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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-593

Filed: 18 December 2018

Iredell County, Nos. 17 JA 117-19, 17 JT 117-19

IN THE MATTER OF: R.L.O., L.P.O., C.M.O.

Appeal by respondents from orders entered 5 April 2018 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 29 November 2018.

Lauren Vaughan, for petitioner-appellee Iredell County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for petitioner-appellee guardian ad litem.

Robert W. Ewing, for respondent-appellant mother.

Christopher M. Watford, for respondent-appellant father.

CALABRIA, Judge.

Respondent-mother and respondent-father (collectively "respondents") appeal from orders adjudicating their children, "Ron,"[1] "Larry," and "Cathy" ("the children"),

[1] We use pseudonyms to protect identities of the juveniles and for ease of reading. *See* N.C. R. App. P. 3.1(b).

to be neglected and dependent juveniles, adjudicating the existence of grounds to terminate respondents' parental rights, and terminating respondents' parental rights. After careful review, we affirm in part, reverse in part, vacate in part and remand the orders for further proceedings.

I. Factual and Procedural History

Ron was born in 2015; Larry was born in 2016; and Cathy was born in 2017. Respondent-father is identified as the children's father on each of their birth certificates. Although respondents are not married, they lived in a domestic relationship with their children prior to these proceedings.

Respondent-father is also the biological father of the children's half-sister "Denise," who was born in June 2014. In January 2017, Denise came to reside with respondents from her mother's home in Catawba County, North Carolina, after being abused by her mother's boyfriend. Respondent-father entered into a case plan with Catawba County Department of Social Services ("CCDSS") on 19 January 2017 and received parenting education on safe and effective disciplinary techniques.

Denise was adjudicated an abused and neglected juvenile in Catawba County District Court by order entered 14 March 2017. The trial court placed Denise in respondent-father's custody and ordered him to cooperate with CCDSS and comply with a case plan that included "therapy sessions to discuss and assess his knowledge

and ability to properly parent a child who has previously received severe inappropriate discipline[.]"

Respondent-mother was treated for postpartum depression after Cathy's birth in March 2017. In April 2017, Denise reported that a bruise on her face had been inflicted by respondent-mother. When Iredell County Department of Social Services ("DSS") investigated the incident, respondent-mother acknowledged she had stopped taking her postpartum depression medication. The Catawba County District Court maintained Denise in respondent-father's custody but ordered him to "ensure that [Denise] is cared for and supervised only by individuals approved by [CCDSS]" and "that [respondent-mother] shall not be unsupervised or alone with [Denise] until further notice by the Department[.]"

On 1 July 2017, DSS received a report that Denise had been admitted to the emergency department at Davis Regional Medical Center with seizures, severe burns, and other injuries. Denise was intubated and transferred in critical condition to the pediatric intensive care unit ("PICU") at Wake Forest Baptist Medical Center where she was diagnosed with, *inter alia*, full thickness third-degree burns to both of her feet and ankles. She remained hospitalized until 14 July 2017.

An investigation revealed that respondent-mother was at home alone with her children and Denise on 1 July 2017 when Denise went into seizure. Respondent-mother walked with Denise up the road from their residence, waved down a passing

motorist, and left the child by the side of the road with the motorist, who called 911. Respondent-mother returned to the residence where the other children had been left unattended. EMS personnel found Denise at the roadside unresponsive and coughing up blood.

Doctors determined that Denise's seizures were caused by low sodium induced by the forced over-consumption of water. She was severely malnourished and had multiple bruises to her head, chest, abdomen, back, and her genital and rectal areas, which were suggestive of abuse. An initial CT scan revealed a possible skull fracture. However, a subsequent bone survey and MRI disclosed no evidence of fracture or intracranial bleeding. A sexual assault nurse examiner's ("SANE") exam disclosed no evidence of sexual abuse.

Denise's feet and ankles were burned in a circumferential, sock-like formation that spared the bottoms of her feet. The pattern and severity of the burns suggested an intentional injury inflicted by forcibly immersing the child's feet into a hot liquid. At the time Denise was admitted to the hospital, her burns were "at least a few days old" and had been wrapped in paper towels that had dried onto the wounds. On 7 July 2017, doctors successfully performed a tangential excision of the burns and grafted skin from Denise's buttocks and hips onto the affected areas.

When DSS and law enforcement responded to respondents' residence on 1 July 2017, they found two-year-old Ron, sixteen-month-old Larry, and four-month-old Cathy living in conditions that were described by the trial court as follows:[2]

> h. [The children] presented on July 1, 2017 extremely dirty. There was dirt in the creases in their legs, armpits, neck, and arms. They had ants in their hair and mouse feces in their diapers. They had bug bites on them, especially on their feet. They had severe diaper rash, with open sores on their genital areas . . . . When nurses checked their diapers, they found the diapers had not been changed in a long period of time . . . .
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> i. The residence in which the children resided with Respondent Parents was uninhabitable. It was full of trash, and personal belongings were strewn about, making it difficult to walk inside. The residence was infested with roaches and ants. The [children] were suffering from numerous insect bites.
>
> j. The bed upon which [Larry] slept was crawling with ants and roaches when law enforcement and social workers searched the home. [Larry] was in the bed with the roaches and ants when officials arrived in the home . . . . The home smelled of human feces. Respondent Parents confirmed that [Cathy] had never had a bath, despite the fact that it was July and she had been born in March . . . .

Larry also had a mark on his arm that appeared to be a human bite mark.

DSS obtained non-secure custody of the children on 2 July 2017 and filed juvenile petitions the following day alleging neglect and dependency. An adjudicatory

[2] Because respondents have not challenged any of the quoted findings that ensue, they are binding for purposes of our review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

hearing was initially scheduled for 2 August 2017 but was continued to 4 October 2017.

On 4 October 2017, the guardian *ad litem* ("GAL") appointed to represent the children in the juvenile neglect and dependency proceeding filed a petition to terminate respondents' parental rights. The trial court continued the neglect and dependency hearing and consolidated the two proceedings pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 42(a) and 7B-1102(c) (2017).

The trial court held the consolidated hearing on 11-12 January 2018 and 8 February 2018 and entered the resulting orders on 5 April 2018. At the time of the hearing, both respondents were being held in Iredell County Jail on felony child abuse charges.

In its "Juvenile Pre-Adjudication Hearing and Adjudication Order" ("Juvenile Adjudication Order"), the trial court adjudicated the children neglected and dependent juveniles as alleged by DSS in the petitions filed on 3 July 2017. The court concluded that entry of a disposition related to the adjudications of neglect and dependency was "moot, given the entry of an Order which terminates the parental rights of the parents to each of these minor children."

By separate "Judgment and Order of Pretrial Hearing and Adjudication in Termination of Parental Rights Proceeding" ("TPR Adjudication Order"), the trial court adjudicated the existence of grounds to terminate respondents' parental rights

for abusing and neglecting the children under N.C. Gen. Stat. § 7B-1111(a)(1) and for committing a felony assault resulting in serious bodily injury to another child residing in the home—*i.e.*, Denise—under N.C. Gen. Stat. § 7B-1111(a)(8). The court also entered a "Judgment and Order of Disposition in Termination of Parental Rights Proceeding" ("TPR Disposition Order") in which it determined that the children's best interests would be served by terminating respondents' parental rights. Pursuant to N.C. Gen. Stat. § 7B-908(b), the court scheduled a "Post-Termination of Parental Rights Placement Review Hearing" for 22 August 2018. Respondents filed timely notices of appeal from the trial court's orders.

As an initial matter, we note that a juvenile abuse, neglect, or dependency ("A/N/D") proceeding and proceeding for termination of parental rights ("TPR") each consist of an adjudicatory stage followed by a dispositional stage.[3] *See* N.C. Gen. Stat. §§ 7B-802, -901, -1109, -1110 (2017); *In re R.B.B.*, 187 N.C. App. at 642-43, 654 S.E.2d at 517-18. An A/N/D adjudication under Article 8 of the Juvenile Code or an adjudication of grounds for TPR under Article 11 is a prerequisite to the entry of a disposition under Article 9 or Article 11 respectively. *See* N.C. Gen. Stat. §§ 7B-807(a), -905, -1109(e), -1110 (2017). Therefore, we review respondents' arguments

[3] The adjudicatory and dispositional hearings may be combined and need not occur sequentially, so long as the court applies the appropriate legal and proof standards at each stage of the proceeding. *See In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004); *see also In re R.B.B.*, 187 N.C. App. 639, 644, 654 S.E.2d 514, 518 (2007), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008) (concluding that "a two-stage termination hearing may also be held concurrently with an [N.C. Gen. Stat.] § 7B-802 adjudicatory hearing on an abuse, neglect, or dependency petition").

related to the trial court's adjudications before addressing their arguments related to disposition. Because respondent-mother and respondent-father have filed separate appellant's briefs with distinct claims for relief, we address their appeals separately.

We further note that neither respondent has challenged the children's adjudications as neglected and dependent juveniles. We therefore affirm this portion of the Juvenile Adjudication Order as to both respondents.

II. Respondent-Mother's Appeal

Respondent-mother challenges each of the trial court's three grounds for terminating her parental rights under N.C. Gen. Stat. § 7B-1111(a). In addressing these claims:

> [W]e review whether there is an evidentiary support for the trial court's findings and whether the trial court's conclusions are supported by its findings. The trial court's findings must be based upon clear, cogent and convincing evidence. A trial court only needs to find one statutory ground for termination before proceeding to the dispositional phase of the hearing.

In re R.B.B., 187 N.C. App. at 647, 654 S.E.2d at 520 (citations omitted). If this Court "determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003) (citation omitted).

A. Adjudication Under N.C. Gen. Stat. § 7B-1111(a)

Among the three statutory grounds adjudicated by the trial court is N.C. Gen. Stat. § 7B-1111(a)(8), under which parental rights may be terminated if "[t]he parent . . . has committed a felony assault that results in serious bodily injury to the child, another child of the parent, *or other child residing in the home*[.]" *Id.* (emphasis added). The trial court determined that both "Respondent Mother and Respondent Father have committed a felony assault that resulted in serious bodily injury to another child, [Denise], who was residing in the home of the [children] and the Respondent Parents."

Respondent-mother argues that the trial court's findings of fact are insufficient to support its adjudication under N.C. Gen. Stat. § 7B-1111(a)(8). She concedes "[t]he trial court made numerous findings of fact providing that [Denise] was a victim of a felony assault in which she sustained serious bodily injury." However, she contends the trial court failed to make "any findings of fact regarding who was the perpetrator of the abuse."

We find no merit to respondent-mother's claim. Finding of fact 12 in the TPR Adjudication Order expressly states that "Respondent Mother . . . [has] committed a felony assault that resulted in serious bodily injury to" Denise.

Respondent-mother asserts that Finding 12 is a conclusion of law rather than a finding of fact, arguing that "[a]lthough the trial court *concluded* that [respondent-mother] has committed a felony assault, the trial court's findings of fact fail to

establish that [she] was in fact the perpetrator of the offense." (emphasis added). It is true that the trial court's designation of a statement as a finding of fact or a conclusion of law is not binding on this Court, where the designation is erroneous. *See Rockwell v. Rockwell*, 77 N.C. App. 381, 383, 335 S.E.2d 200, 202 (1985) ("A finding which is designated as a finding of fact, but in character is essentially a conclusion of law, will be treated as a conclusion of law on appeal, and is reviewable *de novo* upon appeal." (citations omitted)), *cert. denied*, 316 N.C. 195, 341 S.E.2d 578 (1986). However, the identity of the perpetrator of a particular act – such as an assault – is a question of fact. *See, e.g.*, *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971) ("The conflict between the testimony of the victim of the robbery, identifying the defendant as one of the perpetrators of the offense, and the testimony of the defendant, designed to establish an alibi, merely raises a question of fact for the jury."). Respondent-mother's suggestion that the court failed to find who had committed the felonious assault upon Denise is thus directly contradicted by Finding 12.

Perhaps anticipating our conclusion that Finding 12 is, in fact, a finding with regard to the identity of the perpetrator of the assault upon Denise, respondent-mother also "assigns error to this finding." The trial court made additional unchallenged findings that respondent-mother was "the unsupervised primary caregiver of the children" and that she "gave various versions of how [Denise] received

her burns, none of which were consistent with the medical evidence." These uncontested findings are binding for purposes of our review. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

" '[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries.' " *State v. Wilson*, 181 N.C. App. 540, 543, 640 S.E.2d 403, 406 (2007) (quoting *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120-21 (2003)). Moreover, respondent-mother's implausible and evolving explanations for Denise's injuries constitute circumstantial evidence of her responsibility therefor. *See State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E.2d 322, 326 (1957) (concluding that defendant's "conflicting statements voluntarily made at the scene of the homicide, tend to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate herself"). We also note that hospital records admitted into evidence state that when a nurse asked Denise what happened to her feet, she replied, "Mommy . . . [b]urn me." Denise's foster father reported similar statements made by Denise in her sleep. Respondent-mother's exception to the court's finding, and to the adjudication under N.C. Gen. Stat. § 7B-1111(a)(8), is overruled.

Having upheld one of the trial court's grounds for terminating respondent-mother's parental rights found by the trial court, we need not review her arguments

regarding the additional grounds of abuse and neglect under N.C. Gen. Stat. § 7B-1111(a)(1). *See In re Clark*, 159 N.C. App. at 78 n.3, 582 S.E.2d at 659 n.3.

B. Disposition Under Article 9

Respondent-mother next claims the trial court erred by entering a disposition in the TPR proceeding under N.C. Gen. Stat. § 7B-1110(a) without first entering a disposition relating to the children's adjudications of neglect and dependency in accordance with N.C. Gen. Stat. §§ 7B-901, -903, and -905 (2017). She asserts the court was statutorily mandated to enter a disposition containing "an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." *See* N.C. Gen. Stat. § 7B-900 (2017).

In failing to "make a determination and findings of fact concerning the needs of the children in order to design an appropriate plan for [them] as required by N.C. Gen. Stat. §§ 7B-900 [and -]901[,]" respondent-mother argues, "the court was not in a position to make any appropriate disposition for the children including termination of parental rights." Moreover, she contends, the court's failure to enter a disposition in the neglect and dependency proceeding undermined "the objectives of the State in exercising jurisdiction[,]" including the objective of giving preference to relatives of the child when placing the child outside of the parents' home. *See* N.C. Gen. Stat. §§ 7B-900, -903(a1).

The trial court purported to hold dispositional hearings "concurrently" for the juvenile neglect and dependency proceeding and the termination of parental rights proceeding. In its Juvenile Adjudication Order, however, the court concluded "[t]hat Disposition in this matter is moot, given the entry of an Order which terminates the parental rights of the parents to each of these minor children."

The consolidation for hearing of a juvenile A/N/D proceeding with a TPR proceeding is atypical and thus rarely encountered in our case law. *See In re R.B.B.*, 187 N.C. App. at 643-45, 654 S.E.2d at 518-19; *see also In re T.E.S.*, 203 N.C. App. 572, 692 S.E.2d 890 (unpublished), *disc. review denied*, 364 N.C. 326, 701 S.E.2d 680 (2010). The Juvenile Code provides that "[w]hen a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court . . . may consolidate the action pursuant to G.S. 1A-1, Rule 42." N.C. Gen. Stat. § 7B-1102(c) (2017). Under Rule 42, "when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions[.]" N.C. Gen. Stat. § 1A-1, Rule 42(a). Here, the juvenile neglect and dependency proceeding initiated by DSS was pending when the children's GAL filed the petition for termination of respondents' parental rights.

After an A/N/D adjudication under Article 8, Article 9 provides that the trial court shall complete a dispositional hearing within thirty days of the adjudicatory hearing and enter a written dispositional order within thirty days thereafter. N.C. Gen. Stat. §§ 7B-901(a), -905(a). The purpose of the initial disposition "is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C. Gen. Stat. § 7B-900. Section 7B-903 prescribes the alternatives available to the court in tailoring a disposition that it finds "to be in the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-903(a). The statute authorizes the court to assess the juvenile's physical, mental, and developmental needs and to order the arrangement of any necessary treatment or services to meet these needs. N.C. Gen. Stat. § 7B-903(b), (d)-(e); *see also* N.C. Gen. Stat. § 7B-901(a).

Article 9 also expresses a legislative policy favoring preservation of the family unit, stating that, "[i]f possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile." N.C. Gen. Stat. § 7B-900; *see also* N.C. Gen. Stat. § 7B-100(2)-(4) (2017). To that end, Article 9 imposes additional requirements when the court establishes or continues an out-of-home placement for the juvenile as part of a disposition. *Inter alia*, the court must make a finding that returning to the home would be contrary to the juvenile's welfare. N.C. Gen. Stat. § 7B-903(a2). The court

must also "provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a). Further, when ordering an out-of-home placement, the court must "first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home" and must place the juvenile with such relative "unless the court finds that the placement is contrary to the best interests of the juvenile." N.C. Gen. Stat. § 7B-903(a1).

Finally, when a juvenile is placed in the custody of a department of social services, Article 9 contemplates the court mandating the agency to undertake "reasonable efforts for reunification" with the parents, in the absence of certain written findings prescribed by statute. N.C. Gen. Stat. § 7B-901(c)(1)-(3); *see also* N.C. Gen. Stat. §§ 7B-101(18), -903(a3), -906.1(d)(1), (3), -906.2(b) (2017); *In re J.M.*, __ N.C. App. __, __, 804 S.E.2d 830, 841 (2017), *disc. review improvidently allowed*, 371 N.C. 132, 813 S.E.2d 847 (2018).

Article 11 of the Juvenile Code, which governs TPR proceedings, expresses a legislative policy "recogniz[ing] the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with [their] parents." N.C. Gen. Stat. § 7B-1100(2) (2017). It allows the court to terminate the parents' legal relationship with a juvenile "when the parents have demonstrated that

they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile." N.C. Gen. Stat. § 7B-1100(1). Article 11 articulates the additional legislative policy that "[a]ction which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents . . . are in conflict." N.C. Gen. Stat. § 7B-1100(3); *see also* N.C. Gen. Stat. § 7B-100(5) (articulating the Juvenile Code's purpose of "ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time").

Consistent with this policy and after consideration of the parents' constitutional rights, our Supreme Court has repeatedly identified the child's best interests as "the 'polar star' of the North Carolina Juvenile Code." *In re T.H.T.*, 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008) (quoting *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984)).

Under Article 11, after the trial court adjudicates the existence of one or more grounds for TPR, "the court proceeds to the dispositional phase to determine whether the termination of parental rights is in the best interests of the juvenile." *In re C.I.M.*, 214 N.C. App. 342, 347, 715 S.E.2d 247, 251 (2011) (citations omitted). The dispositional order must be entered within thirty days of completion of the

termination hearing. N.C. Gen. Stat. § 7B-1110(a). If the court concludes that termination is in the child's best interests, the court must order that the parent's rights be terminated. *Cf. In re C.I.M.*, 214 N.C. App. at 349, 715 S.E.2d at 252 (explaining that the 2005 amendment to N.C. Gen. Stat. § 7B-1110 "simply directed trial courts, after finding that 'one or more grounds for terminating a parent's rights exist,' to 'determine whether terminating the parent's rights is in the juvenile's best interest' in light of the 'consider[ations]' set out in section (a) of the statute" (alteration in original) (citations omitted)).

If the trial court concludes to terminate parental rights under Article 11, the disposition is limited to the termination. *See* N.C. Gen. Stat. § 7B-1110(a); *see also* N.C. Gen. Stat. § 7B-1112. Section 7B-1110 does not contemplate an assessment of the juvenile's needs or the ordering of treatment or services for the juvenile as part of a termination order. If both parents' rights are terminated, the court must hold a placement review hearing within six months of the termination hearing in order to establish a permanent placement plan for the juvenile. N.C. Gen. Stat. § 7B-908(a)-(b) (2017). Such hearings are then held every six months until the juvenile is adopted. *Id*.

The legal effect of an Article 11 TPR is as follows:

> An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the

> juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued. The parent is not thereafter entitled to notice of proceedings to adopt the juvenile and may not object thereto or otherwise participate therein[.]

N.C. Gen. Stat. § 7B-1112.

Where the trial court consolidates A/N/D and TPR proceedings pursuant to N.C. Gen. Stat. § 7B-1102 and Rule 42(a), there is tension between the mandates and dispositional requirements of Article 9 and the effect of an Article 11 TPR order. The complete and permanent termination of parents' rights described in N.C. Gen. Stat. § 7B-1112 is inconsistent with the constitutional and statutory rights otherwise enjoyed by parents under N.C. Gen. Stat. §§ 7B-901 and -903, including the right to reasonable reunification efforts and the statutory preference afforded to out-of-home placements with a relative. A trial court that attempts to consolidate these proceedings pursuant to N.C. Gen. Stat. § 7B-1102 and Rule 42(a) and purports to conduct them "concurrently" would appear to be unable to satisfy the requirements of Article 9, while simultaneously terminating parental rights under N.C. Gen. Stat. § 7B-1110(a).

Furthermore, unlike an Article 9 dispositional order, a TPR order under N.C. Gen. Stat. § 7B-1110(a) does not account for the affected juvenile's needs. Therefore, when a juvenile is adjudicated as abused, neglected, or dependent under Article 8, the court's statutory duty to enter an appropriate disposition under Article 9 is not

obviated by the entry of a termination order under Article 11 as part of a consolidated proceeding.

In *In re R.B.B.*, the respondent-parent argued on appeal that the trial court erred by, *inter alia*, "simultaneously conducting all adjudicatory and dispositional hearings related to both the abuse and neglect petition and the termination of parental rights petition" and "failing to pursue a separate disposition other than termination of parental rights[.]" 187 N.C. App. at 642, 654 S.E.2d at 517. With regard to the trial court's failure to enter a separate disposition under Article 9, this Court stated:

> Respondent argue[d] that if a trial court consolidates an abuse, neglect, or dependency adjudication with termination proceedings, then DSS is not required to attempt reunification efforts, thereby sending "a signal that DSS does not need the trial court's permission in establishing a permanent plan of care prior to deciding unilaterally to seek a case plan of termination of parental rights."

Id. at 644, 654 S.E.2d at 518. This Court was unpersuaded by the respondent's argument, inasmuch as the trial court had previously ceased reunification efforts after placing the child in non-secure custody, pursuant to a provision in former N.C. Gen. Stat. § 7B-507(b) (repealed effective Oct. 1, 2015).[4] This Court explained that

[4] Before it was repealed by N.C. Session Laws 2015-136, § 7, N.C. Gen. Stat. § 7B-507(b) provided as follows:

> In any order placing a juvenile in the custody or placement

"[i]n cases (such as this) where the trial court has found that reunification efforts would be dangerous or futile under [N.C. Gen. Stat.] § 7B-507(b), the [J]uvenile [C]ode presents no obstacle to simultaneous hearings on an abuse, neglect, and dependency petition and a termination of parental rights petition." *Id.*

Our opinion in *In re R.B.B.* gives no indication that the respondent claimed an Article 9 disposition was required in order to address the juvenile's needs under N.C. Gen. Stat. § 7B-903(d)-(e) or to give preference to an available relative placement under N.C. Gen. Stat. § 7B-903(a1). Therefore, we did not address these issues.

In the case of *In re T.E.S.*, the respondent-father did challenge the trial court's failure to comply with certain dispositional requirements under Article 9 in a consolidated proceeding resulting in the termination of parental rights. 203 N.C. App. 572, 692 S.E.2d 890 (2010) (unpublished). While ultimately concluding the trial court had complied with Article 9,[5] this Court noted as follows:

> responsibility of a county department of social services, whether *an order for continued nonsecure custody*, *a dispositional order*, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> > (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2013) (emphasis added).

[5] As in *In re R.B.B.*, we relied on the trial court's ceasing of reunification efforts under former N.C. Gen. Stat. § 7B-507(b) in concluding the court was not required "to establish a reunification plan with respondent-father" under Article 9. *Id.* at 572, 692 S.E.2d at 890.

> *As DSS and the guardian ad litem suggest, the termination of parental rights proceedings would seem to obviate the need for consideration of dispositional alternatives under N.C. Gen. Stat. § 7B-903.* Nonetheless, we assume *arguendo* that the trial court was required to consider any applicable options under N.C. Gen. Stat. § 7B-903.

Id. (emphasis added). As an unpublished opinion, *In re T.E.S.* has no precedential value. *See* N.C. R. App. P. 30(e). Even so, it represents the only case we have found other than *In re R.B.B.* addressing the issues that arise from the consolidation of proceedings under N.C. Gen. Stat. § 7B-1102.

The repeal of N.C. Gen. Stat. § 7B-507(b) eliminated the trial court's authority to cease reunification efforts before the initial dispositional hearing under N.C. Gen. Stat. § 7B-901. Because this authority was central to our reasoning in *In re R.B.B.*, the continued currency of our holding in that case is unclear.

We find the case *sub judice* materially distinguishable from *In re R.B.B.* While DSS filed both the initial juvenile neglect petition and the motion to terminate parental rights in *In re R.B.B.*, the TPR petition in this case was filed by the children's court-appointed GAL. The respondent's argument in *In re R.B.B.*—that DSS was pursuing termination via the consolidation mechanism in N.C. Gen. Stat. § 7B-1102 in order to avoid its duty to undertake reasonable reunification efforts under Article 9—does not appear germane here. We find it noteworthy that the Juvenile Code explicitly authorizes a GAL appointed in an A/N/D proceeding to initiate termination proceedings. *See* N.C. Gen. Stat. § 7B-1103(a)(6) (2017).

Moreover, this Court has characterized a TPR proceeding as distinct from, and independent of, a related A/N/D proceeding. In *In re Faircloth*, we held that "[a]n adjudicatory hearing on abuse and neglect allegations is not a condition precedent to a termination hearing. In fact, N.C. Gen. Stat. § 7B-1111 provides grounds for terminating parental rights which are not conditioned on a determination that a child is abused or neglected." 153 N.C. App. at 571, 571 S.E.2d at 69 (citation omitted). As contemplated by *In re Faircloth*, the termination of respondent-mother's parental rights to her children under N.C. Gen. Stat. § 7B-1111(a)(8) based on her felonious assault of Denise is not conditioned on her children's status as neglected or dependent juveniles.

We hold the trial court's failure to enter an initial disposition under Article 9 after adjudicating the children to be neglected and dependent does not *per se* invalidate the TPR disposition order entered under Article 11 in accordance with N.C. Gen. Stat. § 7B-1110(a) under the specific facts of this case. As established in *In re Faircloth*, the adjudication of grounds for terminating respondent-mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(8) in the Article 11 proceeding initiated by the GAL was independent of the Article 8 adjudication of neglect and dependency entered in the proceeding initiated by DSS.[6]

[6] We note that the factual predicate for terminating parental rights under N.C. Gen. Stat. § 7B-1111(a)(8) also constitutes grounds for forgoing reunification efforts in an initial Article 9 disposition under N.C. Gen. Stat. § 7B-901(c).

However, we agree with respondent-mother that the trial court erred in concluding that the Article 9 dispositional proceeding was rendered entirely "moot" by its decision to terminate parental rights under Article 11. Rather, we hold the court was required to enter an appropriate Article 9 disposition in the best interests of the children as provided by N.C. Gen. Stat. § 7B-901(a), but without regard to the now-terminated parental rights of respondent-mother.[7] Only those provisions in Article 9 that address the parental relationship severed by the court's disposition under N.C. Gen. Stat. § 7B-1110(a), such as the priority given to relative placements under N.C. Gen. Stat. § 7B-903, are mooted by the Article 11 proceeding. We reverse the Juvenile Adjudication Order in pertinent part and remand to the trial court for entry of an appropriate Article 9 disposition which takes into account the complete and permanent termination of respondent-mother's parental rights and her status as a non-party to the proceeding. *See* N.C. Gen. Stat. § 7B-1112.

III. Respondent-Father's Appeal

A. Adjudication Under N.C. Gen. Stat. § 7B-1111(a)

Respondent-father first claims the trial court erred in adjudicating grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(8). As previously noted, the court found that "Respondent Mother and Respondent Father have committed a felony assault that resulted in serious bodily injury to another child, [Denise], who was

[7] We assume *arguendo* that respondent-mother has standing to raise this claim of error on appeal.

residing in the home of the [children] and the Respondent Parents." Respondent-father concedes the burns suffered by Denise constitute a "serious bodily injury"[8] for purposes of the statute. *See* N.C. Gen. Stat. §§ 14-32.4(a); 14-318.4(a3), (d)(1) (2017) (defining "[s]erious bodily injury" for felony assault and child abuse offenses). He insists, however, that petitioners adduced no evidence to support a finding that he had committed a felonious assault inflicting the burns on Denise. To the contrary, the evidence tended to show that respondent-mother "admitted that she caused the injuries to Denise and that the injury occurred at a time when respondent-father . . . was not at home."

We find merit in respondent-father's claim. Although a parent is deemed to have "abused" his child if he either "[i]nflicts or allows to be inflicted . . . a serious physical injury by other than accidental means[,]"an adjudication under N.C. Gen. Stat. § 7B-1111(a)(8) requires proof by clear and convincing evidence that the parent "*has committed* a felony assault that results in serious bodily injury to . . . another child of the parent, or other child residing in the home[.]" N.C. Gen. Stat. §§ 7B-101(1)(a), -1111(a)(8) (emphasis added). The parent must thus personally commit

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[8] Serious bodily injury.--Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-318.4(d)(1) (2017); *accord* N.C. Gen. Stat. § 14-32.4(a) (2017).

"(1) an intentional assault on [the child] (2) resulting in serious bodily injury." *State v. Williams*, 154 N.C. App. 176, 180, 571 S.E.2d 619, 622 (2002); *see also Wilson,* 181 N.C. App. at 543, 640 S.E.2d at 405-06 ("In order to prove felonious child abuse inflicting serious bodily injury, the State must prove . . . the defendant intentionally and without justification or excuse inflicted serious bodily injury." (citation omitted)). An "assault" is defined, in pertinent part, as "an overt act or an attempt . . . to do some immediate physical injury to the person of another[.]" *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citations and internal quotation marks omitted).

We find no evidence that respondent-father intentionally inflicted Denise's burns, whether individually or while acting in concert with respondent-mother. In their statements to investigators, both respondents portrayed the burns as occurring when Denise was in the exclusive care of respondent-mother. Denise's statements, as reported by a nurse and by her foster parents, also point to respondent-mother as the sole source of her burns. While petitioners' evidence is sufficient to inculpate respondent-father for failing to obtain necessary medical treatment for his daughter and for leaving her in respondent-mother's care in violation of his safety plan, these serious failings do not constitute grounds for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(8).

Arguing in support of the adjudication, DSS points to the trial court's findings which show Denise "suffered extensive injuries all over her body which were the

result of multiple assaults of various kinds . . . when [she] was in the care of both respondent parents, making each of them culpable for causing *or allowing* the assaults to occur." (emphasis added). While undisputed that Denise suffered bruising and other wounds across her head and body, none of these injuries approach the severity required for a serious bodily injury under N.C. Gen. Stat. §§ 14-32.4(a), -318.4(d)(1). Nor does DSS cite any evidence that respondent-father inflicted any of these injuries. We agree that respondent-father is responsible for Denise's condition for purposes of an adjudication of abuse or neglect. *See, e.g.*, *In re Y.Y.E.T.*, 205 N.C. App. 120, 128-29, 695 S.E.2d 517, 522-23, *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010). However, more is required for an adjudication under N.C. Gen. Stat. § 7B-1111(a)(8).

Although the issue is not raised by petitioners, we note that respondent-father, like respondent-mother, invoked his Fifth Amendment privilege against self-incrimination when questioned about Denise's injuries at the hearing. However, the tenor of petitioners' questioning was respondent-father's culpability for leaving Denise in the unsupervised care of respondent-mother and for failing to obtain medical care for his injured child, as follows:

> Q Why did you not take [Denise] to the hospital regarding the burns?
>
> A I plead the Fifth.
>
> . . . .

Q Did [respondent-mother] tell you how [Denise] got those burns?

A I plead the Fifth to that too.

. . . .

Q And did you ever have concerns about [respondent-mother] hurting [Denise]?

A I plead the Fifth.

Q . . . [D]o you recall making a statement to . . . one of the deputies that you had concerns that [respondent-mother] was injuring her children?

A I plead the Fifth.

Q Do you recall making a statement that why you had removed yourself and the children from the home that [respondent-mother] was residing in, that you did so for the purpose of preventing her children from being abused?

A I plead the Fifth.

. . . .

Q With regard to the burns on [Denise's] feet, when is the first time that you saw them?

A I plead the Fifth.

. . . .

Q Are you the person who wrapped paper towels around her feet and pulled socks over them?

A I plead the Fifth.

> Q Are you the person who rubbed onions on her feet?
>
> A I plead the Fifth.
>
> . . . .
>
> Q What did [respondent-mother] tell you specifically about how the burns happened to [Denise]?
>
> A I plead the Fifth.
>
> . . . .
>
> Q Do you have any understanding of what happened to her?
>
> A I plead the Fifth.
>
> Q Do you have any understanding of how the injuries that she suffered can be prevented in the future?
>
> A I plead the Fifth.

From respondent-father's refusal to answer these questions, the trial court was entitled to "infer that his truthful testimony would have been unfavorable to him." *McKillop v Onslow Cty.*, 139 N.C. App. 53, 63-64, 532 S.E.2d 594, 601 (2000). However, in the absence of any affirmative evidence that he intentionally inflicted the burns to Denise's feet and ankles, we do not infer or find respondent-father's use of the Fifth Amendment in response to this line of questioning sufficient to support a finding that he did so. *Cf. id.* at 65, 532 S.E.2d at 601-02 ("[T]here was competent evidence to support the trial court's holding plaintiff in contempt, and we hold that plaintiff, by her refusal to present testimony, chose to abandon her claim that she

was not in contempt of the trial court's order."). Accordingly, we hold the trial court erred in adjudicating grounds for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(8).

Respondent-father further claims the trial court erred in adjudicating grounds to terminate his parental rights for abusing and neglecting the children under N.C. Gen. Stat. § 7B-1111(a)(1). In addition to noting that Ron, Larry, and Cathy were neither alleged nor adjudicated to be abused in the A/N/D proceeding initiated by DSS, respondent-father contends the court failed to make the necessary findings and conclusions that the children were likely to experience a repetition of abuse or neglect if they were returned to his care. We agree.

"Termination of parental rights for [abuse or] neglect may not be based solely on past conditions which no longer exist." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted); *see also In re Greene*, 152 N.C. App. 410, 417, 568 S.E.2d 634, 638 (2002) (addressing adjudication of abuse under N.C. Gen. Stat. § 7B-1111(a)(1)). An adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) "must be 'based on evidence showing [*abuse or*] *neglect at the time of the termination hearing*.' " *In re C.T.*, 182 N.C. App. 472, 479, 643 S.E.2d 23, 28 (2007) (quoting *In re Young*, 346 N.C. at 248, 485 S.E.2d at 615); *see also In re Greene*, 152 N.C. App. at 417, 568 S.E.2d at 638.

"Where a juvenile has not been in the custody of a parent for a significant period of time prior to the termination hearing, a trial court may find that grounds for termination exist upon a showing of a 'history of [abuse or] neglect by the parent and the probability of a repetition of [abuse or] neglect.' " *In re S.D.J.*, 192 N.C. App. 478, 484, 665 S.E.2d 818, 823 (2008) (quoting *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003)); *see also In re Greene*, 152 N.C. App. at 417, 568 S.E.2d at 638. The court must find " 'by clear and convincing evidence a *probability of repetition of* [*abuse or*] *neglect* if the juvenile were returned to [his] parents.' " *In re C.C.*, 173 N.C. App. 375, 381, 618 S.E.2d 813, 818 (2005) (quoting *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000)); *see also In re Greene*, 152 N.C. App. at 417-18, 568 S.E.2d at 638-39.

Respondents' children were removed from his home on 2 July 2017. The trial court held the hearing on the TPR petition more than six months later, in January and February 2018. In order to adjudicate abuse or neglect by respondent-father at the time of the termination proceeding under N.C. Gen. Stat. § 7B-1111(a)(1), the court was required to find both a " 'history of [abuse or] neglect by the parent and the probability of a repetition of [abuse or] neglect.' "[9] *In re S.D.J.*, 192 N.C. App. at 484,

[9] The GAL observes that in *In re R.B.B.*, the trial court also held a TPR hearing approximately six months after the juvenile was removed from the respondent's home. 187 N.C. App. at 640-41, 654 S.E.2d at 516-17. Because this Court affirmed the adjudication of abuse under N.C. Gen. Stat. § 7B-1111(a)(1) without a finding by the trial court of a probability of a repetition of abuse, the GAL contends that no such finding is required here. *See id.* at 647, 654 S.E.2d at 520. We disagree. The respondent

665 S.E.2d at 823 (quoting *In re Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407); *see also In re Greene*, 152 N.C. App. at 417, 568 S.E.2d at 638.

The trial court found and concluded that "[t]he Respondent Mother and Respondent Father have abused the juveniles as defined by N.C. Gen. Stat. § 7B-101, in that they have created or allowed to be created a substantial risk of serious physical injury to the juveniles by other than accidental means." *See* N.C. Gen. Stat. § 7B-101(1)(b). The court's evidentiary findings describe the children, at the time they were removed from respondents' care on 2 July 2017, as filthy and suffering from multiple insect bites and severe diaper rashes. Larry was further found to have "a bruise on his right forearm which was consistent with a human bite mark[,]" but of indeterminate origin. The residence in which the children were living was "uninhabitable."

It is clear Denise suffered abuse while in respondents' care. However, we find the children's condition at the time to be more consistent with the Juvenile Code's definition of neglect—i.e., a lack of proper care, including medical care, and an injurious home environment—than the kind of non-accidental injuries embraced by the definition of abuse in N.C. Gen. Stat. § 7B-101(1). *See* N.C. Gen. Stat. § 7B-101(15). Assuming *arguendo* that respondent-father may be said to have placed the

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in *In re R.B.B.* challenged the adjudication on the ground that it "was based solely on felonious child abuse *charges*" pending against her. *Id.* at 646-47, 654 S.E.2d at 520 ("Respondent argues the trial court erred by . . . basing the termination on a felonious child abuse charge."). Because the issue raised by respondent-father was not before this Court in *In re R.B.B.*, our holding in that case is inapposite.

children at "substantial risk of serious physical injury . . . by other than accidental means" by leaving them in respondent-mother's care despite her postpartum depression and her abuse of Denise, the children were no longer in respondent-mother's care at the time of the termination hearing in January 2018. Moreover, the court received no evidence and made no finding that the children were likely to experience a repetition of abuse if returned to respondent-father's care. In this circumstance, "the absence of this necessary finding requires reversal." *In re E.L.E.*, 243 N.C. App. 301, 308, 778 S.E.2d 445, 450-51 (2015).

The trial court also concluded that "[t]he Respondent Parents have neglected the Juveniles within the meaning of N.C. Gen. Stat. § 7B-1111(a)(1), in that:"

> a. [DSS] filed verified Juvenile Petitions alleging that [Ron, Larry, and Cathy] were neglected and dependent. They obtained non-secure custody on July 3, 2017. The adjudication in this matter was held concurrent with the hearing on the TPR petition.
>
> b. The Respondent Parents were offered services by DSS to alleviate the problems in the home. The Department identified the problems and discussed the same with the parents. Nevertheless, the Respondent Parents failed to address the problems.
>
> . . . .
>
> d. [Ron] suffers from a speech delay, for which the Respondent Parents did not seek treatment.
>
> e. The juveniles do not receive proper care, supervision, or discipline from their parents. The

> juveniles have not been provided necessary medical care. The juveniles live in an environment injurious to their welfare.
>
> f. The juveniles live in a home where another juvenile, [Denise], has been subjected to abuse or neglect by an adult who regularly lives in the home, that being the Respondent Mother and Respondent Father.

The trial court's findings fully support a determination that respondent-father neglected the children prior to their removal from the home on 2 July 2017. However, the court made no findings demonstrating such neglect continued at the time of the termination hearing or that there was a probability of a future repetition of neglect if the children were returned to respondent-father's care. *See In re L.L.O.*, __ N.C. App. __, __, 799 S.E.2d 59, 62 (2017) ("The trial court's order must reflect the process by which the court reasoned and adjudicated facts, based upon clear and convincing evidence, which compel the conclusion that Respondents were likely to neglect L.L.O. if she were returned to their custody." (citation omitted)).

Accordingly, we agree with respondent-father that the court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) is erroneous and requires reversal. We are unpersuaded by DSS's assertion that the court's findings "make it clear that these children would likely be abused and neglected if returned to their parents' care." *See id.* at __, 799 S.E.2d at 63 (rejecting GAL's argument that the trial court's "omission of an ultimate finding of a probability of future neglect . . . constitutes harmless

error"). The facts found by the court give no indication that it considered current neglect at the hearing or the likelihood of a repetition of neglect by respondent-father.

Based on the evidence, including respondent-father's repeated invocation of his Fifth Amendment rights when asked about his awareness of the children's condition and how to protect them from future harm, we find it appropriate to vacate respondent-father's adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) and remand for further proceedings. *See id*. at __, 799 S.E.2d at 64.

On remand, the trial court must consider the evidence of a probability of a repetition of neglect by respondent-father in light of a parent's right to reunification efforts when a child is placed in DSS custody following an initial adjudication of abuse, neglect, or dependency and the limited grounds upon which the trial court is authorized to forgo such efforts under N.C. Gen. Stat. § 7B-901(c). The court may receive additional evidence as it deems appropriate. *See In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007).

B. TPR Disposition Order

Respondent-father also challenges the trial court's determination under N.C. Gen. Stat. § 7B-1110(a) that terminating his parental rights is in the best interests of the children. Having reversed and vacated the adjudicated grounds for termination, it is unnecessary to address this argument. We vacate the TPR Disposition Order as to respondent-father and remand for entry of a new disposition

under N.C. Gen. Stat. § 7B-1110 if the trial court adjudicates grounds for terminating respondent-father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). As with the adjudication, the court may hear additional dispositional evidence on remand.

C. Article 9 Disposition

Finally, respondent-father claims the trial court erred in concluding that the Article 9 disposition resulting from the children's adjudication of neglect and dependency is rendered "moot" by the termination of his parental rights. As discussed above, the trial court was required to enter an Article 9 disposition in the A/N/D proceeding, and we remand for this purpose. To the extent respondent-father separately excepts to the court's scheduling of a post-termination review hearing under N.C. Gen. Stat. § 7B-908(b), we note the propriety of such hearings is contingent upon the conditions described in that subsection.

IV. Conclusion

The Juvenile Adjudication Order is affirmed as to the adjudication of neglect and dependency and vacated as to the trial court's determination that the Article 9 disposition is moot. The cause is remanded for entry of a dispositional order under Article 9 consistent with this opinion.

As to respondent-mother, the TPR Adjudication Order and TPR Disposition Order are affirmed.

As to respondent-father, the TPR Adjudication Order is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. The TPR Disposition Order is likewise vacated and remanded.

On remand, the trial court may hear additional evidence in its sound discretion.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).