Points being provided to the customer for every $1.00 that the customer pays in order to purchase that gift certificate; (2) "mailing a handwritten post card . . . contain[ing] the [customer's] name; address; city; state; zip code; age; date of the request for Game Points; and the name and store address" at which the points are to be used; (3) making an "in-store request from the cashier at a Retail Establishment's point-of-sale terminal"; or (4) "through the award of bonus Game Points by Retail Establishments to customers who purchase certain amounts of gift certificates." After obtaining the required Game Points, the customer may use them to play the two electronic games.

¶ 6 In the first of the two electronic games, which consists of a game of chance called the Reward Game, the customer is entitled to utilize Game Points for the purpose of attempting to win Reward Points. The Reward Game features eighteen reel-spinning games which are played on an electronic machine during which various icons appear when the reel is spun. The results derived from playing the Reward Game are "drawn randomly for each of the [eighteen] different Reward Games . . . from a finite pool of possible results," with "some results [being] associated with Reward Points while others are not." A customer who is successful in playing the Reward Game receives a number of Reward Points equal to a multiple of the number of Game Points which the customer utilized in order to play the Reward Game. In the event that the customer is unsuccessful during his or her attempts to play the Reward Game, he or she is still awarded 100 Reward Points.

¶ 7 After playing the Reward Game, the customer is entitled to take the Reward Points that he or she earned playing the Reward Game and utilize them to participate in a game of skill called the Dexterity Test.

The Dexterity Test involves the use of a simulated stopwatch that counts from 0 to 1,000 and back at a rapid rate. During the course of the Dexterity Test, the customer is allowed three attempts to stop the stopwatch on a number as close to 1,000 as possible, with the customer being awarded Dexterity Points based upon his or her best result. In the event that the customer stops the simulated stopwatch at a point between 951 and 1,000, one-hundred percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points, which can be redeemed for a cash payment calculated at the rate of $1.00 for every 100 Dexterity Points. In the event that the customer stops the simulated stopwatch at a point between 901 and 950, ninety percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points. In the event that a customer stops the simulated stopwatch at a point between 801 and 900, fifty percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points. In the event that the customer stops the simulated stopwatch at a point between 0 and 800, he or she does not win any Dexterity Points. On the other hand, the Reward Points that any such unsuccessful customer utilized to play the Dexterity Test are converted into Game Points so as to allow the customer to play the Reward Game in the hope of winning additional Reward Points.

¶ 8 The record reflects that ninety-five percent of the customers who play the Dexterity Test successfully stop the simulated stopwatch at a point above 800 on at least one of their three attempts so as to win some amount of money. As a result, a customer who successfully plays the Reward Game and proceeds to play the Dexterity Test will likely recoup some portion of the money that he or she utilized in purchasing the gift certificate that allowed him or her to play the games. However, in the event that the customer does not successfully play the Reward Game, the cash price that he or she is able to win is limited to a maximum of $1.00. In addition, the customer retains the full value of the gift certificate that he or she purchased and is entitled to use it to purchase merchandise from Crazie Overstock's website.

¶ 9 On 24 May 2016, Crazie Overstock filed a complaint against defendants in which it sought (1) a declaratory judgment that the Rewards Program is lawful and did not violate N.C.G.S. §§ 14-289 (prohibiting the advertisement of lotteries), 14-290 (prohibiting "[d]ealing in lotteries"), 14-292 (prohibiting gambling, defined as "any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not"), 14-306 (defining slot machines), 14-306.1A (prohibiting the use of

video gaming machines, including a "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes"), 14-306.3 (prohibiting certain game promotions), 14-306.4 (prohibiting the operation of "an electronic machine or device" to play a "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes," with a "prize" being "any gift, award, gratuity, good, service, credit, or anything else of value"), or "any other applicable law of this State"; (2) permanent injunctive relief; (3) a request for a declaratory judgment that Director Senter and Agents McMurray, Poole, Doward, and Redd had deprived Crazie Overstock of its constitutional right to procedural due process; (4) prospective injunctive relief against Director Senter and Agents McMurray, Poole, Doward, and Redd based upon alleged violations of 42 U.S.C. § 1983; and (5) damages against Agents McMurray, Poole, Doward, and Redd, in their individual capacities, jointly and severally, for violations of 42 U.S.C. § 1983. The injunctive relief that Crazie Overstock sought in its complaint included enjoining defendants from (1) warning or threatening any current or potential North Carolina retail establishment that it might be subject to criminal or administrative sanctions if it continued to display or sell Crazie Overstock gift certificates or operate equipment associated with the Rewards Program; (2) citing any North Carolina retail establishment for criminal or administrative offenses or violations based upon the display or sale of Crazie Overstock gift certificates or products, or the operation of any equipment associated with the Rewards Program; (3) compelling or attempting to compel, coerce, or persuade any North Carolina retail establishment to remove products and equipment associated with the Rewards Program or to refrain from selling or operating any such items; (4) making or issuing any statement outside of the proceedings in this case alleging or contending that any gift certificates, products, or equipment associated with the Rewards Program constituted an illegal gambling arrangement, lottery, game of chance, slot machine, or unlawful device; and (5) filing any false or misleading affidavits or otherwise engaging in any similar deceptive or unlawful conduct in connection with any investigation into the activities in which Crazie Overstock or any retail establishment offering the Rewards Program has engaged.

¶ 10 On 1 July 2016, defendants filed a motion to dismiss Crazie Overstock's complaint pursuant to N.C.G.S. §§ 1A-1, Rules 12(b)(1), (2), and (6), in which they contended that Crazie Overstock's claims were barred by the doctrines of sovereign immunity, public official immunity, and qualified immunity and asserting that Crazie Overstock's request for a declaratory judgment that its Rewards Program did not violate

N.C.G.S. § 14-306.4 failed to state a claim upon which relief might be granted. On 13 April 2017, the trial court entered an order denying defendants' dismissal motion.

¶ 11 On 17 March 2017, Crazie Overstock filed a motion seeking the issuance of a preliminary injunction that provided the same relief that it sought in that portion of its complaint seeking the issuance of a permanent injunction. On 16 May 2017, the trial court entered a temporary restraining order precluding defendants from taking certain actions against Crazie Overstock and any retail establishments participating in the Rewards Program pending a decision concerning Crazie Overstock's request for the issuance of a preliminary injunction. On 12 July 2017, defendants filed an answer in which they denied the material allegations set out in Crazie Overstock's complaint and asserted a number of affirmative defenses, including public official immunity, sovereign immunity, qualified immunity, and estoppel.

¶ 12 A hearing concerning the merits of Crazie Overstock's motion for the issuance of a preliminary injunction was held before the trial court on 29 September 2017, 5 and 6 October 2017, and 2 and 3 November 2017. On 13 December 2017, the trial court entered an order denying Crazie Overstock's motion for preliminary injunctive relief. In making this determination, the trial court concluded that Crazie Overstock had failed to demonstrate that it was likely to succeed on the merits given (1) that "[t]he fact that Crazie Overstock's games involve some level of skill and dexterity in and of itself is not enough to show a likelihood of prevailing on the merits"; (2) that "[t]he test for determining whether a game is prohibited under North Carolina law is not whether the game contains an element of skill," but is, "[i]nstead, . . . whether chance is the dominating element that determines the result of the game," citing *Sandhill Amusements, Inc. v. Miller*, 236 N.C. App. 340, 368 (2014), *rev'd per curiam on the basis of the dissenting opinion*, 368 N.C. 91 (2015); and (3) that "[t]he element of chance predominates any amount of skill or dexterity that may be present in Crazie Overstock's games, and therefore the Crazie Overstock Rewards Program may violate N.C.G.S. § 14-306.4 and other North Carolina gambling provisions." In addition, the trial court concluded that Crazie Overstock had failed to show that it was likely to sustain an irreparable injury in the absence of the issuance of the requested preliminary injunction given that (1) "Crazie Overstock's ability to sell goods over the internet will in no way be affected by law enforcement officials being allowed to enforce what they believe to be violations of the gambling laws of North Carolina as performed by retail establishments that are operating the Crazie Overstock

Rewards Program"; (2) "[Crazie Overstock] will still be able to use its website to sell goods over the internet and may continue to license retail establishments to promote the sale of their goods by displaying goods for sale and selling gift certificates"; and (3) "[t]he only impact not entering an injunction will have is that the retail establishments, that are not a party to this action, will not be able to continue to use the Crazie Overstock Rewards Program until such time as a trial/hearing on the merits is conducted and this Court rules on the pending declaratory judgment action."

¶ 13 On 11 July 2018, defendants filed a motion seeking the entry of summary judgment in their favor on the grounds that the record did not reveal the existence of any genuine issues of material fact and that defendants were entitled to judgment as a matter of law with respect to Crazie Overstock's claims pursuant to N.C.G.S. §§ 14-306.1A and 14-306.4. On 20 July 2018, Crazie Overstock voluntarily dismissed its claims against Agents McMurray, Poole, Doward, and Redd, in both their individual and official capacities, without prejudice and the claims that it had asserted against Director Senter in his individual capacity. In addition, Crazie Overstock voluntarily dismissed the claims that it had asserted pursuant to 42 U.S.C. § 1983 relating to alleged violations of its procedural due process rights and its request for prospective relief against Director Senter without prejudice, leaving the State and Director Senter, acting in his official capacity, as the only remaining defendants.

¶ 14 On 25 July 2018, defendants' summary judgment came on for a hearing before the trial court.[2] On 7 August 2018, the trial court entered an order determining that there were no genuine issues of material fact with respect to the claims that Crazie Overstock had advanced pursuant to N.C.G.S. §§ 14-306.1A and 14-306.4 and that defendants were entitled to judgment with respect to those claims as a matter of law.[3] As a result, the trial court allowed defendants' motion for summary judgment,

---

2. At the hearing, Crazie Overstock objected to consideration of the expert reports submitted by defendants on behalf of Andrew Baran and Katrijn Gielens on the grounds that those reports had not been properly authenticated, that the reports had not been submitted in a timely manner, that the report prepared by Ms. Gielens contained new opinions that had not been previously disclosed in discovery, and that Mr. Baran's report invaded the province of the trial court by offering opinions concerning the ultimate issue of whether Crazie Overstock's Reward Program violated N.C.G.S. §§ 14-306.1A and 14-306.4. As a result, the trial court "excluded this information from consideration in its evaluation of the motion for summary judgment."

3. In light of this determination, the trial court declined to rule upon the claims that Crazie Overstock had advanced pursuant to N.C.G.S. §§ 14-289, 14-290, 14-292, 14-306, and 14-306.3.

resulting in the dismissal of each of Crazie Overstock's remaining claims and the entry of final judgment in favor of defendants. Crazie Overstock noted an appeal to the Court of Appeals from the trial court's order.

¶ 15 In seeking relief from the trial court's order before the Court of Appeals, Crazie Overstock argued that the trial court had erred by concluding that the Rewards Program violated N.C.G.S. §§ 14-306.1A and 14-306.4. As an initial matter, the Court of Appeals noted that N.C.G.S. § 14-306.1A "prohibits one from placing into operation a video gaming machine which allows a patron to make a wager for the opportunity to win money or another thing of value through a game of chance" and that N.C.G.S. § 14-306.4 "prohibits one from placing into operation an electronic machine which allows a patron, with or without the payment of consideration, the opportunity to win a prize in a game or promotion, the determination of which is based on chance." *Crazie Overstock Promotions, LLC v. State*, 266 N.C. App. 1, 5 (2019). According to the Court of Appeals, "[o]ne difference between [N.C.G.S. § 14-306.4] and [N.C.G.S. §] 14-306.1A is that a violation of [N.C.G.S. § 14-306.4] can occur even if the patron is not required to wager anything for the opportunity to win a prize." *Id.*

¶ 16 After noting that N.C.G.S. §§ 14-306.1A and 14-306.4 "only proscribe machines where prizes can be won through a game of chance" rather than by winning a "game of skill," the Court of Appeals distinguished these two types of games on the basis that:

> The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute book by the act of 1835. . . . [This term] must be understood [ ] as descriptive of a certain kind of games of chance in contra-distinction to a certain other kind, commonly known as games of skill. [We hold that] "a game of chance" is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.

Id. at 5–6 (alterations in original) (quoting *State v. Gupton*, 30 N.C. 271, 273–74 (1848)). In addition, the Court of Appeals noted that, more recently, this Court has adopted a dissenting opinion reasoning that "the essential difference between a game of skill and a game of chance for purposes of our gambling statutes . . . is whether skill or chance determines the final outcome and whether chance can override or thwart the

exercise of skill." *Id.* at 6 (quoting *Sandhill Amusements*, 236 N.C. App. at 369). As a result, the Court of Appeals determined that, even though "there are elements of 'chance' in many 'games of skill' " and that "there are sometimes elements of skill present in games of chance," *id.* (first citing *Gupton*, 30 N.C. at 274, then *Collins Coin Music Co. of N.C., Inc., v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409 (1994)), "[u]ltimately, whether a game is one of chance or one of skill is dependent on which element 'is the dominating element that determines the result of the game,' " *id.* (quoting *State v. Eisen*, 16 N.C. App. 532, 535 (1972) (recognizing that blackjack contains elements of both skill and chance)).

¶ 17 Although the Court of Appeals determined that the Dexterity Test, considered in isolation, is a game of skill given that "the outcome of the game is dependent primarily on the patrons' ability to react in a timely fashion," it went on to conclude that the Reward Game "is a separate game in which patrons have the opportunity to win something of value," consisting of "*the opportunity* to play an easy game of skill for money," and that "this opportunity to win money, itself," constitutes "a thing of value" and, therefore, a prize pursuant to the definition set forth in the statute. *Id.* at 6–7. As a result, the Court of Appeals held that, even though the Dexterity Test did not, standing alone, violate either N.C.G.S. §§ 14-306.1A or 14-306.4, the Reward Game violated N.C.G.S. § 14-306.4 as a matter of law. *Id.* at 8–9. On the other hand, given that "there [was] at least an issue of fact as to whether the Reward Game violates [N.C.G.S. §] 14-306.1A" arising from the fact that "[o]ne does not violate this Section unless the game of chance requires the patron to wager something of value" and the Court of Appeals' determination that it is "unclear whether, here, patrons are required to wager anything of value," the Court of Appeals affirmed the trial court's decision to grant summary judgment in defendants' favor with respect to the issue of whether the Rewards Program violated N.C.G.S. § 14-306.4 while reversing the trial court's decision to grant summary judgment in defendants' favor with respect to the issue of whether the Rewards Program violated N.C.G.S. § 14-306.1A and remanding this case to the Superior Court, Alamance County, for any necessary proceedings. *Id.* at 9.

¶ 18 In a separate concurring opinion, Judge Hampson stated that, "at least in [his] view, [the Court of Appeals'] reversal of summary judgment on the question of whether Crazie Overstock's business model violates [N.C.G.S.] § 14-306.1A should not be construed as an indication that Crazie Overstock's business model does not violate [N.C.G.S.] § 14-306.1A" and should, instead, be understood as a recognition that

"Crazie Overstock has generated a triable issue of fact as to whether the sale of gift certificates, in fact, constitutes the sale of a legitimate product offered in the free marketplace by a business regularly engaged in the sale of such goods or services or whether the sales of these gift certificates constitutes a mere subterfuge for illegal gaming." *Id.* (citing *American Treasures, Inc. v. State*, 173 N.C. App. 170, 177 (2005)). In light of the conflicting evidence concerning "the actual value received from [Crazie Overstock's] gift [certificates]," Judge Hampson wrote that "the question *sub judice* is," at least in part, "whether 'the price paid for and the value received' from the gift certificates 'is sufficiently commensurate to support the determination that the sale of [gift certificates] is not a mere subterfuge to engage in [illegal gaming], whereby consideration is paid merely to engage in a game of chance.' " *Id.* at 10 (quoting *American Treasures*, 173 N.C. at 178–79). This Court granted requests for further review of the Court of Appeals' decision filed by both Crazie Overstock and defendants.

¶ 19 In seeking to persuade us to overturn the Court of Appeals' decision with respect to the issue of whether the Rewards Program violates N.C.G.S. § 14-306.4, Crazie Overstock begins by arguing that the Court of Appeals "fail[ed] to apply the correct legal standard" in evaluating the lawfulness of the Rewards Program pursuant to N.C.G.S. § 14-306.4 and, instead, utilized a broader legal standard applicable under other gambling-related statutory provisions, thereby "ignor[ing]" the relevant statutory language, which provides that prohibited games are those which are "not dependent on skill or dexterity," *see* N.C.G.S. § 14-306.4(a)(3), so as to "render [the relevant statutory] language meaningless." Secondly, Crazie Overstock argues that the Rewards Program does not violate N.C.G.S. § 14-306.4 given that "[w]hether a participant obtains a prize is determined solely by the participant's performance on the Dexterity Test," making the "final outcome [ ] dependent on skill and dexterity." According to Crazie Overstock, "the fact that chance determines the value of the potential prize that can be realized through the Dexterity Test (by determining the amount of Reward Points awarded in the Reward Game) is not relevant to the analysis of the final outcome of the [ ] Rewards Program" given that "the test under [N.C.G.S. § 14-306.4] is limited to the analysis of the role of skill and chance in the final outcome only." Thirdly, Crazie Overstock asserts that, "even if the standard under the gambling statutes is applied, genuine issues of material fact preclude[ ] the entry of summary judgment for [defendants]" given the existence of "substantial evidence from which a reasonable trier of fact can conclude that skill and dexterity predominate over chance." Finally, Crazie Overstock argues that the Court of Appeals

erred by holding that the Reward Game, "viewed in isolation," violates N.C.G.S. § 14-306.4 on the theory that Reward Points constitute a "prize" for purposes of the relevant statutory provision. In Crazie Overstock's view, the Court of Appeals' determination that Reward Points constitute a prize amounts to a "suggest[ion] that the unrealized *opportunity* to play the Dexterity Test has value independent of the value of *playing* the game" even though "[t]he two are inextricably linked" and the "Reward Points have no inherent value."

¶ 20 In response, defendants argue, based upon this Court's decision to adopt the dissenting opinion in *Sandhill Amusements*, that the reference to skill and dexterity contained in N.C.G.S. § 14-306.4 incorporates "the traditional distinction between a game of skill and a game of chance pursuant to state law" so as to "prohibit[ ] sweepstakes that are conducted through video games" in which "chance predominates over skill." In view of the fact that "luck controls the symbols that appear in the reel-spinning Reward Games, which in turn control whether a customer can win anything more than $1 in cash by playing the Dexterity Test," defendants argue that "pure chance is responsible for whether players ever receive anything more than $1 by playing its games," causing considerations of "chance [to] predominate[ ] in Crazie Overstock's games." In addition, defendants contend that the Court's decision to adopt the dissenting opinion in *Sandhill Amusements* establishes that the Court of Appeals correctly applied the "traditional" predominant factor test rather than the "new test" suggested by Crazie Overstock. In defendants' view, *Sandhill Amusements* makes clear "that chance is the predominate factor when it controls the maximum prizes that players receive" and "can thwart skill by preventing players from winning the best prizes." Finally, defendants claim that predominance is "a mixed question of law and fact that may be resolved on summary judgment where, as here, there is no dispute about how a game is played," citing *Best v. Duke Univ.*, 337 N.C. 742, 750 (1994), on the theory that "mixed questions like [the issues presented in this case] do not turn on assessments of credibility, but instead require 'the application of legal principles' to settled facts," quoting *State v. Sparks*, 362 N.C. 181, 185 (2008), and citing *Sandhill Amusements*, 236 N.C. App. at 370.

¶ 21 According to well-established North Carolina law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant

or deny a motion for summary judgment de novo. *See Meinck v. City of Gastonia*, 371 N.C. 497, 502 (2018).

¶ 22 N.C.G.S. § 14-306.4 prohibits the operation of an electronic machine which allows a user, with or without the payment of consideration, an opportunity to win a prize in a game or promotion in the event that the patron's ability to succeed "[i]s not dependent on the skill or dexterity [of the patron]. N.C.G.S. § 14-306.4(a)(3)(i). In *Sandhill Amusements*, we adopted the dissenting opinion at the Court of Appeals, which evaluated, in pertinent part, whether an enterprise involved an illegal video sweepstakes machines in violation of N.C.G.S. § 14-306.4, *Sandhill Amusements*, 236 N.C. App. at 343, before noting that the critical analytical issue revolves around whether the relevant game was "dependent on skill or dexterity." *Id.* at 365. In spite of the fact that "the term 'skill or dexterity' as used in [N.C.G.S.] § 14-306.4 ha[d] not been statutorily defined," the dissent in *Sandhill Amusements* opined that a reviewing court should look for guidance from the Court of Appeals' prior decision in *Collins Coin*, in which the Court of Appeals held that "[a] game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance"; that "[a] game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory"; and that "[i]t would seem that the test of the character of any kind of a game . . . as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game" or, "to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." *Sandhill Amusements*, 236 N.C. App. at 368 (quoting *Collins Coin*, 117 N.C. App. at 408) (citations and quotations omitted)). In light of the numerous "inherent limitations on a player's ability to win [the game at issue in that case] based upon a display of skill and dexterity," including the fact that the machines and equipment at issue "only permitted a predetermined number of winners," would necessarily "result in the playing of certain games in which the player [would] be unable to win anything of value regardless of the skill or dexterity that he or she displays" and the fact that the opportunity to employ skill or dexterity was "purely chance-based," the dissent in *Sandhill Amusements* noted that it was "unable to see how [an] isolated opportunity [to employ skill or dexterity] to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the

impact of the player's skill and dexterity on the outcome." *Id.* at 369. As a result, given these "inherent limitations on a player's ability to win based upon a display of skill and dexterity," the dissent in *Sandhill Amusements* stated that "an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to 'determine or influence the result over the long haul' " and concluded that " 'the element of chance dominate[d] the element of skill in the operation' " of the machines at issue in that case. *Id.* at 369–70 (quoting *Collins Coin*, 117 N.C. at 409).

¶ 23 The dissenting opinion in *Sandhill Amusements* that we later adopted suggests that N.C.G.S. § 14-306.4 should be interpreted to prohibit the operation of electronic gaming equipment in which skill or chance "dominat[e]" over a player's exercise of skill and dexterity or "thwart the exercise of skill or judgment," *id.* at 368 (quoting *Collins Coin*, 117 N.C. at 408). This construction of the relevant statutory language does not, contrary to Crazie Overstock's contentions, render the words "dependent on skill or dexterity" as found in N.C.G.S. § 14-306.4(a)(3) superfluous. Instead, the approach that we believe to be appropriate simply focuses upon whether skill or dexterity *actually* give the player the ability to control the extent to which he or she receives a prize and the value of the prize that he or she wins rather than merely reflecting whether the player bests the odds of winning in a game of chance.[4] Thus, the relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

¶ 24 After applying the appropriate legal standard to the facts presented to us in this case, we are satisfied that the Court of Appeals correctly concluded that the Crazie Overstock's gaming enterprise violated N.C.G.S. § 14-306.4. As an initial matter, given that the number of Reward Points increases the dollar value of the prizes that a player is entitled to win in the course of the Dexterity Test, the increased potential return available to such players during the Dexterity Test compels the conclusion that Reward Points constitute a "[ ]thing . . . of value" pursuant to N.C.G.S.

---

4. Assuming that all of the other requirements set forth in the statute are met, nothing in this opinion or the dissenting opinion which we adopted in *Sandhill Amusements* should be interpreted as an indication that a gaming enterprise in which skill or dexterity actually predominate in resolving the issue of whether the player receives a prize and the value of that prize would violate N.C.G.S. § 14-306.4, ensuring that the relevant language does not constitute mere surplusage.

§ 14-306.4(a)(4). For that reason, the Reward Game, even when considered in isolation, violates N.C.G.S. § 14-306.4.

¶ 25 Any decision to consider the Reward Game and the Dexterity Test in conjunction with each other produces the same result, Crazie Overstock's argument to the contrary notwithstanding. In spite of the fact that the Dexterity Test, viewed in isolation, involves skill or dexterity, the extent to which a customer is able to win more than a minimal amount of money is controlled by the outcome of the Reward Game regardless of the level of skill and dexterity that the player displays while participating in the Dexterity Test. For instance, a person who is wholly unsuccessful in playing the Reward Game cannot win more than $1.00 in the event of success in the Dexterity Test regardless of how well he or she performs while playing that game, a fact that establishes that the amount of a player's winnings is primarily dependent upon chance rather than skill or dexterity as required by N.C.G.S. § 14-306.4. *Cf. Joker Club, LLC v. Hardin*, 183 N.C. App. 92, 98 (2007) (stating that "the only factor separating the players" in a game of poker is the "relative skill levels" of the players). In other words, a customer cannot win more cash playing the Dexterity Test than the amount established by the chance-driven Reward Game, although a customer may be able to reduce the amount of cash that he or she eventually obtains by poor performance during that phase of the process, a fact that compels the conclusion that "the instrumentality for victory [is not] entirely in the player's hand." *Joker Club*, 183 N.C. App. at 99. As a result, we hold that luck is so "inherent in the nature of [Crazie Overstock's] games" that chance necessarily predominates over the exercise of skill or dexterity, *Gupton*, 30 N.C. at 274, so that Crazie Overstock's Rewards Program should be classified as a game of chance rather than a game of dexterity or skill. *See Sandhill Amusements*, 236 N.C. App. at 368.

¶ 26 The result that we reach in this case is completely consistent with the General Assembly's intent in enacting N.C.G.S. § 14-306.4. As we recognized in *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289 (2012), the General Assembly "noted that 'companies have developed electronic machines and devices to gamble through pretextual sweepstakes relationships with Internet service, telephone cards, and office supplies, among other products,' and that 'such electronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation as other forms of gambling . . . by encouraging repeated play, even when allegedly used as a marketing technique." *Id.* at 294 (quoting An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes, S.L.

2010-103, 2010 NC. Sess. Laws 408, 408). As we understand the record, this statement of intent clearly describes the manner in which Crazie Overstock's Rewards Program operates. Thus, we have no hesitation in holding that Crazie Overstock's Rewards Program represents the type of gaming enterprise that the General Assembly intended to prohibit by enacting N.C.G.S. § 14-306.4.[5] In light of our determination that Crazie Overstock's Rewards Program constitutes an unlawful sweepstakes in violation of N.C.G.S. § 14-306.4 and the fact that this determination appears to us to preclude the award of any relief in Crazie Overstock's favor, we conclude that there is no need for the Court to decide either of the other issues addressed in the parties' briefs and modify the Court of Appeals' decision by obviating any necessity for a remand to the Superior Court, Alamance County, for further proceedings in this case. As a result, since the Court of Appeals correctly determined that the trial court did not err by determining that Crazie Overstock's gaming enterprise constitutes an unlawful sweepstakes in violation of N.C.G.S. § 14-306.4, we modify and affirm the Court of Appeals' decision.

MODIFIED AND AFFIRMED.

Justice BERGER did not participate in the consideration of or decision in this case.

---

5. In addition to responding to Crazie Overstock's challenge to the Court of Appeals' decision, the State argued that Crazie Overstock's enterprise (1) violated the State's ban on video gaming machines as set forth in N.C.G.S. § 14-306.1A, which defines a prohibited "video gaming machine" to include any "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes," *see* N.C.G.S. § 14-306.1A(b)(9); and (2) constituted an illegal gambling enterprise pursuant to N.C.G.S. §§ 14-292 and 14-301 on the grounds that "participants [in the Rewards Program] are not really buying the promoted products," with "the purchase of the products" being, instead, nothing more than "a pretext to place bets," citing *Hest*, 366 N.C. at 294.

DEMINSKI v. STATE BD. OF EDUC.

[377 N.C. 406, 2021-NCSC-58]

ASHLEY DEMINSKI, AS GUARDIAN AD LITEM ON BEHALF OF C.E.D., E.M.D., AND K.A.D.
v.
THE STATE BOARD OF EDUCATION AND THE PITT COUNTY BOARD OF EDUCATION

No. 60A20

Filed 11 June 2021

Constitutional Law—North Carolina—right to education—harassment by other students—board's deliberate indifference—sovereign immunity

Where plaintiff alleged that defendant-school board was deliberately indifferent to the continual harassment of her children by other students, she could bring a claim under the North Carolina Constitution because—as alleged—the indifference denied the children their constitutionally guaranteed right to a sound basic education pursuant to Article I, Section 15. Since plaintiff alleged a colorable constitutional claim for which no adequate state law remedy existed, sovereign immunity did not bar her claim and the trial court properly denied defendant's motion to dismiss.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 165, 837 S.E.2d 611 (2020), reversing an order denying defendant's motion to dismiss in part entered on 3 July 2018 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. On 3 June 2020, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 23 March 2021.

Fox Rothschild LLP, by Troy D. Shelton, Matthew Nis Leerberg, and Ashley Honeycutt Terrazas, for plaintiff-appellant.

Tharrington Smith, LLP, by Deborah R. Stagner, and Poyner Spruill LLP, by Edwin M. Speas, Jr. and Caroline P. Mackie, for defendant-appellee Pitt County Board of Education.

Daniel K. Siegel and Kristi L. Graunke for ACLU of North Carolina Legal Foundation, amicus curiae.

Lisa Grafstein and Virginia Fogg for Disability Rights North Carolina, amicus curiae.

Perry Legal Services, PLLC, by Maria T. Perry, and Lawyers' Committee for Civil Rights Under Law, by Mark Dorosin and Elizabeth Haddix, for North Carolina Advocates for Justice, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson, and North Carolina School Boards Association, by Allison Brown Schafer, for North Carolina School Boards Association, amicus curiae.

NEWBY, Chief Justice.

¶ 1 In this case we consider whether an individual may bring a claim under the North Carolina Constitution for a school board's deliberate indifference to continual student harassment. As alleged, this indifference denied students their constitutionally guaranteed right to the opportunity to receive a sound basic education. Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Where a government entity with control over the school is deliberately indifferent to ongoing harassment that prevents a student from accessing his constitutionally guaranteed right to a sound basic education, the student has a colorable claim under the North Carolina Constitution. Thus, governmental immunity does not bar the claim. Because plaintiff's complaint sufficiently alleges a violation here, we hold that the trial court correctly denied defendant's motion to dismiss. As such, we reverse the decision of the Court of Appeals.

¶ 2 Because this case involves a motion to dismiss, we take the following allegations as true from plaintiff's complaint. Plaintiff is the mother of three minor children, E.M.D., K.A.D., and C.E.D. (plaintiff-students), who were students at Lakeforest Elementary School in Pitt County. E.M.D. and K.A.D. are diagnosed with autism. Over a period of several months during the fall semester of the 2016–2017 school year, C.E.D. was bullied and sexually harassed by other students. Throughout the school day, Student #1 and Student #2 would grab C.E.D. by the shoulders and push her spine so that she was in pain and had trouble breathing and swallowing. Student #3 would stare at C.E.D., interrupt her during tests and other assignments, and repeatedly talk to her during instructional time. The complaint also alleges the following:

> 13. Student #3 sexually harassed C.E.D. repeatedly during the school day:

a. On multiple occasions, Student #3 put his hands in his pants to play with his genitals in C.E.D.'s presence;

b. On multiple occasions, Student #3 informed C.E.D. he "f**** like a gangster";

c. On multiple occasions, Student #3 informed C.E.D. he "want[s] to f*** [another student] from night to morning";

d. On multiple occasions, Student #3 informed C.E.D. he has "got something special for you" before putting his hands in his pants to play with his genitals;

e. On multiple occasions, Student #3 would play with his genitals and then attempt to touch C.E.D.;

f. On at least one occasion, on or about 6 October 2016, Student #3 pulled down his pants in the hallway in C.E.D.'s presence to expose his penis and wiggle it to simulate masturbation; and,

g. On at least one occasion, Student #3 pulled down his pants in the classroom in C.E.D.'s presence to expose his penis and show it to her.

. . . .

15. Student #4, perhaps encouraged by Student #3's lewd conduct going unaddressed, sexually harassed C.E.D. repeatedly:

a. On multiple occasions, Student #4 would tell C.E.D. and other students that he and C.E.D. were dating and intimate;

b. On at least one occasion, Student #4 rolled a piece of paper to approximate a penis and made motions simulating masturbation while in C.E.D.'s presence; and,

c. On at least one occasion, on or about 21 October 2016, Student #4 rolled a piece of

> paper to approximate a penis, put it in his pants, walked over to C.E.D. and attempted to show C.E.D. how to insert himself into C.E.D.'s vagina. When C.E.D. attempted to get away from Student #4 and move to another seat, Student #4 attempted to reposition himself to attempt to get under where C.E.D. would be sitting.

¶ 3 Meanwhile, E.M.D. and K.A.D. were also enrolled in classes with student #3. Both children experienced similar treatment from Student #3, "including sexual conduct, constant verbal interruptions laced with vulgarity, and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves onto the ground."

¶ 4 C.E.D. repeatedly informed her teacher about the incidents with all four students. C.E.D. also informed plaintiff, and plaintiff repeatedly notified the teacher, assistant principal, and principal of the situation. Defendant, the Pitt County Board of Education, also knew of the incidents.[1] Nonetheless, while school personnel insisted that there was a "process" that would "take time," the bullying and harassment continued with no real change. On one occasion, attempting to resolve Student #3's harassment of C.E.D., school personnel adjusted Student #3's schedule to give him additional time in E.M.D. and K.A.D.'s classes.

¶ 5 In October 2016, plaintiff transferred C.E.D., E.M.D., and K.A.D. to a new school, which was initially designated as a transfer only for the 2016–2017 school year. The transfer was later modified to be valid for as long as plaintiff and plaintiff-students resided at their then-current address.

¶ 6 On 11 December 2017, plaintiff filed a complaint in Superior Court, Wake County, based on the allegations above. Plaintiff brought a claim under Article I, Section 15, and Article IX, Section 2 of the North Carolina Constitution.[2] Plaintiff's complaint alleges:

---

1. Plaintiff also named the State Board of Education as a defendant in this action. Both parties moved to dismiss at the trial court, and that court granted the State Board of Education's motion in full. Thus, the Pitt County Board of Education is the only defendant to this appeal. "Defendant" in this opinion refers only to the Pitt County Board of Education.

2. Plaintiff also brought a claim for defendant's alleged violation of the North Carolina School Violence Prevention Act (SVPA). The trial court granted defendant's motion to dismiss that claim. Plaintiff did not appeal that portion of the trial court order.

> 31. Article I, Section 15 and Article IX, Section 2 of the North Carolina State Constitution jointly guarantee each child the right to a "sound basic education." . . . .
>
> 32. The [plaintiff-students] were each denied their rights to a sound basic education as a result of being in a hostile academic environment where they were subjected to verbal and physical harassment, and in C.E.D.'s case to physical abuse and prolonged sexual harassment.
>
> 33. Defendants had substantial control over the harassing conduct.
>
> 34. The harassing conduct was severe and discriminatory.
>
> 35. Defendants had actual knowledge of the harassing conduct.
>
> 36. Defendants exhibited deliberate indifference to the harassing conduct.
>
> 37. The [plaintiff-students] were each damaged as a result of the Defendants' violations . . . .

Plaintiff seeks compensatory and punitive damages, a permanent injunction preventing defendant from assigning or requiring plaintiff-students to attend Lakeforest Elementary, attorneys' fees, and any additional relief that the trial court deems proper and just.

¶ 7 Defendant moved to dismiss, arguing in part that the constitutional claim is barred by the defense of sovereign or governmental immunity. The trial court denied defendant's motion in part, allowing the claim under the North Carolina Constitution to proceed. Defendant appealed.

¶ 8 A divided panel of the Court of Appeals reversed the trial court's order denying defendant's motion to dismiss. *Deminski v. State Bd. of Educ.*, 269 N.C. App. 165, 166, 837 S.E.2d 611, 612 (2020). The Court of Appeals first determined that defendant's appeal from the trial court's denial of the motion to dismiss, though interlocutory, was immediately appealable. *Id.* at 169, 837 S.E.2d at 614. In doing so, the Court of Appeals reasoned that the trial court's denial affected defendant's substantial right to the defense of governmental immunity, should it apply here. *Id.*

¶ 9 The Court of Appeals next recognized that an individual may bring a direct claim under the North Carolina Constitution where her rights have been abridged but she is without an adequate state law remedy. *Id.* at 170, 837 S.E.2d at 615 (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). The Court of Appeals also recognized that the right to education as provided in the North Carolina Constitution includes the right to a sound basic education. *Id.* at 171–72, 837 S.E.2d at 615–16 (citing *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997)). The Court of Appeals then compared the present case to *Doe v. Charlotte-Mecklenburg Board of Education*, 222 N.C. App. 359, 731 S.E.2d 245 (2012) (concluding that the plaintiff's complaint alleging constitutional violations under, *inter alia*, Article I, Section 15 was insufficient to state a colorable constitutional claim). Though *Doe* involved claims of negligence arising from a teacher's sexual relationship with a high school student, the Court of Appeals concluded that, similar to its understanding of *Doe*, "abuse . . . or an abusive classroom environment" does not violate a constitutional right to education. *Deminski*, 269 N.C. App. at 174, 837 S.E.2d at 617. In the Court of Appeals' view, the constitutional guarantee extends no further than an entity affording a sound basic education by making educational opportunities available. *Id.* at 173, 837 S.E.2d at 616.

¶ 10 The dissenting opinion, however, would have concluded that plaintiff's complaint sufficiently alleged that defendant failed to provide plaintiff-students with the constitutionally guaranteed opportunity to receive a sound basic education. *Id.* at 176, 837 S.E.2d at 618 (Zachary, J., dissenting). The dissent opined that unlike in *Doe*, plaintiff's complaint here alleged a colorable constitutional claim based on the school's deliberate indifference to the hostile classroom environment. *Id.* at 177, 837 S.E.2d at 619. Thus, the dissenting opinion would have affirmed the trial court's order. *Id.* at 178, 837 S.E.2d at 619.

¶ 11 Plaintiff appealed to this Court based on the dissenting opinion at the Court of Appeals.[3] Plaintiff argues that defendant's failure to intervene here denied plaintiff-students their constitutional right to the opportunity to receive a sound basic education. Thus, plaintiff contends that the complaint presented sufficient allegations of a colorable constitutional claim to survive defendant's motion to dismiss. We agree. The

3. Additionally, plaintiff petitioned this Court to review whether the Court of Appeals properly determined that defendant had an immediate right to appeal the trial court's interlocutory order based on the alleged substantial right of governmental immunity. This Court allowed plaintiff's petition. We now conclude that discretionary review was improvidently allowed.

right to the "privilege of education" and the State's duty to "guard and maintain" that right extend to circumstances where a school board's deliberate indifference to ongoing harassment prevents children from receiving an education. N.C. Const. art. I, § 15.

¶ 12 This Court reviews de novo a trial court's order on a motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). When reviewing a motion to dismiss, an appellate court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

¶ 13 Article I, Section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This provision, added to the North Carolina Constitution in 1868, "was intended to mark a new and more positive role for state government. Not a restriction on what the state may do, it requires a commitment to social betterment" through educational opportunities. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62 (2d ed. 2013).

¶ 14 Additionally, Article IX, Section 2 implements the right to education as provided in Article I. Specifically, Article IX, Section 2 states that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." Notably, these two provisions work in tandem: "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255. "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." *Id.* at 345, 488 S.E.2d at 254; *see also Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) ("[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.").

¶ 15 Further, Article I, Section 15 places an affirmative duty on the government "to guard and maintain that right." N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require the government to provide an opportunity to learn that is free from continual

intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

¶ 16 The issue here requires us to determine whether plaintiff's complaint sufficiently alleges a claim for relief under Article I, Section 15 and Article IX, Section 2. First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights. *See Corum*, 330 N.C. at 782–83, 413 S.E.2d at 289–90 ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . . The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State."); *id.* at 783–84, 413 S.E.2d at 290 ("This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. . . . The authorities in North Carolina are consistent with the decisions of the United States Supreme Court . . . to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated.").

¶ 17 Second, the claim must be colorable. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 335, 678 S.E.2d 351, 352 (2009) (referencing plaintiff's "colorable claims" that may be brought directly under the North Carolina Constitution); *Claim*, *Black's Law Dictionary* (11th ed. 2019) (defining "colorable claim" as "[a] plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)"); *see also Colorable*, *Black's Law Dictionary* (11th ed. 2019) (defining colorable as "appearing to be true, valid, or right"). In other words, the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution.

¶ 18 Third, there must be no "adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *see also id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights."). No adequate state remedy exists when "state law [does] not provide for the type of remedy sought by the plaintiff." *Craig*, 363 N.C. at 340, 678 S.E.2d at 356. Moreover, a claim that is barred by sovereign or governmental immunity is not an adequate remedy.

"[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 340–41, 678 S.E.2d at 355. Notably, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786, 413 S.E.2d at 292; *see id.* at 785–86, 413 S.E.2d at 291 ("[S]overeign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights.").

¶ 19 Here plaintiff alleged that defendant, the Pitt County Board of Education, failed to protect plaintiff-students' constitutionally guaranteed right to education under Article I, Section 15 and Article IX, Section 2. The Pitt County Board of Education, as a government entity, is a government actor.

¶ 20 Next we must determine whether plaintiff has alleged a colorable constitutional claim. We have previously determined that the North Carolina Constitution provides the right to a sound basic education. *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254. Here plaintiff has alleged that plaintiff-students have been denied that right because the school's deliberate indifference to ongoing student harassment created an environment in which plaintiff-students could not learn. Notably, the right to a sound basic education rings hollow if the structural right exists but in a setting that is so intimidating and threatening to students that they lack a meaningful opportunity to learn. Despite the fact that plaintiff-students here were provided with a public school to attend, plaintiff alleges that defendant was deliberately indifferent to conduct that prevented plaintiff-students from accessing their constitutionally guaranteed right to a sound basic education. Deliberate indifference indicates that the government entity knew about the circumstances infringing plaintiff-students' constitutional right and failed to take adequate action to address those circumstances. The alleged facts here support plaintiff's contention that the government did not "guard and maintain that right." N.C. Const. art. I, § 15. As such, plaintiff has alleged a colorable constitutional claim. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–47, 119 S. Ct. 1661, 1672–73 (1999) (concluding that the plaintiff, a student, sufficiently stated a claim under Title IX where the defendant, a school board with control over the conduct at issue, was deliberately indifferent to known acts of ongoing sexual harassment).

¶ 21 Finally, looking at whether an adequate state remedy exists, here plaintiff seeks monetary damages as well as injunctive relief through, *inter alia*, a permanent injunction preventing defendant from assign-

ing or requiring plaintiff-students to attend Lakeforest Elementary. The remedy sought here cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by plaintiff. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, plaintiff has alleged a colorable constitutional claim for which no other adequate state law remedy exists.[4] Therefore, sovereign or governmental immunity cannot bar plaintiff's claim.

¶ 22 Nonetheless, defendant argues that the Court of Appeals correctly relied on its precedent in *Doe* to reach its decision here. *Doe*, as an opinion from the Court of Appeals, is not binding on this Court. Moreover, *Doe* is clearly distinguishable from this case. In *Doe* a teacher made sexual advances on and off school grounds toward and engaged in sexual activity with the plaintiff, a high school student. *Doe*, 222 N.C. App. at 361, 731 S.E.2d at 247. The plaintiff sued the school board for negligent infliction of emotional distress and negligent hiring, supervision, and retention. The plaintiff also brought a claim against the defendant for violating her constitutional right to an education under, *inter alia*, Article I, Section 15. *Id.* at 361, 731 S.E.2d at 247. In her complaint, the plaintiff merely contended that the defendant's negligence in hiring and overseeing the teacher violated the plaintiff's rights.

¶ 23 At the trial court, the defendant in *Doe* unsuccessfully moved to dismiss the constitutional claims. *Id.* at 362, 731 S.E.2d at 247–48. The Court of Appeals reversed, however, concluding that the plaintiff's complaint did not state a colorable claim under the North Carolina Constitution. *Id.* at 371, 731 S.E.2d at 253. The Court of Appeals determined that the constitutionally guaranteed right to a sound basic education does not extend "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* at 370, 731 S.E.2d at 252–53. Here, however, plaintiff's complaint states a colorable claim under the North Carolina Constitution. Plaintiff has alleged that defendant prevented plaintiff-students from accessing their constitutional right to a sound

---

4. We note that defendant successfully moved to dismiss plaintiff's claims under the SVPA. Defendant pled sovereign or governmental immunity as a defense to any of plaintiff's claims to which it would apply. The SVPA claim is not before us on appeal, and therefore we express no opinion on the merits of that claim. We note, however, that having sought and obtained dismissal of the SVPA claim as barred by governmental immunity, defendant cannot assert that it is an adequate state remedy that would redress the harm alleged here. *See Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355 ("[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim.").

basic education as a result of defendant's deliberate indifference to ongoing harassment in the classroom. Thus, plaintiff's allegations directly impact the "nature, extent, and quality of the educational opportunities made available" to plaintiff-students as well as indicate that the government failed to "guard and maintain that right."

¶ 24 The decision of the Court of Appeals, which reversed the trial court order denying defendant's motion to dismiss, is reversed. As for plaintiff's petition for discretionary review of additional issues, we conclude that discretionary review was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

DIAMOND CANDLES, LLC
v.
JUSTIN WINTER; BAKER BOTTS, LLC; BRIAN LEE; SYMPHONY COMMERCE; AND HENRY KIM

No. 399A20

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendants' Rule 12(b)(2) and Rule 12(b)(3) motions to dismiss entered on 12 March 2020 by Judge James L. Gale, Special Superior Court Judge for Complex Business Cases, in Superior Court, Person County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 18 May 2021.

Miller Law Group, PLLC, by W. Stacy Miller, II, for plaintiff-appellee.

Gordon & Rees, by Robin K. Vinson and Allison J. Becker, for defendant-appellants.

PER CURIAM.

¶ 1 Upon consideration of the affidavits and evidence tendered to the trial court by Symphony Commerce and Henry Kim (defendants) and plaintiff Diamond Candles, the allegations in the complaint that are not controverted by defendants' affidavits, the trial court's findings of fact,

and the arguments of counsel, we conclude that there is substantial record evidence supporting the trial court's finding of personal jurisdiction over defendants in this matter and that the trial court did not abuse its discretion by denying defendants' motion to dismiss for improper venue and defendants' motion to stay under the doctrine of forum non conveniens. Thus, we affirm the trial court's order and opinion on defendants' Rule 12(b)(2) and Rule 12(b)(3) motions to dismiss entered on 12 March 2020 as it relates to defendant-appellants Symphony Commerce and Henry Kim.

AFFIRMED.[1]

IN THE MATTER OF I.K.

No. 403A20

Filed 11 June 2021

Child Abuse, Dependency, and Neglect—permanency planning order—findings and conclusion—sufficiency of evidence

The trial court's permanency planning order granting guardianship of the minor child to her maternal grandmother was affirmed where clear and convincing evidence supported the challenged findings of fact regarding respondent-father's lack of suitable and safe housing, substance abuse, and domestic violence. In turn, those findings supported the trial court's conclusion that respondent acted inconsistently with his constitutionally protected status as a parent.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 848 S.E.2d 13 (N.C. Ct. App. 2020), affirming an order entered on 22 March 2019 by Judge Samantha Cabe in District Court, Orange County. Heard in the Supreme Court on 23 March 2021.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

---

1. The order and opinion of the North Carolina Business Court, 2020 NCBC 17, is available at https://www.nccourts.gov/assets/documents/opinions/2020%20NCBC%2017.pdf.

Sean P. Vitrano for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent is the biological father of I.K. (Iliana)[1] and appeals from the Court of Appeals decision affirming the trial court's permanency-planning order granting guardianship of Iliana to her maternal grandmother. Since we conclude that the trial court's findings of fact are supported by clear and convincing evidence and the findings of fact support the conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent, we affirm.

I. Factual and Procedural Background

¶ 2 Iliana was born to respondent and Iliana's mother (Patty)[2] in 2012. On 10 November 2014, the Rockingham County Department of Social Services (RCDSS) received an initial Child Protective Services (CPS) report for Iliana and her half sibling.[3] CPS was concerned that Iliana was living in a hoarder home, that Iliana's parents were using illegal substances, that her parents were selling their food stamps, and that her parents were having domestic discord. After RCDSS completed an assessment, services were not recommended, and the case was closed on 6 January 2015.

¶ 3 On 16 October 2015, the Orange County Department of Social Services (OCDSS) received a CPS report alleging that Iliana's half sibling was exposed to drug abuse and domestic violence while in Patty's care. Respondent and Patty did not live together at the onset of OCDSS's involvement with Patty. On 8 January 2016, Patty was sentenced to forty-five days in jail for shoplifting and violating her probation. On 26 April 2016, Patty tested positive for cocaine and was jailed for violating her probation.

---

1. A pseudonym is used to protect the juvenile's identity and for ease of reading. While the parties agreed to a different pseudonym, we use the pseudonym used by the Court of Appeals for consistency.

2. A pseudonym is used for Iliana's mother for ease of reading. Furthermore, Patty is subject to the trial court's order ceasing reunification as to Iliana and appealed the trial court order to the Court of Appeals. However, Patty neither filed a notice of appeal of the Court of Appeals opinion affirming the trial court's order to this Court, nor did she file a brief regarding the instant case.

3. Iliana's half sibling, who has the same mother, is not the subject of this appeal.

¶ 4 After Patty was jailed, respondent stated that he could not care for Iliana due to his work schedule, and he voluntarily placed Iliana in her maternal grandmother's care. After Patty was released from jail, respondent and Patty met with OCDSS and agreed that Iliana would remain with her maternal grandmother "until the housing situation was resolved and [respondent and Patty] engaged in substance abuse treatment."

¶ 5 On 27 May 2016, respondent completed an intake with a substance abuse recovery center but refused to submit to drug screens and admitted to the social worker that he would test positive for marijuana. By August 2016, respondent and Patty were homeless and were staying with respondent's mother. Due to respondent's substance abuse and lack of stable housing, OCDSS obtained nonsecure custody of Iliana on 10 August 2016. Shortly thereafter, respondent and Patty agreed to the entry of a consent order that granted temporary custody of Iliana to her maternal grandmother.

¶ 6 After a hearing on 15 September 2016, the trial court entered an order on 6 December 2016 adjudicating Iliana to be a dependent juvenile and ordering her to remain in the temporary legal and physical custody of her maternal grandmother. The trial court ordered respondent and Patty to complete drug screens, seek substance abuse treatment, and comply with all treatment recommendations. However, respondent was arrested in October 2016 and was subsequently convicted of assault on a female after a domestic violence incident between himself and Patty.

¶ 7 The trial court held a hearing on 15 December 2016 to review the case and found that respondent was not complying with drug screens and that domestic violence was a new concern due to the domestic violence incident between respondent and Patty.

¶ 8 After the first permanency-planning hearing held on 2 March 2017, the trial court entered an order setting the permanent plan for Iliana as guardianship and a secondary plan of reunification. At the time of the hearing, respondent had refused eight out of fifteen requested drug screens and stated on one of the refusals that he would likely test positive for marijuana.

¶ 9 On 4 May 2017, respondent requested that the trial court review the case to determine whether the trial court's last order was in Iliana's best interests, including the provisions regarding visitation. The trial court granted respondent unsupervised visits for a minimum of one hour each week after a review hearing on 18 May 2017. However, the trial court stated that the visits would be suspended or revised if respondent was

not in full compliance with his substance abuse treatment and did not submit negative drug screens.

¶ 10 On 15 June 2017, a second permanency-planning hearing was held. In an order entered on 17 July 2017, the trial court maintained the permanent plan of guardianship and the secondary plan of reunification for Iliana. The trial court found that respondent and Patty had refused a significant number of drug screens and had not engaged in services to address their domestic violence issues. The trial court subsequently ordered respondent and Patty to submit to random drug screens, continue substance abuse treatment, abstain from domestic violence, and maintain safe and stable housing. Respondent was also required to participate in a program for domestic violence perpetrators.

¶ 11 On 4 July 2017, respondent and Patty appeared under the influence of a substance while in Iliana's presence. OCDSS rescinded unsupervised visitation on 19 July 2017. Respondent and Patty had another child together in September 2017.

¶ 12 On 7 November 2017, the trial court entered a permanency-planning order in which it granted guardianship of Iliana to her maternal grandmother and ceased reunification efforts with respondent due to a lack of progress on his case plan. The trial court incorporated by reference the social worker's court report, which documented that respondent continued to reside in his mother's home despite safety concerns, respondent and Patty had another child that resided in respondent's mother's home, respondent could only miss one more session before being terminated from the domestic violence perpetrator program, and both respondent and Patty last refused a drug screen on 5 June 2017. Respondent and Patty timely appealed the trial court's order granting guardianship to Iliana's maternal grandmother.

¶ 13 In March 2018, both respondent and Patty completed their substance abuse program at the substance abuse recovery center. However, on 20 April 2018, Patty displayed drug-seeking behavior evidenced by text messages she sent to respondent.

¶ 14 On 7 August 2018, in a unanimous decision, the Court of Appeals vacated the trial court's order and remanded the case to the trial court based on its conclusion that there were insufficient findings to support the trial court's conclusion that respondent was acting inconsistently with his constitutionally protected status as a parent.

¶ 15 Shortly thereafter, on 23 August 2018, respondent was involved in a domestic incident with his mother. The emergency response call log

indicated that respondent was verbally aggressive toward his mother and was "tearing up" respondent's mother's home. On 4 September 2018, respondent tested positive for marijuana. Also, RCDSS completed a home visit on 12 December 2018 and found that respondent's mother's home continued to pose safety concerns for Iliana.

¶ 16 On 3 and 18 January 2019, the trial court held another permanency-planning hearing regarding Iliana. The trial court again found that respondent had acted inconsistently with his protected status as a parent and determined that guardianship with Iliana's maternal grandmother was in Iliana's best interests.

II. Respondent's Appeal

¶ 17 Respondent timely appealed to the Court of Appeals. In a divided opinion filed on 18 August 2020, the Court of Appeals affirmed the trial court's order. *See In re I.K.*, 848 S.E.2d 13, 24 (N.C. Ct. App. 2020). Respondent then appealed to this Court.

¶ 18 On appeal, respondent argues that the trial court's conclusion that he acted inconsistently with his constitutionally protected status as a parent to Iliana is not supported by clear and convincing evidence. Respondent specifically challenges the trial court's findings of fact 26(b)–(c), 28, 30, 37, and 43(a), which relate to his substance abuse, housing situation, and involvement in domestic violence.

III. Standard of Review

¶ 19 "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63 (2001). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009) (cleaned up) (first quoting *In re Will of McCauley*, 356 N.C. 91, 101 (2002); then quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64 (1934)), *cert. denied*, 563 U.S. 988 (2011).

¶ 20 The trial court's legal conclusion that a parent acted inconsistently with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence. *See Boseman v. Jarrell*, 364 N.C. 537, 549 (2010);

Adams, 354 N.C. at 65–66. The trial court's findings of fact are conclusive on appeal if unchallenged, *see Boseman*, 364 N.C. at 549; *Adams*, 354 N.C. at 65–66, or if supported by competent evidence in the record, *see In re L.R.L.B.*, 2021-NCSC-49, ¶ 11.

IV. Analysis

¶ 21 The trial court relied on the challenged findings of fact along with others, which in pertinent part are listed below, to support its conclusion that respondent acted inconsistently with his constitutionally protected right to parent Iliana:

> 26. Both [Patty and respondent] have acted inconsistently with their constitutionally-protected right to parent the minor child. Specifically, this court finds as follows:
>
> > a. [Patty and respondent] voluntarily placed the minor child with her maternal grandmother on April 26, 2016 because of [Patty's] impending incarceration and [respondent's] lack of suitable housing and work schedule.
> >
> > b. [Patty and respondent] have not obtained safe and stable housing appropriate for the juvenile in the three (3) years the juvenile has been out of their custody. Though the home in which they were living was found to have met minimum standards by RCDSS on two visits between March 2, 2017 and October 5, 2017, the home was deemed not suitable for the minor child when RCDSS visited the home in the spring of 2018 and again on 12/12/2018.
> >
> > c. [Patty and respondent] continue to engage in domestic violence and illegal drug use despite their completion of treatment and classes.
>
> 27. When this hearing began on January 3, 2019, [Patty and respondent] were still residing with [respondent's] mother in a home that Rockingham County DSS deemed unsuitable for the children as late as December 12, 2018.
>
> 28. [Patty and respondent] have made some limited progress to remedy conditions that led to the minor

child being removed from their home. However, the issues of substance use, domestic violence, and safe, substance-free housing are still present despite numerous services that have been offered to the family since the issues were first identified in 2014.

. . . .

30. . . . [Respondent] completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018. There has not been another identified domestic violence incident between [Patty and respondent], however there has been domestic violence in the home between [respondent] and his mother . . . .

31. On August 23, 2018, law enforcement responded to a domestic disturbance involving [respondent and his mother] . . . , with whom [Patty and respondent] reside. [Patty and respondent] were not home at the time of law enforcement response. [Respondent] testified he and [his mother] had a disagreement over his misplacing her handicapped placard. He stated that he fell into the dryer while [his mother] was in the bathroom, and then he left the home.

32. [Patty and respondent] completed substance abuse treatment with Freedom House Recovery in March 2018. During the course of the case, [Patty and respondent] only partially complied with random drug screens. Upon remand of the case, OCDSS requested [Patty and respondent] each complete hair follicle drug screens on September 4, 2018. Both parents tested positive for marijuana.

. . . .

34. Despite [respondent] earning a gross income of $46,349.00 per year in a job he has maintained for 10 years and [his mother] paying a portion of the household expenses, [Patty and respondent] continue to reside with their infant daughter and [respondent's mother] . . . , with whom they moved after eviction in 2016 in a two-bedroom single wide trailer that has holes in the floor that were recently covered with

plywood at the request of RCDSS, and that has not otherwise been maintained.

35. Rockingham County DSS completed multiple home visits in 2018. The home was identified to need serious repairs, specifically to the floor, that needed to be resolved for safety; and the home continued to be extremely cluttered akin to hoarding. The home was not deemed appropriate for another juvenile to reside as recently as December 12, 2018.

36. The GAL made two visits to [Patty and respondent's] home . . . prior to appeal of the last order. He recalled the condition of the home to be similar to the description testified to by [the CPS investigator] . . . .

37. At the continuation of this hearing on January 18, 2019, [Patty and respondent] provided photographs of the home that showed somewhat improved conditions from the conditions reflected in the photographs and testimony presented on January 3, 2019. [Patty] testified that the new photos were taken after the January 3, 2019 beginning of the hearing. The court finds the testimony and documentation of Rockingham County DSS to be credible, and that the housing conditions of [Patty and respondent] as of December 12, 2018 was not safe and appropriate for [Iliana]. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home.

38. [Patty and respondent] indicate they plan to reside with [respondent's mother] in the future despite the ongoing concerns about the safety and appropriateness of the condition of the home.[ ]

39. [Patty and respondent] represent that their finances are tight despite [respondent's] stable employment where he earns more than $46,000 per year. [Patty and respondent] have two vehicle loans that total $519 per month. . . . [Patty and respondent] do not pay rent to [respondent's mother], and they share utility expenses with her. [Respondent's mother] pays the mortgage on the home and all of the

> car insurance is in her name. [Respondent] pays $53 per week in child support.
>
> . . . .
>
> 43. Pursuant to N.C.G.S. § 7B-906.2(d), the following demonstrate a lack of success:
>
> > a. [Patty and respondent] are not making adequate progress within a reasonable period of time under the secondary plan of reunification. They have not resolved the issues of substance abuse and [u]nstable housing that led to [the] removal of custody [of Iliana].

A. Substance Abuse

¶ 22 Respondent challenges finding of fact 26(c) as unsupported by clear and convincing evidence. We first address his challenge to the portion of the finding addressing his substance abuse. We conclude the evidence clearly shows that respondent continued to engage in substance abuse after he completed the substance abuse treatment program.

¶ 23 In March 2018, respondent completed his court-ordered substance abuse treatment program. Yet, a month later, in April 2018, Patty exchanged text messages with respondent that displayed drug-seeking behavior. Respondent also continued to use marijuana despite his substance abuse history and tested positive for marijuana in September 2018. Respondent concedes some of these facts expressly in his brief and also concedes them by not challenging these findings of fact by the trial court.

¶ 24 Furthermore, the evidence and testimony from the hearing tend to show that respondent's substance abuse issue had persisted since RCDSS became involved with Iliana in 2014. In 2014, RCDSS was concerned that respondent was abusing substances. Respondent also repeatedly refused to submit to drug screens throughout the duration of this case, refusing a total of eleven out of thirty-one requested drug screens, and of the screens he completed, he tested positive for substances on two occasions.

¶ 25 Respondent asks this Court to reweigh the evidence and conclude that one positive drug screen does not establish that he continued to use illegal drugs as found by the trial court. However, the trial court was also presented with evidence that Patty exchanged text messages with respondent displaying drug-seeking behavior in April 2018,

that respondent tested positive for marijuana after completing his court-ordered substance abuse treatment program in September 2018, and that respondent refused eleven out of thirty-one drug screens. Furthermore, respondent's request is untenable; this Court reviews the trial court's order to determine whether competent evidence supports the finding of fact and cannot reweigh the evidence when making this determination.

> 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. 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 G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 18 (cleaned up) (first quoting *In re A.R.A.*, 373 N.C. 190, 196 (2019); then quoting *In re J.A.M.*, 372 N.C. 1, 11 (2019)). In light of the aforementioned evidence and concessions by respondent, the portion of finding of fact 26(c) that respondent "continue[s] to engage in . . . illegal drug use despite [his] completion of treatment and classes" is plainly supported by clear and convincing evidence.

B. Safe and Stable Housing

¶ 26 Respondent challenges findings of fact 26(b), 28, 37, and 43(a) as not supported by clear and convincing evidence.[4] However, substantial evidence was presented to the trial court to support its findings that respondent did not have safe and stable housing for Iliana.

¶ 27 At the 3 January 2019 permanency-planning hearing, the Rockingham County CPS investigator testified that when he visited respondent's mother's home for the spring 2018 visit, the clutter in the home was piled to the ceiling in some areas and there were holes in the floor of the home covered with plywood. When the investigator returned to complete another visit on 12 December 2018, he found the same conditions present. The investigator stated that respondent's mother's home would pose safety concerns to Iliana, and he was unsure of where she would be able to sleep if respondent regained custody. Specifically, the investiga-

4. Respondent also challenges the trial court's finding that the guardian ad litem corroborated the RCDSS report of the condition of respondent's mother's home as being irrelevant. Since the finding is not necessary to our determination that the trial court's findings are supported by clear and convincing evidence, we do not consider that challenged finding in our analysis.

tor stated that respondent's mother offered that Iliana could sleep on a "foldout couch," but the investigator was "not sure how that would be folded out because [of] the size of the trailer." Notably, respondent has not challenged finding of fact 35, in which the trial court found based on the investigator's testimony that the house was deemed inappropriate for Iliana "to reside as recently as December 12, 2018."

¶ 28 The investigator also testified that during his spring 2018 inspection, the holes in the floor of respondent's mother's home had plywood on it, but when he walked on it, he "could feel [the plywood] kind of bouncing a little bit." The investigator notified respondent of the issues with the floor during that inspection. At the 12 December 2018 inspection, when the investigator found the floor in the same condition, respondent's mother asked the investigator not to include the flooring issue in his report, but nevertheless told the investigator that her in-home aide has shared concerns that she would fall through the floor. While respondent and Patty testified to placing new plywood over the holes in the floor after the 12 December 2018 home inspection, respondent had been aware of the ongoing safety concerns with his mother's home since 2017. Additionally, Patty presented photographs of some additional improvements made only *after* the 3 January 2019 hearing, but it was within the trial court's authority to weigh this evidence with the other evidence before the trial court and find that the state of the home in the pictures was "not indicative of the day-to-day condition of the home."

¶ 29 Furthermore, evidence from the hearing indicates that respondent has and continues to live in his mother's home despite earning an income of more than $46,000.00 and maintaining stable employment for ten years yet had not obtained independent housing, despite OCDSS's offers of assistance. Respondent also continues to live with Patty and their other child, but the trial court ceased efforts to reunify Iliana with Patty and Patty did not appeal the 18 August 2020 Court of Appeals decision to this Court. Respondent has no plans of moving out of his mother's home, despite the ongoing safety concerns and overcrowded conditions, nor does he plan to live separately from Patty and their other child. Iliana would be subjected to living with Patty if she were returned to respondent's care, despite the trial court's conclusion that Patty acted inconsistently with her protected status as Iliana's parent. As aptly stated by OCDSS, "[respondent] should not [be] confronted with a Sophie's Choice between Iliana and [Patty] and their new [child]," which would impose further instability in an already precarious situation.

¶ 30 Respondent's housing situation exposes Iliana to unsafe living conditions and exposes her to an unstable living environment. Therefore, we

conclude that clear and convincing evidence supports the trial court's finding that respondent did not have safe and stable housing for Iliana.

C. Domestic Violence

¶ 31 Respondent challenges findings of fact 26(c) and 30 as not supported by clear and convincing evidence. We agree with the Court of Appeals that the trial court mischaracterized the incident between respondent and his mother as involving physical violence when there was no evidence to support this characterization. *See In re I.K.*, 848 S.E.2d at 20–21. Therefore, we disregard that portion of finding of fact 30 as not supported by clear and convincing evidence. However, the unchallenged findings of fact documenting respondent's past domestic violence and the domestic incident involving his mother support the trial court's finding that domestic violence was an ongoing concern with respondent.

¶ 32 Specifically, domestic violence between respondent and Patty was identified as an ongoing issue since the first report was made to RCDSS in 2014. In 2016, a domestic violence incident occurred between them that led to respondent being convicted of assault on a female. Subsequently, in May 2017, respondent was ordered by the trial court to participate in a domestic violence perpetrator program in May 2017. While respondent demonstrated a reluctance to participate by missing several sessions, respondent reported that he eventually completed the program in February 2018. Nevertheless, only a few months later, respondent was involved in a domestic disturbance involving his mother. The involvement of law enforcement was required to address the incident. The 911 call log indicated that respondent was "verbally aggressive towards his mother[and] was tearing up [his mother's] home that he also resides in" during the 2018 incident.

¶ 33 Considering the unchallenged findings of fact and evidence concerning respondent's history with domestic violence and continued aggressive and violent behavior in the home in August 2018 after completing the domestic violence perpetrator program, we conclude that challenged findings of fact 26(c) and 30 are supported by clear and convincing evidence.

D. Respondent Acted Inconsistently with his Constitutionally Protected Status as Iliana's Parent

¶ 34 The Supreme Court of the United States has recognized that a natural parent has a constitutionally protected liberty interest in the custody, care, and control of his or her child. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *see also Petersen v. Rogers*, 337 N.C. 397, 402 (1994) (discuss-

ing that "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in" *Stanley v. Illinois*, 405 U.S. 645 (1972)). In ceasing reunification efforts with a parent and granting guardianship to a nonparent, there is no bright-line test to determine whether a parent's conduct amounts to action inconsistent with his constitutionally protected status. *Boseman*, 364 N.C. at 549. "[E]vidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. 142, 147 (2003).

¶ 35 While there is no bright-line test, respondent's actions displayed an unwillingness to act as Iliana's parent. Reviewed by this Court de novo, the cumulative evidence, as discussed previously herein, supports the trial court's findings that throughout OCDSS's involvement with Iliana, respondent did not refrain from using illegal substances, respondent did not adequately address his issues with domestic violence, and respondent did not obtain safe and stable housing. In fact, in May 2016, respondent voluntarily placed Iliana with her maternal grandmother "until the housing situation was resolved." Yet now, respondent states that he has no plans to move from the unsafe and crowded home, notwithstanding the fact that the home is totally unsuitable for Iliana. What may have begun as a temporary placement is now, by the respondent's choice, an indefinite one.

¶ 36 Since the trial court's findings of fact supporting its conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent were supported by clear and convincing evidence and the findings support the trial court's conclusion, the Court of Appeals did not err by affirming the trial court's order.

V. Conclusion

¶ 37 The trial court's challenged findings of fact regarding respondent's substance abuse, lack of safe and stable housing, and domestic violence concerns are supported by clear and convincing evidence, and the findings of fact support the trial court's conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent. As such, the trial court did not err by concluding that respondent acted inconsistently with his constitutionally protected status as Iliana's parent. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 38 Unless a parent has been deemed unfit, an order awarding guardianship to a nonparent over a parent in the best interest of the child, as occurred in this case, requires the court to find, based on evidence in the record, that the parent has acted inconsistently with his or her constitutionally protected status as a parent. *Price v. Howard*, 346 N.C. 68, 79 (1997). Abdicating its dual responsibilities to follow precedent and uphold the federal constitution, the majority strains to find sufficient facts in this case supporting such a conclusion. If we are not more careful, literally thousands of parents will be swept into the net of potentially losing their parental rights by virtue of their poverty. Such a result is contrary to our constitutional guarantees. As we said in *Price*, "[i]f a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Id.* Courts cannot take children away from their natural parents merely because another person could provide a materially better home.

¶ 39 Respondent made the difficult decision on 26 April 2016 to send his daughter (Iliana)[1] to live with her grandmother while he settled his housing situation and received substance abuse treatment. Respondent ultimately completed a substance abuse treatment program in March 2018. The record also reveals one incidence of domestic violence between respondent and his partner (Patty)[2] for which respondent received treatment, completing a "domestic violence perpetrator program at Alamance County DV Prevention in February 2018." After completing the substance abuse treatment program, the record and the trial court's findings indicate that respondent tested positive for marijuana on one occasion, on 4 September 2018. Moreover, the record and the trial court's findings indicate that, after completing the domestic violence perpetrator program, respondent had a loud argument with his mother that prompted a call to law enforcement.

¶ 40 At the time of the permanency planning hearing, respondent and Patty were living in a two-bedroom mobile home with respondent's mother and respondent's and Patty's infant daughter. They had been liv-

---

1. As does the majority, I use a pseudonym to protect the juvenile's identity and for ease of reading.

2. As does the majority, I use a pseudonym for Iliana's mother.

ing there since being evicted in 2016. That mobile home was deemed to meet minimum standards on two visits in 2017 but was then deemed to be unsuitable on two visits in 2018, the last of which was on 12 December 2018. Between the hearings on 3 January 2019 and 18 January 2019, respondent and Patty improved the condition of the home and provided photographs of the same to the trial court at the 18 January hearing.

¶ 41 The majority has determined that respondent's failure to timely repair the damaged floor of the mobile home or to obtain new housing, along with his positive test for marijuana and loud argument with his mother (the majority describes the argument as "a domestic incident"), sufficiently establish that respondent has acted inconsistently with his constitutionally protected status as a parent. In my view, this low bar is inconsistent with our precedent and seriously threatens the stability of families throughout the state. There is no record evidence that respondent willfully acted to subvert his constitutional rights. Instead, the majority's decision to disrupt his constitutional interest in the upbringing of his daughter poses a threat to families who may be forced by financial constraints to put off home repairs, or who need to place their children with family members when times are hard or while dealing with personal issues. I do not read the record as supporting the conclusion that respondent has acted inconsistently with his constitutionally protected status as a parent, nor do I read the law as permitting such a conclusion where a parent has not acted in conscious disregard of their parental obligations. I respectfully dissent.

I. Findings of Fact

¶ 42 Respondent has argued in substance that three of the trial court's factual findings are unsupported by the record: (1) that respondent failed to obtain safe and stable housing, (2) that respondent continued to engage in domestic violence after having received treatment, and (3) that respondent continued to have a substance abuse problem after having received treatment. The trial court's findings that respondent "continue[d] to engage in domestic violence and illegal drug use despite [his] completion of treatment and classes" are unsupported by the record. As a result, these findings cannot support the conclusion that respondent has lost his constitutional rights to his child. Although I might have found differently from the trial court, I agree with the majority that the trial court's conclusion that respondent had "not obtained safe and stable housing appropriate for the juvenile" is supported by the record. In the context of this case, however, that finding is not sufficient to conclude that respondent acted inconsistently with his constitutionally protected status as a parent.

A. Safe and Stable Housing

¶ 43 I agree with the majority's determination "that clear and convincing evidence supports the trial court's finding that respondent did not have safe and stable housing for Iliana." The trial court found that, on two occasions in the year leading up to the commencement of the permanency planning hearing, the home in which respondent and Patty were living had been "deemed not suitable for [Iliana]." This finding was supported by testimony from Jordan Houchins, an investigator with Rockingham County Child Protective Services, who stated that he visited the home in spring 2018 and again in December 2018. Mr. Houchins testified that, in addition to problems with the flooring and some clutter, the home was not large enough for another child as well as the home's current occupants, particularly given the "pretty serious health issues" of respondent's mother.

¶ 44 Respondent argues that he "addressed Mr. Houchins' concerns by replacing the portions of the floor that were unsound and removing items from the home that contributed to the clutter." However, repairing the floors and removing some items from the home does not address the crowded conditions identified by Mr. Houchins. Indeed, the trial court credited the testimony of Mr. Houchins, who testified that "[e]ven if [the mobile home] wasn't cluttered, it's very small" and identified the number of people in the home as a concern. The trial court acted appropriately within its role as factfinder when it determined that the improvements made by respondent were "not indicative of the day-to-day condition of the home" and the improvements were not enough to overcome the conclusions of the most recent report of the CPS investigator and convince the trial court that the home was now safe and appropriate for Iliana.

¶ 45 However, there are plenty of parents and families in our state who experience housing insecurity. Sometimes families are forced to live in cramped conditions. It seems unusually cruel to scrutinize families who are struggling to obtain adequate housing and use the lack of enough bedrooms to justify taking away their children. As discussed in more detail below, the simple fact of living in poor housing conditions is not enough to support the conclusion that a parent has acted inconsistently with their constitutionally protected interest in their child. In the absence of any clear and convincing evidence that respondent had better housing options available and chose this one in contravention of his parental obligations, there is no logical connection between respondent's housing insecurity and the conclusion that he has acted inconsistently with his constitutionally protected status as a parent. *Cf. Owenby v. Young*, 357 N.C. 142, 147 (2003) (a father's drunk driving was not

conduct inconsistent with his constitutionally protected status as a parent because the children were not in the car or living with him at the time). Mere supposition about what the respondent's income might have enabled him to rent is not enough. As a result, while the trial court's finding on this point is supported by the record, that finding does not include the element of volitional conduct that is necessary to support the conclusion that respondent's constitutional interest in his child should be severed.

¶ 46 The majority also mentions the fact that respondent continues to live with Patty and intends to continue doing so. The majority notes that Patty did not appeal the decision below to this Court, leaving intact the trial court's determination that she has engaged in conduct inconsistent with her constitutionally protected status as a parent. This is a particularly unfair and unjustified argument. Patty's conduct is not conduct on the part of respondent that is inconsistent with respondent's obligations as a parent. Moreover, there was never a court order that Patty be kept away from Iliana or other evidence that would make respondent's decision to live with her detrimental to his ability to be a parent.

B. Domestic Violence

¶ 47 The trial court's finding that domestic violence continued in respondent's home was unsupported. Instead, the evidence in the record at most supports the conclusion that respondent engaged in a loud argument with his mother.

¶ 48 In support of its conclusion that respondent had "acted inconsistently with [his] constitutionally-protected right to parent" Iliana, the trial court found that respondent "continue[d] to engage in domestic violence." The trial court elaborated, finding that respondent "completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018." The trial court also noted that "[t]here has not been another identified domestic violence incident between [respondent and Patty]." The trial court, however, stated that "there has been domestic violence in the home between [respondent] and his mother." This finding was unsupported.

¶ 49 The trial court wrote that "law enforcement responded to a domestic disturbance involving [respondent] and paternal grandmother" and that respondent "testified he and [his mother] had a disagreement over his misplacing her handicapped placard. He stated that he fell into the dryer while [his mother] was in the bathroom, and then he left the home." The record indicates that respondent's mother "reported it had been a 'family disagreement.' " There is no evidence in the record that

respondent was violent toward his mother, that respondent was violent toward his mother's property, or that there was any law enforcement involvement related to the incident other than responding to a call about a disturbance. The record does not support the majority's factual finding that respondent engaged in "aggressive and violent behavior," nor does the record support the trial court's factual finding that respondent "continue[d] to engage in domestic violence."

C. Drug Use

¶ 50 The trial court's findings that respondent "continue[d] to engage in illegal drug use" and that "the issue[ ] of substance use" was "still present despite numerous services that have been offered" are similarly unsupported. As the trial court acknowledged, the only evidence that respondent continued to use illegal drugs after receiving substance abuse treatment was one positive drug screen for marijuana on 4 September 2018. However, this drug screen was followed by three negative drug screens in the months leading up to the permanency planning hearing. Moreover, this was the only positive drug screen from May 2016 through December 2018.

¶ 51 The majority characterizes respondent's request that we conclude the trial court's findings were not supported by the record as a request to "reweigh the evidence." However, this characterization is off the mark. It is, of course, our job on appellate review to look to the record and determine whether the trial court's findings are supported by the evidence. In this case, a review of the relevant record evidence reveals no record that respondent had a problem with substance abuse, or even that respondent used illegal drugs on more than one occasion in over two years.

¶ 52 The majority leans heavily on the fact that "throughout the duration of this case," respondent refused eleven out of thirty-one requests for drug screens. What the majority overlooks is that from November 2016 through December 2018, respondent was in fact tested (meaning that he did not refuse the test) at least one time each month and received a negative test result. The only exceptions are a positive test in January 2017 for oxycodone, for which respondent provided a prescription, and the one positive test for marijuana in September 2018. Against this backdrop, in which it is clear from the record that respondent tested negative for drugs each month for more than two years and had just one positive drug test for a nonprescription drug in that time, it is astoundingly disingenuous for the majority to conclude that the record supports the trial court's finding that respondent continued to engage in illegal drug use despite the completion of substance abuse treatment. Even more

disingenuous is the majority's reliance on the fact that "Patty exchanged text messages with respondent that displayed drug-seeking behavior." The majority neglects to mention the trial court's finding that the text messages evidenced drug-seeking behavior on the part of *Patty*, not on the part of respondent.

II. Legal Conclusions

¶ 53 The trial court's remaining factual findings establish that respondent failed to secure adequate housing despite seemingly making enough money to afford better housing or to improve the existing housing. This finding is not sufficient to support the conclusion that respondent acted inconsistently with his constitutionally protected status as a parent. "North Carolina law traditionally has protected the interests of natural parents in the companionship, custody, care, and control of their children, with similar recognition that some facts and circumstances, typically those created by the parent, may warrant abrogation of those interests." *Price*, 346 N.C. at 75. For example, the interest may be overcome "when a parent neglects the welfare and interest of his child." *Id.* (quoting *In re Hughes*, 254 N.C. 434, 437 (1961)).

¶ 54 As explained in more detail below, a conclusion that this interest has been overcome requires factual findings that a parent has willfully acted contrary to their parental obligations. Without evidence that respondent chose to live in substandard conditions in contravention of his obligations to Iliana, the findings related to respondent's housing are insufficient to support the necessary legal conclusion.

¶ 55 The majority fails to discuss any of our relevant precedent and summarily concludes that: "[w]hile there is no bright-line test, respondent's actions displayed an unwillingness to act as Iliana's parent." *But see Price*, 346 N.C. at 75 ("[P]rior cases of this Court are instructive on the issue [of whether a parent's constitutionally protected interest must prevail] because they show how we have addressed custody issues in a wide variety of circumstances."). A review of our prior cases demonstrates that respondent's actions in this case do not rise to the level of conduct that we have previously found to be inconsistent with the constitutionally protected status as parent.

¶ 56 In an early case on the issue before us here, we considered a custody dispute between a biological mother and a non-biological father. *Price*, 346 N.C. at 70–71. From the time that the child was born, the mother had represented that the man she lived with at the time was the child's biological father. *Id.* at 71. However, the parents separated

just a few years after the child's birth. *Id.* The child lived primarily with the purported father, although she also spent some time with her mother. *Id.* Approximately three years after the separation, the purported father sued for custody when the mother attempted to have the child's school records transferred to another county's school system. *Id.*

¶ 57 We concluded that the record was not sufficient to determine whether the mother had acted inconsistently with her constitutional right to parent. *Id.* at 84. The trial court had "made no findings about whether defendant and plaintiff agreed that the surrender of custody would be temporary, or about the degree of custodial, personal, and financial contact defendant maintained with the child after the parties separated." *Id.* If the mother had "represented that plaintiff was the child's natural father and voluntarily given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary," we would have held that the mother had acted inconsistently with her constitutional right to parent. *Id.* at 83. This is because, in that case, the mother "would have not only created the family unit that plaintiff and the child [had] established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Id.*

¶ 58 In another case, we considered a custody dispute between a child's biological mother, biological father, and maternal grandparents. *Adams v. Tessener*, 354 N.C. 57, 58 (2001). The mother and father had a one-night stand that eventually resulted in the child's birth. *Id.* at 63–64. The mother informed the father that she was pregnant, but the father "took no action at that time." *Id.* at 58. Approximately four months after the child was born, the mother again contacted the father and told him that he would be contacted by the Department of Social Services regarding child support. *Id.* at 59. The father "made no inquiry concerning [the child]." *Id.* However, the father signed a voluntary support agreement and began making child support payments after DSS conducted a DNA test and determined that he was the father. *Id.* Some months later, after completing three visits with the child, the father sought to intervene in an existing custody action between the mother and maternal grandparents and sought custody of the child. *Id.* We concluded that the father's conduct had been inconsistent with his constitutionally protected interest in the child. *Id.* at 66. We noted that the father had "elected to do 'nothing' about the pregnancy and impending birth" upon being informed about the pregnancy. *Id.* We also considered that the father had made no inquiries with the child's mother about the child's "health and progress" nor had he made any further inquiry as to "whether he had fa-

thered the child." *Id.* We concluded that this failure to involve himself in the child's life supported the trial court's conclusion that the father had acted inconsistently with his rights to the child. *Id.*

¶ 59 We have also held that a mother's "lifestyle and romantic involvements," including her employment as a topless dancer, resulting in her "neglect and separation from the child" amounted to conduct inconsistent with the right to parent. *Speagle v. Seitz*, 354 N.C. 525, 528, 534 (2001). The evidence in that case further indicated that the mother had conspired with a boyfriend to kill the child's father, even though she was acquitted of criminal charges. *Speagle*, 354 N.C. at 532–33; *see also Owenby*, 357 N.C. at 147 (discussing *Speagle*).

¶ 60 In *Owenby v. Young*, however, we affirmed a trial court's conclusion that a parent's "protected status as parent was not constitutionally displaced." 357 N.C. at 148. The parent in that case, the father of two children, had divorced the children's mother seven years before the mother's death in a plane crash. *Id.* at 142. Prior to her death, the mother had primary custody while the father had "secondary custody, structured as visitation." *Id.* The children's maternal grandmother sought custody of the children, arguing that their father had problems with alcohol abuse, was financially unstable, and sometimes drove without a license. *Id.* at 143. The Court of Appeals opinion contains additional information about the evidence presented to the trial court:

> A two-day hearing was held on 7 and 18 December 2000 to determine if Plaintiff had standing to seek custody of Trey and Taylor. The trial court stated Plaintiff's burden was "to show [Defendant] to be unfit or in some other way to have acted . . . in a [manner] inconsistent with the parental relationships." At the hearing, Defendant testified he has driven while impaired and has also driven without a license. At times, Defendant has "operated a vehicle [ ] and consumed alcohol at the same time." Defendant also testified that while he knew it was wrong, he has allowed others to drive his children in the recent past while the individuals were consuming alcohol. According to Defendant, the children have spent a significant part of their lives in McDowell County, living either with or in proximity to Plaintiff.
>
> Both Trey and Taylor testified they often smelled alcohol on Defendant's breath. Trey stated that on

> several instances in the past, he has ridden in a vehicle with Defendant while Defendant drank beer. In addition, Trey's paternal uncle, while drinking, has driven Trey, Taylor, and Defendant to Charlotte.
>
> Taylor testified that on more than one occasion, he has ridden in a car with Defendant while Defendant and others consumed alcohol while driving. On one occasion, when the children's paternal uncle was drinking alcohol and driving, the children were involved in an automobile accident but were not severely injured. Taylor stated that he did not feel good about riding with his father because he was "afraid [Defendant] might . . . [drink] and [they] would get in a wreck again." Both children testified that when Defendant drinks alcohol, he becomes upset and agitated with Trey and Taylor. The two minor children were aware Defendant's driver's license was suspended, he often operated a vehicle while drinking alcohol or being under its influence, and Defendant operated a vehicle on several occasions while his license had been revoked.

Owenby v. Young, 150 N.C. App. 412, 413–14 (2002) (alterations in original).

¶ 61 The trial court determined that the father had a consistent employment history and improved finances, that most instances of his driving without a license were not on public roads, and that the father did not have a problem with alcohol abuse (going so far as to conclude that two convictions for driving while impaired did not raise an inference of "a problem with alcohol abuse"). *Owenby*, 357 N.C. at 143–44. This Court agreed, noting that it was of significance that the father "did not have primary custody of the children, nor were they accompanying him, on either of the occasions for which he received a driving while impaired citation." *Id.* at 147. We concluded that the child's maternal grandmother "failed to carry her burden of demonstrating that defendant forfeited his protected status" and reversed the Court of Appeals, reinstating the trial court's order. *Id.* at 148.

¶ 62 Our decisions in *Price*, *Adams*, and *Speagle* all involved a consistent defining feature: volitional conduct on the part of the parent intended in contravention of their parental obligations. For example, the mother in *Price* actively represented that the child's purported father was the

biological father and voluntarily relinquished custody to the purported father. *Price*, 346 N.C. at 83. We determined that this conduct would be inconsistent with the constitutionally protected parent status if the mother had not made clear that the arrangement was temporary, because it would have actively "induced [father and child] to allow that family unit to flourish" without her. *Id.* Similarly, in *Adams*, the father ignored the existence of his child despite repeated contact from the child's mother. *Adams*, 354 N.C. at 58–59. When we determined that the father's conduct was inconsistent with his constitutionally protected parent status, we did not focus our determination merely on the father's absence—instead, we discussed the father's decision to be absent from his child's life. *Id.* at 66. Finally, in *Speagle*, the Court held that evidence that a mother had some involvement in a conspiracy to murder her child's father was relevant and if proven by a preponderance of the evidence, such conduct would be inconsistent with her constitutionally protected status as a parent. *Speagle*, 354 N.C. at 532–34. In each case, the parent engaged in willful conduct evidencing an intention to act inconsistently with their obligations as a parent.

¶ 63 In the instant case, no such willful conduct exists. The only evidence of drug use by respondent following treatment is a single positive test for marijuana in over two years of consistent testing. Similarly, the only evidence of domestic violence is a loud argument with respondent's mother. Neither of these isolated incidents supports the conclusion that respondent acted willfully in contravention of his parental obligations.

¶ 64 This leaves the trial court's findings that respondent lived in housing conditions that were not appropriate for Iliana to reside in. While, as discussed above, I agree that the trial court's findings are supported by the evidence, this does not indicate that respondent acted contrary to his parental obligations. As the trial court noted, respondent improved the condition of the home between the hearing's commencement on 3 January 2019 and the hearing's second day on 18 January 2019. At the same time, there is no evidence in the record that respondent had better housing options available—instead, the trial court found that respondent and Patty had been living with respondent's mother since being evicted in 2016. In the absence of any evidence that respondent had better options available, it cannot be said that respondent's living conditions are "conduct" on his part that is inconsistent with his constitutionally protected status as a parent. Indeed, the evidence that respondent improved (albeit not sufficiently) the conditions of the home prior to the hearing on 18 January 2019 suggest that he was attempting to live up to his obligations as a parent. As a result, applying the rule that is apparent

from our decisions in similar cases, it is inappropriate to conclude that respondent has forfeited his constitutional interest in Iliana. The majority's characterization of respondent's living situation as a choice resulting in Iliana's indefinite absence from the home does nothing to create the missing factual findings which are necessary to show that respondent, with other options available to him, actually chose to live in housing that would not and could not support his daughter.[3]

¶ 65 A more direct application of and comparison to the decisions in the cases cited above suggests that respondent's conduct was consistent with his constitutionally protected status as a parent. As in *Price*, this case "involves a period of voluntary nonparent custody rather than unfitness or neglect." *Price*, 346 N.C. at 82. However, unlike *Price*, there is no indication in the record that respondent "represented to [Iliana] and to others that [her maternal grandmother] was [Iliana's] natural [mother]." *Id.* at 83. Moreover, the circumstances of the relinquishment made clear from the outset that it was to be temporary—respondent placed Iliana in the care of her maternal grandmother because of respondent's work schedule and because of respondent's lack of adequate housing and agreed it would last "until the housing situation was resolved and [respondent and Patty] engaged in substance abuse treatment." Whereas we determined that "relinquishment of custody" to a nonparent "for an indefinite period" would be conduct inconsistent with the constitutional right to parent in *Price* because such conduct would have "created the family unit that [the nonparent] and the child have established" and "also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated," *Price*, 346 N.C. at 83, no such concerns are present here. The present case presents precisely the scenario we envisioned in *Price*, where a parent's decision to temporarily send a child elsewhere could be action consistent with their obligations as a parent and therefore *consistent* with their constitutionally protected status as a parent. *See id.* ("We wish to emphasize this point because we recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment.").

---

3. Ironically, the majority writes that respondent should not be confronted with the "Sophie's Choice" of choosing between living with Iliana on the one hand and living with Patty and his new child on the other. In fact, it is only the majority's decision here that would have forced him to do so.

¶ 66 The father in *Adams* showed almost no interest in the existence of his child, and his absence from the child's life was a result of his failure to involve himself despite repeated contact from the mother. *Adams*, 354 N.C. at 58–59. By contrast, there is no evidence in the present case that respondent abandoned Iliana. Rather, respondent's decision to place Iliana with a nonparent custodian appears to have been an act of parental responsibility, as the trial court found that the placement was made voluntarily in acknowledgment that respondent needed to improve Iliana's home life. Similarly, respondent has not shown the type of conduct inconsistent with parental status as was demonstrated in *Speagle*—no evidence in the record indicates that respondent was involved in murdering Iliana's mother or indeed that respondent engaged in any other seriously illegal conduct even potentially injurious to his ability to parent Iliana.

¶ 67 Respondent's conduct in this case does not arise nearly to the level of conduct which we have previously found to forfeit a parent's constitutional interest in their child. Instead, the record evidence shows that respondent has responded well to treatment for substance abuse and domestic violence but remains in a difficult housing situation. I do not believe that the law permits a difficult housing situation, without evidence that it results from a parent's decision in contravention of that parent's obligations to a child, to sever the constitutionally protected tie between parent and child. I respectfully dissent from the majority's decision.

IN RE POOL

[377 N.C. 442, 2021-NCSC-61]

IN RE INQUIRY CONCERNING A JUDGE, NOS. 19-136 & 19-242
C. RANDY POOL, RESPONDENT

No. 14A21

Filed 11 June 2021

Judges—discipline—sexual misconduct—material misrepresentations

The Supreme Court ordered that a retired district court chief judge be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the N.C. Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, where the judge engaged in sexual misconduct with numerous women, failed to diligently discharge his judicial duties by constantly using his cell phone while on the bench and frequently continuing cases in order to meet with women, misused the prestige of his office, made material misrepresentations to law enforcement during an investigation, and made material misrepresentations to the Judicial Standards Commission during its investigation. The Court considered mitigating factors, including the judge's recent diagnosis with frontotemporal dementia, his prior years of distinguished service, and his agreement not to serve as a judge again.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered on 18 December 2020 that Respondent C. Randy Pool, a Judge of the General Court of Justice, District Court Division, Judicial District 29A, be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 27 April 2021 but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

IN RE POOL

[377 N.C. 442, 2021-NCSC-61]

ORDER OF CENSURE

¶ 1 By the recommendation of the North Carolina Judicial Standards Commission (the Commission), the issue before this Court is whether Judge C. Randy Pool (respondent) should be censured for violations of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

¶ 2 On 21 August 2019, the Commission filed a Statement of Charges against respondent alleging violations of Canons 1, 2A, and 2B. On 7 October 2019, respondent filed his answer. On 19 March 2020, the Commission filed an Amended Statement of Charges that included new allegations, charging respondent with violations of Canons 1, 2A, 2B, 3A(4), and 3A(5) in the following manner:

> (1) by engaging in sexual misconduct while serving as and exploiting his position as Chief Judge of his judicial district through a pattern of predatory sexual advances towards numerous women in Respondent's community, many of whom were involved in matters pending in the district where Respondent served as Chief Judge; (2) by demonstrating a pattern of failing to diligently discharge his judicial duties for the period from at least November 2016 until his retirement in November 2019; (3) by misusing the prestige of his judicial office to solicit assistance from local law enforcement relating to the attempted extortion of Respondent[1] . . . ; (4) by making material misrepresentations to law enforcement agents during the investigation of [an] attempt to extort money from Respondent; and (5) by making material misrepresentations to the Commission during its investigation into Inquiry No. 19-136.

¶ 3 On 9 November 2020, the Commission and respondent entered into a Stipulation Pursuant to Commission Rule 18 (the Stipulation). The parties stipulated to the following findings of fact:

> 1. Respondent was first appointed to the district court in 1999 and served as the Chief Judge of

1. Respondent's inappropriate electronic communications and exchange of nude photographs resulted in an extortion attempt by one woman, which led to an investigation by law enforcement agencies.

District 29A from 2006 until his retirement effective December 1, 2019.

. . . .

3. For the period beginning in 2016/2017 through June 2019, Respondent was an active user of the social media platform Facebook ("FB") and had a single FB account for both personal and campaign purposes. Respondent ceased the use of his FB account in or about June 2019.

4. A review of Respondent's Facebook activity for the period from November 1, 2018 through May 9, 2019 establishes that: Respondent identified himself on his Facebook page as the Chief District Court Judge located in Marion, North Carolina; Respondent's Facebook page was public and open to anyone to see his posts and comments; Respondent had thousands of "friends" on Facebook; and Respondent was a very active user of Facebook, frequently posting his own photos or comments or commenting on posts of other Facebook users.

. . . .

6. Although some of Respondent's FB messages have been deleted, a review of Respondent's existing FB messages during the period from November 2018 to May 2019 shows that Respondent, who is married, knowingly and willfully initiated and engaged in conversations with at least 35 different women that ranged from inappropriate and flirtatious to sexually explicit. In some cases, Respondent and the female also had telephone conversations, exchanged texts and had personal meetings (including in some cases sexual encounters).

7. Respondent knowingly and willfully engaged in FB conversations of a sexual nature with 12 women during the period from at least November 2018 through July 2019[2] . . . .

2. While the parties stipulated to the fact that respondent stopped using his FB account in or about June 2019, the stiplations indicate that one exchange included text messages that were sent in July 2019. From November 2018 through May 2019, respondent

. . . .

9. In addition . . . , Respondent also made either inappropriate or flirtatious comments through FB messages to women who were required to appear or work in Respondent's court in their professional capacities[.]

. . . .

11. Respondent's FB records from the period from November 2018 to May 2019 when compared to official reports of Respondent's time on the bench show that Respondent engaged in extensive FB activity, including posts, comments and private messages, while Respondent was reported as being in court. Respondent's FB records also establish that Respondent routinely sought to arrange personal meetings with women he contacted on FB either during breaks and recesses from court, before court convened or immediately after court adjourned. Court personnel assigned in Respondent's courtroom in McDowell County regularly observed that Respondent was frequently on his cell phone while on the bench and would often "disappear" during recesses and lunch breaks, and that Respondent would often recuse in cases where the stated reason appeared to be very tenuous, and at other times would continue cases at such a high rate that it would make their jobs more difficult. While Respondent did not engage in any FB or other conversations on his cell phone at times when he was actively presiding in a case, he did use his cell phone extensively during times on the bench that did not require his direct attention.

. . . .

26. Prior to the incidents described herein that began in or about 2017, Respondent had enjoyed a long and distinguished career as a judge of his district

---

communicated, via Facebook, through inappropriate messages with at least sixteen additional women, often seeking photographs of them or sharing photographs of himself. In addition, respondent had ex parte discussions through Facebook regarding pending proceedings in his district.

for almost twenty years. As Chief District Court Judge, Respondent made a number of significant contributions to the administration of justice during his 13 years in that position. Upon being named Chief Judge, Respondent immediately instituted a Continuance Policy for his district that all judges followed and successfully eliminated significant back log in his district. Respondent also created a new Truancy Court for McDowell and Rutherford County at least twelve years ago where he and his colleagues volunteered their time after court to meet with parents, grandparents and students to emphasize and encourage students to stay in school, be present each day, and to work hard to get a good education.

27. Respondent has also actively been engaged in his community. . . .

28. Other than as set forth herein, Respondent has enjoyed a good reputation as a judge for being professional and for diligently discharging his judicial duties while presiding in court.

29. Respondent has also undertaken significant efforts to determine the cause of his sexual misconduct and to address the problems in his personal life. . . . His primary care physician conducted a physical examination in early October 2020 and ordered an MRI, which showed mild atrophy or shrinkage of the front and the left temporal lobes of his brain. . . . [O]n or about October 20, 2020, Respondent was evaluated by a physician . . . . That evaluation resulted in a diagnosis of early stage Frontotemporal Dementia, a disease which can manifest itself through a lack of control of sexual impulses. . . . Frontotemporal Dementia is also recognized as a progressive and terminal illness with a life expectancy of 6–8 years after symptoms manifest . . . .

. . . .

31. Respondent agrees that based upon the nature of his misconduct and his recent diagnosis of early signs of dementia, he will not seek a commission as an emergency judge or a retired recall judge, nor will

> he attend future judicial conferences or continuing judicial education (CJE) programs offered to judges of the State of North Carolina.

¶ 4 The parties further stipulated to the following Code and statutory violations:

> 1. Respondent acknowledges and agrees that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that he violated the following provisions of the North Carolina Code of Judicial Conduct:
>
> a. he failed to personally observe appropriate standards of conduct to ensure that the integrity of the judiciary is preserved in violation of Canon 1;
>
> b. he failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A;
>
> c. he allowed his personal relationships . . . to influence his official judgment and conduct, in violation of Canon 2B;
>
> d. he abused the prestige of his judicial office in seeking favors and influence in the handling of the investigation by local law enforcement and the SBI in violation of Canon 2B;
>
> e. he engaged in improper *ex parte* or other communications concerning pending proceedings in violation of Canon 3A(4);
>
> f. his Facebook activity while in court and consistent efforts to take breaks from court to meet women interfered with his duty to diligently discharge his judicial duties in violation of Canon 3A(5).
>
> 2. Respondent further acknowledges and agrees that the stipulations contained herein are sufficient to prove by clear and convincing evidence that his actions constitute willful misconduct in office and that he willfully engaged in misconduct prejudicial to the administration of justice which brought

> the judicial office into disrepute in violation of N.C.[G.S.] § 7A-376.

¶ 5 On 13 November 2020, the Commission held a disciplinary hearing in this matter.

¶ 6 On 18 December 2020, the Commission filed its Recommendation of Judicial Discipline. The Commission made the following conclusions of law:

> 1. Commission Counsel, Respondent and Counsel for Respondent, all of whom executed the Stipulation, agreed that the factual stipulations contained therein were sufficient to prove by clear and convincing evidence that Respondent had violated Canons 1, 2A, 2B, 3A(4) and 3A(5) of the North Carolina Code of Judicial Conduct. . . . Upon its independent review of the stipulated facts and the Code of Judicial Conduct, the Commission agrees.
>
> 2. Canon 1 of the Code of Judicial Conduct requires that a judge must "participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved." Canon 2A of the Code of Judicial Conduct requires that a judge "should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Commission concludes that Respondent's failure to personally observe appropriate standards of conduct in and out of the courtroom, his conduct in creating the perception among local law enforcement that he wanted a favor in the matter involving Ms. [T.], and his conduct in making misleading statements to the SBI and the Commission violated Canon 1 and Canon 2A.
>
> 3. Canon 2B of the Code of Judicial Conduct provides that a judge "should not lend the prestige of the judge's office to advance the private interest of others." The Commission concludes that Respondent violated Canon 2B by using his office to assist various female litigants as found in the Findings of Fact, including his conduct in using his position

as Chief Judge to direct a local attorney to assist a litigant with whom Respondent was having a sexual relationship and to otherwise use his office to assist her in her divorce proceeding.

4. Canon 3A(4) of the Code of Judicial Conduct provides that "except as authorized by law, [a judge may] neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding." The Commission concludes that Respondent violated Canon 3A(4) through his conversations with the women as described herein relating to pending proceedings in his district.

5. Canon 3A(5) of the Code of Judicial Conduct provides that a "judge should dispose promptly of the business of the court." The Commission concludes that the Stipulation of Facts establishes that Respondent violated Canon 3A(5) through his constant cell phone use on the bench, frequent breaks to have conversations or physical encounters with women he contacted through Facebook, and frequent continuances and recusals (some of which were created by his sexual misconduct).

6. The Preamble to the Code of Judicial Conduct provides that a "violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina." In addition, Respondent has stipulated not only to his violations of the Code of Judicial Conduct, but also to a finding that his conduct amounted to conduct prejudicial to the administration of justice and willful misconduct in office. . . . The Commission in its independent review of the stipulated facts and exhibits and the governing law also concludes that Respondent's conduct rises to the level of conduct prejudicial to the administration of justice and willful misconduct in office.

7. The Supreme Court defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." *Id.* at 305, 226 S.E.2d at 9. As such, rather than evaluate the motives of the judge, a finding of conduct prejudicial to the administration of justice requires an objective review of "the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *Id.* at 306, 226 S.E.2d at 9 (internal citations and quotations omitted). Respondent's objective conduct in initiating and engaging in inappropriate conversations and relationships with women through FB messages, the exchange of indecent photographs, and his inappropriate comments to women who appeared in his court either in their professional capacities or as parties or witnesses, and the resulting extortion attempt by Ms. [T.] based on his indecent photographs, is without question conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

8. The Supreme Court in *In re Edens* defined willful misconduct in office as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present." 290 N.C. at 305, 226 S.E.2d at 9. The undisputed facts at issue in this matter establish that Respondent's conduct involved moral turpitude and dishonesty with the SBI and the Commission during their investigations in an effort to prevent the discovery of the full extent of his sexual misconduct. As such, and despite Respondent's recent diagnosis of the early stages of frontotemporal dementia on the eve of his disciplinary hearing (a fact he noted during his clinical evaluation on October 20, 2020), the Commission

> does not hesitate to conclude that Respondent's conduct between 2017 and 2019 was willful and renders him unfit to serve as a judge of the State of North Carolina and that Respondent fully understood that his conduct would justify disciplinary action. By Respondent's own admission to the SBI on May 16, 2019, his conduct with respect to Ms. [T.] alone was "terrible" and could result in disciplinary action by the Commission to include a recommendation of removal from office and loss of his pension and that his preference was that the Commission would not learn of his misconduct. . . . The Commission thus concludes that Respondent also engaged in willful misconduct in office.

(Second alteration in original).

¶ 7 In addition to these conclusions of law, the Commission also considered the fact that respondent "is no longer a sitting judge of the State of North Carolina and has agreed that he will never serve in such capacity again," that he "had served for approximately 18 years as a judge, and for over a decade as chief judge of District 29A, without any disciplinary matters before the Commission," that he "had contributed to improvements to the administration of justice in his district," and that he is in "the early stages of frontotemporal dementia." Based on the conclusions of law and these mitigating factors, the Commission recommended that respondent be censured.

¶ 8 In reviewing recommendations from the Commission, the Supreme Court acts as a court of original jurisdiction rather than as an appellate court. *In re Daisy*, 359 N.C. 622, 623, 614 S.E.2d 529, 530 (2005). Because this Court is not bound by the Commission's recommendations, we must independently determine what, if any, disciplinary measures to impose on respondent. *In re Stephenson*, 354 N.C. 201, 205, 552 S.E.2d 137, 139 (2001). "[I]n reviewing the Commission's recommendations, this Court must first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008). An admission of facts in a stipulation is "binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact." *State v. McWilliams*, 277 N.C. 680, 686, 178 S.E.2d 476, 480 (1971) (quoting Stansbury, *North Carolina Evidence* § 166 (2d ed. 1963)).

¶ 9 After a careful review of the record, we conclude that the Commission's findings of fact are supported by clear and convincing evidence, and we find that the Commission's conclusions of law are supported by those facts. Therefore, we adopt the Commission's conclusions of law. Furthermore, we agree with the Commission's conclusion that respondent's conduct amounts to willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. *See In re Hair*, 324 N.C. 324, 325, 377 S.E.2d 749, 750 (1989) (concluding that censure was appropriate because the respondent's inappropriate sexual advances and comments were prejudicial to the administration of justice).

¶ 10 In addition, because respondent is no longer a sitting judge and has agreed not to serve as such, while taking into account respondent's eighteen years of distinguished service as a judge and respondent's expression of remorse, we agree that censure is appropriate. *See id.* at 325, 377 S.E.2d at 750 (concluding censure was appropriate where the respondent was a retired judge and had made no application to sit as an emergency district court judge); *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (stating that jurisdiction for purposes of judicial discipline is not lost upon a judge's resignation).

¶ 11 The Supreme Court of North Carolina orders that respondent, C. Randy Pool, be CENSURED for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this the 11th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Justice ERVIN did not participate in the consideration or decision of this case.

IN RE M.J.R.B.

[377 N.C. 453, 2021-NCSC-62]

IN THE MATTER OF M.J.R.B., Z.M.B., N.N.T.B., S.B.

No. 76A20

Filed 11 June 2021

1. Termination of Parental Rights—request for new counsel and new guardian ad litem—denied—abuse of discretion analysis

In a termination of parental rights proceeding, the trial court did not abuse its discretion by denying respondent-father's motions for new counsel and a new guardian ad litem (GAL) where respondent made the requests prior to the hearing and outside the presence of counsel and the GAL, failed to present good cause to remove counsel and the GAL, and did not renew the motion or otherwise address the issue once counsel arrived for the hearing.

2. Continuances—request for two-hour continuance to take medication—failure to show error or prejudice

In a termination of parental rights hearing, the trial court did not abuse its discretion by denying respondent-father's request for a two-hour continuance to take his medication where respondent failed to show the denial of the motion was erroneous or that he was prejudiced by the denial of the motion.

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

In a termination of parental rights hearing where the unchallenged findings of fact showed respondent-mother failed to submit to a required psychological assessment, failed to submit to a required domestic violence assessment, repeatedly failed to submit to drug screens upon request, and failed to complete a parenting program, the trial court did not err when it terminated her parental rights to the older juveniles for willful failure to make reasonable progress in correcting the conditions that led to the removal of the juveniles.

4. Termination of Parental Rights—grounds for termination—failure to establish paternity

In a termination of parental rights proceeding where the trial court's findings related to paternity were unchallenged by respondent-father and he did not challenge the sufficiency of the findings to support termination or that the termination was in the best interests of the children, the trial court's order terminating his parental rights to the children under N.C.G.S. § 7B-1111(a)(5) was affirmed.

5. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—12-month requirement

The trial court erred in terminating respondent-mother's parental rights to the youngest child for failure to make reasonable progress in correcting the conditions that led to the removal of the child where the evidence showed that only nine months had elapsed between the custody order and the filing of the termination petition. The court was required by N.C.G.S. § 7B-1111(a)(2) to look at the parent's reasonable progress over a twelve-month period.

6. Termination of Parental Rights—grounds for termination—incapable of providing proper care and supervision—necessary findings

In a termination of parental rights proceeding where—although there may have been sufficient evidence in the record to show respondent-mother was incapable of providing proper care and supervision for the youngest child—the trial court failed to make findings showing the absence of an acceptable child-care arrangement, did not identify the condition that made respondent incapable of parenting the child, and did not address whether her condition would continue for the foreseeable future, the court's order terminating respondent's parental rights under N.C.G.S. § 7B-1111(a)(6) was vacated and remanded for entry of a new order.

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 12 November 2019 by Judge Karen Alexander in District Court, Craven County. Heard in the Supreme Court on 17 February 2021.

Peter M. Wood for respondent-appellant-father.

Mercedes O. Chut for respondent-appellant-mother.

Bernard Bush for petitioner-appellee Craven County Department of Social Services.

J. Mitchell Armbruster for respondent-appellee guardian ad litem.

BERGER, Justice.

¶ 1 On August 23, 2016, the Craven County Department of Social Services ("DSS") filed petitions alleging that M.J.R.B., Z.M.B., and N.N.T.B. (col-

lectively, the "older children") were neglected and dependent juveniles. DSS alleged, among other things, that on August 15, 2016, three-month-old M.J.R.B. tested positive for cocaine and THC. The trial court ordered that the children be placed in DSS custody, and each parent was appointed a guardian ad litem ("GAL") due to their mental health issues. On February 27, 2017, the trial court entered an order which adjudicated the older children as neglected and dependent.

¶ 2 On November 8, 2017, respondent-mother gave birth to S.B. S.B. tested positive for cocaine at birth, and DSS filed a petition alleging that S.B. was a dependent juvenile. S.B. was placed in nonsecure custody, and on February 20, 2018, the trial court entered an order adjudicating S.B. a dependent juvenile because the older children were in DSS custody and respondent-parents had made no progress toward reunification with them. In addition, respondent-parents had not complied with mental health treatment recommendations, and respondent-mother admitted to consuming cocaine while she was pregnant with S.B.

¶ 3 After a hearing on July 20, 2018, the trial court ceased reunification efforts and changed the children's permanent plan to adoption. On August 2, 2018, DSS filed petitions to terminate respondent-parents' parental rights in the minor children. Before the hearing began on July 2, 2019, respondent-father requested that his counsel and GAL be fired. In addition, respondent-father requested that the hearing be suspended for two hours so he could take his medication. Respondent-father made both of these requests outside of the presence of his attorney and GAL. The court denied both requests. Prior to the start of the hearing, the attorney and GAL met with respondent-father, and no further motions were made.

¶ 4 On November 12, 2019, the court entered orders terminating respondent-parents' parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Respondent-parents' parental rights to S.B. were terminated pursuant to N.C.G.S. § 7B-1111(a)(2) and (6). Respondent-parents appeal.

I. Standard of Review

¶ 5 We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sus-

> tain the trial court's adjudication. The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order.

In re J.S., 374 N.C. 811, 814–15, 845 S.E.2d 66, 70–71 (2020) (cleaned up).

II. Respondent-Father's Motion to Substitute Counsel and Motion to Continue

¶ 6 **[1]** Respondent-father argues the trial court erred by failing to sufficiently inquire about his request for new counsel and a new GAL before the termination hearing began when neither his attorney nor his GAL were present. Respondent-father further alleges that the trial court erred when it declined to postpone the hearing for two hours so respondent-father could take his medication. We disagree.

A. Motion to Substitute Counsel

¶ 7 Parents in a termination of parental rights proceeding have "the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." *In re K.M.W.*, 376 N.C. 195, 208–09, 851 S.E.2d 849, 859 (2020). In addition, "the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C.G.S. § 7B-1101.1(c) (2019). "A parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C.G.S. § 7B-602(a1) (2019).

¶ 8 Here, the trial court made the following relevant findings related to respondent-father's request:

> Prior to the hearing in this matter, the Respondent Father made a motion to dismiss his attorney. The court finds good cause to deny this motion. Let it also be noted that both respondents appeared highly anxious at the start of the proceedings. This court noted their anxiety and frustration and privately requested the attending court bailiffs to show some flexibility with court decorum and not to immediately apprehend and or interrupt the respondents if there were angry outbursts from the respondents. Also, this court denied the respondents to discharge their counsel

> but told them they would be allowed to ask additional questions of witnesses personally if their attorney did not ask a question they wanted. Moving forward, the respondents appeared satisfied and comfortable with this ruling.

¶ 9 Respondent-father's motions were made prior to the termination hearing and outside the presence of his attorney and GAL. The trial court accommodated respondent-father with relaxed courtroom rules during this time. After considering respondent-father's request, the trial court found good cause to deny respondent-father's motion. Once respondent-father's attorney and GAL arrived at the hearing, they conferred with respondent-father and no further motions were made by respondent-father or his attorney. Respondent-father presented no additional information, at trial or on appeal, to make a requisite showing of "good cause" to substitute counsel.

¶ 10 Because respondent-father made these motions prior to the hearing and outside the presence of counsel and his GAL, failed to present good cause to warrant removal of his attorney at the trial court, and did not renew these motions or otherwise address the matter when counsel arrived for the hearing, the trial court did not abuse its discretion in denying respondent-father's motion to substitute counsel.

B. Motion to Continue

¶ 11 **[2]** Respondent-father also argues that the trial court abused its discretion when it denied his request for a two-hour continuance to take his medication.

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. . . . Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

In re A.L.S., 374 N.C. 515, 516–17, 843 S.E.2d 89, 91 (2020) (cleaned up). Here, respondent-father has failed to show that the denial of his motion

to delay the hearing was erroneous, or that he was prejudiced by the trial court's denial of his motion. Thus, the trial court did not abuse its discretion in denying respondent-father's motion to continue.

III. Respondent-Parents' Parental Rights to the Older Children

¶ 12 **[3]** Respondent-mother argues that the trial court erred when it terminated her parental rights because DSS did not make reasonable efforts to work with her, and there was no evidence of lack of fitness as of the termination hearing. We disagree.

A. Respondent-Mother's Parental Rights

¶ 13 A court may terminate parental rights if grounds exist under N.C.G.S. § 7B-1111(a), and the trial court determines that termination is in the best interest of the juvenile. *See* N.C.G.S. § 7B-1111(a) (2019); N.C.G.S. § 7B-1110(a). Here, the trial court determined that grounds existed to terminate respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111 (a)(1), (2), and (6).

¶ 14 Grounds for terminating a parent's rights to a juvenile exist under N.C.G.S. § 7B-1111(a)(2) when:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C.G.S. § 7B-1111(a)(2) (2019).

¶ 15 The trial court made the following unchallenged findings of fact:

> 1. The Petitioner, the Craven County Department of Social Services, was granted custody of the [older children] by non-secure Custody Orders dated August 24, 2016, and subsequent orders in this matter . . . .
>
> . . . .
>
> 14. Regarding the Respondent Mother's level of compliance with the orders of the court for her to facilitate reunification, [as stated earlier in the order]:

a. The Respondent Mother failed to [s]ubmit to a full psychological assessment, to include a substance abuse assessment and a parenting capacity inventory, with an approved and licensed clinician.

b. The Respondent Mother failed to submit to a domestic violence assessment and follow all recommendations. She appeared for the assessment with [respondent-father], and they refused to allow her to be interviewed without him present. As a result, the [a]ssessment could not be completed.

c. The Respondent Mother failed to [s]ubmit to random drug screens immediately upon the request of the Craven County Department of Social Services. She submitted to an initial assessment for drug screen but failed to submit to subsequent drug screens. Drug screens were requested on 1/18/17, 1/30/17, 2/16/17, 3/18/17, 3/14/17, 5/25/17, 6/5/17, 6/27/17, 7/7/17, 3/13/18, 8/21/17, 1/24/17, 4/3/18, 8/29/18, 5/12[/]17, 4/20/18, and she refused to submit to drug screens every time.

d. The Respondent Mother failed to submit to random pill counts and medication monitoring immediately upon the request of the Craven County Department of Social Services.

e. The Respondent Mother failed to execute all necessary releases such that the Craven County Department of Social [Services] may access all medical, mental health and substance abuse records for the Respondent Parent, until December 2018.

f. The Respondent Mother failed to attend parenting referral appointments on the following dates: 1/22/17, 3/22/17, 7/11/17, 1/13/18, 3/13/18, 1/3/19. She started attending EPIC parenting classes in April 2018 but did not complete that parenting program.

g. The Respondent Mother failed to make the Craven County Department of Social Services aware of her residence; however, she did maintain contact with the social workers to inquire about the minor children. The Social Worker testified that this was the Respondent Mother's one strength.

h. The Respondent Mother failed to submit to a full psychological assessment and a recommendation from a mental health professional of safety and mental health stability of the Respondent Mother. The court ordered that visits would be suspended until the respondents submitted themselves for a mental health evaluation due to safety concerns. Therefore, no visitations or any other communication between the parents and minor children took place. The Respondent Parents made repeated requests to visit since that order of suspension. While the Respondent Parents have not caused or attempted to cause any bodily injury to Craven County Department of [S]ocial [S]ervices staff, they have made threats of bodily injury against the staff. As a result, neither Respondent Parent has visited the minor children since September 16, 2016.

. . . .

100. The Respondent Parents' inability to make reunification efforts and their inability to care for the minor child is not caused by poverty.

. . . .

155. Independent of any other grounds found by this court, the parental rights of the Respondent Parents should be terminated due to the following grounds as set forth in North Carolina General Statutes, Sections 7B-1111(a)(2):

a. Respondent Parents have 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 within 12 months in correcting those conditions which led to the removal of the juvenile.

¶ 16 Because respondent-mother did not challenge these findings of fact, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). These unchallenged findings of fact support the trial court's conclusion of law that "grounds authorizing Termination of Parental Rights exist" pursuant to N.C.G.S. § 7B-1111(a)(2). Further, the trial court found that it was in the best interests of the older children that respondent-mother's parental rights be terminated. Accordingly, because the trial court's findings of fact support its conclusion of law, the trial court did not err when it terminated respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 17 Because grounds existed to terminate respondent-mother's parental rights under (a)(2), we need not address the trial court's order to terminate parental rights under subsections (a)(1), (a)(5), or (a)(6). *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) ("an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order.").

B. Respondent-Father's Parental Rights

¶ 18 **[4]** The trial court terminated respondent-father's parental rights to the older children under N.C.G.S. § 7B-1111 (a)(1), (2), (5), and (6). With regard to section (a)(5), the trial court's findings of fact relating to establishment of paternity were unchallenged by respondent-father.

¶ 19 A trial court may terminate the parental rights of a father under N.C.G.S. § 7B-1111(a)(5) states:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:
>
> > a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile.
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
>
> e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C.G.S. § 7B-1111(a)(5) (2019).

¶ 20 Here, respondent-father does not challenge the findings of fact related to paternity, and therefore, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Further, respondent-father does not challenge the sufficiency of the grounds to terminate his parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(5), or that termination was in the best interests of the older children. Because respondent-father presents no challenge to the sufficiency of these grounds, we affirm the trial court's order terminating respondent-father's rights to the older children under N.C.G.S. § 7B-1111(a)(5).

IV. Respondent-Parents' Parental Rights to S.B.

¶ 21 The trial court's order terminated respondent-parents' parental rights to S.B. under N.C.G.S. § 7B-1111(a)(2), (5), and (6). Again, respondent-father failed to challenge the sufficiency of any grounds for termination or the trial court's best interests determination. Therefore, we affirm the order terminating respondent-father's parental rights to S.B. under N.C.G.S. § 7B-1111(a)(5).

¶ 22 **[5]** However, respondent-mother argues that the trial court erred when it terminated her parental rights to S.B. under N.C.G.S. § 7B-1111(a)(2) and (6). Specifically, respondent-mother contends that (1) termination was improper under N.C.G.S. § 7B-1111(a)(2) because only 9 months elapsed between the placement by DSS and the filing of the termination petition, and (2) the trial court failed to make sufficient findings under the (a)(6) standard. We agree.

¶ 23 N.C.G.S. § 7B-1111(a)(2) states:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C.G.S. § 7B-1111(a)(2).

¶ 24 The plain language of N.C.G.S. § 7B-1111(a)(2) requires the trial court to look at the parent's reasonable progress over a twelve-month period. Because only nine months elapsed between the custody order for S.B. and the filing of the termination petition, this subsection is inapplicable. Thus, the trial court erred in terminating parental rights under N.C.G.S. § 7B-1111(a)(2).

¶ 25 **[6]** Respondent-mother further contends that the trial court committed reversible error when it terminated her parental rights under N.C.G.S. § 7B-1111(a)(6) because the trial court failed to make sufficient findings of fact regarding the lack of alternative care arrangements, failed to identify the condition that rendered respondent-mother incapable of providing proper care, and failed to make a finding that the condition would persist for the foreseeable future.

¶ 26 N.C.G.S. § 7B-1111(a)(6) states:

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

N.C.G.S. § 7B-1111(a)(6) (2019).

¶ 27 After a thorough review of the record, we conclude the trial court has not made sufficient findings to support the termination of parental rights under N.C.G.S. § 7B-1111(a)(6). As respondent-mother notes, the trial court failed to find the absence of an acceptable alternative childcare arrangement, did not identify the condition that rendered respondent-mother incapable of parenting S.B., and did not address the issue of whether respondent-mother's condition would continue for the foreseeable future. Again, while there may be sufficient evidence in the record, the lack of sufficient findings compels us to vacate the order terminating parental rights to S.B., and remand this matter back to the trial court for hearing additional evidence, if necessary, and entry of a new order.

V. Conclusion

¶ 28 The trial court did not abuse its discretion when it denied respondent-father's request to substitute counsel and continue the case for respondent-father to take medication. In addition, we affirm the orders terminating respondent-father's parental rights to the minor children under N.C.G.S § 7B-1111(a)(5). We further affirm the orders terminating respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(2). We vacate and remand the order terminating respondent-mother's parental rights to S.B. under N.C.G.S. § 7B-1111(a)(6) for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

McGUIRE v. LORD CORP.

[377 N.C. 465, 2021-NCSC-63]

ROBERT McGUIRE
v.
LORD CORPORATION

No. 320A20

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion granting defendant's motion to dismiss entered on 18 February 2020 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 18 May 2021.

Ellis & Winters LLP, by Scottie Forbes Lee, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein LLP, by Charles E. Raynal IV and Scott E. Bayzle, for defendant-appellee.

PER CURIAM.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court, 2020 NCBC 11, is available at https://www.nccourts.gov/assets/documents/opinions/2020%20NCBC%2011.pdf.

STATE v. PARKER

[377 N.C. 466, 2021-NCSC-64]

STATE OF NORTH CAROLINA
v.
BRANDON ALAN PARKER

No. 119PA20

Filed 11 June 2021

Criminal Law—prosecutor's closing argument—factual misstatements—no objection

In a prosecution for possession of a firearm by a felon where a picture had been admitted into evidence showing defendant with face and chest tattoos, but the witnesses only described the shooter as having a face tattoo, the trial court did not abuse its discretion by failing to intervene ex mero motu when the prosecutor mistakenly stated several times in her closing argument—without objection from defendant—that the witnesses saw a chest tattoo on the shooter. Nothing suggested the misstatements were intentional and, in light of other evidence of defendant's appearance, they did not constitute an extreme or gross impropriety.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 629, 839 S.E.2d 83 (2020), finding no error in a judgment entered on 12 June 2018 by Judge Ebern T. Watson III in Superior Court, Sampson County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, *Attorney General*, *by Michael T. Wood*, *Special Deputy Attorney General*, *for the State-appellee.*

Michael E. Casterline for defendant-appellant.

BERGER, Justice.

¶ 1 On June 11, 2018, a Sampson County jury found defendant Brandon Alan Parker guilty of possession of a firearm by a felon. After the jury returned its verdict, defendant pleaded guilty to attaining habitual felon status. Defendant appealed, and on February 4, 2020, a unanimous panel of the Court of Appeals found no error in defendant's conviction, concluding that the prosecutor's statements during closing argument were not grossly improper. Defendant petitioned this Court for discretionary review.

I. Factual and Procedural Background

¶ 2 On March 5, 2015, Michael Harbin, Carlos James, Derrick Copeland, and an unidentified male went to Garland, North Carolina, to purchase marijuana from Jafa McKoy. Harbin drove a Toyota Camry with James and Copeland inside, while the unidentified male followed them in a Ford Explorer.

¶ 3 The men arrived in Garland between 10:00 and 10:30 a.m. The unidentified driver of the Ford Explorer parked at a nearby apartment complex and remained there while Harbin, James, and Copeland drove to a house at a different location. When Harbin, James, and Copeland arrived, two men were standing outside. Copeland recognized McKoy standing near the front porch, and McKoy introduced the other man, who was on the porch, as "P." Copeland described "P" as being about six feet and two inches tall, weighing around 240 pounds, and having "a Muslim-type beard, brown skin, [and] tattoo on the upper cheek." Harbin stated that the man on the porch was wearing a red hat, and was "[l]ike a bigger, burley (*sic*) dude."

¶ 4 Upon arrival, McKoy informed the men that the marijuana was not there. Harbin, James, and Copeland then left the house and drove to a nearby gas station to buy cigarettes. The three men left the gas station around 11:13 a.m. and returned to the house.

¶ 5 When they returned, McKoy and "P" were outside of the house and a compact car, that was not previously present, was parked outside. Copeland and Harbin exited the Camry while James remained inside. McKoy told Copeland that the marijuana was in the compact car. As Copeland and Harbin walked toward the car, "P" jumped off the porch, pulled out a revolver, and moved toward the Camry. At the same time, McKoy pulled out a gun and began firing at Copeland and Harbin. Copeland and Harbin escaped to the woods, and they made their way to the Ford Explorer parked at the nearby apartment complex. Copeland, Harbin, and the unidentified male traveled back to the house to look for James. After failing to locate James, Harbin called 911 around 12:24 p.m.

¶ 6 Around 12:30 p.m., Freddie Stokes, a resident of the house, returned home and saw a body in his driveway. Stokes called 911, and Sampson County EMS subsequently arrived at the house to find James dead in the driveway. James died from a single gunshot wound to the head.

¶ 7 On March 9, 2015, defendant was identified by Copeland from a photographic lineup as the man McKoy introduced as "P." Copeland stated

that he had eighty-five to ninety percent confidence in his identification of defendant.

¶ 8 Thirteen days after the homicide, on March 18, 2015, defendant learned that law enforcement was looking for him, and defendant called the police and went to the sheriff's office. The same day, Agent William Brady with the North Carolina State Bureau of Investigation interviewed defendant. Initially, defendant denied being present at the house where James was killed. However, approximately seventeen minutes into the interview, defendant admitted he was at the house that morning but claimed that he left by 8:30 or 9:00 a.m. The same day that defendant was interviewed by Agent Brady, the State obtained a search warrant for defendant's cell phone records, including defendant's cell site data.

¶ 9 At trial, Copeland and Harbin testified for the State. During their testimony, neither Copeland nor Harbin positively identified defendant in the courtroom as the man they knew as "P." The State also presented testimony from Jane Peterson, who was dating defendant in March 2015. Peterson testified about defendant's appearance and stated that in March 2015, defendant had a close-cut beard and tattoos on his arm and face. During Peterson's testimony, the State introduced, for illustrative purposes, a photograph of defendant's upper torso that showed defendant had a tattoo on his chest. Defendant objected to the introduction of the photograph.

¶ 10 The trial court, in ruling on the admissibility of the photograph, stated the following:

> In this case, you have someone who has testified she was in a close relationship on the date in question. She's also testified that she has a memory of his physical appearance at the time. She's testified that over your suggestion that it was a peace sign, that his right hand appears to be raised in example of a peace sign, as a layperson might interpret that one way or another. And there's nothing ominous about a peace sign, of course. That's her layperson interpretation and her opinion of the sign that was given by the person in the photograph using their right hand.
>
> The individual in the photograph is bare from the waist up, appearing to have a white, baseball-type cap placed on his head and his right hand raised in some type of gesture. It does not show him in the company

> of any other individuals. It does not show him in a menacing or compromising position. It does show tattoos that she has now said she believes were the same, not different, than what she has testified about in her earlier recollections.
>
> The hat, itself, appears to be white in color, to have a brim, and then have some established marking on it that might represent a sports affiliate, the New York Yankees, of some sort. But it is a neutral color, white. And it is not very graphic as to what the tattoos might say or appear to be, but it does appear to show ink markings upon the chest and/or upper torso of the subject in the photograph itself. Those are not immutable characteristics. Those are things that have been placed upon an individual by choice.
>
> Tattoos are things that you mark yourself with by choice. Those are not things you are born with. And if you place them on your person, you do so in a way that permanently identifies you right, wrong, or indifferent. You subject yourself to that. And, in this case, any of those markings were placed there without any rebuttal at this time, not forcibly, but upon request of the individual that displayed them so proudly in the photograph, and that's not substantially prejudicial, in my opinion. It is admissible for illustrative purposes.

¶ 11 In addition, the State tendered Special Agent Michael Sutton with the Federal Bureau of Investigation as an expert witness on historical cell site analysis and cellular technology. Agent Sutton testified that defendant's phone was used on March 5, 2015, from approximately 8:09 a.m. to 9:57 a.m. in an area of Garland that included the house in question. Between 9:57 a.m. and no later than 11:38 a.m., defendant's phone could not be identified because it was not in use. At 11:49 a.m., defendant's phone was determined to be located in Clinton, North Carolina.

¶ 12 During closing arguments, the prosecutor made the following three statements without objection that mentioned defendant having a chest tattoo:

> And they gave you a description of a guy, Muslim-type beard, big, burley (*sic*), larger than Jafa. They knew Jafa. They could tell the difference between this guy

> and Jafa. A tattoo on his chest, the same guy who was seen on the porch, pulling the revolver from his waistband. The same type of weapon that killed the victim.
>
> . . . .
>
> . . . The man that Michael Harbin described as a big, burley (*sic*) guy with a beard and a hat pulled low who gets up, pulls out a revolver, and walks towards Carlos. The man on the porch that Derrick Copeland described as 6'2, big with a beard, called P, with a tattoo on his chest, who got up, and pulled out a revolver, and went towards Carlos in the car. That's what Mr. Copeland said.
>
> . . . .
>
> Ms. Peterson told you what the defendant looked like back on March 5, 2015. He looks a little different today. But she told you that back in March of 2015 he looked like this big, burley (*sic*) guy with a beard, even a low hat and a tattoo on his chest, just like Mr. Copeland told you.

¶ 13 Prior to closing arguments, the trial court instructed the jury as follows:

> The final arguments of the lawyers are not evidence but are given to assist you in evaluating the evidence. . . .
>
> . . . .
>
> . . . Now if, in the course of making a final argument, a lawyer attempts to restate a portion of the evidence and your recollection of the evidence differs from that of the lawyer, you are as jurors in recalling and remembering the evidence, to be guided exclusively by your own recollection of the said evidence.

¶ 14 During the jury charge after closing arguments, the trial court similarly instructed the jury as follows:

> Now, members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection. Your duty is to remember the evidence, whether called to your attention or not.

¶ 15 Defendant was found guilty of possession of a firearm by a felon and not guilty of the remaining charges. Defendant subsequently pleaded guilty to attaining habitual felon status, and he was sentenced to a minimum of 105 months to a maximum of 138 months in prison. Defendant entered notice of appeal.

¶ 16 In a published opinion filed February 4, 2020, the Court of Appeals determined that the State's closing argument did not constitute prejudicial error and that defendant failed to show that trial court erred in not intervening *ex mero motu*. *State v. Parker*, 269 N.C. App. 629, 639, 839 S.E.2d 83, 90 (2020). Defendant filed a petition for discretionary review, which this Court allowed on June 3, 2020.

II. Analysis

¶ 17 "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984). "When defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety . . . will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

¶ 18 A "[g]rossly improper argument is defined as conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process." *State v. Fair*, 354 N.C. 131, 153, 557 S.E.2d 500, 517 (2001). A "trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000) (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998)).

¶ 19 Defendant contends that the three statements referencing defendant's chest tattoo were not supported by the evidence, and as a result, the trial court committed reversible error when it failed to intervene *ex mero motu*. In essence, defendant argues that in the absence of intervention by the trial court *ex mero motu*, misstatements of evidence by an attorney during closing arguments entitles the opposing party to a new trial. We decline to impose a perfection requirement on the attorneys and trial courts of this State, ever mindful that parties are "entitled to a fair trial but not a perfect one." *State v. Branch*, 288 N.C. 514, 536, 220 S.E.2d 495, 510 (1975) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984).

¶ 20 Here, rather than stating that the individual on the porch identified as "P" had a tattoo on his face, the prosecutor stated that the tattoo was on his chest. At trial, Copeland, Harbin, and Peterson all testified to defendant's appearance. While there was evidence admitted that showed defendant had a chest tattoo, neither Copeland nor Harbin identified "P" as having a chest tattoo. Copeland described the man on the porch as being about six feet and two inches tall, weighing around 240 pounds, and having "a Muslim-type beard, brown skin, [and] tattoo on the upper cheek." Harbin stated that the man on the porch was wearing a red hat pulled low and had a bigger, burly build. According to Harbin, this was the individual that pulled out a revolver, jumped off the porch, and walked towards the Camry.

¶ 21 Defendant admitted to being at the house the morning of March 5, 2015, and defendant's cell site data placed his phone in the vicinity of the house on the morning of the shooting and traveling away from the location in the hours following the incident. Two witnesses placed an individual matching defendant's appearance at the scene. Those characteristics were confirmed by Peterson as matching defendant's appearance in March 2015.

¶ 22 This Court has found that "improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

> [I]n cases of clear-cut violations—those couched as appeals to a jury's passions or that otherwise resulted in prejudice to a defendant—this Court has not hesitated to overturn the results of the trial court. *State v. Smith*, 279 N.C. 163, 165–67, 181 S.E.2d 458, 459–60 (1971) (reversing defendant's rape conviction because of the prosecutor's "inflammatory and prejudicial" closing argument, in which the prosecutor described defendant as "lower than the bone belly of a cur dog"); s*ee also State v. Miller*, 271 N.C. 646, 659–61, 157 S.E.2d 335, 344–47 (1967) (holding that the prosecutor committed reversible error by, *inter alia*, calling defendants "storebreakers" and expressing his opinion that a witness was lying).

Id. at 129, 558 S.E.2d at 105; *see also State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (holding that the trial court erred in not intervening *ex mero motu* when the prosecutor impermissibly commented on the defendant's right to remain silent during sentencing by stating, "he decided just to sit quietly. He didn't want to say anything that would 'incriminate himself' ").

¶ 23 The statements in this case stand in stark contrast to remarks this Court has previously held to be grossly improper. This is not the case where an attorney engages in name-calling, makes statements of opinion, intrudes upon constitutional rights, or references events outside of the evidence. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106. This is a case where an attorney mistakenly summarized evidence during her closing argument. Nothing in the record suggests that the prosecutor's misstatements about the location of the tattoo were intentional, much less "clearly calculated to prejudice the jury." *Huffstetler*, 312 N.C. at 111, 322 S.E.2d at 122. We fail to see how the conflation of the location of defendant's tattoos in conjunction with the other evidence of defendant's appearance at trial was an extreme or gross impropriety. *See Fair*, 354 N.C. at 153, 557 S.E.2d at 517.

¶ 24 Defendant further contends that statements and arguments by attorneys to the jury may be afforded greater weight and that the danger of unfair prejudice results from even unintentional misstatements of the

evidence.[1] However, the plain language of the trial court's instructions to the jury acknowledges and contemplates that attorneys may mistakenly summarize the evidence during closing arguments.

¶ 25 The jurors were specifically instructed that they were to "be guided exclusively by [their] own recollection" of the evidence any time their "recollection of the evidence differs from that of the attorneys." The jury heard the instructions immediately before and after closing arguments. "Jurors are presumed to follow the instructions given to them by the court." *State v. Price*, 344 N.C. 583, 593, 476 S.E.2d 317, 323 (1996) (quoting *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995)). There is no evidence in the record from which we can conclude that the jurors failed to follow the trial court's instructions concerning the manner in which they should consider closing arguments by counsel.

¶ 26 Moreover, defendant's argument would permit attorneys to sit back in silence during closing arguments but then claim error whenever a trial court fails to address or otherwise correct a misstatement of the evidence. *See generally State v. Tart*, 372 N.C. 73, 81, 824 S.E.2d 837, 842–43 (2019) ("In circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party's closing statement at trial, yet assigns as error the detached trial judge's routine [silence] during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party's burden to show prejudice and reversible error as a heavy one."). Trials are not carefully scripted productions. Absent extreme or gross impropriety in an argument, a judge should not be thrust into the role of an advocate based on a perceived misstatement regarding an evidentiary fact when counsel is silent.

¶ 27 The misstatements by the prosecutor appear to be mistakes in arguing the evidence admitted at trial for which defendant did not lodge an objection, and defendant has failed to meet his heavy burden. Based on the circumstances presented in this case, the misstatements by the prosecutor during closing arguments were not extreme or grossly improper, and the trial court did not abuse its discretion when it declined to intervene *ex mero motu*. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

---

1. The opposite may well be true. Jurors may be distrustful of attorneys who repeatedly misstate the evidence, thus, compromising the prospect of a successful outcome.

STATE v. GOINS

[377 N.C. 475, 2021-NCSC-65]

STATE OF NORTH CAROLINA
v.
BRANDON SCOTT GOINS

No. 71A20

Filed 11 June 2021

Criminal Law—prosecutor's closing argument—improper statements—failure to object—prejudice requirement

In a trial for attempted first-degree murder and assault charges where defendant failed to object to the prosecutor's improper closing argument regarding his decision to plead not guilty, the trial court's failure to intervene ex mero motu was not reversible error because defendant was not prejudiced by the improper argument. The argument was a small part of the State's closing argument, the evidence of defendant's guilt was essentially uncontroverted, and the trial court instructed the jury that defendant's decision to plead not guilty could not be taken as evidence of his guilt. The improper argument, without a showing of prejudice, was not enough to grant defendant a new trial and the decision of the Court of Appeals was reversed and remanded for consideration of defendant's remaining arguments.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 618 (2020), vacating judgments entered on 21 September 2018 by Judge Christopher W. Bragg in Superior Court, Cabarrus County, and remanding for a new trial. Heard in the Supreme Court on 26 April 2021.

Joshua Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Nicholas S. Brod, Assistant Solicitor General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

HUDSON, Justice.

¶ 1 Here we must determine whether a prosecutor's improper comments on defendant's decision to plead not guilty during closing arguments prejudiced defendant so as to warrant a new trial. Because we conclude that defendant was not prejudiced, we reverse and remand to the Court of Appeals for consideration of defendant's remaining issues on appeal.

I. Factual and Procedural Background

¶ 2 Defendant plead guilty to a felony in 2016 and was later released on probation. Defendant's probation officer testified that defendant did not follow the terms of his probation and actively avoided meeting with the officer. Defendant met with his probation officer only once over a period of several months and during that meeting the officer explained that if defendant continued to avoid supervision he could return to jail. Some time prior to April 2017, having lost all contact with defendant, the probation officer secured a warrant for defendant's arrest.

¶ 3 Defendant's grandmother testified at trial that defendant showed her a gun at a family gathering on Easter 2017 and told her that the bullets inside were powerful enough to pierce a bulletproof vest. According to his grandmother's testimony, defendant said that he would kill himself—or the police would have to kill him—before he went back to jail. Defendant's uncle also testified that defendant showed him the gun. According to the uncle, defendant said the gun contained "cop-killer" bullets and that he would rather kill himself than return to prison.

¶ 4 On 28 April 2017, police officers located defendant at a hotel in Kannapolis. When defendant saw one of the officers, Detective Hinton, he ran into a stairwell. Detective Hinton chased defendant up the stairs. After a struggle on the third-floor landing, in which Detective Hinton slammed the hallway door on defendant and defendant pointed his gun directly at Detective Hinton, defendant managed to slide through the door and run. The officer followed yelling, "Police," "Drop your gun," and "Drop your weapon." As he was running away, defendant passed a hotel resident, Shannon Arnette, who testified at trial that defendant suddenly stopped running, turned around, drew his weapon, and fired at Detective Hinton. Detective Hinton testified that he saw and heard the initial blast from defendant's gun. Both Detective Hinton and Arnette testified that defendant shot first and that Detective Hinton only returned fire after defendant's first shot.

¶ 5 The exchange between defendant and Detective Hinton was also captured on hotel surveillance video, which was played for the jury. The video, which has no sound, shows defendant running down the hallway, stopping, and turning around. Defendant then stood with his back to the surveillance camera, facing Detective Hinton, indicating that he was ready to fire, or already was firing, his gun. Defendant then fell to the ground and the video footage shows two bursts of light from his gun. In total, defendant fired four of his five bullets.

¶ 6 Eventually the officers detained defendant. At trial, a police officer who later arrived at the scene testified that the ammunition in defendant's gun had "hollow-point rounds," bullets that are colloquially referred to as "cop-killers." The officer testified that hollow-point bullets cause more serious injuries than other types of bullets.

¶ 7 Defendant presented no evidence in his defense.

¶ 8 During closing arguments, the State made the following remarks:

> [You m]ight ask why would [defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, refuse to take responsibility for any of his actions. That's what he does. He believes the rules do not apply to him.
>
> . . .
>
> [Defendant's] not taking responsibility today. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic.

Defendant did not object to the State's closing argument. Ultimately, the jury found defendant guilty on all counts.

¶ 9 At the Court of Appeals, defendant argued that the trial court's failure to intervene *ex mero motu* was reversible error.[1] The majority of the Court of Appeals panel agreed, holding that the prosecutor's commentary on defendant's decision to plead not guilty was so unfair it violated defendant's due process rights. The Court of Appeals ordered a new trial. The dissenting judge would have required a showing of prejudice by defendant because he failed to object at trial. Based on the record, the dissenting judge would have held that the State's closing argument was improper, but that defendant was not prejudiced by the error. The State appealed on the basis of that dissenting opinion.

II. Analysis

¶ 10 "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel

1. Defendant raised other issues at the Court of Appeals, but this is the only issue raised by the State in its appeal to our Court, as it was the only issue addressed in the dissenting opinion.

is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002). In *State v. Huey*, we explained,

> when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial. Only when it finds both an improper argument and prejudice will this Court conclude that the error merits appropriate relief.

370 N.C. 174, 179 (2017) (cleaned up).

¶ 11 Here, the State concedes that the prosecutor's closing argument commenting on defendant's decision to plead not guilty was improper. Therefore, we must only determine whether defendant has shown he was prejudiced by the improper argument. As we explained in *Huey*,

> [o]ur standard of review dictates that only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. It is not enough that the prosecutors' remarks were undesirable or even universally condemned. For an appellate court to order a new trial, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Id., at 180 (cleaned up). Specifically, "defendant has the burden to show a 'reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial.' " *Id.*, at 185 (quoting N.C.G.S. § 15A-1443(a) (2019)) (alteration in original).

¶ 12 Here, the Court of Appeals majority concluded that the State's closing argument "violate[d] [d]efendant's right to receive a fair trial," which "rendered the proceedings fundamentally unfair and requires a new trial." *State v. Goins*, 269 N.C. App. 618, 620 (2020). Given that the argument here was improper, we must evaluate whether or not it was

prejudicial. *Huey*, 370 N.C. at 180. The Court of Appeals erred by failing to analyze prejudice.

¶ 13 When evaluating the prejudicial effect of an improper closing argument, we examine "the statements 'in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 239 (1995)). For example, to evaluate the context here, we consider the entirety of the closing argument, the evidence presented at trial, and the instructions to the jury. *E.g.*, *State v. Phillips*, 365 N.C. 103, 135 (2011) ("Statements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." (cleaned up)); *State v. Jones*, 355 N.C. 117, 134 (2002) ("Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested."); *State v. Goss*, 361 N.C. 610, 626 (2007) ("Even if we assume *arguendo* that the closing argument in this case was grossly improper, we conclude that any prejudice to defendant was cured by the trial court's instructions to the jury following closing arguments.").

¶ 14 Here, the bulk of the State's closing arguments focused on a review of the evidence presented during trial and the elements of the offenses charged. The prosecutor argued that uncontroverted evidence showed that defendant was guilty of two counts of assault with a deadly weapon on a law-enforcement officer and one count of possession of a firearm by a felon. Thus, the only remaining issue for the jury to decide was whether defendant was guilty of attempted first-degree murder, which hinged on defendant's intent. The prosecutor explained the intent required for attempted first-degree murder and cited evidence that supported that intent. After emphasizing the deliberate, nonaccidental nature of the shooting, the prosecutor made the statements quoted above which give rise to the issue on appeal. The improper argument was a small portion of the State's closing argument and was not the primary or even a major focus of the State's argument to the jury.

¶ 15 We also examine the evidence presented to the jury. The State presented evidence that defendant was violating his probation and would rather kill himself or be killed by the police than go back to jail. Several witnesses testified that defendant's gun was loaded with bullets designed to cause more serious injuries, which are colloquially referred to as "cop-killers." The State's witnesses also testified that when defendant was eventually located by police, he pointed his gun directly at a police officer in the midst of the pursuit. Furthermore, after Detective Hinton clearly identified himself as a police officer, defendant turned around,

drew his weapon, and fired at the officer. Multiple witnesses testified that defendant shot first and that Detective Hinton only returned fire after defendant's first shot. In addition, the hotel surveillance video which was played for the jury at trial showed the shootout between defendant and Detective Hinton. Between the video and the testimony of eyewitnesses who corroborated the State's account of events, "virtually uncontested" evidence of defendant's guilt was submitted to the jury for its consideration. *Jones*, 355 N.C. at 134.

¶ 16 Finally, we examine the instructions to the jury. Here, the trial judge instructed the jury both orally and in writing. The judge told the jury that defendant's decision to plead not guilty could not be taken as evidence of his guilt. Specifically, the jury was instructed that "[t]he fact that the defendant has been charged is no evidence of guilt" and "when a defendant pleads not guilty, the defendant is not required to prove the defendant's innocence." The judge also stated that the "defendant is presumed to be innocent" and "[t]he State must prove . . . that the defendant is guilty beyond a reasonable doubt." In addition, the record here indicates that the jury properly followed the judge's instructions. Specifically, during its deliberations, the jury asked to re-watch the slow-motion surveillance video of the shooting. This tends to show that the jury based its decision on the evidence rather than on passion or prejudice resulting from the prosecutor's improper argument.

¶ 17 Based on the foregoing, we conclude that defendant was not prejudiced by the prosecutor's improper closing argument. The prosecutor's reference to defendant's plea of not guilty was undeniably improper, and as the dissenting opinion from the Court of Appeals stated, "[c]ounsel is admonished for referring to or questioning [d]efendant's exercise of his right to a trial by jury." *State v. Goins*, 269 N.C. App. 618, 626 (2020) (Tyson, J., dissenting). However, in the context of the entire closing argument we cannot conclude that the prosecutor's use of this improper argument was "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *State v. Duke*, 360 N.C. 110, 130 (2005). Neither can we conclude that the mention of defendant's choice to plead not guilty "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180.

¶ 18 Furthermore, evidence of defendant's guilt was essentially uncontroverted and ultimately, the jury found defendant guilty of all charges. Of course, the jury could have reached a different conclusion in evaluating the evidence, but we are not convinced that there is a reasonable

possibility that without the State's improper closing argument, the jury would have reached a different verdict.

¶ 19 Finally, although it would have been better for the judge to intervene immediately after the improper argument and directly clarify to the jury that defendant's not-guilty plea could not be counted against him in any way, we believe the judge's instruction to the jury effectively cured any error. The judge clearly instructed the jury on their role and made it clear that defendant is presumed to be innocent, that when a defendant pleads not guilty he is not required to prove his innocence, and that the State must prove defendant's guilt beyond a reasonable doubt. Moreover, the jury's requests to reexamine the evidence indicates that the jury made a reasoned decision based on the evidence rather than a decision based on passion or prejudice. Therefore, we cannot conclude that defendant has met his burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. § 15A-1443 (2019).

III. Conclusion

¶ 20 In conclusion, defendant has failed to show that he was prejudiced as a result of the prosecutor's improper closing arguments. Accordingly, we reverse and remand to the Court of Appeals to address the remaining issues raised by defendant on appeal.

REVERSED AND REMANDED.

STATE v. BLAGG

[377 N.C. 482, 2021-NCSC-66]

STATE OF NORTH CAROLINA
v.
CHARLES BLAGG

No. 261A20

Filed 11 June 2021

Drugs—possession with intent to sell or deliver—methamphetamine—sufficiency of evidence—totality of circumstances

The State presented sufficient evidence to convict defendant of possession with intent to sell or deliver methamphetamine where officers found in the center console of defendant's vehicle a large bag containing 6.51 grams of methamphetamine, several smaller bags of an untested white crystalline substance weighing 1.5 grams, and additional clear plastic baggies; defendant had just left a residence that was under surveillance for drug activity and had a meeting planned with a drug trafficker; the quantity of methamphetamine in defendant's possession was up to 13 times the amount typically purchased for personal use; and the officers also found a loaded syringe, a bag of new syringes, a baggie of cotton balls, and a hidden safe containing clear plastic baggies—even though there was no cash or other items typically associated with the sale of drugs.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 276 (2020), finding no error in a judgment entered on 29 January 2018 by Judge Gary M. Gavenus in Superior Court, Buncombe County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Nicholas R. Sanders, Assistant Attorney General, for the State-appellee.

Sean P. Vitrano for defendant-appellant.

MORGAN, Justice.

¶ 1 In this appeal, we consider whether the trial court erred in denying defendant's motion to dismiss a charge of possession with intent to sell or deliver methamphetamine. In the trial court as well as in the Court of Appeals, defendant argued that the evidence presented by the State, while sufficient to support a charge of possession of methamphetamine, was insufficient to send to the jury the greater charge of possession with intent to sell or deliver methamphetamine. The majority of the Court of Appeals disagreed with defendant's position and found no error in his trial and conviction. Viewing the evidence adduced at trial in the light most favorable to the State and considering the totality of the circumstances presented in this case, we hold that the evidence here was sufficient to withstand defendant's motion to dismiss the greater charge and to permit the jury to resolve the question of whether the State met its burden to prove beyond a reasonable doubt that defendant possessed methamphetamine with the intent to sell or deliver. Accordingly, we affirm the majority decision of the lower appellate court.

I. Factual Background and Procedural History

¶ 2 According to evidence presented at trial in this case, on the evening of 4 January 2017, Darrell Maxwell, a detective with the Buncombe County Sheriff's Office, joined two other deputies in the surveillance of a residence in Weaverville that had been the subject of complaints of illegal drug activity. Maxwell observed a vehicle arrive at the residence and park in the driveway. The detective then saw a man exit the vehicle and enter the surveilled home. Due to the encroaching darkness of the evening, Maxwell did not see the individual leave the residence, but after about ten minutes, Maxwell saw the lights of the vehicle illuminate as it departed from the driveway. Maxwell followed the vehicle in his unmarked patrol car, and after witnessing the vehicle cross the double yellow center line on a portion of the road described by the detective as a "blind curve," Maxwell initiated a traffic stop by activating his patrol car's blue lights. Defendant, who was identified by Maxwell as the operator of the vehicle he stopped, acknowledged having crossed the double yellow center line when Maxwell explained to defendant the reason for the traffic stop. Maxwell obtained defendant's driver's license, performed a records check, and then asked defendant to exit defendant's vehicle so that Maxwell could perform a pat-down of defendant's person. Defendant consented to the pat-down, during which Maxwell discovered a pocketknife.

¶ 3 By this point in the traffic stop, Deputy Jake Lambert, a K-9 handler with the Buncombe County Sheriff's Office, had arrived on the scene to

assist. Maxwell asked defendant whether defendant had any contraband in his vehicle,[1] and Maxwell specifically named several controlled substances, including methamphetamine and marijuana. Defendant denied the presence of any such illegal drugs. When Maxwell asked defendant if Maxwell could search defendant's vehicle, defendant replied, "not without a warrant." Maxwell asked Lambert to employ the K-9 to conduct an open-air sniff of defendant's vehicle, while Maxwell issued defendant a warning citation for the traffic infraction. Lambert's K-9 alerted to defendant's vehicle in a manner which was consistent with the detection of the presence of controlled substances. Lambert consequently began to conduct a search of the vehicle and discovered a bag of what appeared to be methamphetamine in the center console of the vehicle. After handcuffing defendant and placing him under arrest, Maxwell collected all of the apparent drug-related items found in defendant's vehicle, including one large bag and several smaller bags of a white crystalline substance; a bag of a leafy green substance which Maxwell believed to be marijuana; a baggie of cotton balls; several syringes; rolling papers; and a lockbox or "camo safe"[2] containing, *inter alia*, several smoked marijuana blunts and a number of plastic baggies. Upon defendant's arrest, Maxwell informed defendant of his *Miranda* rights. Defendant then offered to provide information about "Haywood[County]'s most wanted," a woman whom defendant claimed was involved in heroin trafficking and whom defendant represented that he was supposed to meet.

¶ 4 On 10 July 2017, defendant was indicted on charges of possession of methamphetamine, possession with intent to sell or deliver methamphetamine, possession of marijuana, possession of marijuana paraphernalia, and the attainment of habitual felon status. Defendant's case came on for trial during the 9 January 2018 Criminal Session of Superior Court, Buncombe County, Judge Gary M. Gavenus presiding. Defendant failed to appear when his case was called for trial, and as a result, his jury trial was conducted in absentia.

¶ 5 At trial, the State offered evidence from three witnesses: Maxwell, Lambert, and Deborah Chancey, a forensic analyst with the State Crime Lab. With regard to the charge of possession with intent to sell or deliver methamphetamine, Chancey rendered expert testimony at trial that the white crystalline substance in the large plastic baggie was methamphetamine and that its weight was 6.51 grams. Maxwell testified that he

---

1. The vehicle, a Ford Focus sedan, was registered to defendant's mother. For ease of reading, we shall refer to the vehicle as "defendant's vehicle."

2. "Camo" is a shortened term for the word "camouflage."

had five years of law enforcement experience which was specifically focused on drug investigations. He further testified that a typical methamphetamine sale for personal drug use was usually between one-half of a gram to a gram, such that the tested amount of methamphetamine recovered from defendant's vehicle was somewhere between six and thirteen times the typical single use quantity. Maxwell also testified that he and Lambert had weighed two of the smaller baggies of the white crystalline substance on the date of defendant's arrest and measured the weights of those respective quantities—bags included—at 0.6 and 0.9 grams. The total weight of the methamphetamine and the untested crystalline substances recovered from defendant's vehicle was over 8 grams.

¶ 6 During his trial testimony, Maxwell opined that the baggies recovered from defendant's vehicle were consistent with those employed in drug sales. He and Lambert both acknowledged at trial that they did not recover cash from defendant's person or from defendant's vehicle, nor any cutting agents, scales, or business ledgers during the search of the vehicle. Both law enforcement officers also acknowledged that there was no evidence which they discovered during the vehicle search that would indicate that defendant was a high-level actor in the drug trade. With the admission into evidence of the lockbox or "camo safe" and its contents, which included an unspecified number of plastic baggies consistent with the illegal sale of controlled substances, the jury was able to observe and to consider the number of plastic baggies as well as the other items which were recovered from defendant's vehicle. At the close of the State's evidence, defendant moved to dismiss the possession with intent to sell or deliver methamphetamine charge because the search of his person and his vehicle yielded "no cash, no guns, no evidence of a hand to hand transaction[,] . . . [n]o books, notes, ledgers, money orders, financial records, documents, . . . [and n]othing indicating that [defendant] is a dealer as opposed to a possessor or user[.]" Defendant also moved to dismiss the possession of marijuana paraphernalia charge and the charge of maintaining a vehicle. The trial court granted defendant's motion to dismiss the possession of marijuana paraphernalia charge but denied defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. Defendant did not present any evidence and renewed his motion to dismiss the possession with intent to sell or deliver methamphetamine charge. The trial court again denied the motion.

¶ 7 On 11 January 2018, the jury returned verdicts of guilty on the charges of possession of methamphetamine, possession with intent to sell or

deliver methamphetamine, possession of marijuana, and having attained habitual felon status. The trial court sentenced defendant on 29 January 2018 to concurrent sentences of 128 to 166 months and 50 to 72 months in prison. Defendant gave notice of appeal in open court.

¶ 8 Before the Court of Appeals, defendant argued that the State did not prove that he had the intent to sell or deliver methamphetamine. The panel of the lower appellate court was divided on this question, with the majority rejecting defendant's position. *State v. Blagg*, 271 N.C. App. 276, 277 (2020). In reaching this result, the Court of Appeals majority considered the various circumstances relevant to defendant's intent and noted that defendant

> had more than six times, and up to 13 times, the amount of methamphetamine typically purchased. While it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same. This issue is properly resolved by the jury.
>
> Moreover, the evidence also tended to show that [d]efendant had just left a residence that had been under surveillance multiple times for drug-related complaints. Defendant also admitted that he had plans to visit an individual charged with trafficking drugs. While [d]efendant's actions may be wholly consistent with an individual obtaining drugs for personal use, the jury could also reasonably infer that he had the intent to sell or deliver methamphetamine because of the quantity of drugs, the other circumstantial evidence, and his admission.
>
> . . . . The baggies in [d]efendant's possession are paraphernalia or equipment used in methamphetamine transactions. . . .
>
> . . . .
>
> . . . . Standing alone, possession of the baggies may be innocent behavior. However, when viewed as a whole and in the light most favorable to the State, the jury could reasonably infer that baggies in [d]efendant's possession were used for the packaging and distribution of methamphetamine.

> The question here is not whether evidence that does not exist entitles [d]efendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is nonexistent in another case is not dispositive on the issue of intent. Instead, the question is whether the totality of the circumstances, based on the competent and incompetent evidence presented, when viewed in the light most favorable to the State, permits a reasonable inference that [d]efendant possessed methamphetamine with the intent to sell or deliver.
>
> In this type of case, where reasonable minds can differ, the weight of the evidence is more appropriately decided by a jury. Accordingly, the trial court did not err in denying the [d]efendant's motion to dismiss and submitting the case to the jury.

Id. at 281–82 (citations omitted).

¶ 9 The dissenting judge in the Court of Appeals disagreed, summarizing an opposing view that "the record evidence in this case shows nothing more than 'the normal or general conduct of people' who *use* methamphetamine; thus, the evidence, at most, 'raises only a suspicion . . . that [d]efendant had the necessary intent to sell and deliver' methamphetamine." *Id.* at 283 (McGee, C.J., dissenting) (first alteration in original) (quoting *State v. Turner*, 168 N.C. App. 152, 158–59 (2005)). On 4 June 2020, defendant filed a notice of appeal in this Court based upon the Court of Appeals dissenting opinion pursuant to N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14(b)(1).

II. Appellate Standards of Review

¶ 10 We review decisions of the Court of Appeals for errors of law. *State v. Melton*, 371 N.C. 750, 756 (2018).

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to

> every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

State v. Golder, 374 N.C. 238, 249–50 (2020) (citations and extraneity omitted).

¶ 11 This Court has long acknowledged that

> [i]t is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. The general rule is that, *if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction*, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

State v. Earnhardt, 307 N.C. 62, 66 (1982) (emphasis added; extraneity omitted) (quoting *State v. Johnson*, 199 N.C. 429, 431 (1930)). Because "[e]vidence in the record supporting a contrary inference is not determinative on a motion to dismiss," *State v. Scott*, 356 N.C. 591, 598 (2002) (citing *State v. Fritsch*, 351 N.C. 373, 382 (2000)), "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction *even when the evidence does not rule out every hypothesis of innocence*," *State v. Stone*, 323 N.C. 447, 452 (1988) (emphasis added); *see also State v. Butler*, 356 N.C. 141, 145 (2002) ("To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being 'adequate to support a conclusion.' " (quoting *State v. Lucas*, 353 N.C. 568, 581 (2001))); *State v. Miller*, 363 N.C. 96, 99 (2009) (holding that "so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also 'permits a reasonable inference of the defendant's innocence.' " (quoting *Butler*, 356 N.C. at 145)). Courts considering a motion to dismiss for insufficiency of the

evidence "should not be concerned with the weight of the evidence." *Earnhardt*, 307 N.C. at 67.

¶ 12 "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Fritsch*, 351 N.C. at 379 (citations and extraneity omitted). "In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Yisrael*, 255 N.C. App. 184, 193 (2017), *aff'd per curiam*, 371 N.C. 108 (2018).

III. Analysis

¶ 13 Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. He asserts that the Court of Appeals majority erred in failing to reverse the trial court outcome and to vacate his conviction for this offense. Specifically, defendant contends that the evidence introduced at trial was not sufficient to permit the charge to be submitted to the jury for consideration because the evidence was inadequate to permit the jury to reasonably infer that defendant possessed the methamphetamine discovered during the traffic stop with the intent to sell or deliver it. Defendant submits, and the dissent of the lower appellate court opines, that the evidence only supports the submission to the jury of the charged crime of possession of methamphetamine instead of the heightened indicted offense. We disagree.

¶ 14 Subsection 90-95(a)(1) of the General Statutes of North Carolina provides that it is unlawful for any person to "possess with intent to manufacture, sell or deliver, a controlled substance." N.C.G.S. § 90-95(a)(1) (2019). Methamphetamine is a controlled substance. N.C.G.S. § 90-90 (2019). In order to prove that a defendant has committed the offense of possession with intent to sell or deliver a controlled substance such as methamphetamine, the State must present evidence of the defendant's (1) possession; (2) of a controlled substance; (3) with intent to sell or deliver the controlled substance. *Yisrael*, 255 N.C. App. at 187–88. Only the third of these elements—intent to sell or deliver the controlled substance methamphetamine—is at issue in this appeal.

¶ 15 We agree with the Court of Appeals that "in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, . . . our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this

factor—by itself—supports an inference of possession with intent to sell or deliver." *State v. Coley*, 257 N.C. App. 780, 788–89 (2018). In cases which focus on the sufficiency of the evidence of a defendant's intent to sell or deliver a controlled substance, direct evidence may be used to prove intent, but appellate courts must often consider circumstantial evidence from which the defendant's intent may be inferred. *Id.* at 786. Such an inference can arise from various relevant factual circumstances, including "(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity [of the controlled substance] found, and (4) the presence of cash or drug paraphernalia." *Id.* (quoting *State v. Nettles*, 170 N.C. App. 100, 106, *disc. review denied*, 359 N.C. 640 (2005)). An example of drug paraphernalia which appellate courts such as ours have considered in determining intent to sell or deliver controlled substances is the presence of packaging materials, such as plastic baggies, which may be used to package individual doses of a controlled substance. *State v. Williams*, 307 N.C. 452, 457 (1983).

¶ 16 In establishing defendant's intent to sell or deliver in the present case, the State introduced evidence of the manner in which the methamphetamine was packaged, the manner in which the methamphetamine was stored, defendant's activities, the quantity of methamphetamine found, and the presence of drug paraphernalia. This combination of direct and circumstantial evidence satisfies the factors first articulated in *Nettles* which we hereby adopt to review a trial court's assessment of the sufficiency of the evidence to show a defendant's intent to sell or deliver a controlled substance, while meeting the standard of the existence of substantial evidence to compel the trial court's denial of defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. In applying the long-established legal principles that the evidence must be considered in the light most favorable to the State upon a defendant's motion to dismiss a criminal charge, that the State is entitled to every reasonable inference from the evidence in the face of a defendant's motion to dismiss, and that evidence which supports a contrary inference is not determinative on a motion to dismiss, we determine that the trial court properly and correctly denied defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine.

¶ 17 In illustration of our determination, we now apply these factors to the evidence presented at trial.

A. Packaging of the Methamphetamine

¶ 18 In his search of defendant's vehicle, Maxwell found one large bag and several smaller bags of a white crystalline substance. The laboratory analysis conducted upon the contents of the large bag showed that the substance was 6.51 grams of methamphetamine. While two of the smaller bags which contained the untested white crystalline substance were found by Maxwell and a fellow law enforcement officer, Lambert, to weigh a total of 1.5 grams, there was also an additional unspecified number of clear plastic baggies which Maxwell testified were consistent with the type which are used in the sale of packaged illegal controlled substances. Maxwell also testified that "[u]sually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking."

¶ 19 In considering the evidence in the light most favorable to the State upon defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine, the matter of the original packaging of the verified methamphetamine and the untested white crystalline substance discovered in defendant's vehicle, coupled with the presence of available additional packaging in the form of an undetermined number of clear plastic baggies which were deemed to be consistent with the sale of packaged illegal controlled substances, tends to support an inference that defendant intended to sell or deliver methamphetamine. Such packaging materials can be considered a relevant circumstance in determining intent to sell or deliver a controlled substance. *Williams*, 307 N.C. at 457.

B. Storage of the Methamphetamine

¶ 20 The methamphetamine was found in the center console of defendant's vehicle, according to trial testimony regarding the joint participation of Maxwell, Lambert, and the drug-sniffing K-9 in the search of the vehicle. Upon the admission of evidence during the presentation of the State's case that defendant had just left a residence which was under surveillance by law enforcement officers due to complaints of illegal drug activity at the home, that defendant had a pending meeting with someone whom he identified as a drug trafficker, along with other evidentiary aspects pertaining to the storage of the controlled substance in light of the totality of the circumstances, the trial court appropriately considered these facts in evaluating the sufficiency of the evidence to show that defendant had the required intent to sell or deliver methamphetamine.

C. Defendant's Activities

¶ 21 The activities of defendant contributed to the existence of substantial evidence which, in turn, amounted to a sufficient quantity of evidence to authorize the trial court's submission to the jury of defendant's charge of possession with intent to sell or deliver methamphetamine. Such activities included defendant's aforementioned endeavors of driving a vehicle to a residence which was under the surveillance of law enforcement officers for suspected illegal drug activity, entering the home and remaining inside its premises for a period of approximately ten minutes, committing to meet with someone whom he identified as an individual who was involved in illegal drug trafficking, and operating a vehicle which contained a large bag of a verified controlled substance and a host of items which could be readily associated with it.

D. Quantity of Methamphetamine Found

¶ 22 The evidence at trial showed that a total of more than 8 grams of a white crystalline substance was recovered from defendant's vehicle pursuant to the search of the car by law enforcement officers. Of this total, 6.51 grams was subjected to laboratory analysis and was identified as methamphetamine; the remaining quantity of the substance was not tested. As previously noted, during his trial testimony Maxwell stated that he observed, based on his training and experience, that a seller of methamphetamine will typically package the substance in a quantity ranging from one-half of a gram to a gram. Maxwell also testified that the unspecified number of clear plastic baggies which were found in defendant's vehicle during the search was consistent with his experience "as to the dealing and transportation of methamphetamine."

¶ 23 We have previously acknowledged the arithmetic computation of the Court of Appeals majority in the decision which it rendered in this case that defendant "had more than six times, and up to 13 times, the amount of methamphetamine typically purchased," such that "[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same." *Blagg*, 271 N.C. App. at 281. Meanwhile, N.C.G.S. § 90-95(h)(3b) establishes that the minimum quantity of methamphetamine for trafficking in the controlled substance is 28 grams; the quantity of 6.51 grams of methamphetamine which was verified as existent and in the possession of defendant in the instant case is 23.3% of the threshold amount of trafficking in methamphetamine. In sum, the amount of methamphetamine at issue here is greater than the amount of the substance that the trial

evidence associates with possession for one's personal use, yet lesser than the amount of the substance that the statutory law associates with trafficking for wider use.

¶ 24 The State is not required to disprove the possibility that the methamphetamine in defendant's possession was solely for personal use in order to survive defendant's motion to dismiss. *See Fritsch*, 351 N.C. at 379 (holding that in order to survive a motion to dismiss the evidence need not "rule out every hypothesis of innocence" (quoting *State v. Stone*, 323 N.C. 447, 452 (1988))). The jury was eligible to draw the permissible inference from this amount of methamphetamine, in combination with the totality of the circumstances, that defendant had the intent to sell or deliver methamphetamine. *See*, *e.g.*, *State v. McNeil*, 165 N.C. App. 777, 783 (2004) (upholding the denial of a motion to dismiss a charge of possession with intent to sell or deliver where the controlled substance—cocaine—was 19.64% of the minimum amount to sustain a trafficking charge and additional circumstances included its packaging in twenty-two individually wrapped pieces placed in the corner of a paper bag), *aff'd*, 359 N.C. 800 (2005).

¶ 25 Since the quantity of the methamphetamine found in defendant's possession was not dispositive of the issue concerning its presence for his personal use or its presence for his ability to sell or deliver the methamphetamine, we find that the trial court's adherence to the principle espoused in *Yisrael* to submit issues to the jury in borderline or close cases to be both prudent and proper.

E. Presence of Cash or Drug Paraphernalia

¶ 26 There was no currency which was recovered from defendant or from his vehicle as a result of the search. Likewise, items such as guns, cutting agents, scales, business ledgers, books, notes, money orders, financial records, documents, and suspicious cellular telephone entries which are often associated with dealers of illegal drugs were not found by law enforcement officers in the course of the search. However, other items such as a "loaded" syringe, a bag of new syringes, a baggie of cotton balls, and other items were discovered during the search. The search also uncovered a lockbox or "camo safe" which was clandestinely kept in the back floorboard of defendant's vehicle and contained numerous clear plastic baggies similar to those that were found in the vehicle's center console; a variety of other items were also maintained in the container.

¶ 27 Just as any list of circumstances frequently considered on the issue of intent to sell or deliver a controlled substance is not exhaustive, the

absence of any of those circumstances is likewise not dispositive. *See Yisrael*, 255 N.C. App. at 186, 193 (upholding denial of motion to dismiss where no baggies, scales, written ledgers, or other client information were found); *State v. Wilson*, 269 N.C. App. 648, 655 (2020) (upholding the denial of a motion to dismiss where no "cash, other drug paraphernalia, or tools of the drug trade—such as scales or additional baggies or containers—which have otherwise generally supported a conviction for" possession with intent to sell or deliver were presented); *Coley*, 257 N.C. App. at 789 (upholding denial of a motion to dismiss where scales and plastic baggies were discovered but only a small amount of marijuana was possessed and no written ledgers or other client information was found). Rather, the appropriate inquiry is a case-by-case, fact-specific consideration in which the totality of the circumstances is evaluated in the light most favorable to the State and which gives the State the benefit of every reasonable inference which can be drawn from the evidence which is produced at trial. *Golder*, 374 N.C. at 249–50; *see also Coley*, 257 N.C. App. at 788. Thus, our focus must be upon the presence of evidence which *could* reasonably support an inference of defendant's possession of the methamphetamine with the intent to sell or deliver and not upon the absence of any hypothetical evidence which could have strengthened or added support to the State's case. *See, e.g.*, *Earnhardt*, 307 N.C. at 67 (holding that reviewing courts "should not be concerned with the weight of the evidence" when considering the denial of a motion to dismiss).

IV. Conclusion

¶ 28 The application of the factors which we employ in the present case, the "totality of the circumstances" standard in assessing the evidence presented in this case, and the fundamental principles governing the determination of a defendant's motion to dismiss with regard to the sufficiency of the State's evidence to support the charged offense lead us to conclude that the State presented sufficient direct and circumstantial evidence of defendant's intent to sell or deliver methamphetamine so as to compel us to affirm the decision of the Court of Appeals which found no error in defendant's trial.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

¶ 29 The criminal offense of possessing a controlled substance is not the same offense as possessing a controlled substance with the intent to sell or deliver it to another person (PWISD). *Compare* N.C.G.S. § 90-95(a)(3) (2019) (making it unlawful for any person "[t]o possess a controlled substance"), *with* N.C.G.S. § 90-95(a)(1) (making it unlawful for any person "[t]o manufacture, sell or deliver, or possess *with intent* to manufacture, sell or deliver, a controlled substance" (emphasis added)). The Legislature chose to draw this distinction for a reason. This distinction has consequences. A defendant convicted under N.C.G.S. § 90-95(a)(1) is guilty of a Class C, Class G, or Class H felony, N.C.G.S. § 90-95(b), whereas a defendant convicted under N.C.G.S. § 90-95(a)(3) is guilty of a Class I felony or a misdemeanor, either of which typically carries a lighter sentence.

¶ 30 In concluding that the State has presented substantial evidence of defendant Charles Blagg's intent to sell or deliver methamphetamine, the majority collapses this distinction. In the process, the majority thwarts the Legislature's effort to tailor criminal liability to the nature of a defendant's alleged criminal conduct. The majority's decision also ensures that Blagg will spend ten to fourteen years in prison, having been convicted of a crime for which the evidence was so utterly lacking that the charge never should have been presented to the jury. Because the majority misinterprets and misapplies the substantial evidence test, I respectfully dissent.

I. Analysis

¶ 31 Every person who possesses any quantity of a controlled substance could intend to sell or deliver the drug to another person. At the same time, not every person who possesses a controlled substance intends to do anything other than use it for his or her own personal consumption. The determinative question in assessing a person's potential criminal liability is the person's intent. As we have often stated, "[i]ntent is a mental attitude seldom provable by direct evidence." *State v. Bell*, 285 N.C. 746, 750 (1974). A defendant's intent to sell or deliver a controlled substance must instead "ordinarily be proved by circumstances from which it may be inferred." *Id.* The issue is that possessing a controlled substance is, at least in theory, itself a "circumstance[ ] from which it may be inferred" that a person intends to sell or deliver a controlled substance. If the evidence sufficient to convict a defendant under N.C.G.S. § 90-95(a)(3) is always sufficient to convict a

defendant under N.C.G.S. § 90-95(a)(1), then the Legislature's carefully drawn demarcation between two different statutory provisions is rendered obsolete.

¶ 32 The way we have handled this issue—at least until today—has been to require the State to present "substantial evidence" of the defendant's specific intent to sell or deliver the controlled substance he or she possessed. This evidence can be circumstantial, certainly, but it cannot merely be evidence common to any individual who possesses a controlled substance. Critically, the "substantial evidence" must be evidence from which the jury could reasonably infer that the defendant intended to sell or deliver the controlled substance to another person. *See*, *e.g.*, *State v. Williams*, 307 N.C. 452, 455 (1983). Evidence which is wholly consistent with a defendant's intention to personally consume the substance cannot, standing alone, be substantial evidence of the defendant's intent to sell or deliver it to someone else. If it were otherwise, every defendant who possessed a controlled substance could be charged, and potentially convicted, under either N.C.G.S. § 90-95(a)(1) or N.C.G.S. § 90-95(a)(3), a result which would be at odds with the Legislature's express intent. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994) ("[A] court should give effect to every provision of a statute and thus avoid redundancy among different provisions.").

¶ 33 The substantial evidence test does not, as the majority correctly notes, require the State to "disprove the possibility that the methamphetamine in defendant's possession was solely for personal use." But the defendant does not bear the burden of disproving the State's theory of the case, either. It is not enough for the State to present evidence which, taken in the light most favorable to the State, establishes only that "[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed the quantity of methamphetamine with the intent to sell or deliver the same." (Alterations in original.) "Substantial evidence" requires "more than a scintilla or a permissible inference." *Lackey v. N.C. Dep't of Hum. Res., Div. of Med. Assistance*, 306 N.C. 231, 238 (1982); *see also State v. Slaughter*, 212 N.C. App. 59, 68 (Hunter, J., dissenting) ("[E]vidence which *merely shows it possible for the fact in issue to be as alleged*, *or which raises a mere conjecture that it is so*, is an insufficient foundation for a verdict and should not be left to the jury." (emphasis added) (quoting *State v. Madden*, 212 N.C. 56, 60 (1937))), *rev'd per curiam for reasons stated in dissent*, 365 N.C. 321 (2011). It is obviously "possible" that Blagg intended to sell or deliver the methamphetamine he possessed to another person. Indeed, it is hard to imagine a circumstance where

it would be "impossible" for a court to infer that a person apprehended while possessing some quantity of a controlled substance intended to sell or deliver it to another person. That is why we have always required substantial evidence of the defendant's specific intent to sell or deliver the controlled substance before allowing the case to proceed to the jury.

¶ 34 In this case, the evidence that Blagg intended to sell or deliver methamphetamine to another person just does not exist. Here are the facts actually established at trial: Blagg went to the home of a suspected drug dealer. He spent "approximately ten minutes" inside. As he was driving away from the home, he was pulled over for a moving violation. A K-9 officer noted the presence of narcotics near Blagg's vehicle. A (human) officer searched the vehicle and found plastic bags containing what proved to be 6.51 grams of methamphetamine and 1.5 grams of an untested white crystalline substance. The officers also found syringes, cotton balls, an untested substance that resembled marijuana, and a small safe containing used marijuana blunts and a number of plastic baggies, all scattered about the vehicle. After he was arrested, Blagg told the officers he could help them track down "a female who was wanted for trafficking heroin or something of that nature."

¶ 35 People who personally consume methamphetamine obtain it from somewhere. Blagg's presence at a residence where drug dealing was suspected of occurring—and his apparent knowledge of who in his community is dealing drugs—suggests only that Blagg knows where and how to purchase methamphetamine, not that he is himself a drug dealer. Testimony established that methamphetamine is typically sold in plastic baggies. It follows as a matter of logic that the manner in which a product is typically sold is also the manner in which it is typically purchased. The fact that Blagg had some number of plastic baggies in his vehicle says nothing about *why* he obtained methamphetamine.[1] Testimony also established that cotton balls and syringes are used for injecting methamphetamine. This says nothing about *who* the intended user of the methamphetamine is. And individuals who possess controlled substances for any reason have good reason to conceal their stash. The point is not that the evidence in the record excludes the possibility that Blagg intended to sell or deliver methamphetamine to another person. The point is that substantial evidence requires more than a mere possibility that something could, maybe, conceivably be true.

---

1. If a person were observed at a store purchasing a gallon of milk and then some empty milk containers were found in that person's car, would that be substantial evidence that the person is selling or delivering milk to other people? Or would the empty milk containers be evidence that the person likes to drink milk?

¶ 36 Everything the majority relies upon beyond the evidence described above—such as its assertion that "the amount of methamphetamine at issue here is greater than the amount of the substance that the trial evidence associates with possession for one's personal use"—is pure speculation. Worse, it is exactly the same speculative reasoning that the trial court explicitly prohibited the State from engaging in during the sole portion of a criminal proceeding where factfinding is typically permitted, the trial. What a given quantity of a controlled substance found in a person's possession reveals about that person's intent is "a matter familiar only to those who regularly use or deal in the substance[or] who are engaged in enforcing the laws against it," not an inference a jury can draw based upon its own "general knowledge and experience." *State v. Mitchell*, 336 N.C. 22, 30 (1994), *abrogated on other grounds by State v. Rogers*, 371 N.C. 397 (2018). The trial court did not permit the State to argue that the amount of methamphetamine found in Blagg's vehicle signified his intent to sell or deliver it because there was "no evidence as to [the amount of methamphetamine being] more than [for] personal use. Absolutely none. [The State] never elicited that testimony from the officer. . . . There was no testimony as to that. None." Apparently, on this matter, the majority knows better than the trial court, even though there is "[a]bsolutely no[ ]" evidence in the record telling us what possessing 6.51 grams of methamphetamine implies. We may not always like the facts as established by the trial court but, as appellate jurists, we are not at liberty to find our own. *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 44 n.16 ("Were we to . . . make our own factual determinations on the evidence . . . we would impermissibly invade the province of the jury . . . ."), *reh'g denied*, 376 N.C. 535 (2020).

¶ 37 Lacking what is typically required to support a legal inference drawn from the quantity of methamphetamine at issue—evidence in the record—the majority casts about for something else. It lands on math. According to the majority, 6.51 grams is both "more than six times, and up to 13 times, the amount of methamphetamine typically purchased" and "23.3% of the threshold amount of trafficking in methamphetamine." This calculation is not substantial evidence of PWISD. The only evidence in the record supporting the first half of the equation is Detective Maxwell's testimony that "[u]sually a seller will individually package [methamphetamine] . . . in anywhere from half a gram to one gram." His testimony does nothing to establish how much or how many packages an individual user of methamphetamine might typically purchase for personal consumption in a single transaction. Nor does Maxwell's testimony include any statement supporting the majority's unfounded conclusion that "a typical methamphetamine sale *for personal drug use*

[i]s usually between one-half of a gram to a gram." (Emphasis added.) His testimony solely addresses how a seller typically packages methamphetamine, not a buyer's purchasing habits or preferences. Regardless, Maxwell explicitly qualified his statement by noting that a seller might package methamphetamine in different quantities "depending on what the buyer is wanting."

¶ 38 Further, the majority's reliance on the trafficking threshold amount as proof of Blagg's intent is an unjustified stretch of our precedents. The very purpose of a threshold amount is to establish the point beyond which the amount possessed becomes legally salient. Although we have previously described the quantity of a controlled substance in a defendant's possession in relation to the trafficking threshold amount, in that case, the amount considered "more than an individual would possess for his personal consumption" and relevant to the defendant's intent to sell or deliver was over two-thirds the amount required to support a conviction for trafficking. *Williams*, 307 N.C. at 457. The majority does not explain why 23.3% of the trafficking threshold amount is substantial enough to support a PWISD conviction. Without an explanation, there is no way to predict whether possessing 15% of the threshold quantity, or 5% of the threshold quantity, would be indicative of a defendant's intent to sell or deliver a controlled substance. The majority's reasoning leaves defendants and lower courts to guess the point beyond which possessing a quantity of a controlled substance less than the statutory threshold amount heightens a defendant's potential criminal liability.

¶ 39 The State presented no testimony or evidence regarding how much methamphetamine an individual user typically consumes in a single sitting, the number of doses a single purchase typically covers, or how frequently a regular consumer of methamphetamine purchases and uses the drug. Absent any of this necessary context, the fact that Blagg possessed 6.51 grams of methamphetamine is meaningless, beyond establishing that Blagg possessed methamphetamine in a quantity insufficient to sustain a trafficking charge.

¶ 40 The majority's rejoinder is that while the quantity of methamphetamine Blagg possessed is "not dispositive," it is still evidence of Blagg's intent to sell or deliver methamphetamine "in combination with the totality of the circumstances," at least when viewed in the light most favorable to the State. Again, those circumstances do nothing to distinguish Blagg from any other individual who purchases methamphetamine exclusively for personal consumption. As the majority acknowledges, "items such as guns, cutting agents, scales, business ledgers, books, notes, money orders, financial records, documents, and suspicious cel-

lular telephone entries which are often associated with dealers of illegal drugs were not found by law enforcement officers in the course of the search."

¶ 41 The majority then goes on to cite various cases in which this Court or the Court of Appeals concluded that the State had presented substantial evidence of a defendant's intent to sell or deliver in purportedly similar circumstances as presented here. Yet in each of those cases, the record disclosed that the defendant had been found with or done something unusual for a person solely intending to personally consume the controlled substance. The defendant in *Yisrael* "was carrying a large amount of cash ($1,504.00) on his person" in small denominations when he was apprehended "on the grounds of a high school while possessing illegal drugs" with a stolen and loaded handgun inside his vehicle. *State v. Yisrael*, 255 N.C. App. 184, 190 (2017). The defendant in *Wilson* "attempted to hide the larger amount of cocaine while leaving the smaller corner bag—associated with only personal use—in plain view." *State v. Wilson*, 269 N.C. App. 648, 655, *review denied*, 376 N.C. 532 (2020). The defendant in *Coley* was found with marijuana, "a digital scale[,] and an open box of sandwich bags." *State v. Coley*, 257 N.C. App. 780, 789 (2018). The defendant in *Williams* was in constructive possession of a residence where drug sales were proven to have occurred, *Williams*, 307 N.C. at 456, and his fingerprints were found on one of many "tinfoil squares, a material frequently used to package heroin for sale," found inside, *id.* at 457. Invoking the totality of the circumstances is no substitute for the State's burden to present substantial evidence of Blagg's intent to sell or deliver methamphetamine. The cases relied upon by the majority all included additional facts inconsistent with possession merely for personal use.

¶ 42 Perhaps anticipating the harsh consequences of its gloss on the substantial evidence test, the majority emphasizes that it is not the ultimate arbiter of Blagg's guilt. The majority explains that it finds "the trial court's adherence to the principle . . . to submit issues to the jury in borderline or close cases to be both prudent and proper." Yet our responsibility for ensuring fair and equal application of the law in all cases is not discharged by references to the role of the jury as factfinder. It requires us to consistently apply the law as enacted by the Legislature and interpreted though our precedents.

¶ 43 Finally, the majority's analysis does not clearly identify the basis for its holding. According to the majority, "[j]ust as any list of circumstances frequently considered on the issue of intent to sell or deliver a controlled substance is not exhaustive, the *absence* of any of those

circumstances is likewise not dispositive." What the majority appears to be saying is that even if prior cases have enumerated factors determined to be indicative of a defendant's intent to sell or deliver a controlled substance, when confronted with a case in which none of those factors are present, a court may choose to redefine the test to include new factors. This manner of deciding cases is out of step with our traditional respect for precedent.

> The doctrine of stare decisis, commonly called the "doctrine of precedents," has been firmly established in the law . . . . It means that we should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination. The precedent thus made should serve as a rule for future guidance in deciding anal[o]gous cases . . . . This is not only a sensible, but a just, principle, and a contrary rule would manifestly be inequitable. . . . We have repeatedly said that the weightiest reasons make it the duty of the court to adhere to its decisions.

Hill v. Atl. & N.C. R.R. Co., 143 N.C. 539, 573–75 (1906). As we have long recognized, judicial inconstancy comes at a cost to litigants and to our institutional legitimacy.

¶ 44 Because the majority's decision lends the erroneous impression that any time a defendant is charged with possession of a controlled substance pursuant to N.C.G.S. § 90-95(a)(3), there is substantial evidence that the defendant possessed the substance with the intent to sell or deliver it to another person within the meaning of N.C.G.S. § 90-95(a)(1), I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE v. HAMER

[377 N.C. 502, 2021-NCSC-67]

STATE OF NORTH CAROLINA
v.
DEMON HAMER

No. 279A20

Filed 11 June 2021

Criminal Law—waiver of jury trial—statutory inquiry—harmless error review

The trial court's failure to timely conduct an inquiry with defendant pursuant to N.C.G.S. § 15A-1201(d) to determine whether defendant fully understood and appreciated the consequences of his decision to waive his right to a jury trial was subject to harmless error review. Defendant could not demonstrate prejudice where the trial court belatedly conducted the statutory inquiry after the State rested its case, the record tended to show that defendant understood and appreciated his decision, and there was overwhelming evidence of defendant's guilt of the charged crime.

Justice ERVIN dissenting.

Justices HUDSON and EARLS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 116, 845 S.E.2d 846 (2020), affirming a judgment entered on 29 November 2018 by Judge Michael J. O'Foghludha in Superior Court, Orange County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Robert C. Ennis, Assistant Attorney General, for the State-appellee.

W. Michael Spivey for defendant-appellant.

BERGER, Justice.

¶ 1 On November 29, 2018, defendant was found guilty in a bench trial of speeding 94 miles per hour in a 65 mile-per-hour zone. A divided panel of the Court of Appeals determined that even though the trial court failed to follow the procedure set forth in N.C.G.S. § 15A-1201 for waiver of defendant's right to a jury trial, defendant was not prejudiced by the trial court's noncompliance. Defendant appeals.

I. Factual and Procedural Background

¶ 2 On the afternoon of January 12, 2018, Trooper Tracy Hussey with the North Carolina State Highway Patrol observed a black 2017 Jeep traveling westbound on I-40 in Orange County. Using a handheld LIDAR device for speed detection, Trooper Hussey determined that the vehicle was traveling 94 miles per hour. The speed limit on this section of I-40 is 65 miles per hour.

¶ 3 Trooper Hussey relayed information about the 2017 black Jeep to Trooper Michael Dodson with the North Carolina State Highway Patrol, who then initiated a traffic stop. Trooper Dodson identified the driver of the Jeep as defendant. Trooper Dodson issued a citation to defendant for speeding 94 miles per hour in a 65 mile-per-hour zone in violation of N.C.G.S. § 20-141(j1) and for reckless driving in violation of N.C.G.S. § 20-140(b).

¶ 4 On July 26, 2018, defendant pleaded guilty in Orange County District Court to speeding 94 miles per hour in a 65 mile-per-hour zone, and he was ordered to pay a $50.00 fine and costs. The State dismissed the reckless driving charge. Defendant filed written notice of appeal for trial de novo in Orange County Superior Court. Defendant entered a plea of not guilty, and he was appointed a public defender for the traffic charges.

¶ 5 When the matter came on for trial, defense counsel announced that defendant wanted his case to be tried in a bench trial. The State consented to this request. The following exchange occurred on the record in open court:

> THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Okay. And I presume that there is a statute that allows that?
>
> [DEFENSE COUNSEL]: That is correct, Your Honor. We have—the State and I have—the State has consented. We have—there is no disagreement about the bench trial.
>
> THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?

> [DEFENSE COUNSEL]: If I'm not mistaken, Your Honor—
>
> THE COURT: I know that one requires the consent of the State.
>
> [DEFENSE COUNSEL]: I apologize.
>
> [THE STATE]: Your Honor, I believe it's controlled by 15A-1201—
>
> THE COURT: Okay. Which does allow waiver of trial in a misdemeanor?
>
> [THE STATE]: That's correct, Your honor. Or I believe any charge except a capital offense.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: It's 15A-1201 subsection (b).
>
> THE COURT: Thank you, sir. So just as a technical matter, this is a—so that—that's accepted by the [c]ourt under that statute since the State consents.

¶ 6 After the State rested its case-in-chief, the trial court revisited defendant's waiver of jury trial in the following exchange:

> THE COURT: . . . I was just reading 20-1250—I'm sorry—15A-1201, we complied completely with that statute with the exception of the fact that I'm supposed to personally address the defendant and ask if he waives a jury trial and understands the consequences of that. Would you just explain that to your client.
>
> (Pause in proceedings while [defense counsel] consulted with the defendant.)
>
> [DEFENSE COUNSEL]: Okay, Your Honor.
>
> THE COURT: Okay. . . .
>
> . . . .
>
> Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your [defense

counsel] has waived it on your behalf. The State has consented to that. Do you consent to that also?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [a] possibility of a 20-day jail sentence. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

¶ 7 Defendant was subsequently found guilty of speeding 94 miles per hour in a 65 mile-per-hour zone and was ordered to pay court costs. Defendant appealed and was assigned an appellate defender. On appeal, defendant argued that the trial court erred in conducting a bench trial because defendant did not knowingly and voluntarily waive his right to a jury trial.

¶ 8 In a published opinion filed on June 16, 2020, the Court of Appeals held that despite the trial court's initial noncompliance with N.C.G.S. § 15A-1201, the trial court remedied the initial error, thus satisfying N.C.G.S. § 15A-1201, and that defendant was not prejudiced by the error. *State v. Hamer*, 272 N.C. App. 116, 127, 845 S.E.2d 846, 853 (2020). The dissenting judge argued that the failure of the trial court to engage in a colloquy at the outset constituted structural error, requiring a new trial. *Id.* at 155, 845 S.E.2d at 870 (McGee, C.J., dissenting). Defendant appeals.

II. Analysis

¶ 9 On appeal, defendant argues that he did not knowingly and voluntarily waive his constitutional right to a jury trial. We disagree.

¶ 10 In 2014, the people of North Carolina amended our State constitution to allow criminal defendants to waive their right to trial by jury in favor of a bench trial. *See* N.C. Const. art. I, § 24 (stating that a criminal defendant in a noncapital case "in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive

jury trial, subject to procedures prescribed by the General Assembly"); *see also* N.C.G.S. § 15A-1201(a) (2019) (where a noncapital "defendant enters a plea of not guilty [in superior court, the defendant] must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section").

¶ 11 A defendant in a noncapital case may "knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury." N.C.G.S. § 15A-1201(b). The defendant must provide notice of the waiver by either (1) a stipulation signed by the State and the defendant; (2) the filing of a written notice of intent with the court; or (3) providing notice in open court by the time of the arraignment or the calling of the calendar, whichever is earlier. N.C.G.S. § 15A-1201(c). Once the defendant provides notice, the court must then:

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d).

¶ 12 Defendant argues that he is entitled to a new trial because the trial court committed structural error through its noncompliance with N.C.G.S. § 15A-1201(d)(1).

¶ 13 The Supreme Court of the United States has previously defined structural error as "defect[s which] affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In other words, structural error is a defect in which "[t]he entire conduct of the trial from beginning to end is obviously affected." *Id.* at 309–10. The Supreme Court has noted six instances where structural error had been found: (1) "total deprivation of the right to counsel"; (2) "lack of an impartial trial judge"; (3) "unlawful exclusion of grand jurors of defendant's race"; (4) violation of "the right to self-representation at trial"; (5) violation of "the right to a public trial"; and (6) "erroneous reasonable-doubt instruction to jury." *Johnson v. United States*, 520 U.S. 461, 468–69 (1997).

¶ 14 This Court has previously applied the Supreme Court's structural error interpretation in *Fulminante* and the six exceptions outlined in

Johnson. *See State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (applying *Fulminante* to the defendant's argument that the prosecutor's allegedly improper questions and comments constituted structural error); *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("In each of the six United States Supreme Court cases rectifying structural error, the defendant made a preliminary showing of a violated constitutional right and the identified constitutional violation necessarily rendered the criminal trial fundamentally unfair or unreliable as a vehicle for determining guilt or innocence.").

¶ 15 In support of his structural error argument, defendant cites to several cases in which our Court found the trial court committed "a form of structural error known as error per se" because the trial court violated a defendant's constitutional right to be tried by twelve jurors. *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 331 (2012) ("North Carolina courts also apply a form of structural error known as error per se" for certain violations of the North Carolina Constitution). *See State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) (concluding that the defendant's constitutional rights were violated per se when the trial court dismissed one juror for misconduct and allowed the defendant to be capitally sentenced by less than twelve jurors); *State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292–93 (1997) (holding that the defendant's constitutional rights were violated per se when only eleven jurors fully participated in reaching a verdict in a capital case); *State v. Hudson*, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971) (ordering a new trial *ex mero motu* because although the defendant waived his right to trial by twelve jurors, the defendant's constitutional rights were violated when a jury of less than twelve jurors rendered a guilty verdict).

¶ 16 The cases cited by defendant in support of his structural error argument relate to the make up and proper function of the jury. While the deprivation of a properly functioning jury may be a constitutional violation, the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation.

¶ 17 In *State v. Garcia*, the defendant argued that the trial court committed structural error by deviating from the jury selection procedure of N.C.G.S. § 15A-1214 which violated his constitutional right to be tried by a fair and impartial jury. *Garcia*, 358 N.C. at 404, 597 S.E.2d at 741. Specifically, the defendant argued that the trial court "committed structural constitutional error by requiring defendant to question replacement jurors before the State approved a full panel of twelve individuals," *id*. at 404, 597 S.E.2d at 741, and that "[t]he prosecutor passed less than a full panel of twelve replacement jurors to defendant on two separate

occasions." *Id.* at 406, 597 S.E.2d at 742. While criminal defendants have a constitutional right to be tried by a fair and impartial jury, this Court failed to find structural error because the defendant "ha[d] shown only a technical violation of the state jury selection statute." *Id.* at 410, 597 S.E.2d at 745.

¶ 18 Here, defendant's argument does not relate to the constitutional sufficiency of a properly functioning jury. Rather, defendant contends that the trial court's failure to follow the statutorily prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want. Defendant argues that no subsequent action by the trial court could remedy the statutory violation. Defendant's structural error argument would impose a per se rule that would rigidly require a new trial for technical violations of N.C.G.S. § 15A-1201(d), without regard to the facts and circumstances of a particular case and without consideration of prejudice to the defendant. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) ("[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.").

¶ 19 Here, the trial court's statutory violation is "simply an error in the trial process itself" that did not "affect the framework within which the trial proceed[ed]." *Lawrence*, 365 N.C. at 513–14, 723 S.E.2d at 331 (cleaned up) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). Because "the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331; *see also State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988) (determining whether prejudicial error occurred when the trial court failed to properly conduct a statutory inquiry with a pro se defendant).

¶ 20 N.C.G.S. § 15A-1443(a) provides the following:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2019); *see Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (stating that defendants have the burden of showing there is "a

reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises" (quoting N.C.G.S. § 15A-1443(a) (2009))).

¶ 21 While the right to a jury trial is rooted in both our State constitution and the United States Constitution, the trial court's error here concerns a statutory procedure allowing criminal defendants to waive this constitutional right. *See* N.C. Const. art. I, § 24. Thus, in cases where the trial court commits a statutory violation, the defendant is not guaranteed a new trial, rather "[t]his Court has consistently required that defendants claiming [a procedural error] show prejudice in addition to a statutory violation before they can receive a new trial." *Garcia*, 358 N.C. at 406, 597 S.E.2d at 742–43. Here, defendant bears the burden of demonstrating not only that an error occurred, but also that he was prejudiced by the error.

¶ 22 At trial, defense counsel gave notice of and the State consented to proceeding with defendant's case through a bench trial The trial court discussed the waiver with counsel on the record and in the presence of defendant. However, the trial court failed to conduct an inquiry with defendant pursuant to N.C.G.S. § 15A-1201(d). After the State rested its case, the trial court acknowledged the failure to comply with N.C.G.S. § 15A-1201 and specifically requested that defense counsel explain to defendant that the trial court is to "address the defendant and ask if he waives a jury trial and understands the consequences of that." In a colloquy with the trial court, defendant affirmed the waiver announced by defense counsel prior to trial and personally consented to waiver of trial by jury.

¶ 23 Although the trial court's colloquy was untimely, N.C.G.S. § 15A-1201(d)(1) simply requires the trial court to "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1). Here, the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant's subsequent clear and unequivocal answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that decision. There is no evidence in the record to demonstrate that defendant was not aware of his right to a jury trial or his right to waive the same.

¶ 24 Defendant had the right to waive a trial by jury, and the record tends to show that defendant's strategy was to have the merits of his case decided in a bench trial. During his colloquy with the trial court,

defendant was asked if he consented to the waiver of his right to trial by jury. Defendant answered in the affirmative. Subsequently, the trial court asked defendant if proceeding without a jury was acceptable to him. Defendant again answered in the affirmative. Although this type of inquiry should have been conducted prior to trial, defendant had the unique authority to compel the trial court to declare a mistrial. Defendant was arguably in a more advantageous position to enter a knowing and voluntary waiver at this point in the proceedings than he would have been if the inquiry had occurred prior to trial. Defendant's desire to be tried in a bench trial was affirmed after he heard the evidence presented by the State, knew that the trial court erred, and was given the opportunity to revoke the waiver and start anew, but he ultimately reaffirmed the waiver.

¶ 25 Further, there was overwhelming evidence of defendant's guilt presented at trial. The State was required to prove beyond a reasonable doubt that defendant drove "a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit established by law for the highway where the offense occurred or over 80 miles per hour." N.C.G.S. § 20-141(j1) (2019). Trooper Hussey testified that there was a black Jeep traveling on I-40 and determined that the vehicle was traveling at a speed of 94 miles per hour in a 65 mile-per-hour zone. The speed of the vehicle was nearly 30 miles per hour above the posted speed limit, and well in excess of 80 miles per hour. Trooper Dodson then testified that defendant was the driver of the black Jeep. The evidence supports a finding that defendant was guilty of speeding under N.C.G.S. § 20-141(j1), and defendant has not met his burden as there is no reasonable possibility that had the error in question not been committed, a different result would have been reached in a bench trial or a jury trial. *See* N.C.G.S. § 15A-1443(a) (2019).

AFFIRMED.

Justice ERVIN, dissenting.

¶ 26 I am unable to join my colleagues' decision to uphold the trial court's judgment in this case given my belief that it rests upon a significant understatement of the extent of the trial court's failure to comply with the applicable statutory procedures, a fundamental misapprehension of the nature of the claim that defendant has asserted, and the use of an erroneous standard for determining when a showing of prejudice is and is not required before an award of appellate relief becomes appropriate. Simply put, I believe that the majority's decision involves a substantial

deviation from this Court's precedent that has the effect of countenancing a violation of defendant's fundamental right to trial by jury. As a result, I would hold that defendant is entitled to a new trial and dissent from my colleagues' decision to the contrary.

¶ 27 A criminal defendant's right to trial by jury is one of the bedrock principles of American and English law. Magna Carta provides that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land." Ray Stringham, *Magna Carta: Fountainhead of Freedom* 235 (1966) (providing an English translation of the Magna Carta of 1215). No less an authority than Blackstone lauded "[t]he antiquity and excellence" of trial by jury, in accordance with which "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals." 4 William Blackstone, *Commentaries*, *349–50. In recognition of the fundamental importance of the right to trial by jury, the abridgement of that right was listed as one of the actions on the part of the British crown that justified American independence enumerated in the Declaration of Independence, *see* The Declaration of Independence paras. 2–3 (U.S. 1776) (stating that the "repeated injuries" in which the monarch had engaged included "depriving us in many cases, of the benefits of Trial by Jury") and the necessity for preserving that right is enshrined in both the federal and state constitutions, *see* U.S. Const. amend. VI (providing that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury of the State and district where in the crime shall have been committed . . . ."); N.C. Const. art. I, § 24 (providing that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . ."). As result, it is impossible, at least in my view, to overstate the fundamental importance of the right to trial by jury in the law of this state and this nation.

¶ 28 For many years, individuals charged with the commission of criminal offenses in North Carolina lacked the ability to waive the right to trial by jury. *State v. Hudson*, 280 N.C. 74, 79 (1971) (stating that "[i]t is equally rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains 'not guilty' "). In 2014, however, the people of North Carolina voted in favor of a constitutional amendment authorizing criminal defendants in non-capital cases to waive their right to a jury trial "in writing or on the record in the court and with the consent of the trial judge . . . subject to procedures prescribed by the General Assembly." N.C. Const. art. I,

§ 24. In the aftermath of the adoption of this amendment, the General Assembly enacted legislation providing that "[a] defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury," N.C.G.S. § 15A-1201(b) (2019), and delineating the procedures that were required to be followed in instances in which a criminal defendant sought to waive his or her right to trial by jury. Among other things, the General Assembly stated that, "[b]efore consenting to a defendant's waiver of the right to a trial by jury," the trial court "shall do all of the following:

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d). As a result, in order to ensure that a defendant's waiver of the right to a jury trial satisfied the constitutional requirement that it be knowing and voluntary, *State v. Thacker*, 301 N.C. 348, 354 (1980) (stating that "[the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary . . . "), the General Assembly has prescribed statutory prerequisites that must be satisfied before a knowing and voluntary waiver of the right to trial by jury can be said to have occurred.

¶ 29 Although the majority acknowledges that "the trial court's colloquy" with defendant was "untimely," it fails to acknowledge the seriousness of the trial court's failure to take timely action to ensure that defendant's waiver of his right to a jury trial was knowing and voluntary and makes no mention of the additional ways in which the trial court failed to comply with the requirements of N.C.G.S. § 15A-1201(d). Although N.C.G.S. § 15A-1201(d) clearly contemplates that the trial court would personally address the defendant and determine whether the defendant knowingly and voluntarily waived the right to a jury trial prior to the beginning of the trial, the trial court's colloquy with defendant comes at pages 57 and 58 of a 75-page trial transcript and occurred after the State had rested its case against defendant. As a result, jeopardy had already attached and

the vast majority of the trial had already been completed before the trial court personally addressed defendant for the purpose of determining whether he wished to waive his right to trial by jury.[1] As a result, I am inclined to believe that the "untimeliness" of the trial court's colloquy with defendant was a much more serious error than the majority's opinion would appear to suggest.

¶ 30 Secondly, and even more importantly, the trial court failed to "determine whether the defendant fully underst[ood] and appreciate[d] the consequences of [his] decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1). Although N.C.G.S. § 15A-1201(d)(1) clearly contemplates that the trial court would personally determine that the defendant understood the consequences of his or her decision to waive the right to a jury trial, the trial court, instead, asked defendant's trial counsel to "explain that to your client." According to decisions of this Court in the waiver-of-counsel context, the trial court is not entitled to delegate responsibility for explaining the consequences of a decision to waive a constitutional right to the defendant's attorney. *State v. Pruitt*, 322 N.C. 600, 604 (1988) (stating that "[i]t is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision"); *State v. Bullock*, 316 N.C. 180, 186 (1986) (holding that nothing in N.C.G.S. § 15A-1242, which governs the waiver of a defendant's right to counsel, "makes it inapplicable to defendants who are magistrates, or even attorneys or judges"). Moreover, even if the trial court was entitled to rely upon defendant's trial counsel to help him inform defendant about "the consequences of the defendant's decision to waive the right to trial by jury," N.C.G.S. § 15A-1201(d)(1), the record in this case is completely silent with respect to what, if anything, defendant may have been told by his trial counsel during the conversation that was held in response to the trial court's request. Finally, the trial court's colloquy with defendant was limited to an inquiry concerning whether defendant consented to his trial counsel's actions in waiving his right to a jury trial and whether defendant understood that he was charged with speeding coupled with a statement that the speeding offense "carr[ied] a possible fine" and might "carry [the] possibility of a 20-day jail sentence." For that reason, given the trial court's failure to explain that defendant

1. Although the Court suggests that this delay actually worked to defendant's benefit on the theory that "defendant had the unique authority to compel the trial court to declare a mistrial" and "was arguably in a better position to enter a knowing and voluntary waiver at this point in the proceedings than he would have been if the inquiry had occurred prior to trial," the record provides no basis for believing that defendant had any idea what would have happened had he declined to proceed without a jury.

had the right to be tried by a jury rather than by the trial court sitting without a jury and what the two methods of proceeding in defendant's case might entail, "there is nothing in the record which shows that defendant understood and appreciated the consequences of" waiving his right to trial by jury. *Pruitt*, 322 N.C. at 604. As a result, I am unable to join my colleagues in concluding that the trial court's delayed colloquy constituted a mere "technical" violation of N.C.G.S. § 15A-1201(d) and believe, instead, that the trial court's noncompliance with the requirements of N.C.G.S. § 15A-1201(d)(1) was substantial.[2]

¶ 31 The majority misapprehends the nature of the trial court's error in another respect as well. Although the majority repeatedly states that "the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation" and that "defendant's argument does not relate to the constitutional sufficiency of a properly functioning jury," this set of statements overlooks the constitutionally-based logic that led to the enactment of N.C.G.S. § 15A-1201. As I read the relevant statutory language, the requirements set out in N.C.G.S. § 15A-1201, like the requirements enunciated in the right-to-counsel context as enacted in N.C.G.S. § 15A-1242, are intended to ensure that a criminal defendant who elects to waive his or her right to trial by jury does so consistently with the constitutional requirement that such waivers be knowingly and voluntarily made by a defendant who has been fully apprised of the potential ramifications of his or her decision. For that reason, since a valid waiver is necessary before a defendant is allowed to forgo his or her right to trial by jury, a trial court's decision to allow a defendant to opt for a bench trial in the absence of a valid waiver results in a deprivation of the constitutionally-guaranteed right to trial by jury. As a result, the only remaining issue that needs to be addressed in this case is the remedy, if any, to which defendant is entitled given the defect in the proceedings that led to the entry of the trial court's judgment.

---

2. According to the majority, "defendant contends that the trial court's failure to follow the statutorily-prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want." In making this statement, my colleagues appear to be assuming the answer to the inquiry that N.C.G.S. § 15A-1201(d) requires the trial court to make on the basis of an inquiry that even they appear to recognize was less than optimal. Simply put, the entire purpose of the inquiry required by N.C.G.S. § 15A-1201(d)(1) is to permit a proper determination of the extent to which a fully informed defendant did or did not wish to exercise his state constitutional right to trial by jury. In the absence of substantial compliance with N.C.G.S. § 15A-1201(d), we simply cannot know what defendant would have wanted to do had he been properly informed of the consequences of the decision that he was being asked to make.

¶ 32 The majority's remedy-related discussion rests upon the application of the "structural error" jurisprudence that has been developed by the Supreme Court of the United States. The majority's reliance upon structural error is, however, misplaced. "North Carolina courts . . . apply a form of structural error known as error per se," with "error per se [being] automatically deemed prejudicial and thus reversible without a showing of prejudice." *State v. Lawrence*, 365 N.C. 506, 514 (2012). According to this Court, "federal structural error and state error per se have developed independently" in light of the fact that, while the question of whether a federal constitutional error is or is not harmless is a matter of federal law, the state courts are free to develop their own prejudice-related rules. *Id.* As a result, given that this Court utilizes an error per se approach rather than a structural error approach in determining whether a showing of prejudice is necessary to justify an award of appellate relief based upon a state law claim, the majority's decision to use a structural error approach in this case rests upon a misapprehension of the applicable law.[3]

¶ 33 This Court has held that a number of related violations of the defendant's right to a trial by jury constituted error per se. In *State v. Poindexter*, 353 N.C. 440, 444, this Court held that a defendant's conviction that rested upon "a guilty verdict by a jury composed of less than twelve qualified jurors" which resulted from the misconduct of one of the members of the jury as it had been originally empaneled constituted error per se. *Id.* at 444. In reaching that conclusion, we stated that a trial by an "improperly constituted" jury was "so fundamentally flawed that the verdict [could] not stand," with "a violation of a defendant's constitutional right to have the verdict determined by twelve jurors constitut[ing] error *per se*" that was "not subject to harmless error analysis." *Id.*; *see also State v. Bindyke*, 288 N.C. 608, 629 (1975) (holding that "[t]he presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial"); *State v. Bunning*, 346 N.C.

3. As an aside, we note that the Supreme Court of the United States has stated that, in light of "the Sixth Amendment's clear command to afford jury trials in serious criminal cases[, w]here th[e] right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt," given that "the error in such a case is that the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (citations omitted); *see also Sullivan v. Lousiana*, 508 U.S. 275, 281-82 (1993) (stating that, since "[t]he right to trial by jury reflects . . . a profound judgment about the way in which law should be enforced and justice administered,' " "[t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " (citations omitted) (quoting *Duncan v. Lousiana*, 391 U.S. 145, 155 (1968)). As a result, it would appear to me that, even if the applicable mode of analysis involved structural error rather than error per se, defendant would be entitled to an award of appellate relief in this case.

253, 257 (1997) (awarding the defendant a new sentencing hearing in a capital case in which the trial court allowed an alternate juror to participate in the jury's deliberations after they had already begun for the purpose of replacing a juror who had mental health-related difficulties on the grounds that a "trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand"). In the same vein, we held in *Hudson*, 280 N.C. at 80, that a verdict returned by a jury consisting of only eleven members which was allowed to render a decision after one of the original jurors had become ill and was unable to participate in the jury's deliberations was a "nullity." As a result, as the majority acknowledges, "the deprivation of a properly functioning jury may be a constitutional violation" and certainly constitutes error per se.

¶ 34 I am, quite frankly, unable to see any meaningful distinction between the facts of this case, on the one hand, and the facts at issue in *Poindexter*, *Bindyke*, *Bunning*, and *Hudson*, on the other.[4] In other words, it seems to me that, if a conviction by eleven or thirteen, rather than twelve jurors, results in error per se, a conviction obtained without a valid waiver of the right to a jury trial must necessarily constitute error per se as well. After all, a conviction based upon a verdict by a trial judge, sitting without a jury, is tantamount to a verdict without any number of jurors at all. As a result, it seems clear to me that the trial court's failure to ensure that defendant properly waived his right to trial by jury constituted error per se.[5]

---

4. According to the majority, the outcome in this case is controlled by *State v. Garcia*, 358 N.C. 382 (2004), in which the Court rejected a contention that the trial court's failure to require the prosecutor to pass a full panel of prospective jurors to the defendant constituted structural error on the grounds that the defendant had "failed to show that he was denied trial by a fair and impartial jury or to show that any other constitutional error resulted from the jury selection procedure employed at his trial" and that defendant had, instead, "shown only a technical violation of the state jury selection statute." *Id.* at 410. An error in the order in which the parties are entitled to question and challenge prospective jurors bears no resemblance to a case, like this one, in which the defendant was tried by the trial judge, rather than a jury, in the absence of a valid waiver of his right to trial by jury resulting in a deprivation of that right.

5. The majority seems to suggest that a mere statutory violation can never constitute error per se. However, this Court has found error per se in cases in which the trial court violated N.C.G.S. § 84-14, *State v. Mitchell*, 321 N.C. 650, 659 (1988) (quoting N.C.G.S. § 84-14) (providing that, "in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side"), and N.C.G.S. § 7A-450(b1), *State v. Parker*, 350 N.C. 411, 421 (1999) (citing N.C.G.S. § N.C.G.S. § 7A-31-450(b1) (mandating the appointment of two counsel to represent defendants in capital cases); *State v. Brown*, 325 N.C. 427, 426 (1989); *State v. Hucks*, 323 N.C. 574, 581 (1988). As a result, any suggestion to the effect that error per se can only occur in connection with constitutional violations would be erroneous.

¶ 35 The approach that I believe to be appropriate in this case is indistinguishable from the one that this Court has consistently utilized in cases involving the absence of a valid waiver of the right to counsel. According to N.C.G.S. § 15A-1242,

> [a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2019).[6] In *State v. Moore*, 362 N.C. 319 (2008), this Court held that the trial court had failed to "make an adequate determination pursuant to N.C.G.S. § 15A-1242" before allowing the defendant to proceed pro se and that this error was prejudicial and required reversal. *Id*. at 320–21; *see also Bullock*, 316 N.C. at 186 (holding that "[i]t was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether the defendant voluntarily, knowingly and intelligently waived his right to counsel"); *Pruitt*, 322 N.C. at 604 (holding that the defendant was entitled to a new trial when there was "nothing in the record which show[ed] that defendant understood and appreciated the consequences of proceeding *pro se*" or "understood the 'nature of the charges and proceedings and the range of permissible punishments' " as required by N.C.G.S. § 15A-1242). Thus, even though this Court has never held that a deprivation of the right to counsel in violation of N.C.G.S. § 15A-1242 constitutes error per se in so many words, our prior decisions clearly reflect that such a violation of the defendant's right to counsel necessitates an award of appellate relief without any necessity for a showing of prejudice. As a result of the substantial similarities between the language of N.C.G.S. § 15A-1201(d) and the language of N.C.G.S. § 15A-1242 and the similar purposes that these statutory provisions are intended to serve, the fact

6. The similarity between the statutory language contained in N.C.G.S. § 15A-1242 and the statutory language contained in N.C.G.S. § 15A-1201(d) is striking, a fact that gives added force to the analogy set out in the text of this dissenting opinion.

that this Court has treated violations of N.C.G.S. § 15A-1242 as if they constituted error per se strongly suggests that a similar approach should be utilized when violations of N.C.G.S. § 15A-1201(d) occur.

¶ 36 Admittedly, defendant was not charged with nor convicted of a violent crime or offense involving a significant loss of property in this case. In addition, the majority is correct in noting that the State's case against defendant was strong. Under such circumstances, it is tempting to make every effort to avoid overturning a conviction when the underlying result does not seem fundamentally unfair at a substantive, as compared to a procedural, level. On the other hand, the Court's decision, aside from departing from what seem to me to be well-established principles of North Carolina law, has ramifications that extend far beyond the facts of this case to much more serious criminal actions. For that reason, we should all remember the old adage that "hard cases make bad law" and attempt to avoid violating that principle in this case. As a result, for all of these reasons, I would hold that defendant did not properly waive his right to trial by jury, that the absence of a proper waiver resulted in a deprivation of defendant's right to trial by jury, that the failure to obtain a proper waiver of defendant's right to a jury trial constituted error per se, and that defendant is entitled to a new trial and respectfully dissent from my colleagues' decision to the contrary.

Justices HUDSON and EARLS join in this dissenting opinion.

STATE v. BETTS

[377 N.C. 519, 2021-NCSC-68]

STATE OF NORTH CAROLINA
v.
ERVAN L. BETTS

No. 376A19

Filed 11 June 2021

1. Evidence—indecent liberties trial—expert testimony—child victim—diagnosis of PTSD—credibility vouching

In a prosecution for taking indecent liberties with a child, there was no plain error in the admission of testimony from a licensed clinical social worker, qualified at trial as an expert witness in sexual abuse and pediatric counseling, who had evaluated the child victim and diagnosed her with post-traumatic stress disorder (PTSD). The expert's responses to questions about whether a PTSD diagnosis could be related to domestic violence or sexual abuse, and whether the child victim had experienced any traumas that required therapy, did not constitute impermissible vouching for the child victim's credibility because the expert did not definitively state the victim had been sexually abused or detail which traumas, if any, she had experienced.

2. Evidence—indecent liberties trial—expert testimony—use of word "disclose" in reference to child victim's statements—credibility vouching

In a prosecution for taking indecent liberties with a child, there was no plain error in the use by multiple witnesses of the word "disclose" to describe the child victim's recounting of defendant's conduct against her which resulted in criminal charges. The term, by itself, did not give rise to impermissible vouching of the child victim's credibility and was therefore admissible, and defendant was not prejudiced by its use given the substantial evidence that defendant inappropriately touched the victim.

3. Evidence—indecent liberties trial—past incidents of domestic violence—relevance—probative value

In a prosecution for taking indecent liberties with a child, there was no plain error in the admission of testimony regarding defendant's past incidents of domestic violence against the child victim and her mother, where the evidence was relevant to explain why the victim was afraid of defendant and delayed reporting allegations of sexual abuse perpetrated against her by him, to provide context for

the victim having been diagnosed with post-traumatic stress disorder, and to aid the jury in assessing the victim's credibility.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 272 (2019), finding no plain error after appeal from a judgment entered on 23 March 2018 by Judge R. Stuart Albright in Superior Court, Forsyth County. On 28 February 2020, the Supreme Court allowed defendant's petition for discretionary review to review an additional issue not addressed by the Court of Appeals. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, *Attorney General*, *by Anne M. Middleton*, *Special Deputy Attorney General*, *and Heyward Earnhardt*, *Solicitor General Fellow*, *for the State-appellee.*

Craig M. Cooley for defendant-appellant.

BARRINGER, Justice.

¶ 1 Defendant was convicted of three counts of indecent liberties with a child. Defendant appealed to the Court of Appeals, which in a divided opinion held that defendant had a trial free from prejudicial error. After careful review, we modify and affirm the decision of the Court of Appeals.

I. Background

¶ 2 When B.C.[1] was born in 2013, illegal drugs were found in her system, which prompted the involvement of the Forsyth County Department of Social Services (DSS). On 25 October 2013, DSS conducted an interview of M.C., the seven-year-old sister of B.C., and M.C. informed the social worker, Melodie Archie, that defendant touched her inappropriately. During this time, defendant was in a relationship with M.C. and B.C.'s mother. When the social worker asked additional questions, M.C. denied being touched inappropriately but then described domestic violence incidents between defendant and her mother.

¶ 3 Archie testified on behalf of the State that she conducted a follow-up interview at M.C.'s elementary school where M.C. described incidents of defendant inappropriately touching her. Archie referred M.C. to an advocacy center and contacted the Winston-Salem Police Department.

1. Initials are used to protect the identities of B.C. and M.C., minor children, who are involved in the case.

M.C. went to the child advocacy center in November 2013, where she underwent a forensic interview conducted by Fulton McSwain.

¶ 4 McSwain wrote a report that was admitted into evidence showing that during the forensic interview at the advocacy center, M.C. described incidents of domestic violence between defendant and her mother, two specific incidents of defendant inappropriately touching her, and one incident where defendant slapped her on the leg so hard that he left a hand imprint and then said to her, "F**k you b**ch." M.C. also relayed specific incidents of domestic violence she witnessed between her mother and defendant, which included defendant pushing her mother into a counter and a closet, defendant punching her mother and causing her to have a black eye, and defendant bringing a gun to her mother's residence and attempting to break into her mother's apartment.

¶ 5 While M.C. only described in detail two specific incidents of inappropriate touching by defendant, M.C. explained that defendant kept on touching her private parts over and over again, but she could not remember how many times defendant had inappropriately touched her. The two specific incidents of inappropriate touching that M.C. described were defendant rubbing M.C.'s vagina beneath her underwear and defendant touching M.C.'s breasts. At the conclusion of the interview, the interviewer documented that M.C. "reported to being truthful and did not appear to display any overt signs of deception."

¶ 6 In December 2013, M.C. began seeing Mary Katherine Mazzola,[2] a licensed clinical social worker with DSS, who worked as a therapist in the clinical services unit. Mazzola testified at trial that M.C. was referred to her based on M.C.'s exposure to neglect, sexual abuse, and violence and, after a trauma assessment, Mazzola diagnosed M.C. with post-traumatic stress disorder (PTSD).

¶ 7 On 25 April 2016, defendant was indicted on three counts of indecent liberties with a child. At trial, the State called to testify, among others, M.C., Archie, McSwain, and Mazzola. Mazzola was qualified as an expert witness in sexual abuse and pediatric counseling. The defendant was subsequently convicted of all three counts and sentenced to three consecutive terms of 31 to 47 months imprisonment.

¶ 8 Defendant appealed. The Court of Appeals addressed defendant's arguments that the trial court committed plain error by "(1) not issuing a limiting instruction regarding 'profile' testimony; (2) allowing testimony

2. While there are discrepancies in how Mazzola's name is spelled, we will use the spelling of her name as documented in the Court of Appeals opinion.

and reports that amounted to improper vouching for the credibility of the victim; (3) incorrectly instructing the jury on the proper use of testimony related to the victim's PTSD; and (4) admitting evidence of prior incidents of domestic violence by defendant." *State v. Betts*, 267 N.C. App. 272, 274 (2019). In a divided opinion, the Court of Appeals held that defendant received a fair trial free from prejudicial error. *Id.* at 286.

¶ 9 The dissent, however, argued that the consistent use of the term "disclose" by the State's witnesses was impermissible vouching as to M.C.'s credibility, that the introduction of the domestic violence evidence was error, and the cumulative effect of these errors required reversal of defendant's convictions. *Id.* at 297, 309–310 (Tyson, J., dissenting). Defendant appealed as of right to this Court based on the dissenting opinion from the Court of Appeals. The Court of Appeals opinion did not directly address defendant's issue on appeal of whether separate elements of Mazzola's testimony constituted impermissible vouching of M.C.'s credibility, and this Court allowed defendant's petition for discretionary review as to that issue.

II. Standard of Review

¶ 10 If in a criminal case, an issue was not preserved by objection at trial and was not deemed preserved by rule or law, the unpreserved error is reviewed only for plain error. *See* N.C. R. App. P. 10(a)(4) (2021).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518 (2012) (cleaned up).

III. Analysis

A. Impermissible Vouching

¶ 11 **[1]** Aside from its consideration of the term "disclose," the Court of Appeals did not directly address defendant's specific challenges to part of Mazzola's testimony as impermissible vouching as to M.C.'s credibility. We address the issue here and accordingly modify the Court of Appeals' majority opinion.

¶ 12 Defendant did not object to this evidence when it was offered at trial and, thus, we review for plain error. Defendant argues that Mazzola's answers in the affirmative to a series of questions from the State constituted impermissible vouching as to M.C.'s credibility and the trial court's failure to strike her testimony was plain error. Specifically, the State asked and Mazzola answered in the affirmative the following questions: (1) "when you make a diagnosis of post-traumatic stress disorder, are there several types of traumatic events that could lead to that diagnosis?," (2) "would violence in the home be one of those?," (3) "what about domestic violence or witnessing domestic violence?," (4) "what about sexual abuse?," (5) "[w]ould it be fair to say that [M.C.] had experienced a number of traumas?," and (6) "And that was the basis of your therapy?"

¶ 13 Expert opinion is not admissible to vouch for a victim's credibility; nonetheless, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 266–267 (2002) (per curiam). An expert's opinion that sexual abuse did in fact occur is admissible when there is physical evidence supporting a diagnosis of sexual abuse. *Id.* at 266.

¶ 14 Given the context of the testimony and the questions asked, Mazzola's testimony did not vouch for M.C.'s credibility and thus was admissible testimony. As argued by the State, the challenged testimony addressed what types of trauma could lead to a PTSD diagnosis—and never indicated which traumas M.C. experienced, if any.

¶ 15 This Court has held that "testimony amount[ing] to an expert's opinion as to the credibility of the victim . . . is inadmissible under the mandate of Rule 608(a) [of the North Carolina Rules of Evidence.]" *State v. Aguallo*, 318 N.C. 590, 599 (1986). An identification of trauma which may form the basis of a PTSD diagnosis clearly, as recited by Mazzola, does not constitute a vouching for the victim's credibility, but rather a statement of the considerations that led to the expert's diagnosis. Accordingly, Mazzola's testimony does not address credibility. Mazzola's affirmative answer to the question concerning whether M.C. had experienced a number of traumas was in response to the State's line of questioning regarding Mazzola's diagnosis of PTSD.

¶ 16 Mazzola did not "usurp the jury's function in determining credibility" as defendant claims. Mazzola never testified that M.C. was in fact sexually abused. *Cf. State v. Towe*, 366 N.C. 56, 59–60 (2012) (concluding that expert testimony was improper where the expert testified that the complainant was in fact part of a category of sexual abuse victims

that displayed no physical abnormalities). Mazzola's testimony stayed within the bounds of permissible expert witness testimony in child sex abuse cases.

¶ 17 Even if Mazzola's testimony was admitted in error, the testimony was not prejudicial to defendant. The trial court gave instructions to the jury on two occasions stating that Mazzola's testimony could only be used for two purposes: to corroborate M.C.'s testimony or to explain M.C.'s delay in reporting defendant's crimes. While defendant argues that M.C.'s testimony of the incidents contains several inconsistencies, defendant had the opportunity to present evidence and cross-examine M.C. to highlight any alleged inconsistencies. In fact, defendant's trial counsel did call attention to M.C.'s inconsistencies to the jury during closing arguments. Based on the evidence presented at trial, the burden of showing prejudice for an unpreserved error—that "the error had a probable impact on the jury's finding that the defendant was guilty"—is upon the defendant. *See Lawrence*, 365 N.C. at 518. Defendant has not met his burden of showing plain error.

B. Use of the Word "Disclose" as Impermissible Vouching

¶ 18 **[2]** Defendant next argues that the use of the word "disclose" throughout the State's expert and lay witnesses' testimony constituted impermissible vouching as to M.C.'s credibility. Defendant did not object to this evidence when it was offered at trial and, thus, we review for plain error.

¶ 19 An expert's opinion that a complainant has endured sexual abuse, absent physical evidence, is impermissible vouching as to the complainant's credibility. *Stancil*, 355 N.C. at 266–267. This Court "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822 (1988).

¶ 20 Defendant relies on the unpublished Court of Appeals opinion *State v. Jamison*, COA18-292, 2018 WL 6318321 (N.C. Ct. App. Dec. 4, 2018),[3] which is based on *State v. Frady*, 228 N.C. App. 682, *review denied*, 367 N.C. 273 (2013), to argue that the State's witnesses' use of the word "disclose" constituted impermissible vouching. Defendant not only relies on an unpublished Court of Appeals decision to support his argument, but

3. We note that it is highly disfavored to cite to unpublished opinions. *See* N.C. R. App. P. 30(e)(3) (2021).

the holding in *Frady* does not support defendant's position.[4] An expert witness's use of the word "disclose," standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made. Thus, we conclude that the trial court did not err by allowing the State's witnesses to use the term "disclose" and there is no plain error.

¶ 21 Even if it were error for the trial court to admit testimony of the State's witnesses who used the term "disclose," defendant has not shown plain error. M.C. testified about three incidents of defendant inappropriately touching her, where she gave several details and described the surrounding circumstances. While M.C.'s account of the events may have had inconsistencies, the jury had the opportunity to watch M.C. testify and make an independent determination as to her credibility. Furthermore, substantial evidence was presented to the jury to find that defendant had inappropriately touched M.C. The State submitted for the jury's consideration McSwain's report of the forensic interview, a video of the forensic interview, as well as testimony from Archie and Mazzola. Defendant has not shown that the use of the word "disclose" had a probable impact on the jury's finding that he was guilty. *See Lawrence*, 365 N.C. at 518. Therefore, there is no prejudice.

C. Domestic Violence Evidence

¶ 22 **[3]** Defendant next argues that the trial court plainly erred by allowing evidence of his past domestic violence incidents with M.C.'s mother in violation of North Carolina Rules of Evidence 401 and 403. We disagree.

¶ 23 Rule 401 states that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403.

---

4. In *State v. Frady*, the Court of Appeals assessed the testimony of the expert and evaluated whether the meaning of the testimony would be construed by the jury as an opinion by the expert of the victim's credibility. *Frady*, 228 N.C. App. at 685–86. *Frady* did not hold that the use of the word "disclose," by itself, conveys an opinion as to the credibility of a victim.

¶ 24 Here, defendant argues that the evidence of domestic violence, which consisted of the three incidents M.C. described to McSwain during her forensic interview, "had little–if anything–to do with the charged offenses." Yet, the domestic violence evidence provides a justification for why M.C. was fearful of and delayed in reporting defendant's sexual abuse. In *State v. Espinoza-Valenzuela*, 203 N.C. App. 485 (2010), the Court of Appeals held that evidence of domestic violence between defendant and complainants' mother, although tending to show defendant's character, was relevant pursuant to N.C.G.S. § 8C-1, Rule 401 to show why complainants delayed reporting the sexual abuse defendant perpetrated against them. *Espinoza-Valenzuela*, 203 N.C. App. at 491. The same rationale can be applied in the instant case. The domestic violence evidence goes directly to crucial issues in the case including M.C.'s credibility, the veracity of her allegations, and why she did not reveal defendant's actions until DSS became involved with B.C., her younger sister.

¶ 25 The evidence of domestic violence was also probative of M.C.'s PTSD diagnosis. Mazzola testified to her opinion that M.C. has had "complex trauma" that ultimately led Mazzola to diagnosing M.C. with PTSD. Mazzola testified that domestic violence can contribute to a person developing PTSD. The domestic violence evidence, thus, aided the jury's understanding of M.C.'s PTSD diagnosis. Since the domestic violence evidence was relevant to explain why M.C. delayed reporting defendant's sexual assaults and the domestic violence contributed to M.C.'s PTSD diagnosis, it follows that the evidence was relevant under Rule 401 and 403 as it pertained to M.C.'s PTSD and its effects on M.C. *See State v. Hall*, 330 N.C. 808, 822 (1992) ("[T]estimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent.").

¶ 26 The domestic violence evidence was relevant pursuant to Rule 401 to offer an explanation as to why M.C. delayed reporting defendant's crimes and aided the jury's understanding of M.C.'s PTSD diagnosis. The domestic violence evidence was not more prejudicial than probative so as to be excluded under Rule 403 because it went directly to an issue in the case—M.C.'s credibility. Therefore, we conclude that the trial court did not err by admitting evidence of defendant's past incidents of domestic violence, and thus, there cannot be plain error.

D. Cumulative Error

¶ 27 Finally, defendant argues that the cumulative effect of the trial court's errors prejudiced him. Since we hold that none of the issues present error, we decline to consider defendant's cumulative error argument. *See State v. Thompson*, 359 N.C. 77, 106 (2004) (stating that because the Court concluded there was no error on two of defendant's assignments of error, defendant's cumulative error argument did not need to be considered).

IV. Conclusion

¶ 28 Defendant received a fair trial, free from prejudicial error. Neither Mazzola's testimony, which was not fully addressed by the Court of Appeals, nor the use of the word "disclose" throughout the State's witnesses' testimony constituted impermissible vouching as to M.C.'s credibility. Furthermore, the domestic violence evidence was relevant to explain why M.C. delayed reporting defendant's crimes and aided the jury's understanding of M.C.'s PTSD diagnosis. Since we conclude that the trial court did not commit error, there was no cumulative error. Accordingly, we modify and affirm the Court of Appeals decision.

MODIFIED AND AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

STATE v. CHEEKS

[377 N.C. 528, 2021-NCSC-69]

STATE OF NORTH CAROLINA
v.
THOMAS ALLEN CHEEKS

No. 421PA19

Filed 11 June 2021

1. Homicide—murder by starvation—proximate cause—sufficiency of evidence

In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), there was sufficient evidence that starvation proximately caused the death of defendant's four-year-old stepson where a medical examiner's initial autopsy identified malnutrition and dehydration as the immediate causes of death. Although the examiner's amended autopsy report attributed the boy's death to strangulation, this opinion rested exclusively on defendant's claim that he choked his stepson, which he retracted at trial and which the trial court found to lack credibility. Additionally, other evidence—including accounts of the boy's emaciated, doll-like corpse—showed that defendant failed to feed his stepson more than once a day or to seek medical attention for him even though he was visibly hungry, thin, and malnourished in the months leading up to his death.

2. Homicide—murder by starvation—elements—malice—"starvation" defined

In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), where defendant's four-year-old stepson died after defendant fed him no more than once a day for the last few months of his life, the State was not required to make a separate showing that defendant acted with malice because the malice required to prove first-degree murder is inherent in the act of starving someone. For purposes of section 14-17(a), "starvation" is the deprivation of food or liquids necessary to the nourishment of the human body and is not limited to situations involving the complete denial of all food and hydration.

3. Indictment and Information—negligent child abuse inflicting serious injury—factual allegations—mere surplusage—consistent with trial court's determinations

In a prosecution for negligent child abuse inflicting serious injury, where the indictment alleged that defendant failed to provide his four-year-old stepson with medical treatment for over one

year, despite the child having a disability, and failed to provide proper nutrition and medicine, resulting in weight loss and failure to thrive, the trial court did not err in convicting defendant on grounds that the stepson suffered from severe diaper rash, bedsores, and pressure ulcers under defendant's care. The indictment alleged all essential elements of the offense and any specific factual allegations were mere surplusage. At any rate, no fatal variance existed between the indictment and the court's grounds for convicting defendant, where the court's factual determinations were consistent with the indictment's allegations that defendant deprived the child of medical treatment.

Appeal pursuant to N.C.G.S. § 7A-31(c) from the decision of a unanimous panel of the Court of Appeals, 267 N.C. App. 579 (2019), finding no error in a judgment entered on 1 November 2017 by Judge Hugh B. Lewis in Superior Court, Gaston County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for Defendant-appellant.*

ERVIN, Justice.

¶ 1 The issues before us in this case arise from challenges lodged by defendant Thomas Allen Cheeks to a judgment entered by the trial court based upon defendant's convictions for first-degree murder by starvation and negligent child abuse inflicting serious bodily injury. After careful consideration of defendant's challenges to the trial court's judgment, we affirm the Court of Appeals' decision.

¶ 2 Malachi Golden was born on 15 November 2010 in Gaston County. His mother, Tiffany Cheeks[1], was nineteen years old at the time of Malachi's birth and lived with her grandmother in Charlotte at that time. The child's father, William Golden, was not present for Malachi's birth and was never involved in his son's life.

¶ 3 When Malachi was four months old, Ms. Cheeks noticed that the child was experiencing spasms during which "his head would fall and

1. We will utilize Malachi's mother's married name throughout this opinion in the interest of consistency.

drop." In January 2012, after discussing these occurrences with the child's primary care physician, Ms. Cheeks took Malachi to see a pediatric neurologist named Stephanie Robinett. After performing a number of tests, Dr. Robinett prescribed Malachi an anti-seizure medication called Zonisamide, which proved itself to be effective in improving his spasms.

¶ 4 In June 2012, Malachi and Ms. Cheeks moved to Gaston County. Shortly thereafter, Ms. Cheeks met defendant and entered into a romantic relationship with him. In July 2012, defendant moved into the apartment that Ms. Cheeks occupied with Malachi. Ms. Cheeks and defendant had two children together, one of whom was born in May 2013 and the other of whom was born in November 2014, and married in November 2013.

¶ 5 Malachi continued to see physicians throughout 2012. In September 2012, Malachi underwent a series of tests at the University of North Carolina at Chapel Hill. In the course of the testing process, treating physicians discovered that Malachi suffered from a genetic abnormality that consisted of an inverted 12 chromosome and a minor deletion of his 22 chromosome. After learning about Malachi's chromosomal abnormality, Ms. Cheeks authorized further treatment for her son. Ms. Cheeks did not, however, bring Malachi back to Chapel Hill so that he could receive such treatment.

¶ 6 From December 2012 until November 2013, Malachi received occupational and physical therapy as the result of referrals made by the Child Development Service Agency. Upon turning three years old in November 2013, Malachi aged out of the programs operated through the Child Development Service Agency and began to receive treatment from the Gaston County school system. In December 2014, however, Ms. Cheeks discontinued this treatment.

¶ 7 Shelly Kratt, one of the therapists assigned to provide services for Malachi through the Child Development Services Agency, conducted home visits at the Cheeks residence from April through November 2013. Ms. Kratt described Malachi as a "beautiful child" with "dark olive skin" and "dark beautiful eyes." In the aftermath of the treatment that he received from Ms. Kratt, Malachi's motor skills improved, permitting him to begin to walk and feed himself. Unfortunately, however, Ms. Kratt was frequently unable to conduct scheduled therapy sessions with Malachi because Ms. Cheeks would either cancel the session or refrain from answering the door when Ms. Kratt arrived. On the occasions when she was able to enter the home and provide therapy for Malachi, Ms. Kratt observed that the Cheeks residence was "really dirty and messy" and

"smelled really bad." According to Ms. Kratt, Malachi was always alone in a "Pack N' Play" playpen in a separate area of the home at the time of her arrival. Ms. Kratt noticed that, instead of participating in Malachi's therapy sessions, defendant would occupy himself by playing video games.

¶ 8 Susan Matznik provided occupational therapy to Malachi from December 2012 through October 2013 as the result of referrals from the Child Services Development Agency, with these therapy sessions having originally occurred at the Cheeks residence before being transferred to a clinic in Lincoln County. As had been the case with Ms. Kratt, Ms. Matznik had difficulty assessing and treating Malachi in light of the trouble that she experienced in getting an adult to answer the door at the Cheeks residence. Similarly, Ms. Matznik observed that the apartment was "dirty" and "smelled" and that Malachi was invariably alone in his playpen at the time of her arrival. According to Ms. Matznik, Malachi gained weight during the course of the therapy that she provided. On the other hand, Ms. Matznik remembered conducting a home visit at a time when defendant was the only adult in the residence in which she found Malachi "soaked with urine." Although Ms. Matznik attempted to change Malachi, she had to use paper towels to clean the child given defendant's inability to locate any baby wipes.

¶ 9 At the end of 2013, Malachi began participating in treatment sessions provided by Erica Reynolds, a pre-K itinerant teacher employed by the Gaston County public school system. Ms. Reynolds described Malachi as having "big brown eyes, little chubby cheeks, [and] curly brown hair." Malachi missed several appointments with Ms. Reynolds as a result of Ms. Cheeks' failure to come to scheduled appointments without having sufficient reason for her non-attendance. During the one-year course of treatment that she provided for Malachi, Ms. Reynolds noticed that Malachi's ability to walk had improved, with the child having gone from "taking maybe one or two steps to being able to walk the length of the hallway at the elementary." On the other hand, Ms. Reynolds observed that Malachi appeared hungry during her visits, consistently "shovel[ing] food in his mouth and gulp[ing] his food down."

¶ 10 Linda Hutchins, who provided physical therapy for Malachi during the summer of 2013, remembered that Malachi appeared to be adequately nourished when she began treating the child. Ms. Hutchins discharged Malachi from treatment at some point during 2013 for attendance-related reasons. In 2014, Ms. Cheeks stopped administering Zonisamide to Malachi. The last treatment of any type that Malachi received was provided by Ms. Reynolds in December of 2014.

¶ 11 In spite of the fact that she was no longer treating Malachi, Ms. Hutchins returned to the Cheeks residence during January and February 2015 for the purpose of providing services to one of Malachi's younger siblings. At the time of one such visit in January of 2015, Ms. Hutchins observed that Malachi appeared to be "very thin." Upon being asked if Malachi was under a doctor's care, Ms. Cheeks responded that a physician had been seeing Malachi and that Malachi's needs were being addressed even though Malachi had not been seen by a medical doctor since 31 October 2013.

¶ 12 On 22 January 2015, Ms. Hutchins and Michelle Hartman, a case coordinator with the Child Development Services Agency, came to the Cheeks residence for a visit. On that occasion, Ms. Hutchins observed that both Malachi and his younger sibling were hungry. However, while defendant fed Malachi's sibling, Ms. Hartman had to take care of feeding Malachi. Similarly, upon arriving at the Cheeks residence on 5 February 2015, Ms. Hutchins observed that Malachi and his younger sibling were hungry and that, while the younger sibling received food, no one gave Malachi anything to eat. No one from outside the Cheeks household ever saw Malachi alive after that date.

¶ 13 On 11 May 2015, Ms. Cheeks was away from the residence and at work for most of the day, having left Malachi in the care of defendant, who served as Malachi's primary caregiver during Ms. Cheeks' absences. Upon returning home that night, Ms. Cheeks discovered that Malachi was "not breathing and [was] blue." After calling 911 for help, Ms. Cheeks asked defendant to help attempt to resuscitate Malachi, a request with which defendant refused to comply.

¶ 14 Upon their arrival at the Cheeks residence, emergency medical technicians found Malachi's body lying on the floor in a bedroom. According to Travis Gilman, who was one of the emergency medical technicians dispatched to the Cheeks residence, Malachi was "cold to the touch and . . . stiff." As a result, Mr. Gilman pronounced Malachi dead on the scene.

¶ 15 Jennifer Elrod, another emergency medical technician who came to the Cheeks residence in response to Ms. Cheeks' call, observed that Malachi's "facial features were very sunken," "his eyes were extremely sunken," "you could see every bone on his body," "you could count every rib in his rib cage," "his stomach was very sunken," and "there was no fat on his body." In addition, Ms. Elrod stated that Malachi's skin was gray, that his arms were "very skinny and very stiff," that Malachi's body was propped up on a pillow, and that there was "nothing" in the room other than a playpen and a highchair, with there being "no toys, nothing, it was just a very sparse room."

¶ 16 Upon his arrival at the Cheeks residence shortly after the arrival of the emergency medical technicians, Officer Justin Kirkland with the Gaston County Police Department observed that the kitchen was stocked with food items and found a bottle containing a thirty-day supply of Malachi's seizure medication, in which all thirty pills were still present, dated 24 July 2013. In addition, Officer Kirkland observed the presence of several flat screen televisions and video game consoles throughout the house. At the time that he "glanced in and passed by [Malachi's body,]" Officer Kirkland "saw what appeared to [be] a doll or — it didn't appear like a person on the floor . . . it didn't appear like a boy to me."

¶ 17 According to Officer Kirkland, Malachi appeared "small, skinny, and bony," with his head seeming to be disproportionately large when compared to his body. Officer Kirkland testified that, despite the fact that Malachi was four years old and the fact that his clothes were sized for a 24-month old child, they were too baggy for his body. Officer Kirkland described Malachi as "laying on a pillow that was covered in numerous yellow stains and had a strong smell or odor of urine coming from the pillow."

¶ 18 Detective James Brienza of the Gaston County Police Department, who also came to the Cheeks residence in the aftermath of Malachi's death, stated that "Malachi didn't look or appear to be real" and "almost looked doll like." At the time that he interviewed defendant at the residence, Detective Brienza observed that defendant maintained an "emotionless" demeanor. In the course of his interview with Detective Brienza, defendant stated that he had fed Malachi earlier in the day and that Malachi had vomited before implying that Malachi's genetic disorder had something to do with his death. A few days later, Detective Brienza interviewed defendant for a second time and noticed that there were several inconsistencies in the statements that defendant made on these two occasions. For example, Detective Brienza noticed that defendant claimed to have given different types of food to Malachi in these two interviews and made no mention of his earlier claim that Malachi had vomited in the second interview.

¶ 19 Angela Elder-Swift with the Gaston County Medical Examiner's office examined Malachi's body before it was removed from the Cheeks residence on 11 May 2015. Ms. Swift "didn't even notice the decedent laying in the middle [of the bedroom floor] because [he] didn't look real." According to Ms. Elder-Swift, Malachi "looked like a doll laying on a pillow" and "almost looked plastic." Ms. Elder-Swift testified that she "was able to see all of [Malachi's ribs]," that Malachi's "spine was showing"

and "his skin was hanging off," and that Malachi was "very cachectic." In addition, Ms. Elder-Swift noticed that "[Malachi] had sores on places like pressure ulcers" and "pretty bad diaper sores." Furthermore, Ms. Elder-Swift said that Malachi's "eyes were very dry" and that "his mouth was extremely dry," facts which, in Ms. Elder-Swift's opinion, tended to suggest that Malachi was dehydrated. Upon removing Malachi's diaper, Ms. Elder-Swift discovered "what looked to be some blood that transferred from [the] bad sores." As best Ms. Elder-Swift could tell, no attempt had been made to perform cardio-pulmonary resuscitation upon Malachi.

¶ 20 On 12 May 2015, forensic pathologist Dr. Jonathon Privette performed an autopsy upon Malachi's body. Malachi weighed only nineteen pounds at the time of his death even though an average four-year old male child would be expected to weigh thirty-eight to forty pounds. Dr. Privette testified that "most of [Malachi's] organs seemed small for his age" and that "[d]ehydration could cause the organs to weigh less." Dr. Privette determined that Malachi had very little subcutaneous body fat, resulting in "tenting" of the skin, a condition that exists when "you can take the skin and pinch it and pull it up and it retains that position when you release the skin" and which "is a clinical indication of dehydration."

¶ 21 According to Dr. Privette, the sunken appearance of Malachi's eyes stemmed from a lack of periorbital fat, which provided yet another indication of malnutrition and undernourishment. Dr. Privette found a "small amount of clear fluid with . . . scattered fragments of semi-solid white material consistent with dairy product" in Malachi's stomach. In addition, Dr. Privette observed that Malachi had severe dermatitis on his buttocks and back, with this condition being attributable to diaper rash resulting from the fact that the child's skin had been in contact with urine or feces for lengthy periods of time. According to Dr. Privette, Malachi's diaper rash was so severe that he suffered from "skin slippage," in which "the very superficial areas of the epidermis will basically slip away as you rub."

¶ 22 As a result of the fact that Malachi's body was in a state of isonatremic dehydration, Dr. Privette described Malachi's dehydration as chronic and stated that it would have occurred over "more than a few days," "probably weeks." Upon detecting a scalp contusion and a subgaleal hemorrhage near Malachi's forehead, Dr. Privette opined that these conditions would have resulted from either "an object hitting the skin or the skin hitting a stationary object," with both of these injuries likely to have "happened very recently." Finally, Dr. Privette noticed pressure ulcers on the inner portions of Malachi's knees at the point where his knees

would touch. Although he sought medical records relating to Malachi for the purpose of obtaining additional information that could be used in determining the cause of the child's death, Dr. Privette was unable to locate any such records for 2014 or 2015. As a result, Dr. Privette initially concluded that Malachi was a "debilitated male child with failure to thrive"; that "[t]here is the clinical appearance of malnutrition and dehydration including severe underweight, sunken eyes, absence of body fat, muscle atrophy, and severe skin tenting"; and that "[m]alnutrition/dehydration may be the immediate cause of death in this case and would represent neglect in the proper context."

¶ 23 On 15 October 2015, Detective Brienza received Dr. Privette's autopsy report. In reviewing that document, Detective Brienza identified several additional difficulties in the statements that defendant had made to him. As a result, Detective Brienza interviewed defendant for a third time on 30 October 2015, at which point defendant admitted to Detective Brienza that he had killed Malachi. During this interview, defendant provided two different accounts concerning the manner in which Malachi's death had purportedly occurred. Initially, defendant told Detective Brienza that he had drowned Malachi in the bathtub. As their conversation progressed, however, defendant stated that he had "put his hands around Malachi's throat to keep him quiet" because he "was frustrated with Malachi." According to defendant, "he would put his hands around Malachi's throat and pick him up by his neck and choke him enough to quiet him" and that, "[o]nce Malachi would become limp, he would physically throw him in the Pack N' Play from a distance." As a result, defendant claimed to have killed Malachi by choking him to death and described "how he watched Malachi take his last few gasps of breath of air of life."

¶ 24 Dr. Privette read the transcript from the third interview that Detective Brienza had conducted with defendant and amended his autopsy report in light of the statements that defendant had made in that interview. In spite of the fact that there was no bruising to Malachi's neck, Dr. Privette opined in his amended report that, "based on the fact that [Malachi] is very debilitated, isn't going to be able to fight back, [and] isn't going to be able to try and put an end to this pressure on the neck," death by strangulation would be "totally consistent with [defendant's] description of the events as to what happened" on the night of Malachi's death. In addition, Dr. Privette stated that the description that defendant had given of Malachi's last moments was consistent with agonal respiration and that defendant's "explanation was spot on for what would [have] happen[ed]." Based upon defendant's account of the man-

ner in which Malachi died, Dr. Privette changed his conclusion concerning the cause of Malachi's death from "failure to thrive" as the result of malnutrition and dehydration to strangulation, with "[n]utritional and medical neglect contibut[ing] to the death."

¶ 25 On 16 November 2015, the Gaston County grand jury returned a bill of indictment charging defendant with first-degree murder. On 6 February 2017, the Gaston County grand jury returned bills of indictment charging defendant with child abuse inflicting serious bodily injury on the basis of an allegation that defendant had "plac[ed] his hands around Malachi Golden's throat restricting air and blood flow resulting in Malachi Golden's death" and negligent child abuse inflicting serious bodily injury on the basis of an allegation that defendant had "show[ed] reckless disregard for human life by committing a grossly negligent omission . . . by not providing [Malachi] with medical treatment in over 1 year, despite the child having a disability, and further, not providing the child with proper nutrition and medicine resulting in weight loss and failure to thrive." On 26 September 2017, defendant requested the trial court to conduct his trial while sitting without a jury. On 2 October 2017, defendant filed a formal waiver of his right to a jury trial. After conducting a colloquy with defendant, the trial court granted defendant's motion for bench trial on 4 October 2017.

¶ 26 The charges against defendant came on for trial before the trial court sitting without a jury at the 23 October criminal session of the Superior Court, Gaston County. At the close of the State's evidence, defendant unsuccessfully moved to dismiss the charges that had been lodged against him for insufficiency of the evidence. While testifying in his own behalf, defendant made a number of statements that conflicted with those that he had made during his previous interviews with Detective Brienza, including assertions that he had fed Malachi several times on the day of his death. On cross examination, defendant testified that the explanations that he had given to Detective Brienza concerning the manner in which Malachi had died were "lie[s]":

> Q. You gave vivid details. You had long dialogs about what you did to Malachi?
>
> A. Yes, ma'am, but I did not do those things to my son.
>
> Q. You heard Dr. Privette say that you are spot on with your description of this choking, that that was exactly how it would look if a child was

> choked and you gave vivid details of that. You knew what it would look like?
>
> A. No, I didn't, because I never choked anyone out.
>
> . . . .
>
> Q. You are saying that's all a lie?
>
> A. Yes, ma'am.

After denying that he had strangled Malachi, defendant expressed an inability to explain how the child had become so skinny or why Dr. Privette had found nothing in his stomach during the autopsy. At the close of all of the evidence, defendant unsuccessfully renewed his motion to dismiss for insufficiency of the evidence.

¶ 27 After conferring with the parties for the purpose of discussing the applicable law and the procedures that it would use in determining defendant's guilt or innocence, the trial court developed a set of "jury instructions" that it would utilize in deciding the case, with those instructions including, over defendant's objection, a consideration of the extent, if any, to which defendant was guilty of murder by starvation. *See* N.C.G.S. §14-17(a) (stating that "[a] murder which shall be perpetrated by means of . . . poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree"). In the course of developing these instructions, the trial court identified the following definitions of "starvation":

> Starvation is the result of a severe or total lack of nutrients needed for the maintenance of life. https://medicaldictionary.thefreedictionary.com/starvation
>
> To starve someone is to "kill with hunger;" to be starved is to "perish from lack of food." Starving: Medical Definition, Merriam-Webster Dictionary, http://www.merriam-webster.com/medical/starving (last visited Apr. 16, 2012).
>
> COMMENT: KinderLARDen Cop: Why States Must Stop Policing Parents of Obese Children. 42 Seton Hall L. Rev. 1783. 1801
>
> To starve someone is the act of withholding of food, fluid, nutrition, *Rodriguez v. State*, 454 S.W. 3d 503, 505 (Tex. Crim. App. 2014).

> Starving can result from not only the deprivation of food, but also liquids. Deprivation of life-sustaining liquids amounts to starvation under the statute. A specific intent to kill is . . . irrelevant when the homicide is perpetrated by means [of] starving, or torture. *State v. Evangelista*, 319 N.C. 152 (1987).
>
> When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. *State v. Dunheen*, 224 N.C. 738, 739 (1944).

After defendant's trial counsel claimed to have "found almost the exact same thing" in his research, the trial court relied upon these definitions during its deliberations.

¶ 28 On 1 November 2017, the trial court entered an order in which it made the following findings of fact, among others:

> 6. Malachi Golden died on May 11, 2015.
>
> . . . .
>
> 10. At the time of death, Malachi Golden had a plastic appearance with sunken eyes, protruding collarbones, protruding spine, protruding joints and protruding ribs.
>
> 11. At the time of death, Malachi Golden had very little body fat or muscle tissue.
>
> . . . .
>
> 15. The autopsy revealed that Malachi Golden was malnourished and dehydrated.
>
> 16. At the time of death, Malachi Golden weighed 19 pounds compared to the average weight of a 38-40 pounds for a four-year-old boy.
>
> . . . .
>
> 18. At the time of death, Malachi Golden had a very wasted appearance.
>
> . . . .

> 20. Malachi Golden suffered from acute diaper rash with extensive inflammation on his buttocks and groin.
>
> . . . .
>
> 22. Malachi Golden suffered from acute diaper rash for an extended period without treatment.
>
> . . . .
>
> 36. The caregivers ceased all medication, medical care and therapy sessions without consulting Malachi Golden's physicians.
>
> 37. For the last few months of his life, Malachi Golden was cloistered from all adults except Tiffany Cheeks and Defendant.
>
> 38. During this period, Defendant became the primary caregiver for Malachi Golden and provided up to 80 percent of the child's care.
>
> . . . .
>
> 49. Both Defendant and Ms. Tiffany Cheeks recanted their interviews with the police where they admitted wrongdoing regarding the care of Malachi Golden.
>
> 50. Defendant contradicted himself several times on the stand during his testimony during the trial.

Based upon these findings of fact, the trial court concluded as a matter of law that:

> 7. Defendant committed a grossly wanton and negligent omission with reckless disregard for the safety of Malachi Golden by:
>
> a. Allowing [Malachi] to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and
>
> b. Keeping [Malachi] in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees.

8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

9. To starve someone is to "kill with hunger."

10. A reasonably careful and prudent person could foresee that failing to provide a child's nutritional needs would cause death.

11. By feeding Malachi Golden typically only once a day and watching the child waste away to skin and bones, the Defendant intentionally starved the four-year-old boy.

12. Malachi Golden perished from the lack of food and life-sustaining liquids.

13. Defendant's starving Malachi Golden was the proximate cause of the child's death.

14. Defendant's failure to take any action to seek medical help, through any means possible, for Malachi Golden as the child wasted away from lack of nutrients needed for the maintenance of life was the commission of a homicide.

Based upon these findings of fact and conclusions of law, the trial court found defendant guilty of first-degree murder on the basis of starvation and negligent child abuse inflicting serious bodily injury while refusing to find defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, torture, or the felony murder-rule using child abuse inflicting serious bodily injury as the predicate felony and child abuse inflicting serious bodily injury.[2] After making these determinations, the trial court consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of life imprisonment without the possibility of parole. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

---

2. The parties have not argued that the trial court erred by adopting the procedures that it utilized to decide this case. Although we are inclined to agree with the Court of Appeals that there was no necessity for the trial court to have instructed itself concerning the applicable law or to enter an order containing findings of fact and conclusions of law, *State v. Cheeks*, 267 N.C. App. 579, 595 (2019), we do not believe that the trial court erred by proceeding as it did and will evaluate defendant's challenges to the trial court's judgment utilizing the approach that the trial court elected to adopt in deciding the relatively novel issues that were before it in this case.

¶ 29 In seeking to persuade the Court of Appeals to overturn the trial court's judgment, defendant argued, among other things, that (1) the trial court had erred by denying his motion to dismiss for insufficiency of the evidence on the grounds that the record did not suffice to support defendant's conviction for first-degree murder on the basis of starvation; (2) the trial court had committed plain error and had erred by failing to instruct itself that malice was an essential element of first-degree murder on the basis of starvation and by failing to make a separate determination that defendant had acted with malice; and (3) that the trial court had erred by convicting defendant of negligent child abuse inflicting serious injury based upon a theory that defendant had allowed Malachi to develop sores and pressure ulcers in spite of the fact that the indictment that had been returned against defendant for the purpose of charging him with that offense did not support such a determination. *State v. Cheeks*, 267 N.C. App. 579, 599, 602, 605–06, 610 (2019).

¶ 30 In rejecting these contentions, the Court of Appeals began by noting that no reported decision by either this Court or the Court of Appeals had directly addressed the issue of a convicted criminal defendant's guilt of first-degree murder on the basis of starvation and that neither N.C.G.S. § 14-17(a) nor our appellate jurisprudence defined the term "starv[ation]" for purposes of that statutory provision. *Cheeks*, 267 N.C. App. at 599–600. Based upon this Court's decision in *State v. Evangelista*, 319 N.C. 152 (1987), the Court of Appeals determined that "starving" can be defined as "death from the deprivation of liquids or food 'necessary in the nourishment of the human body,' " *Cheeks*, 267 N.C. at 602 (quoting *Evangelista*, 319 N.C. at 158), while rejecting defendant's contention that murder by starvation requires the complete denial of all food or water, or both, for a certain period of time, concluding that "[t]he deprivation need not be absolute and continuous for a particular time period." *Id.*

¶ 31 In addition, the Court of Appeals held that the record contained sufficient evidence to support a determination that starvation proximately caused Malachi's death. *Id.* at 610. In spite of the fact that Dr. Privette's amended written report and his trial testimony stated that the findings that he had made during the autopsy that he performed upon Malachi's body could be consistent with strangulation, the Court of Appeals noted that the only direct evidence that Malachi died as the result of strangulation stemmed from the statement that defendant gave to Detective Brienza, an account that defendant had repudiated at trial and which the trial court found to lack credibility. *Id.* at 608–09. In addition, the Court of Appeals pointed out that Dr. Privette had testified that, in the absence of defendant's claim to have strangled Malachi, he would not

have amended his initial autopsy report, which concluded that malnutrition and dehydration were the immediate causes of Malachi's death. *Id.* According to the Court of Appeals, the trial court acted well within its authority as the trier of fact in rejecting defendant's extra-judicial claim to have strangled Malachi and the related cause of death determination set out in Dr. Privette's amended report. *Id.* at 609. As a result, given the absence of any additional evidence tending to show that Malachi died as the result of strangulation, the Court of Appeals concluded that there was ample evidence to support a determination that Malachi's death was the proximate result of the deprivation of food and water at a time when defendant was his primary caregiver. *Id.*

¶ 32 Secondly, the Court of Appeals determined that this Court "has clearly held that no separate showing of malice is required for first degree murder by the means set forth" in N.C.G.S. § 14-17(a). *Id.* at 605 (citing *State v. Smith*, 351 N.C. 251, 267 (2000)). For that reason, the Court of Appeals concluded that, "[j]ust as with poisoning or torture, murder by starving 'implies the requisite malice, and a separate showing of malice is not necessary.' " *Id.* at 606 (quoting *Smith*, 351 N.C. at 267). As a result, the Court of Appeals held that "the trial court did not err by not making a finding or conclusion as to malice." *Id.*

¶ 33 Finally, the Court of Appeals held that the trial court did not err by convicting defendant of negligent child abuse inflicting serious bodily injury on the basis of a factual theory that had not been alleged in the indictment on the grounds that the indictment that had been returned against defendant for the purpose of charging him with negligent child abuse alleged all of the essential elements of that offense and that the more specific factual allegations contained in the indictment constituted nothing more than mere surplusage. *Id.* at 614. For that reason, the Court of Appeals rejected defendant's contention that there was a fatal variance between the indictment and the theory of guilt upon which the trial court's instructions and findings and conclusions rested. *Id.* Moreover, given the fact that the indictment that had been returned for the purpose of charging defendant with negligent child abuse inflicting serious injury alleged that defendant had failed to "provid[e] the child with medical treatment in over one year despite having a disability," the Court of Appeals determined that the allegations set out in the indictment were supported by the evidence that Malachi was suffering from severe diaper rash at the time of his death and the evidence that Malachi had not seen a physician during the last year of his life. *Id.* On 1 April 2020, this Court allowed defendant's request for discretionary review of the Court of Appeals' decision in this case.

¶ 34 In seeking to persuade us to overturn the Court of Appeals' decision, defendant argues that the trial court erred by failing to dismiss the first-degree murder charge that had been lodged against him on the grounds that the record failed to contain sufficient evidence to support a finding that Malachi's death was proximately caused by starvation. In support of this contention, defendant asserts that Dr. Privette's testimony provided the only expert testimony concerning the cause of Malachi's death and that Dr. Privette had unequivocally testified that Malachi had died as the result of asphyxia secondary to strangulation. Defendant claims that, "[a]lthough the Court of Appeals was correct that the trial court was free to reject Dr. Privette's opinion that Malachi died of strangulation," "it does not necessarily follow that the trial court could rely on Dr. Privette's previous opinion, even if that opinion really had been that Malachi died of starvation." In defendant's view, expert testimony was necessary to establish the cause of Malachi's death given that the cause of Malachi's death would not have been reasonably apparent to a lay juror. Defendant reasons that, "[a]lthough several of [Dr. Privette's] findings note that Malachi was malnourished and dehydrated at the time of his death, none of these findings relate to cause of death," with "Malachi's emaciated and dehydrated condition as depicted in the pictures [being insufficient to] explain why Malachi was alive on May 10, 2015 but dead on May 11, 2015." As a result, defendant argues that, "because there was no other expert testimony to support any other cause of death, and because expert testimony was necessary to establish the cause of Malachi's death, the evidence was insufficient to support the trial court's verdict that Mr. Cheeks was guilty of murder by starvation."

¶ 35 Secondly, defendant argues that, in light of the manner in which murder and manslaughter are defined at common law, the State was required to make a separate showing of malice in order to prove defendant's guilt of murder on the basis of starvation. In support of this argument, defendant asserts that N.C.G.S. § 14-17(a) did not abrogate the common law requirement that proof of malice was necessary to sustain a murder conviction. As a result, defendant contends that the trial court committed plain error by failing to instruct itself that malice is a necessary prerequisite for a conviction of first-degree murder based upon a theory of starvation and erred by failing to make a specific finding that defendant acted with malice.

¶ 36 In the alternative, defendant argues that, if malice is deemed to be implied in the event of a murder by starvation in a manner similar to the way in which malice has been deemed to be implied in connection with the other forms of murder specified in N.C.G.S. § 14-17(a), *see*, *e.g.*,

Smith, 351 N.C. at 267 (holding that malice is implied through the act of killing another by torture or poison), then "starving" must be defined narrowly in order to ensure that only malicious homicides are punished as first-degree murder. In defendant's view, this Court held that malice was implied in murders by torture and poisoning because such killings require "intentional infliction of grievous pain and suffering." *Smith*, 351 N.C. at 267. In order to ensure consistency between murders by torture and poisoning, on the one hand, and murder by starvation, on the other, defendant asserts that it is necessary that "starving" be defined as involving a complete deprivation of food and water, with this Court having adopted such a definition in dicta in *State v. Evangelista*, 319 N.C. 152, 158 (1987) (affirming a first-degree murder based upon premeditation and deliberation in a case in which the defendant held others, including an infant, hostage while denying them food or water, resulting in the infant's death, and stating that, in addition, the record evidence would have supported a first-degree murder conviction on the basis of a theory of starvation). According to defendant, since the common law did not view the "act of allowing a child to die of malnutrition" as "inherently malicious" and since the enactment of N.C.G.S. § 14-17(a) "did not change the common law definition of murder," this Court should either require the State to make a separate showing of malice or define starvation in the narrowest possible manner.

¶ 37 Finally, defendant contends that his conviction for negligent child abuse inflicting serious bodily injury rested upon findings that Malachi suffered from bedsores, pressure ulcers, and diaper rash while the indictment alleged that defendant's guilt rested upon a failure to provide Malachi with medical treatment and proper nutrition. In defendant's view, the alleged discrepancy between the basis for the claim of serious bodily injury alleged in the indictment and the injuries depicted in the trial court's findings resulted in a conviction that rested upon "a theory not charged in the indictment [that] constitutes reversible error," with the Court of Appeals having erred by relying upon its own earlier decision in *State v. Qualls*, 130 N.C. App. 1, 8 (1998) (holding that "if an indictment contains an averment which is not necessary in charging the offense, it may be disregarded as inconsequential"), which defendant contends to be in conflict with prior decisions of this Court, and by holding that the factual allegations set out in the indictment charging defendant with negligent child abuse inflicting serious injury were nothing more than "mere surplusage."

¶ 38 The State, on the other hand, argues that the record contains ample evidence tending to show that Malachi's death was proximately caused

by starvation. In the State's view, the evidence of starvation in this case was "extreme and obvious" and that, by doing nothing more than "viewing the condition of Malachi's body, any person of average intelligence would be able to determine, at a minimum, that starvation substantially contributed to his death." In addition, the State asserts that the testimony of Dr. Privette coupled with the circumstances surrounding the changes that he made to his autopsy report provided any necessary expert support for the trial court's cause of death determination. In view of the fact that the trial court expressly found as a fact that defendant's testimony conflicted with the admissions that he had made at an earlier time, the State contends the trial court had ample justification for deciding that defendant was not a credible witness, with the same being true of any expert opinion testimony predicated upon defendant's prior statements to Detective Brienza.

¶ 39 Secondly, the State argues that malice is implied in connection with the specific means of killing that are treated as first-degree murder in N.C.G.S. § 14-17(a) given defendant's "willful intent to withhold life sustaining food and water, rather than mere negligence." In support of this contention, the State directs our attention to *State v. Dunheen*, 224 N.C. 738 (1944), which it describes as holding that, "where the murder is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, the means and method used involve planning and purpose, and the act speaks for itself." *Id.* at 740. In view of the fact that the sufficiency of the evidence to support a conviction for first-degree murder by starvation is a matter of first impression in North Carolina, the State identifies decisions from a number of other jurisdictions which hold that the commission of such a murder inherently involves malice given that the length of time needed to starve someone to death shows "coldness and deliberation, for within that time there was ample opportunity for reflection." *See, e.g.*, *Commonwealth v. Tharp*, 574 Pa. 2d 272 (2002). As a result, the State asserts that the operative distinction between conduct that constitutes murder and conduct that constitutes manslaughter hinges upon whether the defendant did or did not act willfully.

¶ 40 In addition, the State responds to defendant's contention that starvation for purposes of N.C.G.S. § 14-17(a) should be limited to situations involving the complete deprivation of food and water by arguing that the adoption of such a definition would unduly restrict the types of conduct that would be deemed to constitute first-degree murder for purposes of N.C.G.S. § 14-17(a). More specifically, the State contends that the adoption of "defendant's argument would lead to the illogical result that giving a victim a drop of food or water each day would shield

a defendant from a charge of first-degree murder by starvation in North Carolina," with there being no reported decision of any court holding that the viability of a "charge of murder was dependent upon a complete deprivation of food and water as a matter of law." On the contrary, the State asserts that numerous decisions from other jurisdictions hold that evidence tending to show that defendants who starved victims over a prolonged period of time could appropriately be convicted of murder even though they occasionally provided food to their victims.

¶ 41 Finally, the State denies that there was a fatal variance between the allegations of the indictment charging defendant with negligent child abuse inflicting serious bodily injury and the evidence upon which the trial court relied in convicting defendant of that offense. According to the State, the Court of Appeals correctly held that the factual allegations set out in the negligent child abuse indictment constituted mere surplusage in light of several decisions by this Court which, in the State's view, hold that an indictment need only allege the essential elements of the crime that the grand jury was attempting to charge and that any factual allegations above and beyond the elements of the offense have no bearing upon the validity of the defendant's conviction. In addition, the State argues that *Qualls* had not been overruled by the cases upon which defendant relies given that they involve allegations that specified the legal theory upon which the State relied in seeking to convict defendant rather than mere recitations of non-essential factual information. *See*, *e.g.*, *State v. Silas*, 360 N.C. 377, 379 (2006) (finding the existence of a fatal variance when the State's evidence did not tend to show that the defendant intended to commit the felony enumerated in the indictment charging the defendant with burglary). The State also argues that, even if the factual allegations upon which defendant's argument relies were not mere surplusage, those allegations support the theory of guilt embodied in the trial court's conclusions given that the indictment alleged both malnutrition and failure to provide medical care while the record evidence tending to show that Malachi suffered from diaper rash, bedsores, and pressure ulcers sufficed to support a determination that defendant was negligent in failing to "provid[e] the child with medical treatment" causing serious bodily injury.

¶ 42 **[1]** This Court reviews the sufficiency of the evidence to support a criminal conviction by evaluating "whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged." *State v. Workman*, 309 N.C. 594, 598 (1983). "The evidence is to be considered in the light most favorable to the State," with the State being "entitled to . . . every reasonable inference

to be drawn therefrom" and with any "contradictions and discrepancies [being left] for the jury to resolve . . . ." *Id.* at 598–99 (quoting *State v. Powell*, 299 N.C. 95, 99 (1980)). In the event that the record contains sufficient evidence, "whether direct, circumstantial, or both," "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury." *State v. King*, 343 N.C. 29, 36 (1996) (quoting *State v. Locklear*, 322 N.C. 349, 358 (1988)).

¶ 43 According to well-established North Carolina law, a conviction for an unlawful homicide requires sufficient evidence that a defendant's unlawful act proximately caused the victim's death. *State v. Minton*, 234 N.C. 716, 721 (1952). Although expert medical testimony is needed to support the making of the necessary proximate cause determination in instances in which an average layman is unable to determine the cause of death, such evidence is not necessary when a "person of average intelligence would know from his own experience or knowledge that the wound was mortal in character" given that "the law is realistic when it fashions rules of evidence for use in the search for truth." *Id.*

¶ 44 A careful review of the record evidence satisfies us that the trial court had ample justification for concluding that Malachi died as a proximate result of starvation. According to testimony provided by a number of persons responsible for providing him and his sibling with various forms of treatment during the last two years of his life, Malachi was not fed even though he was ravenously hungry and looking considerably thinner in the months leading up to his death. Similarly, the emergency medical technicians who responded to Ms. Cheeks' call in the aftermath of Malachi's death noticed the malnourished state of Malachi's body, which some of them initially mistook for a doll. In addition, the physical evidence set out in Dr. Privette's autopsy report unequivocally demonstrates that Malachi was severely malnourished and dehydrated.

¶ 45 Moreover, the record provides ample expert support for a determination that Malachi died of starvation.[3] According to Dr. Robinette, the only thing that "would cause Malachi or any child to look like" the child described by the emergency medical technicians and depicted in the autopsy report and related photographs was "starvation." Although Dr. Privette's amended report attributed Malachi's death to asphyxia secondary to strangulation, the record clearly demonstrates that his opinion to that effect rested solely upon the information that defendant

3. For this reason, we need not determine whether defendant or the State has the better of the dispute over the extent to which expert testimony concerning the cause of death was necessary in this case.

provided in his final interview with Detective Brienza. In light of the fact that Dr. Privette made no physical findings in support of the cause of death determination set out in his amended report and the fact that the record provided more than sufficient support for a determination that defendant's claim to have strangled Malachi lacked credibility, we have no difficulty in concluding that the trial court had ample justification for rejecting any contention that Malachi died from strangulation. *See State v. Morganherring*, 350 N.C. 701, 729 (1999) (holding that, in the event that an expert witness gives testimony regarding the cause of a victim's death, the degree of "familiarity with the sources upon which he based his opinion is certainly relevant as to the weight and credibility the jury should give to [the testimony]"). Furthermore, in light of the fact that Dr. Privette's initial autopsy report appears to have been admitted into evidence without being subject to any limitation, we know of no reason why the trial court was not entitled to rely upon Dr. Privette's initial conclusion that "[m]alnutrition may be the immediate cause of death in this case," particularly given the fact that Dr. Privette returned to the theme of starvation in his amended report by stating that "nutritional and medical neglect contributed to this death" in his amended report.[4] As a result, for all of these reasons, the record contained more than sufficient support for the trial court's determination that Malachi died as a proximate result of starvation.

¶ 46 **[2]** Similarly, we conclude that the trial court did not commit plain error or err by failing to instruct itself concerning the issue of malice or to make a separate finding that defendant acted with malice in connection with the killing of Malachi. As this Court has previously held, the act of torture is indistinguishable from the act of poisoning for purposes of the specifically enumerated types of killings set out in N.C.G.S. § 14-17(a), *Smith*, 351 N.C. at 267, with torture and poisoning both constituting wanton acts that are necessarily conducted "in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life." *Id.* (quoting *State v. Crawford*, 329 N.C. 466, 481 (1991)). As a result, the showing of malice necessary

4. Although defendant emphasizes the fact that Dr. Privette's initial report used the word "may" in attributing Malachi's death to malnutrition and dehydration in arguing that that testimony failed to satisfy the evidentiary principle set out in *Holley v. ACTS, Inc.*, 357 N.C. 228, 233 (2003) (stating that "expert testimony as to the *possible* cause of a medical condition is admissible," "it is insufficient to prove causation"), we conclude that defendant's argument lacks merit given that, when read it its entirety, it is clear that Dr. Privette's report indicates that malnutrition and dehydration probably contributed to Malachi's death.

for guilt of murder is inherent in the act of fatally torturing or poisoning another human being. *Id.*

¶ 47 As is the case with acts of torture or poisoning resulting in the death of another person, the intentional withholding of the nourishment and hydration needed for survival resulting in the death of that other person at a time when the person in question is unable to provide these things for himself or herself shows a reckless disregard for human life and a heart devoid of social duty. *See State v. Wilkerson*, 295 N.C. 559, 916 (1978) (stating that, if "an act of culpable negligence . . . 'is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life,' it will support a conviction for second degree murder") (quoting *State v. Wrenn*, 279 N.C. 674, 687 (1971) (Sharp, J., dissenting)). Put another way, the act of starving another person to death takes time, during which the defendant has ample opportunity to reflect upon his or her conduct, to take mercy upon the victim, and to be increasingly aware of the other person's condition, with a decision to intentionally deprive another person of needed nutrition and hydration resulting in death being, under such circumstances, inherently malicious as a matter of law. Thus, the malice necessary for guilt of murder is inherent in the intentional withholding of hydration or nutrition sufficient to cause death. As a result, we hold that the act of starving another person to death for purposes of N.C.G.S. § 14-17(a), without more, suffices to show malice, so that the trial court did not commit plain error by failing to instruct itself to make a separate finding of malice or err by failing to make a separate determination that defendant acted maliciously in its findings of fact and conclusions of law.[5]

¶ 48 The record contains testimony from multiple witnesses tending to show that food was present in the Cheek residence and that Malachi's siblings received sufficient nutrition and hydration to survive. Although the evidence clearly depicts Malachi as hungry and dehydrated during the months leading to his death, defendant made no effort to seek medical attention for Malachi during that period of time and, at most, fed Malachi only once each day despite the fact that he served as Malachi's primary caretaker for a great deal of the time. For that reason, we further hold that the record and the trial court's findings contain ample evidence tending to show that defendant proximately caused Malachi's

5. In view of the fact that there is not and never has been a requirement that the trial court or jury make a separate finding of malice in order to convict a defendant of first-degree murder on the basis of starvation pursuant to N.C.G.S. § 14-17(a), our decision does not subject defendant to impermissible punishment on the basis of *an ex post facto* law.

death by intentionally depriving him of needed hydration and nutrition, a showing that amply supports the trial court's decision to convict defendant of murder by starvation pursuant to N.C.G.S. § 14-17(a).

¶ 49 In addition, we are unable to accept defendant's contention that starvation for purposes of N.C.G.S. § 14-17(a) should be understood to require proof that the defendant subjected the alleged victim to a complete deprivation of food and hydration. Aside from the fact the language from our decision in *Evangelista* upon which defendant relies is dicta, nothing in the related discussion in any way suggests that a complete deprivation of nutrition and hydration is necessary for guilt of first-degree murder on the basis of starvation pursuant to N.C.G.S. § 14-17(a). Instead, that discussion simply indicates that murder by starvation occurs in the event that the defendant completely deprives the victim of food and drink, a statement that is self-evidently true. In the same vein, nothing in *State v. Fritsch*, 351 N.C. 373 (2000), upon which defendant also relies, makes the difference between guilt of murder or manslaughter contingent upon the amount of nutrition or hydration that the alleged victim failed to receive. Finally, the adoption of defendant's definition of starvation for purposes of N.C.G.S. § 14-17(a) would produce what strikes us as an absurd result in certain cases, *see Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 250, 253 (1921)), given that, under defendant's definition, a person who kills someone else by withholding virtually all, but not all, food and drink would not be guilty of murder by starvation. As a result, we reject defendant's contention that murder by starvation pursuant to N.C.G.S. § 14-17(a) is limited to situations involving the complete deprivation of hydration and nutrition.

¶ 50 **[3]** Finally, we hold that defendant's contention that there is a fatal discrepancy between the allegations of the indictment charging defendant with negligent child abuse inflicting serious injury and the trial court's factual justification for convicting defendant of that offense lacks merit.[6] As we have already noted, the indictment charging defendant with negligent child abuse inflicting serious injury alleges that defendant failed to provide Malachi "with medical treatment" for over one year, "despite the child having a disability," and with failing to "provid[e] the

6. In view of our determination that the trial court's findings do, in fact, support the theory of guilt alleged in the indictment, we need not determine whether the Court of Appeals correctly concluded that the factual allegations set out in the indictment are or are not mere surplusage or whether defendant properly preserved this claim for purposes of appellate review and express no opinion concerning the manner in which either of these issues should be decided.

child with proper nutrition and medicine, resulting in weight loss and failure to thrive." In our opinion, the trial court's determinations that defendant "allow[ed] the child to remain in soiled diapers until acute diaper rash formed on the [child's] groin and bottom," resulting in "open sores and ulcers," and that defendant kept "the child in a playpen for so long a period of time that bed sores formed on [his] legs and knees" are fully consistent with the grand jury's allegations that defendant deprived Malachi of medical treatment, resulting in the infliction of serious bodily injury. As a result, we hold that the trial court's findings and the relevant allegations of the indictment are fully consistent with each other. As a result, for all of these reasons, the Court of Appeals decision should be affirmed.

AFFIRMED.

WINDOW WORLD OF BATON ROUGE, LLC, ET AL.
v.
WINDOW WORLD, INC., ET AL.

WINDOW WORLD OF ST. LOUIS, INC., ET AL.
v.
WINDOW WORLD, INC., ET AL.

No. 436A19

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on Window World defendants' motions to compel and motion to strike plaintiffs' objections to third-party subpoenas entered on 26 September 2018, from an order and opinion on Window World, Inc.'s motion to compel net worth information entered on 19 December 2018, from an order and opinion on Window World defendants' motion for reconsideration entered on 25 January 2019, and from an order and opinion on plaintiffs' privilege motions, Window World defendants' motion to strike, and the parties' Rule 53(g) exceptions to the special master's report entered on 16 August 2019 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wilkes County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 28 April 2021.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles E. Coble, Robert J. King III, Benjamin R. Norman, and Andrew L. Rodenbough, for plaintiff-appellees.

Fox Rothschild LLP, by Matthew Nis Leerberg, Kip D. Nelson, and Troy D. Shelton; and Manning, Fulton & Skinner, P.A., by Michael T. Medford, Judson A. Welborn, Natalie M. Rice, and Jessica B. Vickers, for defendant-appellants.

Joseph S. Dowdy for BNI Franchising, LLC, Brixx Franchise Systems, LLC, East Coast Wings Corporation, Extended Stay America, Inc., Fleet Feet, Incorporated (d/b/a Fleet Feet), Golden Corral Franchising System, Inc., N2 Franchising, Inc., Salsarita's Franchising, LLC, Village Juice Co. Franchising, LLC, and Wine & Design Franchise LLC; and Richard M. Hutson II for Family Fare, LLC, amici curiae.

Bradley Arant Boult Cummings LLP, by Corby C. Anderson and Jonathan E. Schulz, for International Franchise Association, amicus curiae.

PER CURIAM.

¶ 1 This interlocutory appeal from the order and opinion entered on 16 August 2019 is affirmed per curiam.

¶ 2 Defendant-appellants' appeal from the order and opinion entered on 19 December 2018 based on the claim that the net worth of an individual who owns and controls a business operating as a franchisee is necessary to apply the large franchisee exemption pursuant to 16 C.F.R. § 436.8(a)(5)(ii) is not properly before this Court, and it is hereby dismissed.[1]

AFFIRMED.[2]

---

1. Defendant-appellants did not present or discuss any issues in their brief pertaining to the order and opinion on Window World defendants' motions to compel and motion to strike plaintiffs' objections to third-party subpoenas entered on 26 September 2018 and the order and opinion on Window World defendants' motion for reconsideration entered on 25 January 2019. Thus, defendant-appellants have abandoned all corresponding arguments. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

2. The order and opinion of the North Carolina Business Court, 2019 NCBC 53, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_53.pdf.

IN RE K.S.

[377 N.C. 553 (2021)]

IN THE MATTER OF K.S.	)	
	)	
	)	Cumberland County
	)	
	)	

No. 60PA21

ORDER

The petition for discretionary review filed by the Cumberland County Department of Social Services and the Guardian ad Litem is decided as follows: The petition is allowed with respect to Issue Nos. I, II, and III and is denied with respect to Issue No. IV.

By order of the Court in conference, this the 9th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE V.S.

[377 N.C. 554 (2021)]

IN RE V.S. AND A.S.	)))	BERTIE COUNTY

No. 121PA21

ORDER

Respondent's petition for certiorari is decided as follows: The petition is allowed for the purpose of addressing the following issues:

1. Whether the trial court erred by striking respondent's notice of appeal and dismissing her appeal.

2. Whether the trial court erred in terminating respondent's parental rights, with the more specific issues that respondent wishes to address to be identified and briefed in accordance with the applicable rules of appellate procedure.

The record on appeal shall be settled and filed, and the parties' briefs shall be submitted in accordance with the applicable provisions of the rules of appellate procedure, with the proposed record on appeal to be served within fifteen days from the date of this order.

By order of this Court in Conference, this 9th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

STATE v. HODGE

[377 N.C. 555 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
ROBERT LEE HODGE	)	

No. 134A20

ORDER

The trial court entered judgment following a jury verdict finding defendant guilty of attaining the status of habitual felon. The record contains a document labeled "INDICTMENT – HABITUAL FELON STATUS" dated 7 November 2017 and marked "NOT A TRUE BILL." The record also contains a separate document labeled "INDICTMENT – HABITUAL FELON STATUS" dated 7 November 2017 and marked "A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreperson of the Grand Jury, attest to the concurrence of twelve or more grand jurors in the bill of Indictment." However, the record contains no factual findings from the trial court as to whether the grand jury found the bill to be a true bill of indictment and whether the true bill of indictment was returned in open court. Accordingly, the matter is remanded to the Superior Court, Wake County, for findings of fact on the following four questions:

1) Was there a true bill for habitual felon indictment dated 7 November 2017?

2) Pursuant to N.C.G.S. § 15A-628(c), if there was a true bill, was it returned by the foreman of the grand jury to the presiding judge in open court?

3) Pursuant to N.C.G.S. § 15A-628(d), if there was a true bill, did the clerk keep a permanent record of it along with all matters returned by the grand jury to the judge?

4) If there was a true bill, was defendant properly served with it?

Once these questions are answered by the trial court, the answers shall be certified to this Court no later than ninety days from the date of this Order.

By order of the Court in Conference, this the 5th day of May, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

6P14-3	State v. Daniel Harrison Brennick	Def's Pro Se Motion to Vacate Order	Denied
7P10-2	James Christopher Stitt v. Cumberland County Clerk for Register of Deeds	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **05/26/2021**
11P21	Winifred Hauser v. Brookview Women's Center, PLLC and Donald E. Pittaway, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1073)	Denied **Earls, J., recused**
22A21	Jerry Mace, Sr. & Mace Grading Co., Inc. v. Scott T. Utley, II, Jody Bell, Energy Partners, LLC & Energy Partners of NC, LLC, Utley Enterprises, LLC d/b/a Energy Partners of Mebane	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-726) 2. Defs' PDR as to Additional Issues	1. --- 2. Allowed
40P21-3	Charlie L. Hardin v. Todd E. Ishee, et al.	Plt's Pro Se Motion for Grievance Due to Harassment and Retaliation	Dismissed
44P21-2	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Complaint	Dismissed
54P21	State v. Marc Christian Gettleman, Sr. and Marc Christian Gettleman, II and Darlene Rowena Gettleman	1. Def's (Marc Christian Gettleman, Sr.) PDR Under N.C.G.S. § 7A-31 (COA19-1143) 2. Def's (Darlene Rowena Gettleman) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
60A20	Ashley Deminski, as guardian ad litem on behalf of C.E.D., E.M.D., and K.A.D. v. The State Board of Education, and the Pitt County Board of Education	1. Plt's Notice of Appeal Based Upon a Dissent (COA18-988) 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's PDR as to Additional Issues 4. Def's (Pitt County Board of Education) Motion Suggesting Mootness of Plaintiff's Claims for Injunctive Relief	1. --- 2. Dismissed *ex mero motu* **06/03/2020** 3. Allowed **06/03/2020** 4. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

60P21	In the Matter of K.S.	1. Petitioner and Guardian ad litem's Motion for Temporary Stay (COA20-271) 2. Petitioner and Guardian ad litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2021** 2. Allowed 3. Special Order
63P16-3	State v. Michael Anthony York	1. Def's Pro Se Amended Petition for Writ of Certiorari to Review Decision of the COA (COA15-419) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
67P18-2	Jonathan Eugene Dixon v. Erik A. Hooks, Secretary of N.C. Department of Public Safety, Kenneth Diggs, Warden of Albemarle Correctional Institution	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **05/10/2021** 2. Dismissed as moot **05/10/2021** **Ervin, J., recused**
88P21	Amy Betts v. DHHS, et al.	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County 2. Petitioner's Pro Se Motion to Proceed as Indigent	1. Dismissed 2. Allowed
101P21	Epcon Huntersville, LLC, Plaintiff v. Frances Clairmont and Joe Dominguez, Defendants ——————— Frances Clairmont and Joe Dominguez, Plaintiffs v. Epcon Huntersville, LLC, Defendant	Plts' (Frances Clairmont and Joe Dominguez) Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA20-471)	Dismissed
105P20-2	State v. Matthew Joseph Taylor	Def's Pro Se Motion for Paternity Test	Dismissed
106P21	State v. Robert Chad Bridges	Def's PDR Under N.C.G.S. § 7A-31 (COA19-838)	Denied **Ervin, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

108A21	Volvo Group North America, LLC d/b/a Volvo Trucks North America, a Delaware Limited Liability Company; and Mack Trucks, Inc., a Pennsylvania Corporation v. Roberts Truck Center, Ltd., a Texas Limited Partnership, Roberts Truck Center of Kansas, LLC, a Kansas Limited Liability Company; and Roberts Truck Center Holding Company, LLC, a Texas Limited Liability Company	1. Plts' Motion to Admit Billy M. Donley Pro Hac Vice 2. Plts' Motion to Admit J. Keith Russell Pro Hac Vice 3. Plts' Motion to Admit William P. Geise Pro Hac Vice	1. Allowed **04/29/2021** 2. Allowed **04/29/2021** 3. Allowed **04/29/2021**
111P21	In the Matter of the Foreclosure of a Deed of Trust Executed by Walter Reinhardt Dated March 27, 2000 and Recorded in Book 1616 at Page 338 in the Onslow County Public Registry, North Carolina Substitute Trustee: Luke C. Bradshaw, Grady I. Ingle or Elizabeth B. Ellis Record Owner(s): HGGLBT International Express Trust	1. Petitioner's Pro Se Motion for Petition de Droit (COA20-517) 2. Petitioner's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed
115P21	State v. Emunta Carpenter	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1006)	Denied
116P21	Tammie Counts v. Danny Lee Counts	Def's PDR Under N.C.G.S. § 7A-31	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

117P21	Erie Insurance Exchange v. Edward R. Smith; Archie N. Smith, a Minor; Emily A. Tobias, as Administrator of the Estate of John Pinto, Jr., Deceased; Valley Auto World, Inc.; Universal Underwriters Insurance Company; VW Credit Leasing, Ltd.; and Doe Insurance Companies 1-3	1. Defs' (The Smiths) PDR Under N.C.G.S. § 7A-31 (COA20-246) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
120P21	In re Harley Edwards	Petitioner's Pro Se Motion for PDR (COAP21-104)	Denied
121P21	In the Matter of V.S. and A.S.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Bertie County	Special Order
125P21	State v. Roger Del Herring	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA03-1138)	Denied **Ervin, J., recused**
127P21	TAC Stafford, LLC, a North Carolina Limited Liability Company v. Town of Mooresville, a North Carolina Body Politic and Corporate	1. Def's Motion for Temporary Stay (COAP20-582) 2. Def's Petition for Writ of Supersedeas	1. Denied **04/21/2021** 2. Denied **04/21/2021**
128A20	James Rickenbaugh and Mary Rickenbaugh, Husband and Wife, Individually and on behalf of all others Similarly Situated v. Power Home Solar, LLC, a Delaware Limited Liability Company	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of Business Court 4. Plts' Motion to Dismiss Appeal	1. Allowed **03/20/2020** 2. Allowed **04/03/2020** 3. Denied 4. Allowed
128P21	State v. Ricky L. Hefner	Def's Pro Se Motion to End Deprivation of Life and Liberty	Denied **05/07/2021**
129P15-2	State v. Marqueion Jamal Harrison	Def's Pro Se Motion for a New Trial	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

129P21	Jessika M. Morgan v. Karen D. McCallum, Presiding Judge Western District 26th Judicial Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 4. Petitioner's Pro Se Motion for Expedited Review	1. Dismissed **04/19/2021** 2. Dismissed **04/19/2021** 3. Allowed **04/19/2021** 4. Dismissed **04/19/2021**
131P16-18	State v. Somchai Noonsab	Def's Pro Se Motion to Vacate Imprisonment – Punishment	Dismissed
131P16-19	State v. Somchai Noonsab	Def's Pro Se Motion for Discharge-Vacated and Monetary Relief	Dismissed
133P21	State v. Matthew Benner	Def's PDR Under N.C.G.S. § 7A-31 (COA19-879)	Allowed
134A20	State v. Robert Lee Hodge	The Court's *ex mero motu* Motion to Remand to Trial Court for Specified Findings of Fact	Special Order **05/05/2021**
134P21	In the Matter of B.M.P.	1. Respondent-Mother's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari (COA20-794) 2. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **04/23/2021** 2. Denied
136P21	State v. Ronald Jason Gibson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-219)	Denied
137P07-2	State v. Sherman Wall	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Richmond County	Denied **05/28/2021**
139P21	State v. Andrew Joe Lea, Jr.	Def's Pro Se Motion to Review Orders	Dismissed
142P21	Lydia Self v. Larry Self	Plt's Pro Se Motion to Modify Custody/ Visitation Order	Dismissed
145P21	State v. Marleick Rashaan Jones	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/03/2021**
146P21	State v. Treyvon Latrell Turner	1. Def's Pro Se Motion for 49 Day Jail Credit 2. Def's Pro Se Motion to Supplement	1. Dismissed 2. Dismissed
148P21	State v. Nathan D. Fowler	Def's Pro Se Motion to Run Consecutive Sentences Concurrently	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

150P21	State v. Namique Farrow	1. Def's Emergency Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **05/06/2021** 2.
151P21	State v. Landon W. Barnes	Def's Pro Se Motion for PDR (COAP21-44)	Dismissed **05/06/2021**
152P21	In the Matter of Foreclosure Falecia Richmond	1. Plt's Pro Se Motion for Notice of Appeal (COAP20-545) 2. Plt's Pro Se Motion for Injunctive Relief 3. Plt's Pro Se Motion to Reconsider	1. Denied **05/06/2021** 2. Denied **05/06/2021** 3. Denied **05/06/2021**
153P21	In the Matter of S.M., Jr.	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **05/07/2021** 2.
156P21	State v. Corey Terrell Lee	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/12/2021**
163A21	Murphy-Brown, LLC, et al. v. ACE American Insurance Company, et al.	1. Def's (Old Republic Insurance Company) Motion to Admit Amy R. Paulus Pro Hac Vice 2. Def's (Old Republic Insurance Company) Motion to Admit Don R. Sampen Pro Hac Vice	1. Allowed **05/19/2021** 2. Allowed **05/19/2021**
167A21	Inhold, LLC and Novalent, Ltd. v. Pureshield, Inc.; Joseph Raich; and Viaclean Technologies, LLC	1. Plts' Motion to Dismiss Appeal 2. Defs' Motion for Extension of Time to File Response	1. 2. Allowed **05/24/2021**
174P21	State v. Phillip Brandon Daw	1. State's Motion for Temporary Stay (COA20-680) 2. State's Petition for Writ of Supersedeas	1. Allowed **05/25/2021** 2.
188P21	Brian C. Johnson v. Karen D. McCallum, Presiding Judge Western District 26th Judicial Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 4. Petitioner's Pro Se Motion for Expedited Review	1. Dismissed **06/09/2021** 2. Dismissed **06/09/2021** 3. Allowed **06/09/2021** 4. Dismissed **06/09/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

190P21	State v. Michael K. Eutsey	Def's Pro Se Motion for Assistance to Be Heard	Dismissed **06/01/2021**
196P21	State v. Sherry Lee Lance	1. Def's Motion for Temporary Stay (COA20-273) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/07/2021** 2.
197P21	State v. Charisse L. Garrett	1. Def's Motion for Temporary Stay (COA20-326) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/07/2021** 2.
198P21	In the Matter of Ashley Morris	Claimant's Pro Se Motion for Appeal	Dismissed **06/07/2021**
200P21	In the Matter of J.M., N.M.	1. Petitioner and Guardian ad litem's Motion for Temporary Stay (COA20-677) 2. Petitioner and Guardian ad litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/09/2021** 2. 3.
204A20	James C. McGuine, Employee v. National Copier Logistics, LLC, Employer, and Travelers Insurance Company of Illinois, Carrier, and/or NCL Transportation, LLC, Employer, Non-Insured and the North Carolina Industrial Commission v. NCL Transportation, LLC, Non-Insured Employer, and Thomas E. Prince, Individually	Defs' Motion to Withdraw Appeal	Allowed **05/04/2021**
247P20	Paul Allan Cobb, Jon Allan Cobb, Marc Allan Cobb, and Merie Cobb Mirosavich, Grandchildren of John Bruce Day v. Arley Andrew Day	Def's PDR Under N.C.G.S. § 7A-31 (COA19-805)	Denied **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

249PA14-2	State v. Jose Gustavo Galaviz-Torres	1. Def's Pro Se Motion to Discharge-Vacate Conviction-Sentence 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **05/24/2021** 2. Denied **05/24/2021**
262P18-2	Alessandra L. McKenzie v. Steven M. McKenzie	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1116) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
294P20	Kidd Construction Group, LLC, Rocky Russell Builders, Inc., and Tommy Williams Builders, LLC v. Greenville Utilities Commission	Def's PDR Under N.C.G.S. § 7A-31 (COA19-910)	Denied
299P10-4	State v. Michael Wayne Mabe	Def's Pro Se Motion for Discretionary Review or Other Relief	Dismissed **05/27/2021**
301P12-2	State v. Mark Bradley Carver	1. State's Motion for Temporary Stay (COA19-1055) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2021** 2. 3.
329P20	State v. Leon Dechas Dickens	Def's PDR Under N.C.G.S. § 7A-31 (COA19-722)	Denied
346P20	State v. Gregory Simmons	Def's Pro Se Motion for Due Process Violation	Dismissed
365P20-2	State v. Richard Lee Deyton	Def's Pro Se Motion for PDR	Denied **05/11/2021**
377P20-3	State v. Andrew Ellis	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/01/2021**
385P20	State v. Mitchell Andrew Tucker	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/04/2020** 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

394P20	State v. Joshua Lewis Johnson	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-625) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Berger, J., recused**
395P20-2	State v. Michael Anthony Sheridan	Def's Pro Se Motion for Court Appointed Attorney	Denied **05/14/2021**
397P20	State v. Billy Russell Land	1. Def's Motion for Temporary Stay (COA19-1060) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/16/2020 Dissolved 06/09/2021** 2. Denied 3. Denied
404P20	State v. Tonya Renee Whitaker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1220) 2. State's Motion to Deem Response to PDR as Timely Filed	1. Denied 2. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

412P20	Shearon Farms Townhome Owners Association II, Inc. v. Shearon Farms Development, LLC; Dan Ryan Builders-North Carolina, LLC; Abbington Heights, LLC; Jeld-Wen, Inc., and Jeld-Wen Holding, Inc., Defendants ——— Dan Ryan Builders-North Carolina, LLC, Defendant/Third-Party Plaintiff v. JP&M Enterprise, Inc.; JP&M Enterprise, Inc. d/b/a Ace Vinyl Siding; Alpha Omega Construction Group of Raleigh, Inc.; Alpha Omega Construction Group of Raleigh, Inc. d/b/a Alpha Omega Const. Group of Raleigh; BMC East, LLC; BMC East, LLC d/b/a BMC; BMC East, LLC f/k/a Stock Building Supply, LLC d/b/a Stock Building Supply; Brinley's Grading Service, Inc.; Brinley's Grading Service, Inc. d/b/a Brinley's Grading Service; GMA Supply Inc.; GMA Supply Inc. f/k/a GMA Supply LLC d/b/a GMA Supply, Locklear Roofing Inc.; Locklear Inc.; Locklear Roofing Inc. d/b/a Locklear Roofing; Locklear Inc. d/b/a Locklear Roofing; Taylor's Landscaping, Inc.; Taylor's Landscaping, Inc. d/b/a Taylor's Landscaping Inc., Third-Party Defendants	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1308)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

423P20	State v. Omari Lewis Crump, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-747)	Denied
425P20-2	Bilal K. Rasul v. Erik Hooks, North Carolina Department of Public Safety	Petitioner's Pro Se Motion for PDR (COAP20-491)	Denied
436A19	Window World of Baton Rouge, et al. v. Window World, Inc., et al.	1. Plts' Motion to Dismiss Improper Appeals from Interlocutory Discovery Orders Prior to Briefing on Privilege Appeal 2. Defs' Conditional Petition for Writ of Certiorari to Review Order of Business Court	1. Denied 2. Dismissed as moot
445P20	State v. Roberto Lainez	Def's Pro Se Motion for Relief and Release	Denied
456P20	Samuel Sealey v. Farmin' Brands, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-583) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
495P20	U.S. Bank National Association v. Leland J. Thompson and Amber Thompson, Arkh Isra Ali-Dey, Third-Party Claimant	1. Third-Party Claimant's Pro Se Motion for Judicial Review for Void Judgment in Equitable Relief for Quiet Title Action 2. Third-Party Claimant's Pro Se Motion for Notice of Default 3. Third-Party Claimant's Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed *ex mero motu* 3. Dismissed
525P20	State v. Michael Williams Yelverton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-1123) 2. Def's Motion to Amend PDR to Add Additional Authority	1. Denied 2. Allowed
548A04-3	State v. Vincent Lamont Harris	1. Def's Motion to Dismiss Appeal 2. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. 2. Allowed **04/22/2021**
580P05-21	In re David Lee Smith	1. Def's Pro Se Motion to Vacate Stay 2. Def's Pro Se Motion for Release Pending Appeal	1. Denied **04/19/2021** 2. Denied **04/19/2021** **Ervin, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 JUNE 2021

580P05-22	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus	1. Denied
		2. Def's Pro Se Motion to Amend Pro Se Motion and Vacate Denial Order	2. Dismissed
		3. Def's Pro Se Petition for Writ of Mandamus	3. Denied
		4. Def's Pro Se Motion to Amend Pro Se Habeas Corpus Petition	4. Dismissed
		5. Def's Pro Se Motion to Liberally Construe Pro Se Petition as a Notice of Appeal and Appellate Brief	5. Dismissed
		6. Def's Pro Se Motion to Amend Pro Se Petition or for Court to Allow Fair Amendment Opportunity	6. Dismissed
		7. Def's Pro Se Motion to Vacate April 19, 2021 Denial Order	7. Dismissed **Ervin, J., recused**

APPENDIXES

CHIEF JUSTICE § 7A-39(b)
EMERGENCY ORDERS

GENERAL RULES OF PRACTICE

---

eFILING PILOT PROJECT

PRACTICAL TRAINING OF LAW STUDENTS

RULES OF PROFESSIONAL CONDUCT

ORDERS ISSUED BY CHIEF JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA PURSUANT TO N.C.G.S. § 7A-39(b) – 2003-2021

CHIEF JUSTICE OF THE SUPREME COURT

OF THE

STATE OF NORTH CAROLINA

ORDER

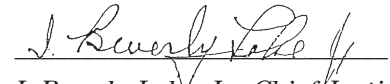
Pursuant to N.C.G.S. § 7A-39(b), the Chief Justice of the Supreme Court of North Carolina hereby determines that catastrophic conditions resulting from Hurricane Isabel existed in Hertford County from Wednesday, September 17, 2003, through Tuesday, September 23, 2003.

Therefore, it is ORDERED that the time within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings in Hertford County be and hereby is extended to the close of business on Monday, October 13, 2003.

All filings that are made after the expiration of any otherwise applicable time limit and before the close of business on Monday, October 13, 2003, are hereby deemed to be timely, whether the filings are made before or after the effective date of this Order.

This Order becomes effective upon being filed in the Office of the Clerk of Superior Court of Hertford County.

This the 1st day of October, 2003.



I. Beverly Lake, Jr., Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from Hurricane Florence currently exist in those counties subject to mandatory evacuation orders: Beaufort, Brunswick, Carteret, Craven, Currituck, Dare, Hyde, Jones, New Hanover, Onslow, Pamlico, Pender, Sampson, and Tyrrell.

I therefore order that all pleadings, motions, notices, and other documents and papers that were due to be filed in the aforementioned counties between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 28 September 2018.

I further order that all other acts that were due to be done in the aforementioned counties between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 28 September 2018.

I will issue additional orders under N.C.G.S. § 7A-39(b) as circumstances may warrant.

This the 13th day of September, 2018.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from Hurricane Florence exist or have existed in the following counties: Beaufort, Bladen, Brunswick, Carteret, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Harnett, Hoke, Hyde, Jones, Lenoir, New Hanover, Onslow, Pamlico, Pender, Richmond, Robeson, Sampson, Scotland, Tyrrell, and Wayne. I therefore extend the time and periods of limitation for filing and for acts due to be done in each of the aforementioned counties, as follows:

Beaufort County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Beaufort County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Beaufort County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Bladen County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Bladen County between the dates of 14 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Bladen County between the dates of 14 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Brunswick County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Brunswick County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal

actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Brunswick County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Carteret County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Carteret County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Carteret County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Columbus County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Columbus County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Columbus County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Craven County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Craven County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Craven County between the dates of 13 September 2018 and 21 September 2018

in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Cumberland County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Cumberland County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Cumberland County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Currituck County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Currituck County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Currituck County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Dare County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Dare County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Dare County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Duplin County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Duplin County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Duplin County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Harnett County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Harnett County between the dates of 13 September 2018 and 19 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Harnett County between the dates of 13 September 2018 and 19 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Hoke County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Hoke County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Hoke County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Hyde County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Hyde County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal

actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Hyde County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Jones County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Jones County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Jones County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Lenoir County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Lenoir County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Lenoir County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

New Hanover County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in New Hanover County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in New Hanover County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Onslow County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Onslow County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Onslow County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Pamlico County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Pamlico County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Pamlico County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Pender County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Pender County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Pender County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Richmond County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Richmond County between the dates of 13 September 2018 and 14 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Richmond County between the dates of 13 September 2018 and 14 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Robeson County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Robeson County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Robeson County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Sampson County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Sampson County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Sampson County between the dates of 13 September 2018 and 21 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Scotland County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Scotland County between the dates

of 13 September 2018 and 19 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Scotland County between the dates of 13 September 2018 and 19 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Tyrrell County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Tyrrell County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Tyrrell County between the dates of 13 September 2018 and 17 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

Wayne County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Wayne County between the dates of 13 September 2018 and 18 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 October 2018.

I further order that all other acts that were due to be done in Wayne County between the dates of 13 September 2018 and 18 September 2018 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 October 2018.

* * *

This order supersedes the order that I issued on 13 September 2018.

This the 21st day of September, 2018.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and Onslow County.

Jones County

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, until 7 November 2018.

Onslow County

I further order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Onslow County may conduct court functions, and the clerk of superior court and magistrates of Onslow County may perform their duties, at the Government Complex Center, 234 NW Corridor Boulevard, Jacksonville, NC 28540, until 7 November 2018.

This order is effective immediately. I will extend this order in whole or in part for additional 30-day periods if necessary.

This the 8th day of October, 2018.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and Onslow County and that the directives of my 8 October 2018 order remain necessary.

Jones County

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, from 7 November 2018 through 6 December 2018.

Onslow County

I further order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Onslow County may conduct court functions, and the clerk of superior court and magistrates of Onslow County may perform their duties, at the Government Complex Center, 234 NW Corridor Boulevard, Jacksonville, NC 28540, from 7 November 2018 through 6 December 2018.

I will extend this order in whole or in part for additional 30-day periods if necessary.

This the 7th day of November, 2018.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and Onslow County and that the directives of my 7 November 2018 order remain necessary.

Jones County

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, from 7 December 2018 through 5 January 2019.

Onslow County

I further order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Onslow County may conduct court functions, and the clerk of superior court and magistrates of Onslow County may perform their duties, at the Government Complex Center, 234 NW Corridor Boulevard, Jacksonville, NC 28540, from 7 December 2018 through 5 January 2019.

I will extend this order in whole or in part for additional 30-day periods if necessary.

This the 7th day of December, 2018.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and Onslow County and that the directives of my 7 December 2018 order remain necessary.

Jones County

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 7 January 2019 through 5 February 2019.

Onslow County

I further order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Onslow County may conduct court functions, and the clerk of superior court and magistrates of Onslow County may perform their duties, at the Government Complex Center, 234 NW Corridor Boulevard, Jacksonville, NC 28540, from 7 January 2019 through 5 February 2019.

I will extend this order in whole or in part for additional 30-day periods if necessary.

This the 7th day of January, 2019.

Mark Martin
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that some of the directives of my 7 January 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 6 February 2019 through 7 March 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 6th day of February, 2019.

Mark Martin
Chief Justice
Supreme Court of North Carolina

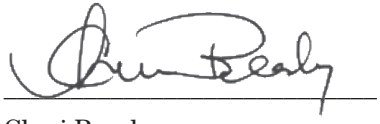
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of former Chief Justice Mark Martin's 6 February 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 8 March 2019 through 6 April 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 8th day of March, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

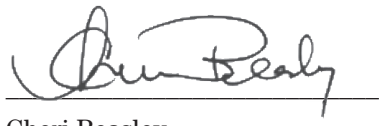
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of my 8 March 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 8 April 2019 through 7 May 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 8th day of April, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

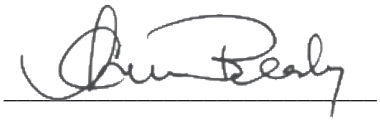
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of my 8 April 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 8 May 2019 through 6 June 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 8th day of May, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

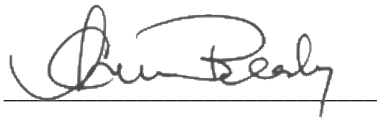
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of my 8 May 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 7 June 2019 through 6 July 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 7th day of June, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

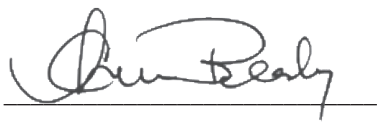
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of my 7 June 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 8 July 2019 through 5 August 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 8th day of July, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

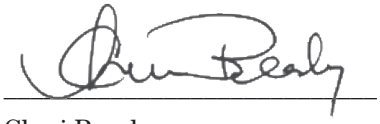
ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from Hurricane Florence have existed and continue to exist in Jones County and that the directives of my 8 July 2019 order remain necessary.

I order under N.C.G.S. § 7A-39(b)(2) that the superior court and the district court in Jones County may conduct court functions, and the clerk of superior court and magistrates of Jones County may perform their duties, at the Former Jones County Administration Building, 389 HWY 58 South, Trenton, NC 28585, and at the Jones County Civic Center, 832 HWY 58 South, Trenton, NC 28585, from 6 August 2019 through 4 September 2019.

This order may be extended in whole or in part for additional 30-day periods if necessary.

This the 6th day of August, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from Hurricane Dorian exist or have existed in New Hanover County and in Pender County. I therefore extend the time and periods of limitation for filing and for acts due to be done in each of these two counties, as follows:

New Hanover County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in New Hanover County between the dates of 4 September 2019 and 6 September 2019 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 27 September 2019.

I further order that all other acts that were due to be done in New Hanover County between the dates of 4 September 2019 and 6 September 2019 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 27 September 2019.

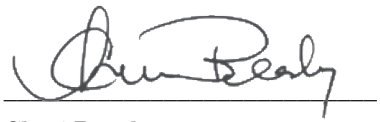
Pender County

I order that all pleadings, motions, notices, and other documents and papers that were due to be filed in Pender County between the dates of 4 September 2019 and 6 September 2019 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 27 September 2019.

I further order that all other acts that were due to be done in Pender County between the dates of 4 September 2019 and 6 September 2019 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 27 September 2019.

I will issue additional orders under N.C.G.S. § 7A-39(b) as circumstances may warrant.

This the 17th day of September, 2019.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 10 March 2020, Governor Roy Cooper declared a state of emergency in North Carolina in response to the emerging public health threat posed by COVID-19. Since that time, the World Health Organization has designated the COVID-19 outbreak as a global pandemic, and the North Carolina Department of Health and Human Services has urged all North Carolinians to take steps to reduce the spread of infection.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the public health threat posed by COVID-19 exist in all counties of this state.

Although the superior courts and district courts remain open, two emergency directives are necessary to reduce the spread of infection.

Emergency Directive 1

I order that all superior court and district court proceedings be scheduled or rescheduled for a date no sooner than 30 days from the issuance of this order, unless:

1. the proceeding will be conducted remotely;
2. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);
3. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or
4. the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

This emergency directive does not apply to any proceeding in which a jury has already been empaneled.

This emergency directive does not apply to grand juries which have already been empaneled.

This emergency directive does not prohibit a judge or other judicial officer from exercising any in chambers or ex parte jurisdiction conferred by law upon that judge or judicial officer, as provided by law.

Additionally, I encourage the superior courts and district courts to liberally grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts who are at a high risk of severe illness from COVID-19.

Emergency Directive 2

I further order that the clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

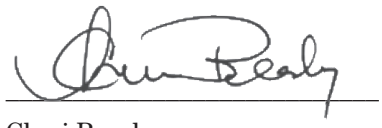
1. has traveled to China, South Korea, Japan, Italy, or Iran within the previous 14 days;
2. has been directed to quarantine, isolate, or self-monitor;
3. has been diagnosed with COVID-19; or
4. resides with or has been in close contact with any person in the abovementioned categories.

* * *

The directives contained in this order will take effect Monday, 16 March 2020.

This order may be extended in whole or in part for additional 30-day periods if necessary.

Issued this the 13th day of March, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 10 March 2020, Governor Roy Cooper declared a state of emergency in North Carolina in response to the emerging public health threat posed by COVID-19. Since that time, the World Health Organization has designated the COVID-19 outbreak as a global pandemic.

On 14 March 2020, Governor Cooper signed Executive Order No. 117, which prohibits mass gatherings, closes the public schools of North Carolina for at least two weeks, and encourages all North Carolinians to practice social distancing whenever possible and practice proper hygiene in order to stem the spread of infection.

Subsequent guidance from state and federal officials has advised or mandated more extensive social distancing in an attempt to limit the spread of COVID-19, including: a recommendation from the North Carolina Department of Health and Human Services that in-person gatherings of 50 people or more be cancelled or postponed, Governor Cooper's Executive Order No. 118 closing dine-in service at restaurants and bars, and guidance from the federal Centers for Disease Control and Prevention to limit in-person interactions.

Although the superior courts and district courts remain open, additional action is necessary to reduce the spread of infection.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the public health threat posed by COVID-19 exist in all counties of this state.

Extension of Time and Periods of Limitation Pursuant to N.C.G.S. § 7A-39(b)(1)

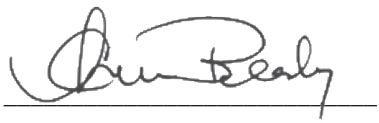
I order that all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020.

I further order that all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 17 April 2020.

This order does not apply to documents and papers due to be filed or acts due to be done in the appellate courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 19th day of March, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 13 March 2020, I issued an order with two emergency directives affecting the North Carolina Judicial Branch in response to the emerging public health threat posed by the COVID-19 outbreak. On 19 March 2020, I issued another order extending time and periods of limitation for documents and papers due to be filed and acts due to be done in the trial courts.

On 27 March 2020, Governor Roy Cooper issued Executive Order 121 directing all individuals in the state to stay in their place of residence subject to limited exceptions. North Carolina's courts are a critical government function and are therefore exempt from the order. Nevertheless, we are directed, to the extent practicable, to maintain social distancing requirements, including "facilitating online or remote access by customers if possible."

Additional emergency directives under N.C.G.S. § 7A-39(b)(2) are now necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 1

All superior court and district court proceedings, including proceedings before the clerks of superior court, must be scheduled or rescheduled for a date no sooner than 1 June 2020, unless:

a. the proceeding will be conducted remotely;

b. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);

c. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or

d. the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

The examples provided above are not exhaustive.

This emergency directive does not apply to any proceeding in which a jury has already been empaneled.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings by remote audio and video transmissions, notwithstanding any other North Carolina statutory or regulatory provision.

Judicial officials who conduct a remote proceeding pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A remote proceeding may not be conducted without the consent of each party.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before that proceeding may be conducted remotely.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained in the remote proceeding.

d. If the proceeding is required by law to be recorded, then the remote proceeding must be recorded.

e. Each party to a remote proceeding must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

Nothing in this emergency directive prevents judicial officials from conducting in-person proceedings consistent with Emergency Directive 1.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that

day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

Emergency Directive 7

For all monies owed pursuant to a judgment or order entered by a court prior to 6 April 2020 in a criminal or infraction case with a payment due date on or after 6 April 2020 and before or on 1 May 2020, the date by which payment must be made is hereby extended 90 days. Nonpayment of monetary obligations in such cases shall not be deemed a willful failure to comply, and the clerks of superior court are directed not to enter or report a failure to comply as a result of nonpayment during the 90-day extension period.

The clerks of superior court also are directed not to enter or report, until after the expiration of this order, a failure to comply for a criminal or infraction case with a payment due date before 6 April 2020 where the 40th day following nonpayment falls on or after 6 April 2020 and before or on 1 May 2020.

If a court enters a judgment or order on or after 6 April 2020 and before or on 1 May 2020 in a criminal or infraction case, then the payment due date must be at least 90 days after the date of entry of the judgment or order, and the installment fee of N.C.G.S. § 7A-304(f) shall not be assessed until after the due date has passed.

Monetary obligations owed pursuant to a term of probation which is scheduled to end within 30 days after the date that this order is issued are excluded from the operation of this emergency directive.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

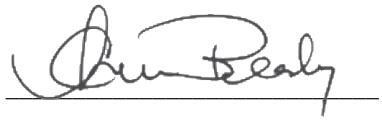
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order are effective immediately and expire on 1 May 2020.

Nevertheless, given the current severity of the COVID-19 outbreak, I fully expect to extend these directives for an additional 30-day period. Accordingly, judicial system stakeholders should plan for these directives to last through the month of May 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

I encourage all court officials to liberally grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts, as they deem appropriate.

Issued this the 2nd day of April, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 19 March 2020, I issued an order pursuant to N.C.G.S. § 7A-39(b)(1) extending time and periods of limitation for documents and papers due to be filed and acts due to be done in the trial courts. My order was in response to the public health threat posed by the COVID-19 outbreak and was intended to reduce the spread of infection in courthouses throughout the state.

The deadline set for filings and other acts by my previous order is 17 April 2020. Late April, however, may be the apex of the outbreak in North Carolina. An additional extension of time and periods of limitation pursuant to N.C.G.S. § 7A-39(b)(1) is therefore necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Extension of Time and Periods of Limitation Pursuant to N.C.G.S. § 7A-39(b)(1)

I order that all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 1 June 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 June 2020.

I further order that all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 1 June 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 June 2020.

This order does not apply to documents and papers due to be filed or acts due to be done in the appellate courts.

Extension of Time in Bail Bond Forfeiture Proceedings Pursuant to N.C.G.S. § 7A-39(b)(1)

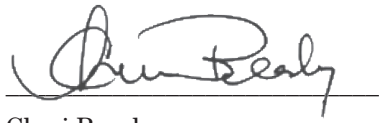
Notwithstanding the extension of time provided above, in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes for which disposition by entry of final judgment under N.C.G.S. § 15A-544.6 or by grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) is due to occur on or after 14 April 2020 and before or on 29 September 2020, any motion to set aside or any objection to a motion to set aside that is due to be filed within that period shall

be deemed to be timely filed if it is filed before the close of business on 30 September 2020.

In order to implement this extension, any entry of final judgment under N.C.G.S. § 15A-544.6 or any grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) that is due to occur on or after 14 April 2020 and before or on 29 September 2020, is hereby stayed until after the close of business on 30 September 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 13th day of April, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 2 April 2020, I issued an order with seven emergency directives affecting the North Carolina Judicial Branch in response to the emerging public health threat posed by the COVID-19 outbreak. Additional information about that order and the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19-coronavirus-updates.

This emergency directive is now necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

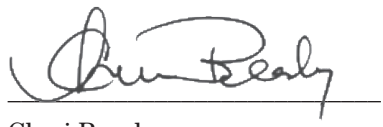
Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

This emergency directive is effective on Monday, 20 April 2020.

Issued this the 16th day of April, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 2 April 2020, I issued an order with seven emergency directives affecting the North Carolina Judicial Branch in response to the public health threat posed by the COVID-19 outbreak. On 16 April 2020, I issued another order with an eighth emergency directive that resumed marriage ceremonies statewide. An extension and modification of those emergency directives is now necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 1

All superior court and district court proceedings, including proceedings before the clerks of superior court, must be scheduled or rescheduled for a date no sooner than 1 June 2020, unless:

a. the proceeding will be conducted remotely;

b. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);

c. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or

d. the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

The examples provided above are not exhaustive.

This emergency directive does not apply to any proceeding in which a jury has already been empaneled.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by

telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and

confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Nothing in this emergency directive prevents judicial officials from conducting in-person proceedings consistent with Emergency Directive 1.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

Emergency Directive 7

For all monies owed pursuant to a judgment or order entered by a court prior to 6 April 2020 in a criminal or infraction case with a payment due date on or after 6 April 2020 and before or on 30 May 2020, the date by which payment must be made is hereby extended 90 days. Nonpayment of monetary obligations in such cases shall not be deemed a willful failure to comply, and the clerks of superior court are directed not to enter or report a failure to comply as a result of nonpayment during the 90-day extension period.

The clerks of superior court also are directed not to enter or report, until after the expiration of this order, a failure to comply for a criminal or infraction case with a payment due date before 6 April 2020 where the 40th day following nonpayment falls on or after 6 April 2020 and before or on 30 May 2020.

If a court enters a judgment or order on or after 6 April 2020 and before or on 30 May 2020 in a criminal or infraction case, then the payment due date must be at least 90 days after the date of entry of the judgment or order, and the installment fee of N.C.G.S. § 7A-304(f) shall not be assessed until after the due date has passed.

Monetary obligations owed pursuant to a term of probation which is scheduled to end within 30 days after the date that this order is issued are excluded from the operation of this emergency directive.

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore

essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

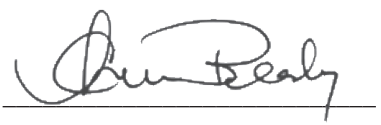
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order are effective immediately and expire on 30 May 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

I encourage all court officials to liberally grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19-coronavirus-updates.

Issued this the 1st day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 19 March 2020 and 13 April 2020, I issued orders pursuant to N.C.G.S. § 7A-39(b)(1) extending time and periods of limitation for documents and papers due to be filed and acts due to be done in the trial courts. My orders were issued in response to the public health threat posed by the COVID-19 outbreak and were intended to reduce the spread of infection in courthouses throughout the state.

Another extension of time and periods of limitation pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Extension of Time and Periods of Limitation
Pursuant to N.C.G.S. § 7A-39(b)(1)

1. **Civil Actions, Estates, and Special Proceedings.**

   a. **Time for Filing and for Other Acts Due to be Done.** All deadlines for filing documents and papers and all deadlines for other acts that were due to be filed or done between 16 March 2020 and 1 June 2020, inclusive of those dates, remain extended until the close of business on 1 June 2020 in accordance with my 13 April 2020 order.

   b. **Periods of Limitation.** All periods of limitation that were set to expire between 16 March 2020 and 31 July 2020, inclusive of those dates, are hereby extended until the close of business on 31 July 2020.

2. **Criminal Actions.**

   a. **Time for Filing and for Other Acts Due to be Done**. All deadlines for filing documents and papers and all deadlines for other acts that were due to be filed or done between 16 March 2020 and 31 July 2020, inclusive of those dates, are hereby extended until the close of business on 31 July 2020.

This order does not apply to proceedings for the forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes, which continue to be governed by my 13 April 2020 order pursuant to N.C.G.S. § 7A-39(b)(1).

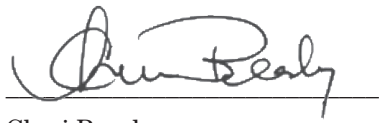
This order does not alter Emergency Directive 7, which continues to be governed in accordance with my 1 May 2020 order pursuant to N.C.G.S. § 7A-39(b)(2).

This order does not apply to documents and papers that are due to be filed or to acts that are due to be done in the appellate courts.

Presiding judicial officials retain the authority provided to them by law to grant further extensions of time as they deem appropriate.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 21st day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Since 13 March 2020, in response to the COVID-19 global pandemic, I have issued a series of emergency directives necessary to ensure the continuation of critical court system functions while limiting the number of face-to-face interactions and the gathering of large groups in courthouses.

In that time, Governor Roy Cooper has issued emergency executive orders limiting public gatherings, closing public schools, restricting the operation of nonessential businesses, and encouraging the use of social distancing in keeping with current public health guidelines.

Adherence to social distancing and other public health guidance cannot be achieved with traditional, routine operation of the district and superior courts of this State. High-volume sessions of court, heavy dockets, and jury trials require the public to gather in county courthouses and courtrooms in close proximity for extended periods of time in numbers greater than currently allowed by the Governor's orders.

North Carolina's courts are a critical governmental function and, as such, are exempt from executive orders that limit large gatherings. Even so, crowded sessions of court are not in keeping with current public health guidance and must be avoided.

It is critical to the continued operation of our court system that the public and our court personnel have confidence that appropriate precautionary measures have been taken to protect public health in their local court facilities.

It is also critical to the functioning of our state government that the Judicial Branch continue carrying out its constitutional functions. Continued operation of the court system in light of the current pandemic requires a careful balancing of the needs of public safety, the rule of law, and our collective public health.

Therefore, additional emergency directives are now necessary to reduce the risk of infection and ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for

extended periods of time in contravention of current public health guidance Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be convened in the district or superior courts of this State for the next thirty (30) days.

Although this emergency directive will expire in 30 days pursuant to N.C.G.S. § 7A-39(b)(2), it is my intention to extend this directive through at least the end of July and judicial officials are directed to plan accordingly.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. The name of the COVID-19 Coordinator for each facility shall be submitted no later than 5:00 p.m. on Tuesday, 26 May 2020 to the Administrative Office of the Courts.

The COVID-19 Task Force is directed to develop additional guidelines and best practices for the conduct of in-person court proceedings in compliance with current public health guidance.

Emergency Directive 12

Each senior resident superior court judge shall for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2 the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the

facility including doorways, service counters, stairwells and elevators; and

5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than thirty minutes will have a facemask made available prior to the session of court.

For sessions of court for which calendars have already been distributed, the COVID-19 Coordinator must make such assurances before the session of court begins.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five (5) business days of the date the filing is due.

Emergency Directive 16

Each COVID-19 Coordinator is directed to determine whether there is adequate space in the court facility to convene a jury trial in keeping with current public health guidance. In making this determination, the COVID-19 Coordinator should take into account the need for the venire to observe social distancing, as well as for jurors to be socially distanced in the courtroom and any deliberation room. The COVID-19 Coordinator is encouraged to consult with the local public health director, or their designee, in making this determination where possible.

If local court facilities are determined to be inadequate to convene socially distanced jury trials, the senior resident superior court judge is directed to identify, no later than 1 July 2020, other appropriate facilities where trials may be safely convened beginning in August and continuing during the pendency of this emergency.

If the alternate facility is located outside the county seat, information about the alternate proposed facility shall, pursuant to N.C.G.S. §§ 7A-42(i) and 7A-130, be submitted to the Administrative Office of the Courts for approval and, in the case of the superior court division, to the Chief Justice for approval as well.

The COVID-19 Task Force is directed to develop recommended best practices and minimum requirements for the convening of jury trials and to submit those recommendations to the Chief Justice and to the Administrative Office of the Courts no later than 30 June 2020.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

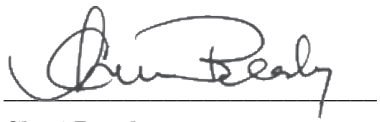
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 20 June 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 21st day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Since 13 March 2020, in response to the COVID-19 global pandemic, I have issued a series of emergency directives necessary to ensure the continuation of critical court system functions while protecting the health and safety of all who work in or visit North Carolina's county courthouses.

On 19 March 2020, 13 April 2020, and 21 May 2020, I issued orders extending the time in which any pleading, motion, notice, document or paper was due to be filed in any county of the state.

On 27 March 2020, the Supreme Court entered an order extending by sixty (60) days all deadlines imposed by the Rules of Appellate Procedure that fell between 27 March 2020 and 30 April 2020.

There is a need for clarity in the application of these orders to the filing of notices of appeal. Therefore, another extension of time and periods of limitation pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

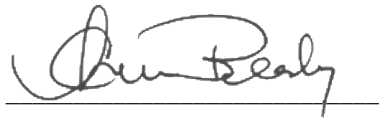
Extension of Time and Periods of Limitation
Pursuant to N.C.G.S. § 7A-39(b)(1)

In any matter in which the deadline to file a notice of appeal fell between 13 March 2020 and 1 June 2020, the deadline for filing such appeal and making any required payment or bond is hereby extended to 30 June 2020.

Presiding judicial officials retain the authority provided to them by law to grant further extensions of time as they deem appropriate.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 30th day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 2 April 2020, I issued an order with seven emergency directives affecting the North Carolina Judicial Branch in response to the public health threat posed by the COVID-19 outbreak. On 16 April 2020, I issued another order with an eighth emergency directive that resumed marriage ceremonies statewide. On 1 May 2020, I issued an order that modified and extended those eight emergency directives for an additional 30 days.

Emergency Directive 1, which delayed superior court and district court proceedings, will not be further extended. Judicial officials should therefore calendar and hear matters consistent with Emergency Directives 9 through 16 in the order I issued on 21 May 2020.

An extension and modification of Emergency Directives 2 through 8, however, is necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

Emergency Directive 7

For all monies owed pursuant to a judgment or order entered by a court prior to 6 April 2020 in a criminal or infraction case with a

payment due date on or after 6 April 2020 and before or on 29 June 2020, the date by which payment must be made is hereby extended 90 days. Nonpayment of monetary obligations in such cases shall not be deemed a willful failure to comply, and the clerks of superior court are directed not to enter or report a failure to comply as a result of nonpayment during the 90-day extension period.

The clerks of superior court also are directed not to enter or report, until after the expiration of this order, a failure to comply for a criminal or infraction case where the 40th day following nonpayment falls on or after 6 April 2020 and before or on 29 June 2020.

If a court enters a judgment or order on or after 6 April 2020 and before or on 29 June 2020 in a criminal or infraction case, then the payment due date must be at least 90 days after the date of entry of the judgment or order, and the installment fee of N.C.G.S. § 7A-304(f) shall not be assessed until after the due date has passed.

Monetary obligations owed pursuant to a term of probation which is scheduled to end within 30 days after the date that this order is issued are excluded from the operation of this emergency directive.

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

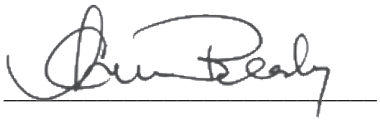
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order are effective 30 May 2020 and expire on 29 June 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Court officials are authorized to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 30th day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

Since 13 March 2020, in response to the COVID-19 global pandemic, I have issued a series of emergency directives necessary to ensure the continuation of critical court system functions while protecting the health and safety of all who work in or visit North Carolina's county courthouses.

Today, Governor Roy Cooper issued Executive Order 142 prohibiting landlords from taking any action in furtherance of a summary ejectment or eviction of a residential or commercial tenant for reason of non-payment.

There are now more than 9,000 pending evictions in our state court system. Hearing these matters would require landlords to act in furtherance of an eviction in violation of Governor Cooper's order.

Additionally, the Coronavirus Aid Relief and Economic Security Act (the "CARES Act" or the "Act") was passed by the United States Congress and signed into law on 27 March 2020. The Act included a moratorium on residential evictions for covered properties as defined by the Act for a period of 120 days from the effective date of the Act. The CARES Act did not provide a procedure for local courts to determine whether a property is covered under the Act and promulgation of additional rules of procedure governing such determination appears to be left to the states.

Therefore, additional emergency directives are now necessary to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

EMERGENCY DIRECTIVE 17

All evictions pending in the trial divisions, whether summary ejectment or otherwise, are hereby stayed until 21 June 2020. Sheriffs shall not be required to execute pending writs of possession of real property or make due return of such writs until 30 June 2020.

EMERGENCY DIRECTIVE 18

In all summary ejectment proceedings filed pursuant to Article 3, Chapter 42 of the North Carolina General Statutes on or after 27 March 2020, no writ of possession for real property shall issue unless a finding is made that the property which is the subject of the complaint is not a covered property as defined by Section 4024(a)(1) of the CARES Act.

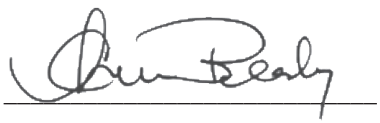
The Administrative Office of the Courts is directed to promulgate a form affidavit to be completed by plaintiffs in any such actions. For any summary ejectment or residential eviction action instituted on or after 27 March 2020 and before 1 June 2020, such affidavit shall be completed and submitted before final judgment by a magistrate is entered. For any summary ejectment action instituted on or after 1 June 2020, such affidavit shall accompany the filing of the complaint such that a copy of the affidavit will accompany the summons and complaint when served on the defendant.

EMERGENCY DIRECTIVE 19

There is hereby established a voluntary mediation program for summary ejectment actions. The Dispute Resolution Commission is directed to submit proposed rules governing such program to the Supreme Court for adoption no later than 7 June 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 30th day of May, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 30 May 2020, I issued Emergency Directives 17–19 in response to the public health threat posed by the COVID-19 outbreak.

Each of those emergency directives addressed the more than 10,500 evictions pending in our state court system and coincided with Executive Order 142, in which Governor Roy Cooper prohibited landlords from taking any action in furtherance of a summary ejectment or an eviction of a residential or commercial tenant for reason of non-payment.

An additional emergency directive related to eviction proceedings is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 20

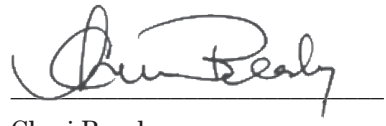
Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed thirty (30) days from the issuance of the summons to answer the complaint.

* * *

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 20th day of June, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 21 May 2020, I issued Emergency Directives 9–16 in response to the public health threat posed by the COVID-19 outbreak.

It remains critical to the continued operation of our court system that the public and our court personnel have confidence that appropriate precautionary measures have been taken to protect public health in their local court facilities.

It also remains critical to the functioning of our state government that the Judicial Branch continue carrying out its constitutional functions.

An extension and modification of Emergency Directives 9–16 is therefore necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be convened in the district or superior courts of this State for the next thirty (30) days.

Although this emergency directive will expire in 30 days pursuant to N.C.G.S. § 7A-39(b)(2), it is my intention to extend this directive through at least the end of July and judicial officials are directed to plan accordingly.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be

designated for multiple facilities. The name of the COVID-19 Coordinator for each facility shall be submitted no later than 5:00 p.m. on Tuesday, 26 May 2020 to the Administrative Office of the Courts.

Emergency Directive 12

Each senior resident superior court judge shall for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than thirty minutes will have a facemask made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five (5) business days of the date the filing is due.

Emergency Directive 16

Each COVID-19 Coordinator is directed to determine whether there is adequate space in the court facility to convene a jury trial in keeping with current public health guidance. In making this determination, the COVID-19 Coordinator should take into account the need for the venire to observe social distancing, as well as for jurors to be socially distanced in the courtroom and any deliberation room. The COVID-19 Coordinator is encouraged to consult with the local public health director, or their designee, in making this determination where possible.

If local court facilities are determined to be inadequate to convene socially distanced jury trials, the senior resident superior court judge is directed to identify, no later than 1 July 2020, other appropriate facilities where trials may be safely convened beginning in August and continuing during the pendency of this emergency.

If the alternate facility is located outside the county seat, information about the alternate proposed facility shall, pursuant to N.C.G.S. §§ 7A-42(i) and 7A-130, be submitted to the Administrative Office of the Courts for approval and, in the case of the superior court division, to the Chief Justice for approval as well.

The COVID-19 Task Force is directed to develop recommended best practices and minimum requirements for the convening of jury trials and to submit those recommendations to the Chief Justice and to the Administrative Office of the Courts no later than 30 June 2020.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

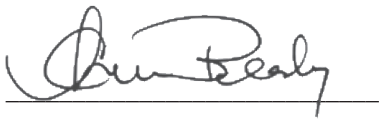
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 20 July 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 20th day of June, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 30 May 2020, I issued Emergency Directives 17–19 in response to the public health threat posed by the COVID-19 outbreak.

Each of those emergency directives addressed the more than 10,500 evictions pending in our state court system and coincided with Executive Order 142, in which Governor Roy Cooper prohibited landlords from taking any action in furtherance of a summary ejectment or an eviction of a residential or commercial tenant for reason of nonpayment.

A modification and an extension of Emergency Directive 18 for an additional period of time is now necessary. Emergency Directive 17 and Emergency Directive 19 will not be extended.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

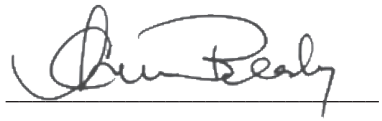
* * *

This emergency directive expires on 24 July 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 29th day of June, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 30 May 2020, I issued an order in response to the COVID-19 outbreak that extended Emergency Directives 2–8 for an additional 30-day period.

A modification and further extension of Emergency Directives 2–8 is now necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

Emergency Directive 7

The clerks of superior court are directed not to enter or report, until after 31 July 2020, a failure to comply for a criminal or infraction case where the 40th day following nonpayment falls on or after 6 April 2020 and before or on 31 July 2020.

Monetary obligations owed pursuant to a term of probation which is scheduled to end before or on 31 July 2020 are excluded from the operation of this emergency directive.

The extension of deadlines that I ordered on 21 May 2020 for acts due to be done in criminal and infraction cases does not apply to payments

of monies owed in criminal and infraction cases that are covered by this emergency directive or previous versions of this emergency directive.

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

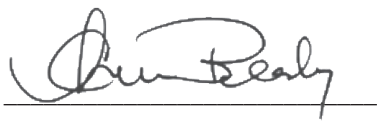
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order are effective 29 June 2020 and expire on 29 July 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Court officials are authorized to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 29th day of June, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 24 June 2020, Governor Roy Cooper signed Executive Order 147, which requires people in our state to wear a face covering in certain settings in order to decrease the spread of COVID-19. Although courthouses are exempt from this requirement, the Governor's order strongly encourages all state government agencies to adopt similar requirements.

Since the COVID-19 pandemic began, I have issued a number of emergency directives for the Judicial Branch in response to the public health threat posed by the outbreak. These directives have been calculated to decrease the spread of COVID-19 in our courthouses so that essential court functions may continue safely.

In June, courts began conducting a greater number of in-person proceedings following the expiration of the first emergency directive that I issued in response to the pandemic. Since that time, dozens of court personnel have contracted COVID-19 and numerous courts have been forced to temporarily close so that the facilities could be sanitized and employees with possible exposure could be tested. If we are to continue conducting a greater number of in-person proceedings, it is vital that we utilize all available tools to limit the transmission of the virus.

Consistent with the Governor's recommendation and mounting evidence that face coverings decrease the spread of COVID-19, an additional emergency directive related to face coverings in courthouses is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are interacting with others.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who

are temporarily removing their face covering to secure medical services or for identification purposes, or who are under eleven years of age.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

* * *

Pursuant to Emergency Directive 10, all jury trials in the superior court and district court are postponed through 20 July 2020. It is my intention to extend Emergency Directive 10 until at least the end of September. While face coverings will help decrease the spread of COVID-19 in our courthouses, more precautions and planning are necessary before jury trials may resume.

The Judicial Branch's COVID-19 Task Force has recently submitted recommendations related to the resumption of jury trials. The Task Force recommends, and I agree, that the approach for resuming jury trials should be left to the reasoned judgment of local judicial officials. An additional emergency directive is therefore necessary to charge local judicial officials to plan for the eventual resumption of jury trials in their districts.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

Before jury summonses are issued, and before promulgating the plan to the public, the senior resident superior court judge shall submit a copy of the Jury Trial Resumption Plan to the Chief Justice, which shall bear a signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

The Jury Trial Resumption Plan shall be promulgated either by local rule or administrative order no later than 1 September 2020, and may become effective after the date on which Emergency Directive 10 expires. The local rule or administrative order shall be submitted to North Carolina Administrative Office of the Courts and thereafter posted to the NCCourts.gov website.

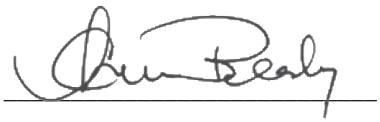
* * *

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 15 August 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 16th day of July, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 20 June 2020, I extended Emergency Directives 9–16 and issued Emergency Directive 20 in response to the public health threat posed by the COVID-19 outbreak.

Emergency Directives 9–15 and Emergency Directive 20 remain critical to the continued operation of our court system. A modification and further extension of these emergency directives for an additional 30-day period is therefore necessary. Emergency Directive 16 will not be further extended.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be convened in the district or superior courts of this State for the next 30 days.

Although this emergency directive will expire in 30 days pursuant to N.C.G.S. § 7A-39(b)(2), it is my intention to extend this directive through at least the end of September, and judicial officials are directed to plan accordingly.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

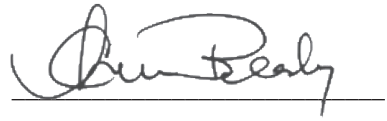
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 19 August 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 20th day of July, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 29 June 2020, I extended Emergency Directive 18 in response to the public health threat posed by the COVID-19 outbreak. A modification and further extension of Emergency Directive 18 for an additional period of time is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act or an "applicable property" as defined by Section 4023(f)(1) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

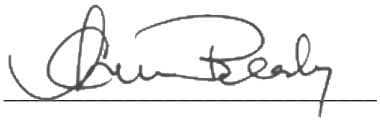
* * *

This emergency directive expires on 23 August 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 24th day of July, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 29 June 2020, I extended Emergency Directives 2–8 in response to the public health threat posed by the COVID-19 outbreak. A further extension of Emergency Directives 2–8 is now necessary to reduce the spread of infection and to ensure the continuing operation of essential court functions.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions,

a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

Emergency Directive 7

The clerks of superior court are directed not to enter or report, until after 31 July 2020, a failure to comply for a criminal or infraction case where the 40th day following nonpayment falls on or after 6 April 2020 and before or on 31 July 2020.

Monetary obligations owed pursuant to a term of probation which is scheduled to end before or on 31 July 2020 are excluded from the operation of this emergency directive.

The extension of deadlines that I ordered on 21 May 2020 for acts due to be done in criminal and infraction cases does not apply to payments of monies owed in criminal and infraction cases that are covered by this emergency directive or previous versions of this emergency directive.

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

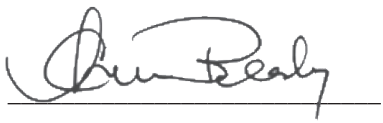
Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order are effective 29 July 2020 and expire on 28 August 2020.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Court officials are authorized to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 29th day of July, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 16 July 2020, I issued Emergency Directive 21 and Emergency Directive 22 in response to the COVID-19 outbreak. Those emergency directives require persons in court facilities throughout our state to wear a face covering and call on local judicial officials to develop a plan for the eventual resumption of jury trials.

On 20 July 2020, I extended existing Emergency Directives 9–15 and Emergency Directive 20, which are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

An extension of all these directives for an additional 30-day period is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be convened in the district or superior courts of this State for the next 30 days.

Although this emergency directive will expire in 30 days pursuant to N.C.G.S. § 7A-39(b)(2), it is my intention to extend this directive through at least the end of September, and judicial officials are directed to plan accordingly.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between

staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are interacting with others.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, or who are under eleven years of age.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his

or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

Before jury summonses are issued, and before promulgating the plan to the public, the senior resident superior court judge shall submit a copy of the Jury Trial Resumption Plan to the Chief Justice, which shall bear a signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

The Jury Trial Resumption Plan shall be promulgated either by local rule or administrative order no later than 1 September 2020 and may become effective after the date on which Emergency Directive 10 expires. The local rule or administrative order shall be submitted to North Carolina Administrative Office of the Courts and thereafter posted to the NCCourts.gov website.

* * *

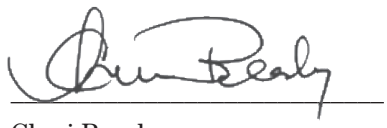
Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 14 September 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 15th day of August, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Last month, I extended Emergency Directives 2–8 and Emergency Directive 18 in response to the public health threat posed by the COVID-19 outbreak. A further extension of Emergency Directives 2–6, 8, and 18 is now necessary. Emergency Directive 7 will not be further extended. A modification and extension of Emergency Directive 22 is also necessary to change the date by which local Jury Trial Resumption Plans may be promulgated.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard

the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act; or (2) the property is a "covered dwelling" and the tenant had 30 days of notice to vacate as required by Section 4024(c) of the CARES Act. Further, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an "applicable property" as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an "applicable property" and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

* * *

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials,

craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice no later than 30 September 2020.

* * *

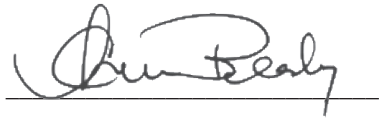
Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 22 September 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 24th day of August, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Last month, I issued orders extending Emergency Directives 2–6, 8–15, 18, and 20–22 in response to the public health threat posed by the COVID-19 outbreak. Those emergency directives remain crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public. A further extension of those emergency directives is therefore necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. has travelled internationally within the preceding 14 days;

b. is experiencing fever, cough, or shortness of breath;

c. has been directed to quarantine, isolate, or self-monitor;

d. has a known exposure to COVID-19;

e. has been diagnosed with COVID-19; or

f. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

Emergency Directive 6

Notwithstanding the manner of service described in Rule 5 of the Rules of Civil Procedure, service required by Rule 5 may be made electronically on a party or a party's attorney as follows:

If the party has consented in writing to service by electronic mail ("email"), then service may be made on the party by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If the attorney has consented in writing to service by email, then service may also be made on the attorney by email to an address that is either included in the consent or is otherwise on record with the court in the case. The email must be timestamped before 5:00 P.M. Eastern Time on a regular business day to be considered served on that day. If the email is timestamped after 5:00 P.M., then service will be deemed to have been completed on the next business day.

If one or more persons are served by email, then the certificate of service shall show the email address of each person so served.

Nothing in this emergency directive is intended to modify electronic service in the North Carolina Business Court, which continues to be governed by Business Court Rule 3.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be convened in the district or superior courts of this State for the next 30 days.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and

2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act; or (2) the property is a "covered dwelling" and the tenant had 30 days of notice to vacate as required by Section 4024(c) of the CARES Act. Further, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an "applicable property" as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an "applicable property" and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are interacting with others.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, or who are under eleven years of age.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known

exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

In the event that approval of one or more of the above-named officials cannot be obtained, the senior resident superior court judge may submit the plan with a statement indicating that despite his or her good-faith effort, such approval could not be obtained.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice no later than 30 September 2020.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

This order includes all Emergency Directives currently in effect: 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 21, and 22.

These emergency directives are crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Emergency Directive 6 expires on 30 September 2020. Pursuant to N.C.G.S. § 7A-39(b)(2), the other emergency directives contained in this order expire on 15 October 2020.

Other Emergency Directives issued throughout the pandemic expired on the following dates:

Emergency Directive 1: 30 May 2020

Emergency Directive 7: 28 August 2020

Emergency Directive 16: 20 July 2020

Emergency Directive 17: 29 June 2020

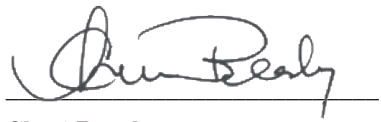
Emergency Directive 19: 29 June 2020

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 15th day of September, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 13 April 2020, I issued an order pursuant to N.C.G.S. § 7A-39(b)(1) extending time in certain proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes. My order was in response to the public health threat posed by the COVID-19 outbreak and was intended to reduce the spread of infection throughout the state. An additional extension of time pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

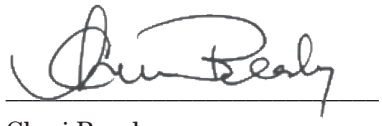
Extension of Time in Bail Bond Forfeiture Proceedings
Pursuant to N.C.G.S. § 7A-39(b)(1)

In proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes for which disposition by entry of final judgment under N.C.G.S. § 15A-544.6 or by grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) is due to occur on or after 14 April 2020 and before or on 29 November 2020, any motion to set aside or any objection to a motion to set aside that is due to be filed within that period shall be deemed to be timely filed if it is filed before the close of business on 30 November 2020.

In order to implement this extension, any entry of final judgment under N.C.G.S. § 15A-544.6 or any grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) due to occur on or after 14 April 2020 and before or on 29 November 2020, is hereby stayed until after the close of business on 30 November 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 30th day of September, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

Last month, I issued an order extending Emergency Directives 2–6, 8–15, 18, and 20–22 in response to the public health threat posed by the COVID-19 outbreak. Emergency Directive 6 expired on 30 September 2020. A further extension of Emergency Directives 2–5, 8–15, 18, and 20–22, however, is crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Modifications have been made in this order to Emergency Directives 2, 10, 21, and 22. Most notably, Emergency Directive 10 had previously postponed jury trials throughout the state. As modified, Emergency Directive 10 will postpone jury trials only in those judicial districts without an approved Jury Trial Resumption Plan.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen (14) days;

d. has been diagnosed with COVID-19 within the last fourteen (14) days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be conducted in the superior or district court of any county unless the Jury Trial Resumption Plan for that county and relevant trial division has been approved by the Administrative Office of the Courts and entered as a local administrative order.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and

2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act; or (2) the property is a "covered dwelling" and the tenant had 30 days of notice to vacate as required by Section 4024(c) of the CARES Act. Further, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an "applicable property" as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an "applicable property" and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were

commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six (6) feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement, or who are under five years of age.

During a jury trial conducted pursuant to a Jury Trial Resumption Plan that has been approved by a local public health director and the Administrative Office of the Courts, the presiding judicial official may order a juror answering questions during voir dire or a testifying witness to remove his or her face covering so that facial expressions may

be observed. Face coverings removed for this purpose may only be removed while the juror or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

In the event that approval of one or more of the above-named officials cannot be obtained, the senior resident superior court judge may submit the plan with a statement indicating that despite his or her good-faith effort, such approval could not be obtained.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

This order includes all emergency directives currently in effect: 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 21, and 22.

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 14 November 2020.

Other emergency directives issued throughout the pandemic expired on the following dates:

Emergency Directive 1: 30 May 2020

Emergency Directive 6: 30 September 2020

Emergency Directive 7: 28 August 2020

Emergency Directive 16: 20 July 2020

Emergency Directive 17: 29 June 2020

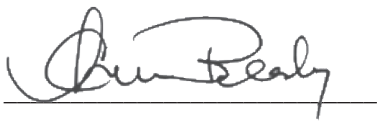
Emergency Directive 19: 29 June 2020

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 15th day of October, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

Last month, I issued an order extending Emergency Directives 2–5, 8–15, 18, and 20–22 in response to the public health threat posed by the COVID-19 outbreak. A further extension of those emergency directives is crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen (14) days;

d. has been diagnosed with COVID-19 within the last fourteen (14) days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be conducted in the superior or district court of any county unless the Jury Trial Resumption Plan for that county and relevant trial division has been approved by the Administrative Office of the Courts and entered as a local administrative order.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;
2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;
3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;
4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and
5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and
2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not a "covered dwelling" as defined by Section 4024(a)(1) of the CARES Act; or (2) the property is a "covered dwelling" and the tenant had 30 days of notice to vacate as required by Section 4024(c) of the CARES Act. Further, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an "applicable property" as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an "applicable property" and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4

June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six (6) feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement, or who are under five years of age.

During a jury trial conducted pursuant to a Jury Trial Resumption Plan that has been approved by a local public health director and the Administrative Office of the Courts, the presiding judicial official may order a juror answering questions during voir dire or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding

judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

In the event that approval of one or more of the above-named officials cannot be obtained, the senior resident superior court judge may submit the plan with a statement indicating that despite his or her good-faith effort, such approval could not be obtained.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

This order includes all emergency directives currently in effect: 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 21, and 22.

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 14 December 2020.

Other emergency directives issued throughout the pandemic expired on the following dates:

Emergency Directive 1: 30 May 2020

Emergency Directive 6: 30 September 2020

Emergency Directive 7: 28 August 2020

Emergency Directive 16: 20 July 2020

Emergency Directive 17: 29 June 2020

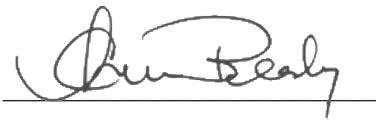
Emergency Directive 19: 29 June 2020

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 16th day of November, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA

On 13 April 2020, I issued an order pursuant to N.C.G.S. § 7A-39(b)(1) extending time in certain proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes. On 30 September 2020, I issued an order with an additional extension of time in those proceedings. My orders were in response to the public health threat posed by the COVID-19 outbreak and were intended to reduce the spread of infection throughout the state.

A further extension of time pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary. Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

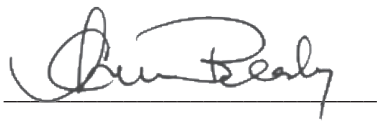
Extension of Time in Bail Bond Forfeiture Proceedings Pursuant to N.C.G.S. § 7A-39(b)(1)

In proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes for which disposition by entry of final judgment under N.C.G.S. § 15A-544.6 or by grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) is due to occur on or after 14 April 2020 and before or on 30 December 2020, any motion to set aside or any objection to a motion to set aside that is due to be filed within that period shall be deemed to be timely filed if it is filed before the close of business on 31 December 2020.

In order to implement this extension, any entry of final judgment under N.C.G.S. § 15A-544.6 or any grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) due to occur on or after 14 April 2020 and before or on 30 December 2020, is hereby stayed until after the close of business on 31 December 2020.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 30th day of November, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Last month, I issued an order extending Emergency Directives 2–5, 8–15, 18, and 20–22 in response to the public health threat posed by the COVID-19 outbreak. A further extension of those emergency directives is crucial to ensuring that our court system continues to administer justice while protecting the health and safety of court officials, court personnel, and the public.

Moreover, due to the rising levels of COVID-19 infection throughout North Carolina, I am reinstituting Emergency Directive 1, which orders a 30-day pause for most judicial proceedings. Emergency Directive 1 had previously expired on 30 May 2020 but is once again needed to help slow the spread of COVID-19 in our courts. I am also modifying Emergency Directive 10 to clarify that, during the period of time Emergency Directive 1 is in effect, no jury trial should be conducted unless a jury has already been empaneled.

Further, a modification of Emergency Directive 18 is necessary.

Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Emergency Directive 1

All superior court and district court proceedings, including proceedings before the clerks of superior court, must be scheduled or rescheduled for a date no sooner than 14 January 2021, unless:

a. the proceeding will be conducted remotely;

b. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);

c. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or

d. the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

The examples provided above are not exhaustive.

This emergency directive does not apply to any proceeding in which a jury has already been empaneled.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen (14) days;

d. has been diagnosed with COVID-19 within the last fourteen (14) days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions, notwithstanding any other provision of law.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. While consent of the parties is not required to conduct a proceeding that includes remote audio and video transmissions, a party may, for good cause, object to the use of remote audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

Emergency Directive 4

Attorneys and other persons who do not have business in a courthouse should not enter a courthouse, and those who do have business in a courthouse should not prolong their visit once their business has concluded. Attorneys are strongly encouraged to submit filings by mail rather than in person.

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions,

workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the Chief District Court Judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the Chief District Court Judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

Emergency Directive 9

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

All judicial officials should minimize large gatherings and face-to-face interactions between court personnel and the public to the greatest extent possible.

Emergency Directive 10

No jury trials shall be conducted in the superior or district court of any county for the next thirty (30) days, unless a jury has already been empaneled.

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

1. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;

2. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

3. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

4. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

5. all areas accessed by the public are cleaned daily with high touch areas cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

Emergency Directive 13

Before any court calendar is published or distributed, the COVID-19 Coordinator must ensure that:

1. each session of court, either individually or when considered collectively with other planned sessions of court, will not result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance; and

2. all judicial branch personnel assigned to a courtroom for more than 30 minutes will have a face covering made available prior to the session of court.

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

The clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. The clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent

possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due.

* * *

Emergency Directive 18

This emergency directive applies only in summary ejectment actions that are commenced pursuant to Article 3 of Chapter 42 of the General Statutes for nonpayment of rent or other fees or charges.

In actions commenced on or after 27 March 2020, no writ of possession for real property shall be issued unless the magistrate or judge concludes that either: (1) the property is not an "applicable property" as defined by Section 4023(f)(1) of the CARES Act; or (2) the property is an "applicable property" and the mortgage loan on that property is not currently in forbearance, and, if a prior forbearance period has expired, the tenant had 30 days of notice to vacate under the provisions of Section 4023(e) of the CARES Act.

The Administrative Office of the Courts has promulgated a form affidavit to be completed by the plaintiff in these actions. In actions that were commenced on or after 27 March 2020 and before 4 June 2020, the plaintiff shall file the affidavit with the court before the magistrate or judge enters final judgment. In actions that are commenced on or after 4 June 2020, the plaintiff shall file the affidavit with his or her complaint, and the affidavit shall be served on the defendant with the summons and complaint.

* * *

Emergency Directive 20

Notwithstanding the time limitation in N.C.G.S. § 42-28, when a plaintiff files a summary ejectment or small claim eviction complaint pursuant to Article 3 or Article 7 of Chapter 42 of the General Statutes and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 30 days from the issuance of the summons to answer the complaint.

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six (6) feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement, or who are under five years of age.

During a jury trial conducted pursuant to a Jury Trial Resumption Plan that has been approved by a local public health director and the Administrative Office of the Courts, the presiding judicial official may order a juror answering questions during voir dire or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

Emergency Directive 22

Each senior resident superior court judge shall, in consultation with other local officials, craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for the district court is warranted, the chief district court judge shall, in consultation with other local officials, craft a plan for the resumption of district court jury trials in his or her judicial district.

The Jury Trial Resumption Plan shall ensure that all court operations are in compliance with each of the Chief Justice's emergency directives and shall be informed by the Best Safety Practices distributed by the North Carolina Administrative Office of the Courts.

The plan shall, at a minimum, include the following:

a. a confirmation that each court facility and any alternate facility to be used for court operations is in compliance with each of the Chief Justice's emergency orders in response to the COVID-19 outbreak;

b. a plan for summoning and excusing jurors, which allows for as much of the process to be handled remotely as possible;

c. a plan for conducting voir dire with social distancing;

d. a plan for conducting trials with social distancing in the courtroom for all court participants, including the jury, and in the deliberation room;

e. a plan for daily screening of jurors, court personnel, attorneys, witnesses, and parties for COVID-19 exposure or infection;

f. a plan for making face coverings available to jurors, court personnel, attorneys, witnesses, and parties; and

g. a plan for responding in the event that a juror, defendant, attorney, witness, judge, or other courtroom personnel becomes symptomatic, tests positive for COVID-19, or has a known exposure to someone who has tested positive for COVID-19 during the trial.

The Jury Trial Resumption Plan shall bear the senior resident superior court judge's signature indicating approval of the plan by each of the following officials in the county in which jury trials are to be conducted:

a. the chief district court judge;

b. the clerk of superior court;

c. the district attorney;

d. the public defender, or a criminal defense attorney chosen by the senior resident superior court judge in districts without a public defender;

e. the sheriff; and

f. the public health director.

In the event that approval of one or more of the above-named officials cannot be obtained, the senior resident superior court judge may submit the plan with a statement indicating that despite his or her good-faith effort, such approval could not be obtained.

The Jury Trial Resumption Plan shall be submitted to the Administrative Office of the Courts and the Chief Justice.

* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

This order includes all emergency directives currently in effect: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 21, and 22.

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 13 January 2021.

Other emergency directives issued throughout the pandemic expired on the following dates:

Emergency Directive 6: 30 September 2020

Emergency Directive 7: 28 August 2020

Emergency Directive 16: 20 July 2020

Emergency Directive 17: 29 June 2020

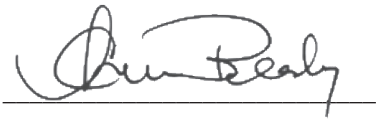
Emergency Directive 19: 29 June 2020

All court officials are encouraged to liberally grant additional relief and accommodations to parties, witnesses, attorneys, and others with business before the courts.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

Issued this the 14th day of December, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 13 April 2020, I issued an order pursuant to N.C.G.S. § 7A-39(b)(1) extending time in certain proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes. I issued an order with an additional extension of time in those proceedings on 30 September 2020 and another order on 30 November 2020. My orders were in response to the public health threat posed by the COVID-19 outbreak and were intended to reduce the spread of infection throughout the state.

A further extension of time pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary. Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

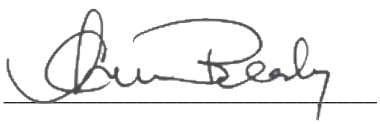
Extension of Time in Bail Bond Forfeiture Proceedings
Pursuant to N.C.G.S. § 7A-39(b)(1)

In proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes for which disposition by entry of final judgment under N.C.G.S. § 15A-544.6 or by grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) is due to occur on or after 14 April 2020 and before or on 30 January 2021, any motion to set aside or any objection to a motion to set aside that is due to be filed within that period shall be deemed to be timely filed if it is filed before the close of business on 31 January 2021.

In order to implement this extension, any entry of final judgment under N.C.G.S. § 15A-544.6 or any grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) due to occur on or after 14 April 2020 and before or on 30 January 2021, is hereby stayed until after the close of business on 31 January 2021.

Additional emergency orders or directives under N.C.G.S. § 7A-39(b) may be entered as necessary to support the continuing operation of essential court functions.

Issued this the 31st day of December, 2020.



Cheri Beasley
Chief Justice
Supreme Court of North Carolina

14 JANUARY 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 14 December 2020, Chief Justice Cheri Beasley issued an order containing a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. I hereby extend some, but not all, of those emergency directives for an additional thirty-day period. The emergency directives in that order not extended by this order are no longer in effect.

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." I am committed to this constitutional mandate. At the same time, the Judicial Branch must fulfill this mandate in ways that prioritize and protect the health and safety of judicial officials and employees and the public.

While I am allowing Emergency Directive 1 to expire, I ask that local judicial officials and employees conduct trials and other proceedings and perform other courthouse functions with caution and with due regard for the COVID-19 situation in their respective judicial districts. This order restores to local judicial officials substantial decision-making authority over when and how to conduct jury trials and other in-person proceedings. Although some emergency directives will expire on 13 January 2021, the risks posed by COVID-19 continue to be serious. I have allowed certain emergency directives to expire because they concern matters best addressed by local judicial officials. Disagreements among local judicial officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution. Appropriate safety precautions may include a temporary courthouse closure when emergency conditions in a particular county warrant such action. As local judicial officials consider what measures to take in addition to the ones set out in this order, I request that they consult their local health directors, as well as COVID-19 protocols adopted by the State and the counties and municipalities in which they operate.

Given the evolving nature of the pandemic, I will be evaluating how best to exercise the emergency powers vested in my office by State law, including N.C.G.S. § 7A-39(b), in the days and weeks ahead. That evaluation may result in the expiration or modification of emergency directives already in force, the issuance of new emergency directives, or both. In the interim, I deem it necessary to extend Emergency Directives 2, 3, 5, 8, 11, 12, 14, 15, and 21 for an additional thirty days in order to ensure the continuing operation of essential judicial functions. I further determine

and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen days;

d. has been diagnosed with COVID-19 within the last fourteen days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the chief district court judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the chief district court judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. The COVID-19 Coordinator shall ensure that relevant safety protocols and mandates are being followed within court facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

a. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;

b. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

c. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

d. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

e. all areas accessed by the public are cleaned daily and that high touch areas are cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

* * *

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

A clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. A clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due. The extension of filing deadlines in this emergency directive does not apply to pleadings and other documents filed in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes.

* * *

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from

law enforcement or courthouse personnel, or who are under five years of age.

During a trial or proceeding, the presiding judicial official may order a juror answering questions during voir dire, an affiant, or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror, witness, or affiant is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

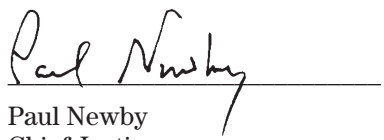
* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 12 February 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 14 January 2021. Issued this the 13th day of January, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

29 JANUARY 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

On 31 December 2020, Chief Justice Cheri Beasley issued an order pursuant to N.C.G.S. § 7A-39(b)(1) extending time in certain proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes. That order was in response to the public health threat posed by the COVID-19 outbreak and was intended to reduce the spread of infection throughout the state.

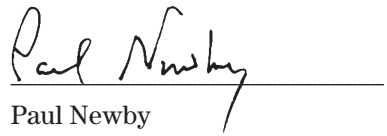
A further extension of time pursuant to N.C.G.S. § 7A-39(b)(1) is now necessary. Accordingly, I hereby determine and declare under N.C.G.S. § 7A-39(b)(1) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state.

Extension of Time Pursuant to N.C.G.S. § 7A-39(b)(1)
in Bail Bond Forfeiture Proceedings

In proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes for which disposition by entry of final judgment under N.C.G.S. § 15A-544.6 or by grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) is due to occur on or after 14 April 2020 and before or on 27 February 2021, any motion to set aside or any objection to a motion to set aside that is due to be filed within that period shall be deemed to be timely filed if it is filed before the close of business on 28 February 2021.

In order to implement this extension, any entry of final judgment under N.C.G.S. § 15A-544.6 or any grant of a motion to set aside under N.C.G.S. § 15A-544.5(d)(4) due to occur on or after 14 April 2020 and before or on 27 February 2021, is hereby stayed until after the close of business on 28 February 2021.

Issued this the 29th day of January, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

13 FEBRUARY 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Last month I issued an order extending a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. I determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State. I hereby extend those emergency directives for an additional thirty-day period in order to ensure the continuing operation of essential judicial functions.

I will use the emergency powers vested in my office by State law, including N.C.G.S. § 7A-39(b), to continue to evaluate the evolving nature of the pandemic in the days and weeks ahead. This evaluation may result in the expiration or modification of emergency directives already in force, the issuance of new emergency directives, or both. Presently, I plan to extend the emergency directives of this order until the public health threat posed by the COVID-19 pandemic has subsided.

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." I am committed to this constitutional mandate. At the same time, the Judicial Branch must fulfill this mandate in ways that prioritize and protect the health and safety of judicial officials and employees and the public. I continue to ask that local judicial officials and employees conduct trials and other proceedings and perform other courthouse functions with caution and with due regard for the COVID-19 situation in their respective judicial districts. Local judicial officials should exercise their substantial decision-making authority over when and how to conduct jury trials and other in-person proceedings while recognizing that the risks posed by COVID-19 continue to be serious.

As stated in my previous order, disagreements among local judicial officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution. Appropriate safety precautions may include a temporary courthouse closure when emergency conditions in a particular county warrant such action. As local judicial officials consider what measures to take in addition to the ones set out in this order, I request that they consult their local health directors, as well as COVID-19 protocols adopted by the State and the counties and municipalities in which they operate.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has

likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen days;

d. has been diagnosed with COVID-19 within the last fourteen days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the chief district court judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the chief district court judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. The COVID-19 Coordinator shall ensure that relevant safety protocols and mandates are being followed within court facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

a. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;

b. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

c. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

d. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

e. all areas accessed by the public are cleaned daily and that high touch areas are cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

* * *

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

A clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. A clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due. The extension of filing deadlines in this emergency directive does not apply to pleadings and other documents filed in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes.

* * *

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement or courthouse personnel, or who are under five years of age.

During a trial or proceeding, the presiding judicial official may order a juror answering questions during voir dire, an affiant, or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror, affiant, or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after

consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

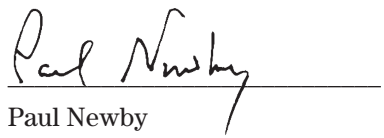
* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 14 March 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 13 February 2021. Issued this the 12th day of February, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

15 MARCH 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

In January of this year, I issued an order extending a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. I determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State. I hereby extend those emergency directives for an additional thirty-day period to ensure the continuing operation of essential judicial functions.

I will use the emergency powers vested in my office by State law, including N.C.G.S. § 7A-39(b), to continue to evaluate the evolving nature of the pandemic in the days and weeks ahead. This evaluation may result in the expiration or modification of emergency directives already in force, the issuance of new emergency directives, or both. Presently, I plan to extend the emergency directives of this order until the public health threat posed by the COVID-19 pandemic has subsided.

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." I am committed to this constitutional mandate. At the same time, the Judicial Branch must fulfill this mandate in ways that prioritize and protect the health and safety of judicial officials and employees and the public. I continue to ask that local judicial officials and employees conduct trials and other proceedings and perform other courthouse functions with caution and with due regard for the COVID-19 situation in their respective judicial districts. Local judicial officials should exercise their substantial decision-making authority over when and how to conduct jury trials and other in-person proceedings while recognizing that the risks posed by COVID-19 continue to be serious.

As stated in my previous order, disagreements among local judicial officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution. Appropriate safety precautions may include a temporary courthouse closure when emergency conditions in a particular county warrant such action. As local judicial officials consider what measures to take in addition to the ones set out in this order, I request that they consult their local health directors, as well as COVID-19 protocols adopted by the State and the counties and municipalities in which they operate.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has

likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen days;

d. has been diagnosed with COVID-19 within the last fourteen days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the chief district court judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the chief district court judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. The COVID-19 Coordinator shall ensure that relevant safety protocols and mandates are being followed within court facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

a. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;

b. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

c. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

d. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

e. all areas accessed by the public are cleaned daily and that high touch areas are cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

* * *

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

A clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. A clerk may, at his or her discretion, require that access

to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due. The extension of filing deadlines in this emergency directive does not apply to pleadings and other documents filed in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes.

* * *

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement or courthouse personnel, or who are under five years of age.

During a trial or proceeding, the presiding judicial official may order a juror answering questions during voir dire, an affiant, or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror, affiant, or witness is actively speaking and only

if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

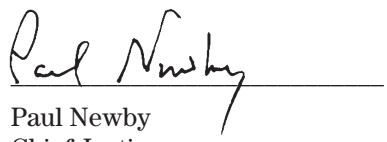
* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 11 April 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 15 March 2021. Issued this the 12th day of March, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

12 APRIL 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

In January of this year, I issued an order extending a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. I determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State. I hereby extend those emergency directives for an additional thirty-day period to ensure the continuing operation of essential judicial functions.

I will use the emergency powers vested in my office by State law, including N.C.G.S. § 7A-39(b), to continue to evaluate the evolving nature of the pandemic in the days and weeks ahead. This evaluation may result in the expiration or modification of emergency directives already in force, the issuance of new emergency directives, or both. Presently, I plan to extend the emergency directives of this order until the public health threat posed by the COVID-19 pandemic has subsided.

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." I am committed to this constitutional mandate. At the same time, the Judicial Branch must fulfill this mandate in ways that prioritize and protect the health and safety of judicial officials and employees and the public. I continue to ask that local judicial officials and employees conduct trials and other proceedings and perform other courthouse functions with due regard for the COVID-19 situation in their respective judicial districts. Local judicial officials should exercise their substantial decision-making authority over when and how to conduct jury trials and other in-person proceedings while recognizing that the risks posed by COVID-19 continue to be serious.

As stated in my previous order, disagreements among local judicial officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution. Appropriate safety precautions may include a temporary courthouse closure when emergency conditions in a particular county warrant such action. As local judicial officials consider what measures to take in addition to the ones set out in this order, I request that they consult their local health directors, as well as COVID-19 protocols adopted by the State and the counties and municipalities in which they operate.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has

likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen days;

d. has been diagnosed with COVID-19 within the last fourteen days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 8

Marriages establish and implicate numerous rights and legal obligations (e.g., military deployments, social security benefits, pensions, workers' compensation benefits, and disability benefits). The date of marriage may impact these rights and legal obligations. It is therefore essential that individuals continue to have access to the performance of marriage ceremonies during this time.

Accordingly, magistrates shall continue to perform marriage ceremonies. Marriage ceremonies before magistrates shall be held in a location that is approved by the chief district court judge and that is capable of allowing all persons in attendance to practice social distancing. Additionally, the chief district court judge may restrict the hours and times during which marriage ceremonies are conducted, may require appointments for marriage ceremonies, and may restrict attendance at the marriage ceremonies.

* * *

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. The COVID-19 Coordinator shall ensure that relevant safety protocols and mandates are being followed within court facilities.

Emergency Directive 12

Each senior resident superior court judge shall, for each facility in his or her district, ensure that:

a. intervals of at least six feet in every direction are marked with tape or other visible markers in all areas where the public is expected to congregate or wait in line;

b. the maximum allowable occupancy of each courtroom or meeting space is established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction;

c. the established maximum occupancy is prominently posted at the entrances to each courtroom or meeting space;

d. hand sanitizer is, at a minimum, available at the entry and exit of the facility and, preferably, at all high touch areas of the facility including doorways, service counters, stairwells, and elevators; and

e. all areas accessed by the public are cleaned daily and that high touch areas are cleaned periodically throughout the day (high touch areas include, but are not limited to doorknobs, water fountains, handrails, elevator walls and buttons, bathroom faucets and dispensers, and reception desks or counters).

* * *

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

A clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. A clerk may, at his or her discretion, require that access

to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due. The extension of filing deadlines in this emergency directive does not apply to pleadings and other documents filed in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes.

* * *

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility and when they are or may be within six feet of another person. A face shield may be used in addition to, but not as a substitute for, a face covering.

For purposes of this emergency directive, a "face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A "face shield" means an item of personal protective equipment that consists of a plastic barrier, usually attached to a helmet or headband, that shields the wearer's face from splashes, coughs, or sneezes.

The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement or courthouse personnel, or who are under five years of age.

During a trial or proceeding, the presiding judicial official may order a juror answering questions during voir dire, an affiant, or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be removed while the juror, affiant, or witness is actively speaking and only

if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

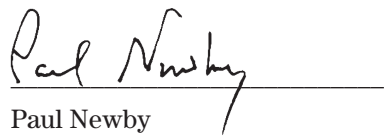
* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 9 May 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 12 April 2021. Issued this the 9th day of April, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

10 MAY 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." The Judicial Branch is committed to this constitutional mandate. Over the past year, the Judicial Branch has faced the challenge of fulfilling this mandate while prioritizing and protecting the health and safety of judicial officials and employees and the public.

In January of this year, I issued an order extending a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. On 6 January 2021, I requested that Governor Cooper designate courthouse personnel as frontline essential workers. Courthouse personnel received that designation and early access to the COVID-19 vaccine beginning 3 March 2021. The public can now access the vaccine as well.

Given the availability of the vaccine, the immediate threat of COVID-19 is lessening, and many aspects of life are moving toward pre-pandemic normal. Nonetheless, the COVID-19 outbreak resulted in catastrophic conditions as defined by N.C.G.S. § 7A-39(b)(2) and created health and safety concerns that have contributed to an accumulation of pending cases in our judicial system. I determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State. Given the grave impact of further delaying justice, it is imperative that the Judicial Branch do its best to continue to move closer to fully opening the courts.

The order I issue today continues to recognize that local courthouses are in the best position to address health and safety concerns. It also continues to provide the tools necessary to administer justice without delay while implementing appropriate safety precautions. I hereby extend for an additional thirty-day period only those emergency directives that are necessary to continue to fulfill our constitutional mandate while protecting stakeholders and the public.

Disagreements among local judicial officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution. Senior resident superior court judges are strongly encouraged to do whatever they can to resume jury trials without delay. To do so, they must weigh local conditions against the exceedingly negative impacts of further delaying justice.

Emergency Directive 2

The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person who has likely been exposed to COVID-19 should not enter the courthouse. A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction. For purposes of this order, a person who has likely been exposed to COVID-19 is defined as any person who:

a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;

b. is under a direction to quarantine, isolate, or self-monitor;

c. has been exposed to a person who tested positive for COVID-19 within the last fourteen days;

d. has been diagnosed with COVID-19 within the last fourteen days; or

e. resides with or has been in close contact with any person in the abovementioned categories.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must

be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

Emergency Directive 11

Each senior resident superior court judge shall, for each facility in his or her district, serve as or designate a COVID-19 Coordinator. In districts with more than one court facility, the same coordinator may be designated for multiple facilities. In consultation with local health officials, each senior resident superior court judge shall ensure that proper safety protocols are met depending on the courthouse location, which can include social distancing requirements.

* * *

Emergency Directive 14

Clerks of superior court are directed to ensure that filings may be submitted during normal business hours and that access to public records is provided.

A clerk may, at his or her discretion, require that filings be submitted using a secure drop box to limit face-to-face interactions between staff and the public. A clerk may, at his or her discretion, require that access to public records be by appointment only and may limit the hours during which such access is available.

Emergency Directive 15

To further minimize foot traffic in the courthouses, attorneys and litigants are encouraged to submit filings by mail to the greatest extent possible. Beginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five business days of the date the filing is due. The extension of filing deadlines in this emergency directive will not be renewed following the expiration of this order. The extension of filing deadlines in this emergency directive does not apply to pleadings and other documents filed in proceedings for forfeiture of bail bonds under Part 2 of Article 26 of Chapter 15A of the General Statutes.

* * *

Emergency Directive 21

All persons who are in a court facility are required to wear a face covering while they are in common areas of the facility. The clerks of superior court shall post a notice of this requirement at the entrance to every court facility in their counties.

This face-covering requirement does not apply to persons who cannot wear a face covering due to health or safety reasons, who are actively eating or drinking, who are communicating with someone who is hearing-impaired in a way that requires the mouth to be visible, who are temporarily removing their face covering to secure medical services or for identification purposes, who are complying with a directive from law enforcement or courthouse personnel, or who are under five years of age.

During a trial or proceeding, the presiding judicial official may order a juror answering questions during voir dire, an affiant, or a testifying witness to remove his or her face covering so that facial expressions may be observed. Face coverings removed for this purpose may only be

removed while the juror, affiant, or witness is actively speaking and only if he or she is six feet or more away from any other person. The presiding judicial official may, upon a showing of good cause and after consideration of all appropriate health concerns, exempt a criminal defendant from the requirement to wear a face covering during his or her jury trial.

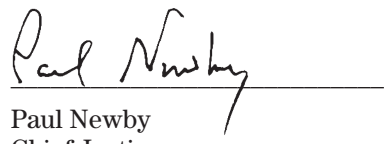
* * *

Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 6 June 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 10 May 2021. Issued this the 7th day of May, 2021.



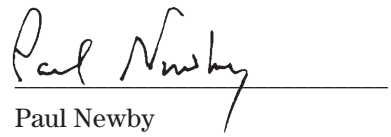
Paul Newby
Chief Justice
Supreme Court of North Carolina

14 MAY 2021 MODIFICATION
OF THE 10 MAY 2021 ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

In January of this year, I issued an order extending a number of emergency directives in response to the public health threat posed by the COVID-19 pandemic. As recognized in the 10 May 2021 order, the immediate threat of COVID-19 is lessening, and many aspects of life are moving toward pre-pandemic normal. Yesterday, the Centers for Disease Control and Prevention modified its position regarding face coverings. I now modify the 10 May 2021 order to recognize that reality.

This modification eliminates Emergency Directive 21 that pertains to face coverings in court facilities and instead leaves that decision to the informed discretion of local court officials. The remaining emergency directives from the 10 May 2021 order will remain in place until they expire on 6 June 2021. Local court officials are in the best position to address health and safety concerns. Disagreements among local court officials over proposed safety precautions should be referred to the senior resident superior court judge for resolution.

This order modification becomes effective immediately. Issued this the 14th day of May, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

7 JUNE 2021
ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open" and that "justice shall be administered without favor, denial, or delay." The Judicial Branch is committed to this constitutional mandate. Over the past year, the Judicial Branch has faced the challenge of fulfilling this mandate while prioritizing and protecting the health and safety of judicial officials and employees and the public.

I determine and declare under N.C.G.S. § 7A-39(b)(2) that catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this State. Those conditions created health and safety concerns that have contributed to an accumulation of pending cases in our judicial system. I hereby extend for an additional thirty-day period only those emergency directives that provide the necessary tools to effectively dispose of those accumulated cases and therefore administer justice without delay.

Given the grave impact of further delaying justice, it is imperative that the Judicial Branch do its best to continue to move toward fully opening the courts. Senior resident superior court judges are strongly encouraged to do whatever they can to resume jury trials without delay.

Emergency Directive 3

Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmissions.

Judicial officials who conduct a proceeding that includes remote audio and video transmissions pursuant to this emergency directive must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process. To this end:

a. A party may, for good cause, object to the use of remote audio and video transmissions. If good cause is not shown, the court may conduct a proceeding that includes audio and video transmissions.

b. If a criminal defendant's right to confront witnesses or to be present is implicated by the proceeding that is to be conducted, then the defendant must waive any right to in-person confrontation or presence before remote audio and video transmissions may be used.

c. If the proceeding is required by law to be conducted in a way that maintains confidentiality, then confidentiality must

be maintained notwithstanding the use of remote audio and video transmissions.

d. If the proceeding is required by law to be recorded, then any remote audio and video transmissions that are used must be recorded.

e. Each party to a proceeding that includes remote audio and video transmissions must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney.

The authorization in this emergency directive does not extend to proceedings that involve a jury.

This emergency directive does not apply to proceedings in which the use of remote audio and video transmissions is already permitted by law. Those proceedings should continue as provided by law.

* * *

Emergency Directive 5

When it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice be verified, or that an oath be taken, it shall be sufficient if the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

(Signed) _____"

This emergency directive does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

* * *

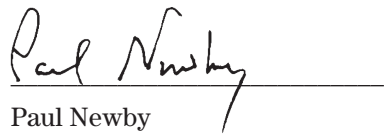
Expiration of this Emergency Order and Guidance to Judicial System Stakeholders

Pursuant to N.C.G.S. § 7A-39(b)(2), the emergency directives contained in this order expire on 4 July 2021.

I urge local judicial officials to exercise their own authority to grant additional relief and accommodations as necessary to protect courthouse personnel and the public while honoring the Judicial Branch's commitment to open courts and the prompt administration of impartial justice. Additional information about the Judicial Branch's response

to the COVID-19 outbreak is available at https://www.nccourts.gov/covid-19.

This order becomes effective on 7 June 2021. Issued this the 4th day of June, 2021.



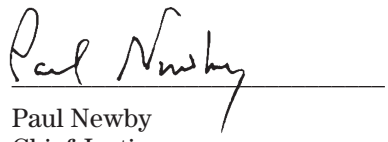
Paul Newby
Chief Justice
Supreme Court of North Carolina

21 JUNE 2021 REVOCATION
OF THE 7 JUNE 2021 ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

Earlier this month, I issued an order extending only those emergency directives that provide the necessary tools to effectively address the cases accumulated during the COVID-19 pandemic. Those tools allowed the Judicial Branch to continue to administer justice without delay.

Last Friday, Governor Cooper signed into law Senate Bill 255 that codified those essential tools for future use. These legislative changes render the 7 June 2021 order unnecessary. Effective immediately, I hereby rescind my 7 June 2021 order. No more Emergency Directives remain in place.

Issued this the 21st day of June, 2021.



Paul Newby
Chief Justice
Supreme Court of North Carolina

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 and section 7A-49.5 of the General Statutes of North Carolina, the Court hereby amends the General Rules of Practice for the Superior and District Courts. This order affects Rules 5, 5.1 (new rule), 22, and 27 (new rule).

* * *

Rule 5. Filing of Pleadings and Other Documents

(a) **Electronic Filing.** Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

(b) **Paper Filing.** Documents filed with the court in paper should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed with the court in paper must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

Comment

The North Carolina Judicial Branch will implement a statewide electronic-filing and case management system beginning in 2021. The system will be made available across the state in phases over a five-year period.

Subsection (a) of Rule 5 of the General Rules of Practice lists those contexts in which electronic filing already exists and serves as a placeholder until the new electronic-filing and case-management system is available. As the new system is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

Rule 5. Filing of Pleadings and Other Documents in Counties with *Odyssey*

(a) **Scope.** This rule applies only in those counties that have implemented Odyssey, the Judicial Branch's new electronic-filing and case-management system. The Administrative Office of the Courts maintains a list of the counties with *Odyssey* at https://www.nccourts.gov/ecourts. In a county without *Odyssey*, a person must proceed under Rule 5.1 of these rules.

(b) **Electronic Filing in *Odyssey*.**

(1) **Registration.** A person must register for a user account to file documents electronically. The Administrative Office of the Courts must ensure that the registration process includes security procedures consistent with N.C.G.S. § 7A-49.5(b1).

(2) **Requirement.** An attorney must file pleadings and other documents electronically. A person who is not represented by an attorney is encouraged to file pleadings and other documents electronically but is not required to do so.

(3) **Signing a Document Electronically.** A person may sign a document electronically by typing his or her name in the document preceded by "/s/."

(4) **Time**.

a. **When Filed.** A document is filed when it is received by the court's electronic-filing system, as evidenced by the file stamp on the face of the document.

b. **Deadline.** If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date.

(5) **Relief if Emergency Prevents Timely Filing.** If an *Odyssey* service outage, natural disaster, or other emergency prevents an attorney from filing a document in a timely manner by use of the electronic-filing system, then the attorney may file a motion that asks the court for any relief that is permitted by law.

(6) **Orders, Judgments, Decrees, and Court Communications.** The court may sign an order, judgment, decree, or other document electronically and may file a document electronically. The court may also send notices

and other communications to a person by use of the electronic-filing system.

(c) **Paper Filing.** Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

(d) **Service**. Service of pleadings and other documents must be made as provided by the General Statutes. A Notification of Service generated by the court's electronic-filing system is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

(e) **Private Information**. A person should omit or redact nonpublic and unneeded sensitive information in a document before filing it with the court.

(f) **Business Court Cases**. The filing of documents with the North Carolina Business Court is governed by the North Carolina Business Court Rules. This rule defines how a person must file a document "with the Clerk of Superior Court in the county of venue" under Rule 3.11 of the North Carolina Business Court Rules in counties with *Odyssey*.

Comment

The North Carolina Judicial Branch will implement *Odyssey*, a statewide electronic-filing and case management system, beginning in July 2021. The system will be made available across the state in phases over a five-year period.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b)(2) of Rule 5 requires an attorney to file pleadings and other documents electronically. An attorney who seeks relief from this filing requirement for a particular document should be prepared to show the existence of an exceptional circumstance. In an exceptional circumstance, the attorney should exercise due diligence to file the document electronically before the attorney asks the court for relief.

Subsection (b)(5) of Rule 5 describes the process of asking the court for relief if an emergency prevents an attorney from filing a document electronically in a timely manner. Subsection (b)(5) should not be construed to expand the court's authority to extend time or periods of limitation. The court will provide relief only as permitted by law.

The North Carolina Business Court currently accepts filings through *eFlex*, a legacy electronic filing and case-management system. Until *Odyssey* is implemented both in the Business Court and in the county of venue, duplicate filings in Business Court cases will still be required (see Rule 3.11 of the North Carolina Business Court Rules). Subsection (f) of Rule 5 of the General Rules of Practice clarifies that in Business Court cases, Rule 5 governs filings "with the Clerk of Superior Court in the county of venue."

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

Rule 5.1. Filing of Pleadings and Other Documents in Counties Without *Odyssey*

(a) **Scope**. This rule applies only in those counties that have not yet implemented *Odyssey*, the Judicial Branch's new electronic-filing and case management system. In a county with *Odyssey*, a person must proceed under Rule 5 of these rules.

(b) **Electronic Filing**. Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the legacy North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

(c) **Paper Filing**. Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant

the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

Comment

The North Carolina Judicial Branch will implement *Odyssey*, a statewide electronic-filing and case management system, beginning in July 2021. The system will be made available across the state in phases over a five-year period.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b) of Rule 5.1 lists those contexts in which electronic filing exists in the counties without *Odyssey*.

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

~~**Rule 22. Local Court Rules**~~

~~In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge *assigned to hold a session of court in his district* is furnished with a copy of the local court rules at or before the commencement of his assignment.~~

Rule 22. Local Rules of Practice and Procedure

(a) **Purpose**. Local rules of practice and procedure for a judicial district must be supplementary to, and not inconsistent with, the General Rules of Practice. Local rules should be succinct and not unnecessarily duplicative of statutes or Supreme Court rules.

(b) **Enforcement**. A trial judge must enforce the local rules of the judicial district in which the trial judge is assigned to hold court. This enforcement provision does not apply to cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules.

* * *

Rule 27. Sealed Documents and Protective Orders

(a) **General Principles.**

(1) **"Persons" Defined**. References to "persons" in this rule include parties and nonparties who are interested in the confidentiality of a document.

(2) **"Provisionally Under Seal" Defined**. A document is "provisionally under seal" if it is filed electronically with a confidential designation in the electronic-filing system or if it is filed in paper inside of a sealed envelope or container marked "Contains Confidential Information – Provisionally Under Seal."

(3) **Open Courts**. A person who appears before the court should strive to file documents that are open to public inspection and should file a motion to seal a document only if necessary.

(4) **Scope**. This rule does not apply to documents that are closed to public inspection by operation of statute or other legal authority, nor does it apply to search warrants and other criminal investigatory documents. This rule does not affect a person's responsibility to omit or redact private information from court documents pursuant to statute or other legal authority.

(b) **Procedure for Sealing a Document**.

(1) **Filing**. A person who seeks to have a document (or part of a document) sealed by the court must file the document provisionally under seal and file a motion that asks the court to seal the document. The document must be filed on the same day as the motion.

(2) **Motion**. The motion to seal must contain:

a. a nonconfidential description of the document the movant is asking to be sealed;

b. the circumstances that warrant sealing the document;

c. an explanation of why no reasonable alternative to sealing the document exists;

d. a statement that specifies whether the document should be accessible only to counsel of record (as opposed to the parties);

e. a statement that specifies how long the document should be sealed and how the document should be handled upon unsealing;

f. a statement, if applicable, that (i) the movant is filing the document provisionally under seal because another person has designated the document as confidential and the terms of a protective order require

the movant to file the document provisionally under seal and (ii) the movant has unsuccessfully sought the consent of the other person to file the document unsealed; and

g. a statement, if applicable, that a nonparty who designated the document as confidential under the terms of a protective order has been served with a copy of the motion and notified of the right to file a brief in support of the motion.

(3) **Briefing**. A person may file a brief in support of or in opposition to the motion no later than twenty days after having been served with the motion.

(4) **Hearing**. The movant must notice a hearing on the motion as soon as practicable after the briefing period ends.

(5) **Disclosure Pending Decision**. Until the court rules on the motion, a document that is provisionally under seal may be disclosed only to counsel of record and unrepresented parties unless otherwise ordered by the court or agreed to by the parties.

(6) **Decision by Court**. The court may rule on the motion with or without a hearing. In the absence of a motion or brief that justifies sealing the document, the court may order that the document (or part of the document) be made public.

(7) **Public Version of Document**. If the movant seeks to have only part of a document sealed by the court, then the movant must file a public version of the document no later than ten days after filing the document provisionally under seal. The public version of the document may include redactions and omissions, but the redactions and omissions should be as limited as practicable. If the movant seeks to have the entire document sealed, then the movant must file a notice that the entire document has been filed provisionally under seal instead of filing a public version of the document. The notice must contain a nonconfidential description of the document.

(c) **Protective Orders**. The procedure for sealing a document in subsection (b) of this rule should not be construed to change any requirement or standard that governs the issuance of a protective order. The court may therefore enter a protective order that contains standards

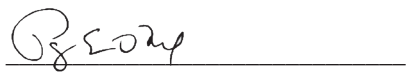
and processes for the handling, filing, and service of a confidential document. To the extent that a proposed protective order outlines a procedure for sealing a confidential document, the proposed protective order should include (or incorporate by reference) the procedures described in subsection (b) of this rule. Persons are encouraged to agree on terms for a proposed protective order before submitting it to the court.

* * *

These amendments to the General Rules of Practice for the Superior and District Courts become effective on 10 May 2021.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 21st day of April 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of April 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA eFILING PILOT PROJECT

Pursuant to section 7A-34 and section 7A-49.5 of the General Statutes of North Carolina, the Court hereby amends the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project. This order affects Rules 1 and 5.

* * *

~~**Rule 1. Purpose and Scope**~~

~~**1.1. Citation to Rules.** These rules shall be known as the "Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project," and may be cited as the "eFiling Rules." A particular rule may be cited as "eFiling Rule ___."~~

~~**1.2. Authority and Effective Date.** The eFiling Rules are promulgated by the Supreme Court of North Carolina pursuant to G.S. 7A-49.5. They are effective as of May 15, 2009, and as amended from time to time.~~

~~**1.3. Scope and Purpose.** The eFiling Rules apply to civil superior court cases and to foreclosures under power of sale filed on or after the effective date in Chowan and Davidson Counties. Upon addition of Wake County to the pilot project by the North Carolina Administrative Office of the Courts (the "AOC"), these rules shall apply to civil superior court cases and to foreclosures under power of sale filed in Wake County on or after the effective date of the implementation of the pilot project in Wake County, and the public announcement thereof by AOC. In addition, these rules apply to any designated case types and in any counties upon the implementation of the eFiling project in any other counties and the public announcement thereof by the AOC. In general, these rules initially allow, but do not mandate, electronic filing by North Carolina licensed attorneys and court officials of pleadings and other documents required to be filed with the court by the North Carolina Rules of Civil Procedure ("Rules of Civil Procedure"), or otherwise under North Carolina law, and permit electronic notification of the electronic filing of documents between attorneys. Initially, they do not permit electronic filing by pro se parties or attorneys not licensed by the State of North Carolina, and they do not permit electronic filing of documents in cases not initially filed electronically. Upon the addition of Alamance County or other counties to the pilot project by the AOC, the electronic filing of civil domestic violence cases by *pro se* parties, acting through domestic violence center personnel approved by the Chief District Court Judge, shall be permitted upon the implementation of the eFiling project in any such counties and the public announcement thereof by AOC.~~

~~**1.4. Integration with Other Rules.** These rules supplement the Rules of Civil Procedure and the General Rules of Practice for Superior and District Courts (the "General Rules"). The filing and service of documents in accordance with the eFiling Rules is deemed to comply with the Rules of Civil Procedure and the General Rules. If a conflict exists between the eFiling Rules and the Rules of Civil Procedure or the General Rules, the eFiling Rules shall control.~~

Rule 1. Purpose and Scope

1.1. Purpose. These rules define practice and procedure for the legacy North Carolina eFiling Pilot Project, which will phase out beginning in July 2021.

1.2. Scope. These rules apply only in those counties that (i) have not yet implemented *Odyssey*, the Judicial Branch's new electronic-filing and case management system, and (ii) still participate in the legacy North Carolina eFiling Pilot Project. The Administrative Office of the Courts maintains a list of those counties and case types to which these rules apply at https://www.efiling.nccourts.org/.

Comment

The North Carolina Judicial Branch will implement *Odyssey*, a statewide electronic-filing and case management system, beginning in July 2021. The system will be made available across the state in phases over a five-year period.

Counties that currently have access to *eFlex*, a legacy electronic-filing and case-management system, through the North Carolina eFiling Pilot Project will continue to have access to that legacy system until it is replaced by *Odyssey*.

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

Rule 5. Electronic Filing and Service

5.1. Permissive Electronic Filing. Pending implementation of revised rules by the North Carolina Supreme Court, electronic filing is permitted only to commence a proceeding or in a proceeding that was commenced electronically. Electronic filing is not required to commence a proceeding. Subsequent filings made in a proceeding commenced electronically may be electronic or non-electronic at the option of the filer.

5.2. Exceptions to Electronic Delivery. Pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the

Rules of Civil Procedure must be served as provided in those rules and not by use of the electronic filing and service system. Unless otherwise provided in a case management order or by stipulation, filing by or service upon a *pro se* party is governed by eFiling Rule 5.3.

5.3. *Pro se* Parties. ~~Except as otherwise permitted in these Rules, a party not represented by counsel shall file, serve and receive documents pursuant to the Rules of Civil Procedure and the General Rules~~. A party not represented by counsel may file electronically in civil domestic violence cases through domestic violence center personnel who have been issued an electronic identity. Service upon a party not represented by counsel may not be made by use of the electronic filing and service system.

5.4. Format. Documents must be filed in PDF or TIFF format, or in some other format approved by the court, in black and white only, unless color is required to protect the evidentiary value of the document, and scanned at 300 dots per inch resolution.

5.5. Cover Sheet Not Required. Completion of the case initiation requirements of the electronic filing and service system, if it contains all the required fields and critical elements of the filing, shall constitute compliance with the General Rules ~~as well as G.S. 7A-34.1~~, and no separate AOC cover sheet is required.

5.6. Payment of Filing Fees. Payment of any applicable filing and convenience fees must be done at the time of filing through the electronic payment component of the electronic filing and service system. Payments shall not include service of process fees or any other fees payable to any entity other than the clerk of superior court.

5.7. Effectiveness of Filing. Transmission of a document to the electronic filing system in accordance with the eFiling Rules, together with the receipt by the eFiler of the automatically generated notice showing electronic receipt of the submission by the court, constitutes filing under the North Carolina General Statutes, the Rules of Civil Procedure, and the General Rules. An electronic filing is not deemed to be received by the court without receipt by the eFiler of such notice. If, upon review by the staff of the clerk of superior court, it appears that the filing is inaccessible or unreadable, or that prior approval is required for the filing under G.S. 1-110, or for any other authorized reason, the clerk's office shall send an electronic notice thereof to the eFiler. Upon review and acceptance of a completed filing, personnel in the clerk's office shall send an electronic notice thereof to the eFiler. If the filing is of a case initiating pleading, personnel in the clerk's office shall assign a case number to the filing and include that case number in said notice.

As soon as reasonably possible thereafter, the clerk's office shall index or enter the relevant information into the court's civil case processing system (VCAP).

5.8. Certificate of Service. Pending implementation of the court's document management system, and the integration of the electronic filing and service system with the court's civil case processing system, a notice to the eFiler showing electronic receipt by the court of a filing does not constitute proof of service of a document upon any party. A certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished for applicable parties and indicating how service was or will be accomplished as to those parties.

5.9. Procedure When No Receipt Is Received. If a receipt with the status of "Received" is not received by the eFiler, the eFiler should assume the filing has not occurred. In that case, the eFiler shall make a paper filing with the clerk and serve the document on all other parties by the most reasonably expedient method of transmission available to the eFiler, except that pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules.

5.10. Retransmission of Filed Document. After implementation of the court's document management system, if, after filing a document electronically, a party discovers that the version of the document available for viewing through the electronic filing and service system is incomplete, illegible, or otherwise does not conform to the document as transmitted when filed, the party shall notify the clerk immediately and, if necessary, transmit an amended document, together with an affidavit explaining the necessity for the transmission.

5.11. Determination of Filing Date and Time. Documents may be electronically filed 24 hours a day, except when the system is down for maintenance, file saves or other causes. For the purpose of determining the timeliness of a filing received pursuant to Rule 5.7, the filing is deemed to have occurred at the date and time recorded on the receipt showing a status of "Received."

5.12. Issuance of Summons. At case initiation, the eFiler shall include in the filing one or more summons to be issued by the clerk. Upon the electronic filing of a counterclaim, crossclaim, or third-party complaint, the eFiler may include in the filing one or more summons to be issued by the clerk. Pursuant to Rule 4 of the Rules of Civil Procedure, the clerk shall sign and issue those summons and scan them into the electronic filing and service system. In civil domestic violence

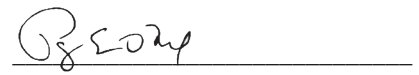
cases, magistrates are authorized to sign and issue summons electronically or in paper form. The eFiler shall print copies of the filed pleading and summons to be used for service of process. Copies of documents to be served, any summons, and all fees associated with service shall be delivered by the eFiler to the process server. Copies of civil domestic violence summons, complaints, orders, and other case documents may be transmitted by the magistrate or clerk to the sheriff electronically or in paper form for service of printed copies thereof. Documents filed subsequent to the initial pleading shall contain a certificate of service as provided in Rule 5.8. Returns of service by sheriff's personnel of civil domestic violence summons, complaints, orders, and other case documents may be transmitted to and filed with the clerk of superior court via the electronic filing system or in paper form.

* * *

These amendments to the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project become effective on 10 May 2021.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 21st day of April 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of April 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1C, Section .0200, *Rules Governing the Practical Training of Law Students*, be amended as shown on following attachments:

ATTACHMENT A-1: 27 N.C.A.C. 1C, Section .0200, Rule .0201, *Purpose*

ATTACHMENT A-2: 27 N.C.A.C. 1C, Section .0200, Rule .0202, *Definitions*

ATTACHMENT A-3: 27 N.C.A.C. 1C, Section .0200, Rule .0203, *Eligibility*

ATTACHMENT A-4: 27 N.C.A.C. 1C, Section .0200, Rule .0204, *Form and Duration of Certification*

ATTACHMENT A-5: 27 N.C.A.C. 1C, Section .0200, Rule .0205, *Supervision*

ATTACHMENT A-6: 27 N.C.A.C. 1C, Section .0200, Rule .0206, *Activities*

ATTACHMENT A-7: 27 N.C.A.C. 1C, Section .0200, Rule .0207, *Use of Student's Name*

ATTACHMENT A-8: 27 N.C.A.C. 1C, Section .0200, Rule .0208, *Student Practice Placements*

ATTACHMENT A-9: 27 N.C.A.C. 1C, Section .0200, Rule .0209, *Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic*

ATTACHMENT A-10: 27 N.C.A.C. 1C, Section .0200, Rule .0210, *Pro Bono Activities*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the amendments to the Rules and Regulations of the North Carolina State Bar, as shown on Attachment A, were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 21st day of April, 2021.

s/Paul Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of April, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0201 PURPOSE

The rules in this subchapter are adopted for the following purposes: to support the development of ~~clinical~~ experiential legal education programs at North Carolina's law schools in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education; to enable law students to obtain supervised practical training while serving as ~~legal interns~~ certified law students for government agencies; and to assist law schools in providing substantial opportunities for student participation and experiential education in *pro bono* service.

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; September 25, 2019; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0202 DEFINITIONS

The following definitions shall apply to the terms used in this section:

(a) Clinical legal education program — Experiential educational program that engages students in "real world" legal matters through supervised practice experience. Under the supervision of a faculty member or site supervisor who is accountable to the law school, students assume the role of a lawyer either as a protégé, lead counsel, or a member of a lawyer team.

. . .

~~(c) Field placement – Practical training opportunities within a law school's clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as "externships."~~

(c) Certified law student - A law student who is certified to work in conjunction with a supervising attorney to provide legal services to clients under the provisions of this subchapter.

(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public ~~defenders~~ defender's office or a district attorney's office.

. . .

~~(g) Legal intern - A law student who is certified to provide supervised representation to clients under the provisions of the rules of this subchapter.~~

~~(h)~~(g) Legal services organization - A nonprofit North Carolina organization organized to operate in accordance with N.C. Gen. Stat. § 84-5.1.

(~~i~~h) Pro bono activity —~~.~~ An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(~~j~~i) Rules of Professional Conduct —~~.~~ The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(~~k~~j) Site supervisor —~~.~~ The attorney at a ~~field~~student practice placement who assumes administrative responsibility for the ~~legal intern~~certified law student program at the ~~field~~ placement and provides the ~~notices~~ statements to the State Bar and the certified law student's law school required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a ~~field~~student practice placement.

(1) Externship - A course within a law school's clinical legal education program in which the law school places the student in a legal practice setting external to the law school. An externship may include placement at a government agency.

(2) Government internship - A practical training opportunity in which the student is placed in a government agency and no law school credit is earned. A government internship may be facilitated by the student's law school or obtained by the student independently.

(3) Internship - A practical training opportunity in which the student is placed in a legal practice setting external to the law school and no law school credit is earned. An internship may be facilitated by the student's law school or obtained by the student independently.

(k) Supervising attorney - An active member of the North Carolina State Bar, or an attorney who is licensed in another jurisdiction as appropriate for the legal work to be undertaken, who has practiced law as a full-time occupation for at least two years, and who supervises one or more ~~legal interns~~certified law students pursuant to the requirements of the rules in this subchapter.

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
June 7, 2001; March 6, 2002; March 6, 2008;
September 25, 2019; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0203 ELIGIBILITY

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

. . .

(b) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and legal education to perform as a ~~legal intern~~ certified law student, which education shall include satisfaction of the prerequisites for participation in the clinic, externship, or ~~field~~ other student practice placement;

. . .

(e) ~~certify~~ attest in writing that he or she has read the North Carolina Rules of Professional Conduct and is familiar with the opinions interpretive thereof.

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; September 25, 2019; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0204 FORM AND DURATION OF CERTIFICATION

Upon receipt of the written materials required by Rule .0203(b) and (e) and Rule .0205(b), the North Carolina State Bar shall certify that the law student may serve as a ~~legal intern.~~certified law student. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 consecutive months or until the announcement of the results of the first bar examination following the ~~legal intern's~~certified law student's graduation whichever is earlier. If the ~~legal intern~~certified law student passes the bar examination, the certification shall remain in effect until the ~~legal intern~~certified law student is sworn-in by a court and admitted to the bar. For the duration of the certification, the certification shall be transferrable from one student practice placement or law school clinic to another student practice placement or law school clinic, provided that (i) all student practice placements are approved by the law school prior to the certified law student's graduation, and (ii) the supervision and filing requirements in Rule .0205 of this subchapter are at all times satisfied.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the ~~legal intern's~~certified law student's law school, authorized to act by the dean of the law school, that the ~~legal intern~~student has not graduated but is no longer enrolled;

(2) notice from a representative of the ~~legal intern's~~certified law student's law school, authorized to act by the dean of the law school, that the ~~legal intern~~student is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the ~~legal intern~~certified law student and that no other qualified attorney has assumed the supervision of the ~~legal intern~~student; or

(4) notice from a judge before whom the ~~legal intern~~certified law student has appeared that the certification should be withdrawn.

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; September 25, 2019; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0205 SUPERVISION

(a) Supervision Requirements. A supervising attorney shall:

(1) for a law school clinic, concurrently supervise an unlimited number of ~~legal interns~~certified law students if the supervising attorney is a full-time, part-time, or adjunct member of a law school's faculty or staff whose primary responsibility is supervising ~~legal interns~~certified law students in a law school clinic and, further provided, the number of ~~legal interns~~certified law students concurrently supervised is not so large as to compromise the effective and beneficial practical training of the ~~legal interns~~certified law students or the competent representation of clients;

(2) for a ~~field~~student practice placement, concurrently supervise no more than two ~~legal interns~~certified law students; however, a greater number of ~~legal interns~~certified law students may be concurrently supervised by a single supervising attorney if ~~the~~(i) an appropriate faculty ~~supervisor~~member of each certified law student's law school determines, in his or her reasoned discretion, that the effective and beneficial practical training of the ~~legal interns and~~certified law students will not be compromised, and (ii) the supervising attorney determines that the competent representation of clients will not be compromised;

(3) assume personal and professional responsibility for any work undertaken by a ~~legal intern~~certified law student while under his or her supervision;

(4) assist and counsel with a ~~legal intern~~certified law student in the activities permitted by these rules and review such activities with the ~~legal intern~~certified law student, all to the extent required for the proper practical training of the ~~legal intern~~ student and the competent representation of the client; ~~and~~

(5) read, approve, and personally sign any pleadings or other papers prepared by a ~~legal intern~~certified law student prior to the filing thereof, and read and approve any documents prepared by a ~~legal intern~~certified law student for execution by a client or third party prior to the execution thereof.; and

(6) for externships and internships (other than placements at government agencies), ensure that any activities by the certified law student that are authorized by Rule .0206 are limited to representations of eligible persons.

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified ~~legal interns~~certified law students, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified ~~legal interns~~certified law students, and (iii) certifying that the supervising attorney will adequately supervise the ~~legal interns~~certified law students in accordance with these rules.

(2) Prior to the commencement of a ~~field~~student practice placement for a ~~legal intern(s),~~certified law student, the site supervisor shall provide a signed statement to the North Carolina State Bar and to the certified law student's law school (i) assuming responsibility for the administration of the ~~field~~ placement in compliance with these rules, (ii) identifying the participating ~~legal intern(s)~~certified law student and stating the period during which the ~~legal intern(s)~~certified law student is expected to participate in the program at the ~~field~~ placement, (iii) identifying the supervising attorney~~(s)~~ at the ~~field~~ placement, and (iv) certifying that the supervising attorney~~(s)~~ will adequately supervise the ~~legal intern(s)~~certified law student in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a ~~legal intern~~certified law student program at a ~~field~~ student practice placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a ~~legal intern~~certified law student concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of ~~Legal Intern.~~ Certified Law Student. During any period when a ~~legal intern~~certified law student is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the ~~legal intern~~certified law student is available or a new ~~legal intern~~certified law student is assigned to the matter. During law school seasonal breaks, or other periods when a ~~legal intern~~certified law student is not available, if a

law school clinic or a supervising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a ~~legal intern~~certified law student, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a ~~legal intern.~~certified law student. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the law school clinic.

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008; September 24, 2015; September 25, 2019; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0206 ACTIVITIES

(a) A properly certified ~~legal intern~~ law student may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a ~~legal intern~~ certified law student may give advice to a client, including a government agency, on legal matters provided that the ~~legal intern~~certified law student gives a clear prior explanation that the ~~legal intern~~certified law student is not an attorney and the supervising attorney has given the ~~legal intern~~certified law student permission to render legal advice in the subject area involved.

(c) A ~~legal intern~~certified law student may represent an eligible person, the state in criminal prosecutions, a criminal defendant who is represented by the public defender, or a government agency in any proceeding before a federal, state, or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the ~~legal intern~~certified law student.

(d) In all cases under this rule in which a ~~legal intern~~certified law student makes an appearance before a tribunal or agency on behalf of a client who is an individual, the ~~legal intern~~certified law student shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the ~~legal intern~~certified law student is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case. In all cases in which a ~~legal intern~~certified law student makes an appearance before a tribunal or agency on behalf a government agency, the consent of the government agency shall be presumed if the ~~legal intern~~certified law student is participating in a law school externship program or an internship program of the government agency. A statement advising the court of the ~~legal intern~~certified law student's participation in an externship or internship program ~~of~~ at the government agency shall be filed with the

tribunal and made a part of the record in the case.

(e) In all cases under this rule in which a ~~legal intern~~certified law student is permitted to make an appearance before a tribunal or agency, subject to any limitations imposed by the tribunal, the ~~legal intern~~certified law student may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notice of appeal.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0207 USE OF STUDENT'S NAME

(a) A ~~legal intern~~certified law student's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the ~~legal intern~~certified law student has worked with or under the direction of the supervising attorney, provided the ~~legal intern~~certified law student is clearly identified as a ~~legal intern~~ student certified under these rules, and provided further that the ~~legal intern~~certified law student shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or government agency, provided there appears below the ~~legal intern~~certified law student's signature a clear identification that the ~~legal intern~~ student is certified under these rules. An appropriate designation is "~~Certified Legal Intern~~Certified Law Student under the Supervision of [supervising attorney]", and

(3) be printed on a business card, provided the name of the supervising attorney also appears on the business card and there appears below the ~~legal intern~~certified law student's name a clear statement that the ~~legal intern~~ student is certified under these rules. An appropriate designation is "~~Certified Legal Intern~~Certified Law Student under the Supervision of [supervising attorney]."

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; October 7, 2010; April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0208 ~~FIELD~~STUDENT PRACTICE PLACEMENTS

(a) A law student ~~enrolled~~participating in a ~~field~~student practice placement at an organization, entity, ~~agency, or~~ law firm, or government agency shall be certified ~~as a legal intern~~ if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons ~~or government agencies~~ outside the organization, entity, ~~agency, or~~ law firm, or government agency where the student is placed, or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a ~~legal intern~~certified law student enrolled in a ~~field~~ student practice placement may be shared by two or more attorneys employed by the organization, entity, ~~agency, or~~ law firm, or government agency, provided one attorney acts as site supervisor, assuming administrative responsibility for the ~~legal intern~~certified law student program at the ~~field~~ placement and ~~providing the notices to~~filing with the State Bar and the certified law student's law school the statements required by Rule .0205(b) of this subchapter. All supervising attorneys at a ~~field~~ student practice placement shall comply with the requirements of Rule .0205(a).

History Note: *Authority G.S. 84-7.1; 84-23;*
Adopted Eff. September 25, 2019.
Amendments Approved by the Supreme Court: April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0209 RELATIONSHIP OF LAW SCHOOL AND CLINICS; RESPONSIBILITY UPON DEPARTURE OF SUPERVISING ATTORNEY OR CLOSURE OF CLINIC

. . .

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recommended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the ~~legal intern~~certified law student. See Rule 1.5, cmt. [2] of the Rules of Professional Conduct ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.")

. . . .

History Note: *Authority G.S. 84-23;*
Adopted Eff. September 25, 2019.
Amendments Approved by the Supreme Court: April 21, 2021.

SUBCHAPTER 01C – RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0210 PRO BONO ACTIVITIES

. . .

(b) Student Certification Not Required. Regardless of whether the pro bono activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law student participating in a pro bono activity made available by a law school is not required to be certified ~~as a legal intern~~ if

(1) . . .

. . . .

History Note: *Authority G.S. 84-7.1; 84-23;*
Adopted Eff. September 25, 2019.
Amendments Approved by the Supreme Court: April 21, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as set forth in 27 N.C.A.C. 02, Section .0100, *Client-Lawyer Relationship*, be amended as shown on the following attachment:

ATTACHMENT B: 27 N.C.A.C. 02, Section .0100, Rule 1.5, *Fees*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the amendments to the Rules and Regulations of the North Carolina State Bar, as shown on Attachment B, were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of February, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 21st day of April, 2021.

s/Paul Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of April, 2021.

s/Berger, J.
For the Court

CHAPTER 02 – RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0100 – CLIENT LAWYER RELATIONSHIP

27 NCAC 02 RULE 1.05 FEES

. . . .

(g) A lawyer shall not enter into an arrangement for, charge, or collect anything of value for responding to an inquiry by a disciplinary authority regarding allegations of professional misconduct by the lawyer, for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer, or for responding to and participating in the resolution of a petition for resolution of a disputed fee filed against the lawyer.

COMMENT

. . . .

[13] Lawyers have a professional obligation to respond to inquiries by disciplinary authorities regarding allegations of their own professional misconduct, to respond to Client Security Fund claims alleging wrongful conduct by the lawyer, and to respond to and participate in good faith in the fee dispute resolution process. It is improper for a lawyer to charge a client for the time expended on these professional obligations because they are not legal services that a lawyer provides to a client, but rather they advance the interests of the public and the profession.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as set forth in 27 N.C.A.C. 02, Section .0700, *Information About Legal Services*, be amended as shown on the following attachments:

ATTACHMENT C-1: 27 N.C.A.C. 02, Section .0700, Rule 7.1, *Communications Concerning a Lawyer's Services*

ATTACHMENT C-2: 27 N.C.A.C. 02, Section .0700, Rule 7.2, *Communications Concerning a Lawyer's Services: Specific Rules*

ATTACHMENT C-3: 27 N.C.A.C. 02, Section .0700, Rule 7.3, *Direct Contact with Potential Clients*

ATTACHMENT C-4: 27 N.C.A.C. 02, Section .0700, Rule 7.4, *Intermediary Organizations*

ATTACHMENT C-5: 27 N.C.A.C. 02, Section .0700, Rule 7.5, Reserved

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the amendments to the Rules and Regulations of the North Carolina State Bar, as shown on Attachments C-1 to C-5, were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of February, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 21st day of April, 2021.

s/Paul Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of April, 2021.

s/Berger, J.
For the Court

CHAPTER 02 – RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0700 – INFORMATION ABOUT LEGAL SERVICES

27 NCAC RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

~~(a)~~ A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it~~:~~

~~(1)~~ contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading~~;~~. Such communications include but are not limited to a statement that

~~(2)~~ is likely to create an unjustified expectation about results the lawyer can achieve~~;~~; a statement that ~~or~~ states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or a statement that

~~(3)~~ compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

~~(b) A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.~~

Comment

False and Misleading Communications

[1] This Rule governs all communications about a lawyer's services, including advertising ~~permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading t~~T~~ruthful statements ~~that are misleading~~ are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for

which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] ~~An advertisement~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with ~~the services or fees~~ those of other lawyers or law firms may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). *See also* Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence ~~improperly~~ a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names, Letterheads, and Professional Designations

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current principals or by the names of deceased or retired principals where there has been a succession in the firm's identity. The name of a retired principal may be used in the name of a law firm only if the principal has ceased the practice of law. A lawyer or law firm also may be designated by a trade name, a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired lawyer who was not a former principal of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as

"Springfield Legal Clinic," an express statement explaining that it is not a public or charitable legal services organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading. It is also misleading to use a designation such as "Smith and Associates" for a solo practice.

[8] This Rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is exclusively limited to areas that do not require a North Carolina law license. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

[9] If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C. Admin. Code 1E.0200 et seq.

Dramatizations

[10] Dramatizations of fictional cases in video advertisements are potentially misleading. *See* 2010 FEO 9, RPC 164. A communication by a lawyer that contains a dramatization depicting a fictional situation is not misleading if it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court: July 24, 1997;
~~Amended Eff.~~ Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; April 21, 2021.

CHAPTER 02 – RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0700 – INFORMATION ABOUT LEGAL SERVICES

27 NCAC 02 RULE 7.2 ~~ADVERTISING~~COMMUNICATIONS CONCERNING A LAWYER'S SERVICES: SPECIFIC RULES

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a~~A lawyer may a~~dvertise~~communicate information regarding the lawyer's services through ~~written, recorded or electronic communication, including pub-lic~~any media.

(b) A lawyer shall not compensate, give, or promise anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of ~~a not-for-profit lawyer referral service that complies with Rule 7.2(d)~~an intermediary organization that complies with Rule 7.4, or a prepaid ~~or group~~ legal services plan that complies with ~~Rule 7.3(d)~~27 N.C. Admin. Code 1E.0301 et seq.; ~~and~~

(3) pay for a law practice in accordance with Rule 1.17~~.~~; and

(4) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state that the lawyer specializes or is a specialist in a field of practice unless:

(1) the lawyer is certified as a specialist in the field of practice by:

(A) the North Carolina State Bar;

(B) an organization that is accredited by the North Carolina State Bar; or

(C) an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar; and

(2) the name of the certifying organization is clearly identified in the communication.

(ed) Any communication made ~~pursuant to~~under this ~~r~~Rule~~, other than that of a lawyer referral service as described in paragraph (d), shall~~ must include the name and ~~office address~~contact information of at least one lawyer or law firm responsible for its content.

~~(d) A lawyer may participate in a lawyer referral service subject to the following conditions:~~

~~(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive, or misleading name by the referral service;~~

~~(2) the referral service is not operated for a profit;~~

~~(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;~~

~~(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;~~

~~(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;~~

~~(6) the referral service does not collect any sums from clients or potential clients for use of the service; and~~

~~(7) all advertisements by the lawyer referral service shall:~~

~~(A) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and~~

~~(B) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.~~

Comment

~~[1] To assist the public in learning about and obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services~~

~~ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching..~~

[~~2~~1] This Rule permits public dissemination of information concerning a lawyer's ~~name~~ or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization and see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.~~

~~[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

~~[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. See, e.g., N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.~~

Paying Others to Recommend a Lawyer

[6~~2~~] Except as permitted under paragraphs (b)(1)-(b)(~~3~~4), lawyers are not permitted to pay others for recommending the lawyer's services ~~or~~

~~for channeling professional work in a manner that violates Rule 7.3.~~ A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1)~~, however,~~ allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers. ~~Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(e)(division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's service). To comply with Rule 7.1, a lawyer must not pay a lead generator if the lead generator states, implies, or creates an impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a)(duty to avoid violating the Rules through the acts of another).~~

[4] Paragraph (b)(4) permits a lawyer to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

~~[7] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to~~

~~be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.~~

Paying Lead Generators

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See* Comment [2] (definition of "recommendation"). *See also* Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

Referrals from Intermediary Organizations and Prepaid Legal Service Plans

[8~~6~~] A lawyer who accepts assignments or referrals from a prepaid ~~or group~~ legal service plan or referrals from a ~~lawyer referral service~~an intermediary organization must act reasonably to assure that the activities of the plan or ~~service~~ organization are compatible with the lawyer's professional obligations. *See* Rule 5.3, Rule 7.3, and Rule 7.4. A prepaid legal service plan assists people who seek to secure legal representation. Intermediary organizations, including lawyer referral services, are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. ~~Any lawyer who participates in a legal services plan or lawyer referral service is professionally responsible for the operation of the service in accordance with these rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service.~~ Prepaid l~~L~~egal service plans and ~~lawyer referral services~~intermediary organizations may communicate with the public, but such communication must be in conformity with these Rules; notably, such communication must not be false or

misleading. ~~Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (d)(7)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred. In addition, the lawyer may not allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.~~

Specialty Certification

[7] The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations are expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this rule. The rule requires that a representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization accredited by the North Carolina State Bar, or an organization accredited by the American Bar Association under procedures approved by the North Carolina State Bar. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[8] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation."

Contact Information

[9] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address, or a physical office location.

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court:
March 1, 2003; October 2, 2014; September 28, 2017;
April 21, 2021.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0700 - INFORMATION ABOUT LEGAL SERVICES

27 NCAC 02 RULE 7.3 DIRECT CONTACT WITH POTENTIAL CLIENTS

(a) "Solicitation" or "solicit" denotes a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

(~~a~~b) A lawyer shall not ~~by in-person, live telephone, or real-time electronic contact~~ solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the ~~person contacted~~contact is with a:

(1) ~~is a~~ lawyer; ~~or~~

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm.; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(~~b~~c) A lawyer shall not solicit professional employment ~~from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment~~, compulsion, intimidation, or threats~~.

~~(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice), which shall be conspicuous and subject to the following requirements:~~

~~(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any~~

~~other printing on the front or the back of the envelope. If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the enclosed written communication in a font as large as or larger than any other printing contained in the enclosed written communication. If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed written communication shall be more conspicuous than the advertising notice.~~

~~(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.~~

~~(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(~~d~~e) Notwithstanding the prohibitions in ~~paragraph (a)~~ this Rule, a lawyer may participate with a prepaid ~~or group~~ legal service plan ~~subject to the following:~~ in compliance with 27 N.C. Admin. Code 1E.0301 et seq. that uses live person-to-person contact to enroll members or sell subscriptions for the plan to persons who are not known to need legal services in a particular matter covered by the plan, provided that, after reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with 27 N.C. Admin. Code

1E.0301 et seq., and the lawyer's participation in the plan does not otherwise violate the Rules of Professional Conduct.

~~(1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of any immediate need for the specified legal service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.~~

~~(2) Conditions for Participation.~~

~~(A) The plan must be operated by an organization that is not owned or directed by the lawyer;~~

~~(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;~~

~~(C) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;~~

~~(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;~~

~~(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and~~

~~(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:~~

~~(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and~~

~~(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.~~

Comment

[1] ~~A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.~~ Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. ~~In contrast, a~~A lawyer's communication ~~typically does not constitute~~is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~ electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. ~~There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services.~~ A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services by live person-to-person contact. ~~These forms~~This form of contact subject~~s~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon ~~being retained immediately~~an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for ~~abuse~~ overreaching inherent in ~~direct in-person, live telephone, or real-time electronic solicitation~~live person-to-person justifies its prohibition, ~~particularly because~~since lawyers have alternative means of conveying necessary information ~~to those who may be in need of legal services~~. In particular, communications can be mailed or transmitted by email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws ~~governing solicitations~~.

These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in-person, telephone or real-time electronic~~live person-to-person persuasion that may overwhelm a person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.~~ The contents of ~~direct in-person, live telephone, or real-time electronic~~live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in a~~busive practices~~overreaching against a former client, or a person with whom the lawyer has a close personal, ~~or~~ family, business, or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. ~~Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also,~~ pParagraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] ~~But even permitted forms of solicitation can be abused. Thus, any~~A solicitation ~~which~~ that contains ~~information which is~~ false or misleading

information within the meaning of Rule 7.1, which involves coercion, duress, or harassment~~, compulsion, intimidation, or threats~~ within the meaning of Rule 7.3(~~b~~c)(2), or ~~which~~ that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(~~b~~c)(1) is prohibited. ~~Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

Contact to Establish Prepaid Legal Service Plan

[7] This Rule ~~is~~ does not ~~intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~potential~~ prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[8] Paragraph (c) of this rule requires that all targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services," appears in capital letters in a font at least as large as any other printing on the front or the back of the envelope. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear in the "in reference" or subject box of an electronic communication (email) and at the beginning of any paper or electronic communication in a font that is at least as large as the font used for any other printing in the paper or electronic communication. On any paper or electronic communication required by this rule to contain the advertising notice, the notice must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of~~

~~the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant. The font size requirement does not apply to a brochure enclosed with the written communication if the written communication contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice. The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

~~[9] See Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this rule. A lawyer may not send electronic or recorded communications if prohibited by law. See, e.g., N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.~~

Contact to Enroll Members in Prepaid Legal Service Plan

[~~10~~9] Paragraph (~~d~~e) of this Rule permits a lawyer to participate with an organization which uses personal contact to ~~solicit~~ enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (~~d~~e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-person or telephone~~ person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need

legal services in a particular matter, but ~~is to~~ must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with ~~Rule 7.3(d)~~27 N.C. Admin. Code 1E.0301 et seq., as well as Rules 7.1, 7.2 and 7.3(~~b~~c). ~~See 8.4(a).~~

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court:
March 1, 2003; October 6, 2004; November 16, 2006;
August 23, 2007; August 25, 2011; October 2, 2014;
September 28, 2017; April 21, 2021.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0700 - INFORMATION ABOUT LEGAL SERVICES

27 NCAC 02 RULE 7.4 ~~COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION~~ INTERMEDIARY ORGANIZATIONS

(a) ~~A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law~~An intermediary organization is a lawyer referral service, lawyer advertising cooperative, lawyer matching service, online marketing platform, or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance. A tribunal or similar government agency that appoints or assigns lawyers to represent parties before the tribunal or government agency is not an intermediary organization under this Rule.

(b) ~~A lawyer shall not state or imply that the lawyer is certified as a specialist in a field of practice unless~~Before and while participating in an intermediary organization, the lawyer shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) ~~the certification was granted by the North Carolina State Bar~~ The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;

(2) ~~the certification was granted by an organization that is accredited by the North Carolina State Bar~~ The intermediary organization, including its agents and employees, does not engage in improper solicitation pursuant to Rule 7.3; ~~or~~

(3) ~~the certification was granted by an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar~~The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service, at the outset of the client's interaction with the intermediary organization; ~~and~~

(4) ~~the name of the certifying organization is clearly identified in the communication.~~ The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;

(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs, including sums paid in accordance with Rule 5.4(a)(6); and

(6) The intermediary organization is not owned or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm.

(c) If a lawyer discovers an intermediary organization's noncompliance with Rule 7.4(b)(1) – (6), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

COMMENT

[1] ~~The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations are expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this rule. The rule requires that a representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization accredited by the North Carolina State Bar, or an organization accredited by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification~~ The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer.

~~[2] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation."~~

~~[3] Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

History Note: *Authority G.S. 84-23;*
~~*Eff. July 24, 1997;*~~
~~*Amended Eff. February 27, 2003.*~~
Adopted by the Supreme Court: April 21, 2021

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0700 - INFORMATION ABOUT LEGAL SERVICES

27 NCAC 02 RULE 7.5 ~~FIRM NAMES AND LETTERHEADS~~RESERVED

~~(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not false or misleading in violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar for a determination of whether the name is misleading.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina.~~

~~(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.~~

~~(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.~~

~~Comment~~
~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations~~

of the State Bar. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. A firm name that includes the surname of a deceased or retired principal is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired principal may be used in the name of a law firm only if the principal has ceased the practice of law.

[2] This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 NCAC 1E, Section .0200.

[3] Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina. See, however, Rule 5.5.

[4] With regard to Paragraph (e), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

History Note: *Authority G.S. 84-23;*
Eff. July 24, 1997;
Amended Eff. September 22, 2016; March 1, 2003.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

TERMINATION OF PARENTAL RIGHTS—Continued

TERMINATION OF PARENTAL RIGHTS—Continued

Effective assistance of counsel—failure to advise—appeal of termination case—meritless—Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument alleging that he received ineffective assistance of counsel. Even assuming counsel rendered deficient performance by failing to notify the father that he needed to contribute to the cost of his child's care, the father could not establish prejudice because ignorance did not excuse his failure to fulfill his inherent parental duty to provide support; further, there was no merit in his argument that counsel should have pursued a second appeal in his son's termination case, because his son's case was not before the trial court on remand (only his daughter's case was). **In re J.M., 298.**

Effective assistance of counsel—no showing of prejudice—Respondent-father's claim that he received ineffective assistance of counsel at a termination of parental rights hearing—arguing his counsel failed to make any objections during the hearing and failed to introduce certain evidence that could have helped his case—was rejected because he failed to show he was prejudiced as a result of his counsel's allegedly deficient conduct. **In re G.G.M., 29.**

Findings of fact—sufficiency of competent evidence—exhibit not admitted during hearing—The trial court's order terminating respondents' parental rights to their daughter on multiple grounds was reversed where the court's findings were not supported by clear, cogent, and convincing evidence. Although the department of social services tendered three witnesses who gave testimony, the challenged findings of fact contained information not from their testimony but from an exhibit which was not admitted into evidence during the hearing and which was presumed to be inadmissible incompetent evidence for purposes of the appeal. **In re M.L.B., 335.**

Grounds for termination—abandonment—willful intent—sufficiency of findings and evidence—The trial court properly terminated a father's rights to his two children on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the court's findings of fact—supported by clear, cogent, and convincing evidence—established that the father did not contact the children for five and a half years before the termination petition was filed (with the exception of one brief interaction) and provided no care or financial support during that time, which supported the court's conclusion that he intended to abandon the children. Although the father testified that he stopped seeing the children out of fear for their safety after he was injured in an unsolved shooting, the weight and credibility of this evidence could not be reassessed on appeal. **In re G.G.M., 29.**

Grounds for termination—failure to establish paternity—In a termination of parental rights proceeding where the trial court's findings related to paternity were unchallenged by respondent-father and he did not challenge the sufficiency of the findings to support termination or that the termination was in the best interests of the children, the trial court's order terminating his parental rights to the children under N.C.G.S. § 7B-1111(a)(5) was affirmed. **In re M.J.R.B., 453.**

Grounds for termination—failure to make reasonable progress—In a termination of parental rights hearing where the unchallenged findings of fact showed respondent-mother failed to submit to a required psychological assessment, failed to submit to a required domestic violence assessment, repeatedly failed to submit to drug screens upon request, and failed to complete a parenting program, the trial court did not err when it terminated her parental rights to the older juveniles for

TERMINATION OF PARENTAL RIGHTS—Continued

willful failure to make reasonable progress in correcting the conditions that led to the removal of the juveniles. **In re M.J.R.B., 453.**

Grounds for termination—failure to make reasonable progress—The trial court properly determined that grounds existed to terminate respondent-mother's parental rights based on her failure to make reasonable progress to correct the conditions that led to the removal of the children—substance abuse, domestic violence, and homelessness—where, although respondent had acquired a structurally safe and appropriate residence and had participated in substance abuse support groups and abstained from using marijuana for a year, the unchallenged findings of fact showed respondent had multiple positive drug tests, consistently failed to comply with drug screens, failed to complete substance abuse treatment and domestic violence counseling, and was involved in repeated acts of domestic violence involving the consumption of alcohol. **In re A.M., 220.**

Grounds for termination—failure to make reasonable progress—The trial court properly terminated the parental rights of respondent-mother for willful failure to make reasonable progress to correct the conditions which led to the removal of the children where the evidence showed that respondent left the children in foster care for sixteen months, she never obtained the required substance abuse assessment (despite losing custody of the children due to substance abuse issues), she repeatedly failed drug screens, and she did not comply with any of the mental health aspects of the case plan. **In re A.M.L., 1.**

Grounds for termination—failure to make reasonable progress—12-month requirement—The trial court erred in terminating respondent-mother's parental rights to the youngest child for failure to make reasonable progress in correcting the conditions that led to the removal of the child where the evidence showed that only nine months had elapsed between the custody order and the filing of the termination petition. The court was required by N.C.G.S. § 7B-1111(a)(2) to look at the parent's reasonable progress over a twelve-month period. **In re M.J.R.B., 453.**

Grounds for termination—failure to make reasonable progress—compliance with majority of case plan—An order terminating a mother's parental rights to her son was reversed where the trial court's findings of fact did not support its conclusion that she willfully failed to make reasonable progress in correcting the conditions leading to the child's removal from the home. Although the trial court properly considered the mother's partial noncompliance with the "parenting skills" component of her case plan with the Department of Health and Human Services, the court's remaining findings showed the mother had made reasonable progress by fully complying with the remaining components of her case plan, including those addressing her substance abuse, domestic violence issues, mental health, and housing situation. **In re D.A.A.R., 258.**

Grounds for termination—failure to make reasonable progress—relevant time period—poverty exception—An order terminating a father's parental rights was affirmed where the trial court's findings of fact supported a conclusion that he willfully failed to make reasonable progress in correcting the conditions leading to his children's removal (N.C.G.S. § 7B-1111(a)(2)). The order contained sufficient findings regarding the father's lack of progress up to the date of the termination hearing (the relevant time period under the statute), and the "poverty exception" in section 7B-1111(a)(2) did not require the court to enter specific findings addressing whether poverty was the "sole reason" for the father's failure to make reasonable

TERMINATION OF PARENTAL RIGHTS—Continued

progress where the father presented no evidence that he was impoverished. **In re T.M.L., 369.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—domestic violence—The trial court properly terminated a mother's parental rights to her children for failure to make reasonable progress in correcting the conditions that led to the children's removal from her home (N.C.G.S. § 7B-1111(a)(2)). The findings of fact challenged on appeal, which were supported by clear, cogent, and convincing evidence, showed that the mother failed to address domestic violence issues stemming from her relationship with her youngest child's father by continuing the relationship (even though he kept on perpetuating new incidents of domestic violence), repeatedly lying to the court about having ended the relationship, and failing to attend domestic violence counseling despite her means and ability to do so. **In re L.N.G., 81.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—incarceration—no contribution—Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument challenging the trial court's conclusion that the grounds of willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) existed to terminate his parental rights. Although he was incarcerated, he earned some money working and received some from friends and family, yet he contributed nothing to the cost of his child's care during the relevant six-month time period. **In re J.M., 298.**

Grounds for termination—incapable of providing proper care and supervision—necessary findings—In a termination of parental rights proceeding where—although there may have been sufficient evidence in the record to show respondent-mother was incapable of providing proper care and supervision for the youngest child—the trial court failed to make findings showing the absence of an acceptable child-care arrangement, did not identify the condition that made respondent incapable of parenting the child, and did not address whether her condition would continue for the foreseeable future, the court's order terminating respondent's parental rights under N.C.G.S. § 7B-1111(a)(6) was vacated and remanded for entry of a new order. **In re M.J.R.B., 453.**

Grounds for termination—neglect—findings—sufficiency—The trial court properly terminated respondent-mother's rights to her children on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) where its findings of fact, including those regarding respondent's lack of progress in her parenting skills and the children's trauma under respondent's care, were supported by clear, cogent, and convincing evidence. The evidence and findings amply demonstrated a likelihood of future neglect, based on respondent's history of failing to meet her children's basic needs, her inability to protect them from physical and sexual abuse, and her lack of progress in resolving those issues. **In re M.J.B., 328.**

Grounds for termination—neglect—incarceration—likelihood of future neglect—The trial court's termination of respondent-father's parental rights based on neglect was affirmed where the children had been previously adjudicated to be neglected and the unchallenged findings established a lack of changed circumstances and a likelihood of repeated neglect. Although respondent was incarcerated or absconding for much of the time after the original adjudication of neglect, he was not incarcerated for the entirety of the case and his incarceration was not the

TERMINATION OF PARENTAL RIGHTS—Continued

sole evidence of neglect. Respondent failed to complete his case plan addressing the issues that led to the adjudication of neglect (substance abuse, mental health, and housing) or to remain in contact with DSS, he failed to regularly visit the children or check on their well-being, and his probation violations and criminal activity continued up until the month before the hearing. **In re J.E., 285.**

Grounds for termination—neglect—incarceration—likelihood of future neglect—The trial court's termination of respondent-father's parental rights on the basis of neglect due to a likely repetition of neglect was affirmed where respondent was incarcerated, the child had been placed in foster care due to neglect caused by domestic violence and respondent's use and distribution of drugs while the child was in respondent's care prior to his incarceration, respondent was only involved in the child's life in a limited way when he was not incarcerated, and he made no attempt to contact the child during his incarceration except for a single letter and had limited contact with DSS. **In re N.B., 349.**

Grounds for termination—neglect—likelihood of future neglect—The trial court properly determined respondent-mother's parental rights were subject to termination on the basis of neglect where the children had been previously adjudicated to be neglected (due to respondent's housing instability, her drug use and incarceration, domestic violence, and her leaving the children with inappropriate caretakers who subjected the children to physical and sexual abuse) and where—although respondent had made some progress towards satisfying the requirements of her case plan—there was a likelihood of future neglect due to respondent's failure to establish stable housing free from substance abuse, her lack of contact with the children, and her inability to meet the children's trauma-related needs. **In re N.B., 349.**

Grounds for termination—neglect—likelihood of future neglect—incarceration—The trial court's order terminating respondent-father's parental rights was affirmed where respondent's lengthy term of incarceration (which implicated a future likelihood of neglect since he could not provide proper care, supervision, and discipline to the children while incarcerated) combined with his history of drug use and incarcerations for drug offenses, his lack of care and attention to the children when he was not incarcerated, and a history of domestic abuse between respondent and the children's mother witnessed by the children, supported the trial court's conclusion that respondent's parental rights were subject to termination on the grounds of neglect due to a likelihood of future neglect. **In re J.S., 73.**

Grounds for termination—neglect—likelihood of future neglect—sibling died of suspected abuse—The trial court properly terminated respondent-mother's parental rights to her child based on neglect where, after a sibling suffered injuries in the home that led to her death from likely abuse, respondent-mother failed to acknowledge the non-accidental cause of the sibling's injuries, provided an implausible explanation for those injuries, and maintained a relationship with respondent-father. The court's findings supported its conclusion that neglect was likely to reoccur if the child were returned to respondent-mother's care. **In re A.W., 238.**

Grounds for termination—neglect—likelihood of future neglect—substance abuse and unstable housing and employment—The trial court's termination of respondent-mother's parental rights based on neglect due to a likelihood of future neglect was affirmed where the child was previously adjudicated neglected, respondent had made only limited progress on the issues that led to the prior adjudication, her substance abuse continued after the child entered DSS custody, her housing

TERMINATION OF PARENTAL RIGHTS—Continued

situation remained unstable, and she was unable to maintain stable employment. **In re B.T.J., 18.**

Grounds for termination—neglect—likelihood of repetition of neglect—substance abuse—The trial court properly terminated respondent-mother's parental rights to her two children on the ground of neglect where its findings demonstrated a likelihood of the repetition of past neglect if the children were returned to respondent's care, based on her ongoing substance abuse, domestic violence between her and her partner, and lack of sustained progress on her case plan. **In re H.A.J., 43.**

Grounds for termination—willful abandonment—incarceration—failure to contact child—The trial court properly determined that a father's parental rights were subject to termination on the grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where it was undisputed that the father, who had been incarcerated for approximately six years when the termination petition was filed, had made no contact with his daughter during his incarceration. He failed to seek his daughter's contact information from relatives (other than a single unsuccessful attempt to ask the sister of his daughter's caregiver for the caregiver's phone number—years outside the determinative period) or to otherwise display any interest in her welfare. The father's incarceration and alleged ignorance of how to contact his child could not negate the willfulness of his abandonment. **In re M.S.A., 343.**

Grounds for termination—willful abandonment—incarceration and restraining order—no emotional or material support—domestic abuse—The trial court's order terminating the parental rights of respondent-father on the grounds of willful abandonment was affirmed where respondent was aware of his ability to seek legal custody and visitation rights (and how to obtain such relief) despite the limitations of his incarceration and a restraining order prohibiting contact with the child and her mother, he did not provide any emotional or material support during the determinative period although he could have done so, and his domestic abuse of the mother which led to the restraining order supported an inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7). **In re I.R.M.B., 64.**

Grounds for termination—willful failure to make reasonable progress—incarceration—The trial court properly terminated respondent-father's parental rights to his children on the basis that he willfully failed to make reasonable progress to correct the conditions that led to the children's removal where the findings, supported by evidence, demonstrated that respondent, who was incarcerated throughout the pendency of the case, repeatedly made voluntary choices which delayed his release date, limited his options, and hindered his ability to comply with different aspects of his case plan. **In re G.B., 106.**

No-merit brief—abandonment—The termination of a father's parental rights on grounds of abandonment was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds. **In re A.R.P., 16.**

No-merit brief—failure to pay a reasonable portion of the cost of care—The termination of a father's parental rights on the grounds of willful failure to pay a reasonable portion of the cost of care was affirmed where counsel filed a no-merit brief and the termination order was supported by competent evidence and based on proper legal grounds. **In re J.M., 298.**

TERMINATION OF PARENTAL RIGHTS—Continued

No-merit brief—neglect—failure to make reasonable progress—The termination of a father's parental rights to his three children—on the grounds of neglect and willful failure to make reasonable progress in correcting the conditions that led to the children's removal—was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds. **In re P.M., 366.**

No-merit brief—neglect—failure to make reasonable progress—The termination of a mother's parental rights on the grounds of neglect and willful failure to make reasonable progress was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds. **In re G.D.H., 282.**

No-merit brief—neglect—failure to pay reasonable portion of cost of care—The termination of a mother's parental rights for neglect and for failure to pay a reasonable portion of the costs for the child's care was affirmed where counsel for the mother filed a no-merit brief. The trial court's order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds. **In re M.C.T.B., 92.**

No-merit brief—neglect, failure to make reasonable progress, and abandonment—The termination of the incarcerated respondent-father's parental rights on the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, and willful abandonment was affirmed where respondent's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds. **In re A.R.W., 234.**

No-merit brief—pro se brief—weight of evidence—Where a father's parental rights were terminated and his attorney filed a no-merit brief on appeal, the Supreme Court rejected the father's pro se argument asking the Court to reweigh the evidence. **In re J.M., 298.**

No-merit brief—termination on multiple grounds—both parents—The trial court's order terminating the parental rights of a mother based on neglect and willful failure to make reasonable progress and of a father based on neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of the children's care was affirmed where their attorneys filed no-merit briefs and the order was based on clear, cogent, and convincing evidence supporting the grounds for termination. **In re R.D.M., 94.**

Permanency planning—findings of fact—challenged on appeal—On appeal from the trial court's order terminating a mother's parental rights and from an earlier permanency planning order, the mother's challenges to several portions of a finding of fact in the permanency planning order—regarding her positive tests for alcohol, her lack of compliance with drug screens, her failure to maintain stable housing, and incidents of domestic violence—were rejected. The trial court's error in finding that she received three—rather than two—sanctions in drug treatment court was harmless where the evidence established two sanctions. **In re L.R.L.B., 311.**

Permanency planning—required findings—insufficient—remedy—The trial court erred in a permanency planning order by failing to make all the written findings required by N.C.G.S. § 7B-906.2(d); specifically, even though there were sufficient

TERMINATION OF PARENTAL RIGHTS—Continued

findings addressing subsections (d)(1), (2), and (4), there were no findings concerning subsection (d)(3)—whether the mother "remain[ed] available to the court, the department, and the guardian ad litem." Where the trial court substantially complied with the statute, the appropriate remedy was to remand the matter for entry of the necessary findings and determination of whether those findings affected the decision to eliminate reunification from the permanent plan (rather than vacation or reversal of the permanency planning order or termination order). **In re L.R.L.B., 311.**

Request for new counsel and new guardian ad litem—denied—abuse of discretion analysis—In a termination of parental rights proceeding, the trial court did not abuse its discretion by denying respondent-father's motions for new counsel and a new guardian ad litem (GAL) where respondent made the requests prior to the hearing and outside the presence of counsel and the GAL, failed to present good cause to remove counsel and the GAL, and did not renew the motion or otherwise address the issue once counsel arrived for the hearing. **In re M.J.R.B., 453.**

Subject matter jurisdiction—during pendency of appeal—order void—The trial court lacked subject matter jurisdiction to proceed with the termination of a father's parental rights in his daughter while his appeal of the adjudicatory and dispositional orders (which had been entered on remand from the Court of Appeals) was pending, so the order was void. The Supreme Court rejected the guardian ad litem's argument that the father should be required to prove prejudice in order to prevail on appeal. **In re J.M., 298.**