A Minor's Consent to Adoption: Where and in What Proceeding Is It Waived?

North Carolina adoption laws are codified in G.S. Chapter 48. I find it to be one of the more difficult Chapters to navigate because it consists of interrelated Articles and Parts. As you get familiar with the Chapter, the procedures and requirements become less challenging to piece together. It is imperative to know these procedures because "the law governing adoptions in North Carolina is wholly statutory." Boseman v. Jarrell, 364 N.C. 537, 542 (2010).

Under North Carolina adoption laws, before an adoption of an unemancipated minor may be granted, certain consents must be obtained. *See* G.S. 48-3-601 through -603. One required consent is from the minor adoptee if they are 12 years old or older. G.S. 48-3-601(1). However, that minor's consent may be waived when the court issues an order based upon a finding that it is not in the minor's best interests to require their consent. G.S. 48-3-603(b)(2).

What court has jurisdiction to enter the order waiving the minor adoptee's consent?

The question is circulating due to some recent North Carolina Supreme Court opinions involving appeals of termination of parental rights (TPR) orders. The facts of the opinions indicate the district court in the TPR action waived the juvenile's consent to the adoption. The issue of whether the district court in a TPR proceeding has subject matter jurisdiction to waive the juvenile's consent does not appear to have been raised before or decided by the Supreme Court. Instead, the minor's waiver of consent is discussed by the Supreme Court in its review of the facts when analyzing a challenge to the district court's determination that the TPR is in the juvenile's best interests. The factual summaries in the Supreme Court TPR opinions made me sit up in my chair, take notice, and ask the questions in this post.

Subject Matter Jurisdiction in an Adoption

An adoption is a special proceeding before the clerk of superior court. G.S. 48-2-100(a). The clerk decides all the matters in controversy to dispose of the adoption proceeding. G.S. 1-301.2(d). However, the clerk must transfer the special proceeding to the district court if an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk. G.S. 48-2-601(a1); 1-301.2(b) (raised in a written motion or pleading). When the special proceeding is transferred, the district court may (1) hear and decide all the matters in controversy (which in this case would be deciding whether to grant the adoption), or (2) if it appears to the court that justice would be more efficiently administered by the court disposing of only the matter leading to the transfer, the court may decide the issue(s) that resulted in the transfer and remand the remainder of the special proceeding to the clerk. G.S. 1-301.2(c). The only other time a district court has jurisdiction in an adoption proceeding is when the adoption is appealed – the appeal is a de novo hearing before the district court. G.S. 48-2-607(b); 1-301.2(e).

In some adoptions, there is a companion abuse, neglect, dependency (A/N/D) and/or TPR action before the district court. These are civil actions and are governed by G.S. Chapter 7B (the Juvenile Code). The adoption statute specifically contemplates the need for a TPR to be commenced by an adoption petitioner and authorizes the concurrent filing of an adoption petition and TPR petition. G.S. 48-2-302(c); *see also* G.S. 7B-1103(a)(7) (standing to initiate a TPR). When there is a companion A/N/D or TPR proceeding, "the district court having jurisdiction under Chapter 7B shall retain jurisdiction until the final order of adoption is entered[, but t]he district court may waive jurisdiction for good cause." G.S. 48-3-102(b). The statute addressing jurisdiction in a TPR action, G.S. 7B-1101, states, "… the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes."

In reading these statutes together, I have always interpreted them to mean that the district court has jurisdiction to continue with the A/N/D action until there is a final decree of adoption and that the adoption decree terminates the district court's jurisdiction in the A/N/D action. And, when there is a TPR action, the district court may exercise jurisdiction in the TPR while the adoption proceeding is pending. Although these various proceedings involve the same juvenile as the subject of each respective proceeding, these proceedings are occurring simultaneously but are different – the juvenile civil actions in district court are separate from the adoption proceeding that is initiated before the clerk as a special proceeding and may be transferred or appealed to district court.

Waiving the Minor's Consent

Under the relevant jurisdiction statutes, the clerk of superior court has the authority to waive the minor's consent. It is clear that when an adoption proceeding is transferred to the district court, the judge hearing the special proceeding (the adoption), has the authority to waive the minor's consent. Similarly, if there is an appeal of the adoption for a de novo hearing before the district court, the judge has the authority to waive the minor's consent.

But what about in the context of a TPR – does the district court have jurisdiction to waive the minor's consent to the adoption?

The statute governing the waiver of the minor adoptee's consent refers to "the court." G.S. 48-3-603(b)(2). Because the adoption proceeding is a separate special proceeding from any other proceeding or action, I have always interpreted "the court" to be the court presiding over the adoption proceeding. But, unlike the Juvenile Code, which defines "court", "court" is not defined in G.S. Chapter 48. *See* G.S. 7B-101(6); -1501(4) ("the district court division of the General Court of Justice"). Has my interpretation been too limited? Here is what the appellate courts have said on this issue.

The North Carolina Supreme Court has discussed the minor's waiver of consent in the context of a TPR appeal when there is a challenge that the district court abused its discretion when determining

the TPR is in the juvenile's best interests. At the TPR hearing, the district court considers several factors, including the likelihood of the juvenile's adoption and any other relevant factor. *See* G.S. 7B-1110(a). In several appeals, an argument about a juvenile, who is 12 or older, not wanting to consent to an adoption has been raised as a factor that should have been given greater weight than other factors because the juvenile's lack of consent impacts the likelihood of the child's adoption. Additional arguments are that the juvenile's express preference should be considered as is the case with any other relevant factor. The NC Supreme Court has addressed these arguments several times by looking to the adoption statutes that address a minor's consent. Because the adoption statutes allow for the minor's consent to be waived, the Supreme Court has determined a minor who does not consent is not necessarily a barrier to the proposed adoption. *See, e.g.,* In re A.J.T., 374 N.C. 504 (2020).

In three recent opinions involving an appeal of a TPR order, the Supreme Court has stated the *trial judge* could waive the consent of the minor. The Supreme Court said: "In addition, N.C.G.S. § 48-3-603(b) provides that a trial judge may dispense with the requirement that a child who is twelve years of age or older consent to an adoption 'upon a finding that it is not in the best interest of the minor to require the consent.' " *In re M.A.*, 374 N.C. 865, 880 (2020). In that opinion, the Supreme Court held that "[t]he trial court was not required to make findings and conclusions concerning the extent, if any, to which [the juveniles] were likely to consent to any adoption that might eventually be proposed. *In re M.A.*, 374 N.C. at 880. The Supreme Court further stated "a trial court may waive the minor's consent requirement 'upon a finding that it is not in the best interest of the minor to require the consent.' " *In re C.B.*, 375 N.C. 556, 562 (2020). After these two opinions, the Supreme Court decided *In re B.E.*, 375 N.C. 730 (2020). In that case, the district court judge hearing the TPR determined that it was in the minor's best interests to waive that minor's consent and ordered his consent be waived. In the appeal, it appears that the trial court's authority to waive the minor's consent under G.S. 48-3-603(b)(2) in the context of the TPR was not raised. The Supreme Court found there was no abuse of discretion by the trial court and stated, "[o]n their face, however, these findings evince the court's full awareness of the legal implications of [the juvenile's] opposition to being adopted and the court's determination that it was contrary to [his] best interests to require his consent to adoption. Given the waiver mechanism in N.C.G.S. § 48-3-603(b)(2), the evidence fully supports a finding that [the juvenile] is likely to be adopted." *In re B.E.*, 375 N.C. at ___ (2020).

Does This Mean the District Court in a TPR May Waive the Minor's Consent in the Adoption Proceeding?

I don't think so. The question was not presented to the Supreme Court, so it has not been resolved either way. In an unpublished opinion, the North Carolina Court of Appeals discussed the issue. In *In re A.L.M.*, 269 N.C. App. 323 (2019) (unpublished), the Court of Appeals addressed the relevant adoption statutes regarding the minor's consent. It recognized the matter before the district court was a TPR and not an adoption proceeding and stated, "there was more than enough evidence to show that even if the two children objected to the adoption plan, those concerns would be

addressed at the adoption hearing under Chapter 48." *In re A.L.M.*, 268 N.C. App. at ___. Although the opinion addresses the question, it is unpublished.

There is no authority in the Juvenile Code that authorizes the district court to waive a juvenile's consent to adoption. The jurisdiction of the clerk to hear adoption proceedings is explicitly stated in G.S. 7B-1101 – the jurisdiction statute applying to TPRs. At the TPR adjudicatory hearing, the district court adjudicates the existence or nonexistence of the grounds alleged in the TPR petition or motion. G.S. 7B-1109(e). At the dispositional hearing in a TPR, the district court determines whether the TPR is in the juvenile's best interests. G.S. 7B-1110(a). A TPR order completely and permanently severs the rights and obligations of a parent to the child and the child to parent, except for the child's rights to inherit (that right terminates upon the entry of a final decree of adoption). G.S. 7B-1112. The district court may address the child's custody under G.S. 7B-1112. The district court may assign costs to a party. G.S. 7B-1110(e). The court's authority in the TPR order appears to be limited by these provisions. There is no reference to the juvenile's consent in an adoption proceeding in the statutes governing a TPR.

Instead, the adoption statutes govern the minor's consent and the court's authority to waive that consent. As both our appellate courts have repeatedly held, the court's subject matter jurisdiction to act in a case is statutory and is invoked by a proper pleading. *See, e.g., Boseman v. Jarrell*, 364 N.C. 537. To act under the provisions of G.S. 48-3-603(b)(2), it reasons that a petition for adoption under G.S. Chapter 48, which is a special proceeding, heard by the clerk of superior court (with limited transfer to the district court or an appeal to district court) is required. A TPR petition or motion does not invoke the jurisdiction of the district court to make required findings and enter orders for an adoption proceeding. As such, I believe the district court, in a TPR action, lacks subject matter jurisdiction to waive a juvenile's consent to an adoption.

Additionally, practical concerns arise when a district court in a TPR action enters an order waiving a minor's consent for a separate adoption proceeding that is heard before the clerk. For example, a TPR may be ordered before any adoption petition is filed. There is no time limit for when a prospective adoptive parent must file an adoption petition. A significant period of time could pass between the entry of the TPR order and the filing of the adoption petition. Circumstances may very well change during that period such that any prior waiver of the minor's consent would no longer be in the minor's best interests. In addition, there could be circumstances that the district court is unaware of. What if there were competing adoption petitions filed before the clerk of superior court? By waiving the minor's consent, the prospective adoptee will not have input on which placement is in their best interests. It is also possible that the adoption will be denied, based on the clerk determining it is not in the minor adoptee's best interests. A court may decide this after considering the report to the court that the clerk orders (*see* G.S. 48-2-501 through -504) or evidence from witnesses who did not appear in the TPR about the minor's best interests (*see* G.S. 48-2-405).

Until the issue is decided by our appellate courts, I'll have to wait to see if my reasoning is correct.

Court of Appeals Addresses Temporary Suspension of Supervised Visits in an A/N/D Order

Earlier today, the Court of Appeals published In re K.M., an opinion that examines a trial court's permanency planning order awarding supervised visitation between a mother and her child but temporarily suspending that visitation because of the COVID-19 pandemic. For more than a year, pandemic restrictions have been imposed by state and local orders as well as by decisions made by individual businesses and agencies. These restrictions have impacted some court orders of visitation between parents and children that were either in effect or entered during this period. Most often, the impact has resulted in the reduction of a parent's time with their child – either by suspending in-person visits, converting in-person visits to electronic communication, or reducing the length or frequency of visits. Questions about the appropriateness of and/or authority to make those changes to visitation orders with or without court approval have been raised. Today's appellate decision is the first opinion that discusses this issue. However, the basis for a temporary suspension of visits is not necessarily unique to the COVID-19 pandemic. This opinion may provide guidance for the suspension of visits generally.

The Facts

In 2019, the court adjudicated K.M. as neglected and dependent based on circumstances created by his parents' ongoing issues related to their mental health, substance use, and domestic violence, all of which impacted their ability to provide proper care and supervision. K.M. was placed in DSS custody, and his parents were awarded supervised visitation. The court held numerous permanency planning hearings where K.M. continued to remain in an out-of-home placement. In March of 2020, in response to COVID-19 restrictions, the parents agreed to temporarily suspend their in-person visitation and participate in electronic visitation. K.M.'s mother participated in electronic visitation from March 28 through May 21, 2020. In August 2020, a permanency planning order was entered that ordered mother have visitation at a supervised visitation facility. The order also suspended that visitation temporarily because the facility was closed due to COVID-19. Mother appealed.

The Visitation Order

The order provided for the statutorily required minimum frequency, duration, and level of supervision of visits. *See* G.S. 7B-905.1(a).

The Findings of Fact

The findings of fact identified mother's volatile and uncontrolled temper and her inability to comply with the terms of the court orders. Because of mother's conduct, the trial court found that supervised visitation was required and that supervision provided by a relative, the guardians, or

anyone other than someone trained in supervision techniques and strategies would pose a risk of harm to the child and would be inconsistent with his health and safety. The trial court also found that the visitation center is not currently operating due to the COVID-19 pandemic and has not provided a date for re-opening.

The Visitation Provisions

Mother was awarded two visits a month for two hours, to take place at the Family Abuse Services (FAS) supervised visitation program or other supervised visitation program with a similar cost and structure and within a reasonable driving distance. The order required eyes and ears on direct supervision. The order further decreed that in-person visits outside of a supervised visitation facility was contrary to the child's best interests. As such, the order suspended the in-person visits until FAS reopens or another similar program is identified and is open. During the suspension of in-person visits, mother was permitted to have weekly video contact with her 2-year-old son for 15–30 minutes, depending on her son's attention span, to be supervised by the guardians.

Mother's Challenge Regarding Suspension of Visits

Mother made two arguments on appeal about the visitation suspension. First, the trial court erred when suspending the visitation order because it "effectively eliminate[d] the very visitation the trial court ordered." Sl.Op. ¶19. Second, the findings and evidence did not support the trial court's conclusion that it was contrary to the child's best interests to have face-to-face visits. Mother's appeal did not challenge any findings of fact but rather focused on the conclusion of law and decretal provisions of the order.

The Court of Appeals Opinion: Affirmed

A dispositional (including visitation) order is reviewed for an abuse of discretion, meaning the "ruling is so arbitrary that it could not have been the result of a reasoned decision." Sl.Op. ¶18. The appellate court looks to whether there is competent evidence in the record to support the findings and whether the findings support the conclusion of law. Unchallenged findings are deemed to be supported by the evidence and are binding on appeal.

The Trial Court's Determination

The trial court made two independent determinations: "(1) that only a specific, narrowly defined supervised visitation with Respondent-Mother would be in [the child's] best interests; and (2) that the COVID-19 pandemic rendered that specific supervised visitation temporarily unavailable." Sl.Op. ¶23.

The Analysis

The trial court placed a reasonable limitation on the suspension of in-person visits, which was limited to the specified facility reopening or another adequate supervised visitation center becoming available. The findings that no other supervisor or supervised setting would be appropriate demonstrated that "the trial court plainly considered – and rejected – alternative forms of visitation and specifically concluded that [the child's] best interests would be best served by limiting Respondent-Mother to visitation at a supervised visitation facility". Sl.Op. ¶25. Because the trial court determined other appropriate forms of visitation was not in the child's best interests, it provided for visitation that it determined was in the child's best interests. The trial court also exercised its authority under G.S. 7B-905.1(a) to specify the conditions under which visitation may be suspended. The court temporarily suspended mother's visits until safe and appropriate supervision was available. Although the trial court could have ordered no visitation, it provided mother with a contingency, electronic communication, until the specific form of supervised visits it found to be in the child's best interests was available.

In her argument, mother relied on *In re T.R.T.*, 225 N.C. App. 567 (2013), which applied the language of G.S. 50-13.2(e) that electronic communication is not a substitute or replacement for visitation, and held that visitation by Skype was not visitation as provided for in the Juvenile Code. The court of appeals distinguished *In re K.M.* from *In re T.R.T.* where the court did not make findings about visitation being contrary to the child's best interests. Here the trial court made findings that any visitation other than supervised visitation at a facility would be inappropriate. Also, unlike *In re T.R.T.*, the temporary suspension in this order was not a replacement or substitution for visitation.

Applying the Holding of *In re K.M.*

COVID-19 and Suspending Visitation

This opinion examines the circumstances in this one case. The trial court made the appropriate findings required by G.S. 7B-905.1 regarding the child's best interests and the level of supervision required. Had those findings not be made, the result likely would have been different. In fact, the court of appeals vacated and remanded the order in part for the trial court to address the costs of the supervised visitation based upon a different issue raised by mother.

The opinion also applies the provision of G.S. 7B-905.1(a) that authorizes a trial court to specify conditions under which visitation may be suspended. There is a similar provision in G.S. 7B-905.1(b) that authorizes a DSS to temporarily suspend all or part of a visitation plan if it makes a good faith determination that it is contrary to the child's health and safety. The opinion does not address G.S. 7B-905.1(b). This opinion should not be relied upon as an affirmation that any blanket suspension of visits that do not specifically address the facts of an individual case is authorized simply because of the restrictions of COVID-19. Here, the trial court considered alternatives for visitation and determined all but one method of visitation was contrary to the child's health and safety. This opinion is a reminder that the motto one size fits all does not apply to visitation orders

in an A/N/D case.

Other Reasons for Suspending Visitation

COVID-19 is not the sole reason why court-ordered visits may need to be suspended. This opinion should not be read to limit the basis for why a trial court may suspend visits. There may be a variety of factors that present in a particular case that a court may consider, such as a parent with substance use disorder appearing to be actively impaired by substances when arriving for a visit. The trial court should include specific findings of fact that support its determination that visits may be suspended when certain conditions exist.

The Importance of Contingency Planning

This opinion provided for two different contingencies regarding mother's visitation. The first was to allow for electronic contact in lieu of having no contact at all while the supervised visitation center was closed. The second was to allow for a different supervised visitation center than the one specifically named to be an option. If an order identifies a particular location for visits or drop-off/pick-ups to occur, it may be beneficial to all the parties to provide for a contingency location in the order. There is no guarantee the one identified location will always be available and accessible. Identifying a second location or the criteria for a second location to be selected by a designated person or agency (e.g., the guardian) may avoid a loss of visits and/or additional litigation requiring an order addressing a needed new location.

NC Supreme Court Addresses ICWA for the First Time

In August, the North Carolina Supreme Court published its first opinion addressing the Indian Child Welfare Act (ICWA): *In re E.J.B.*, 375 N.C. 95 (2020). Specifically, the supreme court examined the history and purpose behind Congress's enactment of ICWA and the notice requirements that apply when a trial court knows or has reason to know the child involved in the "child custody proceeding" is an "Indian child."

What is ICWA? Why the quotation marks? What does the opinion say? How does the opinion impact practice?

What Is ICWA?

The Indian Child Welfare Act is a federal law that was enacted in 1978 and establishes minimum federal standards addressing the removal of an "Indian child" that applies to certain "child custody proceedings" heard in a state court. *See* 25 U.S.C. 1902; 25 C.F.R. 23.101. The law is codified at 25 U.S.C. 1901 *et seq.* Effective for "child custody proceedings" commenced on or after December 12, 2016, binding regulations are found at 25 C.F.R. Part 23.

The purpose of ICWA is two-fold:

- to protect the best interests of Indian children and
- to promote the stability and security of Indian tribes and families.

25 U.S.C. 1902.

There are many components to ICWA. This blog post focuses only on the issues raised in *E.J.B.*, which were related to the requirement under ICWA that when the trial court knows or has reason to know the child is an "Indian child," proper notice of the proceeding must be sent to the appropriate federal Indian tribes and regional Bureau of Indian Affairs (BIA).

Why the Quotation Marks?

"Child custody proceeding" and "Indian child" are specifically defined terms under ICWA.

A "child custody proceeding" is an action that may result in one of the following:

1. A temporary foster care (including guardianship) placement, when a parent cannot have the child returned on demand, and where parental rights have not been terminated;
2. A termination of parental rights (TPR);
3. A temporary pre-adoptive placement, which occurs after a parent's rights are terminated but before the child is placed in a pre-adoptive placement; and

4. A permanent adoption placement.

25 U.S.C. 1903(1); 25 C.F.R. 23.2.

In North Carolina, the majority of the applicable child custody proceedings include abuse, neglect, or dependency actions; post-relinquishment reviews; TPR and post-TPR reviews; and adoptions of minors.

An "Indian child" is defined as an unmarried person younger than 18 years old who is

1. a member of a federally recognized Indian tribe (currently, there are 574 federally recognized tribes), or
2. eligible for membership in a federally recognized tribe and a biological parent of that child is a member of a federally recognized tribe.

25 U.S.C. 1903(4); 25 C.F.R. 23.2. *See* 85 FR 5462 (recognized tribes as of 1/30/2020).

What Happened in *E.J.B.*?

E.J.B. involves a father's appeal of a 2019 order that terminated his parental rights to his two children. He argued that the notice requirements of ICWA were not satisfied such that the trial court lacked jurisdiction, which should result in the TPR being vacated.

The TPR is a "child custody proceeding" under ICWA. The county department of social services (DSS) initiated the proceeding by filing a TPR motion in an underlying neglect and dependency proceeding. In both the underlying proceeding and the TPR proceeding, the father indicated that he was affiliated with the "Cherokee Indian tribe." After the TPR was granted and the appeal was pending, the trial court conducted post-TPR reviews under G.S. 7B-908. Post-TPR hearing notices were sent to the different Cherokee tribes. At a post-TPR hearing, the trial court found that ICWA was followed: DSS sent notices to the three federally recognized Cherokee tribes and the appropriate regional BIA director. Two of the three tribes responded to the notice and indicated that the children were not registered members or eligible to be registered as members of their respective tribe. The third tribe never responded to the notice, and the trial court determined that ICWA did not apply.

What Did *E.J.B.* Say?

The need for ICWA: The opinion discusses the reason behind the enactment of ICWA – "The Act was a product of growing awareness in the mid-1970s of abusive child welfare practices that led to an 'Indian child welfare crisis . . . of massive proportions.' " Sl.Op. at 5. That crisis resulted from the removal of 25–35% Indian children, the vast majority (90%) of whom were placed in non-Indian foster and adoptive homes or institutions. Congress recognized that the " ' wholesale separation

of Indian children from their families [primarily from state agencies and the courts] is perhaps the most tragic and destructive aspect of American Indian life today,' causing long term emotional harm for Native American children who lose their cultural identity, mass trauma for Native American families, and the erosion of tribal communities, heritage, and sovereignty.' " Sl.Op. at 6.

Despite the enactment of ICWA, "Native American children are still disproportionately likely to be removed from their homes and communities." Sl.Op. at 9. To address inconsistencies in the various states' interpretation and implementation of ICWA, the BIA adopted binding federal regulations in 2016. Those 2016 regulations include specific requirements about providing notice, including who must receive it, how it must be sent, and what it must contain.

Notice requirements and the role of the court:

Under the regulations, the state courts

- "bear the burden of ensuring compliance with the Act. . . [by asking] each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child" (Sl.Op. at 10; *see* 25 C.F.R. 23.107(a)) and
- is obligated to instruct the parties that if they learn of a reason to know the child is an Indian child, they have a duty to inform the court. 25 C.F.R. 23.107(a).

When there is reason to know a child is an Indian child but there is insufficient evidence to definitively know,

- The trial court must confirm on the record that the "agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . . 25 C.F.R. 23.107(b)(1)." Sl.OP. at 10–11.
- While this information is being sought from the tribe, who has sole jurisdiction to make that determination, the court must treat the child as an Indian child.
- If a tribe does not respond to multiple written requests, the court must seek assistance from the BIA. 25 C.F.R. 23.105(c).
- "State courts can only make their own determination as to a child's status if the tribe and [BIA] fail to respond to multiple requests." Sl.Op. at 11.

Applying ICWA to the Facts: "[T]he record shows that the trial court had reason to know that an Indian child might be involved" based on multiple DSS court reports that the father indicated he had Cherokee Indian heritage. Sl.Op. at 12. There is no evidence in the TPR record that the court made the inquiry of participants about a reason to know whether the children were Indian children or that the court informed the parties of their duty to inform the court if they subsequently learn of information that there is reason to know the children may be an Indian children. Although DSS

attempted to rectify the failure to comply with the ICWA notice provisions by sending notices, certified mail, return receipt requested, to each Cherokee tribe and the regional BIA director, the notices were legally insufficient because they did not contain all the required information set forth in 25 U.S.C. 1912 and 25 C.F.R. 23.111(d). The post-TPR notice, therefore, did not cure the failure to comply with the Act at the TPR proceeding. Furthermore, even if the notices were legally sufficient, the trial court erred by determining that ICWA did not apply because the "courts can only make their own determination as to the child's status if the tribe and [BIA] fail to respond to multiple written requests." Sl.Op. at 11; *see* Sl.Op. at 17.

Remand: The TPR was reversed and remanded for the trial court to order DSS to send a legally sufficient notice to the Keetoowah Band of Cherokee Indians. If that tribe indicates that the children are not Indian children, the TPR shall be reaffirmed by the trial court. If the tribe indicates the children are Indian children, the trial court must proceed by applying the relevant provisions of ICWA.

How Does the Opinion Impact Practice?

Subject Matter Jurisdiction: Although *E.J.B.* does not expressly state the notice provisions do not impact a trial court's subject matter jurisdiction, both the remand instructions and the analysis about whether the notice deficiencies were cured in the post-TPR hearing indicate subject matter jurisdiction is not affected.

Reason to Know the Child Is an Indian Child: The opinion does not expressly analyze when there is "reason to know" the child is an Indian child. There appears to have been agreement by the parties and the trial court that there was reason to know. The regulations address "reason to know" at 25 C.F.R. 23.107(c), and the dissent in *E.J.B*. states "If the trial court has reason to suspect the children are Indian children through any of the avenues recognized in 25 C.F.R. 23.107(c), including an allegation of Indian heritage. . . ." Dissent at 4.

The court of appeals has held that a parent's assertion of Indian heritage with a federally recognized tribe is sufficient to give the court reason to know. *See In re A.P*., 260 N.C. App. 540 (2018) and opinions cited therein. Although not binding in North Carolina, last month, the Washington Supreme Court analyzed the purposes of ICWA and held that a court has reason to know a child is an Indian child when a participant indicates tribal heritage. *See In re Z.J.G., M.E.J.G*., 471 P.3d 853 (2020).

Notice: The petitioner or movant in a foster care or TPR proceeding must provide a legally sufficient notice to the tribe(s) and regional BIA director. To ensure compliance, review the provisions of both 25 C.F.R. 23.11 and 23.111. If a deficiency is discovered, send a new legally sufficient notice. An original or copy of each notice and proof of proper service of those notices must be filed with the court. 25 C.F.R. 23.111(a)(2).

Time Period for the Tribe and BIA to Respond: ICWA does not explicitly address time frames for when the tribe must respond. However, previous court of appeals decisions have by looking to the time requirements for when a hearing may be held. A hearing may not be held until 10 days after the ICWA notice is received, and a request to the court for an additional 20 days may be made. 25 U.S.C. 1912(a); 25 C.F.R. 23.112. Adding these time periods results in a 30-day period from when the notice is received. *See In re A.P.* and cases cited therein.

ICWA does address the time period for when the BIA must respond at 25 C.F.R. 23.11(c). The BIA has 15 days after receipt of the notice to notify the tribe and child's parent or Indian custodian and send a copy to the trial court or to inform the trial court that it needs more time. Given that this 15-day time period is shorter than the 30-day time period, applying the longer 30-day time period to the BIA would not cause a delay in the proceeding.

Multiple Written Requests: Neither the statute nor regulations require that a tribe or the BIA receive more than one legally sufficient notice that is sent by registered or certified mail, return receipt requested. Yet, *E.J.B.* refers to "multiple written requests." There are 2016 BIA Guidelines, and section B.7 refers to "multiple written requests." Although the Guidelines encourage tribes to promptly respond, B.7 states "if a Tribe fails to respond to multiple written requests for verification regarding whether a child is in fact [an Indian child]. . ., and the agency has sought the assistance of the [BIA] in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available." Further, "If new evidence later arises, the court will need to consider it and should alter the original judgment if appropriate.

The regulations state that *in addition to* the delivery of the notice by registered or certified mail, return receipt requested, notice may also be sent by personal or electronic delivery. 25 C.F.R. 23.111(c). Given this language, it appears that multiple written requests may be satisfied with the official delivery and follow-up emails or faxes to the Tribe and BIA. That issue has yet to be raised before our appellate courts.

CAUTION: Applicable Provisions When There Is Reason to Know: The NC appellate court opinions have focused on the issue of notice to the tribes and BIA when there is reason to know the child is an Indian child. However, that is not the sole requirement that must be followed under ICWA when the court has reason to know a child is an Indian child. The court must "treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' ". 25 C.F.R. 23.107(b)(2). My reading of that language is that all the relevant provisions of ICWA apply, including but not limited to notice provisions, timing of hearings, standards for removal, and placement preferences. These requirements are discussed in Chapter 13.2 of the Abuse, Neglect, Dependency, and Termination of Parental Rights manual here.

S.L. 2021-100 Amends the Juvenile Code Related to Abuse, Neglect, Dependency and Termination of Parental Rights

As the 2021 Legislative Session continues, laws that revise the Juvenile Code are being enacted. The most recent session law is S.L. 2021-100, which amends various provisions of Subchapter I of Chapter 7B of the General Statutes – the laws that relate to abuse, neglect, dependency and termination of parental rights proceedings. This blog summarizes the amendments made by "*An Act to Make Revisions to the Juvenile Code Pursuant to Recommendations by the Court Improvement Program.*"

Relative Defined: Section 1 adds a definition of "relative" at G.S. 7B-101(18a). A relative is "an individual directly related to the juvenile by blood, marriage, or adoption, including a grandparent, sibling, aunt, or uncle." This definition is quite broad and does not contain an exhaustive list of who is considered a relative. The role of relatives is important given that a county department of social services (DSS) must exercise due diligence in identifying and notifying relatives when a child is placed in DSS custody, and a court must give relative placement priority over a non-relative placement when the child is being placed outside of their home. *See, e.g.*, 7B-506(h)(2); -903(a1). Section 1 also makes conforming changes to the numbering of the definitions for "responsible individual" and "return home or reunification" to accommodate the addition of the new definition of "relative."

The Juvenile's and GAL's Access to DSS Records: Sections 2 and 18 amend G.S. 7B-302(a1)(2) and 7B-2901(b)(1) to explicitly allow for the juvenile (even after turning 18) and their GAL to receive from DSS electronic or written copies of requested DSS records, which are not prohibited from disclosure under federal law, within a reasonable period of time.

Sibling Placement and Contact: Sections 3 and 6 add G.S. 7B-505(a1) and 7B-903.1(c1) to specifically address a preference for placing siblings together both at the nonsecure custody and dispositional stages of an A/N/D proceeding. The new subsections incorporate federal law (*see* 42 U.S.C. 671(a)(31)). The DSS director must make reasonable efforts to place siblings together unless the director documents that such a placement would be contrary to the safety or well-being of any of the siblings. When a director is unsuccessful in placing siblings together after making reasonable efforts to do so, the director must make reasonable efforts to provide frequent visitation and interaction between the siblings unless there is documentation that such contact would be contrary to the safety or well-being of any of the siblings.

Practice Note: Although sibling visitation is not specifically addressed in the visitation statute, G.S. 7B-905.1(a) authorizes the court to order visitation that is in the child's best interests and is not limited to ordering visitation with a parent, guardian, or custodian. Similarly, a court may determine whether DSS made reasonable efforts and may specify efforts. *See, e.g.,* G.S. 7B-507, -903(a3), -906.2(b).

Appointment of Counsel for Parent: Sections 4 and 17 amend G.S. 7B-602(a) and 7B-1101.1(a) to make it clear that the provisional counsel appointed to a respondent parent in an A/N/D or TPR action receive from the clerk a copy of the petition and summons or notice.

Authority over Parents and Medication-Assisted Treatment: Section 7 enacts G.S. 7B-904(c1), which specifically addresses medication-assisted treatment (MAT). This new subsection defines MAT and explicitly states that an individual is not in violation of a court order to comply with treatment for substance use when that individual is complying with MAT. Essentially, this new subsection recognizes that MAT is treatment and may be necessary and ongoing for an individual.

Section 7 also makes technical corrections to G.S. 7B-904(a) and (b) by conforming to the 2019 amended definition of caretaker. The amendment to the definition of caretaker applies to any adult (versus an adult relative) entrusted with the juvenile's care. *See* G.S. 7B-101(3). The conforming amendments remove references to "relative" and refer to an "adult."

Visitation: Section 9 amends G.S. 7B-905.1(d) to limit when a court must inform the parties of a right to file a motion for review of any visitation plan. The court need only inform the parties when it has waived permanency planning hearings but retained jurisdiction – in other words, when another hearing is not required to be scheduled. This statutory amendment appears to supersede the holding of *In re K.W.*, 272 N.C. App. 487 (2020), remanding an initial dispositional order for compliance with G.S. 7B-905.1(d) to inform the parties of their right to review even though a review hearing needed to be scheduled under G.S. 7B-906.1. In this opinion, the court of appeals recognized that it was common sense that the party need not be informed because a further hearing was being scheduled but that the law did not make any distinction between when a further hearing was being scheduled or waived.

Eliminating Reunification after Ceasing Reunification Efforts: Section 11 amends G.S. 7B-906.2(b) to state that when a court finds that reunification efforts would clearly be unsuccessful or inconsistent with the child's health or safety, the court "shall eliminate reunification as a plan." The new requirement that reunification as a permanent plan be eliminated when reunification efforts are ceased addresses the confusion created by published appellate opinions that allowed a district court at permanency planning hearings to bifurcate ceasing reunification efforts from eliminating reunification as a permanent plan. This change appears to answer the following request from the Court of Appeals, "[t]o avoid confusion of our DSS workers and trial courts and to promote permanency for children in these cases, we encourage the North Carolina General Assembly to amend these statutes to clarify their limitations." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466 (2019) (addressing *In re C.P.*, 258 N.C. App. 241 (2018), which "created a dichotomy between "reunification' and "reunification efforts' ").

Waiving Permanency Planning Hearings: Section 10 amends G.S. 7B-906.1(n), which authorizes the court to waive further hearings while retaining jurisdiction over the A/N/D proceeding. The language of G.S. 7B-906.1(n) is amended to refer to "permanency planning"

hearings and removes references to “review” hearings.

Permanency Planning Hearings and Post-TPR Hearings: Section 10 amends G.S. 7B-906.1(o) to make it clear that when post-TPR review hearings are required, the court is no longer obligated to also conduct permanency planning hearings under G.S. 7B-906.1. Instead, when there is an underlying A/N/D action, the court will switch from permanency planning hearings to post-TPR review hearings under G.S. 7B-908.

Section 12 amends G.S. 7B-908 and clarifies that a post-TPR review hearing is required when either (1) both parents’ parental rights have been terminated or (2) one parent’s rights have been terminated and one parent has executed a relinquishment. (Note that when a parent executes a relinquishment and there has not been a TPR for the other parent, the court conducts post-relinquishment review hearings pursuant to G.S. 7B-909.) Additional amendments to G.S. 7B-908 address the type of relief the court may order at a post-TPR review hearing. This includes situations where there is an underlying A/N/D action with the need for the court to adopt concurrent permanent plans and situations where there is not an underlying A/N/D action where DSS or a private child-placing agency would have developed only one permanent plan.

Juveniles 17 and Older: Sections 14 and 15 amend G.S. 7B-912 to address 17-year-old youth who are likely to age out of foster care. After a juvenile turns 17, at every permanency planning hearing held, the court must inquire about whether the juvenile has copies of certain documents (e.g., birth certificate) and whether they have information about how to participate in the Foster Care 18–21 program. A new G.S. 7B-912(b1) is enacted to address what DSS must include in its report to the court for each of those permanency planning hearings. The information addresses enumerated factors that will assist the juvenile with transitioning to adulthood as well as information about how the juvenile may maintain contact with their families.

Foster Care 18–21: Section 13 amends G.S. 7B-910.1, which applies to court reviews of the Foster Care 18–21 program. Termination of the voluntary placement agreement is addressed by the new G.S. 7B-910.1(e). DSS must file a motion for review before it may terminate the agreement with the young adult when the young adult disagrees with the proposed termination. Although a court review is required, the statute does not include any criteria for what the court should consider when resolving the contested issue of whether the young adult’s participation in the program should be terminated.

Motion to Modify under G.S. 7B-1000: Section 16 makes significant amendments to G.S. 7B-1000. These hearing are now referred to as “modification” hearings and are not review hearings or hearings to vacate an order. The purpose of a modification hearing under G.S. 7B-1000 is limited to issues that do not warrant a permanency planning or review hearing under G.S. 7B-906.1. When the relief sought is to change a permanent plan or dispositional alternative, a motion for review or permanency planning hearing under G.S. 7B-906.1 should be filed, rather than a motion to modify under G.S. 7B-1000.

When a motion to modify is filed, a GAL for the child and provisional counsel for parents should be reappointed if they had been previously released.

Interstate Compact on the Placement of Juveniles (ICPC): Section 19 repeals G.S. 7B-3807, which was enacted in 2019, and codified the AAICPC regulations as North Carolina law. With the repeal of G.S. 7B-3807, North Carolina is still bound by the ICPC (*see* G.S. 7B-3800), but the regulations that are created by the association of compact administrators do not have the effect of law.

The effective date of all the various amendments is October 1, 2021.

Stay Updated: Previously, the General Assembly passed S.L. 2021-18, which returned appeals of TPR orders and orders that eliminated reunification as a permanent plan that were combined with a TPR appeal back to the court of appeals (from the supreme court), effective July 1, 2021. There are more bills pending that make additional changes to the Juvenile Code. Be sure to stay informed. As those bills become law (assuming more do), I will continue to blog about them.

The TPR Dispositional Stage, the Juvenile's Best Interests, and the N.C. Supreme Court

Since January 1, 2019, termination of parental rights (TPR) orders are appealed directly to the North Carolina Supreme Court. In August 2019, the Supreme Court published its first appellate opinions under this new TPR appellate procedure. Between August 2019 and today, the Supreme Court has decided 134 TPR opinions, all of which are published. Each of those published opinions from our state's highest court established or reinforced a precedent. Perhaps because of that, new and old arguments have been raised before the Supreme Court in those TPR appeals. This post focuses on what the Supreme Court has held when addressing the dispositional stage of the TPR.

For context, a TPR consists of two stages. *In re Montgomery*, 311, N.C. 101 (1984); *In re A.U.D.*, 373 N.C. 3 (2019). The first stage is the adjudication where the alleged ground(s) must be proved by clear, cogent and convincing evidence. G.S. 7B-1109(f).; -1111(b). If the petitioner meets their burden, the court proceeds to the second stage – the dispositional stage. G.S. 7B-1110(a). At disposition, the court has discretion to not terminate the parent's rights despite the existence of a ground based on the court's determination of whether the TPR is in the child's best interests. G.S. 7B-1110(a), (b). The determination of best interests must be based on the individual circumstances related to each child. *In re J.J.H*., 376 N.C. 161 (2020).

The Standard of Review: Abuse of Discretion

An abuse of discretion occurs "when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re Z.L.W.* at 435. An abuse of discretion also occurs when the court "misapprehends the applicable law." *In re B.E*., 375 N.C. 730, ___ (2020).

As early as 1984, the N.C. Supreme Court recognized the trial court's discretion to not terminate parental rights based on the child's best interests. *In re Montgomery*. For decades, both the N.C. Supreme Court and Court of Appeals have applied an abuse of discretion standard when examining an appeal of the TPR disposition. Recently, the Court has considered arguments that the standard of review should be de novo. In each instance, the Supreme Court has rejected that argument, stating there have been no amendments to the Juvenile Code that changes their prior holding establishing the standard of review. In numerous recent opinions, the Supreme Court has repeatedly and explicitly reaffirmed that the standard of review at disposition is an abuse of discretion. *See, e.g., In re G.B*., ___ N.C. ___ (April 16, 2021); *In re A.M.O*., 375 N.C. 717 (2020); *In re K.S.D.-F*., 375 N.C. 626 (2020); *In re C.V.D.C*., 374 N.C. 525 (2020); *In re Z.L.W*., 372 N.C. 432 (2019).

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

At the dispositional stage of a TPR, the trial court must consider the six factors enumerated in G.S. 7B-1110(a):

- The juvenile's age,
- The likelihood of the juvenile's adoption,
- Whether the TPR will aid in accomplishing the juvenile's permanent plan,
- The bond between the parent and juvenile,
- The quality of the relationship between the juvenile and proposed adoptive parent or other permanent placement, and
- Any other relevant consideration.

The Supreme Court agreed with the Court of Appeals in holding that although the court must consider the six factors, the court is not required to make written findings of each factor. Instead, the trial court must make written findings of only those factors that are relevant. G.S. 7B-1110(a); *In re A.U.D.,* 373 N.C. 3 (2019) (noting a better practice is to include all six factors); *In re A.R.A.*, 373 N.C. 190 (2019). Agreeing again with the Court of Appeals, the Supreme Court has held that factors are relevant when there is conflicting evidence about a factor such that the issue is presented to the trial court. *In re A.U.D*; *In re A.R.A*.; *In re C.J.C.;* 374 N.C. 42 (2020); *In re S.M*., 375 N.C. 673 (2020). When there is uncontested evidence or no evidence of a factor, a finding is not required. *In re C.V.D.C.*, 374 N.C. 525 (2020). When making a G.S. 7B-1110(a) finding, the court is not required to use the exact language of the statute but must address the substance of the statute. *In re L.R.L.B.*, ___ N.C. ___ (April 23, 2021) (citing *In re LM.T*., 367 N.C. 165 (2013)).

Evidence and the Judge's Discretion

In *In re R.D*., 376 N.C. 244 (2020), the N.C. Supreme Court addressed evidentiary issues in a dispositional hearing. The Supreme Court explained that although the petitioner/movant bears the burden of proof at the adjudicatory hearing, no party has the burden at the dispositional stage to prove whether the TPR is in the child's best interests. When interpreting G.S. 7B-1110(a), the Supreme Court explained that the trial court is not limited by the rules of evidence at the dispositional stage but instead may admit any evidence, including hearsay, that it finds to be relevant, reliable, and necessary to determine the child's best interests. Further, the trial court is not required to make explicit findings as to why it found the evidence to be relevant, reliable, and necessary. Finally, the Supreme Court held that there is not an absolute right to cross examination at the dispositional hearing given that hearsay is admissible.

Despite the lower evidentiary standards at the dispositional stage, there still must be competent evidence upon which the court makes its findings. *In re R.D*. (2020) (disregarding findings where the GAL report was not admitted into evidence and the GAL did not testify). When considering competent evidence, the trial court has discretion to determine witness credibility, how much weight to give to the evidence, and reasonable inferences to draw from the evidence. *Id.; In re A.J.T.,* 374 N.C. 504 (2020). The appellate court will not reweigh the evidence and substitute its own judgment

for that of the trial court. *See, e.g., In re A.J.T.; In re C.B*., 375 N.C. 556 (2020).

Commonly Appealed Factors

Many of the appeals have challenged the court's findings regarding the G.S. 7B-1110(a) factors and how those factors are considered when making the best interests of the child determination. The Supreme Court has consistently held that the trial court has the discretion to determine how much weight to give the evidence and to the factors. *See, e.g., In re I.N.C*., 374 N.C. 542 (2020); *In re Z.L.W*., 372 N.C. 432 (2019).

The Parent-Child Bond

Some appeals have argued that the trial court abused its discretion by finding the TPR was in the child's best interests despite also finding there was a strong bond between the parent and the child. The Supreme Court has consistently held that the bond between a parent and child is one of many factors the trial court must consider, and the trial court has discretion to give greater weight to the other factors. Doing so is not an abuse of discretion. *See, e.g*., *In re Z.L.W*.; *In re Z.A.M*., 374 N.C. 88 (2020); *In re A.J.T.,* 374 N.C. 504 (2020); *In re J.J.B*., 374 N.C. 787 (2020).

The Likelihood of Adoption

This factor requires the court to examine the likelihood of the child's adoption. The Supreme Court has held that this factor does not require a certainty of adoption. *In re E.F*., 375 N.C. 88 (2020). The finding may be made even when barriers to the child's adoption exist. In addressing some of those barriers, there are three common arguments made in challenging this factor: (1) there is not a pre-adoptive placement for the juvenile; (2) the juvenile's preference is not to be adopted; and/or (3) the juvenile is suffering from significant mental health needs making their adoption unlikely.

The Supreme Court has held that the absence of a pre-adoptive placement is a not a bar to a TPR. *See, e.g., In re A.J.T*., 374 N.C. 504 (2020); *In re M.A*., 374 N.C. 865 (2020); *In re J.S*., 374 N.C. 811 (2020). Without a prospective adoptive home, the factor addressing the quality of the relationship between the child and prospective parent is not relevant. *See, e.g., In re A.R.A*., 373 N.C. 190 (2019).

A juvenile's preference is one factor for the court to consider but it is not determinative. This is because the best interests of the child, rather than the child's preference, is the polar star. *In re M.A.* The Supreme Court has recognized that the preference of an older juvenile should be given more weight. *In re A.K.O*., 375 N.C. 698 (2020) (16 year old gave a well-reasoned objection to his adoption and favored the award of guardianship instead). However, the trial court still determines the weight to give to the older juvenile's preference. *In re B.E*., 375 N.C. 730 (15 year old preferred guardianship over adoption but court granted TPR).

For juveniles who are 12 and older, their consent to their adoption is required, however, their consent may be waived if the court finds it is not in the child's best interests. G.S. 48-3-601(1); 48-3-603(b)(2); *In re B.E.*, 375 N.C. 730 (2020) (see my earlier blog post here). Because the minor's consent to adoption may be waived, evidence at a TPR that the minor who is 12 or older has expressed a preference not to be adopted does not necessarily bar the granting of the TPR. *In re M.A.* The consent requirements govern adoptions and not TPRs. *Id.* The trial court in a TPR is not required to make a finding about whether the juvenile is likely to consent to any adoption that might ultimately be proposed to them. *Id.*

In cases where the child exhibited significant mental health issues and resulting behaviors, several appeals have relied on a Court of Appeals opinion, *In re J.A.O.*, 166 N.C. App. 222 (2004). There, the court reversed a TPR on best interests grounds. In recent appeals, the Supreme Court noted that it is not bound by *In re J.A.O*. *In re A.J.T.*, 374 N.C. 504 (2020). The Supreme Court distinguished the facts in the present cases from the facts of *J.A.O.*, where the juvenile had been placed in 19 different treatment centers over 14 years, the GAL recommended against the TPR and believed that J.A.O. was not likely to be adopted, and J.A.O.'s mother had made reasonable progress. In contrast, in the cases before the Supreme Court, the recommendations of the juvenile's GAL were for adoption; the GAL and/or social worker believed there was a likelihood of adoption; the parents had not made reasonable progress; and in some of the cases, the children were younger than J.A.O. *Id.; In re C.B.*, 375 N.C. 556 (2020); *In re K.S.D.-F.*, 375 N.C. 626 (2020); *In re I.N.C.*, 374 N.C. 542 (2020).

Other Factors

The catch-all factor, "any other relevant consideration," has been challenged on the basis that the trial court abused its discretion by not considering other dispositional alternatives to adoption that could make a TPR unnecessary. The Supreme Court has held it is not error when a trial court does not consider non-TPR-related dispositional alternatives, such as guardianship or custody, which would not require a TPR. *In re N.K.*, 375 N.C. 805 (2020).

Regarding placement with a relative, the availability of such a placement may be a relevant factor, but findings are not required when evidence about the placement is not introduced at the dispositional hearing. *See, e.g., In re E.F.*, 375 N.C. 88 (2020); *In re S.D.C.,* 373 N.C. 285 (2020). Even when a relative placement or dispositional alternative is available, it is one factor to consider and is not determinative. However, "the trial court should make findings of fact addressing 'the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family.' " *S.D.C.* at 290. The trial court must keep in mind that one purpose of the Juvenile Code is ensuring that the child's best interests are of paramount consideration and that when it is not in the juvenile's best interests to be returned home, that they will be placed in a safe, permanent home within a reasonable period of time. G.S. 7B-101(5); *In re Z.A.M.*, 374 N.C. 88 (2020).

Now What?

S113 was presented to the Governor on April 29, 2021. It returns the appeal of TPRs back to the Court of Appeals, effective for appeals filed on or after July 1, 2021. Assuming this bill becomes law, the Supreme Court will still decide the appeals that were or will be timely filed between January 1, 2019 and June 30, 2021. The cases discussed above establish precedent under North Carolina law and will continue to apply to our courts, TPR petitioners and movants, the parents, and their children.

UPDATE: This bill became law, S.L. 2021-18.

What the N.C. Supreme Court's Ruling in In re S.M. may mean for Court Reports In Abuse, Neglect, and Dependency Cases

What happens if a court report is distributed to the parties and the court in an abuse, neglect, and dependency case, but the report is never formally offered or admitted into evidence? What if, despite never being admitted into evidence, the court relies on the report in its order? Can a party appeal due to the report never having been admitted? Is there anything a party must do to preserve this issue for appeal? This post will explore the answers to these questions in light of a recent N.C. Supreme Court decision in *In re S.M.*, 375 N.C. 673 (2020).

History in Abuse, Neglect, and Dependency Appeals of Dispositional Orders

In 2015, the Court of Appeals heard the appeal of a permanency planning order that resulted from a dispositional hearing during which the Department of Social Services (DSS) distributed a social worker's court report to the parties and to the court. *In re J.H.*, 244 N.C. App. 255 (2015). (In addition to permanency planning orders, dispositional orders include initial dispositional and review orders in abuse, neglect, and dependency cases and the dispositional portion of an order terminating parental rights.) After being handed the report along with other documents, the judge stated in open court that she would read what she had been given. DSS never formally proffered the report, and the court did not officially admit it, nor did any party object to the report. On appeal, the Court of Appeals rejected Respondent Mother's argument that she could not have objected to something that was not done—specifically, the admission of the DSS report. The Court of Appeals held that dispositional hearings are not governed by the Rules of Evidence but are governed by G.S. 7B-901 and 7B-906.1(c), that reports can be considered by a trial court without being formally tendered, and that to preserve the issue, a party must object to the trial court's consideration of a report at trial, not for the first time on appeal. *Id*. at 22 (citing G.S. 7B-901 and N.C.R. App. P. 10(a)(1)).

More recently, in 2016, the Court of Appeals again had occasion to address whether a parent preserved the issue of reports not formally admitted into evidence serving as the basis for findings of fact in a dispositional order—specifically, a permanency planning order. *In re E.M.*, 249 N.C. App. 44 (2016). At trial, distributed court reports were referred to several times but never formally offered into evidence. No party objected to the reports being considered or admitted. The Respondent Mother appealed. The Court of Appeals held that a party's failure to object to the court's consideration and reliance on reports means the party has failed to preserve the issue for appeal. A party must bring to the district court "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make." *Id.* at 9 (citing N.C.R. App. P. 10(a)(1)).

Also in 2016, the Court of Appeals heard an appeal by a Respondent Mother who appealed both a

dispositional order that ceased reunification efforts and an order terminating her parental rights. *In re P.T.W.*, 250 N.C. App. 589 (2016). Here, in the dispositional hearing, the DSS report was submitted to the court and admitted into evidence without objection. On appeal, the Respondent Mother argued that the order ceasing reunification efforts, the dispositional order, was not based on competent evidence. She further argued that the order terminating her rights did not correct the problems in the order ceasing reunification efforts and thus both orders needed to be reversed. The Court of Appeals held that "[c]ompetent evidence is evidence that a reasonable mind might accept as adequate to support the finding," and that an order ceasing reunification efforts must be based on "credible evidence presented at the hearing." *Id.* at 594. The court held that the trial court's findings about the Respondent Mother's lack of progress were supported by the DSS report, among other evidence, which was introduced at the hearing. The court noted multiple times in its order that the Respondent Mother did not object to the evidence at trial. *Id.* at 596, 598.

Note that *P.T.W.* and similar cases do not address the same situation as *J.H.* and *E.M.*, above. In *P.T.W.*, the report was offered and admitted into evidence without objection, which is the more common scenario where failure to preserve is an issue.

The N.C. Supreme Court Weighs In

In a late-2020 appeal of orders terminating the parents' rights, the North Carolina Supreme Court ruled on an issue like the ones presented in *J.H.* and *E.M*. *In re S.M.*, 375 N.C. 673 (2020). At trial, the guardian ad litem report was distributed to the parties and to the court; however, it was not formally admitted into evidence. The guardian ad litem did not testify. The Respondents appealed, challenging a finding of fact that detailed the guardian ad litem's recommendations as to the juveniles' best interests. The Respondents argued that because the finding of fact drew on the guardian ad litem report, and because the report was never admitted into evidence, the finding of fact was not based on competent evidence and should be struck. While the trial court's order terminating the Respondents' parental rights was affirmed for other reasons, the Supreme Court agreed with the Respondents on the issue of the guardian ad litem report and disregarded the challenged finding of fact for not being based on competent evidence. *Id.* at 690-91.

What Does This All Mean?

To summarize: We have two lines of cases addressing dispositional hearings and the district court's consideration of reports. In one line of cases, such as *P.T.W.,* the Court of Appeals applied the usual rule that parties on appeal cannot challenge evidence that was admitted without objection at trial. In the other line of cases, *J.H.* and *E.M.*, the Court of Appeals went further and held that a party on appeal cannot challenge the court's reliance on reports that were distributed but not admitted at trial when the party did not object, thereby failing to preserve the issue.

Now, in *S.M.*, the Supreme Court has addressed the latter situation where a report is distributed but not admitted into evidence at a dispositional hearing. Like *J.H.* and *E.M.*, the court noted that

the record reflects that the report was distributed to the parties and to the trial court. Also, like *J.H.* and *E.M.*, there is no indication from the record that any party objected to the trial court relying on the report. Unlike *J.H.* and *E.M.*, however, the Supreme Court in *S.M.* held that the trial court cannot rely on evidence that was not admitted. *S.M.* at 690-91. Also, unlike *J.H.* and *E.M.*, the Supreme Court in *S.M.* did not hold that a party's failure to object in this situation means the party has failed to preserve the issue for appeal. The court did not go into great detail to explain its reasoning behind this portion of its decision. In setting the relevant finding of fact aside, however, the court recognized that "there was not competent evidence of record to support a consideration of the GAL's recommendation by the trial court regarding the best interests of the child," as the report was merely distributed and not admitted, and because the guardian ad litem did not testify. *Id*. The decision in *S.M.* runs contrary to *J.H.* and *E.M.*

One of the questions now is whether the Court of Appeals' decisions in *J.H.* and *E.M.*, which were appeals from abuse, neglect, and dependency actions, are still good law after *S.M.*, an appeal of termination of parental rights (TPR) orders. While there has not yet been a case directly on point, it appears that *S.M.* overruled these earlier Court of Appeals opinions.

We have seen the Court of Appeals recognize the effect of a TPR decision by the Supreme Court on a different issue in an abuse, neglect, and dependency case. In *In re S.G.*, the Court of Appeals was addressing a trial court's ability to order parents to take steps to achieve reunification. *In re S.G,* 68 N.C. App. 360 (2019). The Court of Appeals recognized that the Supreme Court's decision in a TPR case, *In re B.O.A*., 372 N.C. 372 (2019), overturned two of its prior decisions, *In re H.H.*, 237 N.C. App. 431 (2014) and *In re W.V*., 204 N.C. App. 290 (2010). In other words, the Court of Appeals applied a Supreme Court ruling in a TPR to an abuse, neglect, and dependency case, recognizing that two of its prior decisions in appeals from dispositional orders were no longer good law. It therefore seems appropriate for the Court of Appeals to take *S.M.*, another Supreme Court TPR ruling, and apply it to abuse, neglect, and dependency cases.

If *S.M.* is controlling, it would affect dispositional phases in TPR and abuse, neglect, and dependency cases. There are provisions of the juvenile code that govern the evidence a court is permitted to consider at dispositional hearings in abuse, neglect, and dependency cases. G.S. 7B-901(a), 7B-906.1(c). Article 11 of the juvenile code lays out the rules regarding permissible evidence in the disposition stage of a TPR proceeding. G.S. 7B-1110(a). While the language in each of these statutory provisions is not identical, the intent and effect are similar: to give a trial court in non-adjudication proceedings wide latitude in the evidence it receives and considers, but to provide parameters for the court in doing so. These parameters may not be as strict as the Rules of Evidence, but they do limit consideration by the court to evidence that is reliable, relevant, and necessary and that is actually offered and admitted. It is logical that the holding in *S.M.* may apply to each type of proceeding: termination of parental rights and abuse, neglect, and dependency.

This result is a practical outcome. It is difficult to expect someone to object to evidence that was never formally offered or admitted. The time to register one's objection to a trial court relying on

evidence that was not admitted would logically be on appeal. Unless the trial court specifically states otherwise, the attorney does not know the court is going to admit, let alone rely, on such a report. The attorney does not become aware of the court's reliance on the report until after the order is entered and, as a result, does not know of the need to object before the order's entry.

A corollary issue is that not applying the holding in *S.M.* to other types of 7B cases leaves trial attorneys in a difficult, if not impossible, situation given the attorneys' duties as advocates. If the attorney fails to object to a report that was distributed but not admitted, the attorney will have failed to preserve the issue for appeal. But should a parent defender really be the one standing up and drawing attention to the government's failure to offer evidence that may be damaging to the parent? Is it proper to expect the respondent's counsel to announce during trial that DSS did not seek to admit a social worker's report into evidence, when that report may harm the respondent's position? Doing so would just remind DSS to introduce the evidence. Inviting counsel for the government to introduce evidence harmful to the attorney's client seems inconsistent with the attorney's role as advocate.

To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing

Consider the common scenario in which a proceeding under Article 11 of G.S. Chapter 7B is filed to terminate a parent's rights to their child. How and when an attorney is appointed for the respondent parent in a termination of parental rights proceeding (TPR), whether the attorney is provisional or confirmed, and how the attorney may withdraw, depends on a few factors. Ongoing confusion on these points has led to several appeals in recent years, including a new ruling by our Supreme Court. *See In re K.M.W.*, 376 N.C. 195 (2020). This post reviews the governing principles under North Carolina case law and statutes.

Appointment of Counsel

Underlying Matter. Often, if a Department of Social Services (DSS) believes that a child is abused, neglected, or dependent, the agency will file a petition in district court. G.S. 7B-402. In some instances, this proceeding leads to the later filing of a TPR petition by DSS to aid in achieving a permanent plan for the child. When a TPR petition is filed, the original juvenile abuse, neglect, or dependency action is casually referred to as the "underlying matter." It is not necessary that there be an underlying matter for a TPR to be filed; however, the existence (or nonexistence) of an underlying matter, and whether a parent has an attorney in that underlying matter, are important factors in the questions this post explores.

The statutory right to counsel. To ensure that a parent's due process rights in a TPR are protected, a parent has a statutory right to counsel. G.S. 7B-1101.1(a); *In re K.M.W.*, 376 N.C. 195 (2020). "When a petition [for a TPR] is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent named in the petition." G.S. 7B-1101.1(a). At the first hearing held after a parent is served, the court decides to dismiss or confirm the attorney's appointment depending on several considerations, including whether the parent appears at the hearing, is indigent, has retained counsel, or makes a knowing and voluntary waiver of the right to counsel. *Id*.

TPRs initiated by motion. If there is an underlying matter, a TPR may be commenced by the filling of a motion in that proceeding rather than by a separate petition. G.S. 7B-1102. The procedure for appointing counsel to a respondent parent in a TPR differs when the proceeding is brought by motion in the underlying matter. There, notice to the parent of the TPR motion must indicate "that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel." G.S. 7B-1106.1(b)(4). This means that if the parent has an attorney in the underlying proceeding, the same attorney represents the respondent parent in the TPR. If the parent does not have an attorney in the underlying proceeding, the parent must request an

attorney, who is considered provisional until confirmed by the court. This request requirement differs from TPR cases initiated by petition, in which an attorney is automatically appointed for the parent. (Whether it is reasonable to require that a parent request an attorney when a TPR begins by motion rather than by petition is a question worth considering but is beyond the scope of this post.)

The attorney in the underlying matter is not provisional counsel in the TPR. Unless a court orders otherwise, the statutes indicate that an attorney for a parent in an underlying proceeding continues representation as the non-provisional attorney for the respondent parent in the TPR. In other words, the same attorney is confirmed counsel in both the underlying and TPR proceedings, whether the TPR is initiated by petition or motion. *See, e.g.,* G.S. 7B-1101.1(a) (requiring a clerk to appoint provisional counsel "unless the parent is already represented by counsel"); G.S. 7B-1106(a2) (requiring service of a TPR on an attorney if the "attorney has been appointed for a respondent pursuant to G.S. 7B-602 and has not been relieved of responsibility"); G.S. 7B-1106(b)(4) (requiring notice to a parent that "is not already represented by appointed counsel" of how to request counsel); G.S. 7B-1106.1(b)(3) (requiring whenever a motion for a TPR is filed, notice "that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court").

Our appellate courts have recognized that a parent's attorney in an underlying proceeding ordinarily continues as non-provisional counsel in a subsequent TPR. In *In re D.E.G.*, 228 N.C. App. 381, 388 (2013), the Court of Appeals held that in a TPR "the appointment of provisional counsel is unnecessary in the event that 'the parent is already represented by counsel'" in an underlying proceeding. Two years later, in *In re M.G.*, 239 N.C. App. 77, 86 (2015), the Court of Appeals held that a parent's attorney in an underlying action does "not assume a provisional role in the TPR" and, thus, the court was not "excused from the necessity for compliance with the usual procedures required" before permitting withdrawal.

Withdrawal of Appointed Counsel

How does an attorney's status as provisional or confirmed in a TPR affect an attorney who needs to withdraw? What must the attorney and court each do before the attorney may withdraw?

Notice to the client. "When the State moves to destroy weakened familial bonds"—that is, terminate parental rights—"it must provide the parents with fundamentally fair procedures." *In re K.M.W.*, 376 N.C. 195, 208 (2020). For example, an attorney who has entered an appearance cannot withdraw without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211 (1965). "[W]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion and must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *In re D.E.G.*, 228 N.C. App. 381, 386 (2013) (citation and internal quotation marks omitted). This

requirement is consistent with the obligations under the Rules of Professional Conduct for attorneys terminating representation of a client. *See* N.C. Rules of Prof'l Conduct r.1.16 (N.C. State Bar 2003).

At the new hearing date, if the parent is present, the court would decide whether (1) the attorney should be permitted to withdraw, (2) the parent is making a knowing and voluntary waiver of their right to counsel, (3) new counsel should be appointed , and (4) the TPR hearing should proceed or be continued to allow for time to prepare. If the parent is not present at the new hearing date, the court could decide whether to grant the motion to withdraw and whether to proceed with the TPR. The court must ask what efforts the attorney made to provide notice of the intent to withdraw "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate" in a TPR." *In re D.E.G.*, 228 N.C. App. at 386-87; *see also In re M.G.*, 239 N.C. App. at 84-5 (vacating a TPR order where the court improperly allowed counsel to withdraw "after conducting a superficial inquiry" and without receiving "any evidence whatsoever" that the client had prior notice); *In re K.M.W.*, 376 N.C. at 211 (holding that an attorney at a TPR was improperly permitted to withdraw, despite explaining that he was doing so at the client's request, when the client was not present, the certificate of service on the withdrawal motion showed that only DSS had been served with a copy, and the court did not inquire further about whether the client was given notice).

What It All Means

If a parent has counsel in an underlying matter, and a TPR petition or motion is filed, the same attorney will represent the respondent parent in the TPR. The attorney is not provisional. If the attorney moves to withdraw, there must be justifiable cause, notice given—or sufficient efforts to give notice—to the client of the attorney's intent, and court approval. The court does not have discretion to allow the withdrawal if the attorney has not provided the client notice.

If there is no underlying action, or there is one but for whatever reason the parent is unrepresented, an attorney appointed to the respondent parent in the TPR is provisional. The court would then confirm or release the provisional counsel. G.S. 7B-1101.1(a).

Below is a diagram illustrating these principles. Please reach out to me if you would like help figuring out the appropriate steps in your case.

Respondent's Counsel in a TPR: Provisional or Confirmed?