

2004 CASE SUMMARIES
(IN ALPHABETICAL ORDER—INDEX AT PAGE 46)
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Unpublished decisions are noted by an * following the case name. See note at end of section.

Chick v. Chick, --- N.C. App. ---, 596 S.E.2d 303 (June 1, 2004) (Wake County). This custody action under Chapter 50 implicates provisions of the UCCJEA as adopted by North Carolina and the UCCJA adopted by Vermont. Parents were married and resided in North Carolina with their children due to the father being stationed at Camp Lejeune. Due to financial problems, the mother moved to Vermont with the children to live with their paternal grandparents while the father remained in North Carolina. After visiting his family in Vermont, he convinced his wife to return with him to North Carolina to participate in free marital counseling through the Marine Corps, and the children came with her. After six weeks, the mother and children returned to Vermont and were shortly thereafter joined by the father who had left the marines. On the first of July, the mother returned to North Carolina with the children without notice to the father, only leaving him a note. The next day the mother filed for custody in Wake County, and on the same day, the father filed an action for divorce and custody in a Vermont court. The Vermont court entered an order asserting jurisdiction over the children and granted the father temporary custody. The father then filed a motion to enforce the order in the Vermont court. The mother then filed a motion in Wake County requesting that it determine the existence and priority of jurisdiction, and moved to dismiss the father's complaint because it lacked a summons. The Wake County court issued an *ex parte* order prohibiting the removal of the children until the hearing on the motion. The trial court denied renewal of this motion at the hearing, and the Vermont court entered an order to enforce custody and directed law enforcement to assist the return of the children. North Carolina then declined jurisdiction and deferred to the Vermont orders. The mother appealed on four grounds: (1) it was error for North Carolina to decline jurisdiction; (2) concluding she had proper notice of the Vermont hearing on the father's motion; (3) the court did not make a proper record of communications with the Vermont court; and (4) the order of law enforcement assistance. Because North Carolina could not assert home state jurisdiction, whether Vermont was the home state depended on whether the children's six-week stay in North Carolina was a "temporary absence." The mother argued that since the stay was of indefinite duration that it should not be considered temporary. Her contention means parties' intent at the time of the move should determine whether the absence is "temporary" for home state determination. Adopting a totality of the circumstances approach as to whether an absence is temporary, the Court affirmed that the absence was temporary and rejected the notion that parties' intent should govern. The Court also rejected her argument that she did not have notice that Vermont would be ruling on jurisdiction since her own response to the father's motion raised the issue of jurisdiction. The Court then held that the Vermont order that indicated communication with the North Carolina court was a sufficient record under NCGS 50A-110. The Court also clarified that when registering an out of state custody order, the although the statute provides for a twenty day period by which the other party may object to the registration under specific circumstances, that the order is effectively registered when appropriately filed. Finally, the mother argued that neither the UCCJEA nor the UCCJA allowed the use of law enforcement to return the children. The Court agreed with this argument, and vacated this portion of the order.

David N. v. Jason N., --- N.C. App. ---, 596 S.E.2d 266 (June 1, 2004) (Buncombe County). Jason N., the biological father of J.L.N., appealed the order granting custody to the paternal grandfather, David N., and his wife (the plaintiffs). Born in 1992, the child had lived with the plaintiffs since he was ten months old. The father was not active in his son's life and did not provide financial support. The court found that the father was fit to have visitation, but concluded as a matter of law that the facts supported the conclusion that Jason N. had acted inconsistently with his parental duties and his actions were abandonment; therefore, the custody determination would be decided in the child's best interest. The trial court granted the parties joint custody with the plaintiffs having primary placement and defendant having visitation. The father argued the court must make findings of unfitness before awarding custody to a non-parent over a parent. The Court found that finding the parties fit and proper to have custody of the minor child is inconsistent with the conclusion of law that declined his constitutionally protected parent status. The defendant also argued it was error to allow amendment of the complaint to include a child support claim because it denied his ability to fight for custody and defend the child support. The Court was unsympathetic to this argument, and found no prejudice.

Justice Wynn dissented based on the contention that a finding of fitness does not exclude a determination that the parent acted inconsistently with his protected status—this right may be forfeited either by a finding of unfitness or acting in a manner inconsistent with protected status.

Guilford County o/b/o Ray v. Williams, * (Unpub.) --- N.C. App. ---, 603 S.E.2d 583 (October 5, 2004) (Guilford County). This case was heard by writ of certiorari with the child support enforcement office as appellant. Defendant executed an affidavit of parentage two years prior to an order to show cause. At the contempt hearing, defendant requested a paternity test on the grounds that plaintiff mother had told him he was not the father; however, defendant did not ask for a rescission of the affidavit of parentage and the court did not set aside the previous finding of paternity. The trial court allowed the paternity testing, and the plaintiff appealed. The Court reversed the trial court and reiterated that a party is barred from obtaining paternity testing if a prior acknowledgment of paternity or judgment of paternity is still in effect. Since there was no order setting aside the paternity judgment, *res judicata* bars the paternity testing.

In the Matter of A.F.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 472 (June 1, 2004) (Catawba County). Respondent mother appealed the permanency planning order that ceased reunification efforts and changed the plan to adoption. Although the initial allegations were of neglect and dependency, the child was adjudicated on the neglect ground alone. The child was voluntarily placed with the Department of Social Services after a drug raid at respondent's residence. Evidence presented at the hearing indicate that the mother had received child protective services since the month of A.F.'s birth and that she continued to have a chronic substance abuse problem with unsuccessful treatment and positive drug screens. The mother argued the evidence did not support the findings in that one positive drug screen prior to beginning new treatment does not indicate reunification would be futile. Citing the purpose of permanency planning hearings to develop a child's plan of care within a reasonable time, the Court overruled her argument and affirmed that the evidence supported the findings of fact that supported the conclusions of law.

In the Matter of A.L. and N.W.,* (Unpub.) --- N.C. App. ---, 601 S.E.2d 331 (August 3, 2004) (Mecklenburg County). **Reported in full at *In the Interest of A.L.***, 2004 N.C. App. LEXIS 1595 (August 3, 2004). The Court affirmed the termination of respondent mother's parental rights. Each child has a different father and neither established paternity nor were involved in their children's lives. Prior to the adjudication of abuse, neglect and dependency, the respondent had a history of involvement by Mecklenburg County Youth and Family Services (YFS) due to several referrals of inappropriate discipline and injurious environment. Before moving to North Carolina, the children had been placed in foster care in New Jersey on more than one occasion. At the adjudication of abuse and neglect, the trial court found that there was a "chronic, consistent, and severe history of physical abuse" and that the children were emotionally abused. As a result, the trial court prohibited contact with the children and did not recommend reunification. The Court held that the record showed clear and convincing evidence that supported several grounds for termination and that termination was in fact in the children's best interest. The mother continued to blame the children for their own abuse; failed to take responsibility for her actions; and did not recognize her own need for therapy stemming from abuse she received as a child.

In the Matter of A.L.K.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 520 (July 6, 2004) (Guilford County). Guardian ad Litem was the petitioner in this termination of parental rights proceeding in which respondent mother has been incarcerated since 1992. Initially her release was expected to be 2001; however, respondent's length of incarceration was extended due to charges while incarcerated. A.L.K. was placed with his great grandparents when respondent first entered prison, but due to disruptive behavior, the caretakers determined they were unable to provide for him and placed him in the custody of DSS. Reunification with the great grandparents became futile, and although respondent advocated the placement of her son with her aunt, home studies were not positive due to the aunt's criminal history, specifically a murder charge, and the fact that her aunt's son who was convicted of a sexual offense had moved back into her home. Despite this fact respondent continued to advocate for her son's placement at these two relative's homes. The Court found that this continued effort by respondent to place her son in situations considered dangerous by DSS was evidence of her lack of concern for her son's welfare. Procedurally, respondent tried to argue violation of due process because there was no summons with the petition. The Court overruled this argument because respondent filed an answer denying all allegations, and although she was not physically present at the trial, she was represented by court appointed counsel. In sum, the Court determined that the evidence support the findings of fact and conclusions of law, and that the trial court did not abuse its discretion in determining that it was in A.L.K.'s best interest that respondent's rights be terminated.

In the Matter of A.N.B.,* (Unpub.) --- N.C. App. ---, 601 S.E.2d 331 (August 3, 2004) (Mecklenburg County). In this private termination of parental rights proceeding, the Court reversed the order of termination as to the respondent father because based on the evidence respondent did not *willfully* abandon his child nor did he have any opportunity to neglect the child, the two grounds of the termination order. Respondent entered an Alford plea to three counts of indecent liberties with a minor, his stepdaughter. He and his wife divorced, and his wife obtained sole custody of A.N.B. and respondent was ordered not to have any contact with his wife, her family, or A.N.B. After respondent was released from prison, the mother filed the petition to terminate his rights based on neglect, failure to pay child support, abandonment, and

commission of a felony assault on another child residing in the home. However, the trial court's order addressed neither the child support allegation nor the commission of a felony on another child. The appellate issue was whether the trial court erred in terminating respondent's parental rights based on willful abandonment and neglect. The Court concluded that the evidence did not support the contention that respondent lack of contact was with a purpose to forego his parental duties—the child custody order and his probation terms prohibited respondent from contacting A.N.B. Further, due to the prohibition of contact of the child custody order, respondent was prevented from providing his child with the type of care necessary to overcome a neglect allegation.

In re A.P. & S.P., --- N.C. App. ---, 600 S.E.2d 9 (August 17, 2004) (Buncombe County). In the original neglect petitions (separate petitions were originally filed for each child), the parents, paternal grandmother and paternal stepgrandfather were listed as the children's "parents, guardian, custodian or caretaker." After the children were adjudicated neglected in October 2002, DSS obtained custody with placement authority and the parents' visitation was suspended, and by subsequent motion, ceased. This subsequent order also ceased visitation with the paternal grandmother. At the June 2003 review hearing, the trial court determined that adoption was in the best interest of the children and suspended all visitation between family members. From this order the paternal grandfather appealed. The issue is whether respondent, as paternal grandfather is an appropriate party to appeal the order under NCGS § 7B-1002. Respondent argued that he was a "custodian" of the children under the statute giving him standing. However, the Court refused to accept his argument that he was a custodian because he and his wife were listed on the petition. Merely being listed on a juvenile petition does not make an individual a party to the action. Respondent qualified only as a "caretaker" because the evidence indicated he never assumed the status or obligation of parent to confer the position of "custodian" under NCGS § 7B-1001(8). NCGS § 7B-1002 does not confer standing on mere caretakers of children, and the appeal was dismissed.

In the Matter of A.R.P.,* (Unpub.) --- N.C. App. ---, 603 S.E.2d 583 (October 5, 2004) (Dare County). Respondent father was a citizen and resident of New York where he has lived during the child's entire life, having only sporadic contact with his daughter. The child lived in North Carolina since 1996 with the exception of a brief two-month visit to New York with her mother in 2000. The trial court entered a lengthy and detailed order terminating respondent's rights; however, he did not assign error to these findings and therefore, they are presumed to be supported by clear, cogent and convincing evidence. Respondent argued that the trial court lacked jurisdiction to terminate his rights under the UCCJEA because he had filed a petition to modify custody during the two-month period in which the child was visiting New York. The Court affirmed the trial court's finding of jurisdiction under the UCCJEA due to the fact there was no indication that New York ever had jurisdiction as the home state, could exercise temporary emergency jurisdiction, or even had jurisdiction to modify the custody order.

In re Ashley W. & Anthony J.,* (Unpub.) --- N.C. App. ---, 601 S.E.2d 331 (August 3, 2004) (Forsyth County). **Reported in full at *In re Ashley W.***, 2004 N.C. App. LEXIS 1570 (August 3, 2004). Respondent mother appealed the termination of her parental rights, but after review, the Court affirmed the order. In the original adjudication order of neglect, DSS was relieved of reunification efforts, but instead enumerated specific conditions respondent had to meet for the

trial court to consider reunification. At the termination hearing, respondent admitted that she failed to meet all requirements and determined that evidence presented support grounds under neglect, willfully leaving the children in foster care for over 12 months, and failure to contribute to their support. Respondent argued that the termination order should be vacated since it was not reduced to writing within the statutorily mandated 30 days. The Court dismissed this argument and reaffirmed that although the statute was not followed, vacating the termination order is not the remedy; further, respondent failed to show any prejudice as a result of the delay. Her other arguments were that the evidence presented was insufficient to support termination and that the trial court abused its discretion in determining that it was in the children's best interest to terminate her rights. After review of the record, the Court overruled both arguments.

In re A.W.; E.W., --- N.C. App. ---, 596 S.E.2d 294 (June 1, 2004) (Buncombe County).

Respondent mother appealed the adjudication of neglect of her children and disposition granting the paternal grandparents guardianship. The petition alleged the children lived in an injurious environment, and prior to the hearing, the children were placed with the paternal grandparents in order for the parents to follow through on a substance abuse referral. There was no visitation prior to the hearing that was six months later. At the hearing, respondent denied the allegations in the petition "without contesting them." Respondent argued on appeal that although she denied the allegations without contest, that the petitioner still had a burden of proving the allegations by clear and convincing evidence. In this case, the petitioner did not present any evidence from which the court could make findings of fact or conclusions of law. Findings were clearly from the DSS court summary that was not introduced into evidence during the adjudication. As a result, the order was reversed and remanded.

In re L.N.B.,* (Unpub.) 163 N.C. App. 610, 594 S.E.2d 260 (April 6, 2004) (Wayne County).

The Court affirmed the termination of respondent father's parental rights on the ground of willful abandonment. Respondent is incarcerated with an expected release date of 2007. While in prison he makes \$7.00 that he spends on personal items. Respondent argued error to the trial court's finding that he spent the money on personal items and has not written or sent any gift to the child for the six months prior to the action. Upon review of the evidence, the Court upheld this finding. Respondent also argued that it was error for the trial court to find that he had abandoned his child. Respondent presented no evidence that he had contacted his daughter during the relevant time period and admitted he did not contact the Department of Social Services. The Court has held that failure to contact one's child or to inquire about the child's welfare while incarcerated is a sufficient found to show abandonment, and on this basis, overruled his assignment of error. Finally, respondent argued it was an abuse of discretion in finding termination to be in the child's best interest. The Court overruled this argument, and reiterated that one of the underlying principles during the disposition stage recognition of the necessity for a child to have a permanent plan of care at the earliest possible age while recognizing the need to protect children from the unnecessary severance of the parental relationship. The fact that respondent has been incarcerated since the child was eighteen-months old and she will be nine upon his release supports the fact that there was no abuse of discretion.

In the Matter of B.E.L. & N.D.,* (Unpub.) --- N.C. App. ---, 602 S.E.2d 727 (August 17, 2004) (Catawba County). The Court affirmed this termination of parental rights of siblings in which the older sibling suffered a subdural hematoma likely caused by shaken baby syndrome. B.E.L.

came into care in March 2002 after the respondent mother took the child to the hospital because of irritability and twitching, but the pediatricians found the head injury likely caused by inflicted trauma. N.D. was born in November 2002 and DSS took custody of the child at the hospital. After nearly a year of continuations of nonsecure custody, the adjudication was heard in March 2003. B.E.L. was adjudicated abused and neglected, in a separate but consolidated order, N.D. was adjudicated neglected, and reunification efforts were ordered to cease for both children. Respondent mother appealed these orders and argued (1) that the trial court erred in finding B.E.L. abused; (2) that the trial court erred in concluding that N.D. was neglected based only on evidence of B.E.L.'s adjudication of abuse; and (3) that the trial court erred in ordering reunification efforts to cease when respondent showed some evidence of progress with her case plan. With respect to the first two assignments of error, the Court held that the evidence supported the conclusions of law—the trial court's findings of fact were specific regarding the intentional injury and the likelihood of future injury or neglect based on the parents' psychological evaluations. Although respondent showed some progress in her case plan, it is evident from the findings of fact that the trial court weighed this evidence and concluded that it was in the best interest of the each child that reunification efforts cease.

In re Brown,* (Unpub.) 162 N.C. App. 547, 591 S.E.2d 598 (February 3, 2004) (Davie County). **Reported in full at** *In re Brown*, 2004 N.C. App. LEXIS 214 (N.C. Ct. App., Feb. 3, 2004).

Respondent parents appealed the review order that removed their son Damian from their home and granted custody to the Department of Social Services with a permanent plan of reunification with the parents, concurrent with termination of parental rights and adoption. Although only the biological father of Damian, four of the mother's biological children lived in the home with the parents. The family moved to Davie County in 1997, and DSS became intensely involved with the family due to neglect issues. The initial petition involved the mother not wanting to care for one of her daughters, and subsequent petitions were filed on her remaining three children because of neglect issues. DSS filed amended petitions on all five children alleging inappropriate discipline, failure to address the children's special needs, and the possibility of sexual abuse by the mother's brother. Over the course of the case, the mother's four children were removed from the home so that only Damian remained in the physical custody of the parents. Although the mother's appeal initially involved all five of her children, she subsequently relinquished her rights to all four children except Damian; therefore, the appeal with respect to the four is moot. At the review hearing from which respondents appeal, findings of fact include the parent's failure to comply with previous court orders, the Family Services Case Plan, and to accept responsibility for the physical and psychological harm inflicted on the children. Respondent mother argued that the quality of the audiotape was so poor that it infringed upon her due process rights. The Court overruled this argument and pointed out that NCGS § 7B-806 does not require that the review hearing even be taped. She next argued that there was no subject matter or personal jurisdiction because there was no evidence of a summons or services of the petitions on her; however, there is evidence of a summons and service on the father, and it has previously been held that there must only be service on one parent for the court to obtain jurisdiction over the subject matter. The personal jurisdiction argument was overruled since the mother appeared at the adjudication hearing. To address her due process argument, the Court balanced the mother's right to custody of her child with the State's interest in children's welfare and the right of Damian to be protected from abuse or neglect. After reviewing the record, the Court held that the mother's due process rights had been protected. Finally, the

mother argued that the court did not have jurisdiction because the amended petition was only signed by the DSS attorney and not verified. The Court overruled this argument because it only supplemented facts to support the original allegations of neglect and dependency. Respondent father argued that placing Damian in foster care violated the purpose of the Juvenile Code. The Court overruled this argument and held that the record clearly supported that removal was not a violation of the Code's purpose and was in Damian's best interest.

In re B.S.D.S., 163 N.C. App. 540, 594 S.E.2d 89 (April 6, 2004) (Burke County). Respondent mother appealed the termination of her parental rights as to her fourteen-year-old daughter. There were two previous adjudications of neglect, and the most recent adjudication in 1999 involved sexual abuse by the mother's boyfriend. As a result of the abuse, the child had emotional and behavioral problems, including major depression with psychotic symptoms. Under specific conditions, including counseling for the mother and daughter, and that no unrelated males would be allowed in the home, the child was returned to respondent's care. Subsequently, the Department of Social Services received custody after it was determined that respondent did not comply with the provisions of the order. Evidence introduced at the termination hearing indicated that respondent had missed visitations with her daughter, and had encouraged her to disobey the rules of the group home. On appeal, respondent first argued that the trial court lacked subject matter jurisdiction because the petition did not state it was not filed to circumvent the UCCJEA. This assignment was overruled because she did not show any prejudice. Second, respondent took issue with the trial court's finding that she had not made progress. At trial, respondent testified that she had completed her counseling program; however, DSS was not notified. The Court stated that even if this testimony was credible, there was still sufficient evidence that she did not make reasonable progress to support the finding that she willfully left her child in foster care for more than twelve months. The termination order was affirmed.

In re C.M.,* (Unpub.) 163 N.C. App. 610, 594 S.E.2d 257 (April 6, 2004) (Cabarrus County). This case involved four siblings, J.M.C., J.D.C., S.N.A., and S.E.C. who had a long history of child protective involvement prior to the filing of the petition due to extremely poor hygiene, unsanitary conditions at home, and improper supervision. Respondent mother appealed the termination of her parental rights as to the four children, and the Court upheld the order. Besides the hygiene problems that involved school officials on numerous occasions, the two boys exhibited behavioral problems and the older girl was a selective mute. The trial court found that respondent suffered from dysthymic disorder and had an IQ of 67—she could understand problems, but not how to correct them. After removal, both boys were put in treatment facilities, and the younger boy significantly improved. The selective mute was initially below grade, and in foster care, made the honor roll and the youngest was doing well. The trial court determined that if the children were returned to respondent, there was a high likelihood of repeated neglect. On appeal respondent argued that it was error for the trial court to deny her motion to dismiss at the close of evidence; however, the record clearly contained evidence to support the findings that she neglected her children and the trial court did consider changes in respondent's conditions before it concluded repetition of neglect was likely. Because grounds were found under neglect, the Court declined to review respondent's argument that the findings did not support the ground of dependency.

In re C.A.C.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 906 (June 15, 2004) (Wake County). The Court affirmed this private termination of parental rights proceeding on the ground of abandonment. Petitioner was the biological father of the child, and had physical custody since the parties separated in 1999. Respondent mother had little contact, no correspondence, and did not provide financial support since this time. On appeal, she argued that the trial court erred by concluding there were grounds for termination and that it was in C.A.C.'s best interest to terminate her rights. She also argued it was error not to have the written order entered within the statutory mandate of thirty days. After reiterating that a finding of willful abandonment is a fact to be determined by the evidence presented, the Court concluded that although parts of the order merely recited the contentions of each side, it ultimately held that the record had sufficient facts to support the ground. With respect to best interests, the Court affirmed the trial court's conclusion based on the following facts: when the child had lived with respondent, they moved six times to two states and she had school attendance problems requiring her to repeat a grade; during her residence with the petitioner, she did well in school and consent to adoption by petitioner's wife. Finally, the order not being reduced to writing did not prejudice respondent and vacating an order on these grounds would protect unfit parents as opposed to the children subject of such proceedings.

In re C.A.J. & K.M.J.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 473 (June 1, 2004) (McDowell County), *review denied*, 2004 LEXIS 1220 (N.C., Dec. 2, 2004). The Court affirmed the termination of respondent father's parental rights under NCGS § 7B-1111(a)(8) that provides termination upon a finding by clear and convincing evidence that a parent has committed murder or voluntary manslaughter of another child of the parent. Prior to the birth of the children in this action, respondent was convicted of manslaughter in the death of his six-month son and served an active prison sentence. The children came into the care of the Department of Social Services after respondent fractured the femur of K.M.J. On appeal, he argued that the outcome of the felony child abuse case concerning K.M.J. should not have been considered because it was on appeal at the time of the proceeding. This argument failed because there was no objection at trial, and his own counsel questioned him about the criminal case. Respondent then argued that it was an abuse of discretion for the trial court to find that the death of his son created a probability that they would suffer abuse. However, there were no exceptions to these finding and no abuse of discretion.

In the Matter of Canseco,* (Unpub.) 162 N.C. App. 180, 590 S.E.2d 332 (January 6, 2004) (Forsyth County), *review denied*, 358 N.C. 375, 597 S.E.2d 129 (May 6, 2004). **Reported in full at** *In re Canseco*, 2004 N.C. App. LEXIS 20 (N.C. Ct. App., Jan. 6, 2004). Respondent parents appealed the termination of their parental rights. The Court reversed the father's termination parental rights, but affirmed the termination of the mother's parental rights. Respondents are the parents of three children, although only the youngest child, Karina, is subject to this action. A juvenile petition was filed alleging that the youngest child was abused, and her siblings neglected, due to allegations that Karina child suffered several intentional injuries including several broken bones. There was also evidence of medical neglect due to mouth herpes and lesions under her neck. She also tested positive for opiates. Karina was adjudicated abused and neglected; her siblings were adjudicated neglected. The trial court later found that the parents had made sufficient progress to allow the two siblings to return to their custody; however, Karina was never reunited with her parents. The parents pled guilty to felony child abuse due to

Karina's injuries, and received suspended sentences of sixty months with each parent having six months active time at staggered intervals to allow the care of the Karina's siblings. Subsequently, the mother violated her probation and her sentence was activated. The father was deported to Mexico and the two siblings moved with him. The termination petition alleged four grounds for termination: abuse or neglect of Karina; willfully leaving her in foster care for more than twelve months; failure to pay child support; and the commission of a felony assault on Karina causing serious bodily injury. The termination order did not specify the grounds that were found, but merely states that grounds existed as to each parent to terminate their rights. After reviewing the findings of fact and evidence, the Court determined that the findings did not support the conclusion that grounds for termination existed. There was no finding that respondent father had the ability to pay child support; no finding about his failure to continue the progress toward reunification and evidence that he was progressing until his incarceration; and that the abuse and neglect of Karina was based on the evidence to support the prior petition three years earlier. Although the parents pled guilty to felony child abuse, there was no finding that respondent father actually committed an assault on the child. Because the findings do not support the conclusion that one of the statutory grounds exist, the order relating to the father was reversed. On the other hand, the findings do indicate that the mother stopped making reasonable progress toward reunification after she pled guilty to the child abuse over twelve months earlier. The findings as to the mother support the conclusion of law that statutory grounds exist to uphold the termination of her parental rights.

In the Matter of C.B.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 522 (July 6, 2004) (Wayne County), *review denied*, 358 N.C. 732, 601 S.E.2d 527 (N.C., Aug. 12, 2004). Respondent parents appealed the termination of their parental rights and argued that denial of their motion to continue was an abuse of discretion; that the findings of fact were not supported by the evidence; that the findings did not support the conclusions of law; and it was error to terminate their rights. C.B. came into the custody of DSS after respondent father took the child to the pediatrician with a severely swollen arm that had been present for days. The doctor determined the arm was broken, and x-rays showed a second fracture in the lower left leg. The doctor concluded that the injuries were non-accidental and indicative of violent shaking. Over the course of the case, respondents attended some programs at the domestic violence center, separately and together, and separated but reconciled on several occasions. Respondents both argue that denial of their motion to continue for additional discovery regarding Soft Bone Syndrome, to hire new counsel, and protect rights against self-incrimination. After review of the statute governing continuances, the Court determined there was not abuse of discretion. Further, the Court reiterated that a child's need for permanence should not be compromised due to parents' pending criminal charges. The trial court detailed findings of fact that were sufficiently supported by the evidence as indicated by the record on appeal. Findings were specific that the conditions leading to the abuse had not changed, and future neglect was probable. Finally, there was no abuse of discretion in finding termination to be in the child's best interest despite respondents' argument that there was no adoptive placement and a home study was not performed on the paternal grandmother in Illinois. The termination order was thus affirmed.

In re C.D.M. and J.A.F.D.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Buncombe County). Parents appealed the order terminating their parental rights that the Court affirmed. Both parents had a history of drug abuse and domestic violence. The father has a

criminal history of drug related offenses and the mother has a history of in patient treatment for depression. Relative placements disrupted twice due to the father's harassment of caretakers until the children were placed with a family friend. Parents had no contact with the children, and failed to attend subsequent review hearings. The parents were present for the permanency planning hearing since both had been arrested and were incarcerated in jail. The children were moved to a group home, and the court ordered that reunification efforts cease. DSS had no contact with the father until the TPR hearing, and the mother contacted DSS five months before the hearing stating that she had been in drug treatment and was working part-time. The mother raised several arguments on appeal, but these arguments were waived due to no objection at trial, but the Court declined to consider them. Although the mother had been purportedly drug free for four months, the Court found sufficient evidence to support the trial court's finding that relapse was possible and she would continue to not provide proper care and supervision of the children. The father was only present for part of the TPR hearing due to counsel's failure to file a writ; however, the Court saw no prejudice since his counsel was present during the whole hearing and was allowed to testify after his arrival. The Court rejected his argument that incarceration prevented him from contact his child or provide financial support, and held the findings of fact supporting neglect to terminate his rights.

In the Matter of C.K.M. & S.M.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 11 (November 16, 2004) (Orange County). Respondent mother appealed the custody order placing her children with Orange County Department of Social Services and finding her in willful contempt of court. The Court reversed the custody order after determining that the findings of fact and conclusions of law were not based upon evidence, and reversed the contempt order because respondent did not have statutory notice. A handwritten order for temporary nonsecure custody was initially entered due to the district court's belief that the children were in imminent danger. However, when DSS and law enforcement attempted to execute the order, the children and respondent were not at home. At the subsequent nonsecure hearing five days later, respondent informed the court that the children were in Virginia with their father, although she indicated to the court that she did not know exactly where the children were. At the request of DSS, the judge held respondent in contempt of the nonsecure order until she revealed the children's location. Respondent was placed in custody for contempt of the initial nonsecure order with her release upon delivery of the children to DSS. The Court deduced that the contempt order was civil in nature since its purpose was to compel the mother to disclose the whereabouts of her children. According to the record, Respondent was never served with the initial nonsecure order from which she was found in contempt. Further, civil contempt proceedings require the following: (1) the order or notice of contempt must be given five days prior to a contempt hearing; (2) a sworn affidavit by a person with an interest in enforcing the order must accompany a motion to show cause; and (3) a finding of probable cause to believe there is in fact civil contempt. The trial court failed to follow any of the requisite statutory requirements regarding civil contempt, thus requiring reversal. With respect to the custody order, the nonsecure hearing consisted of an informal conversation between all parties—the court did not give the opportunity to provide witnesses or evidence, and no evidence or testimony was provided. The findings of fact enumerated in the subsequent order were not discussed at the hearing, and therefore not based on the evidence. This case is an example of how informal proceedings in juvenile court may be contrary to law.

In the Matter of C.N.S. and B.N.S.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 521 (July 6, 2004) (New Hanover County). The Court affirmed the termination of respondent parents' parental rights. Undisputed facts indicate that both the mother and the father have a prolonged history of cocaine addiction that affected their ability to have stable housing, employment, and ultimately care for their children. Parents had little direct communication with New Hanover DSS until the filing of the TPR petition, and left Wilmington on foot to relocate in Greenville where the mother gave birth to another child not subject to this case who tested positive for cocaine. After review of the records, the Court determined that sufficient evidence supported the ground of neglect. With respect to best interest, respondent mother argued that the trial court unfairly compared the foster family with them instead of independently evaluating the birth parents. The Court overruled this assignment of error because the trial court did conduct an independent evaluation of the parents' ability to parent when it determined that homelessness, unemployment and drug addiction prevented them from caring for their children. Respondent father argued that several specific findings of fact were not supported by the evidence; however, the Court overruled each assertion.

In the Matter of C.R.,* (Unpub.) --- N.C. App. ---, 603 S.E.2d 407 (September 21, 2004) (Guilford County). From petition to the upholding of appeal of the termination of parental rights, this case spans a decade. In June of 1994 the Department of Social Services took custody of C.R. after receiving notification that the child had a spiral fracture of the femur with an inconsistent explanation of how the injury occurred. Case plans with DSS include both parents completing psychological examinations, follow recommendations, parenting classes, and regular supervised visitation. Despite some participation in therapy, neither parent satisfactorily progressed in parenting and mental health treatment to adequately parent the child with special needs. The psychiatrist for the child specifically recommending in 1998 that the child have no contact with her parents due to severe physiological reactions from her visitation with them. DSS was relieved of reunification and filed for TPR in December 1998; however, the hearing on the petition was not held until 2001. The first assignment of error was that a violation of their due process and constitutional rights occurred as a result of the poor quality of the TPR audio recording. The Court overruled this assignment of error since respondents failed to make any attempt to reconstruct the testimony and were unable to show prejudice since a majority of the inaudible tape consisted of testimony regarding their mental health records that were part of the record on appeal. The respondent father's next argument addressed the delay between the filing and hearing of the TPR petition; however, this case was decided under the former juvenile code, Chapter 7A, and did not contain the compulsory timelines of Chapter 7B that were enacted to reconcile North Carolina's juvenile code with the Adoption and Safe Families Act. The final argument addressed sufficiency of the evidence supporting the TPR and was overruled despite the fact that the trial court's order confused findings of fact and conclusions of law. In a separate concurrence, Judge Tyson pointed out that the respondents failed to take exception with the findings of fact and absent any abuse of discretion, these findings are binding on appeal.

In the Matter of C.S.,* (Unpub.) --- N.C. App. ---, 602 S.E.2d 727 (August 17, 2004) (Franklin County). Respondent, who is the step-grandmother of the minor child, appealed the adjudication of neglect that was affirmed by the Court. After a report was received alleging improper discipline, the investigator questioned respondent's two adult daughters and adult stepson, who is the biological father of C.S. These witnesses disclosed that as children, Respondent and her

husband physically, mentally and sexually abused them and were concerned about the welfare of C.S. if she were to remain in their care. A petition was filed and nonsecure custody was granted to Franklin County Department of Social Services. Respondent and her husband gained custody of C.S. only days after her birth in Texas because her natural parents were both incarcerated, and obtained a custody order after returning to Franklin County. At the adjudication, three of respondent's adult children and stepchildren testified at length regarding the abuse suffered. The biological father of C.S. conceded that his history of drug addiction and incarceration precluded him taking custody, but wanted the child placed for adoption rather than respondent continue to have custody. Two doctors testified regarding physical findings that suggested sexual abuse. Respondent put forth several arguments in her appeal. The first argument contended that her due process rights were violated because the adjudication had been continued several times; the adjudication order was not timely filed and no substantive nonsecure custody orders were entered; there was not a separate dispositional hearing; and that the adjudication order "effectively terminated Respondent's parental rights." The Court overruled all of these arguments. With respect to the continuance and the orders, respondent failed to show any prejudice. As to the disposition hearing argument, the Court cited precedent that although adjudication and disposition have two evidentiary standards, there is no need for separate hearings; further, respondent did not object at the hearing and failed to offer any evidence. The Court dismissed respondent's parental rights argument in that she is not the biological or legal parent, so there is no parental relationship to terminate. Respondent's subsequent arguments alleging insufficiency of the evidence and the fact that the trial judge did not recite specific findings of fact were overruled. She then argued that the trial court was required to address reunification effort; however, NCGS § 7B-507 does not require findings regarding reunification with a specific person, but direct DSS to make reasonable efforts to eliminate the need for the child's placement. In this case, the trial court ordered reasonable efforts to reunify the child with her father which adequately complied with the statute. Finally, respondent argued ineffective assistance of counsel. The Court pointed out that as a non-parent, she did not have the right to counsel, but assuming that she did have this right, she could not show that her attorney's performance was so deficient to deprive her of a fair trial.

In the Matter of D.C. and M.L.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Buncombe County). Respondent mother appealed the termination of her parental rights, and the Court affirmed the ruling. The children came into care due in large part to the mother's substance abuse problem that affected her ability to properly care for her children, contributed to her lack of stable housing, and domestic violence between the parents. Due to her substance abuse problem that resulted in incarceration, the mother attended few court hearings and failed to visit her children while in DSS care. It was not until after the termination petition was filed that the mother began her participation in drug rehabilitation; however, the trial court found that her participation was to comply with the terms and conditions of her probation—not necessarily for reunification with her children. The Court reviewed the trial courts findings of fact, and concluded that the evidence presented supported the findings and conclusions of law. Despite drug rehabilitation, the mother had relapsed twice, most recently weeks before the hearing when she briefly reconciled with the putative father. The trial court found the likelihood of neglect to continue due to the recent relapse and the fact that although she had housing for six weeks, it was unclear how stable the housing would ultimately be. Further, the court made findings regarding

the improvement of the minor children since being placed in foster care that supported the finding that termination was in their best interest.

In the Matter of D.D.T.G.,* (Unpub.) 164 N.C. App. 227, 595 S.E.2d 454 (May 4, 2004) (Johnston County). Shortly after the child's birth, the Department of Social Services became involved with respondent due to concerns that she was not properly taking care of the infant who was hospitalized for not gaining weight. Despite parenting classes, respondent could not apply what she learned, did not complete her adult education classes, and missed visitations. Termination of her rights was based on neglect, leaving the child in foster care without showing reasonable progress, and dependency. Respondent appealed and argued that the court did not have subject matter jurisdiction because there was no statement that the petition was not filed to circumvent the UCCJEA. The Court overruled this argument because respondent showed no prejudice. Next she argued the petition did not have an attached affidavit listing the child's home in compliance with the UCCJEA; however, this information was listed in the petition and the argument was overruled. Finally she argued the court abused its discretion in finding she willfully left the child in foster care. Because respondent failed to argue the other two grounds, the termination was affirmed since only one ground must be found.

In re D.Q.W., T.A.W., Q.K.T., Q.M.T., & J.K.M.T., --- N.C. App. ---, 604 S.E.2d 675 (November 16, 2004) (Wake County). Respondent father appealed the termination of his parental rights, and Wake County Department of Human Services cross appealed the trial court's denial of its motion to dismiss respondent's appeal. The children were initially adjudicated neglected and dependent, and the mother identified respondent as the father. Paternity was established through genetic testing, and respondent requested visitation, but refused to have random drug screens that was a condition of visitation. While in the care of the Department, respondent neither visited nor provided financial support. After initial attempts to serve respondent at his last known address and publication, respondent was served at the Wake County jail, executed an affidavit of indigency, and was appointed counsel the same day. The termination hearing was scheduled in three weeks, and the appointed counsel was notified of the hearing date. At the hearing, respondent's counsel made a motion to continue in order to have more time to prepare, and after argument, this motion was denied. Respondent's only argument on appeal was that it was reversible error when the trial court denied his motion for a continuance. The Court overruled this assignment of error as respondent failed to show any prejudice from the denial of a continuance. With respect to the cross appeal, Petitioner contended that the affidavit of indigency must be served on all parties. Petitioner erroneously based this argument on NCGS § 1-288 that governs the general right of any party to a civil action to pursue an appeal as an indigent; however, NCGS §7A-450 *et seq.* more specifically governs indigency in termination of parental rights cases. Further, there is no requirement that an additional affidavit of indigency be executed for appointment of appellate counsel unless requested by the trial court. Finally, an affidavit of indigency is not a document filed pursuant to the Rules of Appellate Procedure; therefore, serving the affidavit on all parties is unnecessary. The cases cited by Petitioner address the serving of the notice of appeal and not the affidavit of indigency, and in its conclusion, the Court made clear that failure to serve notice of appeal is not a jurisdictional requirement that automatically necessitates dismissal.

In the Matter of D.R., A.R. and S.H., * (Unpub.) 164 N.C. App. 410, 595 S.E.2d 813 (May 18, 2004) (Buncombe County). The Court affirmed the adjudication of dependency, but reversed the adjudication of neglect based on insufficient evidence. Although never married, respondent and the biological mother were the parents of twin boys who were born in Florida. After the family relocated to Asheville with C.R., respondent's daughter from a previous relationship, the parents separated. Respondent was still part of their lives and paid child support. Although it had been three years since the family lived together, and C.R. had moved to Puerto Rico, DSS received a report that she had touched A.R. inappropriately. During the investigation of this report, DSS determined that the twins lived in an injurious environment because of the mother's verbal abuse and lack of supervision by either parent. Respondent returned to Florida, and after the mother needed surgery for treatment of Chron's disease, she voluntarily placed the twins with DSS; however, she died from surgery complications and DSS could not reach respondent. Respondent testified that the mother had changed their phone number and concealed the new number. He did send a greeting card with his new number so the twins could contact him. The only finding the court made to support the injurious environment was "verbal abuse," and the Court held this finding insufficient to support the conclusion. With respect to abandonment, the court only found that respondent "moved back to Florida" eight months before the mother's death. This finding alone does not support willfulness to forego all parental duties.

In the Matter of D.S. & D.M.S.,* (Unpub.) 164 N.C. App. 227, 595 S.E.2d 454 (May 4, 2004) (Cumberland County). The Court affirmed the termination of respondent mother's parental rights. Respondent did not assign error to specific facts, so the Court reviewed the evidence for abuse of discretion. Facts indicate that respondent has a history of substance abuse, including while she was pregnant. She entered drug rehabilitation and gave birth to the twins the next day. She and the putative father have a history of domestic violence, and she left the treatment facility with her children to be with him for a night, and was ultimately discharged. Respondent never completed treatment, did not obtain employment or housing, and another incident of domestic violence occurred resulting in criminal charges against the putative father. At the hearing respondent had been sober and employed for two months. The Court held there was sufficient evidence to support a finding of neglect based on the above history, and that neglect in the future was likely if the children were returned to respondent. Respondent next argued that the trial court abused its discretion in determining that it was in the children's best interest to terminate her rights because of her recent sobriety and employment. The Court upheld the trial court's determination, and affirmed the termination of her parental rights.

In the Matter of Duffy,* (Unpub.) 162 N.C. App. 547, 591 S.E.2d 598 (February 3, 2004) (Cumberland County). **Reported in Full at *In re Duffy*,** 2004 N.C. App. LEXIS 197 (N.C. Ct. App., Feb. 3, 2004). The Court affirmed the adjudication order finding the minor child abused and neglected. Relevant facts include that respondent father was incarcerated from the child's birth until she was four, and during this time while in the care of respondent mother, the child contracted genital herpes. After her father's release, a referral was made to the Department of Social Services that he had sexually abused Dazon. A forensic pediatrician evaluated the child and later testified that the evaluation was consistent with sexual abuse. In the course of investigation, the social worker found history of physical abuse of Dazon indicating that her father had broken her leg. The mother has a history of housing and employment instability, and the father repeated incarcerations. The mother argued that evidence did not support certain

findings of fact, and although the Court agreed with one of her assertions, there was sufficient evidence to support the conclusion of neglect. With respect to the conclusion of abuse, the Court found that Dazon contracted genital herpes while in her mother's care was supported by the evidence; although there was conflicting evidence, there was sufficient evidence to support the finding that the father inappropriately touched his daughter. Respondent mother also argued that the evidence did not support the finding that she failed to provide the necessary medical and therapeutic care after the sexual abuse; however, the Court overruled this argument. With respect to the father's appeal, he first argued that it was error for the expert witness to testify as to her conclusion of sexual abuse. This error was overruled because the evidence clearly showed that the medical expert testified that the child's behavior was consistent with sexual abuse—not that there was a “conclusion” of abuse. Respondent father also argued that the trial court erred in concluding that Dazon was abused because of the inappropriate touching. The Court held that the inappropriate touching was sufficient to establish that he took indecent liberties with his daughter.

In the Matter of Eaker,* (Unpub.) 162 N.C. App. 360, 590 S.E.2d 477 (January 20, 2004) (Caldwell County). Respondent father appealed the termination of his parental rights, and the Court affirmed the order. The child was taken into the custody of the Department of Social Services at birth due to the parents' substantial histories of domestic violence, substance abuse and incarcerations. The parties stipulated to an adjudication of dependency with facts indicating that respondent was arrested three months prior to the child's birth on several violent felonies and the mother has used illegal drugs while pregnant. At disposition, the trial court determined that reunification was inconsistent with the child's need for a safe, permanent home within a reasonable time. The final permanency planning order found that respondent had been sentenced to twenty years, and adoption was the permanent plan. The termination petition alleged that respondent left the child in foster care for twelve months and that the child was dependent due to respondent's diagnosis of antisocial personality disorder and the incarceration, and the court found evidence to support both grounds. The mother relinquished her parental rights. At the hearing respondent was represented by his attorney and GAL via audio and video conferencing. The trial court determined on its own that video conferencing was appropriate due to respondent's previous conduct in the courtroom. On appeal, respondent argued first that his constitutional right to confrontation was violated due to the video conferencing. The Court overruled this argument because the trial court detailed its reasoning to use video, and the transcript indicated that respondent and his attorney were able to effectively participate in the proceeding. Next respondent argued that the finding that he willfully left the child in foster care was erroneous due to his incarceration; however, the Court found that evidence sufficiently supported the ground of dependency and did not reach his argument.

In the Matter of E.L.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Buncombe County). Respondent father appealed the adjudication order finding neglect and the interim dispositional order. Respondent failed to appeal from the final disposition, and the Court upheld previous decisions that a temporary or interim dispositional order is not a final order from which appeal may be taken. With respect to the adjudication, evidence presented indicated that since the child's birth in the hospital, there was major concern of aggressive behavior of both parents to the infant. The child had been placed with the maternal aunt, but his placement was disrupted in part due to the aggressive behavior of respondent. Due to respondent's plain error

argument, the Court reiterated that the plain error rule does not apply in civil cases. Respondent argued that expert testimony and a psychological report from nine years prior was irrelevant. After reviewing the records, the Court found that the report was relevant as it indicated respondent's ability to problem solve and deal with safety issues after a head injury sustained in an automobile accident. The Court confirmed that trial courts should consider competent and relevant evidence in determining best interests, and subsequently weighs the evidence and determines inferences to draw from conflicting testimony. Finally, respondent argued prejudice in the four-month delay from the oral order and the final written order from which appeal may be taken. The Court declined to accept this argument in that common sense indicates that the intent of the General Assembly in requiring written orders to be entered within thirty days was to provide speedy resolution of custody cases—not to overturn such cases on appeal which would ultimately further delay the custody determination. The adjudication order was consequently affirmed.

In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167 (May 4, 2004) (Johnston County), *review denied*, 2004 N.C. LEXIS 1215 (N.C., Dec. 2, 2004). The Court affirmed the adjudication of neglect and disposition that gave DSS custody. While herself in the custody of DSS, Respondent mother who was sixteen gave birth to E.N.S. Because respondent was residing in a drug treatment facility that would not accommodate an infant, DSS took custody of the child at birth and a petition alleging dependency was filed. The petition was subsequently amended to include allegations of neglect due to the mother's other child being adjudicated neglected with reunification efforts ceased; during visitation with her grandmother, she disobeyed curfew and the rules of the drug treatment facility. At the hearing, respondent agreed to a stipulation of dependency, but not neglect. The trial court weighed the evidence of a past adjudication of neglect and the likelihood of continuation in the future in determining that E.N.S. was also neglected. The Court did not determine that the trial court abused its discretion based on the evidence. Respondent contend that it was error for the trial court not to orally recite the standard of proof. This argument was overruled because the standard of proof was clearly cited in the written order, and it is not statutorily or by caselaw required that the court orally state the standard. Finally, respondent's argument that the order should be vacated because it was not entered within the mandated thirty days was also overruled. She failed to show prejudice, and such a result seems to contradict purported legislative intent to provide parties with speedy resolution of their cases.

In the Matter of F.M.L.W. & F.J.S.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 267 (December 7, 2004) (Wake County). Respondent mother appealed termination of her parental rights of her two sons and brought forth four issues on appeal. Her first argument was that a new trial was necessary because the recording of the proceedings was incomplete. The Court overruled this error because respondent failed to attempt to reconstruct the testimony and did not show prejudice. The second argument contended error in that the trial court failed to have a special hearing to determine issues raised by respondent's answer; however, she denied each allegation. The Court reasoned that the purpose of the special hearing is to determine which issues remain for trial, and since all allegations were denied, there were no issues of which to dispose at a special hearing. The third argument addressing sufficiency of the evidence was overruled based on the court's number of specific findings of fact that supported the finding of grounds. Finally, respondent argued that the trial court erred by taking judicial notice of the case file from a

previous hearing; however, she failed to object to the judicial notice and thereby did not preserve the error for appellate review. The Court affirmed the termination.

In the Matter of Hardwick,* (Unpub.) 162 N.C. App. 360, 590 S.E.2d 477 (January 20, 2004) (Buncombe County). The Court affirmed the termination of respondent father's parental rights to his daughter. Respondent and the child's mother were married, but separated. After the separation, the mother lived with another woman whose parental rights had been terminated due to severe physical and sexual abuse of her son. The mother was to make sure her children had no contact with the woman, but she continued the relationship. As a result, a petition was filed and the Department of Social Services gained custody of the child based on an adjudication of abuse and neglect. Although represented by counsel at the hearing, respondent was not present at the adjudication. Respondent was present at the following permanency planning hearings, and allowed supervised visitation. He was also ordered to obtain a substance abuse assessment and pay child support. At a subsequent hearing, DSS was relieved of reunification since respondent failed to follow the orders. At this point, the child was placed in a therapeutic foster home and was given evaluations for psychological and learning disability issues. The termination petition was filed alleging willfully leaving the child in foster care for over twelve months and abandonment. The hearing was continued for half a year to allow respondent to be released from incarceration. Testimony at the hearing described the child's educational delays and psychological diagnosis in addition to the progress made in her therapeutic foster home. Respondent testified that he had been on the run from a probation violation warrant, had not obtained suitable housing since his release from jail, and his only child support was a purge payment. After reunification efforts ceased, respondent had no further visits or other contact with the child. Respondent argued there was insufficient evidence to support grounds for termination because his incarceration did not allow him to have contact, and he was told by a social worker his visitation had been suspended; however, the Court overruled this argument finding sufficient evidence of abandonment. In his second argument, respondent argued that the termination was essentially the fault of DSS. The Court reiterated that it is no longer necessary to have a finding that DSS made diligent efforts to provide a parent services before terminating parental rights.

In re H.A.T., C.A.T. and C.W.T.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 11 (November 16, 2004) (Buncombe County). Respondent mother appealed the termination of her parental rights, but the Court affirmed the termination of her rights. Prior to the children coming into Department of Social Services custody, the children resided with respondent mother, an older sibling, and their biological father, who relinquished his parental rights. The family had a substantial history with child protective services, including the removal of an older stepsister amidst allegations of sexual abuse by the children's biological father. After several reports of extreme filth and odors at the house, DSS filed petitions to gain temporary custody of the children. The children were adjudicated neglected based on many factors, including the condition of the house, inadequate nutrition, personal hygiene, discipline and sexuality issues, sleeping arrangements and lack of supervision. Subsequently there were allegations of sexual abuse of H.A.T. by her father, and sexual abuse of C.A.T. and S.W.T. by the older sibling who resided in the home, and the initial plan of reunification was changed to adoption. The grounds for termination included neglect and willfully leaving the children in foster care for over a year. The respondent argued that the evidence did not support the termination grounds; however, the

Court found that the findings of fact did support the conclusions of law due to the evidence presented that the mother had not shown progress to correct the conditions that led to removal, and that neglect would be likely if the children were returned to her care. The evidence indicated that she was aware of the sexual abuse and did not protect the children. Respondent assigned error to what she argues was inadmissible hearsay about the abuse; however, the Court rejected this argument, finding that she suffered no prejudice due to the fact that it was a bench trial and it is presumed that the trial judge will disregard incompetent evidence. Respondent then argued that her fifth amendment right against self-incrimination was violated. This argument was overruled due to the precedent that there is no right to remain silent in civil abuse and neglect proceedings since the primary concern is the best interest of the children involved.

In re H.D. and J.B.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 741 (December 21, 2004) (Cumberland County). In this termination of parental rights appeal, the Court reversed as to the father based on insufficiency of the evidence and affirmed the termination as to the mother. The children were taken into care as a result of the mother's substance abuse problem that interfered with her ability to provide proper care. Although substance abuse treatment among other services was recommended, the mother failed to take advantage of services. On the other hand, the father was incarcerated during earlier proceedings, but was scheduled for release weeks after the termination hearing and already had a contracting job set up. His sister was caring for his child, and while in her care, she brought the child to visit the father in prison and he sent the child letters. The social worker testified that the father could not provide support due to his incarceration and admitted that she never executed a case plan or otherwise had contact with the father prior to the hearing. Essentially the Court held that the evidence presented as to the father did not support the findings of fact by the necessary clear and convincing standard. The termination order was substantially a recitation of the allegations in the petition, and not supported by the evidence. With respect to the mother, the Court held that sufficient evidence was presented to support the allegations in the petition and ultimately the termination of her parental rights. The Court noted several procedural flaws, including the fact that the written order was not entered until months after the hearing, but held that the mother was not prejudiced. In this case, the parents' counsel erroneously gave oral notice of appeal that was supposed to be incorporated in the final order, but did not file the appropriate notice of appeal within ten days of the order's entry. However, the Court granted certiorari and noted that Petitioner/Appellee and Guardian ad Litem/Appellee failed to file appellee's briefs, motions to dismiss for failure to give timely notice of appeal, or a memorandum in opposition to the writ of certiorari.

In the Matter of H.H. & A.H.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 905 (June 15, 2004) (McDowell County). Respondent mother appealed the permanency planning hearing that released Department of Social Services of reunification efforts. She argued that it was error to have the hearing without proof of proper service and notice, and that the order was not supported by sufficient evidence. The children were adjudicated neglected in part due to respondent's drug use, and placed with A.H.'s biological father with whom both siblings had a relationship. The mother failed drug tests, admitted to its use, did not visit with the children for over a month, and prior visits did go well with the children. With respect to the service argument, the clerk issued a notice of hearing within the appropriate time frame to respondent's address. The social worker testified at the hearing that respondent did receive notice. The Court pointed out that although respondent argued she was not served, she did not argue failure of actual notice and overruled

the assignment of error. Respondent's argument of the orders is that little was done besides the entry of written reports; however, evidence was presented at the hearing to support the trial court's findings of fact. The permanency planning order was affirmed.

In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22 (February 17, 2004) (Burke County).

Respondent parents appealed the termination of their parental rights, and the Court vacated the portion of the order that terminated respondent father's parental rights, and reversed and remanded the portion of the order that terminated respondent mother's parental rights.

Respondent father previously appealed the permanency planning order, and the Court remanded the case for additional findings of fact [see *In re Hopkins*, 157 N.C. App. 572, 579 S.E.2d 520 (2003)]. Pertinent facts indicate that due to domestic violence between the parents the minor, D.J., was in DSS custody from May 1995 until May 1997 when the maternal aunt was given custody. However, the aunt subsequently returned custody to the father in 1999, and the father's stepbrother sexually abused D.J. Respondent father was inconsistent in assuring that his son received the necessary treatment, and at a review hearing in November 2001, the trial court granted DSS legal and physical custody of D.J. This review was also a permanency planning hearing, and at this time, the trial court relieved D.S.S. of reunification efforts with either parent and adoption became the permanent plan. It was from this order that the father appeals. While the permanency planning order was on appeal, the trial court proceeded with the termination of respondents' rights. The mother had sporadic involvement with DSS and the court, and prior to the hearing, her appointed counsel was permitted to withdraw. The mother did not file an answer to the petition, but at the call of the case for hearing requested court-appointed counsel. This request was denied, and the court proceeded to terminate both parents' rights. With respect to the father, the Court held that the trial court lacked jurisdiction pursuant to NCGS § 7B-1003 that states pending disposition of an appeal, the trial court's authority over the juvenile is limited to the entry of temporary orders. With respect to the mother, the Court agreed with her assignment of error that the trial court denied her request to court-appointed counsel. The record indicated that the trial court denied her request for counsel because she had been instructed previously to apply through the clerk prior to the hearing; however, inaction prior to hearing is not a waiver of counsel on the part of a respondent parent.

In re Hunter,* (Unpub.) 162 N.C. App. 180, 590 S.E.2d 333 (January 6, 2004) (Nash County).

Respondent mother appealed the termination of her parental rights as to her daughter, and the Court affirmed the termination. Respondent is the biological mother to eight children, with the children either placed with relatives by the juvenile court, or aged out of the court's jurisdiction. One child's rights were involuntarily terminated. The child in this action came into care as an infant after she was placed in the trunk of a car during a domestic dispute. The mother has a significant history of cocaine and alcohol abuse; anger management issues; unstable housing; unemployment; mental illness including suicidal tendencies; and criminal convictions. The mother failed to successfully complete substance abuse treatment and was incarcerated for absconding while on intensive probation. On appeal respondent argued there was no evidence or specific finding that her alcohol and substance abuse problems had an adverse impact on her child to justify termination on the ground of dependency. The Court found that since the substance abuse issues resulted in institutional admissions and causing suicidal ideations that her substance abuse problems did have an immediate negative impact on her child. Further, the evidence sufficiently supported that findings of fact and conclusions of law that her long term

alcohol and substance abuse caused her to be incapable of providing for the proper care and supervision of her child; and, that the trial court did not abuse its discretion that termination was in the child's best interest.

In re H.W., R.W., 163 N.C. App. 438, 594 S.E.2d 211 (April 6, 2004) (Davidson County), review denied, 358 N.C. 543, 599 S.E.2d 46 (June 24, 2004). Respondent parents appealed the review order that denied the mother's motion for visitation and changed the permanent plan from reunification to a concurrent plan of guardianship to a relative and termination of parental rights and adoption. Facts indicate that the father had been convicted of felony child abuse of his girlfriend's twenty-month old son in 1991 that resulted in permanent paralysis; the mother suffered domestic violence from the father and had mental limitations for which she received disability; and the father suffered from memory loss, blackouts and uncontrollable bursts of anger. The children were adjudicated neglected due to an injurious environment and respondents were given supervised visitation. Five months later, additional petitions were filed by the Department of Social Services alleging abuse, neglect and dependency. Although the parties received services after the prior adjudication, the trial court did not conduct a disposition. Prior to the adjudication of the second petition, the mother made a motion for substitute counsel that was denied; however, her counsel was later allowed to withdraw and a guardian ad litem was appointed for the mother. R.W. was adjudicated abused and neglected, and H.W. was adjudicated neglected. The dispositional order required that visitation be at the discretion of the children's therapists, that the father undergo a sexual disorder specific evaluation, the mother have a full psychological evaluation, and that the parents assist DSS in locating funds to pay for the evaluations. The parties willfully failed to complete their respective evaluations and that the children were doing much better by not visiting their parents. On appeal, the parties argue that the evidence did not support the finding that they failed to get their evaluations due to their unwillingness to cooperate with DSS or comply with the previous order, not their financial circumstances. Respondents argue their indigence prevented them from getting the evaluations, but this assignment of error was overruled. Evidence presented indicated that there was no reason the father did not work, that the mother received disability, and that when the father was in jail, the mother secured \$600 to post his bond. Their next argument was the trial court did not make the requisite findings of fact to support the order ceasing reunification under NCGS § 7B-907. After review of the record, the Court overruled this assignment of error finding that the trial court made the necessary findings to cease reunification at the review hearing and the evidence supported the findings. Their final argument was that it was error for the trial court not to appoint a guardian ad litem for the father, and for not timely appointing the mother's guardian ad litem. The Court was found no merit in their contentions and offered a summary of when appointed of a guardian ad litem is necessary. NCGS § 7B-602(b)(1) does not require the appointment of a guardian ad litem any time dependency is alleged, nor in every case in which substance abuse or other cognitive limitation is alleged. Such appointment is only required if (1) the petition specifically alleges dependency; and (2) the majority of the dependency allegations show the parent to be incapable as a parent due to the listed debilitating conditions. In this case, the majority of allegations as to the father focused on his non-compliance with domestic violence treatment and the abuse of his family. As to the timeliness of the appointment of the mother's guardian ad litem, the Court found that she was not prejudiced. The issue presented was whether failure to appoint a Rule 17 guardian ad litem prior to or at the commencement of the action is prejudicial *per se*. The Court held that the statute does not require reversal when the court makes

the appointment sometime after the commencement of the action unless the appointment is so untimely that the incompetent person is prejudiced. In this case, the mother's guardian ad litem was appointed prior to the adjudication and disposition, and her guardian ad litem was present at every hearing after the appointment. As a result, the mother was adequately represented by her guardian ad litem.

In re J.A.O., --- N.C. App. ---, 601 S.E.2d 226 (September 7, 2004) (Buncombe County). In this case the Court reversed the termination of parental rights citing abuse of discretion at the dispositional phase of the proceeding. Despite the trial court's ruling, the Court agreed with the argument of the mother that she had made reasonable progress to correct the conditions that led to the filing of the TPR petition. The juvenile involved was fourteen at the time of filing, currently sixteen, suffers from violent behavior that has resulted in multiple hospitalizations, including hospitals out of state. It is noteworthy that the Guardian ad Litem agreed with respondent and argued that it was not in the child's best interest to terminate rights because it was unclear whether the mother's actions led to the child's mental health issues and that termination would likely leave the child a legal orphan. The Court agreed that due to the child's age, physical and mental condition, that he would be an unlikely candidate for adoption. Citing *In re Montgomery* and the legislative intent of the two-phase TPR proceedings, this case is a prime example of where legal grounds for termination are established, but the best interests of the child are not served by severing the family relationship.

In re J.B., 164 N.C. App. 394, 595 S.E.2d 794 (May 18, 2004) (Buncombe County). Respondent mother appealed a permanency planning order relieving the Department of Social Services from reunification efforts, and from an order dismissing her previous appeals for production of medical records. The Court vacated all orders, and remanded the case for proper finding of subject matter jurisdiction under the UCCJEA. After respondent moved to South Carolina, a petition was filed alleging abuse and neglect and DSS was given nonsecure custody. Subsequent orders determine that the trial court had jurisdiction over the subject matter and parties without making specific findings of fact to support this conclusion. Under NCGS § 50A-201, it is necessary for a court to meet one of four factors to gain subject matter jurisdiction and the trial court failed to make the requisite findings to conclude it had jurisdiction.

In re J.C.S. & R.D.S., 164 N.C. App. 96, 595 S.E.2d 155 (May 4, 2004) (Catawba County). Respondent mother appealed the permanency planning order that changed the permanent plan of her two children to adoption. By stipulation, the children were originally adjudicated neglected based on the mother leaving them home alone while she worked. Although in the legal custody of DSS, the children were placed with respondent while she received services. However, respondent was subsequently charged with driving while impaired while R.D.S. and another child were in the car. The children were briefly placed with their maternal grandmother, but were later placed in foster care. After a permanency planning hearing, the children were placed with respondent for a trial basis. During this time, fourteen-year-old J.C.S. became pregnant with twins from a 21-year old immigrant. The mother condoned this relationship since the boyfriend financially assisted the family, and as a result, the trial placement ceased and the permanent plan became adoption. While this appeal was pending, the petitioner moved to dismiss the appeal on mootness because the mother's parental rights were subsequently terminated and she did not appeal that order. The Court denied this motion and followed the

holding in *In re Hopkins* that the trial court is without jurisdiction to terminate rights while a subsequent order is on appeal. The Court did note that this decision did not affect the TPR order because it was not under appellate review. As to the permanency planning order, respondent argued that it was not supported by sufficient evidence, but the Court overruled this assignment of error. The result was the order was affirmed.

In re J.D., 164 N.C. App. 176, 605 S.E.2d 643 (May 4, 2004) (Buncombe County), *review and motion denied*, 358 N.C. 732, 601 S.E.2d 531 (Aug. 12, 2004). The Court initially filed an order in this case on December 3, 2003; however, respondent filed a petition for rehearing that was granted. **Please note that this opinion reversing respondent's parental rights supercedes the previous one.** The factual history indicates that the case began when respondent took four-year-old J.D. to the hospital and alleged her son, M.D. raped her. M.D. was placed out of the home, but returned when respondent was hospitalized for psychological problems. As a result of a delinquency proceeding, M.D. was order to complete a sexual offender evaluation and be placed outside the home. He lived in a trailer adjacent to the family home with sensors to monitor him; however, he returned to the home when the court no longer supervised him. There were several other reports, including domestic violence, more sexual abuse, drug use by her stepdaughter and her husband who had a two year old, and purportedly respondent set her stepgrandson on fire. The TPR petition alleged neglect and dependency, and the court terminated her rights under neglect. Respondent argued that it was reversible error for the trial court not to appoint her a guardian ad litem as a result of the dependency allegation. Petitioner argued that because the neglect ground, not dependency, was pursued at hearing, there was no prejudice. The Court disagreed, and held that a GAL for the mother was required because the evidence tended to show that the mother's mental health and the neglect were intertwined, and the TPR order referenced her mental illness.

In the Matter of J.B.C. and C.L.C.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 743 (December 21, 2004) (Yadkin County). Respondent father appealed the termination of his parental rights as to his two children. The Court found that the evidence supported the trial court's findings, and affirmed the termination. Yadkin County Department of Social Services became involved with the family after a Florida social services agency reported domestic violence and drug use, and that the family moved to North Carolina during a child protective investigation. The children had been adjudicated neglected based in part on respondent's drug use and refusal to participate in treatment. Respondent failed to take advantage of services offered to him and the court relieved reunification efforts. In one of his arguments, respondent argued that he should have had a guardian ad litem appointed to represent his interests because DSS believed he suffered from a substance abuse problem and "possibly other disorders." The Court overruled this assignment of error because the TPR petition did not allege dependency to invoke the statutory requirement of a Rule 17 GAL for respondent.

In re J.D.S.,* (Unpub) --- N.C. App. ---, 602 S.E.2d 728 (August 17, 2004) (Wake County). The Court affirmed the termination of parental rights of respondent mother after determining that the evidence presented supported the conclusion that the child was neglected. The child was placed in the nonsecure custody of Wake County Human Services and adjudicated neglected primarily due to improper discipline. The child was initially placed with her biological father, but was subsequently removed from her care due to allegations of neglect. The trial court

entered several conditions for reunification, and although the mother met some of the requirements, she failed to demonstrate appropriate parenting skills. Respondent did not assign error to the findings of fact or the conclusion that termination was in the child's best interest; therefore, the Court only reviewed whether the evidence presented supported the conclusions of law. After review, the Court concluded that respondent's failure to address the underlying issues that brought the original neglect petition support the conclusion that future neglect would be likely to occur, and did not address sufficiency of the evidence as to the other two termination grounds found by the trial court.

In re J.E.P.,* (Unpub.) --- N.C. App. ---, 601 S.E.2d 331 (August 3, 2004) (Guilford County). Respondent parents appealed the termination of their parental rights and argued that the trial court erred in determining that the child was neglected; that they had not made reasonable progress under the circumstances that led to the child's removal; and that they failed to pay child support. The child came into care after the mother tested positive for marijuana at the birth of the child and admitted to using the drug while breastfeeding. The parents did not assign error to the findings of fact; therefore, the Court only reviewed the evidence for abuse of discretion. Because termination can be supported if only one ground exists, the Court only reviewed the ground concerning willfully leaving the child in foster care for over 12 months without sufficient progress. The Court reiterated previous decisions that held that willfulness can be found despite parents making some effort to regain custody if no reasonable progress or positive efforts are found. The findings of fact cited several instances where the parents failed to complete the requirements of their service agreements with DSS, did not comply with substance abuse counseling, and failed to maintain contact with their social worker. The findings were sufficient to support termination on this ground. Respondent father also argued that he had established paternity despite the trial court finding this ground to support termination; however, although he argued he had filed a paternity action, he failed to provide copies of the action with the record on appeal.

In re J.G.M.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 267 (December 7, 2004) (Rowan County). In its termination of parental rights order, the trial court failed to specify the provisions under N.C.G.S. §7B-1111. As a result, the Court of Appeals vacated the order and remanded the case for entry of an order specifying the grounds to support the termination.

In re J.L.K., --- N.C. App. ---, 598 S.E.2d 387 (July 6, 2004) (Johnston County). In this private termination of parental rights action, respondent father appealed on the basis that the order was not reduced to writing within thirty days as required by statute and should be vacated; insufficiency of the evidence; and that the trial court lacked subject matter jurisdiction. Respondent has a history of severe alcoholism and incarceration, and is currently incarcerated until 2009. He never paid child support, and has a history of behavior potentially injurious to the child, for instance, shooting a gun into her residence when she was an infant. Due to his repeated incarcerations, he has very little contact with R.L.K., despite repeated contact with his mother and attorney while incarcerated. The Court overruled his contention that the TPR order must be vacated since it was untimely entered—vacating the order is not an appropriate remedy and respondent suffered no prejudice. After reviewing the evidence, the Court then determined there was no abuse of discretion in the trial court determining that grounds for termination were supported by clear and convincing evidence. Finally, respondent argued that since R.L.K.

resided in Wake County, but the petition was filed in Johnston County, that the trial court lacked subject matter jurisdiction. However, R.L.K. spent significant time in Johnston County since her home was on the border with Wake County, and it is undisputed that R.L.K. was physically present in Johnston County on the date the petition was filed. The Court concluded that respondent confused the issues of subject matter jurisdiction and venue. Since respondent did not raise improper venue in response to the petition, the defense was waived; further, since the child was “found” in Johnston County at filing, the Court’s jurisdiction was proper.

In the Matter of J.M.H.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 742 (December 21, 2004) (Person County). Respondent father appealed the order adjudicating his son neglected for not providing proper medical care, and awarding custody to the Department of Social Services for placement in a therapeutic foster home. The child was diagnosed mildly mentally retarded, with depressive and disruptive disorders, and attention deficit/hyperactivity disorder (ADHD). The parents had been separated for six years, shared joint custody although no formal custody order was entered, and consistently disagreed regarding the care of their son to his detriment. After transferring school, the child began to have behavioral problems. Respondent did seek counseling for his son due to these behavioral issues. After an incident involving an assault on a babysitter, the child was admitted to UNC Hospitals for two weeks. It was the recommendation of treating physicians that the child be placed in therapeutic foster care in part due to the dysfunctional environment created by the parents’ animosity, and respondent’s poor attitude regarding treatment of his son. The Court affirmed that the evidence supported an adjudication of neglect in that the child suffered emotional and mental impairment due to the parent’s relationship that disrupts their ability to provide proper care.

In re J.N.S., --- N.C. App. ---, 598 S.E.2d 649 (July 20, 2004) (Catawba County). Respondent appealed an order denying her motion for partial summary judgment. Despite the fact that such a ruling is interlocutory, the Court granted certiorari to address the merits. The initial adjudication was resolved by consent as to dependency despite allegations of neglect, and this adjudication order was incorporated into the termination petition. In response to the termination of parental rights petition, respondent filed a motion for summary judgment that argued that respondent’s prior consent order resolved the issues of neglect in the initial petition, and that the petitioner was bound by collateral estoppel and res judicata on these issues. The trial court denied respondent’s motion on the basis that the two actions were sufficiently different. The issue on appeal was whether summary judgment is proper in a termination proceeding. First, the Court addressed respondent’s argument that collateral estoppel and res judicata bar relitigation of neglect, and made clear that a prior adjudication of abuse, neglect or dependency stands as to the findings at the time of the order, and that although prior adjudications of abuse, neglect or dependency are admissible, they are rarely sufficient alone to support termination since ground must exist at the time of the hearing of the termination petition. With respect to a summary judgment motion, the Court is clear that the Juvenile Code allows no provision for summary judgment in a juvenile proceeding, but in turn, requires that the trial court hear evidence and make findings of fact as to the petition’s allegations.

In re J.O. & J.O.,* (Unpub.) 164 N.C. App. 227, 595 S.E.2d 451 (May 4, 2004) (Cumberland County). **Reported in full at** *In re J.O. & J.O.*, 2004 N.C. App. LEXIS 736 (N.C. Ct. App., May 4, 2004). Respondent father appealed the order that granted legal and physical custody to

maternal cousins. The children's mother is not party to the appeal, and due to substance abuse, told the social worker that the children should be placed with relatives. Respondent and his girlfriend were allowed visitation after two consecutive drug tests, but failed to submit. Further, respondent changed jobs at least four times and could not maintain a stable residence. Respondent argued that the trial court did not consider the permanency planning hearing statutory requirements pursuant to NCGS 7B-907; however, after reviewed the record, the Court overruled this contention. Respondent also argued that findings of fact were not support by the evidence. For instance, he argued he did attend parenting classes; however, the GAL testified that she contacted the parenting program and was told that respondent accompanied his girlfriend who had to go due to an altercation with her daughter. Failure to have the drug testing was also a violation of previous orders. Respondent argued that reasonable effort were not made to work with him. The Court overruled this argument because the record did show petitioner gave reasonable efforts to work with respondent. Finally, he argued that the court did not consider changed circumstances. This argument was also overruled, and the order was affirmed.

In re J.R., 163 N.C. App. 201, 592 S.E.2d 746 (March 2, 2004) (Guilford County). The Court reversed and remanded the order adjudicating the minor children neglected because not all parties were present as required NCGS § 7B-902 to enter a consent order. The trial court began the adjudication in this case before respondent and her attorney were present. The social worker gave an unsworn summary of the facts; subsequently, respondent's attorney came when the court had already moved on to disposition, and respondent came at the end of the dispositional portion. At the end of the "hearing" the judge stated that the findings should reflect the allegations in the petition, and directed respondent to comply with a visitation plan among other conditions. In addition to the fact that a consent cannot be entered without all parties present, the Court held that there was insufficient evidence since a mere unsworn summary was the basis.

In re J.R.A.,* (Unpub.)164 N.C. App. 227, 595 S.E.2d 454 (May 4, 2004) (Rutherford County). Respondent father appealed the termination of his parental rights based on abuse and neglect due to multiple bone fractures, inflicted by non-accidental means, either by respondent or the mother. On appeal, he argued that the trial court erred in admitting evidence of domestic violence between himself and the mother, specifically that an insufficient foundation was laid for the admission of evidence that the mother had a black eye and told the social worker that respondent inflicted the injury. He also argued that the prejudice outweighed the relevance. The Court reiterated that at a bench trial, it is presumed that the trial court disregards incompetent evidence. It is not reversible error unless it is shown that the trial court relied on the incompetent evidence in makings its findings. The Court did not find any reliance on this evidence, and affirmed the termination order.

In re J.R.T.,* (Unpub) 164 N.C. App. 227, 595 S.E.2d 452 (May 4, 2004) (Davie County). **Reported in Full at *In re J.R.T.***, 2004 N.C. App. LEXIS 663 (N.C. Ct. App., May 4, 2004). The petitioners in this private termination of parental rights action were the great aunt and uncle of the minor child, with whom J.R.T. had resided since shortly after birth. The mother of the child is petitioner's niece, and she consented to their adoption of J.R.T. The allegations included grounds for lack of support, abandonment and neglect. Evidence showed that respondent failed to appear in superior court on a criminal charge, was subsequently apprehended in Australia, and was convicted of statutory rape. At the close of evidence, respondent moved to dismiss and the

motion was denied. Respondent's counsel declined to put on evidence, but requested that his client address the court. The testimony was not under oath. His only argument on appeal was that he had ineffective assistance of counsel because his attorney did not present evidence. Respondent failed to show that this tactical decision deprived him of a fair hearing. Further, the record indicated that respondent did not take the stand in order to prevent the admission of his criminal history. This argument was denied, and the termination affirmed.

In re J.S., --- N.C. App. ---, 598 S.E.2d 658 (July 20, 2004) (Cumberland County). Respondent parents appealed from the permanency planning hearing that ceased visitation and relieved reunification efforts, and the Court reversed and remanded the case for appropriate findings of fact. By consent, the children were originally adjudicated dependent due to unsanitary conditions, poor personal hygiene and medical care, attendance issues, and the parents' inability to manage their finances. As a result of strokes, respondent father received disability and the mother remained unemployed. Periodic permanency planning hearings were held on four occasions prior to this hearing. The order appealed was a two-page order that did not incorporate any prior orders or findings of facts from prior orders, but merely incorporated a DSS court report and a mental health report of the eldest child. The Court has already held that the trial court may not delegate its "fact finding" duty, and therefore, should not broadly incorporate reports from outside sources as its findings of fact. Further, the order failed to sufficiently comply with the statutory requirements of NCGS 7B-907 governing permanency planning hearings.

In re J.W.J., T.L.J. & D.M.J., --- N.C. App. ---, 599 S.E.2d 101 (August 3, 2004) (Richmond County). The children were taken into care based on allegations of abuse and neglect by their caretakers, the paternal grandparents. Although the initial petitions were dismissed with prejudice, the children remained in the legal custody of the Department of Social Services. Subsequently petitions to terminate the parental rights of respondent were filed. The youngest child had been placed with his paternal grandparents at birth, and the older two children had lived with respondent mother in California for some time, but returned to North Carolina where respondent returned to California without her children. Respondent apparently suffers from schizophrenia and did not have contact with DSS until served with the TPR petitions. In response to the petitions, respondent wrote a letter to the Richmond County Clerk of Court to explain her situation. In her appellate argument, respondent contended that the court did not have personal jurisdiction because her contacts were insufficient. This argument failed because of respondent's letter, deemed an "answer" and did not raise the defense of lack of personal jurisdiction pursuant to Rule 12 (b) 6, and was thus waived. Her second argument was that the trial court erred in its determination that it would be in the children's best interest to terminate her parental rights without any findings that the petitioner made diligent efforts for reunification. This argument is outdated, relying on the previous termination statute that did require diligent efforts; however, this statutory requirement has been omitted and does not apply to this case.

In the Matter of L.C. and A.N.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 473 (June 1, 2004) (Mecklenburg County). The Court affirmed respondent mother's termination of parental rights. Due to substance abuse, the children were adjudicated dependent and findings of neglect were held in abeyance. The TPR petition was filed alleging failure to pay child support and willfully leaving her children in foster care—there was no dependency allegation and the mother did not

request a guardian ad litem at trial. The issue is whether the trial court erred in not appointing the mother a guardian ad litem when the petition did not allege dependency, substance abuse, or mental illness. The Court held that the focus of NCGS 7B-1111(6) is narrow and does not require the appointment of a guardian ad litem in all TPR hearings in which the evidence shows mental illness or substance abuse.

In the Matter of L.G.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 742 (December 21, 2004) (Harnett County). In this appeal of a termination of parental rights, the child was initially taken into custody after exhibiting symptoms associated with subdural hematomas including seizures. After examination, it was determined that the child had classic signs of shaken baby syndrome, including retinal hemorrhages, a skull fracture, several fractured ribs, and fractured legs. After the adjudication of abuse, reunification efforts were ceased. Throughout the proceedings, the parents denied inflicting the child's injuries. The parents argued that clear and convincing evidence was not introduced to support grounds for termination. The Court disagreed, citing evidence that the parents were the only caretakers of the child and they never gave any reasonable explanation for the extent of injuries. Further, evidence presented supported the likelihood that neglect would be repeated in that the parents' situation had not changed. The parents argued that the trial court erred in not separately stating the grounds that existed for each parent. This assignment of error was overruled as there is no statutory requirement that the court delineate separate grounds for parents, and in this case, the grounds were the same. Finally the Court affirmed that termination was in the best interest of the child finding no abuse of discretion by the trial court.

In re Lutz,* (Unpub.) 162 N.C. App. 360, 590 S.E.2d 477 (January 20, 2004) (Catawba County). Respondent grandmother appealed the permanency planning order that ceased reunification efforts and adopted a permanent plan of adoption of her two grandchildren. The grandmother obtained custody of the two children in 1997 with the mother relinquishing her rights in 2000 and the father having minimal contact since the custody order. The children were removed from the home in 2000 based on allegations of neglect that the children were allowed to play in their unsafe basement where the grandfather urinated in their presence. The grandmother took steps to alleviate the reasons the children came into care, including parenting classes, and cleaning and locking the basement. During this time the grandfather was incarcerated for the sexual abuse on an unrelated minor. The grandfather was sentenced to sixty years in prison, and the grandmother had plans to divorce him. Despite her efforts, the trial court determined that reunification was not in the children's best interest. On appeal, the grandmother argued that there was insufficient evidence to support the order and that the order did not comply with North Carolina law. The Court agreed and held that the order violated NCGS § 7B-507 governing reasonable efforts and NCGS § 7B-907 that specifies the requirements of a permanency planning order. The transcript indicated DSS reunification efforts were inadequate, particularly in light of the grandmother's progress. Because the findings of fact did not support the conclusions of law, the order was reversed.

In re C.M.,* (Unpub.) 163 N.C. App. 610, 594 S.E.2d 257 (April 6, 2004) (Buncombe County). The Department of Social Services filed five petitions on C.M., J.L.M. Jr., J.L.M., K.W., and L.L.W. based on neglect of both parents and the sexual abuse of J.L.M. and C.M. by the respondent father. L.W. is the child of K.W. At the adjudication, the parties stipulated to facts,

including sexual misconduct; however, petitioner agreed to withdraw the allegations of sexual abuse without prejudice, and the children were adjudicated neglect with the exception of L.W. who was adjudicated dependent. Respondent was ordered to complete a psychological evaluation and follow recommendations, although the trial court did not order a sexual offender specific evaluation. The result of the evaluation was for respondent to undergo the sexual offender specific evaluation, and at the permanency planning hearing the trial court did order the evaluation and respondent appealed. The only issue presented on appeal was whether the trial court exceeded its authority in ordering him to follow the recommendations of the psychological evaluation that he complete the sexual offender evaluation. Respondent argued that because there was no adjudication of sexual abuse in the case that the trial court exceeded its dispositional authority under NCGS § 7B-904(c). The Court overruled this argument and held that the trial court's findings support the order for evaluation and treatment because it was in the children's best interest and directed to remedying the condition that led to the adjudication as specified by the statute. Further, the statute allows for psychiatric and psychological treatment to be ordered at any time—not just at the dispositional hearing.

In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584 (February 3, 2004) (Buncombe County), appeal dismissed, *In re Mashburn*, 2004 N.C. LEXIS 1080 (N.C., Aug. 31, 2004). Respondent parents appealed the adjudication order that found their son and daughter abused and neglected, and relieved the Department of Social Services from reunification efforts. The father is the biological parent of the son only, and the mother is the biological parent of both children. With respect to the daughter, she disclosed sexual abuse by her stepfather, but her mother did not believe the abuse occurred, and failed to protect her daughter from further abuse. The son had been spanked with a paddle on the bottom of his feet as a form of discipline and was three years developmentally delayed. Respondent mother argued that the trial court erred by admitting hearsay testimony describing instances of sexual abuse and denying her motion to dismiss. The Court held that the investigative social worker's testimony regarding description of the report that contained the daughter's description of abuse was non-hearsay because it was offered to explain the reasons that the Department of Social Services began its investigation and to rebut any implication that the child fabricated the allegations. Although the social worker testified that the abuse occurred "multiple times," the admission of this testimony was not prejudicial because the judge did not rely on the testimony in making its findings of fact. The Court then held that the social worker's testimony that the child would be beaten if she told of the abuse was hearsay, but was not prejudicial in light of other substantial evidence of abuse. The social worker also testified regarding a pending investigation of alleged sexual abuse in Yancey County involving respondent stepfather and his grandchildren. The Court held that this testimony was non-hearsay because it was used to provide the history and context of DSS interaction with Mr. Mashburn. A social worker from Yancey County testified regarding the grandchildren's investigation, and the Court again held it was non-hearsay because it was used to corroborate the Buncombe County social worker's testimony of the investigation. Respondent mother next contends that it was error to admit the testimony of an expert pediatrician about the child's disclosure of abuse and the transcribed interview; however, the Court affirmed that this testimony is permissible under the medical diagnosis and ordinary course of business exceptions. In applying the two-part analysis of *State v. Hinnant*, the Court held that the child made the statements to obtain medical treatment or diagnosis, and that the statements were reasonably pertinent to medical diagnosis or treatment. Respondent mother's same argument regarding testimony of a mental

health professional who interviewed both children was also overruled on the basis of the medical diagnosis exception. With respect to her argument regarding denial of her motion to dismiss, the Court held that there was sufficient evidence to support the trial court's judgment and therefore denial of her motion to dismiss.

On his appeal, respondent father argued first that the trial court erroneously received and considered dispositional reports and testimony during the adjudication hearing; however, the Court held that respondent failed to demonstrate that the trial court used this information for any purpose besides disposition. Next he argued that the trial court erroneously allowed expert testimony to establish credibility of the minor child, and there was not a proper foundation for the experts' opinions. The Court held that there was no evidence that the expert testimony about the likelihood that sexual abuse occurred bolstered the child's credibility, and neither professional testified about that the abuse in fact occurred or the truthfulness of the child. The adjudication was thus affirmed.

Judge Levinson concurred in the result only, and Judge Tyson concurred in part and dissented in part. The dissent held that there was no evidence presented that respondent mother abused or neglected her children. He would hold that it was error to admit testimony concerning the female child's statements and Mr. Mashburn's statements to DSS; considering hearsay evidence of Mr. Mashburn's alleged abuse of his grandchildren; and the expert pediatrician's testimony under the medical diagnosis exception about Mrs. Mashburn's "belief" of her daughter's abuse. Therefore, it was error to deny Mrs. Mashburn's motion to dismiss because there was no evidence that she was aware of or condoned the abuse.

In re M.C. & C.H.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 519 (July 6, 2004) (Cabarrus County). The Court affirmed this termination of parental rights after reviewing the record to determine that the evidence supported the trial court's findings of fact and conclusions of law. Procedurally, M.C. was adjudicated abused and neglected due to sexual abuse by her stepfather and the mother's failure to protect her after learning of the abuse, and C.H. was adjudicated neglected based in part on medical neglect and the abuse of his sister. At disposition, the trial judge ordered the permanent plan to be adoption because reunification within a reasonable time was determined to be futile. The termination order contained twenty detailed findings of fact that indicated incidents of domestic violence; the sexual abuse and subsequent charges that respondent and her husband pled guilty; respondent's mental health diagnosis of schizophrenia; her continued support of her husband; and determination by a mental health professional that she does not have the ability to adequately care for her children. Respondent only broadly assigned error to the findings of fact; therefore, the Court found them binding on appeal. Further, the specific findings were well supported by the evidence presented.

In the Matter of M.C. & C.P. & J.P. & R.C.,* (Unpub) --- N.C. App. ---, 603 S.E.2d 407 (September 21, 2004) (Cumberland County). Respondent parents appeal the adjudication and disposition order granting custody of C.P. and J.P. to their father, and R.C. and M.C. to DSS. The court made detailed finding of fact regarding the mental health of the mother, the domestic violence between the parents and toward the children. Respondents assigned error to the fact that there was a nine-month delay in the adjudication hearing in which non-secure custody was continued. The Court failed to see that the respondents were prejudiced by the delay, and that

due to the complexity of the case and number of individuals involved, the trial court adequately moved the case forward. Respondent mother then assigned error to the trial court's finding that she was unfit, that the father of C.P. and J.P. was fit to have custody, that the disposition be filed in a civil custody case, and that visitation was in the discretion of the children's father. The Court held that the trial court did not abuse its discretion, and in fact, the Guardian ad Litem report provided an ample basis for the court's findings. In the concurrence, Judge Timmons-Goodson provides a separate analysis regarding the continuance issue and the trial court's disposition order.

In re Miller, 162 N.C. App. 355, 590 S.E.2d 864 (January 20, 2004) (Wayne County). The Court vacated the termination of parental rights order on the basis that the Department of Social Services lacked standing to file the petition because they did not have custody of the child. A neglect petition was initially filed on the basis that the mother had given custody to a couple, the Jackson's, in order that they adopt the child. The child was adjudicated neglected and placed in the custody of DSS and placement with the Jackson's. At a subsequent permanency planning hearing, the Jackson's were given custody of the child in an order filed February 1, 2002. On March 1, 2002 DSS filed the petition to terminate respondent's rights. Pursuant to NCGS § 7B-1103(a), DSS has standing to file TPR petitions if the juvenile court has either given the agency custody or the parents have surrendered the child to the agency for adoption. Because DSS no longer had custody in this case, there was no standing to file the TPR petition; therefore, the trial court lacked subject matter jurisdiction.

In the Matter of M.K.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Brunswick County). The Court affirmed this termination of parental rights for willful failure to pay child support while the child was in foster care. The child came into the care of the Department of Social Services for neglect due to failure to change dirty diapers or bath the child, and leaving the child in her swing for extended periods of time. The child suffered from stiffened limbs, lack of proper muscle development, and a flattened head with hair loss. The trial court made specific findings regarding the respondent mother's ability to work, work history, and finances in a checking and savings account. Respondent argued that she was never under a court order to pay child support, but the Court rejected this argument because it is well established under North Carolina law that parents have a duty to support their children within their means.

In the Matter of M.L.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 905 (June 15, 2004) (Cleveland County). Respondent parents appealed the termination of their parental rights as to their special needs daughter who suffers from seizures, cerebral palsy, and is severely mentally handicapped with no means of communication. Department of Social Services had removed M.L. from her parent's care due to sexual abuse by the father's roommate, but after completing services, the child was placed with her father with the mother having supervised visitation. Subsequently it was discovered M.L. had a sexually transmitted disease and she was placed in DSS custody. The mother completed the requirements of the court, but moved to Florida. The father moved to California and then Florida, but paid child support and visited his daughter every six to eight weeks. After reviewing the evidence, the Court concluded that respondent father did not willfully abandon his daughter—he regularly communicated with M.L.'s teacher and part of the time considered fell outside of the six months preceding the filing of the petition. Willful

abandonment is a fact-inquiry, and the facts did not indicate the father's intent to relinquish his parental duties. However, the Court found the evidence supported the mother's willful abandonment and affirmed the termination of her parental rights. She had paid no support, was not in contact with her daughter's teacher or DSS, and had not exercised visitation. The trial court did not abuse its discretion that it was in the child's best interest to terminate her mother's rights.

In the Matter of M.L. and A.G.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 898 (July 20, 2004) (Cabarrus County). After A.G. was diagnosed with failure to thrive due to caloric deprivation, a petition alleging both juveniles were neglected and dependent was filed and both children were adjudicated on those grounds. At disposition, the trial court ordered that reunification efforts were not necessary as it was not in the best interest of the children to return to respondent mother's care. By motion, respondent's rights were subsequently terminated on the same grounds. On appeal respondent argued that although she has an IQ of 57, she was consistent in her visitation and has family support to assist raising the children. After review of the record, the Court overruled her argument. Evidence presented showed that the children's hygiene was inadequate, they were often improperly dressed and fed, and her cognitive limitations would likely impede proper medical care. Due to the history of her inability to provide proper care and her cognitive limitations, the Court affirmed that it was in the children's best interest that her rights be terminated.

In re M.L.B.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 266 (December 7, 2004) (Guilford County). Respondent mother, with a substantial drug abuse history who already had her rights terminated as to seven children, appealed the termination of her parental rights arguing that the trial court erred in denying her motion to continue the TPR hearing, denying her an opportunity to present evidence, and finding sufficient evidence to support a termination of her parental rights. With respect to the first assignment of error, the termination hearing had already been continued once in order for respondent to be appointed counsel. Respondent was notified of the next hearing date, but failed to appear at the hearing allegedly due to transportation problems. Counsel for respondent made an oral motion to continue that was denied, and the Court upheld this denial, relying in part on NCGS §7B-1109(d), that continuances beyond the 90 days from the date the initial termination petition is filed should only be granted in extraordinary circumstances. Due to respondent's absence, her counsel was unable to present evidence. The only evidence counsel for the mother attempted to introduce was an unauthenticated letter that the court refused to admit due to hearsay. The Court noted that it was not the trial court that refused to permit respondent to testify, but that it was her absence that prevented her testimony. Finally, with respect to the findings of grounds to support termination, the Court found sufficient evidence had been presented to support the trial court's findings of fact and conclusions of law.

In the Matter of M.L.J.* (Unpub.) --- N.C. App. ---, 600 S.E.2d 519 (July 6, 2004) (Alamance County). Respondent father appealed the consent order adjudicating his daughter neglected and dependent. The issue presented on appeal was essentially whether the consent order was valid, and respondent argued that there was insufficient proof that he consented to the trial court's findings. Respondent's counsel consented to amended allegations, and respondent did not argue that his attorney's consent was invalid; therefore, the Court held that respondent's attorney's consent was in fact that of her client. Respondent attempted to argue that the consent was to

amended allegations, and not consent as to adjudication; however, the attorney did not object at the hearing. After review of NCGS 7B-902 governing entries of consent to resolve juvenile petitions, the Court determined that all requirements were met and affirmed the adjudication.

In re M.R.M., M.A.K., J.S.K.,* (Unpub.) --- N.C. App. ---, 603 S.E.2d 584 (October 5, 2004) (McDowell County). Respondent argued that the evidence did not support a finding of neglect resulting in the termination of her parental rights. Neglect was due to the mother's inability to provide proper care for her children as a result of her prescription drug dependency precipitated by her chronic migraine headaches. The trial court's order had sufficiently detailed findings to support its conclusions, and affirmed the termination. Also after denying the maternal grandparents' motion to intervene except for the limited purpose of presenting evidence at the dispositional stage in the event respondent mother did not present evidence, respondent assigned error to the finding that the children's contact with the maternal grandparents was not in their best interest. Again the Court found no error because the evidence supported this finding, and the termination of parental rights was affirmed.

In re M.R.D.C., --- N.C. App. ---, 603 S.E.2d 890 (November 2, 2004)(Wilkes County). Respondent father appealed permanency planning order that relieved DSS from reunification efforts with his daughter and directed DSS to file for TPR. He argued that the permanency planning order did not comply with the statutory requirements of N.C.G.S. §7B-907 and the Court agreed. The Court has previously held that is it reversible error for the trial court to enter a permanency planning order that continues custody with DSS without making proper findings pursuant to the statute even if the evidence supports the determination of the trial court. The Court confirmed the inadequacy of incorporating DSS court summaries and GAL court reports as findings of fact—it is appropriate to incorporate such reports, but not as a substitute for the trial court's own findings. Further, the Court reiterated that recitations of testimony in an order are not proper findings of fact.

In re N.A.B.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 265 (December 7, 2004) (Cumberland County). Respondent father appealed the termination of his parental rights after pleading guilty to second-degree murder in another state and subsequently receiving a sentence of fifteen years. This appeal arose from a second termination proceeding—although grounds existed at the first hearing on the first petition, the trial court determined that termination was not in the child's best interest noting the positive involvement of the paternal family and the concern that this involvement would cease upon termination. Respondent argued that the court failed to consider and make specific findings regarding the previous dispositional findings; however, the Court explained that the trial court is not bound by such findings in light of additional evidence presented at the second termination hearing.

In re N.B., 163 N.C. App. 182, 592 S.E.2d 597 (March 2, 2004) (Buncombe County), *appeal dismissed*, *In re N.M.B.*, 2005 N.C. App. LEXIS 63 (N.C. Ct. App., Jan. 4, 2005). Respondent parents appealed the order of adjudication that found grounds of abuse, neglect and dependency and denied reunification and visitation. Since the parents' parental rights were subsequently terminated, the Court followed the reasoning of *In re Stratton* and dismissed the appeal as moot. Although the trial court relied on some of the evidence presented at the adjudication, the judge did not rely on the previous adjudication itself in determining that there were grounds to

terminate, and in fact found two additional grounds: leaving the child in foster care for 12 months without making reasonable progress, and failure to pay reasonable child support. Judge Tyson dissented, and followed the reasoning of *In re Hopkins* that the trial court did not have jurisdiction to terminate the parental rights of respondents while the adjudication order was on appeal. The dissent pointed out that in order for the Petitioner, Department of Social Services, to have standing to file a termination of parental rights petition, they must have been granted custody or the parents surrendered the child for adoption. In this case the only basis for DSS to have custody of the child is the adjudication order subject to appeal.

In re N.R.M., T.F.M., --- N.C. App. ---, 598 S.E.2d 147 (July 6, 2004) (New Hanover County). Petitioner filed this private termination of parental rights action against respondent mother, a citizen and resident of Arkansas. Prior to relocating to North Carolina, an Arkansas custody order was entered that granted petitioner custody with respondent to have reasonable, supervised visitation until certain conditions were met. In response to the petition, respondent files an answer raising the defenses of lack of personal jurisdiction and lack of subject matter jurisdiction. Respondent also filed a separate motion to dismiss for lack of personal jurisdiction that was denied by the trial court. The order also specifically noted that North Carolina had jurisdiction over the subject matter and parties, and it was from this order respondent appealed. It is also noteworthy that Arkansas entered a subsequent order that required petitioner to return the children to that state for a three-day visit; however, the hearing was in 2000 and the order was entered nearly two years later. Although respondent argued lack of personal jurisdiction, the Court reviewed the subject matter jurisdiction issue and vacated the order after determining that the trial court did not have subject matter jurisdiction under the UCCJEA. Although the children had been in North Carolina for six months prior to the filing of the petition to qualify as their “home state”, one of the parties still resided in Arkansas and Arkansas court did not relinquish jurisdiction. Further, facts did not even support North Carolina having emergency jurisdiction under the UCCJEA.

In re O.W., --- N.C. App. ---, 596 S.E.2d 851 (June 1, 2004) (Robeson County). Respondent mother appealed the adjudication of abuse and neglect based on her giving alcohol to her child and putting plastic bag over O.W.’s head; the Court affirmed the order. History indicates extensive involvement by the Department of Social Services due to incarceration, physical abuse, and improper care. In a 1999 psychological evaluation, she was diagnosed with borderline intellect, antisocial personality disorder, and episodic alcohol abuse. She participated in therapeutic services, and a 2001 evaluation showed great improvement. Although she did not object at trial, respondent argued it was error to consolidate the adjudication and disposition hearings. Although these hearings require different evidentiary standards, the statutes do not require separate hearings. Respondent then argued that the trial court failed to cite the proper standard of proof; however, the order does indicate the court did make its conclusion based on clear and convincing evidence. There is no standardized way to recite the standard of proof. On her third assignment of error, respondent argued that the order merely recited testimony. The Court agreed this recitation was error, and remanded the case for appropriate findings of fact.

In the Matter of P.S.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 742 (December 21, 2004) (Johnston County). The Court affirmed this termination of parental rights based on neglect and dependency due to the mother’s drug use and inability to address the child’s special needs. The

child was born with a positive toxicology screen for cocaine, has had seizures since birth, has hearing aids, wears glasses at twenty months, and has difficulty using her tongue. The mother's drug use and borderline I.Q. affect her ability to properly parent the child, and she failed to follow dispositional orders requiring substance abuse treatment. Respondent argued that noncompliance with statutory provisions requiring the TPR hearing to be within ninety days of filing the petition, and the order be entered within thirty days. While acknowledging the need for trial courts to adhere to statutory provisions, the Court did not find that the respondent had been prejudiced in any way. In fact the continuation of the TPR hearing allowed respondent additional time in which to correct conditions leading to removal. Respondent next argued the need for a separate hearing for both adjudication and disposition; however, the Court held that although there is a different evidentiary standard at each stage, there is no statutory requirement that there be two separate hearings.

In re Q.V., --- N.C. App. ---, 596 S.E.2d 867 (June 15, 2004) (Orange County), *cert. denied*, 358 N.C. 732, 601 S.E.2d 859 (Aug. 12, 2004). Respondent father appealed the order denying his motion for reimbursement of costs under NCGS § 50A-312 that he incurred to regain physical custody of his son, Q.V. Pertinent facts are that the Orange County Department of Social Services took emergency non-secure custody of the child after his mother was admitted to a psychiatric unit. By stipulation of the mother and stepfather, the child was adjudicated neglected and dependent; however, respondent father who resided in California was not notified of the case. In addition, the superior court of Sonoma County, California had previously issued a custody order granting respondent and the mother joint custody, with the mother having primary physical custody. During the proceedings, respondent was incarcerated in California, but the paternal grandmother filed documents in that state requesting that its court assume jurisdiction over the juvenile. The father wished his son to be placed with his mother until his release. The trial court continued to review the case, and although it initiated a home study of the paternal grandmother, it determined that it had both personal and subject matter jurisdiction. The California court issued a show cause order against the mother and Orange County DSS regarding the physical custody of the child, and respondent father filed motions to dismiss and vacate prior order in the North Carolina court that was denied. Subsequently, the California court issued an order that asserted exclusive, continuing jurisdiction and the North Carolina court relinquished jurisdiction. Respondent father then filed his motion for costs. The Court determined that although costs may be awarded to a prevailing party under the UCCJEA, NCGS § 50A-312(b) specifically denies costs to be awarded against states. The Court reasoned that under previous rulings, our counties are treated as agencies of the state. As a result, costs may not be recovered from a county department of social services, and denial of his motion was affirmed.

In re R.H.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 742 (December 21, 2004) (Mecklenburg County). The Court affirmed this termination of parental rights based on the respondent mother's failure to make reasonable progress to address her substance abuse and parenting issues while leaving her child in foster care for more than twelve months. The mother has a significant history of substance abuse that has impacted her ability to parent leading to involuntary termination of parental rights of two children in Virginia. DSS initially took custody of the child because she was abandoned while the mother sought substance abuse treatment; however, when she was released from that treatment facility, she did not attempt to regain custody. Although the mother made some progress toward reunification due to her substance abuse treatment, she failed

to address other necessary issues including parenting skills, stable housing and employment. The child was in a stable adoptive placement, and there was no abuse of discretion in finding that it was in her best interests to terminate respondent's parental rights.

In re Rholetter, 162 N.C. App. 653, 592 S.E.2d 237 (February 17, 2004) (Macon County).

Respondent father appealed the dispositional orders that awarded custody of his two daughters to their biological mother. Juvenile petitions were filed alleging that respondent and his wife, the children's stepmother, abused and neglected the two girls. Specific findings of fact show that the stepmother physically fought with the girls, including striking them in the face, pulling out hair, and kicking one of the girls in the back, and hit them at least two times a week. The Department of Social Services attempted to work with the family, but the father was hostile to services and obstructed one of the investigations. Although the stepmother was charged with two counts of misdemeanor child abuse and simple assault, respondent father failed to respond. Further, the stepmother abused alcohol and smoked crack in front of the girls, and took \$400 from one of the girls that was for her birthday. Respondent father argued that there was not sufficient evidence to support the trial court's findings of fact and conclusions of law, but the Court overruled these assignments of error. Respondent argued that the trial court was required to conduct a review hearing in ninety days; however, NCGS § 7B-906(d) specifically relieves the necessity of review hearings if custody is returned to a parent. Even though the children were not returned to respondent, custody was in fact restored to the biological mother. Respondent also argued that the trial court was required to follow the mandates of the Interstate Compact on the Placement of Children since the biological mother resided in South Carolina. The Court disagreed because the children were not placed in foster care or as a preliminary to adoption, but with their biological mother. In his final argument, respondent argued that the transcript was incomplete. The Court overruled this assignment of error, and affirmed the trial court's order.

In re R.L.C.H.,* (Unpub.) 163 N.C. App. 783, 595 S.E.2d 238 (April 20, 2004) (Alamance County). Respondent father appealed the adjudication of his son who was adjudicated dependent with the Department of Social Services having continued custody. Respondent was incarcerated pending trial for alleged sexual abuse of his son's sister, and was at Dorothea Dix Hospital for evaluation. As a result of his detention, respondent arranged for girlfriend to act as his son's guardian, including decision-making authority. R.H. was involuntarily committed for aggressive behaviors and suicidal thoughts. The recommendation of the hospital to DSS was R.H.'s placement into a Level III group home. DSS unsuccessfully tried to contact the girlfriend and respondent's mother to authorize the transfer of R.H. In order to facilitate this transfer, DSS filed a juvenile petition. Respondent took issue with specific findings of fact, and argued that the order merely recited allegations. The Court overruled this assignment of error with the exception of one finding that stated domestic violence has occurred in the home because there was no evidence in the record to support this finding. The father argued that dependency was not supported by the facts. However, the record is clear that the behavior of R.H. was beyond the disciplinary control of the girlfriend and paternal grandmother, and that there was no other alternative for his care. Last, respondent argued that facts did not support that it was in R.H.'s best interest to be in DSS custody. This assignment was overruled in light of the evidence of R.H.'s aggressiveness and suicidal ideations, and that the girlfriend and grandmother could not control him. The adjudication of dependency was affirmed.

In the Matter of R.S. & M.S.,* (Unpub.) --- N.C. App. ---, 596 S.E.2d 905 (June 15, 2004) (Alamance County). Respondent mother appealed the adjudication of abuse and neglect of her two daughters; however, the Court overruled her assignments of error and affirmed the trial court's ruling. Facts indicate that after the parents separated, the children lived primarily with respondent mother and the father having visitation every other weekend. The mother subsequently began an intimate relationship with an 18 year-old man who spent nights at the residence with the girls. During a period of visitation, the girls were babysat by the father's neighbor and while giving the girls a bath, discovered redness of their vaginas. The neighbor promptly called the police, and the children were seen that night at the hospital to investigate potential sexual abuse. The physical exam of R.S. showed a torn hymen, and her demeanor during and after the exam was highly suspicious to the emergency room doctor that she had been sexually abused. Prior to this investigation, the evidence showed that the father suspected his daughters' sexual abuse, but did not contact the mother, police or DSS. Although K.S. was too young for a forensic mental health evaluation, R.S. did have the evaluation that also supported sexual abuse with the perpetrator being the mother's boyfriend. There were also incidents of sexual acting out between the sisters, and R.S. with her mother. At the adjudication hearing and on appeal, the mother argued it was error to admit the statements made by R.S. because they were hearsay. Statements made to a half sister and the DSS investigator were offered for the limited purpose of showing the actions taken by these witnesses in response to the statements, and therefore, not hearsay. The Court does caution trial judges in admitting statements for corroboration prior to the testimony needing corroboration. The mother also argued that the statements were more prejudicial than probative, but the Court found no abuse of discretion. The mother then argues that the statements made to the treating physician should be excluded. The medical diagnosis exception is a two party inquiry: (1) whether the statements were made for the purpose of medical diagnosis or treatment; and (2) whether the statements were reasonably pertinent to the diagnosis or treatment. *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). Factors to consider with respect to the declarant child in abuse cases relevant to the first inquiry are (1) the setting of the interview and nature of questioning; (2) to whom the declarant was speaking; and (3) whether the child was told of the nature of the exam and necessity to tell the truth. Respondent argued that since the doctor did not tell R.S. his role, that the exception is not met; however, the Court dismissed this argument following the contention that the trial court should look at the totality of the circumstances to determine whether the necessary intent is present. Relevant factors considered include R.S. went to the hospital by the police the night the abuse was discovered; the exam was in the emergency room; and the attending physician wore a long white coat and introduced himself as doctor. Respondent then argued there was not a proper foundation for the doctor's diagnosis of sexual abuse, but the Court found that the disclosure was sufficient coupled with the physical findings.

The second argument on appeal was that the evidence did not support the factual findings; however, during her testimony, her own attorney introduced a forensic mental health evaluation that supports the findings. She then argued that the conclusions of law were not supported by the facts, but this error was overruled based on unchallenged findings. Her final argument was that the trial court should have granted her motion to dismiss at the end of the evidence. The Court found substantial evidence to support the allegations, and overruled this assignment of error.

In the Matter of R.T.W.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 521 (July 6, 2004) (Orange County), *review granted*, 2004 N.C. LEXIS 1079 (N.C., Aug. 30, 2004). Respondent mother appealed the termination of her parental rights on the basis that the trial court did not have subject matter jurisdiction because an earlier order was on appeal. The Court agreed with this contention, and vacated the termination order; however, the Supreme Court has granted certiorari to determine this dispositive issue. R.T.W. was the product of statutory rape of respondent minor mother by her half brother, and came into care after concerns of lack of bonding and deterioration of the home environment, including lack of electricity and water. At the initial review hearing, the trial court ordered reunification cease and respondent appealed. This panel of the Court distinguished *In re Stratten* that held that respondent father's appeal of an adjudication was rendered moot by a subsequent termination order because it did not address whether the trial court had jurisdiction to enter the termination.

In re Savage, 163 N.C. App. 195, 592 S.E.2d 610 (March 2, 2004) (Catawba County). Respondent mother appealed the termination of her parental rights of her two children in this private termination action. The Court vacated and remanded the case due to the fact the orders were signed by a judge who did not preside over the termination of parental rights hearing. The hearing was presided over by the former chief district court judge who announced in open court certain findings of fact, the ground of failure to pay support for one year prior to the filing, and that it was in the children's best interest to terminate. Petitioner father's attorney was instructed to draft the order that was subsequently signed by a different district court judge. The Court previously held in *In re Whisnant* that an order terminating parental rights was a "nullity" when signed by another judge who did not preside over the hearing. Because the judge who presided over the hearing in this case is no longer on the bench, the case was remanded for a trial *de novo*.

In re S.A.F.,* (Unpub.) --- N.C. App. ---, 603 S.E.2d 407 (September 21, 2004) (Mecklenburg County). In this private termination of parental rights, respondent father was convicted in federal court of interstate domestic violence resulting in bodily injury and death, and using a firearm in relation to the murder after respondent shot and killed the mother of S.A.F. in his grandmother's home in Charlotte. Prior to the relocation to Charlotte, Respondent, the mother and child lived in Georgia. Since his arrest on the day of the shooting, Respondent has continually been incarcerated and the U.S. Fourth Circuit of Appeals upheld his conviction and sentence of life without the possibility of parole. The Petitioner in this case is the mother's sister who moved to Charlotte from New York after the murder to assist in the care of the child. During the five years between his imprisonment and the TPR, Respondent sent only four correspondences by mail to S.A.F. and despite earning up to forty dollars a month, provided no financial assistance. The Court found no merit in Respondent's arguments including that he was prejudiced by the trial court's failure to have a special hearing after he filed an answer denying material allegations in the petition, and the TPR was affirmed.

In the Matter of S.B., --- N.C. App. ---, 602 S.E.2d 691 (October 5, 2004) (Orange County) [COA03-1001]. Respondent father appeals the termination of his parental rights. Respondent mother also appeals the order terminating her rights in the companion case, *In the Matter of S.B.*, COA 03-1239. Respondent father continued to abuse alcohol and drugs despite referrals and participation in drug abuse treatment so that he was not in a position to parent his daughter, S.B. At the permanency planning hearing, DSS was ordered to file petitions to terminate respondent

parents' rights as to S.B. and in its subsequent motion, DSS alleged neglect and dependency due with respect to the father due to his substance abuse history. The trial court terminated respondent's rights due to dependency pursuant to NCGS §7B-111(a)(6); however, the trial court did not appoint a guardian ad litem for respondent as required by NCGS §7B-1101. The Court found reversible error in this failure, and remanded to case for appointment of a guardian ad litem for respondent and rehearing.

In the Matter of S.B., --- N.C. App. ---, 602 S.E.2d 694 (October 5, 2004) (Orange County) [COA 03-1239]. Respondent mother appeals the termination of her parental rights under similar facts as respondent father in the above companion case. Dependency allegations with respect to the mother were based on her mental fitness including depression and social phobia affecting her parenting ability. As in the case of the father, no guardian ad litem was appointed pursuant to statute, and the Court agreed with respondent's assignment of error that she was entitled to such an appointment. This case was heard by on May 19, 2004 by a separate panel than the companion case reaching the same result. This line of cases make clear that appointment of a guardian ad litem for respondents is required when a petition or motion to terminate parental rights alleges dependency, and failure to do so constitutes reversible error.

In the Matter of S.E. & E.E.,* (Unpub.) --- N.C. App. ---, 603 S.E.2d 167 (September 7, 2004) (Cumberland County). This case reiterates the importance of preserving an issue for appellate review. The children came into the care of the Department of Social Services based on neglect and dependency due to the respondent mother's mental health condition in which she suffered delusions, paranoia, and hallucinations. The mother was appointed counsel and a guardian ad litem when the petition was filed due to her condition. By consent, a dependency order was entered granting DSS custody and maintaining the children's placement with the maternal grandparents. The father, a resident of Minnesota, was ordered to submit to a psychological evaluation and parenting assessment. A home study was ordered and approved of the father's home. At the permanency planning hearing, the trial court denied the maternal grandparents' motion to intervene and concluded it was in the children's best interest that they be placed permanently with their father in Minnesota after a transition period. The mother relied on only one assignment of error in her appeal and challenged the trial court's refusal to allow evidence of a report prepared by a counselor who had worked with the children. However, the Court found that the mother failed to preserve this issue for review since she made not offer of proof at the hearing regarding the content of the report, and failed to call the counselor as a witness. Further, she did not even include the report as part of the record on appeal. As a result, the trial court's ruling was affirmed.

In the Matter of S.H. & A.K.,* (Unpub.) --- N.C. App. ---, 600 S.E.2d 520 (July 6, 2004) (Guilford County). This case involved an appeal from a nonsecure custody order that placed A.K. with her father; however, the record indicates the trial court intended to dismiss the petition as to A.K. but the written order does not accomplish this objective as it refers to a date for hearing on the petition. Because the Court concluded that the order neither dismisses the petition nor terminates jurisdiction, the case was remanded for entry of an amended order or adjudication of the neglect petition. Although it appears that the trial court wanted to resolve the case by giving the father custody, dismissal of the petition divests the court of jurisdiction and renders

any custody order invalid. The Court also confirmed that the trial court is without authority to dismiss a petition at a nonsecure custody stage.

In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (January 20, 2004) (Forsyth County). This case is of significance because it gives some guidance to the role of a Rule 17 GAL appointed to represent a parent in a case in which the petition alleges dependency due to the factors listed in NCGS § 7B-1111(a)(6). The four children in this case came into the care of the Department of Social Services after their mother was involuntarily committed due to a diagnosis of bipolar disorder. In an interesting analysis, the Court divides the opinion into two parts. The first part discusses the undisputed facts of the case and upholds the termination on the ground of willfully leaving the children in foster care for over twelve months without making reasonable progress to correct the conditions that led to the children's state care, and upholds the termination of respondent's rights. The second part discusses whether a parent's GAL can testify as to his or her ward's parental capacity and ultimately against the ward's interest in a termination hearing, and held in the affirmative as to this issue. It was undisputed that the mother suffered from severe mental illness that affected her ability to parent. Further, all four of her children suffered from psychological disorders, including but not limited to ADHD. The mother failed to comply with her mental health treatment, and when the children were in her care, did not obtain the necessary services to address their issues. The Court found clear and convincing evidence that the mother refused to acknowledge the reasons the children were removed from her care, and would likely not get treatment for herself or her children.

With respect to the Rule 17 GAL issue, it was undisputed that respondent properly received the appointment. The Court then discusses the legal duties of the parent's GAL. The role of the GAL is guardian of procedural due process for the parent in order to assist, explain and execute the parent's rights. Besides the due process protection, there is little authority regarding the conduct of a GAL in these cases. The Court relied on caselaw governing competency hearings that hold there is no authority to disallow a GAL from testifying as to their ward's competency. The Court found it compelling that respondent did not testify nor call other witnesses, and allowed her GAL to represent her interests as a "spokesperson." Therefore, the testimony of respondent's GAL was admissible and could be used to support grounds for termination.

In the Matter of S.L.L.,* (Unpub.) --- N.C. App. ---, 605 S.E.2d 498 (December 7, 2004) (Haywood County). The Court reversed the adjudication finding neglect for failure to appoint counsel. During the hearing, respondent requested that his court appointed counsel be released and the court permitted the withdrawal; however, respondent subsequently requested counsel. The court denied this request because respondent has already had two attorneys released, and was instructed to represent himself. Respondent timely objected and did not execute a written waiver of counsel. The Court held that waiver of counsel must be knowing and voluntary, and respondent's request that his court appointed counsel be withdrawn was neither a waiver of counsel nor an intent to proceed *pro se*. The Court explained that the trial judge was not required to grant the respondent's request to release his attorney without substantial reason; however, upon doing so, absent a knowing and voluntary waiver, substitute counsel should have been appointed.

In the Matter of Stanford,* (Unpub.) 162 N.C. App. 180, 590 S.E.2d 333 (January 6, 2004) (Orange County). The Court affirmed the termination of respondent mother's parental rights at to her daughter. Respondent gave birth at seventeen to her child after enrolling in a residential substance abuse program. When the child was three months old, the prematurely left the facility with the child without provisions or plans to care for the infant, and used cocaine. As a result of her actions, the Department of Social Services took nonsecure custody of the child. With the assistance of DSS, she enrolled in a two-year treatment program, but again left the program. The child was adjudicated dependent. At a subsequent hearing where respondent was absent, her mother attempted to obtain custody, but the trial court denied this request and allowed reunification efforts to cease. At the termination hearing, respondent's attorney made a motion to continue due to her absence, but the motion was denied. On appeal, respondent argued it was error to deny her motion to continue. The Court overruled this argument because respondent presented no justification for her absence. On her next argument respondent argued that the evidence did not support the conclusion of neglect. The Court found that at the time of the hearing, respondent had not made meaningful progress in eliminating the conditions that led to the removal of her child, specifically successful substance abuse treatment. There was also evidence of lack of contact and concern for the welfare of the child; therefore, the Court held that the evidence did support a conclusion of neglect. In her third argument, respondent asserts that it was error to admit hearsay statements in the DSS court record from treatment staff. The Court agreed that it was error, but not prejudicial since the findings were supported by other clear and convincing evidence. The Court overruled respondent's final argument that termination was not in the child's best interest, and affirmed the termination order.

In re T.B., * (Unpub.) --- N.C. App. ---, 604 S.E.2d 695 (November 2, 2004) (Lee County). In this appeal of a termination of parental rights, respondent argued that the evidence did not support a finding of neglect. However, she failed to challenge any of the trial court's specific findings and as a result, these findings are binding on appeal. The Court held that the findings of fact clearly showed that the Court considered evidence of past neglect and the probability of future neglect. Absent an abuse of discretion, the Court will affirm such holdings as in this case. Respondent also argued it was error that the trial court did not hold a separate dispositional hearing; however, the Court has previously held that it is unnecessary for the two stages of a termination of parental rights proceeding to be conducted at separate hearings.

In the Matter of T.B. & T.B.,* (Unpub.) 164 N.C. App. 227, 595 S.E.2d 451 (May 4, 2004) (Cabarrus County). Respondent mother appealed the termination of her parental rights. Her appointed counsel filed a purported *Anders* brief. Appellate counsel for a criminal defendant may file an *Anders* brief when he believes the defendant's appeal has no merit. The Court has held that *Anders* briefs are not permitted in civil proceedings, including termination of parental rights. Exercising its discretion, the Court reviewed the record to determine whether the evidence supported the trial court's findings of fact and conclusions of law. The termination was affirmed.

In re T.B.K., * (Unpub.) --- N.C. App. ---, 603 S.E.2d 167 (September 7, 2004) (Cabarrus County). The Department of Social Services filed a motion in the cause to terminate respondent's rights alleging she was incapable of providing proper care and supervision due to her substance abuse issues. However, the trial court failed to appoint a Rule 17 guardian ad litem for respondent pursuant to NCGS 7B-1101. The Court is clear that if a motion alleges

dependency due to incapability pursuant to NCGS 7B-1111, and the incapability is the result of one of the conditions set forth in the statute, including substance abuse, the trial court must appoint a guardian ad litem for the respondent parent. The DSS motion clearly alleged dependency with most of the factual allegations referring to the mother's substance abuse issues; therefore, it was reversible error to not appoint a guardian ad litem for the mother. The case was remanded for such an appointment.

In re T.C.B., --- N.C. App. ---, 602 S.E.2d 17 (September 21, 2004) (Buncombe County). In this private termination of parental rights, the trial court terminated respondent father's rights based on willful abandonment, but a final disposition was not ordered in the case until such time that Petitioner's boyfriend filed a petition to adopt the child. The first issue for the Court was whether the adjudication order could be appealed prior to the entry of a disposition order. Citing NCGS § 7B-1113 that governs appeals from termination of parental rights specifically allows that a party may appeal from an adjudication or any order of disposition. Respondent argued and the Court agreed that the trial court's findings of fact did not support the conclusion that respondent willfully abandoned his child for six consecutive months immediately preceding the filing of the TPR petition. Relevant facts are that both parents were age 14 when the child was conceived in 1995. In the fall of 1999, respondent was charged with committing a first-degree sexual offence against the child. His attorney advised him and his parents not to have any contact with the child or mother until resolution of the criminal charges. DSS entered a protection plan with the mother that she would not allow the child to have contact with respondent during the ongoing abuse investigation. In the spring of 2002, the State took a voluntary dismissal of the criminal charge with prejudice; however, respondent and his attorney did not learn of the dismissal until December 2002. The Court held that certain findings of fact by the trial court used to support the adjudication were contrary to a conclusion of willfulness. For instance, his attorney's advice not to have contact until the criminal charges were resolved; the protection plan with DSS; and the fact that he paid child support during the relevant period.

In the Matter of T.D.C., --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Brunswick County). **Reported in Full at *In re T.D.C.***, 2004 N.C. App. LEXIS 2260 (N.C. Ct. App., Dec. 21, 2004). In this termination of parental rights proceeding, the mother failed to follow prior dispositional orders requiring her to attend parenting classes, money management classes, and secure stable housing. In addition, her psychological evaluation tended to show a lack of understanding of the needs of a child stemming from her own neglectful and inappropriate family history. The Court affirmed the finding that the child was neglected at the time of the TPR hearing due to respondent's failure to comply with the court orders addressing the conditions that lead to removal, particularly lack of stable housing and parenting skills. Respondent argued that since she was able to care for another child that was seven weeks old at the TPR hearing, the probability of future neglect to T.D.C. was unlikely; however, the Court disagreed and affirmed that there was a probability of neglect as to T.D.C. because conditions had not adequately changed since T.D.C. was removed from her care.

In re T.D.P., 164 N.C. App. 287, 595 S.E.2d 735 (May 18, 2004) (Cumberland County). The Court affirmed the termination of respondent father's termination of parental rights; however, Judge Wynn dissented. At the time of the hearing, respondent was incarcerated with an expected release date within 1 ½ to 2 years, and was employed as a prison cook. One of the grounds was

failure to pay reasonable child support, and respondent argued that the evidence did not support this ground and that he lacked the means to pay any reasonable support for T.D.P. since he was making between \$0.40 and \$1.00 per day. The majority held that there was clear and convincing evidence that he had an ability to pay an amount greater than zero. The dissent reviewed the facts of the case, and determined that had he had financial means during his incarceration, that there would not have been grounds to terminate his rights and that his meager salary did not enable him to contribute to his child's financial support. Facts on which the dissent relied include the continued contact respondent had with the social worker, including meetings and letters, in which he inquired about his child's welfare; although substance abuse did not contribute to DSS having custody, respondent sought treatment in prison; he was scheduled to be released early on good behavior; and had a job lined up after his release.

In the Matter of T.H. and T.H.,* (Unpub. COA 03-1388) --- N.C. App. ---, 605 S.E.2d 265 (December 21, 2004) (Cabarrus County). Respondent father appealed the order adjudicating his twins as neglected and dependent. The Court affirmed the adjudication after concluding that the trial court's findings of fact were supported by clear and convincing evidence. The Department of Social Services became involved with the twins at birth due concerns of the mother's ability to care for the infants because she suffered mental limitations and had four other children removed from her custody. Respondent and the mother were permitted to retain custody due to respondent agreeing to be the primary caregiver and respondent parents' agreement to be a safety response when he was unable to care for the twins. Five months after their birth, DSS received a report alleging neglect and prior to the investigation, respondent's father spoke to the social worker in person regarding his concerns of the parents' incessant arguments, and refusal at times to care for the twins. The mother moved out of the home, and although DSS obtained nonsecure custody, the children were placed with respondent's parents. However, they were removed from this home two months later after a home study and report from the pediatrician. The trial court made several specific findings regarding the parents' failure to adequately care for the children, respondent father's anger problem, and the multiple occasions that law enforcement was called to the home as a result of the parents' arguments. Further, the twins were born prematurely and required medication on a regular schedule.

In the Matter of T.H. and T.H.,* (Unpub. COA 04-405) --- N.C. App. ---, 605 S.E.2d 741 (December 21, 2004) (Cabarras County). In this appeal from a permanency planning hearing changing the permanent plan from reunification to adoption, the Court remanded for the trial court to comply with N.C. Gen. Stat. § 7B-907(b) as the order lacked the requisite findings. While the evidence could support the trial court's decision, the statutory factors must be considered. The Court overruled respondent father's other argument that a guardian ad litem was not appointed for him prior to the permanency planning hearing. The undisputed facts indicate that respondent's mental capacity was not an issue for the court until it received a psychological evaluation that indicated that respondent's IQ was 70, one point from legal mental retardation, and he had never been declared incompetent. At that point, the trial court promptly appointed a Rule 17 GAL.

In re T.L.B., --- N.C. App. ---, 605 S.E.2d 249 (December 7, 2004) (Iredell County). This action is an affirmation of private termination of parental rights action under NCGS § 7B-1111(a)(5), failure to establish paternity or legitimate child born out of wedlock. The case involved an affair

between co-workers at a restaurant. The couple was together when a home pregnancy test was positive; however, the father believed it was a lie and ploy for him to leave his wife. Shortly thereafter, the restaurant learned of the affair and the father was discharged and later moved out of state. The mother attempted to obtain child support and wrote a letter by way of the paternal grandfather. The father responded that he wanted a paternity test; however, there were no further communications until the TPR petition was served. The father/respondent filed an answer requesting a paternity test and a GAL was appointed to represent the child. Respondent argues that he did not take the appropriate steps to legitimate the child because he did not know of T.L.B.'s existence prior to the letter regarding child support. The Court followed its holding in *In re Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989) that under the termination statute the child's future welfare is not dependent on whether or not the putative father knows of the child's existence at the time of filing. With respect to best interests, the Court did not find any abuse of discretion.

In the Matter of T.S., III & S.M.,* (Unpub.) 163 N.C. App. 783, 595 S.E.2d 239 (April 20, 2004) (Pitt County). The Court remanded this adjudication of neglect to the trial court to enter clear findings of fact and conclusions of law. The children came into the custody of the Department of Social Services after allegations of domestic violence and drug use and sales in the home. The Court cited the holding in *In re Stumbo* that not every act of neglect rises to the level of government interference, and that it is necessary to review the findings of fact and conclusions of law to assure the burden of proof has been met. The problem with the order in this case is that the trial court did not distinguish between findings of fact and conclusions of law, and made no cite to the statutory basis finding neglect. As a result, the case was remanded to the trial court to make specific findings and conclusions based on the evidence. Respondent's second argument was overruled. She argued that it was hearsay when the social worker testified regarding S.M.'s statements; however, there was no objection at the trial to properly preserve this issue for appeal. Respondent also argued that portions of the transcript had omissions denoted as "inaudible". Respondent failed to specify which testimony was lost or whether she was prejudiced; therefore, this argument failed.

In the Matter of V.L.B., --- N.C. App. ---, 596 S.E.2d 896 (June 15, 2004) (Burke County). The Court granted the motions filed by petitioner and guardian ad litem to dismiss this appeal as moot following the reasoning of *In re Stratton*. Pertinent facts are that parties stipulated to an adjudication of dependency with findings of fact to support neglect. Respondent appealed the permanency planning hearing that determined that adoption was the permanent plan, assigning error to failure to make the requisite findings pursuant to NCGS § 7B-907. In the meantime the trial court entered a subsequent order terminating respondent's rights. Because the termination order superceded the permanency planning order, and the termination order did not rely on permanency planning order. The Court admitted that this line of cases is irreconcilable with the holdings of *In re Hopkins* (trial court is without jurisdiction to enter permanent orders while a subsequent order is pending on appeal), but sets forth the contention that following the jurisdictional argument could give parents the power to continually put off termination of their parental rights by appealing orders. The dissent follows the *Hopkins* reasoning and determined that the trial court exceeded its statutory authority by terminating rights while a previous appeal in the case is pending.

Laird v. Carroll, * (Unpub.) --- N.C. App. ---, 605 S.E.2d 740 (December 21, 2004) (Buncombe County). This case involves a private custody action between the plaintiff maternal grandmother against her defendant daughter. For much of the minor child's life, the grandmother cared for and assumed parental responsibility for her grandson. The grandmother was the primary caretaker even when the mother resided in the same home. The mother had a boyfriend and later a husband with whom she engaged in domestic violence, and the mother generally had an anger management problem. During the periods of time that the child was in the mother's care, professionals at his school noticed he was often tardy, had demonstrated behavioral problems, and generally his well-being decreased from when he was in his grandmother's care. Despite these problems being brought to her attention, the mother failed to adequately address these issues. After an argument with the grandmother, the mother threatened to deprive the grandmother contact with the child; as a result, the grandmother filed a custody action. Over the course of the proceedings, the mother was held in contempt of court for failing to abide by court ordered visitation and securing counseling for the child. The court appointed a guardian ad litem for the child and the parties stipulated the GAL report's admissibility. Ultimately, the trial court held that she neglected her child thereby waiving her constitutional right to parent and that it was in the child's best interest that the grandmother have custody. The mother failed to assign error to any findings of fact; subsequently, the findings were binding on appeal and supported by the record. The trial court made detailed findings regarding the mother's conduct, including the fact that she delegated her parental duties by allowing the grandmother to be primarily responsible for the child's care even when the three resided together. Other factors included exposure to domestic violence, failure to secure counseling and proper education, and the willful violation of court orders that had been entered in the best interest of the child.

Lange v. Lange, --- N.C. App. ---, 605 S.E.2d 732 (December 21, 2004) (Mecklenburg County). This case was remanded by the Supreme Court for appellate review on its merits after previously dismissed as moot. In a custody case, plaintiff mother motioned the trial court to move to from Charlotte to Southern Pines. Defendant father requested primary custody in order for the children to remain in Charlotte. After the judge ruled in favor of defendant but prior to the entry of the written order, plaintiff made a motion that the judge recuse himself from the case because he and defendant's counsel were joint owners of a vacation property. A different judge heard the motion, and concluded that there was no violation of the NC Judicial Code of Conduct; but, held that actual bias or violation of the Code of Judicial Conduct was not necessary for recusal. The recusal was granted and the second judge ordered a new trial. Defendant appealed, and plaintiff cross-appealed the finding that there was no violation. The Court first addressed whether the evidence supported the finding that the judge did not violate the Code of Judicial Conduct. Because they found that the findings were supported by evidence and in turn supported the conclusions of law, the Court held it was error that the recusal was granted. The case was reversed and remanded giving the trial judge discretion to enter the initial custody order, or to have a new modification hearing. The dissent found the standard for disqualification based on previous precedents requires a determination as to whether there is substantial evidence of either partiality or an appearance of partiality. Based on this standard, the motion to recuse was properly granted because the evidence and findings support a ground for disqualification.

Miller v. Lillich & Lillich, --- N.C. App. ---, 606 S.E.2d 181 (December 21, 2004) (Cumberland County). Defendant parents appealed the decision of the trial court ruling that consent of the

plaintiff father was required before defendants could adopt their daughter's child. The action began in district court to determine whether plaintiff father's consent was necessary under NCGS § 48-3-601 to adopt the child. Plaintiff and defendant's minor daughter had a consensual sexual relationship that resulted in the birth of a child that defendant parents wished to adopt. The pertinent statutory authority states in summary that an adoption petition may be granted only if consent is executed by the putative father who has acknowledged paternity and one of the following: (1) is under an obligation of support by written agreement or court order; (2) provided reasonable support of the biological mother during the pregnancy, to the child, or both, regularly visited or communicated with the mother during or after the pregnancy, or with the child, or both; *or* (3) after the birth but prior to the adoption placement or relinquishment, married or attempted to marry the biological mother. Defendants argued that these provisions should be read together and not disjunctively despite the presence of the word "or." The Court did not accept their argument due to the statute's plain language. They next argued that without a child support order, the trial court could not determine what is reasonable support to qualify under the statute. This argument failed, and the Court pointed out that in its discretion, the trial court attempted to calculate the proper support under the N.C. Child Support Guidelines to make its determination of reasonableness. Finally, defendant's argued that it was error for the trial court to determine that the payments by plaintiff were in fact "reasonable and consistent." The Court overruled this argument and held that there was no error by the trial court in finding that plaintiff's payments were reasonable and consistent, necessitating the consent of plaintiff in order for the adoption to occur.

Smith v. Barbour & Knawati, * (Unpub.) --- N.C. App. ---, 605 S.E.2d 267 (December 7, 2004) (Wake County). This case involved the legitimation of a married woman's child pursuant to NCGS § 49-12.1. The procedure of this statute is set forth in NCGS § 49-10 except that the married woman's husband is also a party to the action. In this case the petitioner father filed the initial petition without a certified copy of the minor child's birth certificate that was forthcoming, and failed to make respondent mother Barbour's husband Knawati a party. Petitioner's motion to amend was granted, and he filed the certified copy of the birth certificate, made Knawati a party, and also attached a copy of a positive genetic test from an earlier paternity proceeding. A GAL was appointed to represent the child. Petitioner filed a motion for summary judgment that was granted. Respondent's motion to dismiss for lack of subject matter jurisdiction due to the first inadequate petition was denied. Respondent mother appealed the outcome of both motions, but the Court affirmed both decisions. The Court held that the amended petition merely cured a procedural defect and that the failure to attach the birth certificate at the initial filing is not a jurisdictional defect. Presumption of legitimacy of a child born during wedlock may be rebutted by competent evidence, including genetic testing. Respondent also argued that it was an abuse of discretion for the trial court to deny her motion for removal of the GAL. The Court found no error that the GAL was an employee of the County Attorney's Office and that the GAL was not present at the hearing on the motions.

State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208 (May 4, 2004) (McDowell County). Defendant appealed his conviction of assault with a deadly weapon inflicting serious injury, first-degree kidnapping, assault inflicting serious injury, two counts of felony child abuse inflicting serious injury, and two counts of assault on a child under twelve. Defendant shared a home with the pregnant mother of two of children, ages one and four. An argument over a man escalated to

violence in which defendant beat the mother for twenty minutes with his fists, feet, belt and gun. During the altercation, the mother picked up her one-year old hoping he would stop the assault. Instead he continued to strike her, and hit the child on the head with his belt causing a bruise to the forehead. He questioned his four year old about the man, and when she did not answer, he beat her. She suffered welts, bruises and red marks on her body. With respect to the children's injuries, he argued on appeal that the bruise on the one-year old child's face was not "serious" and the state did not provide documentation about the nature and degree of pain of the injury. The Court held that the decision of whether the injury was serious was a question for the jury and upheld the conviction.

* This decision is unpublished pursuant to the Rules of Appellate Procedure, Rule 30(e). "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) ("Additional Authorities"). When citing an unpublished opinion, a party must indicate the opinion's unpublished status." Rule 30(e)(3).

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No prejudice because bench trial—*In re H.A.T. et al.*

Testimony if investigation in another county not hearsay because used to provide history and context of interaction with parent—*In re Mashburn*

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Incarceration

Ability to pay child support—*In re T.D.P.*

Alone, does not excuse neglect—*In re C.D.M. & J.A.F.D.*

And willful abandonment—*In the Matter of Hardwick*

Parent not present at hearing not error—*In re C.D.M. & J.A.F.D.*

Indigency

Affidavit not required to be served on parties—*In re D.Q.W. et al.*

Failure to obtain psychological evaluations not due to indigency—*In re H.W. & R.W.*

Injurious Environment

Finding of "verbal abuse" insufficient—*In the Matter of D.R. et al.*

Interstate Compact

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Of married woman's child—*Smith v. Barbour & Knawati*

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Mootness of Appeal

Appeal of adjudication or dispositional order mooted after TPR entered on independent grounds—*In re N.B.*; *In the Matter of V.L.B.*

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Notice and Service of Process

Proof of service with actual notice not necessary for PPH—*In the Matter of H.H. & A.H.*

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Appropriate to incorporate reports, *but not substitute for findings*—*In re M.R.D.C.*

Must distinguish between findings of fact and conclusions of law—*In the Matter of T.S., III & S.M.*

Recitations of testimony not findings of fact—*In re M.R.D.C.*; *In re O.W.*

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Permanency Planning Order

Must comply with statutory requirements of NCGS § 7B-907—*In re J.S.*; *In re Lutz*; *In re M.R.D.C.*; *In the Matter of T.H. & T.H.*

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Waiver by filing answer and not raising defense—*In re J.W.J. et al.*

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Reasonable Progress

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General assignment of error to findings of fact makes them binding on appeal—*In re M.C. & C.H.*

Plain error not applicable to civil cases—*In the Matter of E.L.*

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DSS cannot file TPR petition without having custody—*In re Miller*

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Generally—*In re B.S.D.S.*

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Termination of Parental Rights

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Best interests, abuse of discretion—*In re J.A.O.*

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Grounds, failure to establish paternity—*In re T.L.B.*
Grounds, failure to pay child support
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 same—*In the Matter of L.G.*
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Adjudication order not entered within required 30 days harmless error—*In the Matter of E.L.*; *In*
 re E.N.S.
Delay between filing and hearing of TPR not prejudicial error—*In the matter of C.R.*; *In the*
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 F.M.L.W. & F.J.S.
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UCCJA

Adopted by Vermont—*Chick v. Chick*

UCCJEA

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 the Matter of D.D.T.G.; *In re N.R.M. & T.F.M.*
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Subject matter jurisdiction, requires specific findings—*In re J.B.*
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Unfitness

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Waiver of Counsel

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--Y--

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