

District Court Judges Fall Conference Child Welfare Case Update June 21, 2016-September 20, 2016

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Abuse/Neglect/Dependency

Neglect: Harm or Risk of Harm

In re K.J.B., ___ N.C. App. ___ (July 19, 2016)

Held: reversed

- For a child to be adjudicated neglected pursuant to G.S. 7B-101(15), the evidence must support findings that the child has suffered emotional, mental, or physical harm or there is a substantial risk of such harm.
- The findings are not support by competent and clear and convincing evidence. A parent’s substance abuse is not per se neglect; there must be evidence showing a nexus between the parent’s substance abuse and the harm or substantial risk of harm to the child. Evidence that respondent mother was intoxicated one night when she left her infant in another person’s (the babysitter’s) care and was not intoxicated the next day when she went to pick up her child do not support an adjudication of neglect.
- In a neglect adjudication, it is relevant whether the child lives in a home where another child has been abused or neglected by an adult who regularly lives in the home. Although the mother’s rights to two of her other children were terminated, there was no evidence that the termination of parental rights was based on abuse or neglect. Without such evidence, the court cannot infer that this child is neglected.

Visitation: Findings

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- There must be findings based on competent evidence to support the portion of an order that prohibits contact between the child and her maternal grandfather. There was no evidence

before the trial court that the grandfather posed a threat to the child's welfare or that contact with the grandfather was contrary to the child's best interests.

Visitation: Cost of Supervision

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and remanded

- Before ordering a parent to pay for supervised visits, the court must make findings of the cost of visitation and the parent's ability to pay for it.

Permanency Planning Hearing: Notice

In re K.C., ___ N.C. App. ___ (August 2, 2016)

Held: vacate and remand

- G.S. 7B-906.1(b) requires that a parent receive 15 days' notice of a permanency planning hearing. A parent does not waive his or her right to the statutorily required notice when the parent objects at the beginning of the permanency planning hearing that she did not receive adequate notice. In this case, the court should not have held the permanency planning hearing after the respondent mother objected to the hearing on the basis that that she received notice only 8 days before the hearing (which was previously scheduled as a review hearing) was changed to a permanency planning review hearing.

Permanency Planning Hearing: Evidence

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: appeal on this issue dismissed

- Respondent mother's challenge that the court's findings of fact were not supported by competent evidence was not preserved for appellate review. No objection or motion to strike was made at the permanency planning review (PPR) hearing to the court's consideration of reports and documents that were not formally offered into evidence.
- Had the issue been preserved, there was no error because "a court holding a PPR hearing is free to consider written reports or other documentary evidence without a formal proffer or admission into evidence as exhibits." *In re J.H.*, 780 S.E. 2d 228, 239 (2015).

Permanent Plan: Relative Consideration

In re E.R., ___ N.C. App. ___ (July 19, 2016)

Held: Reversed in part and remanded in part (*Note*, there are three children born to two different fathers who are the subject of this action; this opinion applies to two children, who are the appellant father's children)

- Prior to ordering guardianship with a non-relative, G.S. 7B-903(a1) requires that the court first consider the children's proposed placement with a relative since the father proposed a placement with his mother, the children's paternal grandmother. G.S. 7B-903(a1) requires that priority be given to an available relative placement at all dispositional hearings (initial, review, and permanency planning) unless the court finds the placement is contrary to the child's best

interests. A remand will result when the court does not make specific findings that address how the child's placement with the relative is not in the child's best interests.

- The children are Indian children [25 U.C.S. 1903(4)], and the proceeding is a child custody proceeding governed by the Indian Child Welfare Act (ICWA). The court's compliance with ICWA does not obviate the need to make findings under G.S. 7B-903(a1) when the court orders placement with a non-relative when a relative placement is available.

Verification of Adequate Resources/Understanding of Legal Significance

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-600 and -906.1(j) requires the court verify that a proposed guardian understand the legal significance of the guardianship and has adequate resources to appropriately care for the child. The verification does not require specific findings but there must be competent evidence in the record to support the findings the court does make as part of the verification requirements. A court cannot make a determination of a proposed guardian's adequacy of resources without evidence of the resources.
- Here, the evidence was not sufficient to support the court's determination that the proposed guardian's resources were adequate. There was evidence of the proposed guardian's source of household income (her husband worked and she received disability) but no evidence of the amount of the household income. There was evidence that the guardian lived in a 4 bedroom house and that the children's placement with her was approved through the Intestate Compact for Children's Placement (ICPC) process, but there was no evidence of the value of the home, amount of any mortgage, debt, or monthly expenses.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part (adequate resources); vacate in part and remand (legal significance)

- GS 7B-906.1(j) requires that the court verify a non-parent who is being awarded custody (or guardianship) of a child (1) has adequate resources to appropriately care for the child and (2) understands the legal significance of the placement.
- Regarding adequate resources, the court must make this determination based on competent evidence that is not merely conclusory, indirect, or inferential of the guardian's resources. The court's determination that the child's paternal cousins (a married couple) had sufficient resources to care for the child was supported by findings of fact, based on competent evidence, that described (1) the cousin's home, child's bedroom, and child's play areas; (2) the cousins' employment; (3) the type of care the child receives, including that the child's medical and developmental needs were being met and that he "lacks for nothing" in terms of toys; and (4) the activities the family engages in, such as vacations and a birthday party on the child's first birthday.
- The court must base its determination that a nonparent understands the legal significance of a placement that awards custody (or guardianship) to him/her must be based on competent evidence for each potential person who the court is considering awarding custody. Citing *In re*

L.M., 767 S.E.2d 430 (2014), sufficient evidence may include (1) testimony from the potential custodian/guardian, (2) a signed guardianship agreement that acknowledges an understanding of the legal significance, or (3) social worker testimony. There was no evidence of either potential custodians (a married couple) understanding of the legal significance of the placement. The husband did not testify; the wife’s testimony did not include her understanding of the significance of the legal relationship; and the DSS report did not address the custodians’ understanding of the significance of the legal relationship.

Acting Inconsistently with Parental Rights: Burden of Proof

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and Remanded

- In both Chapter 50 custody and 7B juvenile actions, “[b]ecause the decision to remove a child from a natural parent’s custody ‘must not be lightly undertaken[,]... [the] determination that a parent’s conduct is inconsistent with... her constitutionally protected status must be supported by clear and convincing evidence.’” [citing *Adams v. Tessener*, 354 N.C. 57, 63 (2001)]. The court must make clear that it applied the clear and convincing standard when determining whether the parent’s conduct has been inconsistent with her constitutionally-protected status.

Permanency Planning Hearing: Waive Reviews

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-906.1 requires that after the initial permanency planning hearing, subsequent permanency planning hearings must be held at least every six months to review the progress made in finalizing the plan or make a new plan when necessary. These subsequent hearings may be waived by the court if the court finds by clear and convincing evidence each of the give enumerated factors set forth in G.S. 7B-906.1(n). The court cannot waive permanency planning hearings when the statutory criteria are not satisfied.
 - *Author’s note:* This case involves a permanent plan appointing a guardian. G.S. 7B-906.1 criteria do not apply when a child is placed in a parent’s custody. Instead, G.S. 7B-906.1(k) relieves a court of the duty to hold periodic permanency planning hearings when custody is with a parent.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated

- GS 7B-906.1(n) authorizes the court to waive permanency planning hearings when it finds each of the five statutory enumerated factors by clear, cogent, and convincing evidence. It is reversible error when the court does not (1) make written findings of each factor or (2) identify the burden of proof it applied on the record (e.g., included in the written order or stated in open court) or the “record when viewed in its entirety clearly reveals the court applied the proper

evidentiary standard.” [*In re M.D.*, 200 N.C. App 35, 39 (2009)]. Here, only one factor was found and it is unknown what standard of proof was used.

Legislative Changes: Pending Cases (Statutory Construction)

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part

- Changes made to the Juvenile Code by S.L. 2015-135 became effective for actions filed or pending on or after October 1, 2015. Pending is defined as remaining undecided or awaiting a decision. A permanency planning review (PPR) is pending when the PPR hearing is held before October 1, 2015 but an order isn’t entered until after October 1, 2015. A new statute, GS 7B-906.2 requires the court to consider certain criteria at the permanency planning hearing. The court was not required to consider in its order the new criteria that became effective after the PPR hearing where the court heard evidence regarding the permanent plan. Such a requirement would be absurd or illogical.

Appeal: Order Changing Custody

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- G.S. 7B-1001(a) identifies the types of final orders that are entered in an A/N/D proceeding that may be appealed, one of which is “any order, other than a nonsecure custody order, that changes legal custody of juvenile.”
- *Citing Peters v. Pennington*, 210 N.C. App. 1 (2011) and *Peterson v. Rogers*, 337 N.C. 397 (1994), legal custody means “the right and responsibility to make decisions with important long-term implications for a child’s best interests and welfare” and includes a “parent’s prerogative to determine with whom their children shall associate.” An order that continues the previous order of joint legal and physical custody of the child to the father and mother but adds a no contact provision between the child and her maternal grandfather is an order that changes legal custody of a juvenile. That order may be appealed pursuant to G.S. 7B-1001(a)(4).

Termination of Parental Rights (TPR)

Grounds: Neglect

In re M.A.W., ___ N.C. App. ___ (June 21, 2016)

Held: Reversed

- A TPR based on G.S. 7B-1111(a)(1) must address the parent’s fitness to care for the child at the time of the termination proceeding. If the child has not been in the parent’s custody for a long period of time before the termination hearing, the court may find the ground exists with a history of neglect by the parent and the probability of the repetition of neglect.

- In 2013, after the county department filed a petition alleging the child was neglected based on circumstances created by her mother, the child was adjudicated neglected. At the termination hearing, there was no evidence or findings of prior neglect by the father, who was incarcerated at the time of the child’s removal and was found by the trial court to be “the non-offending parent.”
- Although the court ultimately ceased reunification efforts with the father in the underlying neglect action, the evidence and findings did not support a conclusion that there was ongoing neglect at the time of the termination hearing.

Ineffective Assistance of Counsel

In re T.D., ___ N.C. App. ___ (July 19, 2016)

Held: Remand

- A termination of parental rights requires that a respondent parent have a fundamentally fair procedure. In North Carolina part of that fundamental fairness is provided by a respondent parent’s statutory right court appointed counsel, which includes the parent’s right to effective assistance of counsel.
- The record raises serious questions as to whether the respondent received effective assistance of counsel in the termination hearing that lasted nineteen minutes. An attorney’s relative silence at a hearing is not per se ineffective assistance of counsel. The trial court must determine (1) whether the attorney’s performance was deficient and (2) if so whether the deficiency prejudiced the respondent such that she was deprived of a fair hearing thus entitling her to a new hearing.

Adoption

Consent of Unwed Father

In re Adoption of C.H.M., ___ N.C. App. ___ (July 5, 2016)

Held: Affirm

- G.S. 48-3-601 requires the consent of a putative father to the child’s adoption if before the adoption petition is filed he has (1) acknowledged paternity, (2) provided in accordance with his financial means, reasonable and consistent payments for the support of the mother (during or after her pregnancy), child, or both, and (3) regularly or attempted to regularly visit or communicate with the mother (during or after her pregnancy), child, or both. The father’s consent was required when he (1) acknowledged paternity, (2) regularly deposited cash (\$3,260) into a lockbox he kept at his home for the exclusive purpose of supporting the child (after the mother had refused to accept offers of financial support from the father), and (3) regularly communicated with the mother via Facebook messages.
- A formal record of payments made for the support of the child is not required. There was competent evidence in the record that the father provided regular support for the child when the district court found the father’s testimony credible. The father testified that he began to save money for the child by placing cash in a lockbox, rather than comingle those funds with his

bank account from which he paid his monthly expenses. The father also introduced bank statements showing cash withdrawals.

- The application of child support guidelines in determining whether a father's support is reasonable is not required but is instead within the court's discretion.

Civil Case Related to Child Welfare

Necessary Party

Tanner v. Tanner, ___ N.C. App. ___ (August 2, 2016)

Held: Vacate order to extent it addresses any issue other than joinder of necessary party; Remand for hearing on substantive issues with all parties having notice and an opportunity to be heard

Facts:

- 2012 husband transferred over \$300K from his business account to his mother.
- 2013 complaint filed; answer and counterclaim filed
- April 2014 defendant wife filed a motion requesting joinder of plaintiff's mother (appellant) as a necessary party, a determination of ownership interest in the funds transferred to her, and the imposition of a restraining order to prohibit use of the funds
- November 2014 hearing on motion for joinder, constructive trust, and restraining order; mother testifies at the hearing
- January 6, 2015 attorney for appellant enters appearance in court action
- January 7, 2015, appellant's attorney objects to entry of an order from November 2014 hearing
- January 12, 2015, order entered joining mother as a party and imposing constructive trust with mother as trustee and a restraining order on the funds
- An order that determines a claim in an action where necessary parties have not been joined are null and void [citing *Rice v. Randolph*, 96 N.C. App. 112 (1989)]. When it appears to the court that a necessary party is absent, the trial court may refuse to deal with the merits of the action until the necessary party is brought to the action. A court may correct this ex mero motu. [citing *White v. Pate*, 208 N.C. 759 (1983)]
- At the November 2014 hearing, the court was only authorized to determine mother was a necessary party. The court should not have heard the merits of the motion prior to mother being joined as a party. By determining the merits of the motion before mother was made a party, mother was denied an opportunity to be heard as a party. At time of hearing, mother was only identified as a potential party, was not served with summons or any pleadings or notice of proceedings, was not represented by an attorney, did not consent to be added as a party or to proceed with the hearing on an issue that would affect her rights, and only participated as witness who had been subpoenaed to testify.