IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-380

Filed: 2 October 2018

Gaston County, No. 16-JT-03

IN THE MATTER OF: L.E.M.

Appeal by Respondent-Father from order entered 5 January 2018 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 23 August 2018.

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

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant father.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent appeals from an order terminating his parental rights to his minor child, L.E.M. ("Landon").[1] Respondent's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). We dismiss.

I. Factual and Procedural Background

[1] We use pseudonyms throughout the opinion for ease of reading and to protect the juveniles' identities.

On 4 January 2016, the Gaston County Department of Social Services ("DSS") obtained non-secure custody of Landon and his older sibling B.E.M. ("Brett") and filed a petition alleging both to be neglected and dependent juveniles.[2] DSS alleged it was involved with the family since September 2015, due to allegations of substance abuse and medical neglect of Brett. Following a recent arrest, both parents[3] were being held in the Gaston County Jail. DSS further alleged the following: (1) the children did not receive proper care, supervision, or discipline from their parents; (2) the children lived in an environment injurious to their welfare; and (3) the parents were unable to provide for the children's care and supervision.

On 17 February 2016, Respondent entered into a mediation agreement with DSS, wherein he accepted Landon would be adjudicated as neglected and dependent, entered into a case plan with DSS, and agreed to work with DSS toward reunification with Landon. On 19 April 2016, the trial court entered an order adjudicating Landon as a neglected and dependent juvenile. The court continued custody of Landon with DSS. The court ordered Respondent comply with the terms of his mediated case plan, including: (1) obtain a substance abuse assessment, follow recommendations of the assessment, and submit to random drug screens; (2) obtain a mental health assessment and follow recommendations of the assessment; (3) attend the juveniles'

[2] Respondent is not the father of Brett, and Brett is not a party to this appeal.

[3] The juveniles' mother is not a party to this appeal.

medical appointments; (4) obtain safe and appropriate housing; (5) obtain employment; and (6) complete a parenting class and utilize skills learned during visits with Landon.

In May and September 2016, the trial court conducted review and permanency planning hearings. The court established Landon's primary permanent plan as reunification, with guardianship as the secondary plan.

On 29 November 2016, the court held another review and permanency planning hearing. In an order entered 28 March 2017, the trial court found Respondent failed to make sufficient progress on his case plan and was incarcerated in West Virginia. The court changed Landon's primary permanent plan to adoption, with a secondary plan of reunification In an order entered 11 April 2017, the court continued Landon's primary permanent plan as adoption, but changed the secondary plan to guardianship.

On 12 April 2017, DSS filed a petition to terminate Respondent's parental rights to Landon. DSS alleged grounds existed for termination of Respondent's parental rights based on: (1) neglect; (2) failure to correct the conditions that led to Landon's removal from his care; and (3) dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017).

On 13 November 2017, the trial court held a termination of parental rights hearing. DSS called Respondent. Respondent entered into a case plan with DSS,

following Landon's adjudication as a neglected and dependent juvenile. Pursuant to the plan, Respondent agreed to resolve substance abuse issues, attend counseling, attend parenting classes, and visit Landon. However, he failed to participate in a substance abuse assessment or complete any substance abuse treatment.

In June 2015, authorities in Harrison County arrested Respondent for a parole violation. On 1 August 2015, authorities "shipped" him to jail in West Virginia. In West Virginia, he did not complete any progress on his case plan, because "[t]hey don't provide that stuff in the West Virginia department."

While Respondent was incarcerated, Hannah Crawford, a DSS social worker regularly contacted Respondent. He wrote her one letter in December 2015. In his letter, he did not tell Crawford about the lack of resources available to him. Following his release in late May or early June 2017, the court and DSS refused to allow him to see Landon and Brett.[4]

DSS next called Hannah Crawford. From the time DSS took custody of Landon on 4 January 2016 to the date of the hearing, Crawford was the social worker assigned to Landon's case. Crawford asserted Respondent failed to make "significant progress" on his case plan, even prior to his incarceration on 1 June 2015. Respondent attended visitation with Landon but did not demonstrate "appropriate" parenting skills. Respondent failed to obtain a substance abuse assessment, engage in any substance

[4] DSS presented Respondent with a June 2017 court order, stating it would "reinstat[e] respondent father's visitation provided he is able to provide a clean drug screen."

abuse treatment, or obtain a mental health assessment. Respondent also did not complete parenting classes, obtain employment, or obtain safe housing. On 26 May 2016, a doctor performed a parental capacity evaluation, concluding Respondent possessed "rather marginal parenting capability."

Following another arrest in June 2016 and Respondent's incarceration until May 2017, Crawford "attempted" to maintain contact with Respondent. Respondent did not contact Crawford "regularly", inquire about Landon's placement, or send any "cards, gifts, letters . . . ." Respondent replied to Crawford only once, in December 2016, acknowledging the case plan Crawford sent to him and that he received her letters. In the letter, it seemed "along the line that he'd be able to complete parenting classes[.]"

Following his subsequent release in April 2017, Respondent called Crawford in May 2017.[5] Crawford asked Respondent to meet with DSS to go over the case plan. DSS and Respondent met on 5 June 2017. Following the meeting, Respondent failed to attend a mental health assessment, failed to obtain a substance abuse assessment, did not comply with two drug screens, and tested positive for drugs.

Since 31 May 2016, Respondent did not write or call Crawford to ask about Landon or have any contact with Landon. As of the day of the hearing, Respondent failed to submit proof of stable employment or appropriate housing.

[5] The date of Respondent's release is not clear from the testimony; however, the trial court found as fact the West Virginia Department of Corrections released Respondent in May 2017.

On 5 January 2018, the trial court entered an order terminating Respondent's parental rights on the grounds of neglect and failure to make reasonable progress. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2). The court concluded termination of Respondent's parental rights was in Landon's best interests. Respondent filed timely notice of appeal.

II. Analysis

Appellate counsel for Respondent filed a no-merit brief on Respondent's behalf in which counsel states she made a conscientious and thorough review of the record on appeal and concluded there is no issue of merit on which to base an argument for relief. Pursuant to North Carolina Rule of Appellate Procedure 3.1(d), appellate counsel requests this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(d) (2017). In accordance with Rule 3.1(d), counsel wrote a letter to Respondent on 26 April 2018, advising Respondent of counsel's inability to find error, of counsel's request for this Court to conduct an independent review of the record, and of Respondent's right to file his own arguments directly with this Court. Counsel also avers she provided Respondent with copies of all relevant documents so that he may file his own arguments with this Court. Respondent did not file written arguments with this Court, and a reasonable time for him to have done so has passed. Thus, "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.V.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, 2018

WL 3232738 (N.C. Ct. App. July 3, 2018). Accordingly, we must dismiss Respondent's appeal. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

III. Conclusion

For the foregoing reasons, we dismiss Respondent's appeal.

DISMISSED.

Judge ARROWOOD concurs in result only in separate opinion.

Chief Judge McGEE dissents in a separate opinion.

No. COA18-380 – *In the Matter of: L.E.M.*

ARROWOOD, Judge, concurring in result only.

We are dismissing respondent's appeal because we are bound by *In re L.V.*, __ N.C. App. __, 814 S.E.2d 928, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). I agree that *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) requires our Court to follow *In re L.V.*, however, I concur in the result only because I believe *In re L.V.* erroneously altered the jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. Furthermore, this change significantly impacts the constitutional rights of North Carolinians, such as the respondent in this case, whose fundamental right to a parental relationship with his child should only be terminated as contemplated by law. Therefore, I write separately to address this shift in our precedent.

The concept of a no-merit brief, also referred to as an *Anders* brief, comes from the United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). *Anders* held that an attorney representing a criminal defendant in a case the attorney finds without legal merit can request permission to withdraw as counsel for this reason, but the request must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. "[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.*

Our Court initially denied extending *Anders* procedures to termination of parental rights cases. *See In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007) (citation omitted). However, the *In re N.B.* court "urge[d] our Supreme Court or the General Assembly to reconsider this issue[,]" noting that "permitting such review furthers the stated purposes of our juvenile code." *Id*. at 117-19, 644 S.E.2d at 24-25. Thereafter, our Supreme Court adopted Rule 3.1(d) of the North Carolina Rules of Appellate Procedure, which states:

> In an appeal taken pursuant to [N.C. Gen. Stat.] § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C.R. App. P. 3.1(d) (2018).

Rule 3.1(d) provides for the filing of "no-merit briefs" and allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from termination of parent rights orders. *See id*. A parent may file a *pro se* brief

when counsel files a no-merit brief, but nothing in the rule appears to require a parent to file a *pro se* brief in order for our Court to review the appeal. *See id.* Indeed, our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief. *See, e.g., In re A.A.S.*, __ N.C. App. __, __, 812 S.E.2d 875, 879 (2018); *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 594 (2016); *In re D.M.G.*, 235 N.C. App. 217, 763 S.E.2d 339, 2014 WL 3511008 at *1, slip op. at *3 (2014) (unpublished); *In re D.M.H.*, 234 N.C. App. 477, 762 S.E.2d 531, 2014 WL 2795916 at *1, slip op. at *2 (2014) (unpublished); *In re O.M.B.*, 204 N.C. App. 369, 696 S.E.2d 201, 2010 WL 2163793 at *1, slip op. at *3 (2010) (unpublished); *In re R.A.M.*, 228 N.C. App. 568, 749 S.E.2d 110, 2013 WL 4005847 at *1-2, slip op. at *3-6 (2013) (unpublished); *In re P.R.B., Jr., III*, 204 N.C. App. 595, 696 S.E.2d 925, 2010 WL 2367236 at *5, slip op. at *10-11 (2010) (unpublished); *In re S.N.W.*, 207 N.C. App. 377, 699 S.E.2d 685, 2010 WL 3860906 at *1-2, slip op. at *3-5 (2010) (unpublished).

In re L.V. disavowed this routine procedure, and signaled a significant shift in our jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. In *In re L.V.*, our Court held for the first time that "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure" when a respondent's appellate counsel files a no-merit brief that complied

with Rule 3.1(d) and respondent fails to "exercise her right under Rule 3.1(d) to file a *pro se* brief." *Id.* at __, 814 S.E.2d at 928-29, slip op. at *2. To support its decision, the *In re L.V.* court cites Judge Dillon's recent concurrence in *State v. Velasquez-Cardenas*, __ N.C. App. __, 815 S.E.2d 9 (2018) (Dillon, J., concurring): "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *Velasquez-Cardenas*, __ N.C. App. at __, 815 S.E.2d at 20 (italics in original). I note that a concurring opinion is not binding on our Court, and also that the cited quotation was dicta, and therefore not controlling authority. *See Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs.,* 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.") (citations omitted). The *In re L.V.* court did not address our Court's previous case law, which consistently conducted an *Anders* review of the record when appellate counsel complies with Rule 3.1(d), even if the appellant does not exercise her right under Rule 3.1(d) to file a *pro se* brief.

I believe that *In re L.V.*'s interpretation of Rule 3.1(d) affects parents' interest in the accuracy and justice of a decision to terminate their parental rights, and is inconsistent with the purposes of our juvenile code. *See Little v. Little*, 127 N.C. App. 191, 192, 487 S.E.2d 823, 824 (1997) ("A parent's interest in the accuracy and justice

of the decision to terminate his or her parental rights is a commanding one.") (citation, quotation marks, and alteration omitted). Therefore, I believe *In re L.V.* is an anomaly in our case law that must be corrected to ensure that the fundamental right to a parental relationship is not terminated other than as permitted by law. However, I concur in the result only because *In re Civil Penalty* requires me to follow the divergent path that the Court has taken. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

No. COA18-380 – *In the Matter of: L.E.M.*

McGEE, Chief Judge, dissenting.

I respectfully dissent from the majority opinion's holding that this Court, pursuant to *In re L.V.*, __ N.C. App. __, 814 S.E.2d 928 (2018), must dismiss Respondent's Rule 3.1(d) appeal. I agree with the analysis of the *concurring* opinion, and adopt that analysis, excepting its ultimate conclusion that we are bound by *In re L.V.*, and must therefore dismiss Respondent's appeal. I agree with the concurring opinion that *In re L.V.* was not correctly decided. As noted by both the majority and concurring opinions, we would normally be bound by *In re L.V.*; however, I believe the holding in *In re L.V.* is contrary to settled law from prior opinions of this Court. Therefore, this Court in *In re L.V.* was without the authority to "overrule" the prior opinions of this Court, and those prior opinions remain controlling in the present matter.

As the concurring opinion notes, "our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief." I also agree that "*In re L.V.* is an anomaly in our case law[.]" Rule 3.1(d) does not require a parent to file a *pro se* brief.

Rule 3.1(d) states:

> *No-Merit Briefs.* In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the

> record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. *Counsel shall also advise the appellant* in writing that the appellant *has the option* of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d) (emphasis added).

In *In re L.V.*, this Court dismissed Respondent's no-merit appeal based on the following reasoning:

> Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief.[6] N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.[7]

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[6] "In accordance with Rule 3.1(d), appellate counsel provided Respondent with copies of the no-merit brief, trial transcript, and record on appeal and advised her of her right to file a brief with this Court *pro se* on 11 April 2018."

[7] "'Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised

In re L.V., __ N.C. App. at __, 814 S.E.2d at 928-29 (footnotes in original).[8]

The majority opinion holds that we are bound by *In re L.V.* and must dismiss Respondent's appeal. However, this Court has continually conducted the *Anders*-type review provided for in Rule 3.1(d), absent any accompanying *pro se* briefs from the respondents, both before and after *In re L.V.* was filed on 3 July 2018.[9] Rule 3.1(d) *requires* a respondent's counsel who appeals pursuant to Rule 3.1(d) to file an appellate brief, which must include issues identified by counsel "that might arguably support the appeal and [counsel] shall state [in the no-merit brief] why those issues lack merit or would not alter the ultimate result." N.C. R. App. P. 3.1(d). Though not explicitly stated in Rule 3.1(d), it seems clear that the purpose in allowing attorneys to file no-merit briefs is to allow a respondent's counsel to request review by this Court of the respondent's record for potential error even though *counsel* has not been able to identify any error *counsel* believes warrants relief on appeal. Pursuant to the reasoning implicit in *In re L.V.*, the actual no-merit brief required to be filed by a respondent's counsel *is itself unreviewable* – i.e. appellate counsel's request to this Court to conduct the review as argued in the no-merit brief does not constitute an

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on appeal.' *State v. Velasquez-Cardenas*, ___N.C. App. ___, ___, 815 S.E.2d 9, 20 (2018) (Dillon, J., concurring)."

[8] I join the concurring opinion in pointing out that the sole "authority" cited by *In re L.V.* is *dicta* obtained from a concurring opinion in a criminal matter, devoid of precedential value. The holding of *In re L.V.* is therefore supported by no legal authority.

[9] *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967).

issue preserved for appellate review. This Court considered the same reasoning in *Velasquez-Cardenas*, where we *rejected* the *dicta* now relied upon in *In re L.V.*:

> In the present matter, the concurring opinion, relying on N.C. R. App. P. 28, argues that we should not address the *Anders* issue in this opinion because it was not first brought up and argued in Defendant's brief. *We believe the fact that Defendant's attorney filed an Anders brief is sufficient to raise the issue and present it for appellate review.*

Velasquez-Cardenas, __ N.C. App. at __, 815 S.E.2d at 18 (some emphasis added); *see also State v. Chance*, 347 N.C. 566, 568, 495 S.E.2d 355, 356 (1998) (Finding "no error" because "[i]n accordance with our duty under *Anders*, we have examined the record and the transcript of the trial. From this examination, we find the appeal to be wholly frivolous."). Because the defendant in *Velasquez-Cardenas* did not have any constitutional right to *Anders* review, the question of whether an *Anders*-type brief preserved any issues for appellate review had to be decided. This Court rejected the reasoning of the concurring opinion, and held that the brief requesting *Anders*-type review did present appropriate issues for appellate review, Rule 28(b)(6) notwithstanding. *Id.* In *Velasquez-Cardenas* we also factored into our analysis that this Court had a long, uninterrupted history of conducting full *Anders*-type review from denials of motions requesting post-conviction DNA testing, and our authority to conduct that review had never before been questioned. *Id.* at __, 815 S.E.2d at 11–12. In part of the analysis, this Court also recognized that review pursuant to Rule

3.1(d) was an *Anders*-type review: "Our Supreme Court added a provision to our Rules of Appellate Procedure, effective for all cases appealed after 1 October 2009, allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from TPR orders. N.C. R. App. P. 3.1(d)." *Id.* at __, 815 S.E.2d at 16.

However, if we follow *In re L.V.*, upon a Rule 3.1(d) appeal, this Court will be limited to review of *only* those issues included in a respondent's *pro se* brief – should respondent chose to file one.[10] Nothing prior to the adoption of Rule 3.1(d) prevented a respondent from filing a *pro se* appeal. Therefore, assuming the holding in *In re L.V.* to be correct, I do not see how the adoption of Rule 3.1(d) has *materially* benefitted respondents, or expanded the scope of appellate review, in any manner.[11]

The majority opinion in this case holds, based upon *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) ("[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"), that we are bound by *In re L.V.* The concurring opinion agrees. I agree that *In re Civil Penalty* controls the outcome, but would reach a different result. In *In re Civil Penalty*, our Supreme Court reasoned and held as follows:

> This Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same

[10] As noted below, since the adoption of Rule 3.1(d) only *a single respondent* has chosen to file any sort of *pro se* response.

[11] Respondents perhaps receive some benefit by their attorney's work in compiling and filing the record, and by performing some other ministerial actions.

> question in the same case. The situation is different here since this case and *N.C. Private Protective Services Board v. Gray*, do not arise from the same facts. In *Virginia Carolina Builders*, however, we indicated that the Court will examine *the effect of the subsequent decision, rather than whether the term "overrule" was actually employed*. We conclude that the *effect* of the majority's decision here was to overrule [a prior opinion of the Court of Appeals]. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.
>
> We hold . . . that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

Id. at 384, 379 S.E.2d at 36–37 (citations omitted) (emphasis added).[12] As this Court held in a recent opinion affirming the termination of a father's parental rights: "To the extent that *J.C.* is in conflict with prior holdings of this Court, . . . we are bound by the prior holdings." *In re O.D.S.*, __ N.C. App. __, __, 786 S.E.2d 410, 417, *disc. review denied*, 369 N.C. 43, 792 S.E.2d 504 (2016). "[P]recisely because of *In re Civil Penalty*, when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve the conflict." *State v. Meadows*, __ N.C. App. __, __, 806 S.E.2d 682, 693 (2017), *disc. review allowed*, __ N.C. __, 812 S.E.2d 847 (2018).; *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d

[12] The 2016 amendment of N.C. Gen. Stat. § 7A-16 created a procedure for *en banc* review by this Court of its own decisions, but *In re Civil Penalty* is still the law with respect to the decisions of three judge panels of this Court.

125, 134 (2004); *State v. Alonzo*, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 3977546, *2 (2018) (this Court is bound to follow an earlier decision of this Court, not a later decision that is in conflict with the earlier decision); *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470 and 477, 621 S.E.2d 1, 7 and 12 (2005) (citation omitted) (certain of this Court's "decisions . . . effectively overrule [a prior decision of this Court]. It is, however, axiomatic that an appellate panel may not interpret North Carolina law in a manner that overrules a decision reached by another panel in an earlier opinion." Therefore, we held that the later opinion was without precedential effect.).

The change proposed by *In re L.V.* can only be adopted if this Court rejects nearly a decade of appellate practice and precedent set following the 2009 enactment of Rule 3.1(d) by our Supreme Court. I believe the "effect" of the holding in *In re L.V.* is to overrule the precedent set by the prior opinions of this Court, which it cannot do. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417. Since the enactment of Rule 3.1(d), I have been able to locate seventy-six opinions, published and unpublished, filed prior to *In re L.V.*, in which one or both respondent-parents' counsel have sought review pursuant to the no-merit provisions of Rule 3.1(d). One of those opinions was dismissed because no proper notice of appeal was filed. *In re D.L.M.*, 208 N.C. App. 281, 702 S.E.2d 555, 2010 WL 5135556, *2–3 (2010) (unpublished). Of the remaining seventy-five opinions involving no-merit appeals, unsurprisingly, only three are

published.[13] *In re A.A.S.*, __ N.C. App. __, __, 812 S.E.2d 875, 879 (2018); *In re M.J.S.M.*, __ N.C. App. __, __, 810 S.E.2d 370, 374–75 (2018); and *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 593–94 (2016).

This Court conducted full *Anders*-type reviews pursuant to Rule 3.1(d) in all seventy-five appeals it decided prior to *In re L.V.* In only *one* out of the seventy-five appeals – *In re A.L.W.* – did the respondent-parent exercise "the option of filing a pro se brief" as allowed by Rule 3.1(d). N.C. R. App. P. 3.1(d); *In re A.L.W.*, __ N.C. App. __, 803 S.E.2d 665 (2017) (unpublished) ("Respondent-mother filed *pro se* arguments with this Court challenging the trial court's decision to terminate her rights. Her *pro se* brief, however, contains no 'citations of the authorities upon which the appellant relies,' N.C. R. App. P. 28(b)(6), and provides no basis to disturb the trial court's orders."). Nonetheless, this Court in *In re A.L.W.* *still* conducted the full Rule 3.1(d) *Anders*-type review based upon the respondent's attorney's no-merit brief. *Id.* In the remaining seventy-four opinions, this Court conducted a full *Anders*-type no-merit review pursuant to Rule 3.1(d) even though *none* of the respondents in those appeals filed *pro se* briefs to accompany their attorneys' no-merit briefs.[14] I cannot find any case prior to *In re L.V.* in which this Court indicated any necessity that a respondent-

[13] By definition, no-merit appeals are likely to be decided without great difficulty, and are unlikely to include novel issues of law.

[14] Had the reasoning in *In re L.V.* been applied to all no-merit appeals since the adoption of Rule 3.1(d), this Court would still be waiting to conduct its *first* review of an appeal pursuant to Rule 3.1(d), because only one *pro se* "brief" has been filed since 2009, and that "brief" was not even considered due to Rule 28(b)(6) violations.

parent file a *pro se* brief in order to activate this Court's jurisdiction or authority to consider the no-merit brief filed by the respondent's attorney. *Following* the filing of *In re L.V.*, this Court has conducted full *Anders*-type review, absent any *pro se* filings from the respondents, in four out of the five appeals it has decided. Out of eighty opinions filed by this Court involving no-merit briefs, only two – *In re L.V.* and *In re A.S.*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4201062 (2018) (unpublished) – have declined to conduct the *Anders*-type review requested in the no-merit briefs filed by the respondents' attorneys.

It is presumed that this Court acts correctly. This Court is required to dismiss an appeal, even *sua sponte*, whenever it is without jurisdiction or authority to act.[15] This duty is not in any manner diminished when this Court decides not to publish an opinion. This Court impliedly holds that it has the jurisdiction and authority to act whenever it considers the merits of an appeal. Though this Court may, in certain circumstances, recognize that is has been acting without authority and correct that error,[16] it may not do so lightly, nor without citation to the earlier precedent that served to invalidate the later holdings. I believe this Court's three published opinions that predate *In re L.V.* – and which are in complete accord with *every one* of this

[15] Unless it applies an authorized discretionary writ or rule to allow review.

[16] If, for example, this Court determines that it has been operating in ignorance of contrary holdings of prior opinions of this Court, or of our Supreme Court, it must acknowledge and adhere to that prior binding precedent – in effect "correct course" and disavow the prior incorrect holdings. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

Court's relevant unpublished opinions filed before *In re L.V.*, have thoroughly established the appropriate requirements of Rule 3.1(d) – including the consequences of the failure of a respondent to file a *pro se* brief.

In a published opinion filed on 20 March 2018, this Court conducted the following review of the respondent-father's appeal:[17]

> Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C. R. App. P. 3.1(d), stating "[t]he undersigned counsel has made a conscientious and thorough review of the [r]ecord on [a]ppeal . . . . Counsel has concluded that there is no issue of merit on which to base an argument for relief and that this appeal would be frivolous." *Counsel asks this Court to "[r]eview the case to determine whether counsel overlooked a valid issue that requires reversal."* Additionally, counsel demonstrated that he advised Respondent-Father of his right to file written arguments with this Court and provided him with the information necessary to do so. *Respondent-Father failed to file his own written arguments*.
>
> Consistent with *the requirements* of Rule 3.1(d), counsel directs our attention to two issues: (1) whether the trial court erred in concluding that grounds existed to terminate Respondent-Father's parental rights and (2) whether the trial court abused its discretion in determining that it was in the children's best interests to terminate Respondent-Father's parental rights. However, counsel acknowledges he cannot make a non-frivolous argument that no grounds existed sufficient to terminate Respondent-Father's parental rights or that it was not in the children's best interests to terminate his parental rights.
>
> *We do not find any possible error by the trial court*. The 25 April 2017 order includes sufficient findings of fact,

[17] Both the respondent-father and the respondent-mother appealed termination of their parental rights. Only the respondent-father's appeal was pursuant to Rule 3.1(d).

> supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed under N.C.G.S. § 7B-1111(a)(1). Moreover, the trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the children's best interests. Accordingly, we affirm the trial court's order as to the termination of Respondent-Father's parental rights.

In re A.A.S., __ N.C. App. at __, 812 S.E.2d at 879 (citations omitted) (emphasis added); *see also In re M.J.S.M.*, __ N.C. App. at __, 810 S.E.2d at 374–75; *In re M.S.*, 247 N.C. App. at 94, 785 S.E.2d at 593–94. I believe this Court's prior published opinions – *In re A.A.S.*, *In re M.J.S.M.* and *In re M.S.* – constitute controlling precedent, and mandate that this Court conduct a full *Anders*-type review whenever a respondent's attorney files a no-merit brief and complies with the requirements of Rule 3.1(d). *In re L.V.* could not have "overruled" these prior opinions. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

In the present case, as required by Rule 3.1(d), Respondent's attorney compiled and filed the 279 page record; composed and filed a twenty-four page no-merit brief that "identif[ied] issues in the record on appeal that might arguably support the appeal and [] state[d] why those issues lack merit or would not alter the ultimate result[;]" provided notice to Respondent and provided Respondent with the required materials; and attached evidence of compliance with the requirements of Rule 3.1(d) to the no-merit brief. DSS and the child's guardian *ad litem* also filed appellee briefs.

Respondent did not avail himself of "the option of filing a pro se brief" as permitted by Rule 3.1(d).

Respondent's attorney complied with the requirements of Rule 3.1(d) for requesting an *Anders*-type review of the no-merit brief by this Court. Because I believe we are bound by the precedent set in *In re M.S.,* and subsequently followed by *In re A.A.S.* and *In re M.J.S.M.,* I believe *In re Civil Penalty* and its progeny require that we disregard the conflicting holding in *In re L.V.*, and conduct the requested Rule 3.1(d) *Anders*-type review.

Upon conducting the appropriate review, I would agree with Respondent's counsel and hold that the trial court's findings of fact support its conclusions that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and 7B-1111(a)(2) (2017), and that termination of Respondent's parental rights was in the best interest of the child. I would further agree that review of the record reveals no errors occurred at trial that would warrant reversal. I would therefore affirm.