# Chapter 2
# The Court, Key People, and the Rights of Children and Parents

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## 2.1 The Juvenile Court and Officials

### A. The Court

Abuse, neglect, dependency, and termination of parental rights cases are heard in district court by a judge and not a jury. In practice, the sessions of district court that hear juvenile matters (which include abuse, neglect, dependency, termination of parental rights, delinquency, undisciplined, and emancipation proceedings) are usually referred to as "juvenile court." There is not a separate juvenile court system in North Carolina.

**Note,** as used in this Manual, the term "juvenile court" refers to a district court that hears juvenile proceedings. Juvenile proceedings include those proceedings that are governed by the Juvenile Code (G.S. Chapter 7B). As used in this Manual, the term "juvenile proceeding" typically refers to an abuse, neglect, dependency or termination of parental rights proceeding; however, in some circumstances, the context may require the inclusion of delinquency, undisciplined, and emancipation actions.

**1. District court is juvenile court**. For purposes of abuse, neglect, dependency, and termination of parental rights actions, G.S. 7B-101(6) defines "court" as "the district court division of the General Court of Justice." There is no definition of "juvenile court" in Subchapter I of G.S. Chapter 7B; however, it is defined in Subchapter II, applying to undisciplined and delinquent juveniles, as "any district court exercising jurisdiction under this Chapter." G.S. 7B-1501(18). The terms "juvenile court" and "district court" are used interchangeably in the Juvenile Code. *See, e.g.,* G.S. 7B-323; 7B-324.

**(a) Juvenile court may be part of a family court district.** In 1998, the legislature authorized the establishment of family courts on a pilot basis, with funding appropriated for three family courts. There are fifteen family court districts that serve twenty-seven counties. Almost fifty percent of the state's population live in a county that is served by a family court district.[1] In these districts, family court case coordinators assist with the assignment and management of cases so that, to the extent possible, all of one family's legal matters are scheduled and heard before the same judge or team of judges who typically receive specialized training to handle complex family matters. Depending on the judicial district, family court matters include abuse, neglect, or dependency; termination of parental rights; domestic violence; child custody and visitation; child support; divorce, alimony, and equitable distribution; and juvenile delinquency and undisciplined proceedings. Some judicial districts that are not designated family court districts model selected family court practices, such as "one family-one judge" or child planning conferences. The North Carolina Supreme Court has recognized that the practice of "one judge, one family… reflects a central policy of the state." *In re J.A.M.*, 375 N.C. 325, 332 (2020).

[1] N.C. ADMIN. OFFICE OF THE COURTS, FAMILY CT. ADVISORY COMMITTEE & CT. PROGRAMS DIV., "NORTH CAROLINA FAMILY COURTS: ANNUAL REPORT" (October 1, 2023).

**(b) Judicially Managed Accountability and Recovery Courts.** Eight judicial districts have a Local Judicially Managed Accountability and Recovery Court (previously referred to as Family Drug Treatment Court or Drug Treatment Court), which works with parents and guardians who are in danger of losing or have lost custody of their children due to abuse or neglect and who have substance use issues. Participants receive support in their efforts to overcome substance use and to make other changes that will facilitate reunification with their children. *See* G.S. 7A-790 *et seq.* Starting in 2022, Local Judicially Managed Accountability and Recovery Courts have an expanded purpose to also work with parents and guardians whose mental, behavioral, or medical health is a significant factor in their commission of abuse or neglect. *See* S.L. 2021-180, sec. 16.5.

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**Resource:** For more information, see "Family Court" and "Family Drug Treatment Court" on the North Carolina Administrative Office of the Courts website. Use the search box for the terms "Family Court" and "Family Drug Treatment Courts."

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**2. Juvenile court sessions.** All juvenile proceedings are civil actions in district court, although they are scheduled and heard separately from other civil cases. The court may have special juvenile sessions for cases that are expected to involve lengthy hearings or for other reasons.

**3. JWise system.** JWise is the official court index of juvenile cases. It is an automated computer information system operated by the North Carolina Administrative Office of the Courts (AOC). JWise is used by multiple juvenile court officials and employees to record and access juvenile court information, manage cases, and link case outcomes from different courts. The AOC is in the process of converting to a new digital integrated case management system: Odyssey. As part of a statewide rollout, five counties are utilizing Odyssey as of the date of this publication: Wake, Johnston, Lee, Harnett, and Mecklenburg. Eventually, Odyssey will replace the JWise applications statewide.

**4. Juvenile Rules of Recordkeeping.** The AOC issues rules that govern recordkeeping in the offices of the clerks of superior court. Chapter XII of the Rules of Recordkeeping Procedures for the Office of the Clerk of Superior Court addresses the filing system, access to and expungement of records, and related topics in juvenile proceedings. See Appendix at the end of this Manual. In 2023, the AOC issued eCourt Rules of Recordkeeping for Clerks of Superior Court, which applies to records that are managed and maintained in Odyssey.

## B. Judicial Officials and Staff

District court judges and clerks of superior court, often through assistant and deputy clerks, are key participants in every abuse, neglect, dependency, and termination of parental rights (TPR) proceeding.

**1. Juvenile court judge**. A district court judge presides over every juvenile court proceeding, without a jury. Any district court judge may preside over abuse, neglect, dependency, and TPR actions. Assignments of judges to juvenile court are made by the chief district court judge. G.S. 7A-146(1), (7); *see* N.C. R. CIV. P. 40. In judicial districts designated as family court districts, the assignment of one judge to one family is encouraged. Other judicial

districts allow for different judges to hear different types of cases for a family or different hearings that are conducted in the same action (e.g., an initial disposition hearing and a permanency planning hearing). Local rules may require or encourage the assignment of one judge to one family, regardless of whether the judicial district is a family court district.

**(a) Specialized training.** Although special training is not a prerequisite for holding juvenile court, the Administrative Office of the Courts (AOC) encourages appropriate training and provides juvenile court certification to judges who complete an approved series of courses related to juvenile proceedings, satisfy experience requirements set by the AOC, and maintain a certain number of continuing judicial education hours designated as qualified courses for continued juvenile certification. *See* G.S. 7A-147. Additionally, an advanced child welfare certification was approved by the AOC in 2022 and is available for judges who have obtained juvenile court certification and want to receive advanced certification. Like juvenile court certification, advanced child welfare certification requires a district court judge to take a series of courses related to child welfare, satisfy experience requirements set by the AOC, and maintain a certain number of continuing judicial education hours designated as qualified for continued advanced child welfare certification.

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**Resources:**
The website for the National Council of Juvenile and Family Court Judges is a valuable resource for publications, training opportunities, and technical assistance for juvenile court judges.

For more information about juvenile court certification and advanced child welfare certification, see "Juvenile Certification" on the "NC District Court Judges" microsite on the UNC School of Government website.

Effective December 2021, the North Carolina Supreme Court approved a new North Carolina State Bar specialization for child welfare law. For the requirements, see 27 N.C.A.C. Chapter 1D, section .3400. District court judges who have attained juvenile court certification may count that certification for one of the five years of required experience.

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**(b) Recusal.** Recusal of a judge is not addressed in the Juvenile Code, but it is an issue that arises occasionally in abuse, neglect, dependency, and TPR proceedings. Even though the one judge-one family approach to judicial assignments for juvenile court has become more common, the issue of recusal is most likely to come up when a judge hears different proceedings involving the same family. The North Carolina Code of Judicial Conduct addresses recusal (disqualification) in Canon 3. Canon 3 of the Code of Judicial Conduct states in part that a judge should disqualify themselves in a proceeding in which the judge's impartiality might reasonably be questioned, including a proceeding in which the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings. *See* N.C. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(a).

When a party requests recusal by the trial judge, the party must demonstrate that grounds for disqualification exist. *See In re Z.V.A.*, 373 N.C. 207 (2019); *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994). Absent a motion from a party, a judge is not required to recuse themselves, and the issue is not preserved for appeal. *In re Z.V.A.*, 373 N.C. 207 (although not preserved for appellate review, supreme court exercised discretion under Rule of Appellate Procedure 2 to address respondents arguments raising judicial bias and recusal); *In re D.R.F.*, 204 N.C. App. 138 (2010) (holding that trial judge did not err in failing to recuse himself where the judge had no duty to recuse himself sua sponte; there was no indication of the reason for the judge's earlier recusal in another hearing; and the issue was not preserved for appeal because no motion for recusal was made in the trial court).

In applying the standard from Canon 3, appellate cases have not found that a judge should be recused simply because the judge presided over another case involving the same children. *See In re J.A.M.*, 375 N.C. 325, 332 (2020) (affirming TPR; recusal not required; recognizing "one judge, one family" practice "reflects a central policy of the state"); *In re Z.V.A.*, 373 N.C. 207 (reasoning a statement at the TPR hearing made by the district court judge at the last permanency planning hearing that he was willing to send the child to an out-of-state relative because he did not think the child could be with her parents was merely an explanation of the court's decision about the child's best interests at the time that decision was made, and was not a reflection that the court had reached a conclusion to terminate the parents' rights prior to the TPR hearing; a determination of judicial bias based on this statement would have the illogical consequence of a district court judge never being able to preside over a TPR after ordering a permanent plan that is compatible with the need for a TPR); *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the trial judge who presided over the mother's TPR proceeding was not barred from presiding over the father's TPR proceeding without any showing by the father of "extraordinary circumstances," which, according to local rules, would have been the only basis for recusal of the judge); *In re Faircloth*, 153 N.C. App. 565 (holding that recusal from a TPR proceeding was not necessary for the sole reason that the judge presided over an abuse, neglect, or dependency proceeding involving the same children); *In re LaRue*, 113 N.C. App. 807 (holding that the judge did not have to recuse himself from a TPR action because he presided over an earlier review hearing).

Although not a recusal case, mother argued in *In re N.L.M.*, 283 N.C. App. 356 (2022) that she was denied a fair hearing because of comments made by the presiding judge. The court of appeals stated that "[t]rial courts have 'broad discretionary power to supervise and control the trial' "… and "even 'extremely pointed' comments by the trial court did not 'show a preexisting bias against plaintiff or a prejudging of her case' when its opinions and remarks were based upon evidence at trial." *In re N.L.M.*, 283 N.C. App. at 371–72. The court of appeals determined the judge's comments were made to all the parties, not just mother, and were based on the evidence it heard during the initial dispositional hearing and did not show bias against mother or a prejudging of mother's case.

**Resource:** For more information about recusal, see Michael Crowell, *Recusal*, ADMINISTRATION OF JUSTICE BULLETIN No. 2015/05 (UNC School of Government, Nov. 2015).

**2. Chief district court judge**. The chief district court judge has the authority to issue various administrative orders related to juvenile court. The chief district court judge may issue an administrative order authorizing someone other than a district court judge to issue nonsecure custody orders under G.S. 7B-502(b), the sharing of reports among the parties under G.S. 7B-800(c), and designating a local agency as an agency that is authorized to share confidential information relating to juveniles under G.S. 7B-3100. See Chapters 5.5.C.2 (relating to issuing nonsecure custody orders) and 14.1.E (relating to agency sharing of information). The chief district court judge may also adopt local rules addressing discovery and other procedures in juvenile proceedings. *See* G.S. 7B-700(b), (f); 7B-800.1(b); 7B-808(c); 7B-903.1(d).

**3. Juvenile court clerk.** The clerk of superior court is responsible for maintaining the official court record and generally designates one or more assistant or deputy clerks to act as juvenile court clerks. Juvenile records include paper and electronic filings, audio recordings of hearings, and an automated index of juvenile proceedings. The clerk has specific statutory responsibilities related to juvenile proceedings. For example, the clerk must issue summonses, appoint provisional counsel, notify the local guardian ad litem office of a petition alleging a child's abuse or neglect, and give written notice of hearings. *See, e.g.*, G.S. 7B-406(a); 7B-408; 7B-602(a); 7B-906.1(b), (h). The clerk generally distributes the hearing calendar but does not manage it. The clerk also operates electronic recording systems for juvenile hearings and, when a case is appealed, creates duplicate recordings and delivers them to a transcriptionist.

Note that the clerk of superior court acts as the judicial official presiding over adoptions. G.S. 48-2-100; *see* G.S. 48-2-607(b); 7B-1101. See also Chapter 10.3 (discussing adoptions).

**4. Juvenile court case manager or coordinators.** Some judicial districts have court staff whose role is to provide case management for abuse, neglect, dependency, and TPR cases.

## 2.2 Key People: Who's Who in the System

### A. Introduction

Many people may become involved in an abuse, neglect, or dependency and, if applicable, termination of parental rights (TPR) proceeding, some playing a role inside the courtroom and others functioning in supporting and service roles outside the courtroom. Understanding the roles of these various people in the system is critical and can affect both the proceedings and the quality of advocacy or decision-making in a case.

The tables in a courtroom where the parties sit can get crowded, as three or more sets of people may be participating. These can include a county department of social services (DSS)

attorney with the DSS caseworker(s); one or more parents, guardians, custodians, or caretakers and their attorneys; the child's guardian ad litem (GAL) team and perhaps the child; and when applicable, a private individual or representatives of a child-placing agency seeking a TPR.

**Note,** for purposes of this Manual, "department of social services" or "DSS" refers to a department as defined by G.S. 7B-101(8a) regardless of how it is titled or structured.

Others who may play a role in the case include relatives, persons providing care to the juvenile (e.g., foster parents), professional service providers (related to mental and medical health, education, etc.), and law enforcement officials.

## B. The People: Explanation of Roles

**1. Social services director.** The DSS director has several duties and responsibilities that are established by statute. *See* G.S. 108A-14. Some of those responsibilities relate specifically to child welfare services, such as assessing reports of child abuse and neglect and taking steps to protect such children, supervising children's placements in foster homes, and investigating and supervising adoptive placements. G.S. 108A-14(a)(6), (11) and (12). Laws and regulations related to DSS responsibilities usually reference "the director" as the one carrying out those responsibilities.

Director is defined by the Juvenile Code as the director of the county department of social services in the county where the child resides or is found, or the director's authorized representative. G.S. 7B-101(10); *see In re A.P.*, 371 N.C. 14 (2018). The director's duties and authority to delegate responsibilities to staff are set out in G.S. 108A-14. It is understood that most responsibilities belonging to the director are carried out through an authorized representative of the director. *See In re D.D.F.*, 187 N.C. App. 388 (2007).

**2. Social services caseworkers.** DSS caseworkers screen the report and assess the case and, with others in the department, determine whether to file a petition and/or provide services to the family. Caseworkers carry out many of the statutory responsibilities of the DSS director. Caseworkers are involved in coordinating services for the family, gathering information to present in court, testifying in and making recommendations to the court, and working with and monitoring the family situation until DSS services are no longer needed.

**3. Social services attorney.** The DSS attorney works with the DSS caseworker(s) assigned to a particular case. Because DSS is the petitioner in every abuse, neglect, or dependency case and in some termination of parental rights (TPR) cases, the DSS attorney is responsible for the initial presentation of evidence at many hearings. *See* G.S. 7B-401.1(a); 7B-1103(a)(3)–(4). In addition to advising and representing DSS in individual cases, the DSS attorney may provide counsel, advice, and training about court procedures, relevant changes in the law, liability, and other matters. DSS attorneys across the state are a mix of in-house agency attorneys, county or assistant county attorneys, and private attorneys under contract to represent DSS. The source of direction and supervision a DSS attorney receives may vary depending on which arrangement is in place. Because DSS is not a legal entity separate from the county, however,

the DSS attorney's ultimate client is the county.

**Resources:**
Effective December 2021, the North Carolina Supreme Court approved a new North Carolina State Bar specialization for child welfare law that DSS attorneys may seek to obtain. For the requirements, see 27 N.C.A.C. Chapter 1D, section .3400.

For a discussion of ethical dilemmas for attorneys representing a DSS, see
- Kristi Nickodem, *New SOG Bulletin: Ethical Dilemmas in Client Representation for DSS Attorneys in North Carolina*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 13, 2021).
- Kristi Nickodem, *Ethical Dilemmas for Client Representation for DSS Attorneys*, SOCIAL SERVICES LAW BULLETIN NO. 48/2021 (UNC School of Government, Oct. 2021).

**4. The child or juvenile.** In this Manual the terms "child" and "juvenile" are used interchangeably. The child is the subject of a report of suspected abuse, neglect, or dependency and any resulting petition filed in juvenile court. The child is also the subject of any action seeking to terminate the rights of one or both parents. In both an abuse, neglect, or dependency and TPR court action, the child is a party. G.S. 7B-401.1(f); 7B-601(a); 7B-1104. As defined by the Juvenile Code, a juvenile is anyone under the age of 18 who is not married, emancipated, or in the Armed Forces. G.S. 7B-101(14). In North Carolina, a 16- or 17-year old minor may become emancipated in one of two ways: marriage or a court order entered in an emancipation proceeding. G.S. 7B-3500 through-3509. *See* G.S. 51-2; 51-2.1 (marriage).

The child may or may not be a source of information relating to the allegations in the petition and may or may not be called to testify in the adjudication or disposition phases of the case. The child's age and situation, as well as local practice and the court's and parties' preferences, will influence the nature of the child's participation in the case. However, children of any age have a right to be present in the courtroom since they are a party. *See* G.S. 7B-401.1(f). The Juvenile Code mandates the child's involvement in certain proceedings, starting at age 12. The child's involvement may be as simple as sending notice directly to the child or as complicated as having the court question the juvenile. *See, e.g.*, 7B-906.1(b)(ii); 7B-912(d); 7B-1110(d).

In all abuse and neglect cases and in most dependency and TPR cases the child is appointed a guardian ad litem (GAL), who advocates for the child's best interests and protects the child's legal rights. G.S. 7B-601(a); 7B-1108.

See sections 2.3.C and D, below (explaining the child's rights and GAL representation).

**5. The child's guardian ad litem.** When a petition alleges that a child is abused or neglected, the court must appoint a GAL for the child; when a petition alleges only that the child is dependent, the court may appoint a GAL. A GAL is also required to represent a child who is the subject of a TPR proceeding in certain circumstances. G.S. 7B-601(a); 7B-1108.

Any time the court appoints a GAL who is not an attorney, the court also must appoint an attorney advocate to protect the child's legal interests. The child's GAL representation is by a team that consists of a GAL volunteer, local GAL program staff, and attorney advocate. The team represents the best interests of the child and protects the child's legal rights. G.S. 7B-601; 7B-1108. See section 2.3.D, below (discussing details related to the N.C. Guardian ad Litem Program and the appointment, role, and responsibilities of GALs). See Chapter 9.4.C (discussing appointment of a GAL in a TPR proceeding).

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**Resource:** Effective December 2021, the North Carolina Supreme Court approved a new North Carolina State Bar specialization for child welfare law that GAL attorney advocates may seek to obtain. For the requirements, see 27 N.C.A.C. Chapter 1D, section .3400.

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**6. Parent.** The child's parents are parties to the abuse, neglect, or dependency proceeding involving the child unless a parent's rights have been terminated or the parent has been convicted of first- or second-degree forcible rape, statutory rape of a child by an adult, or first-degree statutory rape that resulted in the child's conception. A parent who has relinquished the child for adoption ordinarily is not a party, but the court may order that the parent be made a party. G.S. 7B-401.1(b). Effective for infants who are safely surrendered by a parent on or after October 1, 2023, the surrendering parent is not a party in an abuse, neglect, or dependency action for that infant unless (1) the parent seeks to regain custody of the juvenile or (2) the court orders the parent be a party when an action is commenced because of circumstances of abuse, neglect, or dependency created by the non-surrendering parent. *See* S.L. 2023-14, sec. 6.2(a)–(c). For more information about infant safe surrender, see Chapter 5.8

Because abuse, neglect, and dependency cases are about the child, not "against" a parent, and because both parents' rights may be affected by the court's intervention, every effort should be made to serve both parents and involve both parents in the proceeding. A parent who had no involvement in the circumstances leading up to the petition alleging abuse, neglect, or dependency has the same rights in the action as a parent alleged in a petition to have created the child's circumstances.

A parent whose rights are sought to be terminated is named as the respondent in a TPR action.

The term "parent" is not defined in the Juvenile Code but generally is considered to be a child's legal, biological, or adoptive parent. If paternity of a child has not been established legally or if a child has both a legal and a putative father, a determination of paternity in the juvenile proceeding may be necessary. *See* G.S. 7B-506(h)(1); 7B-800.1; 7B-901(b) (requiring the court to inquire about efforts to identify and locate missing parents and to establish paternity if paternity is an issue and authorizing the court to order that specific efforts be made). See Chapter 5.4.B.7 (discussing paternity).

See section 2.4, below (related to parent's rights).

**7. Parent's attorney.** In juvenile proceedings each parent has a statutory right to counsel and to court-appointed counsel if indigent, unless the parent knowingly and voluntarily waives that right. G.S. 7B-602; 7B-1101.1. *See also Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (holding that the Due Process Clause of the U.S. Constitution does not require appointment of counsel for indigent parents in every TPR case and discussing the analysis for determining on a case-by-case basis whether appointment of counsel is constitutionally required). The parent's attorney represents the expressed interests of the parent.

See section 2.4.D, below (discussing court-appointed counsel for respondent parents).

**Resource:** Effective December 2021, the North Carolina Supreme Court approved a new North Carolina State Bar specialization for child welfare law that parent attorneys may seek to obtain. For the requirements, see 27 N.C.A.C. Chapter 1D, section .3400.

**8. Parent's guardian ad litem.** The Juvenile Code requires the appointment of a guardian ad litem (GAL) pursuant to Rule 17 of the Rules of Civil Procedure for a parent who is an unemancipated minor. The court has discretion to appoint a Rule 17 GAL for an adult parent who is incompetent. A Rule 17 GAL is not the same as the child's GAL appointed under G.S. 7B-601 and has no affiliation with the N.C. Guardian ad Litem Program.

See section 2.4.F, below (discussing GALs for respondent parents in abuse, neglect, or dependency cases), and Chapter 9.4.B (discussing GALs for respondent parents in TPR actions).

**9. Custodians, guardians, and caretakers.** Often people other than a child's parents are responsible for or involved with caring for the child. The Juvenile Code classifies these persons for purposes of determining their legal role and significance in an abuse, neglect, or dependency proceeding as "custodians", "guardians", or "caretakers". It is important to understand the definition of each term to determine which applies in a particular circumstance. *See In re M.S.*, 247 N.C. App. 89 (2016) (holding that stepparent who did not adopt the child or have an order awarding him custody of the child was a caretaker, not a parent or custodian, and thus was not entitled to appeal under G.S. 7B-1002); *In re A.J.L.H.*, 275 N.C. App. 11 (2020) (relying on *In re M.S.*, 247 N.C. App. 89), *rev'd and remanded on other grounds*, 384 N.C. 45 (2023). A custodian, guardian, or caretaker who is a party to the case has many but not all of the same rights as a parent. For example, only parents have a statutory right to appointed counsel if indigent. However, the Office of Indigent Defense Services has a policy addressing the payment of counsel for non-parents when a court appoints an attorney after finding constitutional due process requires such appointment.

**Resource:** N.C. OFFICE OF INDIGENT DEFENSE SERVICES, "Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings" (July 2, 2008).

For more information on the role and status of persons who become custodians and guardians as a result of dispositional hearings, see Chapter 7.4.E and 7.10.B.4 (custodians) and 7.4.F and 7.10.B.3 (guardians).

**(a) Custodian.** The Juvenile Code defines custodian as a person or agency that has been awarded legal custody of the child by a court. G.S. 7B-101(8). The custodian of a child at the time a petition is filed is a party to the abuse, neglect, or dependency action; however, the court may remove a custodian as a party when the court finds both that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(d), (g). The failure to make both findings before removing a custodian who was a party from the proceeding is reversible error. *In re J.R.S.*, 258 N.C. App. 612 (2018) (reversing and remanding the order removing grandparents who were custodians through a Chapter 50 order when the neglect and dependency action was initiated; noting that due to the Chapter 50 custody order awarding legal and physical custody to grandparents, the district court hearing the juvenile proceeding in its discretion may be prevented from making the first finding required by G.S. 7B-401.1(g)).

A person who was not a party to the case initially but who becomes the child's custodian through an order that awards custody of the child to that person and finds the custody arrangement is the permanent plan automatically becomes a party to the proceeding. G.S. 7B-401.1(d). See Chapter 7.10.B.4 (discussing custody as permanent plan).

**(b) Guardian.** Guardian is not defined in the Juvenile Code. Instead, the statute that addresses the appointment of a guardian specifies the guardian's rights and responsibilities. *See* G.S. 7B-600. In an abuse, neglect, or dependency proceeding, the court may appoint a guardian of the person for the juvenile when no parent appears in a hearing with the juvenile or any time the court finds it would be in the best interests of the juvenile. The guardian operates under the supervision of the court and has the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile. The guardian also has the authority to consent to certain types of actions for the juvenile that are specified in G.S. 7B-600(a). See Chapter 7.4.F (detailing the appointment and duties of a guardian).

A guardian also includes a guardian of the person or general guardian appointed to the juvenile pursuant to G.S. Chapter 35A by the clerk of superior court. The clerk's authority to appoint a guardian of the person or a general guardian for a minor is limited to when the minor has no natural guardian or pursuant to a standby guardianship. G.S. 35A-1221; 35A-1224(a); 35A-1370 through -1382.

A person who is the child's court-appointed guardian of the person or general guardian at the time the petition is filed is a party to the abuse, neglect, or dependency action. G.S. 7B-401.1(c). The court may remove a guardian as a party when the court finds both that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(g). The failure to make both findings before removing a guardian who was a party from the proceeding is reversible error. *See In re J.R.S.*, 258 N.C. App. 612 (2018) (reversing and remanding the order removing grandparents who were custodians through a Chapter 50 order when the neglect and dependency action was initiated; noting that due to the Chapter 50 order awarding legal and physical custody to the grandparents, the district court hearing the juvenile proceeding in its discretion may be prevented from making the

first finding required by G.S. 7B-401.1(g)).

A person who was not a party to the case initially but who is appointed as the child's guardian pursuant to G.S. 7B-600 automatically becomes a party if the court finds the guardianship is the permanent plan for the child. G.S. 7B-401.1(c). See Chapter 7.10.B.3 (discussing guardianship as permanent plan).

**(c) Caretaker.** A caretaker is any person, other than a parent, guardian, or custodian, who has responsibility for the health and welfare of a juvenile in a residential setting. This may be

- a stepparent,
- a foster parent,
- an adult member of the juvenile's household,
- an adult entrusted with the juvenile's care,
- a potential adoptive parent during a visit or trial placement for a juvenile who is in DSS custody,
- a house parent or cottage parent in a residential child care or educational facility, or
- any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

G.S. 7B-101(3).

The definition of caretaker involving an adult member of the juvenile's household was amended by S.L. 2019-245, effective December 1, 2019. Prior to this effective date, a caretaker included an "adult relative entrusted with the juvenile's care," but the relative relationship has now been removed. Regarding the adult relative, the North Carolina Supreme Court addressed how to determine whether an adult relative is "entrusted with the juvenile's care" such that caretaker status attaches warranting government interference with the parent-child relationship in *In re R.R.N.*, 368 N.C. 167 (2015). The supreme court examined the purposes of the Juvenile Code and the definition of caretaker and described the categories of persons identified in the caretaker statute as those with "significant, parental-type responsibility for the daily care of the child." *In re R.R.N.*, 368 N.C. at 170. The trial court (and although not addressed by the supreme court, DSS) must consider the totality of the circumstances and whether the relative has significant parent-type responsibility for the child when determining whether the person alleged to have created the child's circumstances as abused or neglected is a caretaker. Factors to be considered include the duration, frequency, and location of the care provided as well as the level of decision-making authority given to the adult relative by the parent. *See State v. Chambers*, 278 N.C. App. 474, 479 (2021) (quoting *In re R.R.N.*, 368 N.C. at 170). To comply with the purposes of the Juvenile Code, that same analysis would apply to an adult entrusted with the juvenile's care.

In *R.R.N.*, when applying the totality of the circumstances test to the adult relative, who was the juvenile's stepfather's cousin, the supreme court held that he was not entrusted with the juvenile's care while supervising a one-night sleepover in his home. Although the relative was responsible for ensuring the juvenile's short-term safety, he was not given

significant parent-like responsibility of the juvenile and was not a caretaker within the meaning of the statute. *In re R.R.N*., 368 N.C. 167. In an appeal of a First-Degree Murder conviction that was based on Felony Child Abuse, the court of appeals looked to the "caretaker" definition in G.S. 7B-101(3) and *R.R.N*. for guidance in determining whether the defendant was a person providing care to or supervision of the two-year-old child who died. *See State v. Chambers*, 278 N.C. App. 474. The defendant was the child's mother's boyfriend. The court of appeals determined that the defendant was a person providing care to or supervision to the child as he provided "parental-type" care when he (i) slept at the mother's home every week night (excluding weekends) for four months, (ii) played with her children and supervised the child who died when the child was playing outside, (iii) helped potty train the child, (iv) helped the children get ready for bed and checked on them at night; (v) cooked meals for the household and did yardwork, and (vi) stayed with the other children while the child and mother went to the hospital on the night the child died. *State v. Chambers*, 278 N.C. App. 474.

A caretaker is a party to the abuse, neglect, or dependency action only if the petition includes allegations relating to the caretaker, the caretaker has assumed the status and obligation of a parent, or the court orders that the caretaker be made a party. G.S. 7B-401.1(e). A caretaker may be removed as a party when the court finds the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(g). A caretaker does not have all the same rights in the proceeding as a parent, guardian, or custodian. For example, a caretaker does not have standing to appeal any order entered in the abuse, neglect, or dependency action. G.S. 7B-1002(4) (authorizing appeals by a nonprevailing party who is a parent, guardian, or custodian but not a caretaker); *In re M.S*., 247 N.C. App. 89 (2016) (dismissing appeal brought by stepparent who was a caretaker for lack of standing).

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**Practice Notes:** Caretakers generally do not have a right to intervene in an abuse, neglect, or dependency action. G.S. 7B-401.1(h); *but see* G.S. 7B-401.1(e1) (addressing foster parents). It is unclear whether the language of G.S. 7B-401.1(e)(iii), which allows for a caretaker to be made a party when ordered by the court, results from a non-party caretaker seeking that status or only from the district court acting sua sponte or in response to a motion made by an existing party in the action.

Prior to January 1, 2016, a "caretaker" also included any person responsible for caring for a child in a child care facility as defined in G.S. 110-86. Now, such person is a "caregiver" who is subject to reports of suspected "child maltreatment" occurring in a child care facility that are made to and investigated by the N.C. Department of Health and Human Services Division of Early Education and Child Development. *See* S.L. 2015-123.

**Resources:**
For more information about determining caretaker status, see Sara DePasquale, *Who Is a "Caretaker" in Child Abuse and Neglect Cases?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 2, 2015).

For more information about child maltreatment occurring in a child care facility, see

- Sara DePasquale, *The New Law Addressing Child Maltreatment in Child Care Facilities: It's the State's Responsibility*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 6, 2016).
- SARA DEPASQUALE, *Suspected Child Maltreatment Occurring in a Child Care Facility* (UNC School of Government, 2016), CH. 13A *in* JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA (UNC School of Government, 3d ed. 2013).

**10. Relatives.** Both maternal and paternal relatives may play an important role in the child's life as a resource for support and/or placement. DSS is required to make diligent efforts to notify relatives within thirty days of an initial order removing custody that the child is placed out of the home and determine whether a relative is willing and able to be an appropriate placement or resource support (e.g., supervise visitation). *See* G.S. 7B-505(b); *see also* 7B-506(h)(2); 7B-800.1(a)(4); 7B-901(b). The court must order placement with a relative who is willing and able to provide proper care and supervision to the child in a safe home unless the court finds it would be contrary to the child's best interests. *See* G.S. 7B-505(b); 7B-506(h)(2); 7B-903(a)(4), (a1). *See also* G.S. 7B-101(19) (definition of "safe home"). If a child is placed with a relative, that relative who is providing care to the child must receive notice of and have the opportunity to address the court about the child's well-being in permanency planning hearings. G.S.7B-906.1(b)(iv), (c).

Effective October 1, 2021, the Juvenile Code defines "relative" as "an individual directly related to the juvenile by blood, marriage, or adoption, including, but not limited to, a grandparent, sibling, aunt, or uncle." G.S. 7B-101(18a). This definition is broad and does not contain an exhaustive list of possible relatives. For guidance, the Cross Function section of the N.C. Child Welfare Manual refers to federal law, which identifies adult grandparents, all parents with legal custody of a sibling of a child, and other adult relatives including those suggested by the parents. Additionally, for relative notification, the Permanency Planning section of the Child Welfare Manual identifies adult relatives and kin suggested by the parents; adult maternal and paternal grandparents, aunts, uncles, siblings, great grandparents, nieces and nephews; and a person with legal custody of a sibling. That section further clarifies that adoptive parents of siblings are not relatives of the child but are individuals with legal custody of a sibling. *See* DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL, available here. For purposes of a conflict of interest, the Rules set forth at 10A N.C.A.C. Chapter 70E, section .1105 and Chapter 70H, section .0302 identifies relatives as birth and adoptive parents, blood and half-blood siblings, grandparents (including great and great-great), aunt and uncle (including great and great-great), nephew, niece, first cousin, stepparent, stepsibling, and the spouse of each of these relatives.

**Resource:** For information about relative placement and changes in North Carolina law addressing payment to relative placements that are unlicensed foster homes, see Timothy Heinle, *New Supports for Relative Placements of Abused, Neglected, and Dependent Juveniles,* UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (Nov. 21, 2023).

**11. Nonrelative kin.** The Juvenile Code defines nonrelative kin as (1) an individual having a substantial relationship with the juvenile or (2) for a juvenile who is a member of a State-recognized Indian tribe, an individual who is a member of any State-recognized or federally recognized Indian tribe regardless of whether there is a substantial relationship with the juvenile. G.S. 7B-101(15a). Nonrelative kin may also be referred to as "fictive kin."

The court may consider placing a juvenile with nonrelative kin. G.S. 7B-505(c); 7B-506(h)(2a); 7B-903(a4). If a child is placed with nonrelative kin, that nonrelative kin who is providing care to the child must receive notice of and have the opportunity to address the court about the child's well-being in permanency planning hearings. G.S.7B-906.1(b)(iv), (c).

**12. Foster parents.** Foster parents play a crucial role in an abuse, neglect, or dependency case. They provide substitute care to a child who has been separated from their family due to abuse, neglect, or dependency and placed with foster parents by DSS or the court. The Juvenile Code does not define foster parent; however, the laws governing foster care licensing define a "foster parent" as any individual who is 21 years of age or older and licensed by the State to provide foster care. G.S. 131D-10.2(9a). "Foster care", "family foster home", and "therapeutic foster home" are defined at G.S. 131D-10.2(9), (8), and (14) respectively.

A foster parent is not a party to the abuse, neglect, or dependency proceeding. However, a foster parent may be allowed to intervene when the foster parent has the authority (or standing) to file a TPR petition (or motion). G.S.7B-401.1(e1). Although not a party, foster parents who are providing care to the child must receive notice of and have the opportunity to address the court about the child's well-being in permanency planning hearings. G.S. 7B-906.1(b)(iv), (c); *In re J.L.*, 264 N.C. App. 408 (2019) (discussing foster parents' participation in the hearing with attorney representation; holding no abuse of discretion). When a child's permanent plan is adoption, if a foster parent who wishes to adopt the child is not selected by DSS, the foster parent has a right to notice of the selected prospective adoptive parent and the right to seek a judicial review of that selection. G.S. 7B-1112.1. See Chapter 10.3.B (relating to selection of prospective adoptive parent).

Effective September 10, 2021, the North Carolina Legislature enacted the Foster parents' Bill of Rights. *See* G.S. 131D-10.9C; S.L. 2021-144. The importance of foster parents in supporting children and families and being a member of a team working to address the issues that led to a child's placement in foster care is recognized. There are fourteen enumerated rights that are included in the Foster parents' Bill of Rights, which have the purpose of ensuring foster parents are treated with dignity, respect, and trust in their work. Nothing in the Foster parent's Bill of Rights overrides existing law or administrative rule, and a violation of a provision of the Foster parent's Bill of Rights does not create a cause of action under the law.

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**Resources:**

For more information about the rights and role of a foster parent and licensing requirements and rates for foster parents, see

- Sara DePasquale, *2023 Child Welfare Legislative Changes*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 3, 2023).

- Sara DePasquale, *Legislative Changes Focus on Foster Parents*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 18, 2021).
- Sara DePasquale, *What Is the Role of a Foster Parent in the A/N/D Court Action?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 30, 2015).

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**13. Law enforcement.** It is not uncommon for law enforcement to be the source of reports to DSS of a child's suspected abuse, neglect, or dependency. *See* G.S. 7B-301; 14-204(c); 14-318.6(g). A DSS assessment may reveal facts that DSS is required to report to law enforcement, which then has a duty to initiate a criminal investigation. *See* G.S. 7B-307. See also Chapter 5.1.F (discussing law enforcement involvement in the pre-adjudication stage of a case). At the request of DSS, law enforcement officers are required to assist DSS in the assessment and evaluation of the seriousness of a report. G.S. 7B-302(a), (e). Sometimes law enforcement and DSS coordinate interviews and other aspects of the criminal investigation and social services assessment, and in some counties the agencies have developed protocols to facilitate this type of coordination. Regarding an alleged responsible individual who is not a parent, guardian, custodian, or caretaker and who created the circumstances of a juvenile being a minor victim of human trafficking, DSS must coordinate with local law enforcement to determine the safest way, if possible, to send the required notice to that individual. G.S. 7B-320(a1). See Chapter 5.2.B (discussing the Responsible Individuals List).

**14. District attorney or prosecutor.** In some circumstances, DSS must notify the prosecutor regarding information it obtains. *See* G.S. 7B-307; 7B-302(a1). Whether criminal charges will be filed is always up to the prosecutor. In addition, the prosecutor may be contacted by the person making the report of a child's suspected abuse, neglect, or dependency to request review of a DSS decision not to file a petition. G.S. 7B-302(g); 7B-305; 7B-306. See Chapter 5.1.E (discussing review by a prosecutor of a DSS decision not to file a petition).

**15. Other professionals and their agencies.** Often various professionals and agencies are involved in evaluating or treating children or parents. Agencies and individuals also may be involved in caring for a child or assisting the parent in addressing issues related to employment, housing, education, etc. Professionals and individuals who speak on behalf of agencies are not parties to the proceedings and generally are not subject to orders of the court absent specific statutory authority. Note that there is a new law, effective January 1, 2022, that authorizes emergency hearings where a juvenile in DSS custody presents at a hospital emergency department for mental health treatment and continues to remain at the hospital when it is not medically necessary. *See* G.S. 7B-903.2; S.L. 2021-132, sec. 5.(b). In that statute, a local management entity/managed care organization or prepaid health plan, the hospital, and the NC Department of Health and Human Services are parties for the limited purpose of that hearing and compliance with orders that are entered as a result. For more information about these emergency hearings, see Chapter 7.6.C.

Other professionals may be subpoenaed as witnesses or called on to provide affidavits, written reports, or other information. See Chapter 14 (relating to laws governing confidentiality and disclosure of information in abuse, neglect, or dependency cases). If qualified as experts, professionals may also be called on to provide expert opinion testimony. See Chapter 11.10 (relating to expert testimony).

**16. Persons involved in other court proceedings affecting the family.** Parents and children involved in an abuse, neglect, or dependency case may also be involved in juvenile delinquency or undisciplined proceedings, adult criminal court proceedings, domestic violence actions, child support proceedings, or other court actions. In those situations, there may be juvenile court counselors, probation officers, domestic violence counselors, and others with an interest in the abuse, neglect, or dependency case that have information that might assist the juvenile court. See Chapter 3.6 (discussing overlapping proceedings).

## 2.3 The Child

### A. Introduction

An abuse, neglect, or dependency case centers around the child, starting with cause to suspect that the child is abused, neglected, or dependent. For reports that are screened in, DSS completes an assessment that results in its determination as to whether the child is abused, neglected, and/or dependent and if so, whether services and/or court action is needed to protect the child. When court action is taken, in every abuse, neglect, or dependency proceeding, the child is a party and has rights designated in the Juvenile Code. Additionally, the child has constitutional rights, which are recognized by the Juvenile Code but are not specified. In some cases, termination of parental rights (TPR) is necessary. The child is the subject of the TPR proceeding, is a party, and has rights that are impacted in that proceeding as well.

### B. Definitions of Abused, Neglected, or Dependent Juveniles

Children who are the subject of abuse, neglect, or dependency cases must meet the statutory definitions of abused, neglected, or dependent juveniles. Children who do not meet those definitions will not be the subject of a DSS assessment or resulting abuse, neglect, or dependency petition in district court. When a court action is filed, if the court is unable to conclude by clear and convincing evidence that the child is abused, neglected, or dependent, it must dismiss the petition with prejudice, thereby ending both court and DSS involvement. When a court adjudicates a child abused, neglected, or dependent, the action proceeds to disposition, where the child's best interests are the paramount consideration for the court.

See Chapters 5.1 (discussing mandated reporting and the DSS assessment of a report); 5.3.A (discussing the initiation of court action); 6.3 (discussing evidence and proof at an adjudication hearing); and 7 (discussing the various dispositional hearings and options).

The first question for DSS is whether the child meets the statutory criteria of an abused, neglected, or dependent juvenile. One important component of each definition is the role of the adult who creates the child's condition. For abuse and neglect cases, that role is limited to a parent, guardian, custodian, or caretaker (discussed in sections 2.2.B.6 and 9, above) with one exception. Any minor victim of human trafficking, regardless of who created the child's victimization, meets the statutory criteria for both abuse and neglect. For dependency cases, the creation of the child's condition is limited to a parent, guardian, or custodian.

**1. Abused juvenile.** An abused juvenile is defined as any juvenile less than 18 years of age who

- is found to be a minor victim of human trafficking or
- whose parent, guardian, custodian, or caretaker
  - inflicts or allows to be inflicted on the juvenile a serious physical injury by non-accidental means;
  - creates or allows to be created a substantial risk of serious physical injury to the juvenile by non-accidental means;
  - uses or allows to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify behavior;
  - commits, permits, or encourages the commission of a violation of specified criminal sex or public morality and decency laws by, with, or upon the juvenile;
  - creates or allows to be created serious emotional damage to the juvenile;
  - encourages, directs, or approves the juvenile committing delinquent acts of moral turpitude; or
  - commits or allows to be committed against the juvenile an offense involving human trafficking, involuntary servitude, or sexual servitude.

G.S. 7B-101(1).

For a discussion of case law related to evidence to show abuse, see Chapter 6.3.E.

**(a) Minor victim of human trafficking.** The laws defining human trafficking are codified in North Carolina's criminal statutes – specifically, G.S. 14-43.10 through -43.20. Human trafficking includes both sexual servitude and involuntary servitude; however, there are three separate crimes – human trafficking (G.S. 14-43.11), involuntary servitude (G.S. 14-43.12; *see* G.S. 14-43.10(a)(3) for definition), and sexual servitude (G.S. 14-43.13; *see* G.S. 14-43.10(a)(5) for definition). A "minor" is defined as a person who is younger than 18 years old. G.S. 14-43.10(a)(4). A "victim" is a person who is subjected to human trafficking, involuntary servitude, or sexual servitude. G.S. 14-43.10(a)(6).

Effective October 1, 2018, a minor victim of human trafficking must be alleged to be abused and neglected. G.S. 14-43.15. Any juvenile who is found to be a minor victim of human trafficking is an abused juvenile. G.S. 7B-101(1)(i). There is no required relationship between the juvenile and person who created (or allowed for the creation of) the juvenile's circumstance as a victim of human trafficking, involuntary servitude, or sexual servitude. This expanded definition of abused juvenile was added to the Juvenile Code as required by the federal Justice for Victims of Trafficking Act (discussed in Chapter 1.3.B.11).

The definition of abused juvenile also includes a juvenile whose parent, guardian, custodian, or caretaker commits or allowed to be committed against the child an offense of human trafficking, involuntary servitude, or sexual servitude. G.S. 7B-101(1)(ii)g. Under this particular subsection of abused juvenile, the role of the parent, guardian, custodian, or caretaker is relevant. This definition was enacted in 2013 (prior to the

federal Justice for Victims Trafficking Act) and was not repealed with the 2018 amendment. Although this more restrictive definition still applies, a juvenile may be alleged to be abused under the more expansive definition of abused juvenile set forth at G.S. 7B-101(1)(i).

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**Resource**: For more information about minors and human trafficking, see Margaret Henderson, Sara DePasquale, Nancy Hagan, Christy Croft, *Human Trafficking of Minors and Young Adults: What Local Governments Need to Know*, PUBLIC MANAGEMENT BULLETIN No. 2019/18 (UNC School of Government, Dec. 2019).

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**(b) Conduct by parent, guardian, custodian, or caretaker.** Other than minor victims of human trafficking, conduct that results in a child's status as an abused juvenile as defined by the Juvenile Code includes the action or inaction of a parent, guardian, custodian, or caretaker. The same conduct by someone else may well be deemed abusive in other legal contexts (such as criminal court), but the fact that the harm or risk of harm is caused by the conduct of a parent, guardian, custodian, or caretaker is what makes the child's condition subject to the provisions of the Juvenile Code. While abuse (other than human trafficking) always involves a parent, guardian, custodian, or caretaker, it may involve other people as well. For example, abuse may arise when a parent allows someone else to inflict a non-accidental injury on a child or when a parent creates a substantial risk of serious injury by leaving the child with someone the parent knows to be violent. *See, e.g.*, *In re L.C.*, 253 N.C. App. 67 (2017) (facts involved mother whose infant was severely injured after mother allowed the infant to be in the care of an adult that mother previously agreed the infant would not have contact with due to previous non-accidental injuries to the child while in the presence of this other adult).

**(c) Serious physical injury.** Abuse includes inflicting or allowing to be inflicted on the juvenile a serious physical injury by other than accidental means or creating or allowing to be created a substantial risk of serious physical injury to the juvenile by other than accidental means. G.S. 7B-101(1)(ii)a. and b. The Juvenile Code does not define "serious physical injury." In the criminal context, it is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." G.S. 14-318.4(d)(2). Whether the injury is "serious" must be determined on the facts of each case. *In re L.T.R.*, 181 N.C. App. 376, 383 (2007). *See, e.g.*, *In re A.N.L.*, 213 N.C. App. 266 (2011) (holding that respondent mother's decision to enter into a physical altercation with her boyfriend while holding infant created a substantial risk of serious physical injury to the child); *In re C.M.*, 198 N.C. App. 53 (2009) (affirming adjudication of abuse based on head trauma caused by a blow to the head). The Juvenile Code does not require the cause of the serious injuries to be explained. *See In re W.C.T.*, 280 N.C. App. 17 (2021) (affirming abuse adjudication where the findings support determination that injuries were non-accidental and occurred while child was in the exclusive care of the caretaker); *In re L.Z.A.*, 249 N.C. App. 628 (2016) (affirming abuse adjudication where the findings of fact established the pre-mobile infant sustained multiple fractures and a subdural hematoma when she was in her parents' sole custody and an expert witness testified the injuries were likely the result of non-accidental trauma).

**(d) Cruel or inappropriate procedures to modify behavior.** Abuse includes using or allowing to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify the child's behavior. G.S. 7B-101(1)(ii)c. This part of the abuse definition has not been relied on often, perhaps because it overlaps with the part of the neglect definition that refers to improper discipline or the part of the abuse definition that refers to serious physical injury or emotional abuse. However, it has been used more recently. In the first published opinion under this definition, *In re H.H.*, 237 N.C. App. 431 (2014), the court of appeals affirmed the trial court's abuse adjudication after determining that sufficient findings were made that the mother struck her 8-year-old child five times with a belt, leaving multiple bruises on the inside and outside of his legs that were still visible the next day, and the child described "a beating." *In re H.H.*, 237 N.C. App 431, *overruled by implication in part on other grounds by In re B.O.A.*, 372 N.C. 372 (2019). Most recently, the supreme court considered the frequency of the discipline as a factor that should be considered and stated "when used sparingly, none of respondents' chosen forms of discipline – physically striking a child, forcing a child to stand for hours in a corner, or forcing a child to sleep on the floor – would *compel* a finding of abuse" but here, the discipline was not used sparingly as it was used for days at a time and for possibly two months. *In re A.J.L.H.*, 384 N.C. 45, 54 (2023) (emphasis in original) (affirming adjudication of abuse and reversing court of appeals).

The statutory criteria look to the devices or procedures used and not the child's behavior that is sought to be corrected. *See In re F.C.D.*, 244 N.C. App. 243 (2015) (affirming abuse adjudication).

**(e) Sex and public morality and decency offenses.** Abuse includes committing, permitting, or encouraging the commission of a violation of any of the following laws related to sexual abuse *by, with, or upon* the juvenile:

- first- or second-degree forcible rape (G.S. 14-27.21; 14-27.22);
- statutory rape of a child by an adult (G.S. 14-27.23);
- first-degree statutory rape (G.S. 14-27.24);
- first- or second-degree forcible sexual offense (G.S. 14-27.26; 14-27.27);
- statutory sexual offense with a child by an adult (G.S. 14-27.28);
- first-degree statutory sexual offense (G.S. 14-27.29);
- sexual activity by a substitute parent or custodian (G.S. 14-27.31);
- sexual activity with a student (G.S. 14-27.32);
- crime against nature (G.S. 14-177);
- incest (G.S. 14-178) (familial relationships include grandparent, grandchild, parent, child, stepchild, legally adopted child, brother, sister, half-brother, half-sister, uncle, aunt, niece, or nephew);
- preparation of obscene photographs, slides, or motion pictures of the juvenile (G.S. 14-190.5);
- employing or permitting the juvenile to assist in a violation of the obscenity laws (G.S. 14-190.6);
- dissemination of obscene material to the juvenile (G.S. 14-190.7; 14-190.8);

- displaying or disseminating material harmful to the juvenile (G.S. 14-190.14; 14-190.15);
- first- or second-degree sexual exploitation of the juvenile (G.S. 14-190.16; 14-190.17);
- promoting the prostitution of the juvenile (G.S. 14-205.3(b); note that the juvenile is a minor victim of human trafficking; *see* G.S. 14-43.10(a)(4)–(6); 14-43.15);
- taking indecent liberties with the juvenile (G.S. 14-202.1); or
- unlawful sale, surrender, or purchase of a minor (G.S. 14-43.14).

G.S. 7B-101(1)(ii)d.

A juvenile who commits a violation of one of the designated crimes is an abused juvenile when a parent, guardian, custodian, or caretaker permits the juvenile's commission of a designated crime. *In re M.A.E.*, 242 N.C. App. 312 (2015) (affirming abuse adjudication of older brother (and younger sister) based on findings that older brother sexually abused his sister after respondents learned of the abuse and failed to take appropriate measures to protect the sister).

Harmful conduct that does not fall under one of these laws may constitute abuse under another part of the abuse definition or may be considered neglect.

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**Resource:** For information on crimes listed above, see JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (UNC School of Government, 7th ed. 2012) and JESSICA SMITH, JAMES M. MARKHAM, 2020 CUMULATIVE SUPPLEMENT TO NORTH CAROLINA CRIMES (UNC School of Government, 2021).

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**(f) Emotional abuse.** Abuse includes creating or allowing to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward themself or others. G.S. 7B-101(1)(ii)e. Few cases go into court solely on the basis of emotional abuse. This may be because it is difficult to determine the precise cause of a child's behavior and emotional state. The statutory criteria do not require that the juvenile have a formal psychiatric diagnosis of any of the psychological conditions set out in the statute. *In re K.W.*, 272 N.C. App. 487 (2020) (affirming abuse adjudication where the findings showed the child experienced severe anxiety resulting from mother's vilification of father); *In re A.M.*, 247 N.C. App. 672 (2016) (affirming abuse adjudication where findings showed the 16-year-old child had anxiety, felt hopeless, and her coping mechanism was to emotionally withdraw as a result of her mother's behavior toward her).

**(g) Encouraging or approving delinquent acts.** Abuse includes encouraging, directing, or approving of delinquent acts involving moral turpitude committed by the juvenile. G.S. 7B-101(1)(ii)f. "Moral turpitude" is not defined in the Juvenile Code; however, illegality is not equated with moral turpitude. *In re M.G.*, 187 N.C. App. 536, 551 (2007) (rejecting the argument that illegal substance use is an act of moral turpitude), *rev'd in part on other grounds*, 363 N.C. 570 (2009). Acts involving moral turpitude include "act[s] of baseness, vileness, or depravity in the private and social duties that a man owes to his fellowman or to society in general." *In re M.G.*, 187 N.C. App. at 551 (quoting *Dew v. State ex rel. N.C.*

*Dep't of Motor Vehicles*, 127 N.C. App. 309, 311 (1997)). Moral turpitude is also considered "[c]onduct that is contrary to justice, honesty, or morality." *In re M.G.*, 187 N.C. App. at 551 (citing BLACK'S LAW DICTIONARY 1030 (8th ed. 2004)). A "delinquent act" is not defined by the Juvenile Code, but a "delinquent juvenile" is defined at G.S. 7B-1501(7); *see also* G.S. 143B-805(6) (definition of "delinquent juvenile"). Few cases involve this criterion for an abused juvenile.

**(h) Failure to prevent harm.** The definition of abused juvenile does not explicitly include the failure to prevent harm. However, the language "allows to be" in the definition of abused juvenile means that inaction can constitute abuse. *See* G.S. 7B-101(1)(ii). Failure to prevent harm or allowing situations to occur that create a serious risk of harm may be abuse. *See, e.g.*, *In re M.A.E.*, 242 N.C. App. 312 (2015) (affirming abuse adjudication where respondents permitted older sibling to sexually abuse younger sibling); *In re Adcock*, 69 N.C. App. 222 (1984) (affirming TPR where evidence showed that mother failed to intervene in another adult's abusive conduct toward the child). In a TPR of the ground that a parent aided and abetted the murder of her child, the North Carolina Supreme Court has stated that "parents… 'have an affirmative duty to protect and provide for their minor children' ", and "must 'take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.' " *In re C.B.C.B.*, 379 N.C. 392, 403 (2021) (quoting *State v. Walden*, 306 N.C. 466, 472 (1982)) (affirming TPR; affirming cessation of reunification efforts in initial dispositional order; appeals consolidated before supreme court).

**2. Neglected juvenile.** A neglected juvenile is one

- who is found to be a minor victim of human trafficking;
- whose parent, guardian, custodian, or caretaker engages in certain conduct resulting in harm or risk of harm to the child, including
  - not providing proper care, supervision, or discipline;
  - abandoning the juvenile (excluding an infant who is safely surrendered on or after October 1, 2023; *see* S.L. 2023-14, sec. 6.2(b));
  - not providing or arranging to be provided necessary medical or remedial care;
  - creating a living environment that is injurious to the juvenile's welfare;
  - unlawfully transferring physical custody of the juvenile (*see* G.S. 14-321.2, effective for offenses committed on or after December 1, 2016); or
  - placing the juvenile for care or adoption in violation of the law; or
- whose parent, guardian, or custodian refuses to follow recommendations from the Juvenile and Family Team regarding a "vulnerable juvenile" who is receiving juvenile consultation services from a juvenile court counselor. *See* G.S. 7B-1501(27b) (definition of "vulnerable juvenile"); 7B-1706.1 (juvenile consultation services); 7B-2715 through -2718 (describing authority over parents, guardians, and custodians of vulnerable juveniles receiving consultation services including the makeup of the Juvenile and Family Team).

G.S. 7B-101(15).

Effective for infants who are safely surrendered under Article 5A of G.S. Chapter 7B on or after October 1, 2023, "the act of surrendering the infant, in and of itself, does not constitute neglect." G.S. 7B-101(19a); *see* S.L. 2023-14, sec. 6.2.(b) (amending definition of "neglected juvenile" and enacting definition of "safely surrendered infant"). See Chapters 5.8 (discussing infant "safe surrender" in North Carolina) and 9.11.G (discussing abandonment as a ground for termination of parental rights).

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**Legislative Note:** Effective October 1, 2021, the definition of "neglected juvenile" was amended to create subsections a. through g., mirroring the format of "abused juvenile" found at G.S. 7B-101(1). Corresponding changes were made to the language to comport with the format change from a run-on sentence to the new subsections. *See* S.L. 2021-132, sec. 1.

**Resource:** For more information about a "vulnerable juvenile" and the amendments made to the juvenile delinquency laws, see Jacquelyn Greene, *From 6 to 10: New Minimum Age for Juvenile Delinquency and Undisciplined Jurisdiction*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 4, 2021).

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In determining whether a child is neglected, it is relevant whether that child lives in a home where another child has died as a result of suspected abuse or neglect or where another child has been subjected to abuse or neglect by an adult who regularly lives in the home. G.S. 7B-101(15). A prior neglect (or abuse) adjudication alone is not determinative or sufficient; instead, the trial court has discretion to determine how much weight to give to evidence of a prior adjudication. *In re J.A.M.*, 372 N.C. 1 (2019); *In re S.G.*, 268 N.C. App. 360 (2019).

Although not in the statute, case law requires that the child experience some physical, mental, or emotional impairment or substantial risk of such impairment as a result of the neglect. *In re G.C.*, 384 N.C. 62 (2023); *In re A.W.*, 377 N.C. 238 (2021); *In re J.A.M.*, 372 N.C. 1; *In re Stumbo*, 357 N.C. 279 (2003); *In re K.J.M.*, 288 N.C. App. 332 (2023). However, an explicit finding of such impairment or risk of impairment to the juvenile is not required. *In re G.C.*, 384 N.C. 62.

In determining whether the juvenile is neglected, DSS and the court should consider the totality of the evidence. *In re L.T.R.*, 181 N.C. App. 376 (2007).

For additional case law related to evidence to show neglect, see Chapter 6.3.F.

**(a) Lack of care, supervision, or discipline.** A juvenile is neglected if their parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline. G.S. 7B-101(15). The effect the conduct has or could have on the child is key to a determination of neglect. Case law requires the child experience or be at substantial risk of experiencing mental, physical, or emotional impairment as a result of the improper care, supervision, or discipline. *See* (*See In re G.C.*, 384 N.C. 62 (2023); *In re J.A.M.*, 372 N.C. 1 (2019); *In re K.J.M.*, 288 N.C. App. 332 (2023) ; *In re McLean*, 135 N.C. App. 387 (1999)

Lack of proper discipline may include improper (i.e., inappropriate) discipline that does not rise to the level of causing serious physical injury or involve the use of cruel or grossly

inappropriate procedures or devices (in which case it would be abuse). However, defining what is improper care or discipline is difficult since beliefs about proper care and discipline can vary widely. For a discussion of case law addressing evidence to establish improper care, supervision, or discipline, see Chapter 6.3.F.2.

**(b) Abandonment.** A juvenile who has been abandoned is considered neglected. G.S. 7B-101(15). Abandonment may be the culmination of a parent's long-term failure to perform their parental responsibilities. The appellate courts have described abandonment as "willful or intentional conduct" that "evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). A parent abandons a child and relinquishes all parental claims when the parent withholds their love, care, and presence; foregoes the opportunity to display filial affection; and does not provide support and maintenance. *In re C.B.C.*, 373 N.C. 16 (2019); *In re E.H.P.*, 372 N.C. 388 (2019); *Pratt v. Bishop*, 257 N.C. 486; *see also In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986).

Abandonment does not include an infant who has been safely surrendered on or after October 1, 2023. A safely surrendered infant is defined at G.S. 7B-101(19a) as an infant who (1) is no more than 30 days old, (2) is without signs of abuse or neglect, (3) is voluntarily delivered to a statutorily identified individual by their parent and (4) the delivering parent does not express an intent to return for their child. *See* S.L. 2023-14, sec. 6.2.(b) (amending definition of "neglected juvenile" and enacting definition of "safely surrendered infant"). See Chapters 5.8 (discussing infant "safe surrender" in North Carolina) and 9.11.G (discussing abandonment as a ground for termination of parental rights).

**(c) Lack of medical or remedial care.** A juvenile is considered neglected if their parent, guardian, custodian, or caretaker does not provide or arrange for the provision of necessary medical or remedial care. G.S. 7B-101(15). The Juvenile Code provides no guidance on the meaning of necessary medical or remedial care, nor does it make reference to parents' religious beliefs as a basis for withholding treatment. Although limited and fact-specific, some case law addresses what does or does not constitute necessary remedial or medical care. See Chapter 6.3.F.2(e) (relating to evidence of lack of remedial or medical care).

**(d) Injurious environment.** A juvenile is neglected if their parent, guardian, custodian, or caretaker creates a living environment that is injurious to the juvenile's welfare. G.S. 7B-101(15). This may be an environment that puts the child at substantial risk of harm as well as one in which the child has been harmed. *See In re Safriet*, 112 N.C. App. 747 (1993). See Chapter 6.3.F.2 (relating to evidence for finding neglect, including cases discussing injurious environment).

**(e) Minor victim of human trafficking.** The laws defining human trafficking are codified in North Carolina's criminal statutes – specifically, G.S. 14-43.10 through -43.20. Human trafficking includes both sexual servitude and involuntary servitude; however, there are three separate crimes – human trafficking (G.S. 14-43.11), involuntary servitude (G.S.

14-43.12; *see* G.S. 14-43.10(a)(3) for definition), and sexual servitude (G.S. 14-43.13; *see* G.S. 14-43.10(a)(5) for definition). A "minor" is defined as a person who is younger than 18 years old. G.S. 14-43.10(a)(4). A "victim" is a person who is subjected to human trafficking, involuntary servitude, or sexual servitude. G.S. 14-43.10(a)(6).

Effective October 1, 2018, a minor victim of human trafficking must be alleged to be abused and neglected. G.S. 14-43.15. Any juvenile who is found to be a minor victim of human trafficking is a neglected juvenile. G.S. 7B-101(15)(i). There is no required relationship between the juvenile and person who created (or allowed for the creation of) the juvenile's circumstance as a victim of human trafficking, involuntary servitude, or sexual servitude. The role of the parent, guardian, custodian, or caretaker is not considered. This definition of neglected juvenile was added to the Juvenile Code as required by the federal Justice for Victims of Trafficking Act (discussed in Chapter 1.3.B.11).

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**Resource**: For more information about minors and human trafficking, see Margaret Henderson, Sara DePasquale, Nancy Hagan, Christy Croft, *Human Trafficking of Minors and Young Adults: What Local Governments Need to Know*, PUBLIC MANAGEMENT BULLETIN No. 2019/18 (UNC School of Government, Dec. 2019).

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**(f) Unlawfully placed or transferred.** A juvenile is neglected if their parent, guardian, custodian, or caretaker (1) has placed the juvenile for care or adoption in violation of law or (2) has unlawfully transferred the juvenile's physical custody pursuant to G.S. 14-321.2 (effective for offenses committed on after December 1, 2016). G.S. 7B-101(15). No appellate court decisions address these bases for an adjudication of neglect. Possible unlawful adoptive placements include those that violate statutes relating to

- unlicensed group homes (*see* G.S. 131D-10.1 *et seq*.),
- unlawful payments related to adoption (*see* G.S. 48-10-102), and
- prohibited activities relating to placement for adoption (*see* G.S. 48-10-101).

**(g) Other children.** In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. G.S. 7B-101(15). A child need not be physically in the home for the abuse or neglect of another child in the home to be relevant to a neglect determination. *See In re A.B.*, 179 N.C. App. 605 (2006) (holding that a newborn still physically in the hospital may properly be determined to "live" in the home of the newborn's parents for the purposes of considering whether the abuse or neglect of another child in that home is relevant to the determination of whether the newborn is neglected).

The weight to be given to evidence of neglect of another juvenile in the home is in the trial court's discretion. *In re J.A.M.*, 372 N.C. 1 (2019); *In re P.M.*, 169 N.C. App. 423 (2005). The fact of prior abuse or neglect of another child, standing alone, is insufficient to support an adjudication of neglect; there must be evidence showing a likelihood that the

abuse or neglect will be repeated. *See In re A.J.L.H.*, 384 N.C. 45 (2023); *In re S.M.L.*, 272 N.C. App. 499 (2020); *In re J.C.B.*, 233 N.C. App. 641 (2014); *In re S.H.*, 217 N.C. App. 140 (2011). See Chapter 6.3.F.2(b) (addressing evidence involving other children).

**3. Dependent juvenile.** A dependent juvenile is one who is in need of assistance or placement because

- the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or
- the juvenile's parent, guardian, or custodian is (1) unable to provide for the child's care or supervision and (2) lacks an appropriate alternative child care arrangement.

G.S. 7B-101(9).

Caretaker is not included in this definition and does not factor into a determination as to whether a child is dependent. The definition of dependency includes no reference to the cause of the parent's inability to care for the child or to the temporary or permanent nature of the inability. *Compare* G.S. 7B-101(9) *with* G.S. 7B-1111(a)(6) (TPR ground based on the parent's inability to provide proper care and the child's resulting dependency that addresses causes of the parent's inability and requires a reasonable probability that the parent's incapability will continue for the foreseeable future).

Although the statutory definition uses the singular word parent, the court of appeals has held that a child is not dependent if the child has one parent who can provide proper care or supervision. *In re Q.M., Jr.*, 275 N.C. App. 34 (2020); *In re V.B.*, 239 N.C. App. 340 (2015); *see* G.S. 7B-101 ("the singular includes the plural"). The status of both parents must be taken into account in determining whether a child is dependent. *In re H.H.*, 237 N.C. App. 431 (2014) (where mother left children with their father and placement with father was suitable, it was error for the court to adjudicate the children dependent), *overruled by implication in part on other grounds by In re B.O.A.*, 372 N.C. 372 (2019). Both prongs of the definition must be met for both parents: the parent is unable to provide proper care and supervision and lacks an appropriate alternative child care arrangement. *See In re V.B.*, 239 N.C. App. 340. When an appropriate alternative child care arrangement exists (e.g., an appropriate relative is willing and able to assume responsibility for a child), the child is not dependent, despite the parent's inability to provide proper care. *See, e.g., In re C.P.*, 258 N.C. App. 241 (2018); *In re J.D.R.*, 239 N.C. App. 63 (2015); *In re B.M.*, 183 N.C. App. 84 (2007); *In re P.M.*, 169 N.C. App. 423 (2005). The parent must have taken some action to identify the alternative child care arrangement and not merely have gone along with the DSS plan. *In re B.P.*, 257 N.C. App. 424 (2018).

The supreme court has held that the circumstances of whether a juvenile is dependent is "fixed at the time of the filing of the petition… [and] not the post-petition actions of a party." *In re L.N.H.*, 382 N.C. 536, 544 (2022) (reversing court of appeals and affirming trial court adjudication of dependency; trial court properly considered circumstances at time petition was filed and not availability of father or relatives at time of adjudicatory hearing). In other words, the trial court considers the juvenile's circumstances at the time the petition is filed

and not at the time of the adjudicatory hearing. However, the court of appeals had previously carved out an exception to address paternity, which is a fixed and ongoing circumstance, when considering the circumstances at the time of the adjudicatory hearing. In *In re V.B.*, 239 N.C. App. 340, the court of appeals held that when a petition is filed before paternity has been determined, evidence that paternity has been established after the petition was filed may be considered by the court at the adjudicatory hearing when determining whether a child is dependent. As a result, if paternity is established, without allegations in the petition about the father or when there are allegations, without evidence at the adjudicatory hearing of the father's inability or unwillingness to care for or make alternative child care arrangements for his child, the child cannot be adjudicated dependent. Whether this exception still applies is unknown since it was not specifically addressed by the supreme court in *In re L.N.H.*

For case law related to evidence to show dependency, see Chapter 6.3.G.2.

## C. Rights of the Child

Although children's rights in the juvenile justice (delinquency) system have long been recognized by courts and legislatures, children's rights in the context of custody and child protection proceedings are not as clear-cut. The U.S. Supreme Court has recognized that children have constitutional rights but has not defined the nature of a child's liberty interests in preserving family or family-like bonds. *See Troxel v. Granville*, 530 U.S. 57 (2000) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), as reserving the question) and cases cited in footnote 8 therein. Without defining the nature of those rights, federal courts have recognized that a child has a liberty interest in "his family's integrity and in the nurture and companionship of his parents" although those rights are "attenuated by the fact that, unlike adults, children are always in the custody of either their parents or the state as parens patriae." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 346, 351 (4th Cir. 1994). *See D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (stating "[j]ust as parents possess a fundamental right with respect to their children, children also enjoy a 'familial right to be raised and nurtured by their parents.' ") (quoting *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002)).

Children are the intended beneficiaries of a child welfare system that aims to keep them safe, protect family autonomy, provide fair procedures that protect their own and their parents' constitutional rights, prevent their unnecessary or inappropriate separation from their parents, and ensure that they have safe permanent homes within a reasonable period of time. G.S. 7B-100. Abuse, neglect, and dependency cases involve the government's interference with constitutionally protected rights that impact families. *See In re T.R.P.*, 360 N.C. 588 (2006) (discussing the gravity of the decision to proceed with a DSS assessment and the potential consequences of filing a petition). Although the intended beneficiaries of DSS action, children have rights in that process.

In North Carolina, children who are the subject of abuse, neglect, dependency, and termination of parental rights (TPR) court actions are parties to the proceedings with both constitutional rights and rights established by the Juvenile Code. *See* G.S. 7B-401.1(f); 7B-601(a); 7B-1104. Some of those rights are explicitly stated legal rights (e.g., the right to a guardian ad litem; the right to access DSS and court records; and the right to keep an abuse, neglect, or dependency hearing open to the public). *See, e.g.*, G.S. 7B-601; 7B-302(a1)(2);

7B-2901(b)(1); 7B-801(b). Other rights, although not strictly speaking "legal rights," are implied and relate to case plans, visitation, placement, and permanency planning. *See Suter v. Artist M*., 503 U.S. 347 (1992) (holding that the "reasonable efforts" provisions in the federal Adoption Assistance and Child Welfare Act did not create an implied private cause of action on behalf of children).

**1. Right to participate and be heard.** As a party in a juvenile case, the child has a right to participate, but the child's participation differs from that of the respondents. Unlike a respondent parent, guardian, custodian, or caretaker, the child is not issued and served with a summons that directs the child to appear for a hearing and notifies the child of possible outcomes or consequences that may be ordered in the action. *See* G.S. 7B-406; 7B-407; 7B-1106. Instead, a copy of the petition and notice of hearing is sent to the local judicial district's guardian ad litem (GAL) office when the petition alleges abuse or neglect. G.S. 7B-408. In a TPR proceeding, if the child is represented by a GAL, the GAL is served with the pleadings and other papers that need to be served. G.S. 7B-1106(a1); *see* G.S. 7B-1106.1(a)(5). But in some cases, a GAL is never appointed for the child even though the child is a party. The appointment of a GAL is left to the court's discretion in (i) cases where the juvenile is alleged to be dependent (without allegations of abuse or neglect) and (ii) in a TPR action where there is not an underlying abuse, neglect, or dependency action where a GAL has been appointed for the juvenile or where the respondent parent does not file an answer denying a material allegation in the TPR petition or motion. *See* G.S. 7B-601(a) (applying to dependency); 7B-1108(b), (c) (applying to TPR).

When a GAL is appointed for the juvenile, the child's participation in the proceeding is usually through that GAL. The child's GAL has the right to notice and an opportunity to participate fully in the case. See section 2.3.D, below (discussing the child's GAL). But, a child is not precluded from appearing in court simply because a GAL has been appointed to represent them. In some situations, the child must appear at the hearing. For example, the child's testimony may be necessary because the child is the only witness to an event that must be proved. If the court is approving a primary permanent plan of Another Planned Permanent Living Arrangement for a 16- or 17-year-old juvenile, the court must first question the juvenile. G.S. 7B-912(c), (d).

At the initial dispositional hearing, the Juvenile Code explicitly gives the child (not the GAL) the right to present evidence and advise the court of what the child believes is in their best interests. G.S. 7B-901(a). At review and permanency planning hearings, the court is required to "consider information from" both the juvenile and the juvenile's GAL. G.S. 7B-906.1(c). The court may also consider evidence from the juvenile and the juvenile's GAL at post-TPR placement review hearings. G.S. 7B-908(a), (b)(1). These rights apply regardless of the child's age.

The Juvenile Code also designates certain rights a juvenile who is 12 or older has, which includes the right to individual notice of review and permanency planning hearings and post-TPR placement review hearings. G.S. 7B-906.1(b); 7B-908(b)(1). A juvenile who is 12 or older must be served with a copy of a TPR order. G.S. 7B-1110(d). When adoption is the child's primary plan, under North Carolina's adoption laws if the child is 12 or older, their

consent to the adoption is necessary unless it is waived by the court hearing the adoption proceeding. G.S. 48-3-601(1); 48-3-603(b)(2). See Chapter 9.12.C.4.(e) (discussing child's consent to adoption).

Every juvenile has a right to appeal a final order designated in G.S. 7B-1001. The appeal is taken by the GAL, or if a GAL is not appointed, the juvenile who appeals is then appointed a Rule 17 GAL for the purposes of the appeal. G.S. 7B-1002(1), (2). *See* N.C. R. CIV. P. 17.

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**Practice Notes**: With the exception of an appeal, the Juvenile Code is silent as to how a child participates in the proceeding when a GAL is not appointed in those cases where the child is alleged only to be dependent. That child has the same rights to present evidence and be heard that the Juvenile Code establishes for any juvenile who is the subject of the action. As a party, the child also has constitutional due process rights, which require notice and a meaningful opportunity to be heard. *See In re Adoption of K.L.J.*, 266 N.C. App. 289 (2019) (in an adoption of minors case, tribal court order not required to be given full faith and credit as the adoption petitioners and children were not afforded due process in the tribal court). If a child appeals an order but is not represented by a GAL appointed under G.S. 7B-601, a Rule 17 GAL is appointed to represent the child in the appeal.

When a court is exercising its discretion in deciding whether to appoint a GAL under G.S. 7B-601 for a child alleged to be dependent only, it should consider the child's constitutional due process and statutory rights and how those rights will be protected without the GAL appointment. The child is a party to the proceeding. G.S. 7B-401.1(f); 7B-1104. The court may look to the stated purposes of the Juvenile Code, one of which is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and protect the constitutional rights of juveniles…" when making that decision. G.S. 7B-100(1). A similar analysis may be made in a TPR proceeding where the GAL appointment for the child is discretionary under G.S. 7B-1108(c). *See* G.S. 7B-1108.1(a)(2); *In re P.T.W.*, 250 N.C. App. 589 (2016) (noting in footnote 11 that G.S. 7B-1108.1(a)(2) requires the court to affirmatively consider at a pretrial hearing whether a GAL should be appointed to the juvenile).

When a GAL is appointed, the GAL volunteer and attorney advocate use their discretion to determine how involved a child should be in the proceeding, including the circumstances under which it makes sense for a child to attend court hearings or testify. The child, especially an older child, may also be consulted when making that decision. If the child is subpoenaed by another party, the child must appear, but the child's GAL (or another party) may file a motion to quash the subpoena if the circumstances warrant such a motion. See Chapter 11.2 (discussing child witnesses including quashing of a subpoena).

**Resource:** To hear from representatives of the N.C. Guardian Ad Litem Program, a local GAL program, and district court judges discussing how the child's perspective is represented in abuse, neglect, or dependency proceedings, listen to *Beyond the Bench: The Child's Voice in Court*, UNC SCHOOL OF GOVERNMENT, NORTH CAROLINA JUDICIAL COLLEGE (Jan. 12, 2017) (also available through iTunes).

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**2. Best interests and legal rights representation.** One of the stated purposes of the Juvenile Code is "[t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court." G.S. 7B-100(5). North Carolina appellate cases have referred to "best interests" as the "polar star" of the Juvenile Code. *See In re A.P.*, 371 N.C. 14, 21 (2018); *In re T.H.T.*, 362 N.C. 446, 450 (2008); *In re R.T.W.*, 359 N.C. 539, 550 (2005); *In re Montgomery*, 311 N.C. 101, 109 (1984).

For purposes of an abuse, neglect, or dependency case, best interests are not defined. In termination of parental rights (TPR) proceedings, G.S. 7B-1110 identifies six factors a court must consider when determining a child's best interests: the child's age; the likelihood of adoption; whether the TPR will aid in accomplishing the child's permanent plan; the bond between the child and respondent parent; the quality of the relationship between the child and proposed adoptive parent, guardian, custodian, or other permanent placement; and a catch-all "any relevant consideration."

For a discussion of best interests in the context of the court's dispositional decisions in an abuse, neglect, or dependency case, see Chapter 7.3 and in a TPR proceeding, see Chapter 9.12.

In abuse and neglect and most TPR cases, children have the right to have their best interests represented by a guardian ad litem (GAL) and their legal rights protected by an attorney advocate throughout the course of the case. *See* G.S. 7B-601; 7B-1108. See section 2.3.D, below (discussing GAL appointment and role). The child does not have a right to court-appointed counsel to advocate for their expressed interest. However, the court of appeals has stated that "[o]ne of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court." *In re J.C.-B.*, 276 N.C. App. 180, 192 (2021). Further, GALs are trained to consider the child's wishes in determining best interests and to convey the child's wishes to the court even if they contradict the GAL's recommendations.

When a child's express interest is made known to the court either through the child's testimony or the GAL, it is not determinative on the court; however, "the child's wishes are part of the totality of circumstances the trial court must consider." *In re J.C.-B.*, 276 N.C. App. at 192. The North Carolina appellate courts have recognized that as a child reaches the age of majority, their preference should be considered more. *See In re A.K.O.*, 375 N.C. 698, 706 (2020) (vacating and remanding TPR; noting proper weight should be given to 17-year-old juvenile's preference; distinguishing the same considerations do not apply to 9-year-old sibling); *In re J.C.-B.*, 276 N.C. App. 180 (reversing and remanding order for a new hearing; the GAL did not inform the court of the juvenile's express wishes, nor was the 16-year-old juvenile present to testify). Ultimately, the court exercises its discretion when making a best interests of the child determination. *See In re A.J.T.*, 374 N.C. 504 (2020) (in a TPR appeal, child's preference regardless of age is not controlling); *In re B.R.W.*, 278 N.C. App. 382, 394 (2021) (stating in appeal of permanency planning order, "[a]lthough the children's preferences are not controlling, the trial court may consider their preferences along with other evidence"), *aff'd*, 381 N.C. 61 (2022); *In re L.M.*, 238 N.C. App. 345 (2014) (holding no abuse of discretion when the court determined it was in the child's best interests to order guardianship

rather than reunification, even though the 16-year-old child expressed his desire to be returned home to his mother).

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**Resource:** For information on the child's best interests, see CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Determining the Bests Interests of the Child" (2020).

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**3. Foster Care Children's Bill of Rights.** In 2013, the North Carolina legislature enacted a "Foster Care Children's Bill of Rights," which sets out promoted practices while children are in foster care. The law states that a violation of the bill of rights may not be construed as creating a cause of action against DSS or a person or entity providing foster care. The statute sets out eleven enumerated foster care provisions that the General Assembly promotes:

(1) A safe foster home free of violence, abuse, neglect, and danger.
(2) First priority regarding placement in a home with siblings.
(3) The ability to communicate with the assigned social worker or case worker overseeing the child's case and have calls made to the social worker or case worker returned within a reasonable period of time.
(4) Allowing the child to remain enrolled in the school the child attended before being placed in foster care, if at all possible.
(5) Having a social worker, when a child is removed from the home, to immediately begin conducting an investigation to identify and locate all grandparents, adult siblings, and other adult relatives of the child to provide those persons with specific information and explanation of various options to participate in placement of a child.
(6) Participation in school extracurricular activities, community events, and religious practices.
(7) Communication with the biological parents if the child placed in foster care receives any immunizations and whether any additional immunizations are needed if the child will be transitioning back into a home with his or her biological parents.
(8) Establishing and having access to a bank or savings account in accordance with State laws and federal regulations.
(9) Obtaining identification and permanent documents, including a birth certificate, social security card, and health records by the age of 16, to the extent allowed by federal and State law.
(10) The use of appropriate communication measures to maintain contact with siblings if the child placed in foster care is separated from his or her siblings.
(11) Meaningful participation in a transition plan for those phasing out of foster care, including participation in family team, treatment team, court, and school meetings.

G.S. 131D-10.1.

Effective May 16, 2023, a child in the custody of a DSS may not have a placement denied or delayed because of the child's or placement provider's race, color or national origin. G.S. 131D-10.1(a1), enacted by S.L. 2023-14, sec. 6.5(b).

Most of the provisions of the Foster Care Children's Bill of Rights are mandated by federal law or the Juvenile Code. For example, both federal law and the Juvenile Code specifically address sibling placement and visitation. DSS must make reasonable efforts to place siblings who have been removed from their home in the same placement unless DSS documents that a joint placement would be contrary to the safety or well-being of any of the siblings. When a joint placement is not made, DSS must provide reasonable efforts for frequent visitation or other ongoing interaction between the siblings absent documentation that such contact would be contrary to the safety or well-being of any of the siblings. 42 U.S.C. 671(a)(31); G.S. 7B-505(a1); 7B-903.1(c1).

Both federal law and the Juvenile Code require that DSS make diligent efforts to notify adult relatives of the child's removal and explore the relatives' willingness and ability to be a placement resource for the child. The time period for notification is within thirty days of the child's removal. See 42 U.S.C. 671(a)(29); 7B-505(b); 7B-506(h)(2); 7B-901(b).

A child's school stability is addressed by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 and the Every Student Succeeds Act. See Chapter 13.7 for a discussion of those laws related to a child's educational stability.

The federal Preventing Sex Trafficking and Strengthening Families Act required states to adopt a reasonable and prudent parent standard that allows children in DSS custody to engage in normal childhood activities, including extracurricular and community events. The law also requires children who are 14 and older to participate in the development of their case plan. Additionally, a child who will age out of foster care must be provided with copies of their social security card, birth certificate, health insurance and medical information, and driver's license or state identification card. The Juvenile Code incorporates these federal mandates in G.S. 7B-903.1(a) and (b) and 7B-912(a) and (b). *See* G.S. 131D-10.2A (definition of "reasonable and prudent parent standard").

The federal Multiethnic Placement Act (MEPA-IEP) prohibits the delay or denial of a child's foster care or adoptive placement based on the race, color, or national origin of the child or the prospective foster or adoptive parent. See Chapter 1.3.B.5 for a discussion of MEPA-IEP.

## D. The Child's Guardian ad Litem

**1. Introduction.** The foundation of widespread guardian ad litem (GAL) representation for children in abuse and neglect proceedings is the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA), as amended. CAPTA requires states receiving federal funds for the prevention of child abuse and neglect to provide an appropriately trained GAL for each child involved in an abuse or neglect judicial proceeding. Federal law gives states leeway in exactly how to do this but requires that GAL responsibilities include (1) obtaining first-hand a clear understanding of the child's situation and needs, and (2) making

recommendations to the court regarding the child's best interests. 42 U.S.C. 5106a(b)(2)(B)(xiii). See Chapter 1.3.B.1 (discussing CAPTA and its influence on the Juvenile Code).

In some states, GALs are attorneys, and in some they are trained volunteers (often called Court Appointed Special Advocates or "CASA"). Other states, like North Carolina, provide a combination of attorneys and volunteers (supported by GAL program staff) to represent children. GAL representation differs from state to state not only in the structure of the GAL programs, but also in the type of representation provided to children. In some states, representation is focused on the best interests of the child, and in others representation is focused on the child's wishes (or expressed interests). In North Carolina, the GAL represents the best interests of the child but also considers the child's wishes and conveys them to the court.

**Resources:**
The National Association of Counsel for Children (NACC) addresses the legal protection and representation of children by training and educating child advocates and by affecting policy and legal systems change. The NACC offers training opportunities, memberships, and certifications and produces publications focused on the representation of children.

The National Court Appointed Special Advocate/Guardians ad Litem Association for Children (National CASA) works with state organizations throughout the country that support volunteer GALs advocating for abused and neglected children in court. National CASA provides training and training curricula for programs and advocates; technical assistance to programs; national volunteer recruitment programs; and grant funding to local and state programs.

For more information about the different types of representation for children, see "Representation of Children in Child Abuse and Neglect Proceedings" on the Child Welfare Information Gateway, U.S. Department of Health and Human Services website.

**2. North Carolina GAL Program establishment and structure.** The North Carolina GAL Program was established by statute in 1983. Current provisions for the implementation and administration of the GAL Program are found in G.S. 7B-1200 through -1204. The GAL Program exists within the state's Administrative Office of the Courts (AOC). The GAL state administrative office, along with three regional administrators, oversees local GAL programs that are located in the judicial districts throughout the state; promulgates policy; and provides supervision, training, support, and consultation to local GAL programs.

Every judicial district in the state has at least one local GAL office, and some multi-county districts have more than one office. Each local GAL program has a district administrator responsible for overseeing the program, and each office typically has one or more GAL supervisors. Local GAL programs handle the recruiting and training of GAL volunteers (using a statewide curriculum), manage the assignment of GAL volunteers to cases, and provide ongoing supervision and support to GAL volunteers. GAL volunteers are screened, must meet specified qualifications, and receive pre-service training from GAL staff.

Local GAL programs are also responsible for engaging the services of local attorneys, referred to as "attorney advocates," who are appointed by the court and paid from the GAL Program funds. *See* G.S. 7B-601(a); 7B-603(a). Most attorney advocates are independent contractors, but in some judicial districts with large caseloads, the local GAL programs have staff attorneys who are state employees.

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**Resources:**
For more information about the North Carolina GAL Program, see the North Carolina Guardian Ad Litem program website, here.

For a more detailed explanation of the GAL Program role, responsibilities, and ethical considerations, see Chapters 8 and 12 *in* KELLA W. HATCHER, N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL (2007).

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**3. GAL team representation: volunteer, attorney advocate, and staff.** In North Carolina, volunteers usually serve in the role of guardian ad litem (GAL), and if the volunteer is not an attorney, an attorney advocate must be appointed as well. G.S. 7B-601(a). An attorney advocate works as a partner with a GAL volunteer, and both are supported by the local GAL program staff. The attorney advocate, GAL volunteer, and staff act as a team to represent and promote the best interests of the child in abuse and neglect cases and in some dependency and termination of parental rights (TPR) cases.

The North Carolina Supreme Court addressed GAL team representation when it examined the statutes pertaining to GAL representation and stated:

> When read in *pari materia*, these statutes manifest the legislative intent that representation of a minor child in proceedings under sections 7B-601 and 7B-1108 is to be, as DSS argues, by the GAL program established in Article 12 of the Juvenile Code. Under Article 12 volunteer GALs, the program attorney, the program coordinator, and clerical staff constitute the GAL program.

*In re J.H.K.*, 365 N.C. 171, 175 (2011).

**Note,** in this Manual, use of the term "GAL" when referring to the child's GAL (as opposed to a respondent parent's GAL) typically refers to the team appointed pursuant to G.S. 7B-601.

**4. Role and responsibilities of the GAL.**

See Chapter 9.4.C for an additional discussion of the child's GAL in a TPR proceeding.

**(a) Appointment and standing.** The court is required to appoint a GAL for the child in all cases in which a juvenile petition alleges that a child is an abused or neglected juvenile. The court has the discretion to appoint a GAL in cases in which a petition alleges only that a juvenile is dependent. G.S. 7B-601(a). The statute provides no criteria for determining

whether a GAL should be appointed in a dependency case; however, any party can bring to the court's attention the potential need for a child to have a GAL. See section 2.3.C.1, above (discussing the child's status as a party and legal rights including the right to participate in the proceeding).

If the child is represented by a GAL in an abuse, neglect, or dependency case when a TPR petition or motion is filed, that GAL also represents the child in the TPR action unless the court orders otherwise. *See* G.S. 7B-1106(a1); 7B-1106.1(a)(5); 7B-1108(a), (d). In all other TPR cases, the court is required to appoint a GAL for the child only if the respondent parent files an answer or response that denies any material allegation of the TPR petition or motion. G.S. 7B-1108(b); *In re R.D.*, 376 N.C. 244 (2020). However, in every TPR action, the court has discretion to appoint a GAL for the child at any stage of the proceeding after affirmatively considering at a pretrial hearing whether a GAL should be appointed. G.S. 7B-1108(c); 7B-1108.1(a)(2); *see In re R.D.*, 376 N.C. 244; *In re P.T.W.*, 250 N.C. App. 589 (2016).

When the local GAL program receives a copy of a petition alleging abuse or neglect and any notices of hearing, that local program assigns a GAL volunteer, attorney advocate, and staff to the case. *See* G.S. 7B-408; 7B-601(a). In some cases, there is not an available GAL volunteer or there is a conflict of interest for the GAL program, and an attorney is appointed to serve in both the role of the volunteer and attorney advocate. *See* G.S. 7B-601(a); 7B-1108(b); 7B-1202; *In re C.J.C.*, 374 N.C. 42 (2020) (in TPR, attorney was appointed as both attorney and GAL volunteer); *In re R.D.*, 376 N.C. 244 (in private TPR, attorney was appointed in dual role as GAL and attorney advocate). When the attorney acts as the GAL, the attorney "can perform the duties of both the GAL and attorney advocate." *In re C.J.C.*, 374 N.C. at 46 (quoting *In re J.H.K.*, 365 N.C. 171, 175 (2011)).

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**Practice Note:** The issue of whether this dual appointment of an attorney violates Rule 3.7 of the North Carolina Rules of Professional Conduct was raised at the trial level in *In re R.D.*, 376 N.C. 244 (2020) (a TPR) but was not addressed by the supreme court opinion. The North Carolina State Bar adopted a formal ethics opinion addressing this issue that requires certain procedures be followed prior to the appointment of an attorney in the dual role. See 2022 Formal Ethics Opinion 1 (April 22, 2022).

**Resource:** For a discussion of the formal ethics opinion, see Timothy Heinle, *New Ethics Opinion on Dual Role GAL – Attorney Advocates in Juvenile Proceedings*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (Aug. 17, 2022).

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Appellate cases have been less concerned with the specifics of how the GAL appointment order reads (i.e., whether it names the program, a volunteer, or a GAL program staff member) than with whether someone was performing the duties of the GAL volunteer and attorney advocate from the time of the required GAL appointment and throughout the case. *See In re A.S.*, 190 N.C. App. 679 (2008) (finding no error where a GAL appointment order did not name a particular person or staff member, but, in fact, a person was performing GAL duties), *aff'd per curiam*, 363 N.C. 254 (2009). A clerical error on

the GAL form appointment order does not constitute a failure to appoint a GAL, resulting in prejudicial error. *In re C.J.C.*, 374 N.C. 42 (holding GAL appointment on AOC-J-207 form that failed to check the box that attorney advocate was also acting as the GAL was a clerical error that was not prejudicial, requiring reversal; record showed attorney was also GAL). Even the lack of an appointment order in the appellate record has been found not to be error as long as the record showed that the GAL carried out their duties. *See In re D.W.C.*, 205 N.C. App. 266 (2010); *In re A.D.L.*, 169 N.C. App. 701 (2005).

If a conflict of interest prevents a local GAL program from representing a child, G.S. 7B-1202 authorizes the court to appoint a conflict attorney to represent the child. That attorney may be any member of the district bar. The State and local GAL programs maintain lists of "conflict attorneys" who can represent children in conflict situations.

The GAL volunteer, staff, and attorney advocate have standing to represent the juvenile in all actions related to abuse, neglect, dependency, and termination of parental rights when the team has been appointed. G.S. 7B-601(a). The court of appeals has examined the issue of standing in the context of GAL team representation. Relying on the North Carolina Supreme Court case *In re J.H.K.*, 365 N.C. 171, the court of appeals held that a TPR petition signed by the GAL program specialist "by and through the undersigned Attorney Advocate" and not by the volunteer GAL directly involved in the action was not improper. *In re S.T.B., Jr.*, 235 N.C. App. 290, 293 (2014).

The GAL appointment terminates when the permanent plan has been achieved for the juvenile and is approved by the court, but the court may reappoint the GAL in its discretion or in response to a motion of any party showing good cause for reappointment. G.S. 7B-601(a). If a motion to modify is filed under G.S. 7B-1000, the court must reappoint the GAL and attorney advocate if the GAL was previously released, and the modification hearing may not occur until the reappointment has been made. G.S. 7B-1000(c).

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**AOC Form:**
AOC-J-207, Order to Appoint or Release Guardian Ad Litem and Attorney Advocate.

**Practice Notes:** The AOC form order used for GAL appointments contains space to name a GAL volunteer, attorney advocate, and a GAL staff person. This team appointment ensures that a GAL staff person performs the duties of the GAL any time there is a gap between one GAL volunteer leaving and a new GAL volunteer being appointed. The AOC form order recognizes the attorney advocate may also be acting as the GAL with a checkbox in the "Order of Appointment" section. *See In re C.J.C.*, 374 N.C. 42.

Individuals working as GAL volunteers or attorney advocates may be appointed only as authorized by statute in abuse, neglect, dependency, and TPR cases. *See* G.S. 7B-601; 7B-1108. There is no statutory authority for GAL volunteers or attorney advocates working under the supervision of the GAL Program to be appointed pursuant to Rule 17 of the Rules of Civil Procedure. The GAL Program cannot "consent" to represent a child when the representation is not authorized by statute. In TPR proceedings, the Juvenile Code

authorizes the appointment of GALs who are trained and supervised by the GAL Program only when the child is or has been the subject of an abuse, neglect, or dependency petition, but makes an exception if the local GAL program consents to the appointment for good cause. G.S. 7B-1108. Otherwise, a GAL appointed for a child in a TPR case that was not preceded by an abuse, neglect, or dependency case typically is an attorney serving in the dual role and is not connected with the GAL Program.

**(b) Representation.** The GAL volunteer and attorney advocate are responsible for protecting and promoting the best interests of the child, and the attorney advocate is responsible for protecting the child's legal rights as well. G.S. 7B-601(a). This type of representation differs from traditional legal representation in which the focus is on a client's wishes or expressed interests. GALs determine and consider the child's wishes and report those to the court. However, where the GAL's determination of best interests differs from the child's expressed wishes, the GAL advocates their own perspective but also communicates the child's wishes to the court. *See In re J.C.-B.*, 276 N.C. App. 180, 192 (2021) (stating, "[o]ne of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court").

The North Carolina Supreme Court emphasized the concept of GAL team representation in determining whether the statutory duties of GAL representation were satisfied in a case in which the attorney advocate, but not the GAL volunteer, was present at the TPR hearing. The supreme court reversed and remanded a court of appeals' opinion that held conducting the hearing without the GAL volunteer was error. The supreme court found that the duties of the GAL specified in the statute were fulfilled by the team representation of the GAL program staff, the attorney advocate, and the volunteer and that the court of appeals had failed to recognize the concept of GAL team representation. The supreme court held that the GAL volunteer's presence at the hearing was required only if the attorney advocate or the trial court deemed the GAL volunteer's presence necessary to protect the child's best interest. *In re J.H.K.*, 365 N.C. 171 (2011). *See also In re A.N.L.*, 213 N.C. App. 266 (2011) (confirming appropriateness of GAL staff member's appointment as GAL and holding that GAL representation was adequate where attorney advocate but not appointed GAL was present in court for the hearing). The supreme court in *In re J.H.K.*, 365 N.C. 171, distinguished an earlier case, *In re R.A.H.*, 171 N.C. App. 427 (2005), in which the court of appeals found error. In that case, there was an attorney advocate at the TPR hearing but a GAL volunteer was not appointed until after three and a half days of testimony had taken place. The court of appeals held that no one was fulfilling the statutory duty of investigating and determining the best interests of the child and that the GAL volunteer and attorney advocate may not "pinch hit" for one another. The *In re J.H.K.* decision by the supreme court expressly interpreted the Juvenile Code to permit a GAL who is an attorney to perform the duties of both the GAL and the attorney advocate. *See also In re C.J.C.*, 374 N.C. 42 (2020) (attorney advocate was also appointed as GAL).

**Practice Note:** For clarity, when an attorney is serving in both the role of the GAL volunteer and the attorney advocate, that dual appointment should be clear in the order of appointment.

**(c) Attorneys talking to child.** Just as an attorney should not communicate with a party who is represented by counsel without that counsel's consent, authorization of the child's attorney advocate is required for another attorney to talk to the child. This applies to parents' and non-parent respondents' attorneys, DSS attorneys, prosecutors and law enforcement officers who are acting as agents of prosecutors, and criminal defense attorneys. *See* North Carolina State Bar, RPC 249 (1997) and RPC 61 (1990); 2009 Formal Ethics Opinion 7 (Jan. 27, 2012).

**(d) Duties and responsibilities.** The Juvenile Code sets out specific duties of the GAL, including to

- make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs;
- facilitate, when appropriate, the settlement of disputed issues;
- offer evidence and examine witnesses at adjudication;
- explore options with the court at the dispositional hearing;
- conduct follow-up investigations to ensure that the orders of the court are being properly executed;
- report to the court when the needs of the juvenile are not being met; and
- protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

G.S. 7B-601. Note that these same duties apply in TPR cases pursuant to G.S. 7B-1108.

In addition, if the child is called to testify in a criminal action relating to abuse, the court may authorize the GAL to accompany the child to court. G.S. 7B-601(b).

Typically, the GAL volunteer has the primary role of communicating with the child, interviewing family and others, collecting and reviewing records, and determining recommendations for the court as to needed services and placement for the child. The attorney advocate receives information from the GAL volunteer and staff and handles the legal aspects of the case, including presenting the GAL volunteer's recommendations in court and advocating the GAL volunteer's position related to the child's best interests. *See In re R.A.H.*, 171 N.C. App. 427 (2005). However, the North Carolina Supreme Court has emphasized the concept of GAL team representation, taking the focus off of which GAL duty is performed by which team member and instead focusing on whether all the duties are in fact performed. *In re J.H.K.*, 365 N.C. 171 (2011).

Although the GAL makes recommendations to the court as to what is in the child's best interests, the trial court is not bound by the GAL's recommendations. The supreme court has stated:

> While the role of the guardian ad litem is critical in every juvenile case, with the testimony and reports of the guardian ad litem serving as important evidence at every phase of a case's proceeding, nonetheless a guardian ad litem's recommendations regarding the best interests of a

> juvenile at the dispositional stage of a … case is not controlling.
>
> *In re A.A.*, 381 N.C. 325, 339 (2022).
>
> It is the trial court that weighs all the evidence and makes the decision about the child's best interests. Not following the GAL recommendation is not error or an abuse of discretion. *In re A.A.*, 381 N.C. 325.
>
> See Chapter 14.1.D related to the GAL's access to confidential information.

**5. Fees for child's GAL attorney advocate and experts.** GAL volunteers work under the supervision of the GAL Program without compensation. GAL volunteers are paired with attorney advocates who are compensated. In some cases, an attorney is appointed to act as both GAL volunteer and attorney advocate. The child's attorney advocate, regardless of whether they are also serving in the role of GAL volunteer, is paid as follows:

- Most often, the attorney advocate is paid by the GAL Program in the Administrative Office of the Courts (AOC), which either contracts with or employs GAL attorneys.
- When the local GAL program has a conflict that precludes representation, a GAL conflict attorney is appointed to represent the juvenile and is paid by the AOC through the GAL Program.

*See* G.S. 7B-603(a); 7B-1202.

Whenever an attorney or GAL is appointed for a juvenile pursuant to G.S. 7B-601, the court may require the juvenile's parent, guardian, or a trustee (if applicable) to pay the fee, but only if a juvenile is adjudicated abused, neglected, or dependent or parental rights are terminated. G.S. 7B-603(a1); 7A-450.1.

While not addressed in the statutes, the way the AOC handles payment for experts for the GAL is similar to the way experts are paid for indigent parents. See section 2.4.E., below. For the GAL Program to use state funds to pay for an expert requested by the attorney advocate, a motion for funds must be made and granted by the court.

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**AOC Forms:**

- AOC-J-485, Application for Expert Witness Fee in Juvenile Cases At The Trial Level.
- AOC-J-486, Order for Expert Witness Fee in Juvenile Cases At The Trial Level.
- AOC-G-200, Civil Case Trial Level Fee Application Order For Payment Judgment Against Parent/Guardian.

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## 2.4 Rights of the Parent

### A. Protection of Parent-Child Relationship

**1. Generally.** The first stated purpose of the Juvenile Code is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." G.S. 7B-100(1). A parent's rights to fundamentally fair procedures are long-recognized in federal and state law. *In re K.M.W.*, 376 N.C. 195 (2020).

Unless a parent's rights have been terminated; the parent has relinquished the child for adoption; the parent has safely surrendered an infant; or the parent has been convicted of a first- or second-degree forcible rape, statutory rape of a child by an adult, or first-degree statutory rape, and any of those criminal acts resulted in the conception of the child who is the subject of the proceeding, both parents should be named as parties to any abuse, neglect, or dependency proceeding concerning their child. G.S. 7B-401.1(b), as amended by S.L. 2023-14, sec. 6.2.(c), effective October 1, 2023. That applies to a parent whose identity or whereabouts is unknown and regardless of whether the parent is alleged to have contributed to the child's condition of abuse, neglect, or dependency. An abuse, neglect, or dependency proceeding involves government intervention by a county DSS into constitutionally protected parent-child relationships. A termination of parental rights (TPR) action represents the most severe form of state intervention—asking a court to completely sever the legal relationship between a child and parent.

**2. U.S. Supreme Court.** It is well-settled law that parents have the right to rear their children without the interference of the state. The U.S. Supreme Court has long recognized that parents have a liberty interest in the companionship, custody, care, and control of their children. *See Troxel v. Granville*, 530 U.S. 57 (2000) (declaring a non-parent visitation statute unconstitutional as applied where grandparents were awarded visitation rights based solely on the court's determination of the children's best interest, without a finding of parental unfitness or any special weight given to the parent's determination of the children's best interests). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). This liberty interest, rooted in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, continues throughout an abuse, neglect, dependency, and TPR proceeding. *See Santosky v. Kramer*, 455 U.S. 745, 753 (holding procedural due process applies to TPR hearings and stating that the parents' fundamental liberty interest "in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state").

The Supreme Court also has recognized (in the cases cited above) that the rights of the parent are not absolute. There is a presumption that parents act in their child's best interests, but when a parent is unfit, the state may intervene. *See Troxel*, 530 U.S. 57; *Parham v. J.R.*, 442 U.S. 584 (1979).

Regarding putative fathers, the Supreme Court has held that a biological link between a child and putative father does not establish the constitutional protections of the parent-child relationship. That biological link provides the putative father with the opportunity to develop a

relationship with his child and accept responsibility for establishing the parent-child relationship. The putative father must grasp that opportunity before the paramount constitutional rights of parents regarding their children apply to the putative father. *Lehr v. Robertson*, 463 U.S. 248 (1983).

**3. North Carolina appellate courts.** North Carolina case law affirms parents' constitutional liberty interest in the care, custody, and control of their children and recognizes that the state or other parties who are not parents may interfere with the parent-child relationship only when the parent has acted inconsistently with the parent's superior right as a parent. *See, e.g.*, *In re E.B.*, 375 N.C. 310, 315 (2020) (stating "[w]e begin by noting that DSS's and the trial court's actions repeatedly infringed upon respondent's constitutional parental rights" in case involving the failure to allow father to have custody of his child after child's mother executed a relinquishment (for further discussion of relinquishment, see Chapter 10.2)).

The general rule in a custody dispute between a parent and a non-parent is that the parent is entitled to custody unless there is proof that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's protected status as a parent. *See Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994). Only upon finding one of those circumstances by clear and convincing evidence may the court apply a "best interest" test, which applies in custody cases between parents, to determine a child's custody when the contest is between a parent and anyone who is not a parent. *Price*, 346 N.C. 68; *Petersen*, 337 N.C. 397; *Owenby v. Young*, 357 N.C. 142 (2003); *In re A.C.*, 280 N.C. App. 301 (2021) (vacating and remanding permanency planning order; standard regarding parental unfitness based on competent evidence was insufficient; court must apply the clear and convincing evidence standard). These three conditions – unfitness, neglect, acting inconsistently with constitutional rights – are different determinations. *See In re B.R.W.*, 381 N.C. 61 (2022) (distinguishing between the determination of unfitness and the determination of acting inconsistently with parental rights). Not all cases include all the elements. For example, a parent may act inconsistently with their parental rights but not be unfit or have abused or neglected their child. *In re B.R.W.*, 381 N.C. 61 (affirming determination that mother acted inconsistently with her parental rights by leaving child with grandparents for indefinite period of time with no intention (express or implied) that the arrangement was temporary; summarizing court of appeals reversal of trial court's conclusion that mother was unfit as mother made substantial progress on her case plan and had been awarded overnight and weekend visitation).

The fact that the custody issue arises in an abuse, neglect, or dependency proceeding does not change the rule. *See In re E.B.*, 375 N.C. 310 (trial court lacked authority to enter orders based on child's best interests without making a finding about father's constitutional rights; determining the trial court also lacked jurisdiction to enter permanency planning orders when DSS never filed a petition but instead had custody through mother's relinquishment for adoption); *In re D.A.*, 258 N.C. App. 247 (2018) (vacating and remanding for new hearing portion of permanency planning order that awarded *de facto* permanent custody to foster parents because of insufficient findings to support conclusion that father was either unfit or acted inconsistently with his parental rights); *In re E.M.*, 249 N.C. App. 44 (2016) (error to award custody to a non-parent in a permanency planning review order which did not state that

the trial court applied the clear and convincing standard when determining whether the parent's conduct had been inconsistent with her constitutionally protected status); *In re D.M.*, 211 N.C. App. 382 (2011) (holding in a dependency case that where neither parent had been found to be unfit and there was no finding that the father acted inconsistently with his constitutional rights as a parent, the trial court erred in awarding permanent custody of the child to the grandmother); *In re B.G.*, 197 N.C. App. 570 (2009) (reversing permanency planning order giving custody to relatives where court applied best interest standard without a showing that father was unfit, had neglected the child, or had acted inconsistently with his constitutionally protected status as a parent).

The majority of the opinions addressing the application of the determination of a parent acting inconsistently with their parental rights in abuse, neglect, or dependency cases (including the ones cited above) examined permanency planning orders. *But see In re K.C.*, 288 N.C. App. 543, 544, 552 (2023), *supersedeas granted* (N.C. July 8, 2023) (vacating and remanding initial dispositional order placing temporary custody of juvenile with relatives and not with father, who was the "non-offending parent" and with whom the child was placed prior to the adjudication; findings are insufficient to support conclusion father acted inconsistently with his paramount constitutional rights; dissent based on "premature" and improper analysis of whether parent acted inconsistently with their constitutional rights at initial dispositional stage of case); *In re S.J.T.H.*, 258 N.C. App. 277 (2018) (relying on holding in opinion addressing a permanency planning order; reversing in part the initial dispositional order that did not award custody to the non-removal parent and remanding for new order to address that parent's rights and grant that parent custody unless clear and convincing evidence supports a different dispositional alternative). See Chapter 7.10.B.5 (discussing parent's constitutional rights when guardianship or custody is being ordered as a permanent plan to a third party).

Abuse, neglect, and abandonment or an adjudication of a TPR ground constitutes a parent's unfitness or a parent acting inconsistently with their constitutionally protected status. *In re K.N.K.*, 374 N.C. 50 (2020). Other conduct must be evaluated on a case-by-case basis as to whether it is inconsistent with a parent's constitutionally protected rights. *Price v. Howard*, 346 N.C. 68. There is no bright-line test when determining if a parent has acted inconsistently with their parental rights. *See In re A.C.*, 247 N.C. App. 528 (2016) (examining the mother's conduct and intentions and holding that she acted inconsistently with her parental rights). The court's conclusion as to whether a parent acted inconsistently with their parental rights is a question of law that is reviewable de novo. *See Boseman v. Jarrell*, 364 N.C. 537 (2010); *In re A.S.*, 275 N.C. App. 506 (2020) (on de novo review, trial court's conclusion of law that mother acted inconsistently with her constitutionally protected status was error as findings were unsupported and/or contradicted by the evidence).

The determination is required even when the child has been previously adjudicated as neglected and dependent. *See In re R.P.*, 252 N.C. App. 301 (2017) (reversing permanent guardianship order that made no reference to father's constitutionally protected status; rejecting GAL argument that parental conduct leads to an adjudication and constitutes some showing of unfitness); *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011) (holding in a custody case between the child's mother and grandparents that a finding that the children had been adjudicated dependent in an earlier proceeding was not, by itself, sufficient to support a

conclusion that the mother had acted in a manner inconsistent with her parental status). *But see In re J.R.*, 279 N.C. App. 352, 360 (2021) (distinguishing *Rodriguez v. Rodriguez* as an adjudication of dependency and not abuse or neglect; stating "neglect 'clearly constitute[s] conduct inconsistent with the protected status parents may enjoy' " (without addressing a juvenile's adjudication being about the status of the child and not the fault or culpability of the parent); further finding mother did not comply with case plan).

The determination is not based on whether the conduct consisted of good or bad acts but rather the court considers the voluntariness of the parent's actions and the relinquishment of exclusive parental authority to a third person. *Mason v. Dwinnell*, 190 N.C. App. 209 (2008). As part of its analysis, the court looks at the parent's intentions. *Mason*, 190 N.C. App. 209; *In re A.C.*, 247 N.C. App. 528. The court is not required to find that a parent's conduct is willful and intentional. *In re J.R.*, 279 N.C. App. 352 (distinguishing permanency planning order appointing a guardian from opinion requiring willfulness in TPR on the ground of willful abandonment, G.S. 7B-1111(a)(7)).

When determining whether a parent is unfit or acted inconsistently with their parental rights, "evidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. at 147. The trial court determines how much weight to give the evidence when making its findings, and the appellate court will not reweigh that evidence on appeal. *In re J.M.*, 271 N.C. App. 186 (2020) (holding trial court properly found mother was an unfit parent). One factor that is not relevant in determining whether a parent is unfit or has acted inconsistently with their parental rights is socioeconomic status. *In re K.C.*, 288 N.C. App. 543, *supersedeas granted* (N.C. July 8, 2023); *Thomas v. Oxendine*, 280 N.C. App. 536 (2021); *Dunn v. Covington*, 272 N.C. App. 252 (2020); *Raynor v. Odom*, 124 N.C. App. 724 (1996).

Regarding putative fathers, the court may examine his conduct to determine whether he acted inconsistently with his parental rights by failing to grasp the opportunity to establish a relationship with the child. *Adams v. Tessener*, 354 N.C. 57 (2001) (holding father acted inconsistently with his parental rights when after being informed about the pregnancy and likelihood that he was the father, he did nothing about the pregnancy and impending birth and after the birth, did not inquire about the child or mother); *see In re E.B.*, 375 N.C. 310, 315 (after mother executed relinquishment of child for adoption, biological father "seize[d] the opportunity to become involved as a parent in his child's life[;]' " without a petition being filed, district court lacked authority to impose preconditions for father to satisfy before exercising his constitutional parental rights). In an adoption proceeding, the North Carolina Supreme Court expanded the putative father's need to grasp the opportunity to acts that would put him on notice of the pregnancy when the opportunity to be on such notice existed. *In re S.D.W.*, 367 N.C. 386 (2014) (holding the putative father did not fall in the class of fathers who may claim a liberty interest in developing a relationship with a child; concluding that even though the mother hid the child's birth from him, he was passive in discovering whether she may have become pregnant with his child despite ample evidence that it was possible).

See Chapter 7.3 and 7.10.B.5 (discussing court opinions addressing the child's best interests standard and need for findings regarding the parent's conduct when ordering custody or guardianship to a non-parent).

**Practice Note:** Parents, not third-parties to the parent-child relationship (*e.g.*, a relative), have paramount constitutional rights to care, custody, and control of their children. *See Graham v. Jones*, 270 N.C. App. 674 (2020) (reversing civil custody order and dismissing custody action; order awarded full physical and legal custody to mother and visitation to grandparents; holding grandparents are third parties to the parent-child relationship and do not have rights that are constitutionally protected); *Eakett v. Eakett*, 157 N.C. App. 550, 554 (2003) (stating in grandparent visitation case, "[t]he grandparent is a third party to the parent-child relationship. Accordingly, the grandparent's rights to the care, custody and control of the child are not constitutionally protected while the parent's rights are protected").

## B. Notice and Opportunity to Be Heard

**1. Entitled to due process.** As a party to the juvenile proceeding, a parent is entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds); *In re J.E.B.*, 376 N.C. 629, 633 (2021) (stating "[a] parent whose rights are considered in a termination of parental rights proceeding must be provided 'with fundamentally fair procedures' consistent with the Due Process Clause of the Fourteenth Amendment."); *In re E.B.*, 375 N.C. 310, 316 ( a parent's constitutional rights to care, custody, and control of their child is " 'a fundamental liberty interest' which warrants due process protection") (citations omitted); *see also In re H.D.F*. 197 N.C. App. 480 (2009) (reversing a neglect adjudication when the required notice of key events in the proceeding was not given to the *pro se* respondent parent). "Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual." *In re S.G.V.S.*, 258 N.C. App. 21, 25 (2018) (quoted citation omitted).

Due process requirements "are 'flexible and call[] for such procedural protections as the particular situation demands.' " *In re C.A.B.*, 381 N.C. 105, 115 (2022) (citations omitted). In determining whether due process has been provided, "courts consider 'the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.' " *In re C.A.B.*, 381 N.C. at 115 (citation omitted).

When one parent is served in an abuse, neglect, or dependency case, the other parent's due process rights are not necessarily violated if that other parent is not served before the adjudication and disposition hearings. *In re Poole*, 151 N.C. App. 472 (2002) (in case where mother was served with summons, discussing due process rights of father who was not served and to whom no summons was issued and deciding his rights were adequately protected in light of state's interest in the welfare of children, the child's right to be protected, the father's ability to seek review of the court's order, and the potential for the child's return to his care), *rev'd per curiam for reasons stated in the dissent,* 357 N.C. 151 (2003).

**2. Participation in hearings.** Parents have a right to participate in proceedings in a meaningful way. The summons in an abuse, neglect, or dependency case requires the parent to appear for a hearing at a specified time and place. G.S. 7B-406(a). In a termination of parental rights (TPR) case, the summons or notice includes notice that the parents may attend the hearing. G.S. 7B-1106(b)(6); 7B-1106.1(b)(6). The court of appeals has held that a parent does not have an absolute right to be present at a hearing but "the magnitude of 'the private interests affected by the [termination] proceeding, clearly weighs in favor of a parent's presence at the hearing.' *" In re S.G.V.S.*, 258 N.C. App. at 25 (citations omitted) (reversing and remanding for new hearing; holding the magnitude of the interests at stake in a TPR hearing and the trial court's denial of mother's continuance request because mother was previously scheduled to appear in a criminal action in another county at the same time as later scheduled TPR hearing involved a misapprehension of law and substantial miscarriage of justice). Both the North Carolina Supreme Court and court of appeals have determined that the absence of a parent at the TPR hearing is not, by itself, a due process violation. *In re J.E.*, 377 N.C. 285 (2021) (and cases cited therein).

**(a) Incarcerated parent.** When a parent is incarcerated, the parent's attendance may be impossible or require special steps. On application of a party or the attorney for a party who wants the parent to attend or testify, the court may issue a writ to have the parent brought before the court. The closest statutory authority for such a writ, G.S. 17-41, provides for a writ of habeas corpus ad testificandum. Although an application for the writ must state that the person's testimony is believed to be "material and necessary," the same procedure is used when a parent wants to attend but does not plan to testify or has already testified. The court may issue the writ only for someone who is in a facility in North Carolina. If the parent is in a federal facility in this state, the person seeking the parent's attendance should contact that facility directly to determine whether the parent can be brought to court if a writ is issued. A North Carolina court has no authority to effect the attendance of someone who is incarcerated in another state, but parties may explore with an out-of-state facility the possibility of having the incarcerated party participate remotely. *See* G.S. 7A-49.6 (authorizing court proceedings to be conducted by audio and video transmission); 50A-111 (statute under the Uniform Child-Custody Jurisdiction Enforcement Act (UCCJEA) that allows a parent who is outside of North Carolina to participate in abuse, neglect, dependency or TPR hearings by alternative means (see Chapter 3.3 discussing UCCJEA)).

The court's consideration of whether to issue a writ of habeas corpus ad testificandum or take other steps to facilitate a parent's participation in a hearing requires application of the balancing test articulated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In determining whether due process requires a particular procedure, the court must weigh three factors: (1) the private interests at stake, (2) the risk of deprivation posed by the use (or absence) of the procedure, and (3) the state's interest in providing (or not providing) the procedure. *Mathews,* 424 U.S. at 335. North Carolina courts have applied the test in several juvenile cases. *See, e.g.*, *In re C.A.B.*, 381 N.C. 105 (2022) (vacating and remanding TPR; risk of error (deprivation) posed by the procedure of holding TPR hearing without father present existed when court denied father's motion to continue based on prison being on lockdown due to COVID-19; TPR ground involved father's

conduct while incarcerated and father was crucial fact witness; father's attorney had difficulty communicating with father because of lockdown); *In re K.D.L.*, 176 N.C. App. 261 (2006) (upholding trial court's denial of incarcerated father's motion to have his deposition taken); *In re Quevedo*, 106 N.C. App. 574 (1992) (holding that father's due process rights were not violated when court denied his motion for transportation to hearing and allowed hearing to proceed in his absence); *In re Murphy*, 105 N.C. App. 651 (holding that the court did not violate the parent's statutory or due process rights by denying a motion for transportation from a correctional facility to the termination hearing), *aff'd per curiam*, 332 N.C. 663 (1992).

Even when the parent does not attend the hearing, other steps to ensure protection of the parent's rights may be appropriate. In *In re Quevedo*, the court said:

> We note that the use of depositions is allowed in civil cases where a witness is unable to attend because of age, illness, infirmity or imprisonment. N.C. Gen. Stat. § 1A-1, Rule 32(a)(4). Therefore, when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process.

106 N.C. App. at 582.

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**AOC Form:**
AOC-G-112, Application and Writ of Habeas Corpus ad Testificandum.

**Resources:**
For the North Carolina Department of Public Safety Policy and Procedures related to inmate access to the courts and to their attorneys, see Chapter G, Section .0200 "Court Related Procedures" (July 29, 2014).

For a discussion about incarcerated parents and due process, see Timothy Heinle, *COVID and the Due Process Rights of Incarcerated Parents*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (June 16, 2022).

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**(b) Exclusion from courtroom.** Use of the *Mathews v. Eldridge* due process test is not limited to applications for writs to be brought to a hearing. It is also used when parents have been excluded from the proceeding. *See, e.g.*, *In re J.B.*, 172 N.C. App. 1 (2005) (holding that mother could be excluded from the courtroom during the child's testimony); *In re Faircloth*, 153 N.C. App. 565 (2002) (upholding removal of disruptive parent from termination hearing, without providing means for him to testify, based on strong governmental interest and low risk of error).

**(c) Testimony of parties or witnesses in other states.** Court proceedings may be conducted by audio and video transmission pursuant to G.S. 7A-49.6. In addition, all abuse, neglect, dependency, and TPR proceedings are subject to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A. See Chapter 3.3 (discussing UCCJEA). G.S. 50A-111 addresses taking the testimony of parties or witnesses in another state and provides:

> (a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.
>
> (b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.
>
> (c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

## C. DSS Perspective

Recognition of and respect for parents' rights are essential elements of good social work practice. The North Carolina Department of Health and Human Services Division of Social Services' Child Welfare Manual states that parents and other care providers involved in juvenile cases are entitled to

- Be treated in a courteous and respectful manner;
- Know DSS's legal authority and right to intervene in cases of child abuse, neglect, or dependency;
- Know the allegations of abuse, neglect, or dependency reported at the first contact with DSS;
- Know any possible action that DSS may take, including petitioning the court to remove the child in order to ensure safety and protection;
- Know DSS's expectations of the parent/caregiver;
- Know what services they can expect from DSS and other community agencies; and
- Have a family services case plan that is clearly stated, measurable, and specific, that includes time-limited goals, and that is mutually developed by the DSS and the parent/caretaker.

DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Purpose, Philosophy, Legal Basis and Staffing" p. 9, available here.

## D. Representation

**1. Right to counsel.** Parents have a statutory right to counsel, and to court-appointed counsel if indigent, in all abuse, neglect, dependency, and termination of parental rights (TPR) proceedings. G.S. 7B-602; 7B-1101.1. A parent's eligibility and desire for appointed counsel may be reviewed at any stage of the abuse, neglect, dependency, or TPR proceeding. A parent's right to counsel includes the right to the effective assistance of counsel. *In re T.N.C.*, 375 N.C. 849 (2020); *In re C.D.H.*, 265 N.C. App. 609 (2019); *In re Oghenekevebe*, 123 N.C. App. 434 (1996) (holding that the right to counsel provided by then G.S. 7A-289.23 included the right to effective assistance of counsel). See subsection 6, below.

**2. Appointment of counsel.** When an abuse, neglect, or dependency petition is filed, the clerk must appoint provisional counsel for the parent and indicate that appointment on the summons issued to the parent or a separate notice. G.S. 7B-602(a); *see* G.S. 7B-406(b)(2). The clerk is required to provide a copy of the petition and summons or notice to provisional counsel. G.S. 7B-602(a). If at any time after an adjudication of a juvenile as abused, neglected, or dependent a motion to modify is filed under G.S. 7B-1000 and the parent's attorney has been released, the court must appoint provisional counsel for the parent. G.S. 7B-1000(d).

When a TPR *petition* is filed, the clerk must appoint provisional counsel unless the parent is already represented by appointed counsel, in which case that appointment continues and is not provisional. G.S. 7B-1101.1(a); *see* G.S. 7B-1106(b)(3); *In re D.E.G.*, 228 N.C. App. 381 (2013). The clerk is required to provide a copy of the petition and summons to provisional counsel. G.S. 7B-1101.1(a); *In re C.T.T.*, 288 N.C. App. 136 (2023) (affirming TPR; holding name of provisional counsel is not required to be listed on the summons but provisional counsel must be served). When a TPR *motion* is filed, an attorney appointed to represent the parent in the underlying abuse, neglect, or dependency proceeding will continue to represent the parent in the TPR matter unless the court orders otherwise. *See* G.S. 7B-1106.1(b)(3). The notice to the parent must state that the parent is entitled to appointed counsel if indigent and, if not already represented by an attorney, may contact the clerk to request counsel. G.S. 7B-1106.1(b)(4). Provisional counsel is not appointed; instead, an unrepresented indigent parent must either contact the clerk or request counsel when the parent appears in court. *See* G.S. 7B-1108.1 (providing for pretrial hearing); 7B-1109(b) (requiring the court at adjudication to inquire whether a parent who is present and unrepresented is indigent and wants counsel).

Appointments of counsel are made in accordance with the rules adopted by the North Carolina Office of Indigent Defense Services. G.S. 7B-602(a); 7B-1101.1(a).

Caution should be exercised in appointing one attorney to represent both parents, given the potential for conflicting interests and evidence. *But cf. In re Byrd*, 72 N.C. App. 277 (1985) (holding that the failure to appoint separate counsel for respondent parents was not error, where they did not object when the appointment was made, the record showed that evidence was sufficient to terminate both parents' rights, and there was no indication that the court treated respondents as a couple rather than as individuals).

When provisional counsel is appointed, the court must confirm the appointment at the first hearing in an abuse, neglect, or dependency proceeding, and at the first hearing after service on the parent in a TPR proceeding, unless the parent

- does not appear at the hearing,
- has retained counsel,
- waives the right to counsel, or
- is not indigent.

G.S. 7B-602(a); 7B-1101.1(a). *See* G.S. 7B-1108.1(a)(1) (retention or release of provisional counsel may be addressed at a pretrial hearing); *In re R.A.F.*, 384 N.C. 505 (2023) (reversing court of appeals and affirming TPR; trial court complied with G.S. 7B-1101.1(a) and 7B-1108.1(a)(1) and (3) when releasing provisional counsel after mother was served with summons and petition and did not appear at TPR hearing even though record showed mother was not served with notice of hearing but her provisional counsel was); *In re C.T.T.*, 288 N.C. App. 136 (affirming TPR; court did not err in releasing provisional counsel).

In *In re D.E.G.*, 228 N.C. App. 381, the court of appeals noted that while G.S. 7B-1101.1(a) requires the court to dismiss provisional counsel when the parent does not appear at the first hearing, counsel who was already representing the parent in the underlying abuse, neglect, or dependency proceeding was not provisional counsel. The provisional counsel statute was inapplicable. The appointed attorney was required to seek leave from the trial court to withdraw. The trial court has discretion when deciding whether to allow the attorney's motion to withdraw; however, when an attorney has not provided their client prior notice of the intent to withdraw, the court does not have discretion. Instead, the court must either grant a continuance so that the notice may be provided to the client or deny the attorney's request to withdraw. *See also In re M.G.*, 239 N.C. App. 77 (2015) (attorney who represented respondent mother in the underlying proceeding in which the child was adjudicated neglected was not provisionally appointed in the TPR proceeding; trial court erred in allowing respondent's counsel to withdraw without first confirming that respondent had been notified of counsel's intention to do so).

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**AOC Form:**
AOC-J-144, Order of Assignment or Denial of Counsel (Abuse, Neglect, Dependency, Termination of Parental Rights; Post-Disposition Motion to Modify; Post-DSS-Placement Review and Permanency Planning Hearings (Delinquent/Undisciplined)).

**Resource:** For a discussion about the status of a counsel in a TPR proceeding, see Timothy Heinle, *To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (April 9, 2021).

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**3. Waiver of counsel**. Both G.S. 7B-602 (for abuse, neglect, and dependency cases) and 7B-1101.1 (for TPR cases) provide that when a parent qualifies for appointed counsel, the court may allow the parent to proceed without counsel only after examining the parent on the record and making findings of fact sufficient to show that the waiver is knowing and voluntary. *See*

*In re K.M.W.*, 376 N.C. 195 (2020) (TPR). Before these provisions became effective on October 1, 2013, the North Carolina Supreme Court held that a parent's waiver of counsel in a juvenile case was not governed by G.S. 15A-1242, which applies only in criminal cases. *In re P.D.R.*, 365 N.C. 533 (2012). Subsequently, the court of appeals held that the trial court must make an inquiry sufficient to determine whether a parent's waiver was knowing and voluntary, the standard now stated in the Juvenile Code. *See In re J.K.P.*, 238 N.C. App. 334 (2014) and *In re A.Y.*, 225 N.C. App. 29 (2013) (both holding that trial court's inquiry relating to the respondent's waiver was adequate to determine that the waiver was knowing and voluntary).

The court of appeals has determined that the required court inquiry regarding a parent's knowing and voluntary waiver is sufficient when the trial court engages in "a fairly lengthy dialogue with [a respondent parent] to determine her awareness of her right to counsel and the consequences of waiving that right." *In re J.M.*, 273 N.C. App. 280, 289 (2020) (quoting *In re A.Y.*, 225, N.C. App. 29, 39 (2013); determining mother's waiver was knowing and voluntary). Whether a parent has waived their right to counsel is a conclusion of law. *In re K.M.W.*, 376 N.C. 195. The trial court must make findings of fact to support the conclusion that the parent's waiver is knowing and voluntary. *In re J.M.*, 273 N.C. App. 280 (remanding for entry of written findings of fact about whether mother's waiver of counsel was knowing and voluntary).

A parent's waiver of court-appointed counsel made for the purpose of retaining private counsel is not necessarily a waiver of representation by any counsel such that the parent intends to represent themself. *See In re K.M.W.*, 376 N.C. 195 (mother's signed waiver of counsel form indicated waiver limited to court-appointed counsel; mother retained private counsel who subsequently withdrew, leaving mother unrepresented). If a parent has not indicated a waiver of counsel for self-representation purposes, the court should make an inquiry about the parent knowingly and voluntarily wanting to appear pro se. *See In re K.M.W.*, 376 N.C. 195. Although not discussed by the supreme court in *In re K.M.W.*, G.S. 7B-1109(b) requires the district court, at the TPR adjudicatory hearing, to inquire about whether the parents are present and are represented by counsel, and if a parent is unrepresented, the court must inquire as to whether the parent wants counsel and is indigent. If the parent qualifies for court-appointed counsel, the court must appoint counsel and continue the TPR hearing to allow that attorney to prepare.

Although a parent may appear pro se, they do not have a statutory right to self-representation in an abuse, neglect, or dependency proceeding (a change made in 1998 statutory amendments). A parent also does not have a constitutional right to represent themselves in a juvenile proceeding. The court exercises discretion in deciding whether to allow a parent to waive counsel and represent themselves. *See In re J.R.*, 250 N.C. App. 195 (2016) (holding no abuse of discretion when the court denied mother's request to proceed pro se given possibility of criminal charges arising from the same incident and finding that her waiver was not knowing and voluntary because she was influenced and possibly coerced by her abusive boyfriend to waive counsel).

When a respondent parent has a Rule 17 GAL appointed because of the parent's incompetency that GAL's consent to the parent's waiver of appointed counsel should be obtained. *See In re P.D.R.*, 224 N.C. App. 460, 470 (2012) (decided prior to amendment in GAL statute for respondent parent that removed a GAL of assistance based on diminished capacity, holding if respondent had diminished capacity and a GAL of assistance, "then she was free to make her own decision whether to proceed pro se," but if she had a GAL of substitution based on incompetency, "the GAL would act on behalf of respondent mother, making the decisions necessary to seek a result favorable to the mother"); *In re A.Y.*, 225 N.C. App. at 38 (decided prior to amendment in GAL statute removing a GAL of assistance based on a parent's diminished capacity, and stating "[b]ecause the GAL was acting only in an assistive capacity, respondent mother had the ability to waive counsel, so long as that waiver was knowing and voluntary"). See section 2.4.F, below (discussing GAL appointment for respondent parent and earlier statutes establishing GAL role as either substitution or assistance).

**AOC Form:**
AOC-J-143, Waiver of Parent's Right to Counsel.

**4. Forfeiture of counsel.** A parent may forfeit their right to court appointed counsel in a juvenile proceeding. *See In re D.T.P.*, ___ N.C. App. ___, 895 S.E.2d 431 (2023) (affirming trial court's determination that both parents forfeited their right to appointed counsel in a TPR proceeding); *In re L.Z.S.*, 383 N.C. 309 (2022) and *In re K.M.W.*, 376 N.C. 195 (2020) (no forfeiture of counsel). A forfeiture of counsel differs from a waiver of counsel. Unlike a waiver, which involves an intentional and knowing relinquishment of the right to counsel, a forfeiture of counsel is based on the respondent's actions. A forfeiture of counsel does not require that the trial court make an inquiry about a respondent's knowing and voluntary waiver.

To forfeit the right to counsel, the respondent's actions must be "egregious dilatory or abusive conduct" that "totally undermine[s] the purposes of the right itself by making representation impossible and seeking to prevent the trial from happening at all." *In re K.M.W.*, 376 N.C. at 209 (quoting *State v. Simpkins*, 373 N.C. 530, 541 (2020) and *quoted in In re D.T.P.*, ___ N.C. App. at ___, 895 S.E.2d at 435) (mother's actions did not constitute serious misconduct and were not a forfeiture). Whether a respondent has forfeited their right to counsel is a conclusion of law.

In the three appellate opinions addressing forfeiture of counsel in a juvenile proceeding, only *In re D.T.P.*, ___ N.C. App. ___, 895 S.E.2d 431, concluded the respondents' conduct amounted to a forfeiture. In that TPR case, the trial court made findings of fact based on evidence that included (i) the father had five different court appointed attorneys and the mother had six; (ii) the parents had a calculated plan to delay the court proceedings consisting of several invalid appeals to the court of appeals and the U.S. Supreme Court, all of which were dismissed; (iii) used the practice of having their attorneys file motions to withdraw to delay the TPR hearing; and (iv) filed a lawsuit against their attorneys to cause the attorneys to file a motion to withdraw. Based on those findings, the trial court concluded that the parents' conduct was egregious, dilatory, and abusive; undermined the purpose of the right to counsel

by making representation impossible; and sought to prevent the TPR from occurring resulting in a forfeiture. The court of appeals affirmed the trial court's conclusion that each parent forfeited their right to counsel and affirmed the TPR order.

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**Resources:**
For more information about forfeiture of counsel, see

- Sara DePasquale, *Parents Forfeited Their Right to Court-Appointed Counsel in TPR: What Is the Law for Attorney Representation of Parents in A/N/D and TPR Actions*?, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (Dec. 6, 2023)
- Brittany Bromell, *N.C. Supreme Court Weighs in Again, on Forfeiture of Counsel* (UNC SCH. OF GOV'T: N.C. CRIMINAL LAW BLOG (Feb. 7, 2023).

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**5. Withdrawal of counsel.** Appellate courts have held that an attorney's withdrawal from a case requires: (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. *In re K.M.W.*, 376 N.C. 195 (2020) (referring to Rule 16 of the General Rules of Practice) (*quoted in In re L.Z.S.*, 383 N.C. 309, 315 (2022)); *In re D.E.G.*, 228 N.C. App. 381 (2013) (citing *Smith v. Bryant*, 264 N.C. 208 (1965)). Whether to permit an attorney to cease representation of a client is within the discretion of the trial court. *In re T.A.M.*, 378 N.C. 64 (2021). However, where the client has no notice of the attorney's intent to withdraw, the trial court has no discretion and must either grant a reasonable continuance or deny the motion to withdraw. *In re K.M.W.*, 376 N.C. 195; *In re D.E.G.*, 228 N.C. App. 381. The supreme court has stated, "[u]nder no circumstances may an attorney of record be permitted to withdraw on the day of trial without first satisfying the court that he has given his client *prior* notice which is both specific and reasonable." *In re L.Z.S.*, 383 N.C. at 315 (emphasis in original) (citation omitted) (reversing permanency planning order; no notice of attorney's intent to withdraw was provided to respondent; respondent was not present at hearing). To determine whether circumstances would permit withdrawal when the parent is absent from the hearing, the court must inquire into the efforts made by counsel to contact the parent. *In re K.M.W.*, 376 N.C. 195; *In re D.E.G.*, 228 N.C. App. 381; *see In re M.G.*, 239 N.C. App. 77 (2015) (vacating a TPR order and remanding the case because the trial court erred in allowing respondent's counsel to withdraw without first confirming that respondent had been notified of counsel's intention to do so).

The court must employ a fact-specific analysis in making its decision as to whether the attorney will be permitted to withdraw. *In re L.Z.S.*, 383 N.C. 309; *In re T.A.M.*, 378 N.C. 64. When making the analysis, the principle the court must employ is whether "the parent has been provided adequate notice of counsel's intent to seek leave of court to withdraw and the trial court has adequately inquired into the basis for counsel's withdrawal motion." *In re L.Z.S.*, 383 N.C. at 321. The fact-specific analysis is demonstrated by two differing supreme court opinions.

In *In re K.M.W.*, 376 N.C. 195, the supreme court held that the trial court erred by granting the mother's attorney's motion to withdraw. The mother was not present at the hearing on the motion to withdraw, and there was nothing in the record to show that the mother was served with a copy of the motion. The court did not inquire into the efforts the attorney made to notify the mother of his intent to withdraw or what efforts he made to ensure the mother

understood what he was proposing to do or to protect her statutory right to counsel. The mother did appear at the subsequent TPR hearing where the court made no further inquiries about the mother's knowing and voluntary waiver of counsel and proceeded with and granted the TPR, which was ultimately reversed and remanded.

In *In re T.A.M.*, 378 N.C. 64, the supreme court held the trial court did not abuse its discretion in granting the father's motion to withdraw and distinguished the facts from *K.M.W.* In *T.A.M.*, the trial court had advised the father of his responsibility to attend all the TPR hearings and in the underlying neglect action, advised him to maintain contact with his attorney and that failure to do so may result in the attorney seeking to withdraw, resulting in the action proceeding without him being represented. At the TPR, the court found DSS made diligent efforts to locate the father and authorized service of the TPR petition by publication as the father was attempting to conceal his whereabouts. The father's attorney was permitted to withdraw after she made a good faith attempt to serve her client with the motion and notice of hearing on her motion, albeit at an address the father was no longer receiving mail at and spoke with the father briefly before the TPR hearing where he consented to her withdrawal. At the hearing where the father did not appear, the court held a colloquy with the attorney, who informed the court that she had briefly spoken with her client earlier that day and advised him that if he did not appear at the hearing that she would seek to withdraw and that he consented to her withdrawal. The court granted the motion and proceeded with the TPR, which was granted and affirmed on appeal. The supreme court noted that a trial court is not required to track down a parent. In a dissent, three justices reasoned the holding of *T.A.M.* was inconsistent with *K.M.W.* and goes against the principle of stare decisis.

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**Practice Note:** If an attorney is unable to locate their client, the attorney must make reasonable efforts to notify the client of the attorney's intent to withdraw. This can be done by calling collateral contacts (i.e., family members, employer, landlord), by electronic communication, and by complying with the service requirements of Rule 5(b)(2)(b) of the Rules of Civil Procedure.

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**6. Ineffective assistance of counsel.** A parent asserting a claim of ineffective assistance of counsel must show that the attorney's performance (1) was deficient (or fell below an objective standard of reasonableness) and (2) was so deficient that the parent was denied a fair hearing. *In re B.S.*, 378 N.C. 1 (2021); *In re T.N.C.*, 375 N.C. 849 (2020); *In re C.B.*, 245 N.C. App. 197 (2016) (holding assuming arguendo that counsel's performance was deficient, mother was not deprived of a fair hearing). The parent alleging ineffective assistance of counsel has the burden of proving the attorney's performance was below the required standard, and that burden "is a heavy one for [the client] to bear." *In re L.N.H.*, 382 N.C. 536, 542 (2022); *In re C.B.*, 245 N.C. App. at 214. Regarding an attorney's conduct, there is a strong presumption that it is within the range of reasonable professional assistance. *In re L.N.H.*, 382 N.C. 536. In showing that the parent was denied a fair hearing, the parent must prove that there is a reasonable probability there would have been a different outcome but for the attorney's deficient performance. *In re L.N.H.*, 382 N.C. 536; *In re B.S.*, 378 N.C. 1; *In re T.N.C.*, 375 N.C. 849.

A moderate tone or lack of positive advocacy by the attorney is not necessarily ineffective assistance of counsel. *In re T.N.C.*, 375 N.C. 849 (holding counsel's performance was not deficient when his cross-examination was brief, his tone at closing was one of acquiescence, and the contents of closing included some positive facts and a request for a ruling in his client's favor; distinguishing from opinion where counsel disparaged his client; referring to *In re C.D.H.*, 265 N.C. App. 609 (2019) regarding a lack of positive advocacy). An attorney's failure to advocate or remaining silent during the proceeding is not necessarily ineffective assistance of counsel. *In re C.D.H.*, 265 N.C. App. 609; *In re T.D.*, 248 N.C. App. 366 (2016) (originally unpublished July 19, 2016, but subsequently published).

Several opinions address a respondent parent's ineffective assistance of counsel claim where in the TPR hearing, the respondent did not appear and the respondent's attorney did not participate in the hearing. For such a determination, when the record is insufficient, the court of appeals has held the appropriate remedy is to remand the case back to the trial court to make further inquiries about the reasons for the respondent's absence from the hearing, the attorney's efforts to contact the respondent, and the reasons for the attorney's actions. *In re C.D.H.*, 265 N.C. App. 609 (remanded due to insufficient record for trial court to determine if respondent waived her right to counsel based on her own actions or whether the attorney's performance was deficient); *In re A.R.C.*, 265 N.C. App. 603 (2019) (remanded due to insufficient record for trial court to make a determination about the adequacy of the attorney representation, including efforts by attorney to contact mother and adequately represent her at the hearing); *In re S.N.W.*, 204 N.C. App. 556 (2010) (remanded for trial court to determine what efforts counsel made to contact and adequately represent respondent).

If, on remand, the trial court determines the attorney's actions were deficient, the court should then determine whether the deficiencies deprived the parent of a fair hearing. *In re C.D.H.*, 265 N.C. App. 609; *In re A.R.C.*, 265 N.C. App. 603. On remand, the trial court should make the necessary findings in response to the inquiry and determine whether the parent is entitled to a new hearing with the appointment of new counsel. *In re C.D.H.*, 265 N.C. App. 609; *In re S.N.W.*, 204 N.C. App. 556.

The North Carolina Supreme Court addressed an ineffective assistance of counsel claim based on the parent's argument that he was deprived a fair hearing in a TPR because his attorney failed to advise him of a parental duty. *See In re B.S.*, 378 N.C. 1. The supreme court held that a parent's ignorance, or lack of knowledge, of an inherent duty to parent does not protect a parent from a TPR, and any alleged deficiency of the attorney to advise a parent to fulfill their parental duties is not prejudicial. *In re B.S.*, 378 N.C. 1 (affirming TPR, concluding claim of ineffective assistance of counsel based on attorney not advising father to legally establish paternity or execute an affidavit of parentage to prevent a TPR for failure to legitimate or acknowledge paternity was not prejudicial and was without merit).

As part of the ineffective assistance of counsel cases, the court of appeals has addressed issues related to communication between the attorney and client. In a private TPR action, *In re B.L.H.*, 239 N.C. App. 52 (2015), in which the respondent father asserted ineffective assistance of counsel, the court of appeals concluded that trial counsel did not make sufficient efforts to communicate with the respondent to provide him with effective

representation and vacated the TPR order, remanding the case for a new hearing. The only action taken by counsel related to communicating with the respondent was to contact the federal prison to learn about its email system. Counsel did not write any letters or send any emails to the respondent and did not engage in any phone conversations with the respondent; he did not present evidence on the respondent's behalf at the hearing and failed to make a cogent argument at the adjudication phase. The court of appeals pointed out that it was not a case where the respondent had failed to cooperate; to the contrary, the respondent acted promptly upon receiving the TPR summons with a response directed to his appointed counsel and timely returned an affidavit of indigency.

In another TPR case, *In re M.T.-L.Y.*, 265 N.C. App. 454 (2019), the court of appeals determined that the respondent mother was not denied effective assistance of counsel when the trial court denied her attorney's motion to continue the hearing. A component of effective assistance of counsel involves adequate time for the attorney and client to prepare a defense. Although prejudice is presumed when the court denies a continuance to allow for adequate time to prepare for trial, when the lack of trial preparation is a result of the party's own actions, the trial court does not err when denying a motion to continue. In *In re M.T.-L.Y.*, the court of appeals was not persuaded by the mother's argument that in-person (or face-to-face), rather than phone, text, or email communication was essential to prepare.

The reviewing court will not second guess an attorney's strategy and trial tactics when determining whether the respondent was denied effective assistance of counsel. *See In re L.N.H.*, 382 N.C. 536. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *In re L.N.H.*, 382 N.C. at 541 (citation omitted) (holding ineffective assistance of counsel claim was meritless). The court examines the attorney's conduct and determines whether there was prejudice to the client or whether the conduct undermined the fundamental fairness of the proceeding. *See In re M.Z.M.*, 251 N.C. App. 120 (2016) (holding mother was not denied effective assistance of counsel when her attorney's strategy was to concede the grounds to TPR; attorney did not cross-examine witnesses or present evidence during the adjudication phase but presented evidence and made arguments in the disposition phase).

**7. Payment of counsel and reimbursement of fees.** Counsel appointed for an indigent parent is to be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services. G.S. 7B-603(b); 7B-1101.1(a). The court may require reimbursement of fees from a parent, but only if (1) the parent is 18 or older and (2) the juvenile is adjudicated abused, neglected, or dependent, or the parent's rights are terminated. The court determines whether the parent should reimburse fees at a dispositional or other appropriate hearing, and the court must take into consideration the parent's ability to pay. If the parent does not comply with the court's order to pay, the court must file a judgment against the parent for the amount ordered. G.S. 7B-603(b1).

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**AOC Form:**

AOC-G-200, Civil Case Trial Level Fee Application Order For Payment Judgment Against Parent/Guardian.

**Resources:**
The Office of the Parent Defender, in the Office of Indigent Defense Services (IDS), assists court-appointed parents' attorneys at both the trial and appellate levels. Information about the office as well as resources for parents' attorneys can be found on the IDS website.

For performance guidelines for representing parents created by the IDS, see N.C. COMM'N ON INDIGENT DEFENSE SERVICES, "Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level" (2007).

For standards of practice in representing parents adopted by the American Bar Association (ABA), see AMERICAN BAR ASS'N, "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases" (2006).

For materials, training, and opportunities to connect with other attorneys, see the ABA Center on Children and the Law website.

Access to resources and organizations focused specifically on parent representation or related topics (for example, fatherhood), can be found by searching those specific terms on the website for the Child Welfare Information Gateway.

## E. Funds for Experts and Other Expenses[2]

**1. Expenses of representation.** Indigent persons entitled to appointed counsel are also entitled to have the state provide them with "necessary expenses of representation." G.S. 7A-450(a), (b). An indigent respondent parent has the right to the services of counsel pursuant to G.S. 7A-451, 7B-602, and 7B-1101.1. Upon a proper showing, the parent also is entitled to funds for the services of expert witnesses or other expenses of representation. Payment for these services is in accordance with Rules of the Office of Indigent Defense Services (IDS). G.S. 7A-454. Under current IDS rules, an indigent parent must apply to the court in which the case is pending for funding (see discussion in subsection 3, below, related to parent's ex parte motion). The parent's attorney must locate an expert and then file a motion using the form AOC-G-309 requesting court approval for expert fees. Fees for types of experts are set out in the form itself.

**AOC Form:**
AOC-G-309, Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.

**Resource:** The Office of Indigent Defense Services maintains a website discussing Forensic Resources, here, which includes a database of experts in all areas.

[2] Some content for this section is based on Parent Representation Coordinator, N.C. Office of Indigent Defense Services, "Memo on Ex Parte Motions for Experts in AND Cases."

It is in the trial court's discretion whether to grant motions to obtain funds for experts and other representation expenses. *See In re D.R.*, 172 N.C. App. 300 (2005) (quoting language from other cases). However, if the indigent person makes the required showing of need, they are entitled to funds for expert assistance. *See State v. Parks*, 331 N.C. 649 (1992) (stating the standard). Questions relating to expert assistance arise more often in criminal cases than in abuse, neglect, dependency, and termination of parental rights (TPR) cases. However, all of these cases are decided under the same provisions in Article 36 of G.S. Chapter 7A.

**2. Standard for obtaining expenses.** Case law has established standards for determining whether the fee of an expert or other resource, such as an investigator, is a "necessary expense of representation." Criminal cases establish that the indigent parent must meet a "threshold showing of specific necessity"—that is, a preliminary, but particularized, showing of need. *See State v. Parks*, 331 N.C. 649, 656 (1992) (quoting *State v. Penley*, 318 N.C. 30, 51 (1986)). Juvenile cases have followed that standard. To establish a preliminary, particularized need for funding, a party must show that (1) the person requesting the expert will be deprived of a fair trial without the expert or (2) there is a reasonable likelihood that the expert will materially assist the party in the preparation of their case. *See In re J.B.*, 172 N.C. App. 1 (2005) (upholding trial court's denial of parent's motion for expenses for expert in TPR case where parent was unable to show deprivation of a fair trial without the requested expert assistance or material assistance with the requested expert). Particularized need is a "flexible concept" that must be determined on a case-by-case basis. "Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided[.]" *In re J.B.*, 172 N.C. at 12 (quoting *State v. Page*, 346 N.C. 689, 696–97 (1997)).

The court of appeals seemed to apply the standard for obtaining funds for an expert to a motion for funds to conduct a telephone deposition of the child's foster parents. *In re D.R.*, 172 N.C. App. 300 (2005) (holding that trial court did not abuse its discretion in denying motion for funds). Assuming the test for obtaining funding for experts applies to more routine expense requests, as a practical matter the courts may scrutinize these requests less closely. *See In re J.B.*, 172 N.C. App. 1 (affirming trial court's order that denied motion for funds for expert but allowed parent to submit bill for deposition of respondent's therapist and for costs of obtaining therapist's records).

**3. Parent's ex parte motion.** No appellate court decisions address the question of whether, in a juvenile case, a respondent parent's motion for funds for an expert may be made and heard ex parte. It is well established that in criminal cases ex parte hearings on motions for experts are permissible, and even required if requested, on the basis that an open hearing could jeopardize a defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to effective assistance of counsel, or right to privileged communications with their attorney. *See State v. Ballard*, 333 N.C. 515 (1993). Although a respondent parent in a juvenile case does not have a Sixth Amendment right to counsel like a defendant in a criminal case, the parent does have due process rights and a statutory right to counsel and to effective assistance of counsel.

**Practice Note:** In 2021, Rule 27 was added to the North Carolina General Rules of Practice for the Superior and District Courts. Under Rule 27(b), the procedure involves filing the document sought to be sealed under provisional seal with a motion that requests the document be sealed; both the document and motion are filed on the same day. The contents of the motion, hearing on the motion, court decision, and distinction from a protective order are addressed in Rule 27.

## F. Guardian ad Litem for Parent[3]

**1. Circumstances for appointment and legislative history**. The Juvenile Code, in G.S. 7B-602 and 7B-1101.1, either requires or authorizes the court to appoint a guardian ad litem (GAL) for the respondent parent pursuant to Rule 17 of the Rules of Civil Procedure in two circumstances. When the parent is an unemancipated minor, the court *must* appoint a GAL. When the parent is incompetent, the court *may* appoint a GAL. GAL representation for parents has a complex legislative history that is relevant to the interpretation of any case law based on earlier versions of the statute.

Legislation in 2013 substantially changed GAL representation for parents. Before October 1, 2013, the court had the discretion to appoint a GAL for a parent based on incompetence or diminished capacity, and case law established that the GAL's role was one of either substitution or assistance, depending on the basis for the appointment. Those distinctions no longer exist. A GAL for a parent who is not a minor may be appointed only for a parent who is incompetent. *See* G.S. 7B-602(c); *In re T.L.H.*, 368 N.C. 101(2015) (applying G.S. 7B-1101.1). Designated duties of a GAL appointed under G.S. 7B-602 and 7B-1101.1 were also repealed in 2013. *See* S.L. 2013-129, sec. 17 and 32.

**Resource:** For a thorough discussion of the issue of GAL representation of parents, including legislative and case history, see Janet Mason, *Guardians ad Litem for Respondent Parents in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2014/01 (UNC School of Government, Jan. 2014).

**(a) GAL for minor parent.** If the parent is under the age of 18 and not married or otherwise emancipated, the court must appoint a GAL for the parent pursuant to Rule 17 of the Rules of Civil Procedure. G.S. 7B-602(b); 7B-1101.1(b); *see* G.S. 1A-1, Rule 17. If the minor parent reaches age 18 or gets married or becomes emancipated during the course of the proceeding, the GAL should be released unless the court determines that the parent is incompetent.

A minor parent may be "the juvenile" in a separate case involving the minor parent's own status as an abused, neglected, or dependent juvenile. In that proceeding the minor would (or might, if only dependency was alleged) have a GAL appointed pursuant to G.S. 7B-601 like any other juvenile who is the subject of a petition alleging abuse, neglect, or dependency. That G.S. 7B-601 GAL appointment for the minor as a "juvenile" is separate

[3] Portions of this section are based on Janet Mason, *Guardians ad Litem for Respondent Parents in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2014/01 (UNC School of Government, Jan. 2014).

from the Rule 17 GAL appointment for the minor as a respondent minor parent. See Chapter 5.1.B.1 (discussing conflict of interest for DSS).

**(b) GAL for parent who is incompetent.** On motion of any party or on the court's own motion, the court *may* appoint a GAL for a parent who is incompetent pursuant to Rule 17 of the Rules of Civil Procedure. G.S. 7B-602(c); 7B-1101.1(c). The court determines whether the parent is incompetent. See subsection 5, below.

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**AOC Form:**
AOC-J-206, Order to Appoint, Deny, or Release Guardian Ad Litem (For Respondent).

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**2. Privileged communications.** Communications between the GAL and the parent and between the GAL and the parent's counsel are privileged and confidential. G.S. 7B-602(d); 7B-1101.1(d).

**3. Timing and source of GAL appointment.** Any party or the court itself may move for the appointment of a GAL for a respondent parent. G.S. 7B-602(c); 7B-1101.1(c); *see In re M.S.E.*, 378 N.C. 40 (2021). The North Carolina Supreme Court has concluded that DSS, as a petitioner, is not required to request a GAL appointment for a parent who it believes is incompetent. *In re Q.B.*, 375 N.C. 826 (2020) (interpreting Rule 17(c) of the Rules of Civil Procedure). However, a request for the appointment of a GAL may be made by "written application" before or at the time the action is filed. *See* N.C. R. CIV. P. 17(c).

Although there is no statutory limitation on when during a proceeding the motion can or should be made, the appellate courts have held that when there is a substantial question as to whether a party in a civil action is competent, the court should address that question "as soon as possible in order to avoid prejudicing the party's rights." *In re J.A.A.*, 175 N.C. App. 66, 72 (2005). *See also In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that appointment of a GAL for a respondent was timely when made on motion of the petitioner seventeen days after a TPR petition was filed and three months before the first hearing). The court is not required to conduct an inquiry or a hearing if it determines there is no substantial question about the parent's competency. *See In re Q.B.*, 375 N.C. 826; *In re T.L.H.*, 368 N.C. 101 (2015), discussed in subsection 5 below.

**4. Who may serve as GAL.** The Juvenile Code does not specify whom the court may appoint as GAL for a parent. Rule 17 of the Rules of Civil Procedure, which is referenced in G.S. 7B-602 and G.S. 7B-1101.1, directs the court to appoint "some discreet person" to serve as GAL when one is required. The only other guidance given by the Juvenile Code as to who may serve as GAL is the following:

- A parent's attorney may not also serve as the parent's GAL. G.S. 7B-602(d); 7B-1101.1(d).
- GALs trained and supervised by the N.C. Guardian ad Litem Program do not serve as Rule 17 GALs. The GAL Program is limited to representing children who are the subject of a petition for abuse, neglect, dependency, or TPR. *See* G.S. 7B-601; 7B-1108(b), (d); 7B-1200.

Neither Rule 17 nor the Juvenile Code requires that the Rule 17 GAL be an attorney. This means a "discreet person," such as a relative, could be appointed. Courts should consider whether there is a potential conflict of interest when appointing a "discreet person" as the parent's Rule 17 GAL.

While courts often appoint attorneys as GALs for parents, the GAL's role in the case is not that of a second or back-up attorney for the parent. *See* G.S. 7B-1101.1(d). The North Carolina Supreme Court examined the language of G.S. 7B-1101.1(a)–(d) and held that the language is unambiguous and requires that the parent's attorney and GAL cannot be the same person so as to allow the parent to receive the benefit of both representatives. *In re J.E.B.*, 376 N.C. 629 (2021). The supreme court further held that although the GAL is not the attorney, the statute does not prohibit the GAL from cross-examining a witness or presenting an argument to the court. *In re J.E.B.*, 376 N.C. 629 (Rule 17 GAL in this case was also an attorney). For a further discussion of the role of GAL, see subsection 6, below.

**5. Determination of incompetence.** No specific procedures are articulated in the Juvenile Code or Rule 17 for determining whether to appoint a Rule 17 GAL for the parent. However, an actual adjudication of incompetence pursuant to G.S. Chapter 35A is not required. *See* G.S. 35A-1102 (stating that even though Chapter 35A is the exclusive procedure for adjudicating a person incompetent, that does not interfere with the judge's authority to appoint a GAL under Rule 17). Similarly, an adjudication of incompetence in a Chapter 35A proceeding before the clerk of superior court does not automatically require the appointment of a Rule 17 GAL. *See In re Q.B.*, 375 N.C. 826 (2020) (no abuse of discretion where mother was adjudicated incompetent in Chapter 35A proceeding and court in TPR proceeding determined there was not a substantial question of mother's incompetency and did not hold a hearing on that issue). For purposes of a Rule 17 GAL, the court is examining "whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case." *In re Q.B.*, 375 N.C. at 836.

If a court determines there is a substantial question as to a respondent's competence, the court in the juvenile action must conduct a hearing or inquiry on the issue of competence. *See In re M.S.E.*, 378 N.C. 40 (2021); *In re N.K.*, 375 N.C. 805 (2020). Deciding (1) whether there is a substantial question as to a parent's competence warranting a hearing on the issue and (2) whether the parent is incompetent are both discretionary determinations made by the trial court. *In re M.S.E.*, 378 N.C. 40; *In re Q.B.*, 375 N.C. 826; *In re Z.V.A.*, 373 N.C. 207 (2019); *In re T.L.H.*, 368 N.C. 101 (2015). The standard of review for whether an inquiry into the parent's competency should be conducted and for the appointment of the GAL is an abuse of discretion, which results in a ruling that "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. at 107 (*quoted in In re M.S.E.*, 378 N.C. at 44–45 and *In re Z.V.A.*, 373 N.C. at 210).

A determination of whether there is a substantial question of a parent's incompetency does not require that the parent have a mental health diagnosis. Similarly, if a parent has a mental health diagnosis, that diagnosis is not determinative of incompetency. The trial court's determination of incompetency includes observations of the respondent's behavior in the

courtroom, ability to express themselves, their understanding of the situation, their ability to assist their counsel, and numerous other factors. *In re M.S.E.*, 378 N.C. 40; *In re Q.B.*, 375 N.C. 826; *In re T.L.H.*, 368 N.C. 101. A court may make its observations of the respondent's demeanor and behavior when the parent is present at hearings regardless of whether the parent testifies; the hearings may include both an underlying abuse, neglect, or dependency proceeding and the TPR proceeding. *In re N.K.*, 375 N.C. 805.

A trial court is given substantial deference when determining whether there is a substantial question as to a parent's competency warranting a hearing or an inquiry on the issue because the court has interacted with the respondent parent. *In re Q.B.*, 375 N.C. 826; *In re N.K.*, 375 N.C. 805; *In re Z.V.A.*, 373 N.C. 207; *In re T.L.H.*, 368 N.C. 101. Absent "the most extreme instances," a trial court should not be held to have abused its discretion by not making the inquiry when there is an appreciable amount of evidence that tends to show the respondent is not incompetent. *In re T.L.H.*, 368 N.C. at 108–09 (*quoted and applied in In re Q.B.*, 375 N.C. at 832; *In re N.K.*, 375 N.C. at 810; and *In re Z.V.A.*, 373 N.C. at 210). How a parent appears to be functioning in the case impacts a court's determination of whether there is a substantial question.

The following are cases where no abuse of discretion was found.

- *In re M.S.E.*, 378 N.C. 40 (trial court did not conduct a hearing on mother's competency in a TPR despite mother's intellectual disability requiring supports and services when evidence showed her understanding of the nature of the proceedings, her clear and cogent testimony, and the court's ability to observe mother during her attendance at various hearings).
- *In re Q.B.*, 375 N.C. 826 (trial court did not conduct a second hearing on mother's competency at TPR hearing (first hearing was held in underlying neglect proceeding) after she had subsequently been adjudicated incompetent and appointed a guardian of the person in a Chapter 35A proceeding and received supportive services from Adult Protective Services (APS); mother understood the questions asked of her and responded appropriately and was working on her case plan, which included completion of parenting classes, maintaining contact with DSS, complying with APS recommendations, and attending her visits).
- *In re N.K.*, 375 N.C. 805 (trial court did not conduct hearing on incompetency despite mother's untreated mental health issues and mild intellectual deficits diagnosis when mother understood need for treatment of her mental health and substance use problems and expressed preference for certain providers; entered into a case plan; participated in stipulation negotiations in the neglect and dependency adjudication; verified her answer to the TPR petition; was her own representative payee; attended her visits; expressed her preference for relative placement; and was available to DSS, the child's GAL, and the court).
- *In re T.L.H.*, 368 N.C. 101 (trial court did not hold a hearing on the mother's incompetency in a TPR proceeding as the evidence showed the mother appeared to understand the nature of the proceedings and that she understood that she had to manage her own affairs and that there were steps she needed to take to avoid losing her parental rights).

- *In re Z.V.A.*, 373 N.C. 207 (trial court did not conduct an inquiry into the mother's competency despite an indication that she had a mental disability based on an IQ of 64 as mother was able to work, attend school, and complete domestic violence classes that were part of her case plan).
- *In re J.R.W.*, 237 N.C. App. 229 (2014) (trial court was not required to conduct an inquiry as to the mother's competency based on her history of mental health issues because the record established that her mental health issues did not rise to the level of incompetency; mother had successfully transitioned from shelter to apartment living, had enrolled in a GED program, had appropriate visits with her child, completed a parenting program, and attended all but one hearing where the court had an opportunity to observe her).

When there is a substantial question of a parent's competency, the court conducts an inquiry or hearing on the issue and the need for a GAL appointment under Rule 17. The parent and their attorney must be given notice of the hearing or inquiry. *See Hagins v. Redev. Comm'n of Greensboro*, 275 N.C. 90 (1969). No formal procedure for a hearing to determine incompetence is prescribed, but the court of appeals has offered this guidance:

- when practical, the respondent whose competency is questioned should be present;
- when possible, a voir dire examination of the respondent should take place;
- if the court hears conflicting evidence, the judge should make findings of fact to support its determination.

*Rutledge v. Rutledge*, 10 N.C. App. 427 (1971).

The court's statutory authority to order a pre-adjudication examination of the parent is clear in a TPR proceeding (*see* G.S. 7B-1109(c)), but less clear in the pre-adjudication stage of an abuse, neglect, or dependency case. Although Rule of Evidence 706 and Rule 35 of the Rules of Civil Procedure might provide authority for ordering such an examination, appellate cases have not directly addressed this issue.

In discussing the term "incompetent" in connection with the appointment of Rule 17 GALs for respondent parents, the courts have adopted the definition of "incompetent adult" found in G.S. 35A-1101(7). *See, e.g., In re M.S.E.*, 378 N.C. 40; *In re N.K.*, 375 N.C. 805; *In re D.L.P.*, 242 N.C. App. 597 (2015). That definition reads as follows:

> Incompetent adult. -- An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. An adult or emancipated minor does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property.

G.S. 35A-1101(7), as amended by S.L. 2023-124, sec. 7.1, effective January 1, 2024.

This definition requires more than a mental health diagnosis. Evidence of mental health problems or alleging the ground of incapability based on mental illness for a TPR is not per se evidence of a parent's incompetence to participate in the proceeding. *See In re T.L.H.*, 368 N.C. 101; *In re J.R.W.*, 237 N.C. App. 229.

**6. Role of the parent's GAL.** Appointment of a GAL based on incompetence "will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted) (decided under prior law). An appointment of a GAL in the juvenile proceeding does not affect the parent's control over any other aspect of their life or property. Neither the Juvenile Code nor Rule 17 provides specific guidance as to the role of the parent's GAL. *See In re W.K.*, 376 N.C. 269 (2020).

Broadly speaking, the duty of a GAL is "to protect the interest" of the party in the litigation in which the GAL is appointed. *Narron v. Musgrave*, 236 N.C. 388, 394 (1952) (quoting *Spence v. Goodwin*, 128 N.C. 273, 274 (1901)). The court of appeals has stated that "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed." *In re D.L.P.*, 242 N.C. App. 597, 601 (2015) and *In re P.D.R.*, 224 N.C. App. 460, 469 (2012) (both quoting *In re A.S.Y.*, 208 N.C. App. 530, 538 (2010)). The court of appeals has also said that a GAL's role under Rule 17 is to act "as a guardian of procedural due process for the parent, to assist in explaining and executing her rights . . . to represent the party . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." *In re A.S.Y.*, 208 N.C. App. at 540 (citations omitted) (internal quotation marks omitted) (decided under prior law but addressing parent's incompetency and Rule 17).

The North Carolina Supreme Court has addressed the role of a parent's GAL and referred to the responsibilities of a GAL to meet with the parent, protect the parent's due process rights, assist the parent in executing their rights, and if possible, take actions to improve the parent's chances of obtaining a favorable decision. *See In re W.K.*, 376 N.C. 269 (affirming TPR; holding GAL's actions were not insufficient; there was no evidence GAL did not meet with father, act inappropriately with father, or inadequately represent father when GAL could not offer anything other than repeating the attorney's arguments and had no evidence to present). In another opinion, the supreme court held that a GAL who is also an attorney may make strategic decisions with the parent's attorney about how to best protect the parent's interests. That strategy may include having the GAL perform some trial functions, such as questioning witnesses and presenting arguments to the trial court, when done at the direction of or in coordination with the attorney who does not "functionally abdicate his responsibilities, leaving the GAL to 'act as the parent's attorney.' " *In re J.E.B.*, 376 N.C. 629, 636 (2021) (affirming TPR; GAL who was also an attorney did not violate G.S. 7B-1101.1(d) when cross-examining witnesses and presenting argument on two of the alleged grounds to TPR).

Once a trial court determines that a Rule 17 GAL is required and appoints a GAL to represent a respondent parent in an abuse, neglect, dependency or TPR proceeding, the trial court may not conduct a hearing without the respondent's GAL. *In re D.L.P.*, 242 N.C. App. 597

(vacating adjudication and disposition orders entered after hearings at which respondent's GAL was not present).

The precise nature of a GAL's role will depend on a variety of factors, such as the party's age and maturity, the cause and extent of the party's incompetence, and the nature of the litigation. While a GAL's role may be viewed as one of "substitution," that should not mean depriving the party of the right to participate in and make decisions about the case to the extent the parent is able to do so. The GAL's role should include assisting the parent in understanding the case and in participating to the extent the parent is able, while exercising judgment about and making decisions the parent is unable to make, to protect that parent's interests. The incompetency and guardianship statutes in G.S. Chapter 35A state that "[t]he essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions." G.S. 35A-1201(a)(3). The role of a parent's GAL in a juvenile case can be viewed the same way in the context of the juvenile case.

The following statements referring to guardianship following an adjudication of incompetence seem equally relevant for a parent's GAL:

> Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.
>
> Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

G.S. 35A-1201(a)(4) and (5).

A court may address the role of a GAL for the parent in its appointment order, and the GAL, along with the parent's attorney, may seek guidance from the court if they are unsure about the role the GAL should play.

**7. Payment of parent's GAL.** G.S. 7B-603(b) specifies that GALs for parents shall be paid a reasonable fee in accordance with the rules adopted by the Office of Indigent Defense Services. *See* G.S. 7B-1101.1(f). The Juvenile Code does not address fees for a GAL for a parent who is not indigent in an abuse, neglect, or dependency proceeding; however, Rule 17(b)(2) of the Rules of Civil Procedure (under which an appointment of a parent's GAL would be made) states that the court may "fix and tax" the GAL's fee as part of the costs. Regarding a termination of parental rights (TPR) proceeding, G.S. 7B-1101.1(f) states if the parent is not indigent and does not secure private counsel, the fee of a GAL appointed for the parent is a proper charge against the parent. *See also* G.S. 7B-1110(e), which authorizes the court to tax the cost of a TPR proceeding to any party.