An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1342

Filed: 5 June 2018

Orange County, No. 15 JT 46

IN THE MATTER OF: D.M.O.

Appeal by respondent from order entered 13 September 2017 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 10 May 2018.

H. Wood Vann for petitioner-appellee father.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.

No brief filed for guardian ad litem.

ARROWOOD, Judge.

In *In re D.M.O.*, __ N.C. App. __, 794 S.E.2d 858 (2016), this Court vacated and remanded the trial court's order granting petitioner-father's petition to terminate respondent-mother's parental rights for willfully abandoning their minor child

"David"[1] during the six-month period that immediately preceded petitioner-father's filing of the petition on 28 May 2015. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (2017). We provided the following instructions to the trial court on remand:

> The trial court failed to enter adequate findings of fact and conclusions of law to demonstrate grounds for termination regarding N.C. Gen. Stat. § 7B-1111(a)(7). In addition, the trial court's order fails to resolve material conflicts in the evidence relevant to a conclusion that respondent-mother willfully abandoned David. Accordingly, we vacate the trial court's order and remand for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 7B-1111(a)(7). The trial court may hear and receive additional evidence.

Id. at __, 794 S.E.2d at 866.

The trial court heard evidence on remand on 3 April 2017 and entered a new order terminating respondent-mother's parental rights on 13 September 2017. Upon additional findings of fact regarding respondent-mother's opportunities and efforts to maintain contact with David during the relevant six-month period under N.C. Gen. Stat. § 7B-1111(a)(7),[2] the trial court again concluded that respondent-mother "has willfully abandoned [David] within the meaning of N.C.G.S. 7B-1111" and that petitioner-father had shown grounds to terminate her rights by clear, cogent, and convincing evidence. The court also made dispositional findings under N.C. Gen.

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[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 3.1(b) (2017).

[2] Because respondent-mother's appeal does not contest the substance of the trial court's findings or conclusions on remand, we do not restate the procedural and factual summary of the case provided in *In re D.M.O.*, __ N.C. App. at __, 794 S.E.2d at 860, 862, 864-66.

Stat. § 7B-1110(a) (2017) and concluded that "[i]t is in the best interests of the minor child that [respondent-mother's] parental rights be terminated." Respondent-mother filed timely notice of appeal from the order.

In her lone argument on appeal, respondent-mother claims the trial court erred by failing to hear additional evidence on David's best interests on remand from our decision in *In re D.M.O.* Citing this Court's unpublished opinion[3] in *In re J.P.*, No. COA10-1039, 209 N.C. App. 753, 710 S.E.2d 710, 2011 WL 704846 (N.C. Ct. App. Mar. 1, 2011) (unpublished) ("*In re J.P. II*"), respondent-mother notes that *In re D.M.O.* vacated the trial court's prior adjudication and disposition in this cause. Because the dispositional statute, N.C. Gen. Stat. § 7B-1110(a), provides that the determination of the juvenile's best interest is to be made "[*a*]*fter an adjudication* that one or more grounds for terminating a parent's rights exist," *id.* (emphasis added), she contends the "plain language" of subsection 7B-1110(a) requires the trial court to undertake its best interest assessment only "after" the adjudication. Moreover, the statute requires the trial court to determine "whether terminating the parent's rights *is* in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (emphasis added). Therefore, respondent-mother argues, "[a] new [adjudication] of the ground of abandonment required a new determination as to David's best interest based upon evidence up to the time of the remand hearing" on 3 April 2017.

[3] "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C.R. App. P. 30(e)(3) (2017).

We find the instant case readily distinguishable from *In re J.P. II.*, in which "[t]he trial court did not enter a new dispositional order on remand" following this Court's reversal of "both the original adjudication and dispositional orders" in *In re J.P.*, No. COA09-907, 201 N.C. App. 726, 689 S.E.2d 601, 2010 WL 10958 (N.C. Ct. App. Jan. 5, 2010) (unpublished) ("*In re J.P. I*"). *In re J.P. II*, 2011 WL 704846 at *2, 3. We had ruled in *In re J.P. I*, *inter alia*, "that the trial court failed to make sufficient findings of fact to support terminating Respondent-Mother's parental rights in Jane for either neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) or incapability pursuant to N.C. Gen. Stat. § 7B-1111(a)(6)." *In re J.P. II*, 2011 WL 704846 at *2. On remand,

> the trial court declined to take additional evidence . . . [but] allowed the attorneys for the parties to present arguments . . . . On 11 March 2010, the trial court entered an Order for Termination of Parental Rights containing numerous findings of fact relating to adjudication issues and concluding that DSS had established by clear, cogent and convincing evidence that Respondent-Mother's parental rights in Jane were subject to termination on the basis of neglect and incapability. The trial court did not enter a new dispositional order on remand.

Id. at *2.

On appeal in *In re J.P. II*, we rejected the respondent-mother's claim that "the trial court erred by declining to receive additional evidence on remand." *In re J.P. II*, 2011 WL 704846 at *5. Noting that our mandate in *In re J.P. I* left the taking of additional evidence to the trial court's discretion, we found no abuse of discretion in the decision not to receive such evidence, absent an indication "that the trial court

acted under a misapprehension that it lacked the authority to receive additional evidence on remand[.]" *Id.* at *5. However, we concluded the trial court did err in failing to enter a new dispositional order on remand, inasmuch as

> in the event that an adjudication is reversed on appeal, any subsequent disposition must necessarily be reversed as well since a trial court only reaches the dispositional stage of a termination proceeding after determining that the record supports a finding that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1110(a). . . . Therefore, since the trial court failed to conduct a best interest determination based on its new adjudication decision on remand, no proper dispositional order has ever been entered, necessitating the remand of this case to the trial court for the entry of a new dispositional order.

Id. at *6.

In the case *sub judice*, the trial court entered a new disposition as part of its new termination order entered 13 September 2017. The court made findings to address each of the dispositional factors in N.C. Gen. Stat. § 7B-1110(a)(1)-(5) and expressly concluded that the termination of respondent-mother's parental rights is in David's best interest. On this issue, therefore, *In re J.P. II* is inapposite.

We further find no merit to respondent-mother's claim that the trial court was required to base its new disposition on remand from *In re D.M.O.* on new evidence adduced at the 3 April 2017 hearing regarding David's best interest. Her position is inconsistent with our mandate to the trial court in *In re D.M.O.*, which left the decision to "hear and receive additional evidence" to the court's discretion. *In re*

D.M.O., __ N.C. App. at __, 794 S.E.2d at 866; *see also In re A.B.*, 245 N.C. App. 35, 54, 781 S.E.2d 685, 697 (concluding "the trial court was under no obligation to consider new evidence on remand, since our prior opinion left the decision of whether to receive additional evidence entirely within the discretion of the trial court"), *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). It is also inconsistent with our holding in *In re J.P. II*, which required the trial court to enter a new dispositional order along with its new adjudication on remand from *In re J.P. I*, while *upholding* the court's decision to enter its new adjudication and disposition without taking any additional evidence. *In re J.P. II*, 2011 WL 704846 at *5-6. We find nothing in *In re J.P. II* that would require the trial court to receive additional evidence in order to address David's best interest as of the 3 April 2017 remand hearing simply because the court chose to receive additional evidence related to respondent-mother's willful abandonment of David during the six-month period between 28 November 2014 and 28 May 2015.

Finally, we are not persuaded by respondent-mother's assertion that "the trial court did not have the discretion to reject [her] *request* to hear additional evidence" with regard to David's best interest at the remand hearing. (Emphasis added). The transcript shows that, at the conclusion of the hearing, counsel for respondent-mother suggested to the trial court that it might be required to hear evidence regarding David's best interest, as follows:

[COUNSEL FOR RESPONDENT-MOTHER]: Judge, can I say one more thing? I'm so sorry. Believe it or not, I don't like getting orders reversed. It's not a win for me. But I don't think that Your Honor heard any best interest evidence as to right now why it would be in [David's] best interest to terminate parental rights.

THE COURT: Right now?

[COUNSEL FOR RESPONDENT-MOTHER]: I don't think we stopped back at the last hearing doesn't stop back to the end of the six-month period. I think we have to look at up until now, why is it currently in his best interest to terminate her parental rights, if Your Honor finds ground. *I just want to throw it out there, Judge*.

THE COURT: I'm looking at the Court of Appeals' opinion and it's one of the few that I happen to get and have the ability to open up right after it came out and what I understood from what I got from the opinion as to what went wrong --

[COUNSEL FOR PETITIONER-FATHER]: Your Honor, the Court of Appeals did not indicate in its opinion that it needed any additional findings as to best interest.

THE COURT: Well, it was more specific actually. And what I'm looking for is where they say to me that I did not make a determination as to what was more credible evidence because, you're right, it's one word against the other. And so I took that instruction to mean that is what they want cleared up and they said outright, I just can't find the page right now.

[COUNSEL FOR RESPONDENT-MOTHER]: *I agree with you, Your Honor*.

. . . .

[COUNSEL FOR PETITIONER-FATHER]: If you look,

> Your Honor, page 18 it says, "court must resolve material conflicts and the evidence related to the willfulness of the Respondent Mother's conduct and may in its discretion receive additional evidence in order to do so." That's on page 18 about five lines from the bottom.
>
> THE COURT: That's what I read. And so that was my intent and sole purpose today. All right. Thank you.

(Emphasis added).

Counsel did not affirmatively "request" to present new evidence about David's best interest. *Cf. In re A.B.*, 245 N.C. App. at 54, 781 S.E.2d at 697 (finding no abuse of the court's discretion in failing to hear new dispositional evidence on remand where "the record does not indicate that respondent made any motions for the trial court to receive additional evidence"). Rather, counsel "just want[ed] to throw . . . out there" his procedural concern that the trial court was required to hear new dispositional evidence on remand in order to avoid another reversal on appeal. As shown in *In re J.P. II* and in our published decision in *In re A.B.*, counsel's concern was unfounded. *See In re J.P. II*, 2011 WL 704846 at *4-5; *In re A.B.*, 245 N.C. App. at 54, 781 S.E.2d at 697. Moreover, as petitioner-father observes, counsel did not object to the court's decision not to hear additional evidence or make an offer of proof with regard to any such evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2017). Therefore, we affirm the new termination order.

AFFIRMED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).