And Now a Two-Step: Eliminating Reunification as a Permanent Plan in an A/N/D Proceeding

Since this post was published, the NC General Assembly enacted S.L. 2019-33, effective Oct. 1, 2019. Amendments include removal of the words "remain" and "subsequent" in the statutes addressing permanency planning.

First came the cease reunification efforts shuffle resulting from 2015?2017 statutory changes to the NC Juvenile Code and published appellate decisions interpreting those changes (see my last blog post, here). And now, *In re C.P.*, ___ N.C. App. ___ (March 6, 2018) has created the elimination of reunification as a permanent plan two-step.

Permanency Planning and Reunification

The Juvenile Code recognizes that children who have been adjudicated abused, neglected, and/or dependent need safety, continuity, and permanence. G.S. 7B-100(3). The Juvenile Code also recognizes that children should not be unnecessarily or inappropriately separated from their parents, but when a child cannot be returned home, he or she should be placed in a safe, permanent home within a reasonable period of time. G.S. 7B-100(4), (5). When an abuse, neglect, or dependency proceeding is at the permanency planning stage, the Juvenile Code requires the trial court order concurrent permanent plans, with a primary and secondary plan identified, until a permanent plan has been achieved. G.S. 7B-906.2(a), (a1), (b). There are six possible permanent plans, one of which is reunification. G.S. 7B-906.2(a). Reunification is the child's placement in either parent's home (regardless of whether the child was removed from that home) or the home of the custodian or guardian from whom the child was removed by court order. G.S. 7B-101(18b); *see also* G.S. 7B-906.1(d)(3). Before the trial court can eliminate reunification as a primary or secondary plan, it must make statutory findings addressing reunification efforts. G.S. 7B-906.2(b); *see* G.S. 7B-901(c). Reunification is the only permanent plan that requires such findings. *See* G.S. 7B-906.2(b).

Ceasing Reunification Efforts Does Not Eliminate Reunification

In my last blog post, I introduced the "cease reunification efforts shuffle," which reviewed the timing of and some of the findings that are required for when a court may cease reunification efforts in an abuse, neglect, or dependency proceeding. An order ceasing reunification efforts does not automatically eliminate reunification as a permanent plan. For example, when the court, at initial disposition, orders that reunification efforts are not required, the court must schedule a permanency planning hearing within 30 days to address and order permanent plans. G.S. 7B-901(c), (d). Additionally, the court of appeals has recently published two opinions that distinguish the cessation of reunification efforts from the elimination of reunification as a permanent plan. *See In re C.P.,* ___ N.C. App. ___ (March 6, 2018); In re C.L.S.B., 803 S.E.2d 429 (2017) (originally unpublished but

subsequently published).

The Two-Step

In *In re C.P.*, the court of appeals establishes a two-step process at permanency planning for when reunification may be eliminated: (1) the first permanency planning hearing and (2) all subsequent permanency planning hearings. The opinion raises several unanswered questions, which are posed in this post. But first, the two-step.

Step One: The First Permanency Planning Hearing – Reunification Is Required

In *In re C.P*. the court of appeals addressed the mother's challenge to an adjudication, initial disposition, and permanency planning hearing. The court of appeals rejected mother's challenge that the trial court could not hold the adjudicatory, initial dispositional, and first permanency planning hearings on the same day after concluding the Juvenile Code does not forbid this practice. But, the court of appeals agreed with the mother that the trial court erred when it failed to order reunification as a concurrent plan during that *first* permanency planning hearing. The court of appeals held that that at the *initial* permanency planning hearing, the trial court must order reunification as a primary or secondary concurrent permanent plan. The reasoning for the holding is based on language in G.S. 7B-906.2(b) that states "*reunification shall remain* a primary or secondary plan . . . . [which] presupposes the existence of a prior concurrent plan which included reunification." (emphasis in original). Slip op. at 5. The opinion does not distinguish when an initial permanency planning hearing has been accelerated as a result of an initial dispositional order that ceases reunification efforts. Therefore, it appears the holding applies even when reunification efforts have been previously ceased.

But, reunification efforts may be ceased.

Even though reunification must be one of the two concurrent permanent plans ordered at this first permanency planning hearing, reunification efforts may be ceased so long as the required findings in G.S. 7B-906.2(b) have been made. *In re C.P.* (citing In re H.L., 807 S.E.2d 685 (2017) and the requirement that it follow the precedent established by the prior published opinion but noting its disagreement with that opinion and need for resolution through an en banc hearing or a decision by the NC Supreme Court; affirming the portion of the order ceasing reunification efforts; vacating portion of the order that failed to include reunification as a concurrent permanent plan). *Cf.* In re A.A.S., ___ N.C. App. ___, slip op. at 10 (March 20, 2018) (stating "during concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan").

When ceasing reunification efforts at a permanency planning hearing, other recent appellate opinions have held that findings under G.S. 7B-906.2(d) are also required. In re D.A., ___ N.C. App. ___ (March 6, 2018) (vacating and remanding permanency planning order eliminating

reunification efforts with mother for additional findings under G.S. 7B-906.2(d)); In re K.L., 802 S.E.2d 588 (2017) (vacating in part, reversing in part, and remanding permanency planning order eliminating reunification efforts for additional findings under G.S. 7B-906.2; discussing findings under G.S. 7B-906.1(d) & (e)).

Step Two: The Second or Subsequent Permanency Planning Hearing ? Reunification May Be Eliminated

The court may order the elimination of reunification as a plan at a second or subsequent permanency planning hearing. *See* G.S. 7B-906.2; *In re C.P*. If there was not a prior order ceasing reunification efforts, the court will need to make the required findings to cease reunification efforts before eliminating reunification as a permanent plan.

Unanswered Questions Arising from the Two-Step

1. When the trial court enters a permanency planning order with a primary and secondary plan identified, it must order DSS "to make efforts toward finalizing the primary and secondary permanent plans…." G.S. 7B-906.2(b). What efforts are required to achieve what is likely to be a secondary (versus primary) plan of reunification when DSS has been relieved of providing reunification efforts? For example, are efforts to arrange for visitation if visitation is ordered, maintain a case plan of conditions for the parent, and respond to a parent's communication (e.g., answer and return phone calls and/or emails) sufficient? Practically, does the burden of arranging for and obtaining services switch to the parent? *See* In re L.G.I., 227 N.C. App. 512, 516 (2013) (trial court order stated "the parents have an opportunity, without reunification efforts on the part of the Department, to work their case plan, remain drug free, comply with the terms and conditions of the Family Service Case Plan and demonstrate their ability, desire and commitment to provide proper care for their daughter").

2. When an order ceases reunification efforts (either at initial disposition or the initial permanency planning hearing) but cannot eliminate reunification as a permanent plan until the second permanency planning hearing, is the reunification plan really achievable? If not, is the purpose of concurrent planning defeated? Should that second permanency planning hearing be scheduled as soon as possible so that a different concurrent plan may be ordered? *See* G.S. 7B-906.1(b) (15 days' notice). If so, what is the impact on the juvenile court docket? If not, is there an impact on the child achieving a safe, permanent home within a reasonable period of time? *See* G.S. 7B-100(5); 7B-101(18); 7B-906.1(d)(3), (g).

3. When an order ceases reunification efforts before the second or subsequent permanency planning hearing, what findings about reunification efforts must the court make before eliminating reunification as a permanent plan? *See, e.g.*, G.S. 7B-906.1(d)(3); 7B-906.2(d). Practically, how can the court make any findings other than reunification efforts were not provided as they were previously ceased by court order?

4. Is the first permanency planning order that ceases reunification efforts but does not eliminate reunification an appealable order under G.S. 7B-1001(a)(5)? That statute identifies “an order entered under G.S. 7B-906.2(b)” but refers to a review of “the order eliminating reunification as a permanent plan” and does not reference the cessation of reasonable efforts. Does the parent have to wait to appeal the second or subsequent permanency planning order that eliminates reunification as a permanent plan? If not, does the parent have a right to appeal both the first permanency planning order that ceases reunification efforts and a subsequent permanency planning order that eliminates reunification as a permanent plan?

We will have to wait for these answers. In the meantime, what are your thoughts and questions on the eliminate reunification as a permanent plan two-step?