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A Minor's Consent to Adoption: Where and in What Proceeding Is It Waived?

North Carolina adoption laws are codified in G.S. Chapter 48. I find it to be one of the more difficult Chapters to navigate because it consists of interrelated Articles and Parts. As you get familiar with the Chapter, the procedures and requirements become less challenging to piece together. It is imperative to know these procedures because "the law governing adoptions in North Carolina is wholly statutory." Boseman v. Jarrell, 364 N.C. 537, 542 (2010).

Under North Carolina adoption laws, before an adoption of an unemancipated minor may be granted, certain consents must be obtained. *See* G.S. 48-3-601 through -603. One required consent is from the minor adoptee if they are 12 years old or older. G.S. 48-3-601(1). However, that minor's consent may be waived when the court issues an order based upon a finding that it is not in the minor's best interests to require their consent. G.S. 48-3-603(b)(2).

What court has jurisdiction to enter the order waiving the minor adoptee's consent?

The question is circulating due to some recent North Carolina Supreme Court opinions involving appeals of termination of parental rights (TPR) orders. The facts of the opinions indicate the district court in the TPR action waived the juvenile's consent to the adoption. The issue of whether the district court in a TPR proceeding has subject matter jurisdiction to waive the juvenile's consent does not appear to have been raised before or decided by the Supreme Court. Instead, the minor's waiver of consent is discussed by the Supreme Court in its review of the facts when analyzing a challenge to the district court's determination that the TPR is in the juvenile's best interests. The factual summaries in the Supreme Court TPR opinions made me sit up in my chair, take notice, and ask the questions in this post.

Subject Matter Jurisdiction in an Adoption

An adoption is a special proceeding before the clerk of superior court. G.S. 48-2-100(a). The clerk decides all the matters in controversy to dispose of the adoption proceeding. G.S. 1-301.2(d). However, the clerk must transfer the special proceeding to the district court if an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk. G.S. 48-2-601(a1); 1-301.2(b) (raised in a written motion or pleading). When the special proceeding is transferred, the district court may (1) hear and decide all the matters in controversy (which in this case would be deciding whether to grant the adoption), or (2) if it appears to the court that justice would be more efficiently administered by the court disposing of only the matter leading to the transfer, the court may decide the issue(s) that resulted in the transfer and remand the remainder of the special proceeding to the clerk. G.S. 1-301.2(c). The only other time a district court has jurisdiction in an adoption proceeding is when the adoption is appealed – the appeal is a de novo hearing before the district court. G.S. 48-2-607(b); 1-301.2(e).

In some adoptions, there is a companion abuse, neglect, dependency (A/N/D) and/or TPR action before the district court. These are civil actions and are governed by G.S. Chapter 7B (the Juvenile Code). The adoption statute specifically contemplates the need for a TPR to be commenced by an adoption petitioner and authorizes the concurrent filing of an adoption petition and TPR petition. G.S. 48-2-302(c); *see also* G.S. 7B-1103(a)(7) (standing to initiate a TPR). When there is a companion A/N/D or TPR proceeding, "the district court having jurisdiction under Chapter 7B shall retain jurisdiction until the final order of adoption is entered[, but t]he district court may waive jurisdiction for good cause." G.S. 48-3-102(b). The statute addressing jurisdiction in a TPR action, G.S. 7B-1101, states, "… the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes."

In reading these statutes together, I have always interpreted them to mean that the district court has jurisdiction to continue with the A/N/D action until there is a final decree of adoption and that the adoption decree terminates the district court's jurisdiction in the A/N/D action. And, when there is a TPR action, the district court may exercise jurisdiction in the TPR while the adoption proceeding is pending. Although these various proceedings involve the same juvenile as the subject of each respective proceeding, these proceedings are occurring simultaneously but are different – the juvenile civil actions in district court are separate from the adoption proceeding that is initiated before the clerk as a special proceeding and may be transferred or appealed to district court.

Waiving the Minor's Consent

Under the relevant jurisdiction statutes, the clerk of superior court has the authority to waive the minor's consent. It is clear that when an adoption proceeding is transferred to the district court, the judge hearing the special proceeding (the adoption), has the authority to waive the minor's consent. Similarly, if there is an appeal of the adoption for a de novo hearing before the district court, the judge has the authority to waive the minor's consent.

But what about in the context of a TPR – does the district court have jurisdiction to waive the minor's consent to the adoption?

The statute governing the waiver of the minor adoptee's consent refers to "the court." G.S. 48-3-603(b)(2). Because the adoption proceeding is a separate special proceeding from any other proceeding or action, I have always interpreted "the court" to be the court presiding over the adoption proceeding. But, unlike the Juvenile Code, which defines "court", "court" is not defined in G.S. Chapter 48. *See* G.S. 7B-101(6); -1501(4) ("the district court division of the General Court of Justice"). Has my interpretation been too limited? Here is what the appellate courts have said on this issue.

The North Carolina Supreme Court has discussed the minor's waiver of consent in the context of a TPR appeal when there is a challenge that the district court abused its discretion when determining

the TPR is in the juvenile's best interests. At the TPR hearing, the district court considers several factors, including the likelihood of the juvenile's adoption and any other relevant factor. *See* G.S. 7B-1110(a). In several appeals, an argument about a juvenile, who is 12 or older, not wanting to consent to an adoption has been raised as a factor that should have been given greater weight than other factors because the juvenile's lack of consent impacts the likelihood of the child's adoption. Additional arguments are that the juvenile's express preference should be considered as is the case with any other relevant factor. The NC Supreme Court has addressed these arguments several times by looking to the adoption statutes that address a minor's consent. Because the adoption statutes allow for the minor's consent to be waived, the Supreme Court has determined a minor who does not consent is not necessarily a barrier to the proposed adoption. *See, e.g.,* In re A.J.T., 374 N.C. 504 (2020).

In three recent opinions involving an appeal of a TPR order, the Supreme Court has stated the *trial judge* could waive the consent of the minor. The Supreme Court said: "In addition, N.C.G.S. § 48-3-603(b) provides that a trial judge may dispense with the requirement that a child who is twelve years of age or older consent to an adoption 'upon a finding that it is not in the best interest of the minor to require the consent.' " *In re M.A.*, 374 N.C. 865, 880 (2020). In that opinion, the Supreme Court held that "[t]he trial court was not required to make findings and conclusions concerning the extent, if any, to which [the juveniles] were likely to consent to any adoption that might eventually be proposed. *In re M.A.*, 374 N.C. at 880. The Supreme Court further stated "a trial court may waive the minor's consent requirement 'upon a finding that it is not in the best interest of the minor to require the consent.' " *In re C.B.*, 375 N.C. 556, 562 (2020). After these two opinions, the Supreme Court decided *In re B.E.*, 375 N.C. 730 (2020). In that case, the district court judge hearing the TPR determined that it was in the minor's best interests to waive that minor's consent and ordered his consent be waived. In the appeal, it appears that the trial court's authority to waive the minor's consent under G.S. 48-3-603(b)(2) in the context of the TPR was not raised. The Supreme Court found there was no abuse of discretion by the trial court and stated, "[o]n their face, however, these findings evince the court's full awareness of the legal implications of [the juvenile's] opposition to being adopted and the court's determination that it was contrary to [his] best interests to require his consent to adoption. Given the waiver mechanism in N.C.G.S. § 48-3-603(b)(2), the evidence fully supports a finding that [the juvenile] is likely to be adopted." *In re B.E.*, 375 N.C. at ___ (2020).

Does This Mean the District Court in a TPR May Waive the Minor's Consent in the Adoption Proceeding?

I don't think so. The question was not presented to the Supreme Court, so it has not been resolved either way. In an unpublished opinion, the North Carolina Court of Appeals discussed the issue. In *In re A.L.M.*, 269 N.C. App. 323 (2019) (unpublished), the Court of Appeals addressed the relevant adoption statutes regarding the minor's consent. It recognized the matter before the district court was a TPR and not an adoption proceeding and stated, "there was more than enough evidence to show that even if the two children objected to the adoption plan, those concerns would be

addressed at the adoption hearing under Chapter 48." *In re A.L.M.*, 268 N.C. App. at ___. Although the opinion addresses the question, it is unpublished.

There is no authority in the Juvenile Code that authorizes the district court to waive a juvenile's consent to adoption. The jurisdiction of the clerk to hear adoption proceedings is explicitly stated in G.S. 7B-1101 – the jurisdiction statute applying to TPRs. At the TPR adjudicatory hearing, the district court adjudicates the existence or nonexistence of the grounds alleged in the TPR petition or motion. G.S. 7B-1109(e). At the dispositional hearing in a TPR, the district court determines whether the TPR is in the juvenile's best interests. G.S. 7B-1110(a). A TPR order completely and permanently severs the rights and obligations of a parent to the child and the child to parent, except for the child's rights to inherit (that right terminates upon the entry of a final decree of adoption). G.S. 7B-1112. The district court may address the child's custody under G.S. 7B-1112. The district court may assign costs to a party. G.S. 7B-1110(e). The court's authority in the TPR order appears to be limited by these provisions. There is no reference to the juvenile's consent in an adoption proceeding in the statutes governing a TPR.

Instead, the adoption statutes govern the minor's consent and the court's authority to waive that consent. As both our appellate courts have repeatedly held, the court's subject matter jurisdiction to act in a case is statutory and is invoked by a proper pleading. *See, e.g., Boseman v. Jarrell*, 364 N.C. 537. To act under the provisions of G.S. 48-3-603(b)(2), it reasons that a petition for adoption under G.S. Chapter 48, which is a special proceeding, heard by the clerk of superior court (with limited transfer to the district court or an appeal to district court) is required. A TPR petition or motion does not invoke the jurisdiction of the district court to make required findings and enter orders for an adoption proceeding. As such, I believe the district court, in a TPR action, lacks subject matter jurisdiction to waive a juvenile's consent to an adoption.

Additionally, practical concerns arise when a district court in a TPR action enters an order waiving a minor's consent for a separate adoption proceeding that is heard before the clerk. For example, a TPR may be ordered before any adoption petition is filed. There is no time limit for when a prospective adoptive parent must file an adoption petition. A significant period of time could pass between the entry of the TPR order and the filing of the adoption petition. Circumstances may very well change during that period such that any prior waiver of the minor's consent would no longer be in the minor's best interests. In addition, there could be circumstances that the district court is unaware of. What if there were competing adoption petitions filed before the clerk of superior court? By waiving the minor's consent, the prospective adoptee will not have input on which placement is in their best interests. It is also possible that the adoption will be denied, based on the clerk determining it is not in the minor adoptee's best interests. A court may decide this after considering the report to the court that the clerk orders (*see* G.S. 48-2-501 through -504) or evidence from witnesses who did not appear in the TPR about the minor's best interests (*see* G.S. 48-2-405).

Until the issue is decided by our appellate courts, I'll have to wait to see if my reasoning is correct.