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. the record reflected that the report was distributed to the parties and to the trial court, and the Court's opinion gives no indication that any party objected to the trial court relying on the report. Unlike in *J.H.* and *E.M.*, however, the state Supreme Court in *S.M.* held that a trial court cannot rely on evidence that was never admitted—even here, where presumably no party objected to the particular evidence, as the report was never offered or admitted, and the Court's opinion makes no reference in its discussion to any such objection. 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.

Also, 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 an 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.