

Child Welfare Case Update

July 8, 2020 – September 15, 2020
Social Services Attorneys' Virtual Conference (September 2020)

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Indian Child Welfare Act

Notice Requirements

In re E.J.B., ___ N.C. ___ (Aug. 14, 2020)

Held: Reversed and Remanded; Dissent: Newby, J.

- **Facts:** In 2015, DSS filed a neglect and dependency petition. Throughout the N/D action, DSS, in multiple reports to the court, stated that the children's father reported he is affiliated with the Cherokee Indian tribe. That action was terminated through a G.S. 7B-911 order granting custody of the children to mother. A second neglect and dependency action was commenced in 2018, and the children were adjudicated neglected and dependent. DSS filed a motion to terminate father's parental rights, which was granted. Respondent father appeals. During the pendency of the TPR appeal, the trial court held post-TPR hearings under G.S. 7B-908. At one hearing, the trial court found that ICWA notices had been sent to the 3 Cherokee Tribes and the appropriate regional director of the Bureau of Indian Affairs (BIA). Two of the 3 tribes responded that the children were not "Indian children." No response was received from the United Keetoowah Band of Cherokee Indians (Keetoowah Band), and the trial court determined ICWA did not apply.
- **ICWA:** After various congressional hearings recognizing "abusive child welfare practices that led to an 'Indian child welfare crisis ... of massive proportions' ", Congress enacted the Indian Child Welfare Act in 1978. Sl.Op. at 5. ICWA establishes minimum Federal standards that apply to "child custody proceedings" when an Indian child is involved. A child custody proceeding includes abuse, neglect, dependency; termination of parental rights; pre-adoptive placements; and adoption placements. An "Indian child" is an unmarried person under the age of 18 who is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership and the biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). Under 2016 binding federal regulations promulgated by the BIA, "state courts bear the burden of ensuring compliance with the Act." Sl.Op. at 10.
- **Holding:** "Because we conclude that the trial court failed to comply with the Act's [ICWA] notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act an be followed." Sl.Op. at 1. "If the Keetoowah Band of Cherokee Indians tribe indicates the that the children are not Indian children pursuant to the Act, the trial court shall reaffirm the order terminating respondent-father's parental rights.... [If the] tribe indicates that the children are Indian children pursuant to the Act, the trial court shall proceed in accordance with the relevant provisions of the Act." Sl.Op. at 18.
- **ICWA Notice:** The BIA regulations place the burden on state courts to ensure compliance with ICWA by requiring the court to ask each participant, on the record, whether they know or have to reason to know that the child involved is an "Indian child." 25 C.F.R. 23.107. When there is reason to know, the trial court must ensure the petitioner (DSS in this case) used due diligence to identify and work with all the tribes the child may be a member of or eligible for membership if a biological parent is a member of a tribe, and the court must treat the child as an Indian child during this period. *Id.* "If a tribe fails to respond to multiple

- written requests, the trial court must first seek assistance from the [BIA, and] ... can only make their own determination as to the child's status if the tribe and [BIA] fail to respond to multiple requests." Sl.Op. at 11. There was no evidence in the record, the court inquired at the beginning of the proceeding as to whether any participant knew or had reason to know the child was an Indian child, and although it attempted later comply with the ICWA notice provisions in the post-TPR hearing, the notices were insufficient as they did not include all the required language of 25 U.S.C. 1912 and 25 C.F.R. 23.111(d).
- Dissent: The lack of responses by both the Keetoowah Band (over 7 months) and BIA gives the court no reason to know the children were Indian children such that the trial made the proper determination that ICWA does not apply. The majority has placed the burden of obtaining a response from the tribe on the trial court and DSS and has elevated form over substance. "The purpose of ICWA is to notify Indian tribes that a potential Indian child is involved in a state proceeding, not to delay termination proceedings based on unsubstantiated allegations of Indian heritage." Dissent at 5.

Abuse, Neglect, Dependency

Neglect Adjudication: Findings & Conclusions

In re V.M., ___ N.C. App. ___ (Sept. 1, 2020)

Held: Reversed and Remanded (there is a dissent)

- Facts: DSS received a report after a 4-month-old infant was diagnosed by the hospital with acute alcohol intoxication. The child had ingested alcohol when his mother and uncles had travelled with him out-of-state to a family funeral. On the drive back to NC, the child was fed with formula made with water from a water bottle that had apparently been filled with alcohol by relatives. The child was adjudicated neglected, and the parents appealed that adjudication.
- Standard of review for an adjudication is whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion. Conclusions of law are reviewed de novo.
- The child's status as neglected is a conclusion of law. "[N]ot every act of negligence on part of the parent results in a neglected juvenile." "Sl. Op. at 5. The trial court's summary findings that the child was in an environment where alcohol was being poured into water bottles and that the child had acute alcohol intoxication do not support the conclusion. There was a lack of analysis or additional findings that would have supported a conclusion of neglect. Remanded for additional findings.

Adjudication: Emotional Abuse – Disposition: Evidentiary Requirements; Visitation – Appeal: Rule 2

In re K.W., ___ N.C. App. ___ (July 21, 2020)

Held: Affirmed and Remanded

- Facts: DSS became involved after mother reported to the child's therapist that the children were abused and neglected by their father when there were in his care (joint custody had been

ordered under a G.S. Chapter 50 order). Mother made numerous reports of the children's mistreatment by father to various professionals, including medical providers who were assessing the children for abuse, and law enforcement. All of mother's allegations were false. The children would repeat mother's false disclosures and the older child was fearful and anxious about seeing her father and was diagnosed with Generalized Anxiety Disorder. DSS filed a petition and obtained a nonsecure custody order where the children were placed with their father. Based on several inappropriate incidents involving mother and visitation, the court limited her visitation to electronic only. The court adjudicated the older juvenile abused and neglected and the younger juvenile neglected. At disposition, no new evidence was taken; mother was self-represented (with standby counsel), and after arguments were made the court ordered mother visitation remain the same but authorized DSS to allow for in-person visitation when she made progress on her case plan. Mother appeals the abuse adjudication and disposition.

- Appellate court jurisdiction: Generally, arguments not made before the trial court are not reviewable on appeal. App. Rule 2 gives the appellate court discretion to review arguments not made at trial, which occurred here given that mother is indigent and was self-represented at trial. Mother's notice of appeal was filed after the disposition was rendered but before it was entered. The appellate court granted mother's writ for certiorari to proceed with the appeal.
- Abuse under G.S. 7B-101(1)e. occurs when a parent has created or allows to be created serious emotional damage to the juvenile including severe anxiety. A formal diagnosis is not required. The evidence showed the juvenile had severe anxiety from the "high level of acrimony and vilification of Respondent/father by Respondent/mother." Sl.Op. at 8. The findings of fact support the abuse adjudication. The identification of the mother as the parent who created the emotional damage provided clarity in the order and is not reversible error even though "the adjudication of the child was abused concerns only the status of the child, not the fault or culpability of the parent." *Id.*
- Testimony at Initial Disposition: Mother challenges the disposition based on the court not taking sworn testimony at the initial dispositional hearing. "Mother overstates the formal requirements of an initial disposition hearing." Sl.Op. at 9. There is a statutory two-step: adjudication and disposition. Although the adjudication hearing has heightened requirements to protect the rights and due process of the parent and applies the Rules of Evidence and a standard of clear and convincing evidence, the initial dispositional hearing may be informal, consider evidence that is not barred by the Rules of Evidence, and incorporate into its findings information from written reports and adjudicatory findings. The dispositional hearing is inquisitive and is based on the best interests of the child as opposed to the adjudication which is a formal, adversarial process designed to determine the truth or falsity of the allegations in the petition. G.S. 7B-901(a) allows for the court to rely on written reports and incorporate findings from the adjudication, and if these findings are sufficient to support the disposition, "there is no need for the court to hear additional testimony." Sl.Op. at 10. Sworn testimony is required when the order relies on information from individuals who address the court at the dispositional hearing. Here, no new information was provided such that the lack of sworn testimony was not improper.

- Author's note: This holding differs from the need to have sworn testimony at a review/permanent planning hearing. The language in G.S. 7B-906.1(c) that applies to those hearing differs from G.S. 7B-901(c), which applies to the initial dispositional hearing, and there are published opinions that address the need for sworn testimony at these types of hearings.
- G.S. 7B-905.1 allows the court to order no visitation to a parent if no visitation is in the child's best interests. The standard of review is an abuse of discretion. The court found that the safety of the children required electronic visitation and only and relied on the findings in the adjudication order about mother causing distress for the children. FN 2 refers to *In re T.R.T.*, 225 N.C. App. 567 (2013) that held electronic visitation is not visitation.
- A visitation order that establishes a plan and allows DSS to expand visitation is not an abuse of discretion. Although the court may not delegate its authority to a custodian, here the discretion was not granted to a custodian but to DSS, which has been given significant discretion by the legislature under G.S. 7B-905.1(b) to manage visits. The order allows DSS to expand visits, not reduce it below the minimum visitation the court established in its order, and is not an impermissible delegation of its authority.
- G.S. 7B-905.1(d) requires the court notify the parties of their right to motion for review of the visitation plan. No such notification was provided at hearing (after reviewing the transcript) or in the order. Remanded for compliance with G.S. 7B-905.1(d).

Adjudication: Neglect – Disposition: G.S. 7B-911

In re S.M.L., ___ N.C. App. ___ (July 21, 2020)

Held: Affirmed in part; reversed in part; remanded

- Facts: At the time DSS filed its petition, there was an existing Ch. 50 custody order regarding the 2 children that awarded mother primary physical custody and father visitation and child support. DSS became involved when the older child disclosed sexual abuse by mother's boyfriend. As a safety plan, the children were temporarily placed with father but were allowed to return to mother upon the assurance that her boyfriend would have no contact with the juveniles. Mother initiated believed her child but then began to doubt the juvenile's disclosure, started having contact with her boyfriend, and inquired of DSS what the ramifications would be if she were to marry him. Father remained appropriate and supportive of the juvenile's account of her abuse. DSS recommended father file a motion to modify the Ch. 50 order, which he filed but his request for ex parte relief was denied due to DSS involvement. DSS filed an abuse and neglect petition for one juvenile and a neglect petition for the other. The court adjudicated the juveniles neglected and entered a disposition that awarded custody to father and referred to an order that needed to be drafted for modification of the Ch. 50 order and termination of the 7B action under G.S. 7B-911. That order was never entered. Mother appeals the adjudications and disposition.
- Neglect requires a finding that there be some physical, mental, or emotional impairment or substantial risk of such impairment as the result of the lack of proper care, supervision or discipline.

- Regarding the older juvenile, the findings of fact support the conclusion of neglect. Although the words in one of the challenged findings of fact were not supported by the evidence, the omission of those words has no effect on the other details in the finding of what occurred, and the remaining findings were supported by clear and convincing evidence. Mother's argument goes to the credibility and weight of the evidence, which is not reviewed on appeal. The court determined mother's testimony about ending her relationship and being supportive of her child was not credible.
- When there has been a period of separation between the parent and child, prior neglect alone is insufficient. Here the court did not adjudicate neglect solely on the finding of sexual abuse but considered what occurred after the child's disclosure, which included mother discrediting the juvenile's sexual abuse disclosure and prioritizing her relationship with her boyfriend. The court properly considered mother's ability to care for the juvenile at the time of the adjudication hearing and determined there was a risk of physical, emotional, or mental impairment to the juvenile.
- Under G.S. 7B-101(15), it is relevant if a juvenile lives in the home of another juvenile who has been abused or neglected by an adult who regularly lives in the home. The trial court has discretion to determine how much weight to give such evidence, but there must be other factors that suggest the abuse or neglect will be repeated. Regarding the younger child, there were only 2 findings, neither of which address the impact of the other's juvenile's abuse on this juvenile, that there was any reason to believe this juvenile would be abused in the future, or that there was a risk of any impairment for this juvenile. The findings do not support the conclusion of neglect. There is evidence that could support such findings but that is not the role of the appellate court; the case is remanded to the trial court to make such findings.
- G.S. 7B-911 requires the court enter an order that includes the necessary findings to modify the existing Ch. 50 order – a substantial change in circumstances. There also must be a finding that there is not a need for continued state intervention through the juvenile court proceeding. An order's compliance with statutory requirements is reviewed de novo. At disposition, the trial court directed 2 orders be prepared and entered: the 7B and a Ch. 50 order. Only one order, the 7B order, was entered. Remanded for appropriate findings and conclusions.

Abuse (emotional), Neglect, Dependency Adjudications – Evidence and Findings

7B-911 – Modification of Ch. 50 Order

Supervised Visitation Costs – Findings Required

In re E.P.-L.M., ___ N.C. App. ___ (August 4, 2020)

Held: Affirmed in Part; Vacated in Part and Remanded (there is a concurrence)

- Facts: Prior to DSS involvement, there was a Chapter 50 civil custody order that awarded joint physical custody to both parents, with the juvenile primarily living with mother as father had moved to Georgia. Mother and juvenile resided with maternal grandmother. DSS became involved when mother and grandmother made multiple reports of sexual abuse of the juvenile by the father. After multiple medical assessments and DSS and law enforcement investigations,

none of the reports of sexual abuse were substantiated. During in-home services with DSS, mother refused to agree to a placement of the juvenile with paternal relatives. DSS filed a petition alleging abuse, neglect, and dependency based on mother's substance abuse, housing, and repeated unsubstantiated reports of sexual abuse by the father. At hearing, DSS, the GAL, and father provided stipulations to the court; mother did not stipulate resulting in a hearing where the stipulations were admitted as well as testimony from the social worker, mother, and mother's substance abuse counselor. The child was adjudicated all three alleged conditions. The court entered a dispositional order that awarded custody to father and supervised visitation both electronically and in person for mother through a modification of the Chapter 50 custody order based on a substantial change in circumstances and terminated its jurisdiction in the juvenile action through G.S. 7B-911. Mother appeals, challenging the adjudications based on stipulations, the 7B-911 order, and the visitation order.

- Stipulations and Burden of Proof – Preservation of Issue of Appeal: Mother argues the stipulations were not competent evidence and the trial court erroneously shifted the burden of proof to mother to refute the stipulations. Mother did not preserve the issues raised on appeal as she did not object to the admission of the stipulations or the use of those stipulations as competent evidence. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal," and this rule applies to evidentiary arguments in abuse, neglect, and dependency proceedings. Sl.Op. at 9. "*Evidence admitted without objection is properly considered by the court* and, on appeal, the question of its competency cannot be presented for the first time." Sl.Op. at 10-11 (emphasis in opinion).
 - Concurrence (Murphy): Addressing the use of stipulations even though mother did not preserve the argument for appeal. The trial court improperly relied on the stipulation against mother since she was not a party to the stipulation stating "[s]tipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either." Concurrence at 2. The trial court improperly shifted the burden to mother when it stated "mother's evidence did not convince the [trial c]ourt that any of these stipulations were in fact accurate." Concurrent at 6. DSS, as petitioner, has the burden of proof.
- Standard of Review for adjudications is whether the findings are supported by clear and convincing evidence and whether those findings support the conclusions of law. Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal.
- Emotional abuse under G.S. 7B-101(1)e. exists when a parent allows serious emotional damage to the juvenile as evidenced by the juvenile's severe anxiety, depression, withdrawal, or aggressive behaviors. The findings that are unchallenged and supported by the stipulations which were not objected to are binding, and those findings support the adjudication of abuse. The findings include the child being subjected to multiple unnecessary and harmful medical procedures prior to her turning 4 years old and that those procedures were harmful and inflicted by mother's actions.
- Neglect involves a juvenile whose parent does not provide proper care, supervision or discipline, who is not provided necessary medical care, and who lives in an injurious environment. G.S. 7B-

101(15). It also requires that there be some physical, emotional or mental harm, or substantial risk of such harm, as a result. The trial court has discretion in determining the risk a child is at for a particular type of harm given the child's age and living environment. The unchallenged findings, which include subjecting the child to multiple unnecessary invasive medical procedures, are sufficient to show the existence or risk of harm to the juvenile when she is in mother's care and support the adjudication of neglect.

- Dependency under G.S. 7B-101(9) requires findings for both prongs of the definition: that the parent (1) is unable to provide care and supervision and (2) lacks an appropriate alternative child care arrangement. Dependency does not exist when one parent is capable of providing care and supervision. Mother erroneously argues father was available to provide care and supervision to the juvenile at the time of the adjudicatory hearing.
 - Post-petition evidence: G.S. 7B-802 states "the adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in the petition*." Sl.Op. at 19 (emphasis in opinion). "Absent exceptional circumstances, the trial court may only look to the circumstances before the court at the time the petition was filed when considering whether a juvenile is dependent at the adjudication stage." Sl.Op. at 19. Exceptions include evidence discovered after the petition is filed that reflects "a 'fixed and ongoing circumstance' rather than a 'discreet event or one-time occurrence' " (e.g. paternity). Sl.Op at 19. Distinguishing this case from *In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App., 2019), which reversed a dependency adjudication because of a lack of evidence about mother's ability to care for the juvenile at the time of the adjudication hearing, the juvenile in this case was in mother's care (vs. the parent and child having a long period of separation prior to the petition being filed as was the case in *F.S.*) up until and including the time DSS filed its petition.
 - When the petition was filed, neither parent was available to provide care and supervision to the child – mother because of her emotional abuse and father because of the allegations of sexual abuse by him, rendering father unavailable.
- Standard of review at disposition is an abuse of discretion. "No party 'bears the burden of proof in [dispositional] hearings, and the findings of fact need only be supported by sufficient competent evidence.'" Sl.Op. at 26 (quoting *In re L.M.T.*, 367 N.C. 165, 180 (2013)).
- G.S. 7B-911 and Modification of Ch. 50 Custody Order: When determining whether a substantial change in circumstances exists warranting a modification of an existing Ch. 50 custody order, the trial court is not required to literally examine the previous custody order. The trial court considers only those "*events which occurred after the entry of the previous order... [which] prevent[s] relitigation of conduct and circumstances that antedate the prior custody order.*" Sl.Op. at 24 (emphasis in opinion). Here, the trial court considered the events, specifically the child's adjudications, after the most recent custody order. The evidence and findings of the juvenile's adjudications based on mother's actions are sufficient to support the conclusion that there was a substantial change in circumstances.
- Supervised Visitation at a center requires that the court make findings as to who pays and that the party has an ability to pay. No such findings were made. The appellate court is unable to

review whether the trial court abused its discretion in ordering mother to pay for visitation. Vacated and remanded for additional findings regarding mother's ability to pay.

PPO: Waiver of Counsel; Visitation

In re J.M., ___ N.C. App. ___ (Sept. 1, 2020)

Held: Remanded in part; vacated and remanded in part

- Facts: After the adjudicatory hearing where the court rendered a decision that the children were neglected and dependent, respondent mother requested that her attorney be released. The court granted her request but appointed standby counsel. At subsequent hearings, mother represented herself with standby counsel present. The court granted standby counsel's motion to withdraw for health reasons and appointed a new standby counsel, which mom later asked to be appointed to represent her. At a permanency planning hearing, respondent mother stated she did not want her appointed counsel to represent her. After some questioning, the court granted mother's request but kept the attorney as standby counsel. At that permanency planning hearing, the court ordered guardianship to the maternal grandmother with visitation to mother. The order authorized the guardian to change the conditions or duration of visits if the parent's conduct would cause emotional distress or harm to the children. Mother appeals challenging that she did not waive counsel and the court improperly delegated its authority regarding visitation to the guardian.
- Waiver of counsel is permitted under G.S. 7B-602(a1). Although respondent mother initially stated she was not sure if she wanted assistance from an attorney at the permanency planning hearing, after a series of questions by the court, she answered that she wanted to proceed without attorney representation. This was a waiver of counsel and not a request for new counsel. Although the court's inquiry of mother was adequate to determine if the waiver was knowing and voluntary, the order does not reflect the knowing and voluntary findings required by G.S. 7B-602(a1). Remanded for the required findings and if the waiver is not knowing and voluntary, a new permanency planning hearing.
- Visitation orders are reviewed for an abuse of discretion. G.S. 7B-905.1(c) applies to visitation orders when a child is placed with a guardianship or custodian. Unlike subsection (b), which applies when DSS has custody of a child, G.S. 7B-905.1(c) does not authorize a guardian or custodian to temporarily suspend all or part of a visitation when necessary to protect the juvenile's health and safety. The guardian's ability to unilaterally modify mother's visitation is an improper delegation of judicial authority.

PPO: Findings – Eliminate Reunification, Terminate Visitation

In re C.M., ___ N.C. App. ___ (Sept. 15, 2020)

Held: Affirmed

- Facts: At a permanency planning hearing involving five children, the court eliminated reunification when it ordered concurrent permanent plans of adoption and guardianship. In its order, the court addressed visitation between the children and their mother by continuing the

previous order that did not permit visitation between mother and her 2 oldest children and reducing mother's visitation with her 3 youngest children to one last visit only. Mother appealed.

- Standard of review of an order eliminating reunification is whether the court made the appropriate findings, based on credible evidence, whether the findings support the conclusion and whether the court abused its discretion.
 - Evidence: "There is a difference between arguing that there is *no evidence* to support a finding by the trial court, and arguing that there is evidence which *contradicts* that finding. In a nonjury proceeding such as this, the findings of fact 'are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings.' " Sl.Op. at 5 (emphasis in opinion). The evidence of the SW's testimony support the challenged findings.
 - The language of the findings do not need to match the statutory language but must address the statutory substance. Taken together, the findings about mother's limited progress address the substance of G.S. 7B-906.2 finding that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety.
- Standard of review of a visitation order is an abuse of discretion. There was no abuse of discretion when the court terminated visitation based on findings that mother did not make adequate progress and had difficulty managing the visits.

PPO: Parents Acting Inconsistently with Their Constitutional Rights; Visitation

In re I.K., ___ N.C. App. ___ (Aug. 18, 2020)

Held: Affirmed (There is a dissent)

- Facts and Procedural History: Two children were adjudicated dependent due to circumstances related to unstable housing, substance abuse, and domestic violence in the home. A 2017 permanency planning order that awarded guardianship of the children to their grandmother and eliminated reunification was appealed. The court of appeals vacated and remanded that permanency planning order to address respondents' constitutional rights to care, custody, and control of their children before applying the best interests of the child standard in granting guardianship. On remand, the court awarded guardianship of one child to the grandmother, and that order was not appealed. Later, after hearing, the court awarded guardianship of the other child to grandmother. Visitation of a minimum of one hour/week, supervised, with discretion to the guardian to allow for additional visitation was ordered. Respondents appeal that order.
- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence. The determination is not a bright-line test but is instead fact-specific and is based on the parent's conduct and intention toward the child. The totality of the circumstances in the case support the determination that the parents acted inconsistently with their constitutional rights.
- The findings are supported by clear and convincing evidence, and the findings support the conclusion that the parents acted inconsistently with their constitutionally protected rights.
 - Housing: The findings describe a cluttered (hoarding), crowded (parents living with one of their parents and their infant), dilapidated (holes in the floor) trailer and were

supported by testimony and reports. The trial court gave more credibility to those reports and testimony when determining the day to day living conditions in the home than mother's photographic evidence of recent improvements. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.

- Domestic violence and substance abuse: Evidence of father's verbal aggression toward his mother, mother's drug seeking behavior, and both parents marijuana use support the court's findings that the issues with domestic violence and substance abuse have not been satisfactorily resolved.
- Visitation orders are reviewed for an abuse of discretion. There was no abuse of discretion and the order complied with G.S. 7B-905.1(c) and (d).
- Dissent: Competent evidence does not support the findings re: housing, domestic violence, and substance abuse. Findings do not support conclusion of father acting inconsistently with his parental rights (but do support conclusion regarding mother).

PPO: Burden of Proof, Eliminate Reunification - Findings, Visitation

In re L.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Child was adjudicated neglected and dependent. DSS filed a petition to TPR and before that petition was heard, a permanency planning hearing was held that eliminated reunification as a permanent plan. Respondent mother preserved her right to appeal the permanency planning order (PPO), and after the TPR was granted, she appealed both the PPO and TPR.
- PPO:
 - Burden of Proof: In a permanency planning hearing, no party bears the burden of proof but rather the trial court determines the child's best interests based on sufficient competent evidence. Although mother correctly identifies the trial court mistakenly applied a clear, cogent, and convincing evidence standard of proof, and that standard conflicts with the applicable standard of proof applied to a PPO, she is not entitled to relief as it constituted harmless error since it required stronger proof to eliminate reunification than is actually required.
 - When eliminating reunification as a permanent plan, the court must make written findings under G.S. 7B-906.2(b) and (d), but the use of verbatim statutory language, although best practice, is not required so long as the substance of the statutory provisions are satisfied. The findings that addressed the court's continued concerns, mother's failure to comply with her case plan, and that the parents continue to act in a manner that is inconsistent with the juvenile's health and safety address the ultimate finding mother's asserts was missing.
 - A review of a trial court's order of dispositional order for visitation is based on an abuse of discretion. There was no abuse of discretion in reducing the visitation as part of the PPO that eliminated reunification that made certain findings regarding mother's lack of progress in her case plan, missing visits, and being late to visits.

Termination of Parental Rights

Personal Jurisdiction: Summons

In re W.I.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: On September 18, 2018, DSS filed a petition to terminate parental rights. A summons was issued on September 21st and served on respondent father on October 3rd. Father timely filed a motion to dismiss raising lack of subject matter jurisdiction due to a lack of proper verification of the petition, which was signed by an authorized representative for the former DSS director. DSS filed a motion to amend the TPR petition to verify by an authorized agent of the current DSS director. The motion to amend was granted, and the trial court ordered DSS to file the amended petition and serve it on father. On November 27th, a new summons issued, and father was served with new summons and amended petition on December 4th. Father filed a motion to quash the November 27th successive summons since it was not an alias and pluries summons and did not contain an endorsement under Rule 4(d)(1)-(2) of the N.C. Civ. Pro. The motion was denied as the trial court found the amended summons and petition were not a successive summons warranting an alias and pluries summons but were new filings that were permitted by the court. The TPR was granted, and father appeals.
- The purpose of an endorsement or issuance of an alias and pluries summons is to maintain an original action to toll the applicable period of the statute of limitations. “No such consideration is invoked in this case.” Sl.Op. at 7. The trial court permitted the filing of the amended petition and issuance of new summons and referred to it as “new filings”, and father did not contend that the TPR filing would be time-barred.
- Father waived any objection to the court’s personal jurisdiction over him as he never raised the issue of personal jurisdiction in his answer or motion to quash. Instead he raised subject matter jurisdiction.

TPR Adjudication: Standard of Review (cumulative summary of the opinions below)

The standard of review for a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Unchallenged findings are binding on appeal. The appellate court reviews only those challenged findings that are necessary to support the determination that a ground to TPR exists. Findings that are not supported by the evidence are disregarded by the appellate court. Conclusions of law are reviewed de novo. When findings of fact and/or conclusions of law are mislabeled, they will be reclassified and treated under the appropriate standard of review on appeal.

Only one ground is necessary to support a TPR. As such, if the appellate court reviews and upholds one ground, it need not review any remaining challenged grounds.

Denial of TPR: Findings and Conclusions Required

In re K.R.C., ___ N.C. ___ (July 17, 2020)

Held: Vacate and Remand

- Facts: This is an appeal of a private TPR that was denied. Petitioner is the mother, who obtained sole legal and physical custody of the juvenile as a permanent plan in a neglect action. The court retained jurisdiction in the 7B action and waived reviews. Petitioner mother filed a TPR petition against father 26 months after obtaining custody of the juvenile. The petition was denied when the court concluded “the grounds” were not proved by clear, cogent, and convincing evidence.
- Grounds and ground are used interchangeably. Although mother argues the court mistakenly believed she had to prove grounds to TPR rather than one ground, the use of the term “grounds” was not error as “ground” or “grounds” can be used to denote one basis or reason.
- G.S. 7B-1109 and -1110(c) when read together require the trial court make “appropriate findings of fact and conclusions of law” of the existence of nonexistence of the alleged grounds. This applies to both the granting and denial of a TPR. Further Rule 52 of the Rules of Civil Procedure requires the court to find facts specially and separately state conclusions of law. This allows the appellate court to review the record and order. There must be evidence to support findings, findings to support conclusions, and each step must be taken in logical sequence and appear in the order; otherwise, the appellate court cannot determine if the trial court acted correctly. The order does not include ultimate facts, which are the final effect of logical reasoning based on evidentiary facts, that is dispositive of any of the 4 grounds petitioner alleged, and the general conclusion of law does not provide an analysis of the legal standards the trial court applied. The issue here is not a lack of evidence but a lack of adequate findings and conclusions that makes the basis for the order clear.
- Although the failure to address an alleged ground in a TPR order granted under a different alleged ground amounts to a non-adjudication of that ground, this principle does not apply to the denial of TPR. A denial of a TPR at the adjudicatory phase requires the trial court’s evaluation of each and every ground so that an appellate review may take place.
- One of the 4 alleged grounds was dependency under G.S. 7B-1111(a)(6). Petitioner’s lack of argument on this issue suggest that she recognizes this ground does not exist. A dependent juvenile was in the custody of her mother (petitioner) and therefore is not dependent as she has a parent who is providing care and supervision. See G.S. 7B-101(9).

Neglect/Dependency: Findings of Fact; Conclusion of Law

In re K.L.T., ___ N.C. ___ (July 17, 2020)

Held: Reversed

- Facts: In 2016, the juvenile (along with his siblings) was adjudicated neglected and dependent due to a lack of proper care and supervision and an environment injurious to his welfare. Mother had a long history with CPS. The marriage between mother and the juvenile’s father was mother’s third and domestic violence was present. Throughout the case, mother was awarded supervised visitation. Mother was also ordered to comply with her case plan, which required her to engage in services to address domestic violence, her emotional and mental health, parenting skills, and stable housing. After the primary permanent plan was changed to adoption, with a

secondary plan of reunification with mother, DSS was ordered to and did file a TPR. After a hearing, the TPR was granted on the grounds of neglect and dependency. Mother appeals, challenging the court's findings.

- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. The neglect must result in some physical, mental, or emotional impairment or a substantial risk of such impairment to the juvenile. When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child's best interests and the fitness of the parent at the time of the adjudicatory hearing to TPR. "A termination of parental rights for neglect cannot be based solely on past conditions that no longer exist." SI.Op. at 29.
- Findings regarding the likelihood of future neglect are unsupported by the evidence and the remaining findings are insufficient to support the ground of neglect.
 - Despite the finding that mother did not fully comply with her case plan, the evidence shows otherwise. Mother completed her domestic violence support group, completed parenting classes, completed outpatient therapy after accomplishing her treatment goals with no further treatment recommended, separated and divorced the juvenile's father and obtained and extended a DVPO against him, maintained stable income with disability benefits and a part-time job, moved into a 3-bedroom home, consistently attended her supervised visitation, and paid monthly child support.
 - The finding about mother's new online relationship that created a red flag that caused the court to question mother's judgment is unsupported by the evidence. The evidence about mother's online communications does not indicate any risk to the juvenile. Without any legitimate basis for believing mother's relationship was likely to cause harm to the juvenile, DSS lacks authority to prohibit mother from engaging in her social interaction.
 - Regarding domestic violence and her past history with DSS, mother's therapists did not believe she needed additional treatment to avoid abusive relationships or to understand why her child was removed by DSS. She also divorced her husband and obtained a DVPO against him. Past cases supporting a finding of likelihood of neglect based on domestic violence involve a parent continuing to participate in domestic violence, failing to engage in therapy, or refusing to end the abusive relationship. The evidence also showed she developed a detailed safety plan for her son, which acknowledged her role in failing to protect her children, in anticipation of reunification.
 - Although mother never had unsupervised visits, the record shows she was not permitted to do so.
 - Regarding her housing, the findings focused on the environment and management of the household as two of her other children, who were adults, resided with her. Although the trial court, as fact finder, may make reasonable inferences from the evidence, it "cannot rest on conjecture or surmise.... [and] the appellant court may review the reasonableness of the inferences drawn by the trial court from the evidence." SI.Op. at 26. Here, the majority of the findings were based on conjecture and were not

reasonable inferences that mother would be unable to maintain a safe and stable environment for the juvenile such that he would be at risk of harm.

- Dependency as a ground to TPR under G.S. 7B-1111(a)(6) requires findings that establish (1) the parent's inability to provide care or supervision and (2) the parent lacking an alternative child care arrangement. The finding that mother was incapable of providing care and supervision was unsupported by the evidence as explained above.

Neglect: Findings and Conclusion

In re J.O.D., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2018, the juvenile was adjudicated neglected due primarily to issues of substance use as well as domestic violence. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition alleging neglect. The court granted the TPR, respondent mother filed a no merit appeal. Respondent father appealed arguing there was no likelihood of repetition of neglect.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent. The determinative factors are the child's best interests and the fitness of the parent at the time of the adjudicatory hearing to TPR. "The trial court must consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the adjudication of neglect." Sl.Op. at 7 (emphasis in opinion).
- The findings are supported by clear, cogent, and convincing evidence and support the conclusion of neglect.
 - The findings showed that father has a history of struggling with opiate addiction as well as use of other drugs. His case plan required he participate in substance abuse treatment. The evidence and findings showed that after initially complying with his case plan, he was discharged from treatment, repeatedly tested positive on his drug screens, and was abusing alcohol such that he did not make meaningful progress at the time of the TPR hearing. The conclusion that a likelihood of future neglect existed was appropriate given father's history of substance use, failure to follow treatment recommendations, relapse, and alcohol abuse. There was domestic violence in the relationship with mother as well. Respondent father did not complete a domestic violence program and continued to remain in a relationship with discord with mother. Based on social worker testimony, the trial court's inference that respondents continued to live together was reasonable. Record evidence that would have supported a contrary conclusion will not be reweighed by the appellate court. The trial court is also entitled to not give credit to father's testimony that he would separate from mother.

In re M.A., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: The children were adjudicated neglected based on lack of proper care and supervision and an injurious environment due to domestic violence and substance use in the home. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition. The TPR was granted and father appeals the neglect ground challenging the likelihood of future neglect. Mother also appeals, arguing the court abused its discretion when determining the TPR was in the children's best interests (discussed in section below).
- The evidence, including testimony, prior orders, and a GAL report support the findings.
 - An indication of the likelihood of future neglect is a parent's failure to make progress in completing the case plan. Father acknowledged in the underlying neglect order that domestic violence was a reason for the child's removal. The court findings include ongoing domestic violence based on the frequency of 911 calls made to the home and father's unsuccessful discharge from domestic violence classes and failure to demonstrate concepts from those classes. Father's limited attendance at the classes is not reasonable progress in addressing the domestic violence as required by his case plan. These findings support the adjudication of neglect given the likelihood of future neglect. Because the domestic violence was sufficient to support the neglect ground, the supreme court did not address the findings related to father's substance abuse or housing conditions.

In re M.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: The children were adjudicated neglected due to the domestic violence in the home. There is a history of several Domestic Violence Protection Orders (DVPO), violations of those orders, and father's arrest for such violations. The parents continued their relationship despite mother stating she would not see father anymore so as to get her children back. DSS filed TPR motions. The TPR was granted, and respondent mother appealed.
- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent.
- Findings of fact: Assuming arguendo that one of the challenged findings of fact about the parents dinner together is unsupported by the evidence, other unchallenged findings of fact about additional meetings between the parents support the finding that the parents were still together. Although mother testified that she would not return to the children's father, the trial court was not required to credit her testimony given other testimony that was admitted. Father was in jail pending felony and misdemeanor charges at the time of the TPR hearing. Mother's testimony and father's incarceration, given the historical facts of the case, do not support different inferences the trial court should have made about the likelihood of repetition of neglect. The challenged findings are proved by clear and convincing evidence, and the findings as a whole support the conclusion that the neglect ground exists.

In re J.C.L., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Under G.S. 7B-1111(a)(1), neglect is a ground to TPR. Neglect includes a parent's lack of proper care, supervision, or discipline or an environment that is injurious to a child's welfare. G.S. 7B-101(15). When a parent and child have been separated for a long period of time, there must be both past neglect and a likelihood of future neglect by the parent.
- An indication of the likelihood of future neglect is a parent's failure to make progress on their case plan. There were numerous findings, that were supported by clear, cogent, and convincing evidence – the social worker's testimony – that demonstrated the father did not make enough progress to support the court's conclusion that neglect was likely to recur. Respondent continued to test positive for marijuana use, completed only part of his treatment after a long delay, did not follow through on recommendations for therapy, struggled with anger issues, was late in rent and was unable to maintain utilities, did not acknowledge his child's special needs, and blamed others for his failure to complete his case plan. The progress father did make over the 2 years the juvenile was out of his home was limited and insufficient.

Failure to Make Reasonable Progress

In re L.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Child was adjudicated neglected and dependent. DSS filed a petition to TPR and before that petition was heard, a permanency planning hearing was held that eliminated reunification as a permanent plan. Respondent mother preserved her right to appeal the permanency planning order (PPO), and after the TPR was granted, she appealed both the PPO and TPR.
- TPR: Failure to Make Reasonable Progress
 - G.S. 7B-1111(a)(2) authorizes a termination of parental rights when a parent has willfully left the child in foster care or placement outside of the home for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the child's removal. Although fully satisfying each condition of a case plan is not required, there must be more than extremely limited progress. A parent must have an ability to show reasonable progress but be unwilling to make the effort. The court made findings of fact about mother's partial progress with trauma group sessions, missed group and individual sessions, inconsistent visitation with the child, inconsistent participation with CDSA, failure to maintain stable housing and employment, and continued involvement with father that involved incidents of domestic violence. Although there was some progress, it was not reasonable progress for which mother had an ability to make. The findings support the court's conclusion that this ground exists.

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- Facts: In 2015, the juvenile was adjudicated dependent primarily due to the parents' substance use. Reunification efforts with mother were ceased in 2016. In 2017, DSS filed a TPR petition, which was granted on the ground of failure to make reasonable progress (G.S. 7B-1111(a)(2)), and mother appealed. On appeal, the court of appeals vacated and remanded the case for findings after concluding there was tension in the findings such that the appellate court could not conduct a meaningful review. On remand, the trial court did not take additional evidence and entered an amended adjudication order with additional findings of fact and granted the TPR. Mother appealed the ground and best interests determination (the best interests portion of this appeal is discussed in the section below).
- G.S. 7B-1111(a)(2) authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. A trial court should not find a parent has failed to make reasonable progress when that parent has not fully satisfied all the case plan requirements but does have the authority to determine that a parent's "extremely limited progress" supports the ground. Mother's case plan included substance use treatment and stable housing.
- The findings establish mother made marginal progress because she did not continue the recommended substance abuse treatment after completing a 6-month program. The court found that respondent chose to participate in a methadone program without counseling or a plan to wean herself off the methadone and that mother's testimony that she was in AA or NA was not credible. "[T]he fact that respondent decided to address her substance abuse in this manner – without counseling, all the while having the available option to continue with another residential rehabilitation program that would have allowed her to reside with her child – after she completed the program at Our house is of great significance." Sl.Op. at 14. The court's findings support the conclusion that mother failed to make reasonable progress to address the core reason for the child's removal.
- Dissent (3 justices): The additional findings made by the trial court on remand were not based on clear, cogent, and convincing evidence to support the conclusion the mother failed to make reasonable progress. Mother completed a rehabilitation program and had been drug-free for one year, had a stable living arrangement, and was parenting her younger child.
 - Mother was also meeting the requirements of the methadone program. A "drug addiction is a brain disease["; a] parent who is following a doctor's orders in a treatment program should not have that fact held against her, just as one would not conclude that a diabetic relying on medication to control their diabetes rather than diet and exercise is failing to make reasonable progress towards good health." SL.Op. Dissent at 7.
 - Mother's "parenting of another child without any evidence of neglect" should have been relevant to the issue of whether respondent made reasonable progress towards addressing the conditions that led to her son being removed from her care. Sl.Op. Dissent at 7-8.

In re J.S., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2016, the children were adjudicated neglected due to filthy and unsafe conditions in the home and mother's failure to follow the safety plan. Two years later, DSS filed TPR petitions, which were granted. Respondent mother appealed, challenging the grounds and disposition (disposition discussed in section below).
- G.S. 7B-1111(a)(2) authorizes a TPR if the parent has willfully left the juvenile in foster care or other placement for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. This requires that the child be left in foster care/other placement pursuant to a court order. The reasonable progress by a parent is evaluated for the period of time up to the TPR hearing. (agreeing with *In re A.C.F.*, 176 N.C. App. 520 (2006)). There is no requirement that a parent be in the position to regain custody of the children at the time of the TPR hearing. Willfulness is a question of fact; it does not require fault by the parent. Regardless of some efforts and good intentions, a prolonged inability to improve the situation will support a finding of willfulness and lack of progress. A parent's compliance with a court ordered case plan is relevant when there is a nexus between the case plan components that the parent failed to comply with and the conditions that led to the child's removal.
- Findings were sufficient
 - Mother complied with several case plan provisions including parenting classes, regular contact with DSS, passing drug screens, and visiting with the children. However, she did not make meaningful progress in improving the housing conditions, which were the primary reason for the children's removal.
 - Although mother had cognitive limitations and personality issues, she did not lack the ability to show reasonable progress. There was no indication that mother could not clean and maintain her home and she failed to do so when she was not responsible for providing child-rearing responsibilities to her children. She refused to cooperate with the in-home aide provided by DSS and did not correct the conditions over a 3-year period. The court did not err in determining her actions were willful.
 - There is no internal inconsistency in the order that determined mother willfully failed to make reasonable progress and that she was incapable of providing proper care and supervision to the children as part of the ground to TPR for dependency. Whether mother could regain custody of the children at the time of the TPR hearing is irrelevant for the ground under G.S. 7B-1111(a)(2).

Failure to Pay Cost of Care, Parent's Living Expenses

In re J.A.E.W., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: The child was adjudicated dependent, and at the time, respondent father was incarcerated. After his release, respondent entered into a family case plan with DSS. He did not comply with his case plan and was fired from his job for gross misconduct. Ultimately, he

obtained another job. DSS filed a petition to terminate respondent father's parental rights, which was granted on all 4 alleged grounds and a determination that the TPR was in the child's best interests. Father appeals and challenges the grounds.

- Standard of review is whether the findings are supported by clear and convincing evidence and whether the findings support the conclusion of law. A TPR may be based on one or more statutory grounds, and this opinion addresses one ground only.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay a reasonable portion of the cost of the care of a juvenile in DSS custody if the parent is physically and financially able to do so. The determinative time period is the 6 months preceding the TPR petition. When a parent is employed with some income and has paid nothing, "the trial court did not need to make findings regarding respondent's own living expenses." Sl.Op. at 10. "Respondent's living expenses might be relevant evidence to be taken into account if he had made some child support payments during the applicable time period and the issue was whether the amount he contributed to the cost of Jennifer's care was reasonable, but here the trial court found that he had income and made no contributions at all." *Id.*

Prior TPR and Failure to Establish a Safe Home

In re N.G., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2017, the juvenile was adjudicated dependent. Ultimately DSS filed a petition to TPR, which was granted on multiple grounds. Respondent father appeals the grounds (mother appealed the best interests determination, which is discussed below).
- G.S. 7B-1111(a)(9) authorizes the ground for TPR when a parent's rights with regards to another child of the parent have been involuntarily terminated by a court and the parent lacks the ability or willingness to establish a safe home for the child who is the subject of the current TPR action.
- The challenged findings of fact are supported by clear and convincing evidence, which includes father's stipulations at the underlying adjudicatory hearing in the dependency action about the prior TPR and that his mental health did not allow him to provide a safe home, social worker testimony, father's testimony, and evaluations of experts and their testimony about father's mental health. The findings show that father has (1) a diagnosis of antisocial personality disorder, which is characterized by extensive lying and a disregard for social or moral standards and is difficult to treat, (2) acted in a consistent way with that diagnosis by lying to DSS about his identity and failing to disclose a complete and accurate copy of an evaluation to a second evaluator, and (3) no interest in treatment or in changing. The findings support the court's conclusion that there was a prior TPR and father lacked the ability to provide a safe home.

Abandonment; Best Interests

In re J.T.C., ___ N.C. App. ___ (Aug. 18, 2020)

Held: Affirmed (There is a dissent)

- Facts: Respondent father appeals this 2018 private TPR order granted on the grounds of neglect and willful abandonment (G.S. 7B-1111(a)(1), (7)). This appeal was before the court of appeals

as the appeal was filed prior to Jan. 1, 2019 when appeals of TPRs are before the NC Supreme Court).

- The findings are supported by clear and convincing evidence and the findings support the conclusion that the respondent father willfully abandoned the juvenile during the determinative 6-month period. Efforts made by father's relatives and wife do not preclude an adjudication of abandonment by father when he has the means to take efforts to maintain his relationship with his child and take on parental responsibilities and fails to do so.
- G.S. 7B-1110(a) sets forth the best interests factors for the court to consider. Although a permanent plan is not part of this private TPR, the brief mention of a permanent plan in the findings is not an abuse of discretion. Relevant considerations under G.S. 7B-1110(a)(6) included father's history of domestic violence, criminal record, and ongoing use of substances.
- Dissent based on best interests findings being erroneous resulting in an abuse of discretion.

Disposition: Standard of review (cumulative summary of the opinions below)

A best interests determination is reviewed for an abuse of discretion, which is when the court's ruling is so manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Dispositional findings of fact are reviewed under a competent evidence standard. Unchallenged dispositional findings are binding on appeal.

G.S. 7B-1110(a) Factors

In re J.S., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2016, the children were adjudicated neglected due to filthy and unsafe conditions in the home and mother's failure to follow the safety plan. Two years later, DSS filed TPR petitions, which were granted. Respondent mother appealed, challenging the grounds (discussed in section above) and disposition.
- G.S. 7B-1110(a) requires the court to consider each of the enumerated factors but only make written findings of fact "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [trial] court[.]' " Sl.Op. at 16 (citation omitted).
- There was no conflicting evidence about the likelihood of each child's adoption or the facilitation of the permanent plan if the TPR was granted. For one child, there was no conflicting evidence about the bond between the juvenile and prospective adoptive parents. No findings were required.
- Without a prospective adoptive home for the other children, the factor addressing the bond between the child and prospective adoptive parent is not relevant. Regarding the likelihood of their adoption despite not having a pre-adoptive placement, the adoption social worker testified the children's behaviors had improved and they needed an appropriate adoptive home that provided structure. The evidence supported the finding.

- Regarding the quality of the relationship between mother and her children, the trial court is the authority to credit the testimony of one witness over another when the evidence conflicts. There was no abuse of discretion.

In re N.G., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In 2107, the juvenile was adjudicated dependent. Ultimately DSS filed a petition to TPR, which was granted on multiple grounds. Respondent mother appealed the best interests determination (father appealed the grounds, which is discussed above).
- At the dispositional stage of a TPR, the court determines whether the TPR is in the child's best interests based on the factors listed in G.S. 7B-1110(a). The trial court properly considered the factors and made findings of fact. The challenged findings were supported by the evidence, which included the social worker's testimony and the GAL report.
- Although a stated purpose of the Juvenile Code is to prevent the unnecessary or inappropriate separation of children from their parents, the child's best interests are the court's paramount consideration, and when it is not in the child's best interests to return home, the child should be placed in an safe, permanent home within a reasonable amount of time. G.S. 7B-100. Here, the child had been in the foster home for almost 2 years without being any closer to reunifying with her parents, and the foster parents were meeting her needs and wanted to adopt her and provide her with a permanent home.

In re E.F., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Respondent mother appeals the best interests determination of the TPR arguing the court abused its discretion.
- Although G.S. 7B-1110(a) requires the court to consider each of the enumerated statutory factors at disposition, written findings are only required for those factors that have conflicting evidence. Competent evidence (testimony and reports) supported the findings, and of the challenged findings, there was no evidentiary conflict requiring written findings.
 - Regarding the factor that the TPR would aid in achieving the permanent plan, the TPR was a necessary precondition for the adoption.
 - Regarding the factor addressing the child's likelihood of adoption, it does not require a certainty of adoption.
 - A "trial court may – and should – consider evidence introduced at the adjudicatory stage of a termination hearing in determining the children's best interests during the disposition stage." Sl.Op. at 8. Although the availability of the maternal grandmother as a placement option was raised once at the adjudication stage, there was no reference to her or any other alternative placement at the disposition phase other than the undisputed evidence that the current placement provider (who was not the maternal grandmother) was appropriate and desired to adopt the children. As such, written findings about the maternal grandmother were not required.

Likelihood of Adoption

In re M.A., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: The children were adjudicated neglected based on lack of proper care and supervision and an injurious environment due to domestic violence and substance use in the home. After adoption was ordered as the primary permanent plan, DSS filed a TPR petition. The TPR was granted and mother appealed, arguing the court abused its discretion when determining the TPR was in the children's best interests. Father also appealed the neglect ground (discussed in section above).
- Findings of fact were made for each of the relevant statutory factors enumerated in G.S. 7B-1110(a).
 - The court's findings that there was a likelihood of adoption was supported by testimony from the adoption recruiter even though there were no prospective adoptive families that had been identified at the time of the TPR hearing. The lack of an adoptive placement or the possibility that the adoption process would be lengthy do not preclude a TPR. The testimony included the adoption recruiter's belief that the children were likely to be adopted given that they had an ability to form bonds with their caregivers, had no special needs, and were doing well in school and therapy. Additionally, the TPR would make the children eligible to list with adoption service agencies to help identify an adoptive family. The GAL also testified that he was not concerned about the children's ability to bond with an adoptive family and recommended that TPR was in the children's best interests given the duration of their time in foster care and need for a safe, permanent home.
 - While a court may consider a child's wishes, their preference is not controlling because the best interests of the child is the "polar star" of the Juvenile Code. Although G.S. 48-3-601(1) requires a child who is 12 or older to consent to their adoption, that requirement may be waived when the court finds it is not in the child's best interests. G.S. 48-3-603(b)(2). As such any refusal by a child to consent does not necessarily preclude adoption.

In re J.C.L., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Father challenges the finding that there is a high likelihood his child will be adopted and was placed in a pre-adoptive home since it was a "potential pre-adoptive home." "This argument rests upon a distinction without a difference, as all pre-adoptive homes are by their nature inherently potential." Sl.Op. at 22.

In re S.M.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: In its disposition the court findings included that the juvenile needs more stability given her history of trauma before she can be adopted. Mother argues the likelihood of adoption is

unknown unless the court addressed what constitutes stability and whether the juvenile could obtain it before she turned 18.

- The trial court is required to make findings addressing the likelihood of the child's adoption and is not required to find that the juvenile will achieve the necessary stability for adoption or establish benchmarks a child who has experienced trauma must meet. The findings show the juvenile has a likelihood of adoption if she obtains stability, which requires in part the termination of her mother's parental rights. Although the trial court recognized the necessary stability may not be achieved, "it is well established that a likelihood of adoption is not necessary for a court to conclude termination of parental rights is in the child's best interests." Sl.Op at 16. The court made the appropriate findings and did not abuse its discretion.

In re K.L.M., ___ N.C. ___ (Aug. 14, 2020)

Held: Affirmed

- Facts: Respondent father appeals the TPR order, arguing the court abused its discretion when weighing the best interests factors and concluding it was in the children's best interest to TPR when there was no adoptive placement.
- In a private TPR, the likelihood of adoption is only one factor for the court to consider. The findings about the children's young ages, their current living arrangement with their mother and grandparents, their lack of bond with father, and father's lack of interest and involvement with the children show the court considered the G.S. 7B-1110(a) factors and support the court's conclusion.

Bond between Juvenile and Parent / Foster Parent

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- Facts: Mother challenges the findings that her relationship with her child was similar to "playmates" and that the trial court improperly compared her relationship to the child's relationship with the foster parents.
- The findings were supported by the evidence. The social worker's testimony addressed the relationship and interactions between the child and mother when supervising the visits, which showed mother did not take a parenting role but rather played with the child. There was no evidence that supervised visits prevented mother from demonstrating a parental bond.
- The court did not choose between the parent and foster parent. Mother relies on *In re Nesbitt*, 147 N.C. App. 349 (2001), which is not binding on the supreme court. Additionally, the findings do not compare the two relationships to determine which was better. Instead, the findings evaluate the bond with mother and quality of relationship with the proposed adoptive placement, and the mention of the foster parents in the finding "serves as a somewhat inartful proxy for describing the quality of the parental relationship." Sl.Op. at 21.

In re J.J.B., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: Respondent parents appeal the disposition portion of a TPR.
- The court made a reasonable inference from the testimony at hearing that the children were bonded to their foster parents.
- Although the court found there was a strong bond between the children and their parents, that bond is just one factor to be considered under G.S. 7B-1110(a). The trial court may give greater weight to other factors. The findings and need for permanence within a reasonable amount of time for the juveniles supported the TPR over a guardianship since the child's best interests are the paramount consideration for the court. See G.S. 7B-100(4), (5). Although the trial court stated that the foster parents should honor the relationship between the children and respondents, that statement was not part of the order, is not a repudiation of the best interests ruling it rendered and entered, and is not an abuse of discretion.

Appealable Order

In re A.B.C., ___ N.C. ___ (July 17, 2020)

Held: Affirmed (4-3 decision)

- Facts: A TPR adjudication order was entered on March 21, 2019. A separate dispositional order was entered on April 28, 2019. Respondent mother appealed the TPR on both grounds and disposition. DSS filed a motion to dismiss the appeal of the adjudication order, arguing it was untimely.
- G.S. 7B-1001 identifies those order which may be appealed. A final order terminating or denying a termination of parental rights is an appealable order. Notice of the appeal must be made within 30 days of the order's entry and service. There is a two-stage process for TPR: adjudication and disposition. A TPR adjudication order is not an appealable order under G.S. 7B-1001 because it only establishes a ground to TPR and does not terminate parental rights. The TPR order is not final and subject to appeal until the court enters its disposition order. The appeal was timely filed.

Complying with the Mandate

In re S.M.M., ___ N.C. ___ (July 17, 2020)

Held: Affirmed

- Facts: DSS obtained an order terminating respondent mother's rights. She appealed, and the court of appeals affirmed the ground but concluded the disposition did not address the juvenile's likelihood of adoption. The case was remanded to the trial court to make findings of this statutory factor. On remand, respondent filed a motion to reopen evidence to show a change in circumstances. The motion was denied and the court entered an amended order with new findings of fact. Mother appeals arguing the trial court could comply with the mandate without reopening the evidence.
- A trial court must strictly follow the mandate. The mandate was for additional findings not for a new dispositional hearing. The appellate decision was silent as to whether the trial court should take new evidence when the case was remanded for additional findings. As such, the trial court had discretion to determine whether it should take new evidence on remand, and it was not

required to do so. There was nothing in mother's motion that identified specific changes that would impact the issue of the likelihood of the juvenile's adoption. Speculation of changed facts over an 18-month period is insufficient to show the trial court abused its discretion. The trial court was able to make the required findings from the evidence presented at the original hearing and thus the trial court complied with the mandate.

UCCJEA

Inconvenient Forum

Harter v. Eggleston, ___ N.C. App. ___ (August 4, 2020)

Held: Affirmed

- Facts:
 - 2012, custody action commenced in NC
 - 2013, consent order entered; mother moved to Ohio and consent order modified
 - 2015, order modified granting mother primary physical custody
 - 2018, father filed verified motion to modify 2015 order seeking primary physical custody; ex parte temporary order granted; temporary consent order granted; mother filed verified motion to remove case to Ohio based on NC being an inconvenient forum
 - 2019, mother's motion granted after determination that Ohio is a more convenient forum and declining jurisdiction in NC, staying proceeding. The order was based on the verified pleadings, which the parties requested be accepted as affidavits, and attorney arguments. Father appeals.
- Standard of review of a decision to decline jurisdiction based on inconvenient forum is an abuse of discretion.
- G.S. 50A-207(b) requires findings of fact of relevant factors, and those findings must be based on competent evidence. The court made the requisite findings of fact, based on the affidavits/verified motions that the parties chose to submit to the court and were competent evidence.