

THE CHEROKEE SUPREME COURT
EASTERN BAND OF CHEROKEE INDIANS
QUALLA BOUNDARY, CHEROKEE, NORTH CAROLINA

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CHEROKEE SUPREME COURT
CHIEF JUDGE, NC
2022 NOV 21 A 2:33

IN THE MATTER OF:

D.B.,

A MINOR CHILD.

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CSC-21-01

OPINION

FILED

Sybil G. Mann, for petitioner-appellee Eastern Band of Cherokee Indians Public Health and Human Services Department of Human Services, Family Safety Program.

Leo J. Phillips, for appellee Guardian ad Litem.

Shira Hedgepeth, for respondent father.

Stephanie-Lyn S. Lepre, for respondent-appellant mother.

SAUNOOKE, Chief Justice.

Respondent-Appellant Mother (Respondent Mother or Appellant) appeals pursuant to C.C. § 7B-1201(a)(3) from (1) an adjudicatory order entered 4 November 2020 by Judge Jerry F. Waddell in the Cherokee Court determining, among other things, that Appellant subjected her minor child, D.B., to “child maltreatment” pursuant to C.C. § 7B-101(a)(8) because acts and/or omissions had occurred demonstrating that D.B. was a “[d]rug endangered child as defined in 7B-101(a)(18),” *id.* § 7B-101(a)(8)(C) (2020), and a “[n]eglected child as defined in 7B-101(a)(23),” *id.* § 7B-101(a)(8)(D) (2020), which warranted D.B.’s removal from Appellant’s residence and her placement in the protective custody of Petitioner-Appellee Eastern Band of Cherokee Indians (EBCI) Public Health and Human Services (PHHS) Department of Human Services (Department), Family Safety Program (Family Safety); and (2) a dispositional order entered 14 January 2021 by

Judge Waddell determining, among other things, that, despite the Department having engaged in “reasonable and active efforts” designed to eliminate the need for D.B.’s removal from Appellant’s home and to facilitate reunification pursuant to C.C. § 7B-903, the factual circumstances demonstrated that it was “futile, unreasonable and contrary to [D.B.’s] well[-]being” for the Department to continue these efforts, such that the Department should be relieved from making future efforts under C.C. § 7B-903(f) and (g), and that it was contrary to D.B.’s welfare and best interests to be returned to Appellant’s custody at the time of the dispositional hearing, such that she should remain in the custody of the Department.

On 3 December 2020, Respondent Mother, as D.B.’s parent and a non-prevailing party with respect to the above orders under C.C. § 7B-1202(4), filed a notice to preserve her right to appeal from the 4 November 2020 adjudicatory order in accordance with C.C. § 7B-1201(b). On 18 February 2021, she timely filed a notice of appeal from both the adjudicatory order and the dispositional order in accordance with C.C. § 7B-1201(b). On 19 April 2021, this Court issued a Scheduling Order indicating that “[t]he record on appeal shall consist of the record proper in the Cherokee Courts, the transcript of proceedings and this order.” On 30 July 2021, Appellant filed a “Settled Record on Appeal.”

On 6 January 2022, the parties presented their respective oral arguments to this Court, during which the Court requested that Appellant submit to the Court within 45 days an additional memorandum regarding the meaning of the term “drug endangered child” as set forth in C.C. § 7B-101(a)(18) and the “substantial risk” terminology used therein. *Id.* § 7B-101(a)(18)(2020) (defining “drug endangered child” as “[a] child who is at *substantial risk* of suffering harm as a result of his/her parent[’s] . . . drug misuse, abuse, possession, manufacturing, or distribution including but not limited to the risk created when the parent, guardian, custodian or caretaker’s

drug use interferes with the caretaker's ability to provide proper supervision or a safe and nurturing environment for the child") (emphasis added). On 18 February 2022, Appellant filed a memorandum providing authority from other jurisdictions regarding the use of the term "drug endangered" in the child maltreatment context and indicated that she had found only one jurisdiction, the state of Oklahoma, that uses said term.¹ As set forth herein, having carefully reviewed the record, briefs,² and oral arguments of the parties, we affirm both orders of the lower court.

I. BACKGROUND

This case is governed by Chapter 7B of the Cherokee Code, which addresses issues related to alleged "child maltreatment" as defined in C.C. § 7B-101(a)(8)(A)–(E). This Cherokee Code provision lists five independent grounds that support a "child maltreatment" adjudication, including acts or omissions that demonstrate (1) abuse as set forth in C.C. § 7B-101(a)(2), (2) dependency as set forth in C.C. § 7B-101(a)(16), (3) drug endangerment as set forth in C.C. § 7B-101(a)(18), (4) neglect as set forth in C.C. § 7B-101(a)(23), or (5) "[a]ny form of mental injury including harm to the child's psychological capacity or emotional stability evidenced by an observable and substantial impairment of the child's functioning," *id.* § 7B-101(a)(8)(E). Under C.C. § 7B-200, "[t]he Cherokee Court has exclusive, original jurisdiction over any case involving a child who resides on the EBCI trust lands and is alleged to be maltreated or over cases where the alleged maltreatment occurred on the EBCI trust lands." *Id.* § 7B-200 (2020). If the director of the Department or the director's authorized representative receives a report indicating that such

¹ Appellant did not provide any additional authority regarding the "substantial risk" terminology used in the context of drug endangerment and child maltreatment.

² On 6 December 2021, Leo J. Phillips, who was appointed Guardian ad Litem for D.B. in this matter, submitted a filing to this Court indicating that he accepted and adopted the arguments raised in Family Safety's brief to this Court.

a child has been maltreated and determines that the report merits filing a petition, then the director or authorized representative must draw up a petition, verify it before an official authorized to administer oaths and submit the petition to the clerk of the Cherokee Court, who must file the petition and record the date of filing. *Id.* § 7B-403 (2020); *id.* § 7B-401.1(a) (2020) A petition alleging maltreatment of a child residing on Tribal trust land must be commenced in the Cherokee Court,” *id.* § 7B-401 (2020), and the “action is commenced by the filing of a [verified] petition in the clerk’s office when that office is open or by the issuance of a petition by a magistrate when the clerk’s office is closed,” *id.* § 7B-405 (2020).

Here, on 22 April 2020, the Department filed a verified child maltreatment petition in the Cherokee Court alleging that D.B., a five-year-old child residing in the jurisdiction of the Cherokee Court as defined in C.C. § 7B-200, had been subjected to “child maltreatment” pursuant to C.C. § 7B-101(a)(8) by Respondent Mother based on three of the independent grounds articulated therein, specifically that actions and/or omissions by Respondent Mother demonstrated : (1) neglect under C.C. § 7B-101(a)(8)(D) in that D.B. was a “neglected child” as defined in C.C. § 7B-101(a)(23) because she did not “receive the proper care, supervision, or discipline from [Respondent Mother],” was “not provided necessary remedial care[,]” “lived in an environment injurious to [her] welfare,” and was “a drug endangered child as defined in C.C. [§] 7B-101(a)(18)”; (2) dependency under C.C. § 7B-101(a)(8)(B) in that D.B. was a “dependent child” as defined in C.C. § 7B-101(a)(16) because her “parent . . . [was] unable or unwilling to provide for [her] care or supervision and lack[ed] an appropriate alternative child care arrangement”; and (3) drug endangerment under C.C. § 7B-101(a)(8)(C) in that D.B. was a “drug endangered child” as defined in C.C. § 7B-101(a)(18) because she was “at substantial risk of suffering harm because of [Respondent Mother’s] controlled substance misuse, abuse, possession, manufacturing, or

distribution including but not limited to the risk created when . . . drug use interferes with the caretaker's ability to provide proper supervision or a safe and nurturing environment." In support of these allegations, the verified petition further alleged that, on 19 December 2019, four-year-old D.B. and her older half-sister, also a minor, began a trial placement in Respondent Mother's residence, but remained in the custody of Family Safety. On 17 January 2020, shortly after both children returned to Appellant's residence, D.B.'s older sister was removed therefrom and placed in the Cherokee Children's Home. However, Family Safety assessed D.B. to be safe at that time, allowed her to remain in the home, and eventually returned her to Respondent Mother's custody. Prior to 21 April 2020, Family Safety received child protective service reports containing allegations of domestic violence involving Respondent Mother and her boyfriend and controlled substance use by Respondent Mother occurring in D.B.'s presence. Although the allegations did not lead to D.B.'s removal from the home, Appellant was referred to Family Safety for in-home services to address related safety concerns.

The verified petition further alleged that, on 21 April 2020, Respondent Mother overdosed on heroin in the presence of D.B. and required transportation to the hospital, leaving D.B. without a sober or fit caregiver to provide care at the residence. Although Appellant's boyfriend was present in the home at that time, he was not fit and appropriate to care for D.B. because of his past alleged assaultive behavior toward Appellant and, consequently, Family Safety placed D.B. into protective custody and relocated her to a licensed foster home. In view of the above, Family Safety requested that the court hear the matter to determine whether (1) a protective custody order was necessary to protect D.B., (2) the allegations in the verified complaint were true, and (3) D.B. needed care, protection, and/or supervision from the Department.

On 22 April 2020, based upon the verified petition, the trial court entered an “Order for Protective Custody” in which the court found that there was “a reasonable factual basis to believe that the matters alleged in the petition [we]re true, that there [were] no other reasonable means available to protect” D.B. than removal, that Respondent Mother “ha[d] failed to provide, or [was] unable to provide, adequate supervision or protection[,] and [that] the child [was] exposed to substantial risk of physical injury, emotional harm, or developmental delay . . . as a result of the lack of supervision.” The trial court further determined therein that “emergency circumstances” pertaining to Appellant’s alleged overdose, her inability to provide proper supervision, and the lack of an appropriate alternative caregiver for D.B. precluded Family Safety from engaging in efforts to prevent or eliminate the need to place D.B. outside the home; that it was contrary to D.B.’s welfare to remain in the home; and that, “[d]ue to the circumstances presented, there was an immediate danger to the child that would not have been mitigated by the provision of services to prevent or eliminate the need for [her] removal.” Accordingly, the trial court concluded that Family Safety was warranted in taking D.B. into its custody and that D.B. should remain in Family Safety’s custody pending a pre-adjudication/continued protective custody hearing to be held within seven days to determine the need for future protective custody pursuant to C.C. § 7B-506.

Prior to the scheduled protective custody hearing, Respondent Mother moved to continue the hearing and consented to D.B. remaining in the custody of Family Safety pending the next statutorily mandated custody hearing. On 27 April 2020, consistent therewith and based upon the consent of the parties, the court entered a “Consent Order on First Continued Protective Custody Hearing” continuing the hearing until the next available date mandated by C.C. § 7B-506(a) and instructing that D.B. would remain in Family Safety’s custody pending the hearing.

On 4 May 2020, a protective custody hearing was held in the Cherokee Court pursuant to C.C. § 7B-506. On 14 May 2020, based on “the verified petition, the record proper and representations by Counsel,” the trial court entered a “Child Maltreatment Order on Need for Continued Protective Custody” in which the court determined, among other things, that D.B. should remain in the protective custody of Family Safety pending a future adjudicatory hearing regarding the allegations of child maltreatment contained in the verified petition. In its 14 May 2020 order, the court found that D.B. had been in the protective custody of the Department pursuant to a non-secure custody order entered on 22 April 2020 due to an alleged drug overdose incident involving Respondent Mother the prior day. The court further found that, at the time of the alleged overdose, Family Safety was already involved with Respondent Mother through Jill Miller, a social worker with Family Safety, due to the Department having received child protective service reports that indicated concerns about illegal substance abuse and domestic violence occurring in the family residence in D.B.’s presence. Ms. Miller prepared a Family Safety Protective Action Plan and a Family Safety Case Plan that were signed by Respondent Mother on 9 April 2020, which, among other things, required her to submit to random drug screens and forbade the use of controlled substances around the minor child. In accordance therewith, Ms. Miller subsequently filled out two Family Safety Drug Test Request forms, one on 9 April and one on 20 April 2020, indicating that Respondent Mother required observation by testing personnel during her drug screens and gave the forms to Respondent Mother to provide to the Cherokee Indian Hospital Lab who performed the drug screens. Both urine drug screens came back negative, however, Ms. Miller later learned that both drug test request forms she had filled out and given to Respondent Mother had been altered to indicate that Respondent Mother did not require observation by hospital personnel during the drug screens.

As to the events allegedly occurring on 21 April 2020 that led to D.B.'s removal from the home, the lower court found that, on the evening at issue, Sergeant John P. Taylor Jr. of the Cherokee Indian Police Department (CIPD) responded to a request for emergency medical assistance at Respondent Mother's residence related to an apparent drug overdose, where he found Respondent Mother, her boyfriend, and D.B. present in the home. Respondent Mother was lying on a couch in the living room covered by a blanket and not wearing any clothes. Her boyfriend appeared sober and concerned, and D.B. was heard whimpering and crying in a room adjacent to the living room. Respondent Mother told Sergeant Taylor she was not feeling well and had been shaking, at which point Sergeant Taylor informed her that a tainted batch of heroin was circulating in the community and asked her who the source of her heroin was, and she responded Dylan Wahnetah. Cherokee Emergency Medical Services (EMS) arrived at the residence and transported Respondent Mother to the hospital. She informed EMS that she had ingested heroin around an hour earlier at a location other than her residence, that she had become unresponsive afterwards and that she had been administered six doses of Narcan and cold water had been thrown on her to awaken her before ultimately driving back to her residence.

Ashley Moore, an investigator with Family Safety, visited Respondent Mother at the hospital later that night, and she admitted to Ms. Moore that she had overdosed on heroin. Based on the admission to drug use and possibility of relapse, concerns about controlled substances and paraphernalia being located at the residence, and the prior history of domestic violence between Respondent Mother and her boyfriend, Ms. Moore took D.B. into emergency protective custody pursuant to C.C. § 7B-500. Because it was late at night Ms. Moore could not access the necessary records to see if kinship placements were available for D.B., so Family Safety placed D.B. in a licensed foster home.

Additionally, the court found that, on 22 April 2020, Respondent Mother contacted Brooklyn Ledford, a social worker with Family Safety's Integrated Child Welfare Team (ICWT) who had been assigned to work with Respondent Mother and D.B.'s older sister, and told Ms. Ledford that she may have been drugged at Mr. Wahnetah's residence the evening prior because the last thing she remembered before she passed out was Mr. Wahnetah offering her a drink. She further told Ms. Ledford that, after she awoke, Mr. Wahnetah informed her that he had used Narcan to revive her, and that she noticed that her money and wallet had been stolen. Also on 22 April 2020, Ms. Ledford gave Respondent Mother a Family Safety Drug Test Request form indicating that she needed to be observed during the drug screen. When Ms. Ledford received the results of the drug test, however, she discovered that the form had been altered to indicate that Respondent Mother did not require observation during the drug screen. The court found that the alteration of this form, along with the two others completed by Ms. Moore, resulted in harm to D.B. On 27 April 2020, neither Respondent Mother nor her boyfriend participated in their scheduled controlled substance drug screenings for which they were required to provide hair samples.

In view of the above, the court concluded as a matter of law that grounds for continued custody existed under C.C. §§ 7B-504 and 7B-506; that Family Safety had engaged in reasonable and active efforts to prevent or eliminate the need for D.B.'s placement outside the home; that it was in D.B.'s best interest to continue in the custody and control of Family Safety pending an adjudicatory hearing; and that it was contrary to D.B.'s best interest and her welfare to return to her mother's home at that time. The court also implored Respondent Mother to "*secure a picture of her daughters to help keep her focus on reunification with her children*" (emphasis added) and mandated that Respondent Mother "*shall comply with every drug screen, including participating in a drug screening hair test, and . . . shall refrain from changing any forms*" (emphasis added).

Finally, the court instructed that family members of Respondent Father, who was presently incarcerated, should be considered as possible placement options for D.B and that his attorney should provide the court with names and contact information for any family members relayed to her by Respondent Father.

II. ADJUDICATORY STAGE

On 18 August 2020, an adjudicatory hearing was held pursuant to C.C. § 7B-802 regarding the verified child maltreatment petition at issue here during which the court received into evidence testimony from Sergeant Taylor, Respondent Mother, and Ms. Miller from Family Safety, as well as documentary exhibits consisting of (1) a Family Safety Protective Action Plan dated 9 April 2020 and signed by Respondent Mother, her boyfriend, and Ms. Miller, which was admitted into evidence as Family Safety Exhibit 1, and (2) a Family Safety Case Plan dated 9 April 2020 signed by the same three individuals, which was admitted into evidence as Family Safety Exhibit 2. Additionally, the court took “judicial notice of the orders entered in CVJ 19-02-03,” a child maltreatment case involving D.B.’s older sister who was removed from the home in January 2020.

On 4 November 2020, the trial court entered its “Child Maltreatment Adjudication Order” containing findings of fact and conclusions of law from which Respondent Mother has appealed to this Court. With respect to the events occurring prior to the 21 April 2020 drug misuse/abuse incident by Appellant that led to D.B.’s removal, the court found as fact that, on 19 December 2019, D.B. and her older sister were in the custody of Family Safety and entered a trial placement in their mother’s home located within the Qualla Boundary. On 17 January 2020, D.B.’s sister was removed from the residence and placed in the Cherokee Children’s Home. D.B., however, was allowed to remain in the residence, and was later returned to their mother’s custody and care.

On 8 April 2020, Ms. Miller received a referral to provide services to Respondent Mother due to Family Safety receiving child protective services reports regarding D.B. and her family. On 9 April 2020, Respondent Mother agreed to comply with the Family Safety Protective Action Plan, prepared by Ms. Miller, which expressed Family Safety's concerns regarding "alleged substance abuse and domestic violence in the home," and specified certain actions that the couple needed to take to ensure D.B.'s safety and ability to live in the family home including, among other things, that Respondent Mother and her boyfriend refrain from using drugs in the home that they shared with D.B. and ensure a sober caregiver was present for D.B. in the event they used mind-altering substances of any kind. On 9 and 20 April 2020, Ms. Miller gave Respondent Mother a Family Safety Drug Test Request form in which Ms. Miller indicated that she required observation by hospital personnel when providing her urine samples; both screens came back negative for controlled substances. Ms. Miller later learned that both forms had been altered to indicate that Respondent Mother did not require observation during her drug screens. At the adjudicatory hearing, Respondent Mother admitted that she had altered the forms so that her drug screens would be unobserved, but she testified that she did so because she was menstruating and wanted privacy.

Regarding Respondent Mother's drug use on 21 April 2020, the court found that around 8:00 p.m. that evening, Sergeant Taylor of the CIPD responded in uniform to her residence located on Tribal Trust Lands. There, he found Respondent Mother, who was not wearing any clothes and covered only by a blanket, lying on a couch in the living room. She was shaking, sweating profusely, and appeared afraid; her eyes were wide open, and she looked like she was about to cry. Respondent Mother told Sergeant Taylor that "this was the first time she had drugs in her system in some time" because she had been working towards sobriety. She indicated she was worried and did not feel well and asked Sergeant Taylor if she was going to die. As they conversed, Sergeant

Taylor observed her boyfriend and D.B. in the living room. Her boyfriend appeared sober and concerned and told Sergeant Taylor that he was worried about Respondent Mother because they both had been working hard to beat addiction and achieve sobriety. D.B., who appeared clean and well-fed, was behind the couch on the living room floor; she was crying, appeared upset and afraid, and was not responding to the boyfriend's efforts to comfort her. Sergeant Taylor eventually instructed him to bring D.B. to her bedroom, and he complied. However, Sergeant Taylor continued to hear D.B. crying as she was carried down the hall and after she was in her room.

Sergeant Taylor told Respondent Mother that there was a batch of heroin laced with fentanyl circulating around the community and that he had responded to two overdose calls earlier that day. He asked her if she had used any drugs and, if so, what she had used and where she was located when she had done so. She responded that she had consumed a "hot shot" at Mr. Wahnetah's camper and that she did not use drugs in her own residence.³ Sergeant Taylor asked Respondent Mother if she knew the quantity of narcotics she had consumed, and she replied that Mr. Wahnetah had prepared an amount of drugs that was equivalent to all the money she had with her, that she had "passed out" in his camper after consuming the drugs, that someone had administered Narcan after she had passed out, and that she had driven home after waking up.⁴

Mr. Wahnetah was well-known to the CIPD as both a user and seller of illegal drugs. When Sergeant Taylor and other CIPD officers later searched Mr. Wahnetah's camper and the surrounding yard located on Tribal Trust Lands, Sergeant Taylor did not see any Narcan containers, but he did see used needles outside the home.

³ Sergeant Taylor testified that, based on his training and experience, a "hot shot" is a mixture of heroin and another controlled substance, like methamphetamine or fentanyl.

⁴ This paragraph synthesizes finding of fact 22, which Respondent Mother challenges on appeal.

The court further found in its adjudicatory order that Respondent Mother “testified” during the adjudicatory hearing that, on 21 April 2020, Mr. Wahnetah contacted her and asked her to drive him to Food Lion in Cherokee. Even though Respondent Mother did not have a valid driver’s license, she agreed to give him a ride. Respondent Mother also knew that Mr. Wahnetah was a drug dealer and, at around 6:00 p.m. on the date at issue, she drove to Mr. Wahnetah’s camper, which was located about five to seven minutes away, bringing with her \$400 to \$600 in her purse that she planned to use to pay her April rent. D.B. remained at the family residence with her mother’s boyfriend while her mother was away from the home.

Respondent Mother also “testified” that Mr. Wahnetah was shaving when she arrived at his camper, and she went inside. One of his friend’s offered her a soda, and she passed out. When she awakened, Mr. Wahnetah told her that he had administered Narcan to revive her, and she noticed that her money was missing from her purse. Respondent Mother “did not feel right” after she woke up and drove herself home and took a shower. After the shower, she still “did not feel well,” so she asked her boyfriend to call for emergency medical assistance. Respondent Mother further “testified” that she has a medical condition that causes periods of blackouts, which is why she passed out at Mr. Wahnetah’s residence and that she had told Ms. Ledford from Family Safety that she had issues with blackouts.

The trial court further found therein that Ms. Moore, another Family Safety employee, responded to a child protective services report regarding the 21 April 2020 incident and met with Respondent Mother in her hospital room where she had been transported by EMS. Ms. Moore observed her looking “pale, disheveled, and visibly sad,” and she admitted that she had overdosed earlier that evening. Ms. Moore encouraged Respondent Mother to return to treatment for

substance abuse since she had made progress with her addiction with past treatment. After Ms. Moore's meeting with Respondent Mother, Family Safety placed D.B. in its protective custody.⁵

Regarding the key April 2020 events, the lower court further found: (1) that the results of the April 2020 drug tests coming back negative "d[id] not prove anything" because Respondent Mother had admitted altering the forms so that the drug screens would be unobserved; (2) that the negative April 2020 drug test results and her alleged compliance with the April 2020 Protective Action Plan and Case Plan requiring her to, among other things, comply with random drug screens should be "discount[ed]"; (3) that when Respondent Mother returned home from Mr. Wahnetah's residence, she "was in such a condition" that her boyfriend, D.B., and she herself were all "scared"; and (4) that D.B. "was frightened as she saw her mother lying in the condition that was presented to the [c]ourt." Based on the above factual circumstances, the court determined that "it was neither possible nor reasonable to prevent" D.B.'s removal from the home, that "[n]o other reasonable alternative existed that was less intrusive" than Family Safety taking D.B. into its custody, and that Family Safety "was precluded from making reasonable efforts to prevent or eliminate" her removal from Respondent Mother's residence.⁶

The trial court concluded as a matter of law that it had jurisdiction over the subject matter and the parties,⁷ that D.B. was a "drug endangered child" pursuant to C.C. § 7B-101(a)(18), that D.B. was a "neglected child" pursuant to C.C. § 7B-101(a)(23),⁸ that Family Safety was precluded

⁵ This paragraph synthesizes findings of fact 24 and 25, which Respondent Mother challenges on appeal.

⁶ This sentence synthesizes purported finding of fact 33, which Respondent Mother challenges on appeal.

⁷ There are numerous inconsistencies in the record, including in the trial court's orders, regarding whether Respondent Mother, D.B., and Respondent Father are enrolled members of the EBCI. During oral argument, the parties clarified that none of them are enrolled tribal members, but that Respondent Mother is a first descendant.

⁸ Although Family Safety also alleged in its verified petition that D.B. was subjected to "child maltreatment" pursuant to C.C. § 7B-101(a)(8)(B) in that she was a "dependent child" as defined in C.C. § 7B-101(a)(16), the trial court's adjudicatory order does not address this allegation.

from making reasonable efforts to prevent the need to place D.B. outside of her mother's residence, that "exigent circumstances detailed in the Findings of Fact" warranted her placement in protective custody, and that it was contrary to D.B.'s best interests and welfare to return to her mother's home and care. Finally, the court mandated that the case would proceed to a dispositional hearing pursuant to C.C. § 7B-901.

In her brief to this Court, Appellant argues that the trial court committed reversible error in its adjudicatory order by determining that D.B. was a "drug endangered child" and a "neglected child" pursuant to Chapter 7B of the Cherokee Code for several reasons. First, she asserts that no properly admissible evidence was presented at the adjudicatory hearing to support several of the trial court's critical factual findings that underlie these determinations. Next, she contends that insufficient admissible evidence was presented at the adjudicatory hearing with respect to establishing a link or nexus between her alleged substance use and any harm or potential harm to D.B., which she avers is necessary to establish, as a matter of law, that D.B. was maltreated on the grounds of drug endangerment and neglect under Chapter 7B of the Cherokee Code. Finally, Appellant asserts that the adjudicatory order contains insufficient factual findings to support the conclusions of law that (1) D.B. was maltreated by drug endangerment and/or by neglect and (2) D.B. could not be returned to her custody at the time of the adjudicatory hearing, such that these conclusions are erroneous, and should be reversed.

Family Safety contends that the trial court did not err in adjudicating D.B. to be a "drug endangered child" or a "neglected child" pursuant to Chapter 7B of the Cherokee Code because the trial court's critical findings of fact that underlie those determinations are supported by competent, clear, and convincing evidence contained in the hearing transcript and the record on appeal and the lower court's factual findings support its conclusions of law on those issues. Family

Safety further argues that the trial court did not err in determining that it was contrary to D.B.'s best interest to be returned to the custody of Respondent Mother at the time of the adjudicatory hearing because the factual findings underlying that determination are supported by competent, clear, and convincing evidence and the conclusions of law to that effect are supported by sufficient findings of fact.

With respect to child maltreatment, Tribal Council has instructed that, during the adjudicatory hearing, "[t]he Court shall adjudicate the existence or nonexistence of any of the allegations in a petition." *Id.* § 7B-802 (2020). "The allegations in a petition alleging that a child is maltreated shall be proved by clear and convincing evidence." *Id.* § 7B-805 (2020). "At all adjudicatory hearings where the child is alleged to be maltreated the North Carolina rules of evidence in civil cases shall apply." *Id.* § 7B-804 (2020). "If the Court finds from the evidence, including stipulations by a party, that the allegations in the petition have been proven by clear and convincing evidence, the Court shall so state." *Id.* § 7B-807(a) (2020). The court's "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law and a requirement for a child and family team meeting to be held prior to the disposition[al] hearing." *Id.* § 7B-807(b).

Although the above Cherokee Code provisions provide guidance regarding the quantum of evidence necessary to establish child maltreatment at the adjudicatory stage, the evidentiary rules that apply to the adjudicatory hearing, and some of the information that the written adjudicatory order must contain, Tribal Council did not include an applicable standard of appellate review to guide this Court's review of a trial court's adjudicatory order. Here the parties agree that neither Cherokee law nor federal law that expressly and directly applies to Indian tribes articulates any applicable controlling standard of review with respect to an adjudication of child maltreatment

and, accordingly, that this Court should turn to North Carolina law for guidance as persuasive authority pursuant to C.C. § 7-2(d) (2020) (stating that “[i]n deciding cases and controversies over which it has jurisdiction, the Judicial Branch shall be bound by the laws, customs, traditions, and precedents of the Eastern Band of Cherokee Indians” and that “[i]f there is no applicable Cherokee law, the Judicial Branch shall look next to Federal law, then to North Carolina law, and finally to the law of other jurisdictions for guidance”). The parties further agree that North Carolina law is especially pertinent here because Tribal Council has mandated the use of the North Carolina Rules of Evidence at adjudicatory hearings and because Chapter 7B of the Cherokee Code is similar in scope with Chapter 7B of the North Carolina General Statutes. *Compare* C.C. §§ 7B-800–7B-808 (2020) (pertinent EBCI statutes regarding adjudicatory hearings for child maltreatment) *with* N.C. Gen. Stat. §§ 7B-801–7B-808 (2020) (pertinent North Carolina statutes regarding adjudicatory hearings for child abuse, neglect, and dependency). We agree. Accordingly, we look to North Carolina law for guidance with respect to the applicable standard(s) of appellate review for an adjudicatory order and elect to adopt these standards here.

Under N.C. Gen. Stat. § 7B-807, North Carolina appellate courts review adjudicatory orders regarding child abuse, neglect, or dependency to determine whether the trial court’s factual findings are supported by clear and convincing competent evidence, and whether the factual findings support its conclusions of law with respect to those child maltreatment adjudications. *In re K.L.*, 272 N.C. App. 30, 36, 845 S.E.2d 182, 188 (2020) (citing *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)). “Clear and convincing evidence ‘is greater than the preponderance of the evidence standard required in most civil cases.’” *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (quoting *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984)). “It is defined as ‘evidence which should “fully convince.””” *Id.* (citation

omitted). If “the trial court’s findings of fact [are] supported by clear and convincing competent evidence[, then they] are deemed conclusive [on appeal] even where some evidence supports contrary findings.” *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007) (quoting *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676), *aff’d per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Additionally, factual findings that are not challenged on appeal “are deemed supported by the evidence and are binding on appeal.” *In re K.H.*, 281 N.C. App. 259, 266, 867 S.E.2d 757, 762 (2022) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

In reviewing the lower court’s factual findings and conclusions of law, “labels are not dispositive,” *In re K.L.* 272 N.C. App. 30, 36, 845 S.E.2d 182, 189 (2020) (citation omitted), and “findings of fact [which] are essentially conclusions of law will . . . be treated as such on appeal,” *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (citation omitted)). Appellate courts review a trial court’s conclusions of law de novo. *In re K.L.* 272 N.C. App. at 36, 845 S.E.2d at 189 (citation omitted).

A. ADJUDCIATORY ORDER – FINDINGS OF FACT

In her brief to this Court, Appellant challenges four of the trial court’s factual findings, specifically findings of fact 22, 24, 25, and 32. Finding of fact 22 details part of the exchange that occurred between Sergeant Taylor and Appellant on 21 April 2020 after he arrived at her residence in response to her boyfriend calling for emergency medical assistance. This factual finding states:

22. Sergeant Taylor told Respondent Mother that there was a bad batch of heroin going around the community that was laced with Fentanyl. He told her that he had responded to two other calls about overdoses earlier in the day. Sergeant Taylor asked if she had taken anything and what she had taken. Respondent Mother replied to Sergeant Taylor that Dylan Wahnetah made the drugs for her. She took a “hot shot.” Asked if she had taken drugs in the house, Respondent Mother said she did not do drugs in the house. She had

gone to Dylan Wahnetah's camper. When Sergeant Taylor asked how much she [had taken], Respondent Mother admitted that [Mr.] Wahnetah fixed her the amount of drugs for what money she had. She admitted to Sergeant Taylor that while she was at [Mr.] Wahnetah's camper, she passed out, that someone administered Narcan and she woke up. She then came home.

Appellant contends that there was no competent evidence presented at the adjudicatory hearing that supports this factual finding. More specifically, she asserts that the only evidence admitted at the hearing that tends to support this finding was testimony from Sergeant Taylor regarding statements that she allegedly made to him on the night at issue, which Family Safety offered to prove the truth of the matters asserted therein, and that the trial court should have excluded Sergeant Taylor's testimony as inadmissible hearsay pursuant to the North Carolina Rules of Evidence. Appellant further contends that one of these statements – what she allegedly told Sergeant Taylor regarding having received Narcan – should have been excluded from evidence as hearsay within hearsay because her alleged statement to that effect was based on what Mr. Wahnetah had told her, not her personal knowledge. In sum, she contends that, even if Sergeant Taylor's testimony regarding what she allegedly said to him on 21 April 2020 was clear and convincing, the evidence was incompetent because it was admitted in error, such that this factual finding is wholly without competent evidentiary support.

Family Safety concedes that finding of fact 22 is based on Sergeant Taylor's testimony regarding what Appellant said to him about her drug use on 21 April 2020 and that it was offered for the truth of the matters asserted therein, such that this testimony constitutes hearsay as defined by Rule 801(c) of the North Carolina Rules of Evidence. However, Family Safety contends that Sergeant Taylor's testimony regarding the statements that she made to him was properly admitted into evidence pursuant to Rule 801(d) of the North Carolina Rules of Evidence, which contains an "[e]xception for [a]dmissions by a [p]arty-[o]pponent." N.C. Gen. Stat. § 8C-1, Rule 801(d)

(2020). Additionally, Family Safety points out that North Carolina courts have ruled in the analogous context of a juvenile abuse, neglect, and dependency adjudication that a statement made by a respondent-parent is admissible as an admission of party-opponent when offered by a county Department of Social Services (DSS), which is the case here. Because Sergeant Taylor's testimony was properly admissible pursuant to this hearsay exception in the North Carolina Rules of Evidence, Family Safety asserts that his testimony constitutes competent clear and convincing evidence to support this factual finding. We agree with Family Safety.

The North Carolina Rules of Evidence define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," *id.* § 8C-1, Rule 801(c) (2020), with "statement" further defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion," *id.* § 8C-1, Rule 801(a) (2020), and "declarant" further defined as "a person who makes a statement," *id.* § 8C-1, Rule 801(b) (2020). Under the North Carolina Rules of Evidence, "[h]earsay is not admissible except as provided by statute or by [said R]ules." *Id.* § 8C-1, Rule 802 (2020). One exception to the general rule excluding hearsay from evidence is for admissions by a party-opponent, as set forth in Rule 801(d), which provides:

A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

Id. § 8C-1, Rule 801(d).

Here the various statements that Appellant made, as the declarant, to Sergeant Taylor pertaining to her illegal drug use on the night at issue that Family Safety offered into evidence to prove the truth of the matter asserted via the testimony of Sergeant Taylor indeed constitute hearsay. Nevertheless, North Carolina courts have regularly held that such statements are properly admissible pursuant to Rule 801(d) as admissions by a party-opponent in adjudication hearings regarding child abuse, neglect, and dependency when offered by county social services against a respondent-parent. *In re J.M.*, 255 N.C. App. 483, 488-89, 804 S.E.2d 830, 834 (2017) (concluding that statements that the respondent mother made to her own mother, i.e., the children's grandmother, that the respondent-father had been too rough with the kids and was abusing them and that the children had been present during incidents of domestic violence between the parents – introduced by social services through the grandmother's testimony – were hearsay but admissible as an admission of a party-opponent against the respondent-father at the adjudicatory hearing); *In re Hayden*, 96 N.C. App. 77, 80-81, 384 S.E.2d 558, 561-62 (1989).

Here Appellant was a party-opponent to Family Safety at the adjudicatory hearing during which Family Safety sought to admit Sergeant Taylor's testimony regarding the statements that she made to him about her drug use on 21 April 2020, including that she went to Mr. Wahnetah's camper to buy and use drugs, that she purchased and consumed as much drugs as her money would buy, that she passed out in his camper after consuming the drugs, that someone there administered Narcan to her, and that she drove home thereafter. Each of these statements, except possibly the one regarding the Narcan, are clearly admissible as admissions of a party-opponent pursuant to Rule 801(d)(A) of the North Carolina Rules of Evidence. Even assuming, *arguendo*, however, that what Appellant told Sergeant Taylor about having received Narcan is not admissible pursuant to Rule 801(d)(A), we conclude that this testimony is still properly admissible as an admission of a

party-opponent pursuant to Rule 801(d)(B) because she relayed to Sergeant Taylor “a statement of which [s]he ha[d] manifested h[er] adoption or belief in its truth,” *id.* § 8C-1, Rule 801(d)(B). Accordingly, we conclude that Sergeant Taylor’s testimony regarding Respondent Mother’s admissions to him on 21 April 2020 was competent evidence that the trial court could properly consider as evidentiary support for finding of fact 22.⁹

At the adjudicatory hearing, Appellant did offer her own testimony that conflicted with Sergeant Taylor’s in which she asserted that Sergeant Taylor lied when he testified that she had told him that she had gone to Mr. Wahnetah’s camper to buy drugs and had purchased all the drugs her money could buy consisting of a “hot shot” prepared by Mr. Wahnetah, and in which she claimed that she did not even know what a “hot shot” was. Appellant further testified that she only went to Mr. Wahnetah’s camper to give him a ride; that she did not use any drugs while there; that she was not administered Narcan; that she asked her boyfriend to call for emergency assistance when she returned home because she was concerned she had blacked out due to an existing medical condition that causes her to pass out from dehydration, not due to her having consumed narcotics; and that she would have called her lawyer, not requested emergency medical assistance, if she had consumed illegal drugs.

Importantly, the trial court, not this Court, is the sole fact-finder and the arbiter of the credibility of witnesses.” *See* C.C. § 7-4(a) (2020)) (stating that “[t]he [t]rial [c]ourt shall have the power . . . to make findings of fact”); *id.* § 7-5 (2020) (stating that the “[t]he Supreme Court shall

⁹. According to Sergeant Taylor’s testimony, Respondent Mother told him that she had passed out after consuming all the drugs her money could buy, at which point “she was Narcanned,” and that Respondent Mother did not specify by whom or exactly how she knew that it had happened. Although Respondent Mother could not have administered Narcan to herself while she was unconscious, this does not preclude her from having direct personal knowledge of having received Narcan. Respondent Mother did not testify that she told Sergeant Taylor that Mr. Wahnetah (or anyone else) had informed her that Narcan had been administered or that the statement she made to Sergeant Taylor about having received Narcan was allegedly based solely on what someone else had told her, not any personal knowledge of her own. In fact, in her testimony, she denied telling Sergeant Taylor that she received Narcan and testified that she told EMS, not Sergeant Taylor, that Mr. Wahnetah had told her that he had administered Narcan.

not have the power to make findings of fact”); Unlike this Court, whose review is based on the record on appeal and the cold hearing transcript, trial judges directly interact with the parties and observe the witnesses give live testimony, which uniquely positions trial judges for their important fact-finding role in which they have the “duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom,” *In re N.G.*, 186 N.C. App. at 7, 650 S.E.2d at 49 (quoting *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984)), and “it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal,” *In re K.W.*, 282 N.C. App. 283, 290, 871 S.E.2d 146, 152 (2022) (quoting *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980)). Consequently, if the trial court’s findings of fact are supported by clear and convincing competent evidence, then the findings are conclusive even if some evidence supports contrary findings. *In re N.G.*, 186 N.C. App. at 4, 650 S.E.2d at 47. Although the trial court did not explicitly state in its factual findings that it found Sergeant Taylor more credible than Respondent Mother, it is clear from the factual findings that, in accordance with its fact-finding role, the trial court found Sergeant Taylor’s testimony more credible than hers on these factual issues and afforded his testimony greater weight in finding of fact 22. As such we conclude that Sergeant Taylor’s testimony constituted competent clear and convincing evidence to support this factual finding and, accordingly, that this factual finding can properly be considered in support of the trial court’s conclusions of law.

Findings of fact 24 and 25 pertain to events involving Appellant that allegedly occurred after she was transported to the hospital on 21 April 2020. These factual findings state:

24. Family Safety Program Investigator Ashley Moore responded to a report concerning Respondent Mother’s possible overdose. When she arrived at the residence, she found that Respondent Mother had been taken to the hospital. Thinking it was Cherokee

Indian Hospital, she arrived there to find [D.B.] and [Respondent Mother's boyfriend] but not . . . Respondent Mother. Respondent Mother had been transported to Harris Regional Hospital.

25. Ms. Moore met with Respondent Mother in her room at Harris Hospital. She observed Respondent Mother was pale, disheveled, and visibly sad. FSI Moore discussed the events of the evening. Respondent Mother admitted . . . that she overdosed. FSI Moore encouraged her to return to treatment as she had made past progress while in substance abuse treatment. After meeting with Respondent Mother that evening [D.B.] was placed outside of the home in the custody of the Department of Human Services.

Appellant contends that because Ms. Moore did not testify at the adjudicatory hearing these findings are wholly without any evidentiary support and, therefore, are erroneous and cannot be considered as support for the court's conclusions of law. In response, Family Safety concedes that, to the extent these factual findings are based on purported testimony from Ms. Moore, they are not supported by competent clear and convincing evidence presented at the adjudicatory hearing and were erroneously included in the lower court's order; however, Family Safety asserts that the erroneous inclusion of these findings does not constitute reversible error because these findings can be disregarded and are not necessary to support the lower court's conclusions of law adjudicating D.B. maltreated as to Respondent Mother based on drug endangerment and neglect.

In the instant case, after Respondent Mother finished testifying at the adjudicatory hearing, counsel for Family Safety asked the court: "Your Honor, I have Ms. Ashleigh Moore who is one of the investigators in this matter. She's on the phone as she is in Snowbird. If I might be excused for just a moment to see if she's available," to which the court responded in the affirmative. When the hearing resumed, Family Safety proceeded with the testimony of Ms. Miller, not Ms. Moore. For reasons that are unclear from the record, Ms. Moore did not testify at the adjudicatory hearing. As such, Appellant is correct that key parts of these factual findings are not supported by any competent evidence, specifically those parts that detail Ms. Moore's observations of Appellant's

appearance and demeanor at the hospital, Ms. Moore's efforts to locate Appellant before ultimately connecting with her at the hospital, the precise reason for visiting Appellant there (alleged overdose), and Appellant's alleged admission to Ms. Moore about overdosing. Accordingly, these portions of factual findings 24 and 25 are erroneous, must be disregarded, and cannot be relied on to support the trial court's conclusions of law. However, the portions of these factual findings that indicate that Ms. Moore met with Appellant at the hospital pertaining to a matter that affected her custody of D.B., that they discussed her past time and success in drug rehabilitation, and that D.B. was removed from her custody while Appellant was in the hospital subsequent to their interaction on 21 April 2020 are supported by uncontradicted competent evidence that is clear and convincing, including Appellant's testimony that she had a conversation with Ms. Moore and Ms. Crowe from Family Safety at the hospital on 21 April 2020 during which they discussed her prior stints and past success in drug rehabilitation programs, and Ms. Miller's testimony that Appellant called her later that night after Appellant had returned home from the hospital and indicated to Ms. Miller that Ms. Moore (along with Ms. Crowe) had taken custody of D.B. Accordingly, these portions of the factual findings are properly considered in support of the trial court's conclusions of law.

Finally, Appellant challenges finding of fact 32 on the ground that it is really a conclusion of law, not a factual finding. This purported finding states:

32. Under the circumstances, it was neither possible nor reasonable to prevent the removal from the home and ensure her safety. No other reasonable alternative existed that was less intrusive than taking the child into the custody of the EBCI PHHS Department of Human Services. The Department was precluded from making reasonable efforts to prevent or eliminate the removal of the child from the home.

In response, Family Safety contends that finding of fact 32 is indeed a factual finding and that competent clear and convincing evidence supports the various determinations that the court made therein, such that this factual finding is binding on appeal.

“In distinguishing between findings of fact and conclusions of law, ‘[a]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.’” *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (alterations in original) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted)). Again, “‘findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal.’” *In re Z.J.W.*, 376 N.C. 760, 775, 855 S.E.2d 142, 154 (2021) (quoting *Sparks*, 362 N.C. at 185, 657 S.E.2d at 658).

We agree with Appellant that this purported factual finding is essentially a conclusion of law (or a mixed finding of fact and conclusion of law) because it requires the exercise of judgment and the application of legal principles. In contrast to conclusions of law, finding of facts are the product of the trial court’s consideration and ultimate adjudication of the evidence before it to determine the facts in existence in a particular case. Here, for example, the court’s determinations regarding what the facts in existence were with respect to the pertinent “circumstances” upon which Family’s Safety based its decision to remove D.B. from her mother’s custody and place her outside of the home, such as what had occurred on 21 April 2020 with respect to Appellant’s drug use, what specific interventions and services Family Safety had provided to Appellant and, what, if any, alternative custody or placement arrangements existed for D.B. at the time, constitute findings of fact from which the court could draw conclusions that D.B.’s safety and bests interests necessitated that she be removed from the home and placed in the custody of the Department pending the adjudicatory hearing. Similarly, purported finding of fact 33, which states that “[t]he

minor child is a drug endangered and neglected child under the Cherokee Code, Section 7B-101(a) (18) and (23)” is not a factual finding, but rather two conclusions of law. Although Appellant does not explicitly challenge purported finding of fact 33 in her brief, she does assert therein that the trial court erred in concluding as a matter of law that D.B. was a “drug endangered child” and a “neglected child” under the applicable statutes. Accordingly, we review the challenged conclusions of law de novo. *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (stating that conclusions of law made by the trial court in child abuse, neglect, dependency adjudications “are reviewable de novo on appeal,” which means that the appellate court considers the conclusions of law anew and freely substitutes its own judgment for the lower court in determining whether the trial court’s factual findings support the challenged conclusions of law).

B. ADJUDICATORY ORDER – CONCLUSIONS OF LAW

Appellant argues that the trial court’s order contains insufficient factual findings to support its conclusions of law that D.B. was (1) a drug endangered child pursuant to C.C. § 7B-101(a)(18) and (2) a neglected child pursuant to C.C. § 7B-101(a)(23). More specifically, she contends that both statutes require a sufficient nexus or connection between a parent’s harmful acts or omissions and the harm or substantial risk of harm to the minor child, and that no such nexus or connection exists here. With respect to her own actions, she claims that the court’s order is unclear regarding whether the court believed that her 21 April 2020 request for medical assistance was the result of her using controlled substances and suffering an adverse reaction thereto (e.g., potential overdose), as Sergeant Taylor testified, or was due to her suffering a blackout stemming from a preexisting medical condition unrelated to any illicit drug use, as she testified. Regarding potential harm to the minor child, Appellant maintains that even assuming, *arguendo*, that she used controlled substances on 21 April 2020, the adjudicatory order does not contain sufficient factual findings

that show harm or a substantial risk of harm to D.B. stemming from her drug use that day. She further contends that any alleged drug use on her part complied with the Protective Action Plan and the Case Plan drawn up by Family Safety because she did not take the drugs at the family residence or in D.B.'s presence and her boyfriend remained at the home to serve as a sober caretaker for D.B. According to Appellant, the only evidence presented at the adjudicatory hearing regarding D.B.'s mental and physical state on 21 April 2020 was the testimony of Sergeant Taylor, which indicated that D.B. appeared clean and well-fed, that she was crying while Sergeant Taylor was at the residence, and that her boyfriend (who appeared sober) was present trying to comfort the minor child. Appellant argues that a child crying does not reflect the kind of harm or substantial risk of harm contemplated by Chapter 7B of the Cherokee Code with respect to child maltreatment (whether on the ground of drug endangerment or the ground of neglect), particularly when no evidence was presented at the hearing to establish that the 21 April 2020 events had any lasting impact indicating harm to D.B. or that the boyfriend could not adequately care for D.B.

In response Family Safety contends that the trial court did not err in adjudicating D.B. a "drug endangered child" and a "neglected child" pursuant to the pertinent statutes because the court's factual findings that underlie these determinations are supported by competent, clear, and convincing evidence contained in the hearing transcript and the record, and the factual findings adequately support these conclusions of law. With respect to drug endangerment, Family Safety contends that D.B. was at substantial risk of suffering harm from her mother's drug use, as demonstrated by the child's fearful and distressed reaction to Appellant's emergent drug-related condition on 21 April 2020, and the uncontroverted testimony of Ms. Miller, who opined, based on her training and experience, that it is a "huge trauma" for a minor child to witness a parent potentially overdosing on a controlled substance and that the trauma can last for years or even a

lifetime, especially without proper counseling and treatment for the child. Regarding the ground of neglect, Family Safety points to North Carolina law for the proposition that an adjudication of neglect “require[s] that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline,” *In re Safriet*, 112 N.C. App. 747, 752, 486 S.E.2d 898, 901-02 (1993) (citations and quotation marks omitted). Family Safety contends that the lower court’s factual findings show that Appellant’s drug use and possible overdose created a crisis that negatively affected D.B. in significant ways, as demonstrated by Sergeant Taylor’s observations that D.B. was crying and hysterical at her mother’s drug-related condition and could not be comforted, which is competent clear and convincing evidence demonstrating that emotional impairment or the substantial risk of such impairment existed here. Moreover, Family Safety asserts that, in view of Respondent Mother’s drug use and the alarming condition that she was in when she returned to the family residence that evening, which was compounded further by her violating the Family Safety Case Plan, for example, by altering the Family Safety Drug Test Request forms prepared by Ms. Miller, D.B. clearly was not receiving proper care and supervision and was living in an environment that was injurious to her welfare, which clearly amounts to both drug endangerment and neglect under Chapter 7B of the Cherokee Code.

As noted previously, drug endangerment and neglect are two of the five independent grounds that support a “child maltreatment” adjudication by the Cherokee Court. C.C. § 7B-101(a)(8). Only one ground must be established to support a child maltreatment adjudication. *See id.* Regarding the maltreatment ground of drug endangerment, *id.* § 7B-101(a)(8)(C), Chapter 7B defines a

[d]rug endangered child . . . [as a] child who is at substantial risk of suffering harm as a result of his/her parent, guardian, custodian or

caretaker's drug misuse, abuse, possession, manufacturing, or distribution including but not limited to the risk created when the parent, guardian, custodian or caretaker's drug use interferes with the caretaker's ability to provide proper supervision or a safe and nurturing environment for the child. For the purposes of this [C]hapter "drug" also includes alcohol.

id. § 7B-101(a)(18). As for the maltreatment ground of neglect, *id.* § 7B-101(a)(8)(D), Chapter 7B defines a

[n]eglected child . . . [as a] child *who does not receive proper care, supervision, or discipline from the child's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the child's welfare; or [who] is a drug endangered child as defined in this [C]hapter; or has not been provided proper care pursuant to an intervention plan or other plan developed by the Department to which the parent, guardian, custodian or caretaker has not substantially complied; or who has been placed for care or adoption in violation of law. In determining whether a child is a neglected child, it is relevant whether that child lives in a home where another child has died as a result of suspected abuse or neglect or lives in a home where another child has been subjected to abuse or neglect by an adult who regularly lives in the home.*

C.C. § 7B-101(a)(23) (2020) (emphasis added).¹⁰

Although Chapter 7B of the Cherokee Code has numerous similarities with Chapter 7B of the North Carolina General Statutes, unlike the Cherokee Code, North Carolina does not employ the term "drug endangered child" nor does North Carolina use drug endangerment as one of the independent grounds upon which an adjudication of child maltreatment can be based. or expressly include drug endangerment as one of the various independent grounds upon which a maltreatment adjudication of neglect can be based. *See* N.C. Gen. Stat. § 7B-101(15) (2020) (defining

¹⁰ Again, the italicized bases upon which the ground of neglect can be found were the ones alleged by Family Safety in its verified petition.

“neglected juvenile” as “[a]ny juvenile less than 18 years of age who is found to be a minor victim of human trafficking under G.S. 14-43.15 or whose parent, guardian, custodian, or caretaker does any of the following: (1) “Does not provide proper care, supervision, or discipline”; (2) “Has abandoned the juvenile”; (3) Has not provided or arranged for the provision of necessary medical or remedial care”; (4) “[H]as refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter”; (5) “Creates or allows to be created a living environment that is injurious to the juvenile's welfare”; (6) “Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S. 14-321.2”; or (7) “Has placed the juvenile for care or adoption in violation of law”). North Carolina courts have, however, viewed acts or omissions regarding drugs and alcohol as bearing on juvenile neglect adjudications and, when the allegation of neglect specifically involves the failure to “provide proper care, supervision or discipline” under N.C. Gen. Stat. § 7B-101(15)(ii)(a)), North Carolina Courts have “consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure” *In re Safriet*, 112 N.C. App. at 752, 486 S.E.2d at 901-02; *In re E.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775-76 (determining that a parent’s substance abuse alone cannot serve as grounds for adjudicating a child neglected absent evidence that the child suffered impairment or was exposed to a substantial risk of physical, mental, or emotional impairment), *aff’d per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007). As for other jurisdictions, Appellant’s Memorandum filed on 18 February 2022 indicates that: (1) the state of Oklahoma is the only jurisdiction that explicitly uses and defines the term “drug endangered child” in its statutory scheme governing child maltreatment. OKLA. STAT. tit. 10A, § 1-1-105(23) (defining “drug-endangered child” as “a child who is at risk of suffering physical, psychological or sexual harm as a result of the use,

possession, distribution, manufacture or cultivation of controlled substances, or the attempt of any of these acts, by a person responsible for the health, safety or welfare of the child, as defined in this section[,] includ[ing] circumstances wherein the substance abuse of the person responsible for the health, safety or welfare of the child interferes with that person's ability to parent and provide a safe and nurturing environment for the child"); and (2) several other states and tribal jurisdictions treat a parent's or caregiver's controlled substance use as bearing on child neglect or abuse. Appellant did not provide, and this Court did not locate, any case law from Oklahoma discussing or analyzing the term "drug-endangered child." Oklahoma does, nevertheless, consider a parent's acts or omissions related to controlled substances as one of the bases upon which a determination of neglect can be made, *see id.* § 1-1-105(49)(a)(2)(a) (2022) (defining "[n]eglect" to include, among other things, "the failure or omission to protect a child from exposure to the use, possession, sale, or manufacture of illegal drugs"), which is one of the grounds on which a child can be adjudicated a "deprived child" under Oklahoma law, i.e., that state's analog for a maltreated child, *id.* § 1-1-105(21) (2022) (defining "[d]eprived child," as among other things, a child "who has been abused, *neglected*, or is dependent") (emphasis added).

Importantly, in the Cherokee Code, Tribal Council decided both to make drug endangerment one of the five independent grounds upon which a child maltreatment adjudication can be based and also to include drug endangerment as one of the numerous independent standalone bases upon which the independent child maltreatment ground of neglect can be predicated. This conveys Tribal Council's heightened concern regarding child maltreatment stemming from acts or omissions related to drugs and alcohol by parents or primary caregivers occurring within the territorial jurisdiction of the EBCI and the need for a statutory scheme that broadly protects minor children from a wide array of potential harms stemming from those acts

or omissions. Toward that end, on its face, C.C. § 7B-101(a)(18) merely requires that a child be “at substantial risk of suffering harm,” not that she sustain actual harm. *Id.* Tribal Council further demonstrated this intent by using non-exhaustive language with respect to the risk of suffering harm and what might be encompassed therein. *Id.* (defining “drug engendered child” as “[a] child who is at substantial risk of suffering harm as a result of his/her . . . caretaker’s drug misuse, abuse, possession, manufacturing, or distribution *including but not limited to the risk created when the . . . caretaker’s drug use interferes with the caretaker’s ability to provide proper supervision or a safe and nurturing environment for the child*”) (emphasis added). As such, Tribal Council has made clear that the substantial risk of harm to a minor child created when the “caretaker’s drug use interferes with the caretaker’s ability to provide proper supervision or a safe and nurturing environment for the child,” *id.*, is not the only risk of harm from which children need protection. Indeed, Tribal Council has codified a broad-based approach for protecting children with respect to potential risks of harm stemming from drug endangerment, which further guides our resolution of Appellant’s challenges to the adjudicatory order here and ultimately leads us to affirm the lower court’s order.

First, as to Appellant’s acts and/or omissions regarding illegal drugs, we disagree with her assertion that the trial court’s factual findings do not adequately resolve whether she used controlled substances and sustained an adverse reaction thereto (including a potential overdose), which led her to request emergency medical assistance on 21 April 2020, as Sergeant Taylor testified, or whether she suffered a blackout stemming from a preexisting medical condition unrelated to any drug use, as she testified. Although Respondent Mother points to finding of fact 28 in support of her assertion, the court merely found therein that (1) “Respondent Mother *testified* that she has a medical condition where she has periods of blackouts, which explained her passing

out at Dylan Wahnetah's residence" (emphasis added), not that she, in fact, had such a condition or that it was the cause of her passing out that day, and (2) "Respondent Mother told Brooklyn Ledford that she had blackouts," not that she, in fact, had blackouts, or that her statement to that effect was, in fact, true. As noted earlier, to the extent Appellant's testimony conflicted with Sergeant Taylor's testimony that she used illegal drugs on 21 April 2020, which resulted in her losing consciousness, we find it sufficiently clear from the adjudicatory order that the trial court deemed Sergeant Taylor more credible than her, gave his testimony greater weight, and determined that she had, in fact, used illegal narcotics on the date at issue and requested emergency medical assistance due to concerns about adverse effects stemming from her drug use, including potential overdose concerns.

Next, with respect to the substantial risk of harm to the minor child stemming from Appellant's acts and/or omissions related to controlled substances, we also disagree with her assertion that her drug use at Mr. Wahnetah's camper was in full compliance with the terms of the Protective Action Plan and/or the Case Plan,¹¹ as well as her characterization of the court's factual findings as showing nothing more than a child crying in response to Appellant needing emergency assistance. While it is true that the factual findings tend to indicate that she did not ingest the narcotics at the family residence or in the presence of D.B. and that her boyfriend had remained at the family residence as a sober caregiver, Appellant elected to drive back to the family residence (again, without a valid driver's license) while she was still experiencing negative effects from the recently-consumed narcotics that appeared serious enough that emergency medical assistance was requested. In doing so, Appellant directly brought the effects of her drug use into the presence of the minor child at the family residence. The trial court's order indicates that Appellant was "in

¹¹ The trial court did not find that Respondent Mother's drug use on 21 April 2020 complied with the Protective Action Plan and/or Case Plan.

such a condition” when she returned home from using narcotics that D.B., her boyfriend, and she herself were all “scared” and that D.B. remained “frightened as she saw her mother lying in the condition that was presented to the [c]ourt.” The factual findings further indicate that D.B. was present and witnessed her mother exhibiting fear, alarm and panic to Sergeant Taylor about having consumed narcotics, as well as the physiological symptoms she was experiencing from them, and that D.B. remained “upset and afraid,” and was crying the entire time he was at the residence, despite efforts to comfort the minor child, including relocating her to a room at the back of the residence. Additionally, Ms. Miller testified, without objection or contradiction, that based on her training and experience, it is a “huge trauma” for a minor child to witness a parent experiencing a suspected overdose or severe reaction to a controlled substance, and that the trauma can last for years or even a lifetime, especially without the proper counseling and treatment for the child. Finally, regarding the scene D.B. witnessed and experienced on 21 April 2020, the trial court stated on the record in articulating its ruling: “Of course that’s going to have a long term effect on that child,” and “I can’t overlook that one night because all it takes is one night of neglect or drug endangerment to destroy a little child. All it takes is one night.”

It is certainly true that the factual findings that the trial court made in its adjudicatory order could have been more detailed and thorough, for example, the trial court neglected to provide much specificity regarding the actual scene that Sargent Taylor found at Appellant’s home or the risks of harm to D.B. Ultimately, however, we hold that the court’s findings are sufficient to support its conclusion that Appellant’s acts and/or omissions with respect to illegal drugs in April 2020 resulted in D.B. being a maltreated child based on drug endangerment pursuant to C.C. § 7B-101(a)(8)(C) and C.C. § 7B-101(a)(18). Again, the factual findings indicate that, in early 2020, shortly after Appellant’s older daughter was removed again from the family residence and

during the time D.B. had been returned to her custody, Appellant had not been complying with her random drug screen requirements in the case involving her older daughter. Additionally, her apparent initial compliance with the main drug-related components of the April 2020 Protective Action Plan and Case Plan proved illusory given that she had altered multiple Drug Test Request forms and had returned home around an hour after ingesting drugs at Mr. Wahneta's camper, thereby exposing D.B. to an emergent situation that significantly upset and terrified the minor child. In view of the above, the trial court's findings of fact and the evidence of record certainly support the conclusion that D.B. was a "drug endangered child" because Respondent Mother's acts and/or omissions related to her drug use put D.B. at a substantial risk of suffering emotional harm.

Although Appellant points out that finding of fact 21 states that D.B. appeared clean and well-fed on 21 April 2020, a child being clean and well-fed are just two of the potential pertinent facts that a trial court considers and weighs as part of the overall circumstances in deciding whether a minor child is "drug endangered" or "neglected" under Chapter 7B of the Cherokee Code. Given the totality of the facts and circumstances presented in this case, this finding does not preclude an adjudication of drug endangerment and/or neglect. Additionally, while it is true that the trial court found that Appellant's boyfriend remained at home with D.B. and that he appeared sober, he allowed D.B. to be exposed to the stressors pertaining to her mother's drug use and related emergent condition, and he did not spare or remove her from this unnerving scene until Sergeant Taylor directed him to do so. Moreover, while Respondent Mother is correct that no evidence was presented that D.B., in fact, suffered from any continued physical, psychological, or emotional harm stemming from that day, nothing in Chapter 7B of the Cherokee Code indicates that expert testimony is required to establish that a child was, in fact, harmed for purposes of

adjudicating the child maltreated based on drug endangerment. Again, C.C. § 7B-101(a)(18) explicitly requires that the child be “at substantial risk of suffering harm,” *id.*, based on the totality of the pertinent factual circumstances leading up to the filing of the petition, not that the child was, in fact, harmed. Consequently, we hold that the trial court did not err in adjudicating D.B. maltreated based on drug endangerment under the pertinent provisions in Chapter 7B because, based on the totality of the factual circumstances found by the trial court, Appellant’s acts and/or omissions with respect to drugs put D.B. at a substantial risk of suffering harm.

Because each independent ground, such as drug endangerment, on which a child maltreatment adjudication can be based is sufficient by itself to support a maltreatment adjudication, this Court need not address the independent maltreatment ground of neglect under C.C. § 7B-101(a)(8)(D) and C.C. § 7B-101(a)(23). Nevertheless, we note that the plain language used by Tribal Council in C.C. § 7B-101(a)(23) indicates that, if a minor child is adjudicated a “drug endangered child” under C.C. § 7B-101(a)(8)(C) and C.C. § 7B-101(a)(18), she is also a “neglected child” under C.C. § 7B-101(a)(8)(D) and C.C. § 7B-101(a)(23) (defining a “neglected child” as, among other things, “[a] child who is a drug endangered child as defined in this [C]hapter”). Consequently, we hold that the trial court did not err in concluding that D.B. was a “neglected child” and in adjudicating D.B. maltreated as to Appellant on the ground of neglect as set forth in Chapter 7B of the Cherokee Code.¹²

Next, with respect to purported finding of fact 32, which again is essentially a conclusion of law, Appellant contends that the adjudicatory order lacks sufficient factual findings to support the conclusion that no reasonable alternative existed for providing care to D.B. that was less intrusive than removing her from the family residence and putting her into protective custody on

¹² In view of our holding, we need not address the additional statutory bases for neglect under C.C. § 7B-101(a)(23) that Family Safety contends support a child maltreatment adjudication based thereon.

21 April 2020. She asserts that, to the contrary, the factual findings establish that her boyfriend was a qualified and sober caregiver for D.B. while she was away at Mr. Wahnetah's camper, and that the caregiving arrangement complied with the April 2020 Protective Action Plan and Case Plan.

In response, Family Safety contends that, based on the factual circumstances of this case, the lower court correctly concluded as a matter of law that it was neither possible nor reasonable to prevent D.B.'s removal from the home to ensure her safety, that no reasonable and less intrusive alternative existed other than Family Safety taking her into protective custody, and that Family Safety was precluded from making reasonable efforts to prevent or eliminate D.B.'s removal. In support, Family Safety points to (1) D.B. and her older sister being removed from their mother's home multiple times in two years; (2) the older sister being removed from the home in January 2020 and remaining in Family Safety custody ever since; (3) allegations of domestic violence and controlled substance use occurring in the home in April 2020 leading to Family Safety implementing additional services for Appellant with respect to D.B.; (4) some of the interventions and services designed to preclude the need for removal that Family Safety provided to Appellant prior to 21 April 2020, including the Safety Plan, the Protective Action Plan, random drug screens, and supportive contacts from Ms. Miller; (5) Appellant's April 2020 actions of altering the Family Safety Drug Test Request forms, driving to and from Mr. Wahnetah's camper despite not having a valid driver's license, using all the money she had brought with her to purchase controlled substances, consuming the controlled substances while there, subjecting D.B. to the harmful effects of her drug use by returning home in a condition that alarmed everyone in the home, and being unable to care for D.B. due to her drug use and subsequent hospitalization; and (6) her boyfriend being unable to shield D.B. from the harmful effects of observing and experiencing the

condition her mother was in due to her drug use. According to Family Safety, these factual circumstances demonstrate that despite the Department having engaged in reasonable efforts to support Appellant and to avoid removing the child, Appellant continued to engage in behaviors that put D.B. at substantial risk of harm, such that it was necessary to remove her from the home to ensure her safety, the only reasonable alternative available to Family Safety was to place D.B. in its custody, and Family Safety was precluded from making further reasonable efforts to prevent her removal and placement outside the home. We agree with Family Safety.

Tribal Council has defined “[r]easonable efforts” as:

The diligent and measurable use of preventive interventions or services targeted to preclude the need for a child’s removal or accomplish the reunification of a child placed outside of the home unless a Court of competent jurisdiction determines that the child shall not . . . be returned home, then reasonable efforts means the diligent, measurable and timely use of permanency placement planning services by the Tribe

C.C. § 7B-101(a)(28) (2020). Here the trial court’s factual findings and uncontested evidence indicate that Family Safety engaged in numerous preventative interventions and services targeted to preclude the need to remove D.B. from her mother’s residence in April 2020. These included (1) case management with Ms. Miller beginning on 8 April 2020; (2) the creation of an April 2020 Safety Plan with components that addressed concerns regarding drug use, domestic violence and cleanliness of the home environment including, among other things, providing additional materials to Respondent Mother and her boyfriend regarding domestic violence and reviewing an already-existing Safety/Action plan regarding this issue, requiring the completion of three negative/clean random drug screens within 30-90 days, sending additional food resources to Respondent Mother, and completing a home assessment of the family residence;¹³ and (3) the creation of a Protective

¹³ The Safety Plan states that D.B. was at “imminent” risk for removal and lists a maternal aunt as an alternative placement in the event D.B. was removed from the family residence.

Action Plan designed to protect D.B. in the event Appellant and her boyfriend decided to use “mood altering substances of any kind” that required them to refrain from using such substances in the family home or in her presence and to have a sober caregiver for D.B. if they decided to use.¹⁴ Despite Family Safety engaging in these “reasonable efforts,” Respondent Mother continued to engage in behaviors with respect to controlled substances that were contrary to D.B.’s safety and well-being. And, as noted earlier, although her boyfriend might have been sober on 21 April 2020 when he remained at the family residence as a caregiver for D.B. while Appellant visited a known drug dealer, he failed to protect or shield D.B. from observing and experiencing the emotionally unnerving situation created by her mother’s drug use and subsequent emergency transport to the hospital, for example, by enlisting the aid of her maternal aunt as provided in Protective Action Plan, and he did not even bring the child to her bedroom until Sergeant Taylor instructed him to do so. In view of the circumstances involved in this case, we hold that the trial court correctly concluded that it was neither possible nor reasonable to prevent D.B.’s removal from the home to ensure her safety; that no reasonable and less intrusive alternative existed other than Family Safety taking her into its protective custody, and that Family Safety was precluded from making reasonable efforts to prevent or eliminate D.B.’s removal stemming from Appellant’s drug use on 21 April 2020.

The final argument Appellant makes with respect to the adjudication order is that the trial court erred in determining that D.B. should remain in the custody of Family Safety at the time of

¹⁴ The Protective Action Plan names the same maternal aunt who is listed as an alternative placement option on the Safety Plan as D.B.’s “sober caregiver when needed by” Respondent Mother and her boyfriend. The April 2020 Safety Plan also states that a separate Protective Action Plan was already in place regarding the domestic violence concern; it does not appear, however, that the Protective Action Plan re: domestic violence was included in the Settled Record on Appeal. Finally, the Protective Action Plan lists additional resources that Family Safety had been providing Respondent Mother in the case involving her older daughter, including supportive contacts with Ms. Ledford, random drug screens, legal representation with Ms. Lepre, and therapy sessions involving Respondent Mother and her older daughter.

the 18 August 2020 adjudicatory hearing because no clear and convincing evidence was presented at the hearing that Appellant was unable to care for D.B. at the time hearing. Relying on *In re: F.S.*, 268 N.C. App. 34, 835 S.E.2d 465 (2019), she asserts that, when a minor child is not in parental custody, the trial court must conduct an assessment of future neglect and, in doing so, the court must consider the conditions as they exist at the time of the adjudicatory hearing and the risk of harm if the child is returned to the parent. According to Appellant, absent clear and convincing evidence regarding the existence of current circumstances demonstrating risk or a future probability of risk to D.B. at the time of the adjudicatory hearing, the trial court should have returned D.B. to her custody, especially when no evidence was presented that she was unable to care for D.B. at the time of the hearing.

In response, Family Safety argues that the trial court correctly determined that it was not in D.B.'s best interest to return her to Appellant's custody at the time of the 18 August 2020 adjudicatory hearing particularly when (1) the trial court had just adjudicated D.B. "maltreated" with respect to Appellant based on drug endangerment and neglect, (2) Appellant's behavior resulted in the almost immediate reinvolvement of Family Safety shortly after her minor daughters had returned to her residence, (3) Appellant did not fully comply with the Safety Plan and Protective Action Plan effectuated by Family Safety, (4) Appellant subjected D.B. to trauma by returning to the family residence while she was experiencing the negative and unnerving effects from the narcotics she had consumed, and (5) Appellant altered the Drug Screen Request forms, all of which led to the lower court questioning her credibility and commitment to her minor child. Family Safety contends that the bottom line is that there was no evidence before the court that the above circumstances had changed and that D.B. could safely return to Appellant's home. Accordingly, Family Safety maintains that the trial court's decision to keep D.B. in the custody of

Department at the time of the adjudicatory hearing was consistent with D.B.'s best interests and certainly not an abuse of discretion. We agree with Family Safety.

Although Appellant complains that no evidence was presented at the adjudicatory hearing regarding her present ability to care for D.B. at the time of said hearing, importantly, Tribal Council has instructed that, at the adjudicatory hearing, "[t]he [c]ourt shall adjudicate the existence or nonexistence of any of the allegations *in a petition*." C.C. § 7B-802 (emphasis added). Notably, in analyzing the analogous North Carolina statute, *see* N.C. Gen. Stat. § 7B-802 (2020) (mandating that "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in a petition*") (emphasis added), North Carolina courts generally have concluded that: (1) when deciding issues at the adjudicatory stage, "[a]bsent exceptional circumstances, the trial court may only look to the circumstances before the court at the time the petition was filed," *In re E.P.-L.M.*, 272 N.C. App. 585, 597, 847 S.E.2d 427, 437 (2020) (citation omitted); (2) "post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect, or dependency," *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 869 (2015) (citation omitted); and (3) "post-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not [in] an adjudication," *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006). We believe that Tribal Council similarly intended for Cherokee courts to generally limit consideration of the pertinent circumstances and evidence at the adjudicatory stage to the circumstances that existed up to the time the petition was filed, not afterwards.

The North Carolina Court of Appeals has formed narrow exceptions to this general rule, "for instance, when evidence is discovered after the filing of the petition that reflects a 'fixed and ongoing circumstance' rather than a 'discreet event or one-time occurrence,' that evidence may be

considered in a dependency adjudication.” *In re E.P.-L.M.*, 272 N.C. App. at 597, 847 S.E.2d at 437 (quoting *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 870 (considering post-petition evidence of father’s paternity in dependency adjudication because paternity was a “fixed and ongoing circumstance” relevant to whether the juvenile had a parent capable of supervision and care)). However, Appellant does not assert any such an exception applies here. “More recent case law has muddied the waters regarding what evidence a trial court may consider in an adjudication hearing,” *id.*, at 597, 847 S.E.2d at 437, under the North Carolina law. For example, in *In re F.S.*, the case relied upon by Appellant here, the Court of Appeals reversed (1) the lower court’s neglect adjudication because there was no clear and convincing evidence that “current circumstances or future probability present[ed] a risk to [the minor child] to support [the] conclusion that to immediately return [him] to [the] Respondent-mother’s care would place him ‘in an environment injurious to [his] welfare,’” 268 N.C. App. at 45, 835 S.E.2d at 472 (citation omitted), and, in doing so, the appellate court considered evidence and circumstances occurring after the filing of the petition, *id.* at 44-45, 835 S.E.2d at 472; and (2) the lower court’s dependency adjudication because there was no evidence presented that, at the time of the adjudicatory hearing, the respondent mother was unable to care for her child, and, in doing so, the appellate court considered evidence and circumstances occurring after the filing of the petition, *id.* at 46, 835 S.E.2d at 473. However, the Court did not opine or mandate therein that a trial court must conduct an assessment of future neglect and dependency any time a minor child is not in parental custody at the time of the adjudicatory hearing, or that, in doing so, the lower court must consider the conditions as they exist at the time of the adjudicatory hearing and the risk of harm if the child is returned to the parent. Moreover, subsequent decisions from the Court of Appeals, such as *In re E.P.-L.M.*, 272 N.C. App. at 597, 847 S.E.2d at 437, view the *In re F.S.* decision as applying a narrow exception

based on the unique facts of that case and continue to adhere to the general rule that, absent a few narrow exceptions, only the circumstances leading up to the filing of the verified petition should be considered at the adjudicatory stage. There, the Court materially distinguished *In re F.S.* because the child involved in that earlier case had been removed from his mother's custody several months *before* DSS had filed the petition alleging neglect and dependency, and the child had remained outside of her custody from that point all the way through the adjudicatory hearing, whereas the child involved in *In re E.P.-L.M.* had remained in the mother's custody *until the petition was filed* and then was in DSS custody until the adjudicatory hearing. *In re E.P.-L.M.*, 272 N.C. App. at 598, 847 S.E.2d at 437. The court further determined that none of "the narrow exceptions to the rule that only prepetition facts can be considered by the court in an adjudication [applied]," *id.*, 847 S.E.2d at 438, and rejected the mother's argument that the lower court should have considered the father's status at the time of the adjudicatory hearing with respect to the dependency of the minor child because the adjudication of this issue required consideration of the father's status at the time the petition was filed, not afterwards, *id.* at 597 and 842 S.E.2d at 437.

Likewise, *In re F.S.* is materially distinguishable from the instant matter and, consequently, Appellant's reliance on that case is misplaced. There, not only had the minor child not been in his mother's custody for several months prior to the date on which DSS had filed its petition alleging neglect and dependency, the allegations of neglect and dependency were based on the mother's multiple hospitalizations for alcohol and substance abuse that had occurred during a temporal window in which the minor child was not even in the mother's custody or care, and the child had not been removed from the home based on the allegations contained in the petition that was presently on appeal before the Court, *In re F.S.*, 268 N.C. App. at 35-37, 43-45, 835 S.E.2d at 467, 471-72. Instead, the minor child already had been removed from the home based on different

allegations/adjudications of neglect and dependency contained in a prior petition/order of the court, which the Court of Appeals had previously reversed. *Id.* In fact, at the time the second petition was filed (March 2018) and the second adjudication hearing was held (July 2018), the minor child had been removed from his mother's custody and care since December 2016, a considerable length of time and long before the alleged circumstances that formed the bases for the second petition had even occurred. *Id.* In contrast, here, D.B. was removed from Appellant's residence on 21 April 2020 based on actions or omissions that occurred during a time in which D.B. was in her custody and care that prompted Family Safety to file a verified juvenile petition 22 April 2020, which is a vastly different and materially distinguishable factual and procedural scenario. Accordingly, we conclude that the evidence presented to and the circumstances considered by the trial court at the adjudicatory hearing here were properly limited to the window of time leading up to the filing of the petition, not afterwards, and that Appellant's argument ultimately fails because "it requires consideration of [Respondent Mother's] status [and circumstances] at the time of the adjudication hearing, rather than the circumstances as they existed at the time the petition was filed." *In re E.P.-L.M.*, 272 N.C App. at 597, 847 S.E.2d at 437. As such, we hold that the trial court did not err in declining to consider circumstances existing at the time of the adjudicatory hearing regarding Appellant with respect to the custody and control of D.B. and in determining that D.B. should remain in the custody and control of the Department pending the statutorily-mandated dispositional hearing, particularly when the court had just adjudicated D.B. maltreated in the same order based on the acts and/or omissions of Appellant.

III. DISPOSITIONAL PHASE

After a child is adjudicated maltreated pursuant to Article 8 of Chapter 7B of the Cherokee Code, the case proceeds to the dispositional phase, which is governed by Article 9 of said Chapter.

See C.C. §§ 7B-900–7B-911 (2020). “The purpose of case dispositions is to fully evaluate the family strengths and needs and design an appropriate service plan with specific action steps to meet the specific needs of the family.” *Id.* § 7B-900. “The goal of all case services and action steps are to strengthen the safety and protective factors for the child and family so that the child can remain in the home with the parent, guardian, custodian or caregiver.”¹⁵ *Id.* When, as here, the trial court determines that a child has been maltreated under the Cherokee Code, then, at a future dispositional hearing, the court must consider issues regarding, *inter alia*, who should have custody, care and control of the minor child, as well as the permanent placement and plan for the child. See *id.* § 7B-902 (providing a non-exhaustive list of dispositions or alternative dispositions with respect to the custody, care, and control, as well as the placement, of a “maltreated child”); *id.* § 7B-903 (addressing the requirements and process pertaining to “reasonable efforts” designed to prevent placement of the minor child outside the home and to facilitate reunification).

Unlike the more formal adjudicatory hearing, “[t]he dispositional hearing may be informal and the [c]ourt must consider all available reports, including but not limited to the ICWT’s predisposition report, a report prepared by a guardian ad litem, and any other reports or evidence concerning the needs of the child.” *Id.* § 7B-901(b). Toward that end, Tribal Council has instructed that, at dispositional hearings, the [c]ourt shall consider information from the parents, the child, the guardian, any person providing care for the child, the custodian or agency with custody, the guardian ad litem and attorney advocate, members of the ICWT and any other person or agency that will aid in the [c]ourt’s review” regarding the disposition that reflects the best interests of the

¹⁵ Toward that end, in its adjudicatory order, the trial court “shall require a predisposition report be prepared for the disposition hearing,” *id.* § 7B-808(a), which must contain “the results of the home study assessment and comprehensive clinical assessment, a placement and reunification plan, and any service contracts that the ICWT deems appropriate to meet the child’s needs, *id.* § 7B-808(b). Here, the lower court’s adjudicatory order mandated that ICWT needed to “prepare a predisposition report for the [c]ourt containing the results of the home study assessment and comprehensive clinical assessment, a placement and reunification plan, and any service contracts that the ICWT deems appropriate to meet [D.B.’s] needs” prior to the future dispositional hearing.

child. *Id.* § 7B-901.1(b). Additionally, the court may permissibly consider any evidence, including hearsay as defined by Rule 801 of the North Carolina Rules of Evidence, or provided by a nonparty to the case if the court believes the evidence is “relevant, reliable, and necessary to determine the needs of the child and the most appropriate disposition.” *Id.*

On 5 and 18 November 2020, a dispositional hearing was held before Judge Waddell in the instant matter during which the court received into evidence (1) testimony from Ms. Ledford from Family Safety and Nicholas Ross, a therapist with Analenisgi-Family Safety Program, and (2) an ICWT Pre-Disposition court report prepared by Ms. Ledford, which was admitted as Family Safety Exhibit 1 and which included a behavioral health court report for D.B., a behavioral health court report for Respondent Mother, a home study for April Johnson (the individual with whom Family Safety placed D.B. in a foster home) and the most recent case plan for Respondent Mother. Additionally, the trial court took “judicial notice of the prior orders in this matter,” stated that “[a]ll prior orders of this [c]ourt [would] remain in full force and effect except as modified by” the dispositional order, and noted that the factual findings from the adjudicatory order were incorporated as if set forth in full in the dispositional order. Based on the testimony presented, the record proper, and the documentary evidence submitted by Family Safety, the trial court entered its dispositional order on 14 January 2021 from which Respondent Mother appeals.

In its dispositional order, the trial court found as fact that Respondent Mother was present at the dispositional hearing represented by Ms. Lepre and that Respondent Father was participating via telephone because he was presently incarcerated in North Carolina and that he was represented by Ms. Hedgepeth. The court also found that D.B. had been removed from Appellant’s custody previously on 19 February 2019. On 20 December 2019, D.B. entered a trial placement in Appellant’s home, and the court returned D.B. to her custody on 5 February 2020. At the time of

the 21 April 2020 events that led to the issuance of the protective custody order in this matter and the removal of D.B from the family residence, D.B. was in the legal custody of Respondent Mother and resided at her residence located on Tribal Trust Lands. Prior to removing D.B., Family Safety had engaged in reasonable and active efforts to prevent her placement outside the home and preserve the integrity of the family unit, including, but not limited to, Safety Plans, Case Plans, drug screens, counseling with the Analenisgi-Family Safety Program, and support from Ms. Miller from Family Safety. On 18 August 2020, the court adjudicated D.B. “maltreated” based on drug endangerment and neglect as to Respondent Mother.

The court further found that, as of the date of the November 2020 dispositional hearing(s), D.B. had been placed in a licensed foster home located in Graham County, North Carolina for over six months and was attending kindergarten. The court determined that the placement was safe, met her behavioral, physical, and developmental needs, and was the least restrictive, most family-like setting available for her.

Turing to the ICWT Pre-Disposition court report, the trial court found that said report was relevant, reliable, and necessary with respect to determining D.B.’s needs and the most appropriate disposition. The court determined that Family Safety had engaged in “reasonable efforts and services” to reunite Appellant with D.B., including Child and Family Team (CFT) Meetings, drug screens, behavioral health services, childcare applications, assistance with a Domestic Violence Protective Order, transportation, Safety Plans, domestic violence education, supportive contact visits with Family Safety/ICWT staff, and child therapy. Additionally, Respondent Mother had weekly visits with D.B. that were supervised by a relative, as well as phone conversations with the minor child. Respondent Father, who was still incarcerated at that time, also engaged in weekly phone calls with the child.

The court further found that Morgan Buckner, LCMHCA of the Analenisgi-Family Safety Program, reported that D.B. had been diagnosed with post-traumatic stress disorder, but that, despite this diagnosis, a 21 September 2020 Family Safety Treatment Continuum Recommendations and Report indicated that she had not been receiving therapy for it since being returned to Family Safety's custody, and that Ms. Buckner planned to reassess D.B.'s current needs for services. Additionally, the court made numerous factual findings regarding a 20 October 2020 CFT meeting attended by Appellant, Ms. Lepre, Mr. Phillips, Ms. Ledford, and mental health counselors Amy Smith, Ms. Buckner and Mr. Ross during which the group discussed the "worries" they had with respect to Respondent Mother, what had been working well, and what still needed to happen for her to achieve reunification with D.B.. Specifically, the group mentioned: (1) her lack of consistent sobriety and her engagement in an unsupervised visit involving her minor daughters after the children had tested positive for COVID-19 as "worries"; (2) Respondent Mother coming off of quarantine with no symptoms, her report that she had successfully applied for and would soon begin a job in Gatlinburg, TN, her regular participation in therapy and CFT meetings, and her plan to contact her Narcotics Anonymous (NA) sponsor as items that were "working well"; and (3) numerous goals the ICWT team deemed necessary for her to be reunified with D.B. and to which she and her attorney agreed. These goals included: (1) her NA sponsor writing Ms. Ledford a letter, which had not been accomplished as of the dispositional hearing; (2) Appellant continuing to participate in therapy, which she was achieving; (3) Appellant attending Family Safety Court, which she was achieving; (4) Appellant setting a date for regular phone calls with D.B., which she did, but she was inconsistent following the date/schedule in terms of making the actual calls; (5) Appellant participating in regular urine and hair drug screens, which she did at times but was inconsistent; (6) Appellant achieving consistent sobriety, which she had not done;

- (7) Appellant attending CFT's, albeit another CFT had not occurred since 10 October 2020; and
- (8) Appellant providing proof of employment, which she had not done.

Regarding Appellant's response to Family Safety's reasonable efforts, the court found that although she had provided urine samples that were negative for controlled substances in April 2020, those results should be discounted because she had engaged in efforts to falsify the urine screens, and a drug screen performed on D.B.'s hair sample on 24 April 2020 was positive for methamphetamine. On 4 May 2020, Appellant failed a urine screen due to noncompliance, and on 8 and 22 May 2020 she tested positive for controlled substances (hair screen positive for methamphetamine, amphetamines, heroin, and morphine on the earlier date and urine screen positive for oxycodone on the later date). Between 12 June and 21 July 2020, she submitted to five urine screens, all of which were negative for controlled substances. On 24 July 2020, her boyfriend failed a drug test due to noncompliance, but on 28 July 2020, his urine sample tested negative for all substances. On 7 August 2020, Appellant failed a urine screen due to noncompliance.

On 10 August 2020, she and her boyfriend were arrested for felony possession of methamphetamine. The jail reported that they both were subject to a \$5000.00 secured bond, neither of them were cooperating with authorities, and that her boyfriend was refusing the assistance of an attorney and to sign any paperwork. Prior to their arrest, beginning on 23 July 2020, Appellant had been allowed two hours of supervised visitation and three hours of unsupervised visitation per week based on her progress, including no positive drug screens in June or July 2020. After the arrest, unsupervised visitation was terminated. Also on 10 August 2020, Mr. Ross reported that Appellant had regularly attended individual therapy sessions with him and had only missed one appointment, which she had rescheduled, but Ms. Buckner reported that she was inconsistent with attending family therapy. On 11 August 2020, both Appellant and her

boyfriend failed urine screens due to noncompliance. On 13 August 2020, she attended a CFT meeting, and on 20 August 2020, she failed a urine screen due to noncompliance.

On 8 September 2020, a permanency planning hearing was held regarding D.B.'s older sister, which resulted in Family Safety being relieved of reasonable efforts to reunify Appellant and her older daughter, except for daily urine screens and weekly hair screens until a 30 September 2020 hearing in that matter. On 9 September 2020, Appellant failed a urine screen and a hair screen due to noncompliance. On 10 September 2020, her urine screen was negative for all substances, but her urine screens were positive for methamphetamine on 11 and 14 September 2020. Although her urine screen on 15 September 2020 was negative for controlled substances, her 15 September 2020 hair screen was positive for methamphetamine and amphetamine, and her 16 September 2020 urine screen was positive for methamphetamine. Moreover, although her 17, 18, and 21 September 2020 urine screens were negative for controlled substances, Appellant failed a 22 September 2020 urine screen due to noncompliance, a 22 September 2020 hair test was positive for methamphetamine, amphetamine, and morphine (with the levels of methamphetamine having increased since the 15 September 2020 hair test), and a 23 September 2020 urine screen due to noncompliance. Her urine screens on 24 and 25 September 2020 were negative for controlled substances.

On 25 September 2020, D.B. and her older sister allegedly went to their maternal grandmother's home for a weekend visit but, instead, spent the weekend unsupervised with Appellant, which Ms. Ledford neither approved nor knew about at the time. When the minor children did not return to their foster care placement on time, their maternal grandmother told Ms. Ledford that the children had visited their aunt in Brevard, which was not true. On 28 September 2020, Ms. Ledford received notification that both D.B. and her older sister had tested positive for

COVID-19, that the children's maternal grandmother had allowed them to spend the weekend unsupervised with Respondent Mother, and that the children had been instructed to lie and tell others that they were with their aunt in Brevard. On 28 September 2020, D.B.'s older sister reported to Ms. Ledford that she and D.B. had spent the weekend with Respondent Mother, and the children's aunt confirmed to Ms. Ledford that the children had not spent the weekend at her house. Based on this incident, both girls were removed from their grandmother's home and placed in a foster home, D.B. with April Johnson and her sister with Kathy and Tony Johnson. Appellant was quarantined due to exposure to COVID-19 stemming from the unauthorized unsupervised visit. On 12 October 2020, Appellant informed Ms. Ledford that she was free from quarantine.

At the 20 October 2020 CFT meeting, Appellant reported that she would provide Ms. Ledford proof of employment/receiving unemployment and a letter from her NA sponsor. On 21 October 2020, Respondent Mother learned that her regular phone call with the girls would take place at 4:00 p.m. on Sundays (after their weekly calls with Respondent Father), and she submitted to a urine screen that was negative for controlled substances.

The court further found that Appellant first began counseling with Mr. Ross in February 2019 and that she had been attending therapy regularly. Appellant had reported sobriety since the beginning of May 2020, at which point she shared information with Mr. Ross about a relapse. Because Mr. Ross believed she had been making progress identifying behaviors and managing relapse triggers and emotional regulation, he had reduced Appellant's therapy appointments to one day per week and, in his opinion, her motivation for change and her actions, such as her efforts towards sobriety, had been consistent for the last several months. However, the court emphasized in its factual findings that Mr. Ross's statement regarding her sobriety was based solely upon Respondent Mother's self-reports to him, not the results of the hair screens, that her report of

maintaining sobriety to Mr. Ross “was not accurate,” and that Mr. Ross confirmed in his testimony that the results of her hair screens were measurable indicators of substance use. Although Mr. Ross did a reassessment of Appellant based on the positive drug screens, he did not change his recommendations and opinion, which was that the “positive drug screens, occurring at the time that there were also negative screens and positive progress in therapy [were] relapses instead of [an] indication of long-term substance use.” The court further found that Appellant had applied for and received unemployment benefits based on her own initiative, which provided her with income, that she had maintained a safe and stable home while D.B. was in Family Safety’s custody, and that there was no evidence that she was impaired during visits with D.B.

On 16 November 2020, Appellant participated in a urine screen which was positive for amphetamine. On 17 November 2020, Respondent Mother missed her scheduled supervised visit with D.B. because she failed to produce a negative COVID-19 test. Although Respondent Mother previously reported to Mr. Ross that she was seeking or had obtained employment and/or housing in Tennessee, she did not provide any evidence to that effect to Ms. Ledford.

Additionally, in its dispositional order, the court noted that, in December 2019, it had ordered a home placement for both daughters in Respondent Mother’s residence because Respondent Mother had been doing well. However, the court emphasized that less than a month later, her older daughter was removed from the home and, although D.B. remained in the home at that time, she witnessed the effects of her mother’s drug use and potential overdose on 21 April 2020, which terrified D.B. Additionally, the court noted that, on 24 April 2020, D.B. herself participated in a hair screen that was positive for the presence of methamphetamine and highlighted concerns regarding Appellant’s positive drug tests, her up-and-down progress with drugs, and the August 2020 arrest of Appellant and her boyfriend.

The court further found that the Guardian ad Litem for D.B. shared Family Safety's recommendation that reasonable efforts to promote reunification with Respondent Mother should cease, that she had been unable to resolve the issues that had prevented her from providing safe and consistent care for the minor child that had previously led to the child being removed from her custody and care, and that D.B. could not be safely returned to her custody at the time of the dispositional hearing. Although the court noted that it "hat[ed] to make the decision to relieve the Department of making further reasonable efforts to reunify [D.B.] with Respondent Mother," the court found that "her behaviors ha[d] not changed despite the time and effort put forth by the Department and Analenisgi."¹⁶ The court also determined that "[f]urther services and reasonable efforts would be futile or unreasonable under the facts and circumstances present[ed] . . . and, therefore, sh[ould] cease," and that it was contrary to D.B.'s well-being for Family Safety to continue to make reasonable efforts at reunification with Appellant. Nevertheless, the court indicated that it wanted Appellant to succeed, encouraged her to engage in efforts to address the barriers to reunification with D.B., and emphasized that it was "not slamming the door on Respondent Father" either, such that upon his release from "prison . . . he can knock on the door and it will be opened for him to get involved."

Finally, the court concluded as a matter of law that it was contrary to D.B.'s welfare to return to Appellant's custody; that D.B. required more care than either of her parents could provide at that time; that the permanent plan for D.B. remained reunification with a concurrent plan of guardianship to a court-approved caregiver, which was the best plan to achieve a safe, permanent home for the minor child within a reasonable period of time; that the efforts Family Safety made to eliminate the need to remove D.B. and to reunify her with Appellant were "reasonable and active

¹⁶ This sentence is a synthesis of finding of fact 52, which Respondent Mother challenges on appeal to this Court.

efforts” pursuant to C.C. § 7B-903; that it was “futile, unreasonable and contrary to the well-being of the minor child for further reasonable efforts at reunification” with Appellant to continue; and that it was in D.B.’s best interests to remain in the custody and control of the Department.

In her brief to this Court, Appellant argues that the trial court committed reversible error in its dispositional order by concluding that (1) Family Safety should be relieved from making further reasonable efforts to reunite her with D.B., and (2) D.B. could not be returned to her custody at the time of the November 2020 dispositional hearing(s). Regarding the former issue, Appellant acknowledges that C.C. § 7B-903(g) allows the trial court to order the cessation of reasonable efforts geared toward reunification based on the existence of certain circumstances as set forth therein, but she contends that the factual circumstances in the instant matter did not warrant the conclusion that those efforts should be ceased. As to the latter issue, she asserts that the trial court erred by concluding that it was contrary to D.B.’s best interests to return to her custody at the time of the dispositional hearing because the trial court’s factual findings do not support its conclusion of law to that effect and because the trial court purportedly failed to make any factual findings to support the continued custody of D.B. outside of Appellant’s home.

In response, Family Safety argues that the trial court correctly determined that (1) it was “futile, unreasonable, and contrary to the well[-]being of the minor child for further reasonable efforts at reunification with Respondent Mother to continue”; and (2) returning D.B. to Respondent Mother’s custody at the time of the dispositional hearing(s) was contrary to her best interests. Regarding issue one, Family Safety contends that the lower court’s factual findings are supported by competent evidence, that the factual findings support its conclusion of law that reunification efforts with Appellant should be ceased under C.C. § 7B-903(g), and that the trial court did not abuse its discretion in ordering the cessation of such efforts. As to issue two, Family Safety asserts

that the factual findings are supported by sufficient evidence, that the factual findings support the lower court's conclusion that it was contrary to D.B.'s best interests to be returned to Respondent Mother's custody, and that the lower court did not abuse its discretion in ordering that D.B. remain in the Department's custody. As set out below, we agree with Family Safety.

Tribal Council has mandated, in pertinent part, that "[t]he dispositional order shall be in writing, . . . and shall contain appropriate findings of fact and conclusions of law, including why the best interests and safety of the child are served by the disposition and case plan ordered." C.C. § 7B-904(a). Moreover,

[a]ny dispositional review order shall comply with the requirements of C.C. [§] 7B-903 and shall include a brief description of what reasonable efforts were made to prevent the child's placement and to reunify the child with the parent, guardian or caretaker from whom the child was removed at the earliest time consistent with the child's safety.

Id. § 7B-904(f). As with adjudicatory orders, however, Tribal Council did not include any standards of appellate review to guide this Court in analyzing the lower court's dispositional order, and the parties again agree that neither Cherokee law nor federal law that expressly and directly applies to Indian tribes articulates any controlling standard of review with respect to said order, such that we should turn to North Carolina law for guidance as persuasive authority pursuant to C.C. § 7-2(d). The parties further agree that North Carolina law is especially pertinent here for numerous reasons, including that both statutory regimes utilize a best interest of the child standard at the dispositional stage. *Compare* C.C. § 7B-901(b) (providing that "[t]he child and the child's parent, guardian, custodian or caretaker . . . have the right to present evidence, and . . . may advise the [c]ourt concerning the disposition they believe to be in the best interests of the child") *with* N.C. Gen. Stat. § 7B-901(a) (2020) (providing that "[t]he juvenile and the juvenile's parent, guardian, or custodian shall have the right to present evidence, and they may advise the court

concerning the disposition they believe to be in the best interests of the juvenile”). We agree and, accordingly, adopt the applicable standards of appellate review set out in North Carolina law as set forth below.

Under North Carolina law, “[t]he standard of review that applies to an assignment [of error] challenging a dispositional finding is whether the finding is supported by competent evidence.” *In re B.W.*, 190 N.C. App. 328, 332, 665 S.E.2d 462, 465 (2008) (second alteration in original) (quoting *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007)). “A finding based upon competent evidence is “binding on appeal, even if there is evidence which would support a finding to the contrary.”” *Id.* (quoting *In re K.S.*, 183 N.C. App. 315, 323, 646 S.E.2d 541, 545 (2007)). Factual findings that are not challenged are “presumed to be supported by competent evidence and [treated as] binding on appeal.” *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted). In reviewing “challenged conclusions of law, [North Carolina appellate courts] determine whether the trial court’s [findings of] fact[] support the challenged conclusion.” *In re B.C.T.*, 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019) (citation omitted)). Finally, North Carolina appellate courts “review a trial court’s determination as to the best interest of the child for an abuse of discretion,” *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007), which occurs when “the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

A. DISPOSTIONAL ORDER – FINDINGS OF FACT

In her brief to this Court, Appellant only specifically challenges finding of fact 52, which states: “The Court hates to make the decision to relieve the Department of making further reasonable efforts to reunify [D.B.] with Respondent Mother; however, her behaviors have not

changed despite the time and effort put forth by the Department and Analenisgi.” Appellant asserts that this factual finding fails to adequately state or define the behaviors that she allegedly failed to change, but that it appears that the court’s primary concern was her intermittent positive drug screens that occurred over the course of Family Safety’s involvement with her and her minor daughters. According to Appellant, the evidence presented at the dispositional hearing did not establish that her behaviors pertaining to substance use had not changed; rather, she avers that the evidence, especially the testimony of Mr. Ross, and factual findings related thereto, establish that she remained actively engaged in her treatment plan, even though she had some setbacks, that she could not be expected to correct her substance abuse problem overnight, and, accordingly, those setbacks were not indicative of a lack of changed behavior on her part.

Family Safety acknowledges that the trial court did not specifically list or delineate in finding of fact 52 itself the unchanged “behaviors” that the court believed warranted the Department ceasing its reasonable efforts to reunify D.B. with Appellant. Nevertheless, Family Safety contends that the court articulated the behaviors with which it was concerned in other factual findings that detail, among other things, Respondent Mother’s apparent overdose on 21 April 2020 that led to D.B.’s removal from the home; her inconsistent drug screens, which showed continued controlled substance use; her arrest, along with her boyfriend, for possession of methamphetamine in August 2020; and her failure to provide Family Safety with the name of any sponsor or sobriety group with which she had claimed involvement as she had promised. Family Safety further argues that the court’s findings demonstrate that the court evaluated Appellant’s engagement with her treatment plan, including her participation in counseling with Mr. Ross, and correctly determined that the plan had little effect on her behavior. Contrary to Appellant’s assertions, Family Safety contends that the trial court did not ignore or misinterpret the testimony

of Mr. Ross with respect to making this determination; rather, the court discounted and afforded less weight to Mr. Ross's statements regarding Appellant's behavior because she had not been honest and forthcoming with Mr. Ross involving the use of controlled substances and because Mr. Ross did not question her self-reports of sobriety or review her drug tests, and relied on her statements alone in forming his opinion. Additionally, Family Safety notes that Ms. Ledford detailed the pattern of inconsistency that Appellant exhibited regarding maintaining her sobriety and her treatment plan in general, including that she still had failed to secure and maintain employment, have her driving privileges restored, or stop using controlled substances, during the six months in which D.B. had been in its custody leading up to the November 2020 dispositional hearing(s). Accordingly, Family Safety contends finding of fact 52 is amply supported by competent evidence that Appellant failed to change her behavior to address her controlled substance use and to create a safe home for D.B.

While the trial court certainly could have crafted this factual finding with greater clarity (and, concomitantly, facilitated this Court's task of appellate review) by listing or specifying the unchanged "behaviors" of concern in the finding itself, we agree with Family Safety that additional findings of fact contained in the dispositional order adequately highlight the behaviors with which the Court was concerned, including those highlighted above by Family Safety. Moreover, although Respondent Mother argues that finding of fact 52 lacks adequate evidentiary support because Mr. Ross's testimony tends to show that she made some progress in changing her behaviors, this argument is misplaced for several reasons. First, "partially performing a required condition does not necessarily preclude a conclusion that the performance is inadequate." *In re M.T.-L.Y.*, 265 N.C. App. 454, 467, 829 S.E.2d 496, 506 (2019). Second, as noted earlier, only the trial court has the authority to make findings of fact, as well as the underlying determinations regarding the

credibility of witnesses and other evidence and what weight should be assigned thereto. Here, we certainly can glean from the dispositional order that the trial court discounted and assigned less weight to the testimony of Mr. Ross than it did other evidence, like the testimony of Ms. Ledford and the Pre-Disposition Report, in accordance with the lower court's exclusive province and role. Third, if a factual finding in a dispositional order is supported by competent evidence, the factual finding is binding on appeal, even if certain other evidence might arguably support a contrary finding. *E.g., In re B.W.*, 190 N.C. App. at 332, 665 S.E.2d at 465. Hence, even assuming, *arguendo*, that Mr. Ross's testimony supports a contrary finding with respect to whether Appellant's behaviors of concern had changed, finding of fact 52 is indeed supported by competent evidence, such as the testimony of Ms. Ledford and documentation contained in the Pre-Disposition Report, and, therefore, is binding on appeal.

Accordingly, we overrule this assignment of error.

B. DISPOSITIONAL ORDER – CONCLUSIONS OF LAW

In this Court, Appellant argues that the trial court erred by determining (1) that Family Safety should cease reasonable efforts to reunite D.B. with Appellant and (2) that returning the minor child to her custody was contrary to the best interest of the minor child. As to the former issue, she contends that insufficient evidence was presented at the dispositional hearing to support the court's determination that it would be futile for Family Safety to continue undertaking reasonable efforts to reunite D.B. with Respondent Mother under C.C. § 7B-903(g) and that there are inadequate factual findings to support the conclusion that Family Safety should cease reasonable efforts at reunification. Appellant acknowledges her intermittent positive drug screens, but she contends that this evidence merely demonstrates that she had certain substances in her system at a point in time, not that those substances had any effect on her ability to parent, and that

the trial court's order is unclear regarding what, if any, problems her drug use caused for D.B. Appellant also acknowledges that a drug screen performed three days after her 21 April 2020 drug use incident on a hair sample from D.B. was positive for methamphetamine, but tries to discount the import of this test by arguing that no evidence was presented as to how D.B. came into contact with the substance (whether she ingested or was exposed to it), the circumstances pertaining to the drug test, or what kind of effect the substances had on the minor child. Moreover, she contends that the testimony of Mr. Ross and the factual findings related thereto indicate that she had made progress toward reunification and that it was still possible for D.B. to be returned to her custody in due time. As such, she asserts that the trial court's conclusion that reasonable efforts should be ceased under C.C. § 7B-903(g) is not supported by sufficient factual findings, and that the court abused its discretion by ignoring evidence that she contends weighs against the court making such a determination under C.C. § 7B-903(g).

In response, Family Safety asserts that the trial court's determination is supported by competent evidence and sufficient findings of fact and that the court did not abuse its discretion in making this conclusion. More specifically, Family Safety contends that the trial court correctly determined in accordance with C.C. § 7B-903 that reasonable efforts at reunification should be ceased based on C.C. § 7B-903(g)(10) and C.C. § 7B-903(g)(11) because the evidence presented at the dispositional hearing(s) demonstrated that Appellant had made little progress toward successful reunification, as demonstrated by objectively measurable results, including not only failed drug screens based on positive hair and urine samples and noncompliance, but also numerous other unmet goals throughout the six months leading up to the dispositional hearing(s) articulated in the Pre-Disposition Court Report. Family Safety emphasizes that, even during the two-week break between the two November 2020 dispositional hearing dates in this matter,

Respondent Mother produced a positive drug screen for amphetamine, missed a scheduled visit with D.B., and failed to provide any information about her alleged sobriety support group sponsor in accordance with prior requests. In sum, Family Safety contends that the pertinent factual findings are supported by competent evidence and, in turn, support the pertinent conclusion of law that it was “futile, unreasonable and contrary to the well[-]being of the minor child for further reasonable efforts at reunification with Respondent Mother [to] continue” under C.C. §7B-903(g). We agree.

Tribal Council has instructed Cherokee Courts that, “[i]n determining reasonable efforts to be made and in making such reasonable efforts, the health, developmental stage and safety of the child shall be the paramount concern.” *Id* § 7B-903(a). In a situation like the instant case in which the child has been previously removed from the family residence, Family Safety has maintained custody of the child, and the Court has determined that remaining in the home is contrary to the welfare of the child, Family Safety must still make “reasonable efforts” to reunite the child with her family as set out in C.C. § 7B-903(c), but only “for a period that shall not exceed six months for children under the age of seven years of age . . . unless otherwise ordered by the Court. *Id.* § 7B-903(f). After the six-month period has passed,

the Court may make a determination that no more reasonable efforts shall be made to reunite a child with a parent, guardian or custodian and shall order a permanency planning hearing to be held within 15 days of such determination and upon making findings that include but are not limited to the following:

....

(10) In light of the circumstances, the [c]ourt rules that family reunification would be contrary to the well[-]being of the child.

(11) The provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances.

Id. § 7B-903(g)(10), –(g)(11).

Although the trial court’s dispositional order does not explicitly cite to any of the provisions found in C.C. § 7B-903(g)(1)–(g)(11), the court’s findings sufficiently detail circumstances that support its conclusions that reunification would be contrary to the well-being of the child and that further services geared toward reunification would be futile and, therefore, unreasonable under C.C. § 7B-903(g)(10) and (g)(11). Here the court’s findings indicate that, from 19 February 2019 (when D.B. was initially removed from Appellant’s custody) through the November 2020 dispositional hearing(s), D.B. had only resided with Appellant for a period of approximately four months (20 December 2019 until 21 April 2020). During those four months, D.B.’s older sister again was removed from the home (January 2020); the Department received additional reports of domestic violence and substance abuse involving Appellant and her boyfriend necessitating Family Safety’s involvement; D.B. was exposed to the effects of her mother’s drug use on 21 April 2020; and, three days later, a hair sample taken from D.B. yielded positive results for methamphetamine. Moreover, although the trial court had admonished Respondent Mother in a 14 May 2020 custody order to “secure a picture of her daughters to help keep her focus on reunification with her children” and to comply with “every drug screen,” including hair tests, and refrain from changing drug test forms, Appellant continued from that date forward to engage in concerning behaviors which were antithetical to the goal of reunification. These circumstances include Appellant continuing to fail numerous drug tests based on noncompliance and positive results, even testing positive for amphetamines on 16 November 2020, two days before the second dispositional hearing; her arrest along with her boyfriend for possession of methamphetamine in

August 2020; her engagement in an unsupervised visit with D.B. and her older sister during the weekend of 25 September 2020 when the children had tested positive for COVID-19 and encouraging her daughters to lie about the visit to Family Safety; and Appellant neglecting to meet numerous obligations that the Family Safety ICWT team deemed necessary for her to achieve reunification (and to which she and her attorney agreed), such as providing Ms. Ledford with a letter from her alleged sobriety group sponsor and with proof of employment that she claimed she had secured, consistently following the planned schedule for making phone calls to D.B., and achieving consistent sobriety.

The trial court also did not abuse its discretion in arriving at its determination. As noted earlier, Appellant's heavy reliance on the testimony of Mr. Ross with respect to her efforts is misplaced. Nothing in the trial court's order indicates that the lower court ignored or wholly misunderstood Ms. Ross's testimony in arriving at its determination that the reasonable efforts at reunification with Respondent Mother that the Department made after D.B.'s removal from the home should be ceased under C.C. § 7B-903; rather, the lower court discounted his opinion and afforded it less weight, as it is entitled to do. Additionally, although Appellant is correct that some of the court's factual findings might potentially cut the other way with respect to this determination, such as her regular participation in individual therapy with Mr. Ross, maintaining safe and stable housing during the time D.B. had been in custody, and applying for and securing unemployment benefits based on her own initiative, we certainly cannot conclude that the lower court's "ruling [was] so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. at 10-11, 650 S.E.2d at 51 (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)).

Finally, Appellant argues that the trial court erred by concluding that it was contrary to D.B.'s best interest to be returned to Appellant's custody at the time of the dispositional hearing because the trial court's factual findings are insufficient to support the court's conclusion of law. According to Appellant, none of the trial court's factual findings support the continued custody of D.B. outside of Appellant's home. Moreover, she maintains that some of the evidence and findings tend to suggest that the minor child would not have been harmed by being returned to her care and that the findings do not support the conclusion that it was contrary to the welfare of the minor child to be returned to her custody at the time of the hearing. Appellant also contends that the lower court failed to make any factual findings regarding her inability to care for the minor child, and that no evidence was presented regarding D.B.'s status and needs at the time of the dispositional hearing, such that the dispositional order should be reversed, citing *In re B.C.T.*, 265 N.C. App. 193-94, 828 S.E.2d at 61-62, in support.

In response, Family Safety argues that the trial court correctly concluded that it was contrary to D.B.'s best interests to return her to Appellant's custody because sufficient findings of fact exist to support this determination, including, among other things, the unauthorized weekend visit by Appellant with her daughters; her failure to secure employment; and the numerous unmet goals from CFT meetings, including her disregard of scheduled visits and the continued use of controlled substances, all of which show that Appellant still was not acting in the best interests of D.B. (or her older sister) at the time of the dispositional hearing. Moreover, noting that dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion, Family Safety contends that the lower court's ruling here clearly was not so arbitrary that it could not have been the result of a reasoned decision. We agree.

Again, the previously highlighted factual findings detailing Appellant's problematic behavior clearly support the determination that it was contrary to D.B.'s welfare to return her to Appellant's custody at the dispositional hearing, and the trial court certainly did not abuse its discretion in arriving at it. Additionally, we find Respondent Mother's reliance on *In re B.C.T.* for the proposition that the best interest determination here should be reversed based on insufficient findings to be misplaced, as that case is materially distinguishable. There, the trial court made a conclusory recitation of the best interest standard in a matter involving dispositional orders and a civil custody order with respect to a decision to award custody of the minor children to a non-parent third-party individual who the court found was "a fit and proper person to have custody of the children," 265 N.C. App. at 188, 828 S.E.2d at 58, even though almost no evidence was presented regarding the third party, her home, or her care of the children, and no evidence was presented that the mother had failed to make progress on her plan, *id.* at 185-94, 828 S.E.2d at 58-62. In contrast, the instant matter does not involve a civil custody order or an award of custody to a non-parent third party; custody of D.B. remained with Family Safety; evidence was admitted at the hearing and findings were made with respect to D.B.'s foster placement with April Johnson; and Appellant repeatedly engaged in behaviors that demonstrated her failure to make adequate progress.

CONCLUSION

In sum, we hold that the trial court did not err in its adjudicatory order by: (1) adjudicating D.B. "maltreated" under Chapter 7B of the Cherokee Code based on drug endangerment pursuant to C.C. §§ 7B-101(a)(8)(C) and 7B-101(a)(18) and neglect pursuant to C.C. §§ 7B-101(a)(8)(D) and 7B-101(a)(23); (2) concluding that it was neither possible nor reasonable to prevent D.B.'s removal from the home to ensure her safety, that no reasonable and less intrusive alternative

existed other than Family Safety taking her into its protective custody, and that Family Safety was precluded from making reasonable efforts to prevent or eliminate D.B.'s removal stemming from Respondent Mother's drug use on 21 April 2020; or (3) determining that D.B. should remain in the custody of Family Safety at the time of the 18 August 2020 adjudicatory hearing. Likewise, we hold that the court did not err in concluding in its dispositional order that Family Safety should cease reasonable efforts at reunification with Appellant under C.C. § 7B-903 or in determining that it was contrary to D.B.'s welfare and best interests to be returned to Appellant's custody at the time of the dispositional hearing. Consequently, we affirm the trial court's 4 November 2020 adjudicatory order and its 14 January 2021 dispositional order.

AFFIRMED.

SO ORDERED

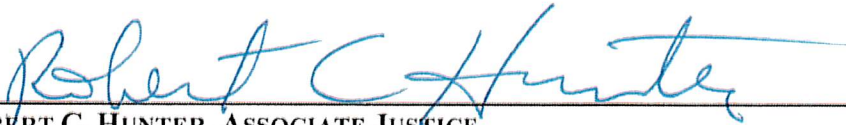
This the 21st, day of November 2022.



KIRK G. SAUNOOKE, CHIEF JUSTICE
THE CHEROKEE SUPREME COURT



BRENDA TOINEETA PIPESTEM, ASSOCIATE JUSTICE
THE CHEROKEE SUPREME COURT



ROBERT C. HUNTER, ASSOCIATE JUSTICE
THE CHEROKEE SUPREME COURT