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.