

Child Welfare Case Update

June – July 7, 2021

Social Services Attorneys' Virtual Conference Summer 2021

To view these and other summaries of opinions published on or after January 1, 2014 by the NC Appellate Courts, go to the [Child Welfare Case Compendium](#) on the School of Government's website

Contents

Abuse, Neglect, Dependency	2
Adjudication: Neglect, Dependency - Findings; Reasonable Efforts.....	2
Order Suspending Visitation	3
Permanency Planning Order	4
Findings: Custody, Eliminate Reunification, Cease Further Hearings	4
Acting Inconsistently with Constitutional Rights to Parent	4
Guardianship; Verification	6
Termination of Parental Rights	6
Attorney Motion to Withdraw	6
Ineffective Assistance of Counsel	8
Motions for substitute counsel and to continue	9
Rule 17 GAL	9
Neglect	10
Failure to Make Reasonable Progress.....	11
Failure to Pay Reasonable Portion of Cost of Care	11
Dependency	12
Willful Abandonment.....	12
Disposition: Best Interests of the Child.....	13
Civil Case Related to Child Welfare.....	14
Paternity for Sperm Donor, Choice of Law	14

Abuse, Neglect, Dependency

Adjudication: Neglect, Dependency - Findings; Reasonable Efforts

In re H.P., 2021-NCSC-299

Held: Reversed and Remanded for Dismissal

Concurs in part and Dissents in part, Inman, J.

- Facts: Reports of suspected neglect based on injurious environment, lack of proper care and supervision, substance use, and domestic violence were first received in 2015. Numerous reports were made over several years, many of which were closed for insufficient evidence to support a finding of neglect. The reports alleged inadequate housing, including the family living in a storage unit and a camper without water or electricity, food insecurity and hunger, and domestic violence. In 2020, DSS substantiated the report and filed a petition alleging neglect and dependency. At the adjudication hearing, neither parent was present; father eventually appeared. The evidence presented was DSS social worker testimony reviewing “Exhibit A,” an attachment to the petition that summarized the years of reports and 37 allegations, 4 of which stated the evidence was insufficient to support other allegations in the exhibit. The court proceeded to disposition, which included testimony from the foster care social worker and the DSS report. The court adjudicated the juveniles neglected and dependent, using a prepared order the DSS attorney drafted prior to the hearing. The order contained 47 findings of fact. Mother appeals.
- Standard of review is whether the findings are support by clear and convincing evidence and whether the findings support the conclusions. Conclusions of law are reviewed de novo.
- The findings are not supported by competent evidence, and the court failed to make the ultimate facts. Findings of fact require more than a recitation of the evidence and must include specific ultimate facts. It is not per se reversible error to mirror the wording of a petition as the appellate court will examine whether the trial court, through a process of logical reasoning applying the evidentiary facts before it, found the ultimate facts to support the adjudication.
 - Many of the findings of fact are recitations of the allegations in Exhibit A to the petition. Four of the allegations that were found as facts state “there was not evidence” to support other allegations in the petition that were found as facts by the trial court. Sl.Op. ¶24. Exhibit A is not competent evidence because the allegations are contradictory. No evidence supported the allegations of Exhibit A. The court did not make ultimate findings of fact.
 - Many of the findings were recitations of statements that were made to DSS by the children, mother, neighbors without addressing whether the statements were true.
- Findings about inadequate housing, specifically the family living in a storage unit, were not supported. In assessing 2 reports of the family living in a storage unit, the DSS investigation found the parents were living in a motel and later were moving to a camper and would stop residing in the storage unit. “Without evidence of the conditions of the storage unit or other access to necessities, we hold that taking temporary shelter in a storage unit is not per se neglect. Sl.Op. ¶29.

- A finding that mother reported the refrigerator was broken and nothing could be stored in it is a recitation of evidence and does not resolve a material issue of ultimate fact that would support the GAL's argument that a broken refrigerator created an inability to reliably provide the children with adequate nutrition.
- Some of the findings of fact were really conclusions of law and will be treated as such and reviewed de novo. Findings of fact are objectively ascertained, and conclusions of law require an exercise of judgment.
- Neglect requires harm or substantial risk of harm to the juveniles. There was no evidence of any harm. Although DSS expressed concern about food insecurity, the children were not found to be underweight or malnourished. There were no ultimate findings about proper care and supervision for neglect or dependency grounds. Substantive findings that a young child was running between his parents' campers naked and later was walking alone are not, by themselves, neglect or dependency.
- The conclusion that DSS made reasonable efforts to prevent the children's removal from their home is unsupported.
- Dissent: Concur in that the ultimate facts were not made to support neglect or dependency adjudications. However, the appropriate remedy is reverse and remand for further proceedings to make findings of fact. The contradictions in Exhibit A do not make it incompetent evidence as a matter of law, and it is not the role of the appellate court to reconcile those contradictions. The trial court is the sole authority for making findings of fact and resolving conflicts in evidence, and it should have that opportunity on remand. The majority *sua sponte* raised the question of reasonable efforts, which is not the role of the appellate court. Disagrees with analysis that reasonable efforts were not provided.

Order Suspending Visitation

In re K.M., ___ N.C. App. ___ (June 1, 2021)

Held: Affirmed in part; vacated and remanded in part

- Facts: In permanency planning order, court made findings that unsupervised visitation or supervised visits between mother and child that were supervised by someone who was not training in supervision techniques was contrary to the child's best interests and inconsistent with the child's health and safety. The court ordered supervised visits at a supervised visitation center but suspended those visits temporarily when the center was closed because of COVID-19. Mother appealed.
- G.S. 7B-905.1(a) authorizes the court to suspend visits when certain conditions exist. 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.
- For a full discussion of this case, see On the Civil Side blog post [here](#).

Permanency Planning Order

Findings: Custody, Eliminate Reunification, Cease Further Hearings

In K.P., 2021-NCCOA-268

Held: Vacated and Remanded

Dissent in Part, Concur in Part

- Facts: The juvenile was adjudicated neglected based on domestic violence. Paternity of the juvenile was an issue, and husband was determined not to be the father and another man was determined to be the father. The child was placed with husband's parents, where his half-siblings were also placed. After an unsuccessful trial home placement, a primary permanent plan of custody with a relative and secondary plan of reunification or custody to a court-approved caretaker was ordered. At the last permanency planning hearing, the court ordered custody to the husband's parents and with supervised visits to mother. No concurrent plan was ordered as the permanent plan of custody to a relative was achieved, and further hearings were waived. Mother appeals.
- A failure to make statutorily required findings is reversible error.
 - Before eliminating reunification as a permanent plan, the court must make the findings under G.S. 7B-906.2(b) and (d). The ultimate finding addressing whether reunification efforts would clearly be unsuccessful or inconsistent with the child's health or safety as required by G.S. 7B-906.2(b) was not made. The findings required by G.S. 7B-906.2(d) were not made. The permanent plan of custody to a relative was not achieved since the child was placed with a non-relative (husband's parents, who were not the paternal grandparents).
 - The order does not verify the custodians understood the legal significance of the appointment as custodians and have adequate resources to care for the juvenile, which is required by G.S. 7B-906.1(j).
 - Before waiving further reviews, the court must make findings of each of the five G.S. 7B-906.1(n) factors, which the court did not do here.
- Dissent in part: The permanent plan of custody to a court-approved caretaker was achieved. Because a permanent plan was achieved, the findings of G.S. 7B-906.2(b) were not required. The findings of G.S. 7B-906.2(d) were made. The verification under G.S. 7B-906.1(j) was made and supported by social worker testimony, step-grandfather's testimony, and the child have lived with the custodians for at least six consecutive months.

Acting Inconsistently with Constitutional Rights to Parent

In re I.K., 2021-NCSC-60

Held: Affirmed

Dissent, Earls, J.

- Facts and Procedural History: The juvenile was adjudicated dependent due to circumstances related to unstable housing, substance use, and domestic violence in the home. A 2017 permanency planning order that awarded guardianship to paternal grandmother and eliminated reunification was appealed by both parents. The court of appeals vacated and remanded that

permanency planning order to address whether respondent father was acting inconsistently with his constitutional rights to care, custody, and control of the child. On remand, the court awarded guardianship to the grandmother. Father appealed, challenging the findings and conclusions that he acted inconsistently with his parental rights. The court of appeals in a divided opinion affirmed the trial court's order. Father appealed to the supreme court.

- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence with findings of fact that cumulatively support that conclusion. The conclusion of law is reviewed de novo. The determination is not a bright-line test. The cumulative evidence supports the court's conclusion that father acted inconsistently with his constitutional rights by not refraining from using illegal substances, not adequately addressing his issues with domestic violence, and not obtaining safe and stable housing.
- The findings are supported by clear and convincing evidence, and the findings support the conclusion that father acted inconsistently with his constitutionally protected rights. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.
 - Substance use: The findings show that father continued to use substances after completing his substance abuse treatment program. The evidence showed he had a history of using substances for years, refused to submit to 11 out of 31 drug screens throughout the case, and tested positive on two of the drug screens, one of which was after completing his treatment.
 - Housing: The findings describe an unsafe and inappropriately sized home that was based on testimony of hoarding conditions, holes in the floor covered with plywood, and overcrowding. Despite having an income of more than \$46,000 and assistance offered by DSS, father had no plans to move out of his mother's inappropriate home or to stop living with the juvenile's mother when she was found to have acted inconsistently with her parental rights.
 - Domestic violence: Unchallenged findings document father's past domestic violence with the juvenile's mother. Although he completed a domestic violence program, he then had a domestic violence incident involving his own mother.
- Dissent: The findings are insufficient to support the conclusion that father acted inconsistently with his parental rights, and the findings related to domestic violence and substance use are unsupported by the evidence. The majority sets a low bar in this case that is contrary to the Court's precedent and "seriously threatens the stability of families throughout the state" who are facing financial constraints. Dissent ¶ 42. There is no evidence of father's willful conduct evidencing his intent to act inconsistently with his parental rights. Although the findings support a lack of safe and stable housing, living in poor housing conditions is insufficient to conclude a parent acted inconsistently with their parental rights. There was no evidence better housing options were available to respondent such that the majority's characterization of father choosing to live in the unsafe environment is misplaced.

Guardianship; Verification

[In re B.H.](#), 2021-NCCOA-297

Held: Affirmed

- Facts: The juvenile was adjudicated neglected and dependent and was placed in DSS custody, who continued their placement with relatives (which began with nonsecure custody). At a permanency planning hearing, the court awarded permanent guardianship to the relatives the child was placed with and ordered supervised visitation. Mother appealed, arguing the court did not properly verify the guardians understood the legal significance of their appointment.
- G.S. 7B-600(c) and -906.1(j) requires the court verify the person being appointed as guardian understands the legal significance of the appointment and will have adequate resources to appropriately care for the juvenile. Specific findings are not required but there must be competent evidence to demonstrate the guardian's understanding. When two people are appointed, there must be sufficient evidence that both of them understand.
- There is sufficient competent evidence for the court to have made a proper verification. Any evidence that is relevant, reliable, and necessary to determine the juvenile's needs and most appropriate disposition may be considered by the court at a permanency planning hearing. G.S. 7B-906.1(c). Sufficient evidence may include social worker testimony, a court summary, a home study, and/or the testimony of the proposed guardian that addresses the guardians' understanding. Here, there was testimony from one proposed guardian and the social worker as well as a home study. The testimony of one of the proposed guardians about the collective understanding of both proposed guardians is sufficient to find both understood; using the word "we" regarding their discussions between themselves and with the social worker about meeting the children's needs – raising them and providing a stable environment, education, love, care, and teaching them things. Regarding the social worker's testimony, an affirmative response of "yes" to a question of whether the guardian understands the appointment is sufficient.

Termination of Parental Rights

Attorney Motion to Withdraw

[In re T.A.M.](#), 2021-NCSC-77

Held: Affirmed

Concur in part, Dissent in Part (Ervin, J., joined by Hudson, J. and Earls, J.)

- Facts: The juveniles were adjudicated neglected due to circumstances created by their parents' domestic violence, substance use, and mental health issues. The parents had done well with their case plan services for a while but then stopped doing so. The primary permanent plan was changed to adoption and DSS filed TPR petitions. Father's location was unknown, resulting in his service by publication. His attorney moved to withdraw based on father's failure to maintain contact with her. The motion was granted, and the hearing was continued. Father appeared at the next scheduled hearing and his same attorney was reappointed to represent him. At the next scheduled TPR hearing, the attorney filed a second motion to withdraw based on father's failure to maintain contact with her and her lack of knowledge about his wishes. Father did not

appear at the hearing, and the court granted the attorney's motion to withdraw after engaging in a colloquy with the attorney, who advised the court that she had spoken with father that day and told him if he did not appear at the hearing, she would withdraw and the case would proceed without him and father consented to her withdrawal. The motion was granted, and the TPR was also granted. Father appeals, challenging the court's decision to allow his attorney to withdraw. Mother appealed, challenging the best interests determination. This summary focuses on father's appeal.

- The standard of review for a motion to withdraw is an abuse of discretion, which is 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." Sl.Op. ¶120. The appellate court inquiry is "whether the ruling is unreachable by a reasoned decision, *see White [v. White]*, 312 N.C. [770], 777 [1985], which necessarily requires appellate courts to consider broadly the circumstances which may render the ruling justifiable." *Id.*
- There was no abuse of discretion. The trial court advised father of his responsibility to attend all the TPR hearings, and in the underlying neglect action advised him to maintain contact with his attorney and that if he failed to do so, the attorney may ask the court to be permitted to withdraw such that the case would proceed without his having an attorney represent him. After the TPR petition was filed, the court found that DSS made diligent efforts to locate father, who was actively trying to conceal his whereabouts, and ordered service by publication. The court continued the attorney's appointment at that time. When the court reappointed his attorney (after the first motion to withdraw was granted), the court again advised father of his responsibility to maintain contact with his attorney and failing to do so may result in another motion to withdraw such that father would be unrepresented when the case proceeded. The attorney filed a second motion to withdraw and made a good faith effort to serve him with the motion and notice of the hearing on the motion. The court had granted father's motions to continue.
- These cases are fact-specific, and this case is distinguishable from *In re K.M.W.*, 376 N.C. 195 (2020) based on father's actions and his attorney's execution of her responsibilities. Unlike *K.M.W.* where mother appeared at the hearing and the court failed to determine whether mother was knowingly and voluntarily waiving her right to counsel, father did not appear at the TPR hearing. Father did not make efforts to follow the court's advisement to attend all the hearings, and he verbally consented to his attorney's withdrawal.
- Overburdened trial courts and permanency: A parent could successfully manipulate the judicial system to delay a TPR and thwart the purpose of the Juvenile Code in finding permanency for a child at the earliest possible age by repeatedly failing to communicate with their attorney, avoid communications from DSS and other parties, and fail to attend hearings. The court is not required to track down a parent. Here, the court respected father's statutory right to counsel by giving him reasonable opportunities to participate and be represented by counsel in the TPR proceeding. The court "reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of parent." Sl. Op. ¶132.

- **Dissent:** The majority's opinion is inconsistent with the holding in *In re K.M.W.*, 376 N.C. 195 (2020) and goes against the principle of stare decisis. There has been no attempt to overrule *K.M.W.*, based on a "grievous wrong." Dissent ¶161. The facts are similar. The trial court erred in granting the attorney's motion to withdraw without first ensuring proper notice had been provided to father and without conducting a sufficient inquiry into the reasons for the withdrawal or extent father understood his attorney's request. There was no inquiry into the nature and extent of the attorney's efforts to serve the motion on father or to ensure father "understood the implications of the action that [counsel] proposed to take or to protect [respondent-father's] statutory right to the assistance of counsel." Dissent ¶155 (quoting *In re K.M.W.*). The court did not ensure the father was provided with "reasonable notice" of the attorney's motion to withdraw as required by G.S. 7B-1101.1(a1) or *In re K.M.W. Id.* The motion and notice to father was sent to an address where father indicated he was not receiving mail. Father's conduct is not a forfeiture of counsel. The purpose of the Juvenile Code is also to "assure fairness and equity," "protect the constitutional rights of juveniles and parent," and "prevent the unnecessary or inappropriate separation of juveniles from their parents." Dissent ¶163.

Ineffective Assistance of Counsel

In re B.S., 2021-NCSC-71

Held: Affirmed

- **Facts:** Respondent father's parental rights were terminated on several grounds. Father appeals, raising for the first time on appeal ineffective assistance of counsel warranting reversal of the ground that he failed to legitimate or establish paternity for his child (G.S. 7B-1111(a)(5)). He argues his attorney failed to advise him of the need to execute an affidavit of paternity or explain how to establish paternity as ordered by the court.
- Parents who are indigent have the right to court-appointed counsel in a TPR proceeding. G.S. 7B-1101.1. To give this statutory right meaning, the attorney must provide effective assistance. Ineffective assistance of counsel requires the respondent show that (1) the counsel's performance was deficient and (2) the deficiency was so serious that it deprived him of a fair hearing – meaning there is a reasonable probability that but for the deficiency there would have been a different result.
- Father did not meet his burden to prove ineffective assistance of counsel. A parent will not be protected from a TPR because of an absence of knowledge of his parental duties, and any alleged failure by an attorney to advise a parent-client of their inherent duty to parent is not prejudicial. There is no reasonable probability that any alleged deficiency by the attorney would have affected the outcome of the TPR.

Motions for substitute counsel and to continue

[In re M.J.R.B.](#), 2021-NCSC-62

Held: Affirmed in part, vacated and remanded in part

- **Facts:** Three juveniles were adjudicated neglected and dependent, and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. Prior to the TPR hearing and outside of the presence of his attorney and GAL, father requested his counsel and GAL be replaced and further requested a 2-hour continuance of the hearing so he could take his medication. His requests were denied. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- **Motion to Substitute Counsel:** The trial court did not abuse its discretion in denying father's motion to substitute counsel when the request was made outside of the attorney's and GAL's presence, there was good cause to deny the request, and the motion was not renewed when counsel did appear for the hearing.
- **Motion to Continue:** There was no abuse of discretion in denying the motion and father was not prejudiced by the denial of the motion to continue.

Rule 17 GAL

[In re M.S.E.](#), 2021-NCSC-76

Held: Affirmed

- **Facts:** Two juveniles were adjudicated neglected based on circumstances created by mother's untreated mental health and substance use issues and housing instability. Mother continued to use marijuana and cocaine and did not submit to the majority of required drug screens. She did not comply with recommendations for mental health and substance use treatment. Mother did attend some parenting classes and showed improvements in her interactions with the children. Mother had a psychological assessment that showed she had borderline intellectual functioning and recommended a support person for assistance with parenting, a rep payee, and review of written documents with her to ensure she understood. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.
- **Rule 17 GAL:** Under G.S. 7B-1101.1(c), on the motion of a party or its own motion, the trial court may appoint a Rule 17 GAL to a parent who is incompetent. Incompetency is defined at G.S. 35A-1101(7). Incompetency is more than a mental health diagnosis and requires an examination of the parent's courtroom behavior, how they express themselves, and whether they appear to understand what is happening and can assist their attorney. The court must inquire into a litigant's competency when circumstances that are brought to the court's attention raise a substantial question as to that litigant's competency. The standard of review on whether there

is a substantial question of incompetency and whether the parent is incompetent is an abuse of discretion.

- Although mother had an intellectual disability requiring supports and services, and the social worker noted at a prior hearing that mother doesn't understand why the case is happening and why she needs services, there is an appreciable amount of evidence to show mother was not incompetent at the time of the TPR hearing. The evidence shows mother's understanding of her history of homelessness and need for the children to have safe and stable housing, her establishing supportive relationships with others, and exercising appropriate judgment at a CFT meeting (held earlier in the case) when requesting the children remain in their placement because she wasn't ready. Mother attended all the hearings allowing the trial court to observe and evaluate her capacity to understand the proceedings. At the TPR hearing, mother testified in a clear and cogent manner and showed her understanding of the proceedings. There was no abuse of discretion in not conducting an inquiry into mother's competency.

Neglect

In re M.S.E., 2021-NCSC-76

Held: Affirmed

- Facts: Two juveniles were adjudicated neglected based on circumstances created by mother's untreated mental health and substance use issues and housing instability. Mother continued to use marijuana and cocaine and did not submit to the majority of required drug screens. She did not comply with recommendations for mental health and substance use treatment. Mother did attend some parenting classes and showed improvements in her interactions with the children. Mother had a psychological assessment that showed she had borderline intellectual functioning and recommended a support person for assistance with parenting, a rep payee, and review of written documents with her to ensure she understood. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which includes a parent not providing proper care, supervision, or discipline or the juvenile living in an environment injurious to their welfare. When the parent and juvenile have been separated for a significant period of time, there must be a showing of past neglect, which may include a neglect adjudication, and a likelihood of future neglect based on evidence of changed conditions at the time of the TPR hearing.
 - "The 'trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.' " Sl.Op. ¶31. The trial court made the required facts to resolve the dispute, and those facts were supported by clear, cogent, and convincing evidence. Further, unchallenged findings are binding on appeal.
 - Although findings showed mother obtained safe and appropriate housing, her progress on the rest of her case plan, which addressed engaging in substance use and mental health services, completing drug screens, taking medication as prescribed, and

improving her parenting including understanding her son's mental health needs, was inadequate. The findings support the conclusion of a likelihood of future neglect.

Failure to Make Reasonable Progress

In re M.J.R.B., 2021-NCSC-62

Held: Affirmed in part, vacated and remanded in part

- Facts: Three juveniles were adjudicated neglected and dependent, and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully left the children in foster care for 12 months and failed to make reasonable progress to correct the conditions that resulted in the children's removal.
 - Unchallenged findings of fact are binding on appeal. The unchallenged findings about mother's noncompliance with her case plan addressing substance use treatment, drug screens, a psychological assessment, a domestic violence assessment, medication monitoring, and parenting classes were sufficient to support the ground under G.S. 7B-1111(a)(2) for her 3 older children.
 - For the newborn, the court erred in granting the TPR under G.S. 7B-1111(a)(2) because the juvenile was only in foster care for 9 months, not 12 months as required by the statute.

Failure to Pay Reasonable Portion of Cost of Care

In re J.E.E.R., 2021-NCSC-74

Held: Affirmed

- Facts: The juvenile was adjudicated neglected. Father, who resided in New York, was contacted and agreed to participate in genetic marker testing (paternity was adjudicated), a case plan (which he failed to enter into), and an ICPC home study (both home studies were denied). Father was not engaged in services, and DSS ultimately filed a TPR petition, which was granted. Father appeals. This appeal focuses on the ground of failing to pay the reasonable cost of care.
- G.S. 7B-1111(a)(3) authorizes a TPR when a juvenile is in the custody of a DSS and the parent has willfully failed to pay a reasonable cost of the child's care when financially and physically able to do so, for six consecutive months immediately preceding the filing of the TPR petition. The cost of care is the amount DSS pays to care for the child, e.g., foster care. "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. . . . The requirement applies irrespective of the parent's wealth or poverty." SI.Op. ¶14.
- Clear, cogent, and convincing evidence shows father was continuously employed during the relevant time period, making \$200 to \$800/week, the cost of foster care was \$6,158.46, and father paid zero despite having an ability to do so.

Dependency

[In re M.J.R.B.](#), 2021-NCSC-62

Held: Affirmed in part, vacated and remanded in part

- Facts: Three juveniles were adjudicated neglected and dependent, and a newborn was adjudicated dependent due to substance use and mental health issues. Each parent was appointed a Rule 17 GAL. The primary plan was adoption, and DSS filed TPR petitions. The TPR was granted on the grounds of failure to make reasonable progress to correct the conditions and dependency. Both parents appealed.
- G.S. 7B-1111(a)(6) authorizes a TPR when a parent is incapable of providing care or supervision such that the juvenile is a dependent juvenile and there is a reasonable probability the incapability will continue to the foreseeable future. Dependency requires a finding that the parent lacks an appropriate alternative child care arrangement.
- The findings do not address a lack of appropriate alternative child care arrangement, the reason for the mother's incapability, and whether the mother's condition would continue for the foreseeable future. There may be evidence in the record for those findings. Vacated and remanded for entry of a new order.

Willful Abandonment

[In re I.J.W.](#), 2021-NCSC-73

Held: Affirmed

- Facts: The juvenile was adjudicated neglected and dependent based on circumstances created by substance use by both parents and a lack of proper care and supervision. Initially, in a safety plan, the juvenile was placed with father, who obtained a DVPO against mother. Father maintained contact with mother and allowed her contact with the juvenile while they resided in a home that lacked running water, heat, and electricity. Father was ordered to comply with a case plan, and he initially made progress on that plan. He stopped making reasonable progress and disengaged from any services with DSS after a visit was ended because of his aggressive behavior toward the DSS social worker. The court ordered ongoing visitation was conditioned on father completing anger management, which father refused to do. DSS filed a TPR motion more than one year after father stopped working with DSS, had no visits, and did not file a motion to seek a modification of the visitation order. After the TPR was filed, father began to complete services. The TPR was granted and father appeals.
- G.S. 7B-1111(a)(7) authorizes a TPR on the ground of willful abandonment, with a determinative time period of the six months immediately preceding the filing of the TPR petition/motion. The findings of fact are supported by clear and convincing evidence and support the conclusion of willful abandonment. During the relevant six-month period, father had not visited with his child, refused to work on his case plan or with DSS, and did not make any effort to maintain a parental bond with his child. The court found his post-TPR-motion behavior of engaging in services showed he had the ability to comply previously but chose not to do so. His post-TPR-motion actions are outside of the determinative six-month time period and do not bar a TPR on the ground of abandonment.

Disposition: Best Interests of the Child

In re E.S., 2021-NC-72

Held: Affirmed

- Facts: This is an appeal by mother and father of the best interests determination to TPR; there is no challenge to the TPR grounds adjudication. Mother's appeal involves her 15-year-old child; her appeal regarding the younger child was abandoned because she did not present any arguments about that child in her brief. Father's appeal involves the younger sibling only.
- After adjudicating a ground to TPR, the court moves to the dispositional stage where it must consider the factors set out in G.S. 7B-1110(a). Written findings are required for relevant factors, and a factor is relevant when there is conflicting evidence of that factor that placed it as an issue before the trial court.
- Regarding the likelihood of adoption, G.S. 7B-1110(a) does not require the court to consider whether the juvenile who is 12 or older will consent to their adoption. The requirement for a juvenile's consent to their adoption is in G.S. 48-3-601(1), which "is found in an entirely separate chapter of the General Statutes of North Carolina." Sl.Op. ¶15. The question before the district court is whether the TPR is in the child's best interests, and the court does not abuse its discretion by making that finding solely because a 12-year-old or older juvenile is not interested in being adopted. The court is not required to expressly consider the juvenile's consent to adoption, and in this case there was no evidence that the 15-year-old juvenile was not interested in adoption or would not consent to her adoption.
- Regarding the bond between the juvenile and her mother, the evidence that the child had a bond with her mother was uncontested. The finding was, therefore, not relevant. Further, the bond between a child and parent is one factor for the court to consider, and the court had discretion to give greater weight to other factors.
- Regarding a possible relative placement, the court is not "expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding." Sl.Op. ¶22). Here, the court made findings, which show the possible relative placement would not be appropriate given the juvenile's bond with the family she was currently placed with who wished to adopt her and the possible interference with the proposed relative placement by father.

In re T.A.M., 2021-NCSC-77

Held: Affirmed

Concur in part, Dissent in Part (Ervin, J., joined by Hudson, J. and Earls, J.)

- Facts: The juveniles were adjudicated neglected due to circumstances created by their parents, domestic violence, substance use, and mental health issues. The parents had done well with their case plan services for a while but then stopped doing so. The primary permanent plan was changed to adoption and DSS filed TPR petitions. The court granted the TPR petitions and parents appeal. Father challenges the granting of his attorney's motion to withdraw. Mother challenges the court's determination that the TPR was in the children's best interests. This summary focuses on mother's appeal.
- Standard of review is an abuse of discretion.

- The dispositional findings must be supported by competent evidence. The challenged findings of fact are supported by competent evidence, including social worker testimony, the admitted GAL report and visitation logs.
- The “little bond” mother had with the children was supported by the evidence. Although mother argued that she did not have opportunities to act in a parental manner due to her being separated from her children, her limited opportunities arose from her own behavior – substance use relapse, late arrival to visits, and inability to control her emotions during visits.
- The court is not required to consider other dispositional alternatives (e.g., guardianship). The court considered the G.S. 7B-1110(a) dispositional factors and reasonably weighed those factors in concluding that TPR was in the children’s best interests.

In re M.S.E., 2021-NCSC-76

Held: Affirmed

- Facts: Two juveniles were adjudicated neglected based on circumstances created by mother’s untreated mental health and substance use issues and housing instability. Ultimately, DSS filed a TPR motion, which was granted on the grounds of neglect and failure to make reasonable progress. Mother appeals.
- The court made sufficient findings under G.S. 7B-1110(a) regarding the disposition and the TPR being in the children’s best interests. The findings were supported by competent evidence. Although mother argues the court erred by not making findings of the dispositional alternatives it considered, G.S. 7B-1110(a) does not require written findings of any dispositional alternatives the court considered.

Civil Case Related to Child Welfare

Paternity for Sperm Donor, Choice of Law

Warren County DSS ex rel Glenn v. Garrelts, 2021-NCCOA-275

Held: Reversed and remanded

- Facts: Defendant agreed to be a sperm donor for mother. The verbal contract was made and the artificial insemination occurred in Virginia where mother resided. Mother remained in Virginia and gave birth in Virginia in 2011. Mother was the only parent listed on the birth certificate. In 2019, Warren County DSS in NC filed a child support action alleging Defendant was the father. Defendant resided in NC. At the child support hearing, Defendant argued VA law applied, which states a sperm donor does not legally qualify as parent so no child support was owed. DSS argued NC law applies. The district court applied NC law and ordered that Defendant was the father and established current and past due child support. Defendant appealed.
- Issue: Choice of law between artificial insemination laws of Virginia and North Carolina in determining whether a sperm donor is a parent.
- The Full Faith and Credit doctrine is inapplicable because there was not an existing order from another state, Virginia. Instead, the court must apply a choice of law analysis because there are multiple states with conflicting substantive laws. Conflict of laws is a legal conclusion that requires a de novo review.

- Matters affecting substantial rights (e.g., causes of actions and damages) are determined by lex loci, the laws of the situs of the claim – the state where the cause of action accrued. Matters determining procedural rights (e.g., statute of limitations) are determined by lex foci, the law of the forum.
- Paternity law is substantive requiring the lex loci test because parenthood is a fundamental right that is protected by the legal system. Virginia was the situs of the claim – it was where the verbal contract, artificial insemination, pregnancy, and child’s birth occurred. Virginia is the state where “the last event necessary to make the actor liable” took place. Sl.Op. ¶15. This approach follows Illinois and Kansas decisions and ensures predictable and equitable results and prevents forum-shopping to a state that has the most favorable laws for paternity.