Chapter 3
Jurisdiction, Venue, and Overlapping Proceedings

3.1 Summary and Scope of Jurisdiction Issues

A. Introduction

Orders entered by a court that does not have subject matter jurisdiction are void. A court's action with respect to a person over whom the court does not have personal jurisdiction, when personal jurisdiction is required, is not binding on that person. Therefore, an early inquiry should be made in every action as to whether the court has the requisite jurisdiction to proceed.

In abuse, neglect, dependency, and termination of parental rights (TPR) cases

- subject matter jurisdiction generally depends on following the jurisdictional procedures set forth in the Juvenile Code (G.S. Chapter 7B), including the proper initiation of proceedings and compliance with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA);
- personal jurisdiction generally depends on a statutory basis for exercising jurisdiction and proper issuance and service of process, unless an individual's actions constitute consent to personal jurisdiction, G.S. 1-75.3; 1-75.7; and
- venue addresses where the action is filed, which in juvenile cases depends generally on where the child resides or is present (note that separate from venue, the child's residence or location may also relate to jurisdiction in a TPR, explained more fully in sections 3.2.B.1 and 7, below).

B. District Court Jurisdiction

The district court has exclusive original jurisdiction over the following proceedings that are discussed in this Manual:

- any case involving a juvenile who is alleged to be abused, neglected, or dependent;
- proceedings dealing with petitions alleging obstruction of or interference with a DSS assessment required by G.S. 7B-302;
- proceedings on petitions for judicial review of DSS determinations that someone is a "responsible individual";
- proceedings under the Interstate Compact on the Placement of Children (ICPC), Article 38 of the Juvenile Code;
- termination of parental rights proceedings;
- proceedings for reinstatement of parental rights;
- judicial reviews of voluntary foster care placements between the juvenile's parent or guardian and DSS as required by G.S. 7B-910; and
- judicial reviews of voluntary foster care placements between DSS and young adults participating in the Foster Care 18–21 program as required by G.S. 7B-910.1.

G.S. 7B-200(a); *see* G.S. 7B-101(6) (definition of "court").

Note, for purposes of this Manual, a "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.

The district court also has exclusive original jurisdiction over the following proceedings that are not discussed in this Manual:

- proceedings involving judicial consent for emergency treatment for a juvenile when the juvenile's parent (or other responsible person) refuses to consent for treatment,
- proceedings involving waiver of the parental consent requirement for an unemancipated minor's abortion,
- proceedings involving authorization for an underage party to marry,
- emancipation proceedings, and
- any proceeding in which a juvenile is alleged to be undisciplined or delinquent.

G.S. 7B-200(a); 7B-1600; 7B-1601; *see* G.S. 7B-101(6) (definition of "court").

C. Continuing and Ending Jurisdiction in Abuse, Neglect, or Dependency Proceedings

The Juvenile Code provides that once jurisdiction is obtained over a juvenile, jurisdiction continues until whichever of the following occurs first:

- jurisdiction is terminated by order of the court,
- the juvenile turns 18, or
- the juvenile is emancipated. (In North Carolina, a juvenile who is 16 or 17 years old may be emancipated by a court order entered under Article 35 of G.S. Chapter 7B; a juvenile

who is married is emancipated (G.S. 7B-3509).)

G.S. 7B-201(a); *see In re A.K.G.*, 270 N.C. App. 409 (2020) (dismissing appeal of permanency planning order as moot when juvenile turned 18 during the pendency of the appeal, thus terminating the district court's jurisdiction in the action).

Under the adoptions statute, the court's jurisdiction in a juvenile proceeding ends when the child becomes the subject of a final order of adoption. G.S. 48-2-102(b); *In re W.R.A.*, 200 N.C. App. 789 (2009). *See* G.S. 7B-908(b) (post–termination of parental rights review hearing no longer required when child is the subject of a final order of adoption).

Unless the juvenile turns 18, becomes emancipated, or is adopted or a court order terminates the court's jurisdiction in the juvenile proceeding, the court continues to have jurisdiction in the case even if a permanent plan for the juvenile is achieved, further court hearings are waived, DSS is relieved of making reasonable efforts, and the respondents' attorneys and juvenile's GAL are released. *In re K.S.D-F.*, 375 N.C. 626 (2020) (trial court had subject matter jurisdiction to enter nonsecure custody order on DSS motion for review filed in 2016; court obtained jurisdiction when petition was filed in 2008 and retained jurisdiction after permanency had been achieved in 2010); *In re K.S.*, 274 N.C. App. 358 (2020) (trial court had subject matter jurisdiction in 2007 action, where in 2009, permanent guardianship was ordered, court retained jurisdiction and waived further hearings; new 2016 petition and adjudication, which was remanded by court of appeals, did not deprive trial court of subject matter jurisdiction to review guardianship order in 2007 action); *In re C.M.B.*, 266 N.C. App. 448 (2019) (addressing continuing jurisdiction under G.S. 7B-201 as compared to a civil custody action under G.S. Chapter 50; determining the court never terminated its jurisdiction in the juvenile proceeding pursuant to G.S. 7B-201 or 7B-911); *see McMillan v. McMillan*, 267 N.C. App. 537 (2019) (determining court entered order pursuant to G.S. 7B-201(a) expressly terminating its jurisdiction in the juvenile proceeding even though it did not enter an order pursuant to G.S. 7B-911 transferring the case to a G.S. Chapter 50 custody action).

In some actions related to abuse, neglect or dependency, the district court has jurisdiction after the juvenile turns 18. In *In re Patron*, 250 N.C. App. 375 (2016), the court of appeals held that a district court had jurisdiction to review a DSS determination that appellant stepmother was a "responsible individual" even though the juvenile, who was 17 when abused, had turned 18 by the time the petition for judicial review was heard. G.S. 7B-323(e) provides for judicial review of a responsible individual determination "at any time." Note also that a child who ages out of foster care may continue receiving foster care services until they turn 21 years of age when meeting the eligibility requirements in G.S. 108A-48(c), and the district court has jurisdiction to review the now young adult's voluntary foster care placement as required by G.S. 7B-910.1. G.S. 131D-10.2B; 7B-200(a)(5a).

When the court's jurisdiction terminates, whether automatically or by court order, the court has no authority to enforce or modify any order that was previously entered in the action. G.S. 7B-201(b). Instead, the legal status of the juvenile and the custodial rights of the parties revert to the status they were before the petition was filed, unless an applicable law or a court order in another action provides otherwise. G.S.7B-201(b). The termination of the court's

jurisdiction in an abuse, neglect, or dependency proceeding does not affect

- a civil custody order entered pursuant to G.S. 7B-911;
- an order terminating parental rights;
- a pending action to terminate parental rights, unless the court orders otherwise;
- any delinquency or undisciplined proceeding; or
- any proceeding related to a new petition alleging abuse, neglect, or dependency.

G.S. 7B-201(b).

D. Terminology Related to Continuing and Ending Jurisdiction

Because of the effect of an order that terminates jurisdiction in an abuse, neglect, or dependency action, the language a court uses in its order that addresses the status of the action is critical. There is a significant difference between an inactive case (meaning further hearings are waived) where the court retains jurisdiction and a case where jurisdiction has been terminated. Clarity in a court order is essential so that the parties and the court understand which orders are in effect; whether the court has jurisdiction to hear motions to modify, enforce, or review; or whether a new action is required.

1. Terminate jurisdiction. The Juvenile Code refers to the termination of the court's jurisdiction. *See* G.S. 7B-201; 7B-401.1(a); 7B-906.1(d2); 7B-911(a); 7B-1000(b). The Juvenile Code authorizes different methods for the court to terminate its jurisdiction. One, the court may enter an order under G.S. 7B-201(b) expressly terminating its jurisdiction over the abuse, neglect, or dependency proceeding, which results in the parties returning to their pre-petition status. Two, the court may enter an order terminating its jurisdiction pursuant to G.S. 7B-906.1(d2) in an action where the juvenile has never been removed from the custody of a parent, guardian, or custodian, and the court at a review hearing has determined the parent, guardian, or custodian has successfully completed court-ordered services and the child is residing in a safe home. *See* G.S. 7B-101(19) (definition of "safe home"). Three, the court may enter an order pursuant to the requirements of G.S. 7B-911, which requires that the court terminate its jurisdiction in the juvenile proceeding and enter a G.S. Chapter 50 custody order, thereby transferring the juvenile proceeding to a civil custody action. When terminating jurisdiction under G.S. 7B-201(b), the court is not required to follow the procedures of G.S. 7B-911. *McMillan v. McMillan*, 267 N.C. App. 537 (2019). For a further discussion of G.S. 7B-911, see Chapter 7.10.B.4. Four, when DSS fails to prove at the adjudicatory hearing the child's alleged abuse, neglect, or dependency, the court must dismiss the petition with prejudice. G.S. 7B-807(a). In addition to the procedures of the Juvenile Code, the court may determine it no longer has jurisdiction pursuant to the criteria and procedures of the Uniform Child-Custody Jurisdiction Enforcement Act (UCCJEA) set forth in G.S. Chapter 50A, discussed in section 3.3, below.

When applying G.S. 7B-201, G.S. 7B-906.1(d2), or 7B-911, using the statutory language that "jurisdiction is terminated" in a court order clearly and explicitly addresses the jurisdictional status of the case. *See In re C.M.B.*, 266 N.C. App. 448, 462 (2019) (concluding, "But unless the trial court determines that the case should remain under the jurisdiction of the juvenile

court of Surry County, the trial court's order should clearly terminate the juvenile court's jurisdiction"). There is no room for interpretation as to what the court intended. Without jurisdiction, the court has no authority to act any further in that case. *See McMillan v. McMillan*, 267 N.C. App. 537 (determining court entered order expressly terminating its jurisdiction in the juvenile proceeding pursuant to G.S. 7B-201(a) such that the court had jurisdiction to enter an order in the separately initiated G.S. Chapter 50 custody action).

2. Waive permanency planning hearings. A court in an abuse, neglect, or dependency action may retain jurisdiction while waiving required review or permanency planning hearings. G.S. 7B-906.1(d2), (k), (n). In contrast to an order that terminates the court's jurisdiction, when review or permanency planning hearings are waived, a party has the right to file a motion in the cause seeking (1) that an order be modified or enforced; (2) a show cause order; or (3) termination of the parental rights (TPR) of a parent over whom the court has personal jurisdiction. G.S. 7B-906.1(k1), (n); 7B-905.1(d) (authorizing motion for review of a visitation plan); 7B-1000(a) (authorizing motion to modify a dispositional order); 7B-904(e) (authorizing motion to show cause); 7B-1102 (authorizing TPR motion). When jurisdiction is retained, the court has the authority to act on the motion. For further discussion about the timing and waiver of required review and permanency planning hearings, see Chapter 7.2.A.

However, when custody is ordered to a parent and the four criteria of G.S. 7B-401(b), one of which involves a new report about the child, applies, the court does not have authority to act on a motion that is filed by DSS in the existing case. Instead, DSS must file a verified petition in the existing case setting out any new allegations resulting from the new report and assessment. The court must then conduct a new adjudicatory hearing before proceeding to a dispositional hearing where custody may be modified. *In re T.P.*, 254 N.C. App. 286 (2017) (vacating modification of permanency planning order resulting from DSS motion for review when G.S. 7B-401(b) was triggered; holding that motion was not the proper pleading and trial court did not have subject matter jurisdiction to hear the motion; G.S. 7B-401(b) requires new petition and subsequent adjudicatory hearing). See Chapters 6 (discussing adjudicatory hearings and adjudication) and 7.2.A.4 (discussing when G.S. 7B-401(b) applies).

3. Caution about "closing a case". A court should avoid using the term "closed" because it does not provide clarity about the jurisdictional status of a case. "Closed" is not a statutory term and is subject to varying interpretations about whether the court has terminated its jurisdiction or is retaining jurisdiction while waiving permanency planning hearings.

The court of appeals has said, "[c]losing a case file is not the equivalent of the trial court terminating its jurisdiction." *In re S.T.P.*, 202 N.C. App. 468 (2010) (holding that trial court had jurisdiction to consider DSS's motion to reassume custody years after court entered order that "vested" custody with grandparents and ordered "Case closed"); *see In re K.B.*, ___ N.C. App. ___, ___, 891 S.E.2d 479, 484 (2023) (permanency planning order awarding guardianship to relative and visitation to mother that stated "[t]he matter is closed and [DSS] and its counsel are released and relieved of further responsibilities regarding this matter" does not preclude mother from filing motions in the action). The court of appeals has also said an order that relieves DSS of further responsibility in a case does not terminate the

court's jurisdiction. *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011); *see In re C.M.B.*, 266 N.C. App. 448 (2019) (in case that was initiated in 2009, court retained jurisdiction in the juvenile proceeding and heard parties' motions filed in 2018; DSS had been relieved in 2011 and did not participate in motions hearings). Earlier cases seem to say the opposite. *See In re D.D.J.*, 177 N.C. App. 441, 444 (2006) ("DSS [did not] include in its brief any citation of statutory or case law authority that would allow the court to act after it had closed the case;" the child's guardian ad litem (GAL) and DSS were released); *In re P.L.P.*, 173 N.C. App. 1 (2005) (concluding that trial court's jurisdiction in earlier action was terminated by trial court's order to "close" case; court also released DSS, child's GAL, and attorneys for respondents), *aff'd per curiam*, 360 N.C. 360 (2006).

When the jurisdictional status of the case is not obvious from the language of the court order, the appellate courts have examined the substance of the order to determine whether the trial court retained jurisdiction. As part of its analysis, the court of appeals has looked to whether the parents are back to their pre-petition legal status.

In *In re S.T.P.*, 202 N.C. App. 468, the court of appeals determined that the respondent parents were not returned to their pre-petition legal status since legal custody was awarded to the maternal grandparents. As a result, jurisdiction was not terminated even though the order said, "case closed." In *In re C.M.B.*, 266 N.C. App. 448, the court of appeals determined the district court did not terminate its jurisdiction in orders entered in 2011 or 2014 and that those orders did not return the respondent mother to her pre-petition status.

In contrast, in *Rodriguez*, 211 N.C. App. 267, the court of appeals held that despite the absence of a specific order terminating its jurisdiction, the contents of the juvenile order amounted to a termination of jurisdiction as contemplated by G.S. 7B-201(a). The order vacated prior custody orders entered in the action, placed the children back in the physical and legal custody of their mother from whose care they were initially removed, ended involvement of DSS and the GAL program, and included no provisions requiring ongoing supervision or court involvement. The order essentially returned the mother to her pre-petition legal status.

When deciding whether a court terminated its jurisdiction, the focus has been on the parents' legal status and not on whether the child has been returned to the parent from whose care the child was removed. A trial court is not affirmatively obligated to return the child to the removal parent's home before terminating its jurisdiction. *In re A.P.*, 179 N.C. App. 425 (2006) (jurisdiction was terminated when the court placed the child with the non-removal parent and "closed" its case; the parents were returned to their pre-petition legal status as either parent had the option to pursue a G.S. Chapter 50 custody proceeding), *rev'd per curiam for reasons stated in dissenting opinion*, 361 N.C. 344 (2007).

Reference to "closing" a case may be appropriate when referring to a DSS internal administrative action. DSS may "close" a case to document that its involvement in that abuse, neglect, or dependency case has ended. *See, e.g.*, *In re H.D.F.*, 197 N.C. App. 480 (2009) (noting that DSS completed a family assessment and "closed the case"); *In re H.T.*, 180 N.C. App. 611 (2006) (stating that respondents complied with their treatment plan and

"their case was closed"). When a court has retained jurisdiction in an abuse, neglect, or dependency action and relieved DSS of further responsibility, an internal DSS administrative action that indicates the case is "closed" does not affect a district court's jurisdiction. *See Rodriguez*, 211 N.C. App. 267. Even if DSS administratively closes its case, it remains a party in the court action until the court's jurisdiction is terminated. G.S. 7B-401.1(a). If a motion is filed in court, DSS should reactivate its case. If DSS does not reactivate its case, the court may order it to do so. *See* G.S. 7B-905.1(d) (visitation); 7B-600(b1)(1) (motion to review guardianship appointment).

Practice Note: To prevent a misinterpretation of the court's intentions, a court order should state explicitly that the court

- retains jurisdiction over the proceeding even though further hearings are waived (the court may also want to state in the order that any party may file a motion) or
- terminates jurisdiction over the proceeding.

3.2 Subject Matter Jurisdiction

A. Introduction

Judicial jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re A.P.*, 371 N.C. 14, 17 (2018) (quoting *In re T.R.P.*, 360 N.C. 588, 590 (2006)). To decide a case, the court must have "[j]urisdiction over the nature of the case and the type of relief sought[;]" otherwise, "the proceedings of a court without jurisdiction of the subject matter are a nullity." *In re T.R.P.*, 360 N.C. 588, 590 (citations omitted).

The district court has exclusive original jurisdiction over any case involving a juvenile alleged to be abused, neglected, or dependent. G.S. 7B-200(a). The district court also has exclusive original jurisdiction over termination of parental rights cases. G.S. 7B-200(a)(4); 7B-1101. Subject matter jurisdiction starts when a properly signed and verified petition is filed with the district court, and the jurisdiction continues "through all the subsequent stages of the action." *In re T.R.P.*, 360 N.C. at 593 (*quoted in In re K.S.D-F.*, 375 N.C. 626, 633 (2020)). Subject matter jurisdiction cannot be conferred by consent, waiver, stipulation, estoppel, or failure to object. *In re T.R.P.*, 360 N.C. 588. A lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal. *See In re L.T.*, 374 N.C. 567 (2020); *In re K.J.L.*, 363 N.C. 343 (2009); *In re T.R.P.*, 360 N.C. 588. A court may conclude that there is no subject matter jurisdiction even when a party challenging jurisdiction asserts an incorrect statutory basis for the lack of subject matter jurisdiction. *In re M.C.*, 244 N.C. App. 410 (2015).

In a particular case, the court may lack subject matter jurisdiction if steps necessary to invoke the court's jurisdiction have not been taken. *See In re E.B.*, 375 N.C. 310 (2020) (trial court lacked subject matter jurisdiction to hold permanency planning hearings after accepting a relinquishment for adoption; DSS never filed a petition alleging abuse, neglect, or dependency (although not discussed in the opinion, DSS did not file a petition for a post-

relinquishment review under G.S. 7B-909; see Chapter 10.2 for discussion of post-relinquishment judicial reviews)).

When a trial court acts, there is a presumption that it has properly exercised jurisdiction, and the party challenging a trial court's subject matter jurisdiction has the burden of showing the trial court lacked subject matter jurisdiction. *In re Z.G.J.*, 378 N.C. 500 (2021) (holding mother did not meet her burden of showing petitioner did not have standing to file TPR petition); *In re M.R.J.*, 378 N.C. 648 (2021), *In re L.T.*, 374 N.C. 567 (2020), and *In re S.E.*, 373 N.C. 360 (2020) (all holding that the respondent-appellant parent did not meet their burden of showing that the trial court lacked subject matter jurisdiction under the UCCJEA); *In re M.A.C.*, ___ N.C. App. ___, 893 S.E.2d 556 (2023) (holding mother did not meet her burden of showing that the trial court lacked subject matter jurisdiction under G.S. 7B-1101 based on children's location at time of filing TPR petition).

Any order entered by a court that lacked subject matter jurisdiction is void. *In re A.L.L.*, 376 N.C. 99 (2020); *see In re E.B.*, 375 N.C. 310 (concluding permanency planning orders lacked the force of law when entered without a petition ever having been filed in district court); *In re T.R.P.*, 360 N.C. 588 (concluding that because trial court lacked subject matter jurisdiction, review hearing order was void ab initio). *See also* N.C. R. CIV. P. 12(h)(3) (dismissal of action). The appropriate action for the appellate court is to vacate any order that has been entered by the trial court without the authority to do so. *In re N.P.*, 376 N.C. 729, 731–32 (2021) (quoting *State v. Felmet*, 302 N.C. 173 (1981)). Further, "[a] trial court cannot determine a party's rights based on facts established in or arising from a legally void judicial proceeding." *In re E.B.*, 375 N.C. at 317 (reversing TPR; facts supporting the three grounds to TPR were inextricably intertwined with permanency planning orders the trial court had no subject matter jurisdiction to enter).

B. Key Issues in Determining Subject Matter Jurisdiction

1. Proper petitioner. Standing involves a statutory right to bring an action. *In re Baby Boy Scearce*, 81 N.C. App. 531 (1986). The Juvenile Code establishes who may initiate an abuse, neglect, dependency, or termination of parental rights (TPR) action. Standing is a jurisdictional issue and, consequently, it "is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re S.E.P.*, 184 N.C. App. 481, 487 (2007) (citations omitted); *see In re A.A.*, 381 N.C. 325, 332 (2022) ("[o]ne issue that could implicate subject matter jurisdiction is the standing of a party to initiate a particular action") (citation omitted); *In re A.S.M.R.*, 375 N.C. 539, 542 (2020) ("[S]tanding is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' ") (citations omitted). The court does not have subject matter jurisdiction over the action if the petition (or TPR motion) is filed by someone who does not have standing.

(a) Abuse, neglect, dependency. An abuse, neglect, or dependency action may only be initiated by a county department. A DSS director, or the director's authorized representative, is the only party authorized to file a petition alleging a juvenile's abuse, neglect, or dependency. G.S. 7B-401.1(a); *In re Van Kooten*, 126 N.C. App. 764 (1997); *see In re M.R.J.*, 378 N.C. 648 (2021).

In *In re A.P.*, 371 N.C. 14 (2018), the North Carolina Supreme Court examined the issue of standing related to which county DSS had authority under the Juvenile Code to file an abuse, neglect, or dependency petition by looking to the definition of "director." As defined by G.S. 7B-101(10), a "director" is "the director of the county department of social services *in the county in which the juvenile resides or is found* . . . ." (emphasis added). The supreme court reversed the court of appeals decision holding that standing, and therefore subject matter jurisdiction, requires that the child be a legal resident of or found in the county of the DSS that files the petition at the time the petition is filed. The supreme court employed whole-text canon to interpret the relevant statutes and held that standing was not limited to only DSS directors in the county where the juvenile who was the subject of the action resides or is found. The supreme court reasoned that a limiting interpretation is both contrary to the purpose of the Juvenile Code and "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star." *In re A.P.*, 371 N.C. at 21 (2018) (citation omitted).

In *In re M.R.J.*, 378 N.C. 648, the supreme court applied the holding of *In re A.P.*, 371 N.C. 14, in an appeal of a TPR. The mother raised lack of subject matter jurisdiction by arguing that DSS did not have custody and, therefore, standing to file the TPR because the trial court did not have subject matter jurisdiction in the underlying neglect action such that any orders awarding custody to DSS were void. In the underlying neglect case, the child had been placed in a temporary parental safety placement in South Carolina before the neglect petition had been filed. The supreme court again stated that the language of "a county director" (versus "the county director") does not limit a DSS director to a county where the juvenile resides or is found. The supreme court further explained that the statute addressing residency for social services purposes, G.S. 153A-257(a), also does not limit the trial court's subject matter jurisdiction. The supreme court looked to the venue statute, G.S. 7B-400, which refers to G.S. 153A-257 and states the juvenile's absence from their home due to a protection plan during the DSS assessment does not change the original venue when it is necessary to subsequently file a petition.

In an unpublished opinion, *In re T.C.M.*, 865 S.E.2d 375 (2021), the court of appeals applied the holding of *In re A.P.*, 371 N.C. 14, to address a challenge to standing due to a conflict of interest with the DSS. The conflict of interest was created when the same DSS had a dependent juvenile in its custody and initiated a dependency action for that juvenile's infant. *See* 10A N.C.A.C. 70A.0103(a)(6). Assuming the conflict of interest existed and required the DSS to refer the infant's case to another county DSS, the court of appeals held that the conflict of interest rule does not affect standing since the Juvenile Code allows for any county director to file a juvenile petition. See Chapter 5.1.B.1. (discussing conflicts of interest).

Resources:

For a more detailed discussion of the appellate opinions addressing standing, see

- Sara DePasquale, *In re A.P.: A County Director's Standing to File an A/N/D Petition Is Not as Limited as Previously Held by the Court of Appeals*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 14, 2018).

- Sara DePasquale, *Which County DSS Files the A/N/D Petition: That Is the Jurisdictional Question!*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG Sept. 15, 2017).

Before DSS may file a petition, it must follow the procedures of G.S. 7B-302(a), (c) and (d). Those procedures require that DSS receives a report of abuse, neglect, or dependency; conducts an assessment that indicates the juvenile is abused, neglected, or dependent; and determines that a petition alleging abuse, neglect, and/or dependency must be filed with the district court. *In re S.D.A.*, 170 N.C. App. 354 (2005) (holding that the trial court lacked subject matter jurisdiction when the county DSS did not follow the proper procedures under G.S. 7B-302 to invoke the court's jurisdiction; the county DSS received a report of abuse and neglect and referred the report to a second county DSS for an investigation; after the second county DSS determined there was no abuse, neglect, or dependency, the first county DSS, without conducting its own investigation, filed a petition); *see also* G.S. 7B-403(a).

(b) Termination of parental rights. Persons who have standing to file a termination of parental rights (TPR) petition or motion include

- either parent seeking termination of the other parent's rights, except when the petitioning parent is convicted of
  - first- or second-degree forcible rape occurring on or after December 1, 2004 (G.S. 14-27.21 or 14-27.22; prior to December 1, 2015, G.S. 14-27.2 and 14-27.3),
  - statutory rape of a child by an adult occurring on or after December 1, 2008 (G.S. 14-27.23; prior to December 1, 2015, G.S. 14-27.2A), or
  - first-degree statutory rape occurring on or after December 1, 2015 (G.S. 14-27.24 or after December 1, 2004, under prior language of former G.S. 14-27.2(a)(1)),

  if the rape resulted in the conception of the child who is the subject of the TPR proceeding;
- any judicially-appointed guardian of the person of the child;
- any DSS or licensed child-placing agency to which
  - a court has given custody of the child or
  - a child has been surrendered for adoption pursuant to G.S. Chapter 48 by the parent or guardian of the person of the child appointed by the clerk of superior court under G.S. 35A-1241 (or in another jurisdiction in which the law authorizes the guardian to consent to the adoption) (*see* G.S. 48-1-101(8) (definition of "guardian");
- any person with whom the child has lived for a continuous period of eighteen months or more immediately preceding the filing of the petition or motion (note that prior to October 1, 2021, the time period was two years or more; *see* S.L. 2021-132, sec. 1.(*l*));
- any guardian ad litem appointed to represent the child pursuant to G.S. 7B-601 who has not been relieved of their duties; or
- any person who has filed a petition to adopt the child. (Note that petitions for adoption and TPR may be filed concurrently. G.S. 48-2-302(c).)

G.S. 7B-1103(a), (c).

For further discussion about standing to initiate a TPR proceeding, see Chapter 9.3.B.

2. Proper initiation of proceedings. Abuse, neglect, or dependency actions are initiated by the filing of a petition. G.S. 7B-405. A termination of parental rights (TPR) proceeding may be initiated either by petition or if there is a pending abuse, neglect, or dependency action, by motion filed in the pending action. *See, e.g.*, G.S. 7B-1101; *In re C.N.R.*, 379 N.C. 409 (2021).

The court does not have subject matter jurisdiction in the absence of a valid initiating pleading. *In re T.R.P.*, 360 N.C. 588 (2006); *In re McKinney*, 158 N.C. App. 441 (2003). *See, e.g.*, *In re E.B.*, 375 N.C. 310 (2020) (disregarding six permanency planning orders that were entered by the trial court and relied upon in a TPR proceeding; trial court lacked subject matter jurisdiction to enter such orders when DSS never filed a proper petition alleging abuse, neglect, or dependency but instead had custody via a relinquishment); *In re S.D.W.*, 187 N.C. App. 416 (2007) (holding that a parent could not initiate a termination action by filing a counterclaim for termination in the other parent's civil action for visitation).

Without specific factual allegations to put the respondent on notice as to each alleged ground for adjudication – abuse, neglect, or dependency – the court lacks jurisdiction to adjudicate a ground that was not alleged. *See In re K.L.*, 272 N.C. App. 30 (2020); *see also In re L.E.W.*, 375 N.C. 124, 126 n.2 (2020) (noting the trial court lacked authority to adjudicate the juvenile dependent when dependency was not alleged in the neglect petition); *In re B.W.*, 274 N.C. App. 280 (2020) (vacating adjudication of abused juvenile; petition only alleged neglected juvenile).

3. Verified petition or motion. A petition alleging a juvenile's abuse, neglect, or dependency or a petition or motion to terminate parental rights (TPR) that is not properly verified is fatally defective. *In re T.R.P.*, 360 N.C. 588 (2006); *In re O.E.M.*, 379 N.C. 27 (2021) (interpreting and applying *In re T.R.P.* to a TPR motion).

In abuse, neglect, or dependency cases, the petition must be verified. G.S. 7B-403(a). The North Carolina Supreme Court interpreted the language of G.S. 7B-403 and determined the verification requirement was jurisdictional and not merely a procedural requirement. *In re T.R.P.*, 360 N.C. 588 (holding that the failure to verify the petition deprived the trial court of subject matter jurisdiction).

In TPR cases, the action may be commenced by either a TPR petition or if there is an underlying abuse, neglect, or dependency action, by a motion in that underlying action. *See* G.S. 7B-1102 through -1104; *In re C.N.R.*, 379 N.C. 409 (2021). Under G.S. 7B-1104, the petition or motion must be verified. The supreme court held that the verification requirement of G.S. 7B-1104 is also jurisdictional, and not merely a procedural requirement, for both a petition or a motion in the underlying action. *In re O.E.M.*, 379 N.C. 27 (holding that the failure to verify the TPR motion deprived the trial court of subject matter jurisdiction as there was no legally significant difference between a petition or motion).

(a) "Verified" defined. G.S. 7B-403(a) states that a petition alleging abuse, neglect, or dependency must be "verified before an official authorized to administer oaths," and G.S. 7B-1104 says that the petition or motion to terminate parental rights "shall be verified by the petitioner or movant." The Juvenile Code does not define "verification". The appellate courts have looked to Rule 11 of the Rules of Civil Procedure for the definition of verification and have applied Rule 11 to determine whether a verification is sufficient. *See In re C.N.R*, 379 N.C. 409; *In re N.T.*, 368 N.C. 705 (2016); *In re N.X.A.*, 254 N.C. App. 670 (2017); *In re Triscari Children*, 109 N.C. App. 285 (1993).

Rule 11(b) states that a pleading may be verified by affidavit of a party. The verification by a party must state "in substance" that the contents of the pleading are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters the party believes them to be true. N.C. R. CIV. P. 11(b); *see In re C.N.R.*, 379 N.C. 409.

Rule 11(d) addresses verification when the State or any officer acting in its behalf is a party and allows a pleading to be verified by any person acquainted with the facts. N.C. R. CIV. P. 11(d). When filing a petition alleging abuse, neglect, or dependency, a county DSS is acting as an agent of the State Department of Health and Human Services, and Rule 11(d) applies. *In re N.X.A.*, 254 N.C. App. 670.

Combining the language of the Juvenile Code with the language of Rule 11, proper verification by a party in a juvenile action requires a confirmation of truthfulness

- as to the contents of the petition or motion,
- by an appropriate person with the appropriate signature, and
- sworn to or affirmed before an official who is authorized to administer oaths.

(b) Proper verification. In an abuse, neglect, or dependency action, the court is required to hold a pre-adjudication hearing and consider "[w]hether the petition has been properly verified and invokes jurisdiction." G.S. 7B-800.1(5a).

Director and authorized representative. G.S. 7B-403(a) requires that a petition alleging abuse, neglect, or dependency "be drawn by the director [and] verified before an official authorized to administer oaths." "Drawn" is not defined in the Juvenile Code, but the court of appeals seems to use the term synonymously with "signed by." *In re D.D.F.*, 187 N.C. App. 388, 395 (2007). In addition, the Juvenile Code states that "the director shall sign a petition" alleging abuse, neglect, or dependency to invoke the jurisdiction of the court. G.S. 7B-302(c), (d). *See* G.S. 7B-403(a). "Director" is defined by the Juvenile Code as "[t]he director of the county department of social services . . . or the director's representative as authorized in G.S. 108A-14," which is a social services statute. G.S. 7B-101(10). Social services law permits a county DSS director to "delegate to one or more members of his staff the authority to act as his representative." G.S. 108A-14(b). One statutory responsibility a director has is to assess reports of suspected child abuse and neglect and take appropriate protective action under Article 3 of G.S. Chapter 7B, which includes filing an abuse, neglect, or dependency petition. G.S. 108A-14(a)(11); *In re*

D.D.F., 187 N.C. App. 388. Based on the statutory duties assigned to the director and executed by caseworkers, the DSS caseworker assigned to the child's case is an authorized representative of the director. *In re D.D.F.*, 187 N.C. App. 388; *In re Dj.L.*, 184 N.C App. 76 (2007).

In *In re Z.G.J.*, 378 N.C. 500 (2021), the supreme court heard a challenge to standing in a TPR action where the social worker signed and verified the TPR petition, but when identifying the petitioner, the social worker listed her name. The supreme court read the allegations in the TPR petition as a whole and held DSS, not the individual social worker, as respondent mother argued, was the petitioner. The allegations identified the social worker as working for the county DSS, listed the county DSS address, and identified DSS as having standing under G.S. 7B-1103(a)(3).

Appropriate signature. The statutory requirement that the petition be verified is a way to ensure that the courts are exercising jurisdiction in cases that impact families and constitutional rights "only when an identifiable government actor 'vouches' for the validity of the allegations." *In re T.R.P.*, 360 N.C. 588, 592 (2006). Verification by a party requires that the petitioner attest that the contents of the petition are true or believed to be true based upon the petitioner's knowledge. N.C. R. CIV. P. 11(b); *In re A.J.H-R.*, 184 N.C. App. 177 (2007). For a proper verification, the petitioner who is verifying the contents of the petition must sign their own name before the person authorized to verify the oath and not the name of another individual on whose behalf the action is being commenced. *In re A.J.H-R.*, 184 N.C. App. 177 (DSS caseworker who brought petition on behalf of the director and signed the director's name, followed by her own initials, in one place, and then signed her own first initial and last name in another place, made an insufficient verification; the director should have personally appeared and signed his own name before the person verifying the oath); *In re S.E.P.*, 184 N.C. App. 481 (2007) (insufficient verification when DSS caseworker brought petition on behalf of director and signed the director's name by her own name). For a proper verification by an authorized representative, the representative must sign their own name as the petitioner. *See In re D.D.F.*, 187 N.C. App. 388. Although it is best to indicate whether the person signing and verifying the petition is the DSS director or the director's authorized representative, the failure to identify one's role is not a jurisdictional defect. *In re D.D.F.*, 187 N.C. App. 388 (verification sufficient when the record showed the caseworker who signed the petition was assigned to the case; there was no indication she was not an authorized representative); *In re Dj.L.*, 184 N.C. App. 76 (finding no error where the petition was signed and verified by a DSS employee with actual knowledge of the case but did not indicate that the person signing was either the DSS director or an authorized representative; respondent did not assert that the person who signed the petition was not an authorized representative).

The verification of a petition alleging neglect and dependency that was based upon information and belief and was made by a DSS attorney was held to be proper under Rule 11(d). The county DSS was acting as an agent of the State Department of Health and Human Services, and the county DSS attorney was acting as a state official. The DSS attorney's verification showed that he was acquainted with the facts of the case as

required by Rule 11(d). *In re N.X.A.*, 254 N.C. App. 670 (2017) (holding that neither Rule 11(b) or (c), requiring personal knowledge of the facts of a case, apply to verification by a state officer; the requirement in Rule 11(d) that a DSS attorney, as an officer of the State, be acquainted with the facts was satisfied; noting that it can be assumed that one becomes acquainted with the facts by reviewing the case materials compiled by the various DSS agents and employees assigned to the case and pointing out that only a person who witnesses the abuse, such as an anonymous reporter, has personal knowledge of the facts).

It is not a jurisdictional defect when the director's or authorized representative's verification is executed before the petition is signed by the department's attorney. *In re M.M.*, 217 N.C. App. 396 (2011) (DSS social worker verified the petition on October 1 before it was signed by the DSS attorney on October 5 and filed with the court on October 7; nothing in the record established that the petition was not in existence when the social worker signed the verification).

A party who signs a proper verification is not required to also sign separately on a signature line if there is a separate signature line, although doing so is the better practice. *In re D.D.F.*, 187 N.C. App. 388.

Person authorized to administer oaths. The petition must be verified before a person "authorized to administer oaths." G.S. 7B-403(a). North Carolina law authorizes "any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate . . . to take affidavits for the verification of pleadings, in any court or county in the State . . . ." G.S. 1-148; *In re C.N.R.*, 379 N.C. 409; *In re N.T.*, 368 N.C. 705 (2016). *See also* G.S.7A-103(2) (clerk of superior court); 7A-291(1) (district court judge); 7A-292(1), (5) (magistrate); 10B-20(a) (notary).

The petition will include the signatures of

- the petitioner, who is confirming the truthfulness of the contents of the petition, and
- the person who is authorized to administer oaths and is performing the verification.

There is nothing in Rule 11 or G.S. 1-148 that requires the verified pleading be notarized. *In re C.N.R.*, 379 N.C. 409. Additionally, a notarization is not synonymous with verification. Verification requires an additional step: the appropriate confirmation of truthfulness. *See In re Triscari Children*, 109 N.C. App. 285 (1993).

It is not a jurisdictional defect if the signature of the person authorized to administer oaths is not accompanied by that person's title (or capacity) or full name. The North Carolina Supreme Court, in *In re N.T.*, 368 N.C. 705, rejected a challenge to the verification of a petition where the signature of the person before whom the petition was verified was illegible and no title was stated to explain their authority. The court held that the respondent father as challenger had the burden of showing that the petition's facially valid verification was not verified by a person authorized to administer oaths,

overcoming the presumption that a public official performing an official duty acts in accordance with the law and their authority. Here, the judicial official's signature, made in a conspicuous place designated for the signature of a person authorized to administer oaths, represented the official's authority to act and was presumed to be regular. The respondent failed to challenge the presumption of regularity by evidence or specific allegations to the contrary.

It is also not a jurisdictional defect if the date of the verification is missing. In *In re C.N.R.*, 379 N.C. 409, the supreme court determined the trial court had subject matter jurisdiction in a TPR proceeding when the date of the verification of the TPR motion was listed as ___ May, 2020. The supreme court noted that there is nothing in Rule 11 or G.S. 1-148 that requires the date the verification was made. The supreme court also recognized that the significant date is the date the TPR petition or motion is filed not the date the pleading is signed or verified. Neither Rule 11 nor G.S. 1-148 requires the verification occur at the same time as or after the pleading is signed.

When a notary performs the verification, appellate cases have looked to G.S. 10B-40(d), which addresses verification by a notary, to determine whether the verification was proper. *See In re C.N.R.*, 379 N.C. 409; *In re Dj.L.*, 184 N.C. App. 76. The supreme court has noted that nothing in G.S. 1-148 requires the affidavit for verification be certified by a notary public pursuant to the formal provisions of the Notary Public Act. *In re C.N.R.*, 379 N.C. 409; *see* G.S. 10B-1 through -146 (Notary Public Act and Electronic Notary Act). In *In re C.N.R.*, the supreme court addressed a challenge to subject matter jurisdiction in a TPR proceeding based on a lack of date of the verification of the TPR motion, which was verified by a notary public. The supreme court determined the notarial certificate was in substantial compliance with G.S. 10B-40(d) even though it was undated; the notary signed her name and included her seal and the date her commission expired. The supreme court also looked to G.S. 10B-99, which "contains a savings clause that accords a 'presumption of regularity' to notarized documents despite the existence of minor technical defects in the notarial certificate" as opposed to fraud or a deliberate violation of the Notary Public Act. *In re C.N.R.*, 379 N.C. at 418. The record contained no evidence of fraud or a deliberate violation of the Notary Public Act. *See* G.S. 10B-99 (presumption of regularity); *see also In re M.F.*, 828 S.E.2d 752 (N.C. Ct. App. 2019) (unpublished) (holding presumption of regularity accorded to notarial acts was not overcome when the notary's signature that was dated months before the TPR motion was signed and verified; this was a clerical error that did not deprive the court of subject matter jurisdiction).

4. Indian Child Welfare Act. If the abuse, neglect, dependency, or termination of parental rights (TPR) action involves an "Indian child" or if the court has reason to know the child is an "Indian child", the Indian Child Welfare Act (ICWA) applies. 25 C.F.R. 23.103; *see* 25 C.F.R. 23.107. The definition of "Indian child" requires that the child be 17 or younger, unmarried, and either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. 1903(4). ICWA applies to Indian tribes recognized by the U.S. Secretary of the Interior as eligible for services provided to Indians because of their status as Indians and covers Alaska native villages. 25

U.S.C. 1903(8); *In re A.D.L.*, 169 N.C. App. 701 (2005) (holding that ICWA does not apply to children who are registered members of the Lumbee Tribe, which is a state-recognized but not fully federally recognized tribe); *see In re A.L.*, 378 N.C. 396 (2021) (remanded for compliance with mandatory ICWA inquiry; juvenile was member of Lumbee tribe and TPR would be undisturbed if inquiry as to whether there was reason to know if the child was an Indian child showed juvenile was only eligible for membership with state recognized versus fully federally recognized tribe).

There are 574 recognized tribal entities; one is located in North Carolina: the Eastern Band of Cherokee Indians. *See* 88 Fed. Reg. 2112 (Jan. 12, 2023). However, a child who is the subject of a juvenile proceeding in North Carolina may be from an Indian tribe located outside of the state. *See In re Bluebird*, 105 N.C. App. 42 (1992) (child was an Indian child requiring compliance with ICWA based on the putative father being a registered member of the Cherokee Nation of Oklahoma and the child's eligibility for tribal membership); *see also In re N.D.M.*, 288 N.C. App. 554 (2023) (child was an Indian child based on mother's membership and child's eligibility for membership with the Monacan Tribe); *In re Adoption of K.L.J.*, 266 N.C. App. 289 (2019) (in adoption proceeding involving two children who are members of the Cheyenne River Sioux Tribe, ICWA applied).

If the Indian child resides or is domiciled on Indian land or is a ward of tribal court, the Indian tribe has exclusive jurisdiction over the child custody proceeding. 25 U.S.C. 1911(a); *see* 25 C.F.R. 23.110 (dismissal of action by state court); *see also* 25 C.F.R. 23.2 (defining "domicile"); *In re Adoption of K.L.J.*, 266 N.C. App. 289 (defining "ward of tribal court" and holding the Indian children were not wards of tribal court such that the North Carolina court had subject matter jurisdiction). However, the state court may exercise jurisdiction over that Indian child in an emergency proceeding where the emergency removal or emergency placement of the Indian child is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. 1922; 25 C.F.R. 23.113. The state court may also exercise jurisdiction over that Indian child when the tribe and state entered into an agreement authorizing the transfer of jurisdiction on a case-by-case basis or allowing for concurrent jurisdiction. 25 U.S.C. 1919. *See In re E.G.M.*, 230 N.C. App. 196 (2013) (acknowledging that an agreement pursuant to 25 U.S.C. 1919 between the State of North Carolina and the Eastern Band of Cherokee Indians would allow for state court jurisdiction but remanding for findings of a determination of subject matter jurisdiction after holding that (1) the agreement was not subject to judicial notice as a "legislative fact", (2) nothing in the trial court record referred to the agreement, and (3) the copy attached to the appellee's brief was not certified or authenticated and could not be validated (note that the agreement is no longer in effect)).

For Indian children who are not (1) residing or domiciled on Indian land or (2) wards of the tribal court, an abuse, neglect, dependency, or TPR action may be commenced in state court; however, the case is subject to transfer to a tribal court. 25 U.S.C. 1911(b); 25 C.F.R. 23.115–23.119. ICWA establishes minimum federal standards that apply to certain types of "child-custody proceedings", which include abuse, neglect, dependency, and TPR actions. *See* 25 U.S.C. 1902 and 1903(1). Failure to comply with certain provisions may result in delays in the proceedings and possibly the invalidation of the court order. 25 U.S.C. 1914; *see e.g., In re M.L.B.*, 377 N.C. 335 (2021) (reversing and remanding TPR; trial court did not ask

participants on the record whether they knew or had reason to know that the child was an Indian child and on remand must do so); *In re E.G.M.*, 230 N.C. App. 196 (vacating and remanding permanency planning order for further proceedings consistent with ICWA provisions).

For a discussion about ICWA and what is required in abuse, neglect, dependency, TPR, and adoption proceedings, see Chapter 13.2.

5. Uniform Child-Custody Jurisdiction and Enforcement Act. Abuse, neglect, dependency, and termination of parental rights proceedings are child-custody actions for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) codified in G.S. Chapter 50A. The court must have jurisdiction under the UCCJEA, which is discussed in section 3.3, below.

6. **Parental Kidnapping Prevention Act**. The Parental Kidnapping Prevention Act (PKPA) is a federal law found at 28 U.S.C. 1738A and applicable to abuse, neglect, dependency, and termination of parental rights proceedings in North Carolina. The court must have jurisdiction under the PKPA, which is discussed in section 3.3.I, below.

7. Residence/Location of child. For an abuse, neglect, or dependency action, the Juvenile Code does not explicitly set forth a jurisdictional requirement that is specific to a child's residence or location. However, the various requirements regarding the residence or location of a child related to DSS's authority to act imply that for subject matter jurisdiction to exist, the child must either reside or be found in North Carolina. *See* G.S. 7B-101(10); 7B-301; 7B-400; 7B-903(a)(6). *Cf.* G.S. 50A-202 (exclusive continuing jurisdiction under the UCCJEA). However, if a county DSS is assessing a report of abuse, neglect, or dependency and during the assessment there is a temporary parental safety agreement where the child is temporarily staying in a safety placement (i.e., with a relative) outside of North Carolina, the North Carolina district court has jurisdiction over the action when that county DSS determines a petition is necessary and files the petition with the court. *See In re M.R.J.*, 378 N.C. 648 (2021) (in a TPR appeal, referring to G.S. 7B-400 (venue), 7B-101(10) (definition of "director"), and 153A-257 (residency for social services purposes), court had subject matter jurisdiction in neglect action when county DSS filed petition for a juvenile who was living with a safety resource in South Carolina; discussion on venue identified mother resided in North Carolina and child was visiting in county at time petition was filed; court also had jurisdiction under the UCCJEA).

Separate from subject matter jurisdiction, there is a venue statute that relates directly to the child's location or residence: G.S. 7B-400. However, venue is not jurisdictional and may be waived. *In re M.R.J.*, 378 N.C. 648; *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218 (2016). For a discussion of a child's residence and venue, see section 3.5.B, below.

There is a "jurisdiction" statute that specifically makes the child's residence and/or location a jurisdictional requirement for a termination of parental rights (TPR) action. Pursuant to G.S. 7B-1101, the district court in the judicial district where the child (1) resides, (2) is found, or (3) is in the legal or actual custody of a county DSS or licensed child-placing agency at the

time the petition or motion is filed has exclusive original jurisdiction to determine the TPR action. "Found" has been interpreted to mean where the child is physically present. *In re J.L.K.*, 165 N.C. App. 311 (2004) (*quoted in In re M.A.C.*, ___ N.C. App. ___, 893 S.E.2d 556 (2023)); *In re Leonard*, 77 N.C. App. 439 (1985). The supreme court has stated, "Section 7B-1101 properly focuses the question of subject matter jurisdiction on the custody, location, or residence of the subject *child* in a termination of parental rights proceeding rather than on the residential state of the *parents*." *In re N.P.*, 376 N.C. 729, 735 (2021) (emphasis in original).

If none of the three statutory circumstances exist at the time the TPR petition is filed, the district court does not have subject matter jurisdiction to hear the TPR matter. *In re M.C.*, 244 N.C. App. 410 (2015). The appellate courts recognize an exception to this jurisdictional requirement when in a TPR proceeding there is an existing abuse, neglect, or dependency proceeding in North Carolina; the child resides outside of North Carolina; and North Carolina is exercising continuing exclusive jurisdiction in the abuse, neglect, or dependency action under the UCCJEA. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008). The court of appeals did not apply this exception when there was an underlying abuse, neglect, or dependency action in North Carolina and the child continued to reside in North Carolina. *See In re J.M.*, 797 S.E.2d 305 (N.C. Ct. App. 2016) (holding that there was a lack of subject matter jurisdiction under G.S. 7B-1101 when the guardians appointed in an abuse, neglect, and dependency proceeding in Durham County filed a petition to terminate parental rights in Durham County when, at the time the petition was filed, the child was not in the custody of the Durham County DSS, was not found in Durham County, and was residing with petitioners in Wake County).

Resource: For a further discussion on G.S. 7B-1101, see Sara DePasquale, *It's Complicated: Venue vs Jurisdiction in A/N/D and TPR Actions*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Feb. 22, 2017).

C. Issues That Do Not Affect Subject Matter Jurisdiction

1. Defects in or lack of summons. Lack of a proper summons or problems with issuance of a summons implicate personal jurisdiction, not subject matter jurisdiction. Failure to follow the required procedures with respect to issuance of the summons, defects or irregularities in the contents of the summons, problems with service of the summons, or expiration of the summons will not deprive a court of subject matter jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009) (holding that defects in a summons and failure to issue a summons do not deprive a court of subject matter jurisdiction and relate only to personal jurisdiction) (*cited in In re A.L.I.*, 380 N.C. 697 (2022)); *In re J.T.*, 363 N.C. 1 (2009) (preceding *In re K.J.L.* and holding that problems with the summons or service of the summons related to personal, not subject matter, jurisdiction — a holding that did not explicitly disconnect issuance of the summons from subject matter jurisdiction but abrogated a number of appellate decisions that had found a lack of subject matter jurisdiction due to problems with summonses) (*quoted in In re A.L.I.*, 380 N.C. at 700); *In re J.D.L.*, 199 N.C. App. 182 (2009) (holding that failure to serve a summons within the time allowed affects only personal jurisdiction and can be waived). *But see In re N.P.*, 376 N.C. 729, 736 (2021) (in challenge of termination of parental rights (TPR)

appeal based on subject matter jurisdiction, noting all three components of G.S. 7B-1101 were satisfied, one of which was "process was served on [respondent mother] pursuant to G.S. 7B-1106[;]" mother resided in Virginia); *In re P.D.*, 254 N.C. App. 852 (2017) (unpublished) (vacating TPR order against a nonresident parent; holding that G.S. 7B-1101 limits the court's authority to exercise jurisdiction in a TPR action involving a nonresident parent by requiring the court to find that (1) it has jurisdiction under the UCCJEA and (2) the nonresident parent was served with process pursuant to G.S. 7B-1106; determining that the statutory jurisdictional requirements regarding proper service of process on the nonresident parent were not satisfied).

Personal jurisdiction is discussed in section 3.4, below. The requirements for the content, issuance, and service of a summons in a juvenile proceeding are discussed in Chapter 4.3 and 4.4.

2. Failure to include certain information in petition. While the Juvenile Code sets out requirements for the contents of a petition alleging abuse, neglect, or dependency and for a petition or motion for termination of parental rights (TPR), failure to adhere exactly to the requirements concerning contents may not be a jurisdictional defect when the court can get the necessary information from the record or from the face of the petition and no prejudice is shown. *See* G.S. 7B-402; 7B-1104. Note that the requirements concerning contents should be distinguished from the jurisdictional requirement of verification, discussed in section 3.2.B.3, above.

(a) Child's address and "clerical information." Failure to list the child's address in a dependency petition, as required by G.S. 7B-402(a), did not deprive the court of subject matter jurisdiction because it was "routine clerical information" and the court could determine from information provided in the petition whether it had subject matter jurisdiction. *In re A.R.G.*, 361 N.C. 392 (2007).

(b) Language regarding circumvention of Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). Failure to include in a TPR petition or motion the statutorily required statement that the pleading was not filed to circumvent provisions of the UCCJEA does not deprive the trial court of subject matter jurisdiction absent a showing of prejudice. G.S. 7B-1104(7) (requiring statement); *In re J.D.S.*, 170 N.C. App. 244 (2005). *See also In re Humphrey*, 156 N.C. App. 533 (2003).

(c) Affidavit as to child's status. Information about the child's status, as required by the UCCJEA in G.S. 50A-209(a), must be set out in the petition or motion or in an attached affidavit. Failure to attach the affidavit to an abuse, neglect, dependency, or TPR petition (or motion) does not, by itself, deprive the court of subject matter jurisdiction where the court can get necessary information from the record or direct that the information be provided within a reasonable time and there is no prejudice. *In re A.R.G.*, 361 N.C. 392, 399 (2007) (emphasis in original) (nothing in the statute suggests that the information is jurisdictional; G.S. 50A-209(a) refers to "reasonably ascertainable" information, "requires *both* parties to submit the information[,]" and authorizes the court to stay the proceeding until the information is obtained). *See In re D.S.A.*, 181 N.C. App. 715 (2007) (neglect

petition); *In re J.D.S.*, 170 N.C. App. 244 (2005) (TPR petition).

(d) Custody order. Failure to attach a custody order, if one exists, to a TPR petition or motion as required by G.S. 7B-1104(5) does not deprive the court of subject matter jurisdiction where the court can get the necessary information concerning custody from the petition itself or from the record and no party is prejudiced by the omission. *See, e.g., In re T.M.H.*, 186 N.C. App. 451 (2007); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re B.D.*, 174 N.C. App. 234 (2005). However, failure to attach the custody order has been found to be reversible error when the court is unable to get the needed information concerning custody from the petition or record. *See In re T.B.*, 177 N.C. App. 790 (2006) (when DSS did not attach to the petition a copy of the order giving DSS custody and did not remedy the omission by amending the petition or including the order in the record, DSS failed to establish that it had standing and the trial court lacked subject matter jurisdiction); *In re Z.T.B.*, 170 N.C. App. 564 (2005) (holding that failure to include the custody order, the name and address of the appointed guardian, or a statement declaring that the petitioner had no knowledge of such information rendered the petition facially defective).

3. Statutory timelines. The time limits in the Juvenile Code are not jurisdictional. *In re Dj.L.*, 184 N.C. App. 76 (2007). This includes the timeline for initiating a termination of parental rights (TPR) proceeding. *In re B.M.*, 168 N.C. App. 350 (2005) (rejecting the argument that DSS's failure to initiate the TPR proceeding within sixty days after the permanent plan was changed to adoption was a jurisdictional defect; this case was decided under former G.S. 7B-907). See Chapter 4.5.D (explaining delays beyond statutory timelines and remedy of mandamus).

4. Different courts for abuse, neglect, dependency and TPR actions. The North Carolina Supreme Court has held subject matter jurisdiction is not limited to a single court when there is an underlying abuse, neglect, or dependency action and a termination of parental rights (TPR) action for the same juvenile. Subject matter jurisdiction in a TPR exists when the requirements of G.S. 7B-1101 are met. There is no requirement that a TPR petition be filed in the same district court as an underlying abuse, neglect, or dependency proceeding. When the requirements of G.S. 7B-1101 are met in one county, that county has jurisdiction even when an abuse, neglect, or dependency action is pending in another county. *In re A.L.L.*, 376 N.C. 99 (2020) (holding Davie County district court had subject matter jurisdiction in TPR proceeding when child resided there (one of the requirements under G.S. 7B-1101) despite the underlying dependency proceeding being heard in Davidson County); *In re M.J.M.*, 378 N.C. 477 (2021) (holding Robeson County district court had subject matter jurisdiction in TPR proceeding when child resided there despite underlying juvenile action pending in Wake County).

3.3 Uniform Child-Custody Jurisdiction and Enforcement Act and Parental Kidnapping Prevention Act[1]

A. Introduction

The Parental Kidnapping Prevention Act (PKPA), enacted in 1980, is a federal law that requires states to give full faith and credit to other states' child custody orders if the orders comply with the jurisdictional provisions of the federal law. Pub. L. No. 96-611, sec. 6−10. Congress found that the PKPA was necessary because of the increasing number of cases involving child custody and visitation disputes in different state courts that resulted in conflicting and inconsistent resolution of those disputes, which contributed to the seizure, restraint, concealment, and interstate transportation of children by parties involved in the disputes. Pub. L. No. 96-611, sec. 7(a)(1)–(3). The PKPA establishes national standards for state courts to determine which state has jurisdiction over a custody and visitation dispute and what effect should be given to another state's custody order. Pub. L. No. 96-611, sec. 7(b). The relevant federal statute is codified at 28 U.S.C. 1738A.

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) addresses the need for uniformity in child custody cases involving multiple states. The UCCJEA is not a federal law; it is a set of uniform statutes that have been adopted by every state but Massachusetts (note that in Massachusetts, the precursor to the UCCJEA, the UCCJA, is in effect). In North Carolina, the UCCJEA is codified at G.S. Chapter 50A.

The UCCJEA was created to harmonize the former UCCJA with the PKPA and the Violence Against Women Act (VAWA). Its purpose is to (1) avoid jurisdictional competition and conflict between different states' courts and the relitigation of custody decisions made by other states, (2) promote cooperation with the different states' courts, and (3) facilitate the enforcement of other states' custody orders. Official Comment to G.S. 50A-101; *see In re N.P.*, 376 N.C. 729, 732 (2021) (stating, the UCCJEA "is an overarching jurisdictional scheme intended to '[a]void jurisdictional competition and conflict with courts of other States in matters of child custody.' "). The UCCJEA establishes a state court's jurisdiction by addressing temporary emergency jurisdiction, jurisdiction to enter an initial child custody order, exclusive continuing jurisdiction, modification jurisdiction, and simultaneous proceedings. In addition, the UCCJEA addresses enforcement of child custody determinations.

The PKPA's full faith and credit provisions and the UCCJEA's jurisdictional requirements seek to ensure that a state is properly exercising subject matter jurisdiction in a child custody proceeding. Subject matter jurisdiction gives the court the authority to act and cannot be conferred by consent on a court that does not have jurisdiction. *In re N.P.*, 376 N.C. 729; Official Comment 2 to G.S. 50A-201. An initial question in every abuse, neglect, dependency, and termination of parental rights proceeding is whether the court can properly

[1] Some content for this section is based on *Child Custody*, CH. 4 *in* CHERYL D. HOWELL & JAN S. SIMMONS, NORTH CAROLINA TRIAL JUDGES' BENCH BOOK DISTRICT COURT: VOL. 1, FAMILY LAW (UNC School of Government, 2021).

exercise jurisdiction. Answering this question involves a two-pronged inquiry:

1. Does the court have jurisdiction under the Juvenile Code?
2. Does the court have jurisdiction under the UCCJEA?

In re J.H., 244 N.C. App. 255 (2015); *see In re N.P.*, 376 N.C. 729 (referring to both G.S. 7B-1101 and the UCCJEA).

The answer to both of these questions must be "yes." In addition, when there is an out-of-state custody order, the North Carolina court should look to the requirements of the PKPA to determine whether that order is entitled to full faith and credit for modification and enforcement purposes. When making a custody determination, the North Carolina court's compliance with the provisions of the PKPA will affect whether the order that court enters is recognized and enforceable in other states.

B. Applicability of the UCCJEA: G.S. Chapter 50A

1. Abuse, neglect, dependency, and termination of parental rights. The UCCJEA applies to any case in which the court is making determinations related to a child's custody (legal or physical) or visitation. The UCCJEA explicitly defines "child custody proceeding", which includes abuse, neglect, dependency, and termination of parental rights actions. G.S. 50A-102(4). As such, compliance with the UCCJEA is required in these juvenile proceedings. *In re N.P.*, 376 N.C. 729 (2021); *In re L.T.*, 374 N.C. 567 (2020); *In re S.E.* 373 N.C. 360 (2020).

2. Inapplicability. The UCCJEA does not apply to adoption, contractual emancipation, authorization of emergency medical care for a child, delinquency, or undisciplined proceedings. G.S. 50A-102(4); 50A-103.

Note, however, that in an adoption proceeding in North Carolina,

- the petition must include any information required by the UCCJEA that is known to the petitioner (G.S. 48-2-304(b)(4)) and
- the court may not exercise jurisdiction if, when the adoption petition is filed, a court in another state is exercising jurisdiction substantially in conformity with the UCCJEA; however, a North Carolina court may exercise jurisdiction when either (1) the other state's court dismisses its proceeding or releases its exclusive continuing jurisdiction before the adoption decree is granted or (2) the other state's proceeding places the child in the custody of an agency, the adoption petitioner, or another custodian that expressly supports an adoption plan when a specific prospective adoptive parent (who is not the adoption petitioner) is unidentified. G.S. 48-2-100(c).

3. Indian Child Welfare Act controls. Custody proceedings pertaining to Indian children are not subject to the UCCJEA to the extent they are governed by the Indian Child Welfare Act. G.S. 50A-104(a). State courts, however, must treat Indian tribes as if they were states for most purposes under the UCCJEA. G.S. 50A-104(b), (c). See Chapter 13.2 for a discussion of the Indian Child Welfare Act.

4. Foreign countries. Foreign countries are treated as states for most UCCJEA purposes. G.S. 50A-105(a). The UCCJEA is not applicable if the child custody law of a foreign country violates fundamental principles of human rights. G.S. 50A-105(c). For examples of a court dealing with child custody proceedings involving a foreign country, see *Hamdan v. Freitekh*, 271 N.C. App. 383 (2020) (initial custody order was entered by Shar'ia Court in Israel); *Tataragasi v. Tataragasi*, 124 N.C. App. 255 (1996) (holding that the trial court had emergency jurisdiction despite the father's pending custody action in Turkey).

C. Jurisdictional Basis for Making Custody Determination under the UCCJEA

Jurisdictional criteria under the UCCJEA differ depending on whether a court is making an initial custody determination, modifying an existing custody order, or dealing with a temporary emergency custody situation. One of the factors the court looks to when determining jurisdiction is the state where the child lives. Oftentimes, there is a reference to "a person acting as a parent." *See, e.g.*, 50A-201(a)(1); 50A-202. A "person acting as a parent" is defined at G.S. 50A-102(13) as (i) someone who has physical custody of the child or had physical custody of the child for six months within one year immediately preceding the commencement of a child custody action and (ii) has a court order of legal custody or claims a right to legal custody under the State's law. The factors a court considers when concluding whether a person is acting as a parent "are the 1) formality, 2) timing, and 3) plausibility of the person's claimed right to legal custody." *Sulier v. Veneskey*, 285 N.C. App. 644, 667 (2022) (citation omitted) (holding stepfather was not a person acting as a parent when he was not claiming a right to custody but instead executed a document for grandmother to remove child from North Carolina).

1. Initial child custody jurisdiction. When a court is making an initial child custody determination (meaning there is no court order that addresses custody of the child at issue), the court should look to G.S. 50A-201 to determine if it has jurisdiction. Listed in order of priority, starting with home state, G.S. 50A-201 establishes four different criteria for an initial child custody determination. *See* Official Comment 1 to G.S. 50A-201. Note that even without initial child custody jurisdiction, a court may exercise temporary emergency jurisdiction, discussed in subsection 3, below.

(a) Home state. A North Carolina court has jurisdiction if (1) North Carolina is the child's home state on the date of commencement of the proceeding or (2) North Carolina was the child's home state within six months before the commencement of the proceeding, the child is absent from North Carolina, and a parent or person acting as a parent continues to live in North Carolina. G.S. 50A-201(a)(1). Jurisdiction is determined at the time the proceeding is commenced, which is defined by the UCCJEA as "the filing of the first pleading in a proceeding." *See* G.S. 50A-102(5); *In re M.B.*, 288 N.C. App. 351 (2023); *Halili v. Ramnishta*, 273 N.C. App. 235 (2020). The court does not lose jurisdiction if, after the commencement of the action and before its resolution, the parties permanently leave the state; "[o]nce jurisdiction of the [trial] court attaches to a child custody matter, it exists for all time until the case is fully and completely determined." *Waly v. Alkamary*, 279 N.C. App. 73, 84 (2021) (quoting *In re Baby Boy Scearce*, 81 N.C. App. 531, 538–39 (1986)).

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. G.S. 50A-102(7). If a child is less than six months of age and has not lived in a single state with a parent or person acting as a parent, the child has no home state. *See In re M.R.J.*, 378 N.C. 648 (2021) (juvenile was born in North Carolina; prior to being six months old, he was placed with a safety resource in South Carolina; neglect petition was filed in North Carolina at time child had resided in South Carolina for 131 days). In examining home state jurisdiction, if the child is living with a person acting as a parent, e.g., a foster parent, in North Carolina for six months before the petition is filed, North Carolina is the home state. *In re N.P.*, 376 N.C. 729 (2021) (affirming TPR; North Carolina was home state when TPR petition filed; child lived in North Carolina her entire life, most of which was in foster care; parents resided out of state).

In *In re N.B.*, 240 N.C. App. 353 (2023), the court of appeals discussed the limited situation where North Carolina may become the child's home state after an abuse, neglect, or dependency petition has been filed in district court. If the court initially exercises temporary emergency jurisdiction when the petition is filed, North Carolina may acquire initial custody jurisdiction if (1) the child continues to reside in North Carolina such that North Carolina becomes the child's home state and (2) a child custody proceeding has not been commenced in another state. In that circumstance, the court's jurisdiction transitions from temporary emergency jurisdiction to initial custody jurisdiction based on North Carolina becoming the child's home state. *In re N.B.*, 240 N.C. App. 353 (holding district court properly exercised temporary emergency jurisdiction when entering nonsecure custody orders; North Carolina became child's home state after child resided in North Carolina for six months; district court had initial custody jurisdiction at time it entered an adjudication and disposition order.) For a discussion of temporary emergency jurisdiction, see subsection 3, below.

Resource: For more information, see Sara DePasquale, *UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (July 20, 2023).

A period of temporary absence from a state by a child or parent or person acting as a parent is counted in calculating the six-month statutory period. G.S. 50A-102(7). *See Ellison v. Ramos*, 130 N.C. App. 389 (1998); *Brewington v. Serrato*, 77 N.C. App. 726 (1985). The court of appeals has adopted a "totality of the circumstances" approach for determining whether an absence from a state is a mere temporary absence or a change of residence sufficient to change home state status.

- Looking to the parties' intent, the length of the absence, which was eleven days, and the factual circumstances of the case, the court of appeals determined the child's short absence was temporary. The facts involved the grandmother taking the child from her stepparent, who had been a person acting as a parent, to Michigan after the child's mother died. The grandmother attempted to hide the child and obtain guardianship of

the child in Michigan. North Carolina was the child's home state, as the child had resided here for at least six months before a custody action was filed by father in North Carolina and the guardianship action was filed by grandmother in Michigan. *Sulier v. Veneskey*, 285 N.C. App. 644 (2022).

- The initial visit in North Carolina, which the court found was a vacation, that the child and parents made prior to relocating to North Carolina from New York was a temporary absence from their residence in New York. Without counting that time, the findings show the child had not lived in North Carolina for six consecutive months prior to the commencement of the custody action. *Halili*, 273 N.C. App. 235.
- The almost six months that children spent in Japan prior to the commencement of the child custody action was ruled a temporary absence from North Carolina. *Hammond v. Hammond*, 209 N.C. App. 616 (2011).
- The six weeks that children spent in North Carolina was considered to be a temporary absence from Vermont. *Chick v. Chick*, 164 N.C. App. 444 (2004).
- Ten months spent by children in Georgia pursuant to a temporary custody order was considered to be a temporary absence from North Carolina. *Pheasant v. McKibben*, 100 N.C. App. 379 (1990).
- Military deployment is not necessarily a temporary absence; deployment is one of the circumstances considered by a court when determining whether the absence from a state is temporary. A court may look to the actions taken by a parent after the commencement of the custody proceeding when determining if a relocation was a temporary absence. *Gerhauser v. Van Bourgondien*, 238 N.C. App. 275 (2014).

(b) Significant connection and substantial evidence. A North Carolina court has jurisdiction if there is no home state or if the home state has declined to exercise jurisdiction and

- the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with North Carolina other than mere physical presence and
- substantial evidence is available in North Carolina concerning the child's care, protection, training, and personal relationships.

G.S. 50A-201(a)(2).

This type of jurisdiction "is normally referred to as 'significant connection' jurisdiction." *Gerhauser*, 238 N.C. App. 275, 295.

A child has no home state when they have moved to different states more frequently than every six months or have not lived with a parent or person acting as a parent. *See In re M.R.J.*, 378 N.C. 648 (holding that there was no home state when juvenile was born in North Carolina; prior to being six months old, he was placed with a safety resource in South Carolina; neglect petition was filed in North Carolina at time child had resided in South Carolina for 131 days); *In re T.N.G.*, 244 N.C. App. 398 (2015) (holding that there was no home state when the child had not lived in South Carolina with a parent or person acting as a parent for six months and had not been living in North Carolina for six months immediately preceding the filing of the neglect petition); *In re M.G.*, 187 N.C. App. 536

(2007) (holding that where children had lived in North Carolina less than six months, it could not be considered their home state), *rev'd in part on other grounds*, 363 N.C. 570 (2009).

The determination of whether jurisdiction exists is made by the court and cannot be consented to by the parties. In its determination, the court generally looks to the facts that exist at the time the action is commenced. *Gerhauser*, 238 N.C. App. 275. There must be both a significant connection to and substantial evidence in the state. *Holland v. Holland*, 56 N.C. App. 96 (1982).

"Substantial evidence" means "more than a scintilla" and includes available evidence from sources in the state that could address each of the aspects of the child's present or future interest, care, protection, training, and personal relationships. *Holland*, 56 N.C. App. at 100. A history of litigation involving custody of the child that was heard in the state is not by itself sufficient to establish that there is a significant connection with or substantial evidence available in that state. *Gerhauser*, 238 N.C. App. 275 (while original custody order was entered in 2003 by North Carolina court and subsequent motions and orders were filed in North Carolina through 2013, neither parents nor children lived in North Carolina since 2009; although there was no home state, North Carolina could not be said to have significant connection simply because past custody proceedings had taken place here). Other factors beyond litigation history must be considered. Examples of when there is a significant connection with and substantial evidence related to the child's care, protection, training, and personal relationships available in the state to establish jurisdiction include evidence showing the following:

- The infant was born in North Carolina and resided in North Carolina until a South Carolina safety resource placement was made before the infant was six months old and had only lived in South Carolina for 131 days at the time the neglect petition was filed. Mother and her older child resided in North Carolina; mother was on probation in North Carolina; mother filed a false police report regarding the infant in North Carolina; the infant tested positive for substances at birth in North Carolina; child protective involvement was in North Carolina; and two of mother's identified safety resources were in North Carolina. *In re M.R.J.*, 378 N.C. 648.
- The child, her parents, and her grandparents (who were acting as parents) resided in North Carolina from the time of the child's birth to the filing of the petition, with the exception of a ten-month period when the child and her father were in South Carolina. *In re T.N.G.*, 244 N.C. App. 398 (2015).
- The mother and children were living in, and the mother was also working in, North Carolina during the one-month period from when the family moved to North Carolina and the petition was filed, and the alleged conduct constituting neglect occurred in North Carolina. *In re T.R.*, 250 N.C. App. 386 (2016).

More than one state can have significant connection jurisdiction. *Gerhauser*, 238 N.C. App. 275 (the court of appeals determined that although North Carolina did not have significant connection jurisdiction, Utah and Florida did).

(c) Convenience and unjustifiable conduct. A North Carolina court has jurisdiction if all state courts that would have jurisdiction based on home state or significant connection have declined to exercise jurisdiction because a North Carolina court is the more appropriate forum under G.S. 50A-207 (convenience) or because G.S. 50A-208 applies (unjustifiable conduct by the person seeking jurisdiction). G.S. 50A-201(a)(3). Note that the provisions regarding inconvenient forum and declining jurisdiction to a more appropriate forum also apply to modification jurisdiction, discussed further in subsection 2, below.

Unjustifiable conduct. The UCCJEA has an exception to a court exercising jurisdiction – the court must decline jurisdiction when a party has engaged in unjustifiable conduct to invoke the court's subject matter jurisdiction. *See* G.S. 50A-208. The UCCJEA does not define "unjustifiable conduct", but the official comment to G.S. 50A-208 gives the example of one parent abducting a child and establishing a new home state prior to a custody decree. A parent who is a domestic violence victim fleeing for protection is excluded from the definition of "unjustifiable conduct" in the official comment.

The court of appeals examined G.S. 50A-208 in *Malone-Pass v. Schultz*, 280 N.C. App. 449 (2021) (a custody action involving modification jurisdiction). The mother argued before the permanent custody hearing that the trial court should decline jurisdiction as the father had committed fraud. The mother's argument was based on the father asserting to a prior court (in New York) that he and the children would remain in North Carolina until the children graduated high school, yet the father and the children moved to South Carolina after living in North Carolina for just over a year. The court of appeals determined that G.S. 50A-208 did not apply as the father had not committed fraud, which involves "a misrepresentation of a past or existing fact." *Malone-Pass*, 280 N.C. App. at 461. The father and the children did live in North Carolina for over a year such that the father did not misrepresent his actual residence, and "[t]he UCCJEA does not base jurisdiction on where a parent plans or intends to reside in the future, but on the actual residence." *Malone-Pass*, 280 N.C. App. at 461.

Three exceptions to a court declining to exercise jurisdiction because of a party's unjustifiable conduct are set forth in G.S. 50A-208(a). First, the parents or persons acting as parents have acquiesced to the court's jurisdiction. Second, a state court with initial or modification jurisdiction determines the other state court is a more convenient forum under G.S. 50A-207. Third, no state has jurisdiction under home state or modification jurisdiction. In *Malone-Pass*, 280 N.C. App. 449, although the court of appeals determined the father did not engage in unjustifiable conduct, it addressed two of the three exceptions. The first exception applied because both parties acquiesced to jurisdiction in North Carolina when the mother registered the New York custody order and filed motions in North Carolina, and the father countermotioned. The second exception applied because the order from New York, which was sought to be modified, explicitly stated it was relinquishing jurisdiction and that the parties were ordered to register the New York order in North Carolina, which was a determination that North Carolina was the more convenient forum.

See subsection 2, below, discussing modification jurisdiction.

Inconvenient forum. A court may decline to exercise jurisdiction at any time under G.S. 50A-207, which requires the state court to determine it is an inconvenient forum and another state is a more appropriate forum. It is the other state court, not the North Carolina court, that determines whether North Carolina is a more convenient forum and whether the other state will decline to exercise jurisdiction. Regarding initial custody jurisdiction in North Carolina, the North Carolina court cannot exercise jurisdiction under G.S. 50A-201(a)(3) unless a court with home state or significant connection jurisdiction declines jurisdiction. *Gerhauser*, 238 N.C. App. 275. In one opinion, the North Carolina Court of Appeals recognized that another "state could not decline to exercise jurisdiction if no one filed a custody proceeding in that state." *Gerhauser*, 238 N.C. App. at 285−86.

However, when a North Carolina court has home state or significant connection jurisdiction, it can decline to exercise that jurisdiction at any time after determining that North Carolina is an inconvenient forum and another state is a more appropriate forum. G.S. 50A-201(a)(3); 50A-207(a); *see Halili*, 273 N.C. App. 235 (affirming trial court's order dismissing case for lack of subject matter jurisdiction under the UCCJEA). The court must first "consider whether it is appropriate for a court of another state to exercise jurisdiction" before it determines North Carolina is an inconvenient forum. G.S. 50A-207(b); *Harter v. Eggleston*, 272 N.C. App. 579, 582. Because G.S. 50A-207(a) allows a court to decline to exercise jurisdiction at any time due to an inconvenient forum, the court is not limited to considering whether North Carolina is an inconvenient forum only at the time the complaint or petition is filed. *Halili*, 273 N.C. App. 235.

The issue of an inconvenient forum may be raised by a party or by the court in this state or in another state. G.S. 50A-207(a). When it is raised, there is a list of eight factors the court must consider in determining whether it is an inconvenient forum, but the list is not meant to be exclusive. G.S. 50A-207(b) and Official Comment. The court is required to consider only those factors that are relevant. G.S. 50A-207(b); *Velasquez v. Ralls*, 192 N.C. App. 505 (2008). Some of the factors contemplate post-filing circumstances; none of the factors require the court to consider the child's best interests. *Halili*, 273 N.C. App. 235.

Findings about the relevant factors are necessary when the court determines that the current forum is inconvenient. *See Valasquez*, 192 N.C. App. at 509 (the G.S. 50A-207(b) factors "are necessary when the current forum is inconvenient, not when the forum is convenient"); *Halili*, 273 N.C. App. 235 (affirming order declining jurisdiction; court considered relevant factors in G.S. 50A-207(b) and findings support the conclusion to decline jurisdiction because North Carolina was an inconvenient forum); *In re M.M.*, 230 N.C. App. 225 (2013) (reversing order declining jurisdiction and determining that Michigan was a more appropriate forum; North Carolina trial court failed to consider relevant factors in G.S. 50A-207(b), including the likelihood of the recurrence of domestic violence between the respondent parents, the nature and location of the evidence, the relative familiarity of the courts in each state with the case, and the relative financial circumstances of the respondent parents); *In re M.E.*, 181 N.C. App. 322 (2007) (affirming the trial court's determination that Ohio was the more convenient forum after

making relevant findings based on evidence that the child had been placed with the father in Ohio for three years, the family had been receiving counseling in Ohio during that time, and the child's therapist and school were in Ohio, among other factors).

In considering the factors, the court must allow the parties to submit information. G.S. 50A-207(b); *Harter*, 272 N.C. App. 579 (information was submitted by parties through verified motions and affidavit). There must be evidence to support the court's findings of fact regarding the G.S. 50A-207(b) factors. *Harter*, 272 N.C. App. 579 (competent evidence includes affidavits and verified motions when determining inconvenient forum); *In re C.M.B.*, 266 N.C. App. 448 (2019) (reversing order when trial court heard only arguments without any evidence to support findings that would support conclusion of inconvenient forum; motion was unverified, there was no sworn testimony, and neither party presented affidavits or documentary evidence). Although most of the factors require evidence, the court of appeals recognized that there are some factors that may be addressed by the court's record without evidence, such as the court's familiarity with the case. *In re C.M.B.*, 266 N.C. App. 448.

The trial court has discretion to determine that another state is a more appropriate forum and to decline to exercise jurisdiction at any time, even if an action has not been commenced in another state at the time the North Carolina court determines the other state is a more appropriate forum. G.S. 50A-207(a); *In re M.E.*, 181 N.C. App. 322, 327–28 (emphasis in original) (affirming trial court's order that determined Ohio was a more convenient forum and stayed the North Carolina proceeding for a specified period to allow the father to bring a custody action in Ohio; a North Carolina court hearing an abuse, neglect, or dependency proceeding has continuing jurisdiction until the child turns 18 (or the court terminates jurisdiction); the action is " 'pending' within the meaning of G.S. 50A-207" such that the court may decline to exercise jurisdiction "*at any time*" it determines it is an inconvenient forum). The standard of review of "a trial court's decision to decline to exercise jurisdiction in favor of another forum [is] an abuse of discretion." *Harter*, 272 N.C. App. at 581(citations omitted) and *Halili*, 273 N.C. App. at 246.

The court of appeals discussed a trial court's ability in an abuse, neglect, or dependency case to terminate its jurisdiction when making an analysis of inconvenient forum in *In re C.M.B.*, 266 N.C. App. 448. As a neglect action, *In re C.M.B.* was initiated in 2009. In 2011, a permanent plan was achieved that placed the child in the guardianship of relatives; relieved DSS, the child's guardian ad litem (GAL), and the parents' attorneys; and waived further hearings in the action. In 2014, the North Carolina court entered a consent order in the juvenile action that modified mother's visitation, continued to relieve DSS, and released the child's GAL and mother's attorney. The court never entered an order that terminated its jurisdiction in the juvenile proceeding under G.S. 7B-201(b) or 7B-911. In 2017, the guardians commenced an action in Tennessee where they had been living with the child since 2014. The Tennessee court determined it had jurisdiction as the mother was residing in Virginia. A Tennessee order that transferred jurisdiction to Tennessee and modified mother's visitation was entered. The Tennessee order that transferred jurisdiction to Tennessee had no effect on North Carolina's jurisdiction under the Juvenile Code as "[o]nly North Carolina can terminate its own juvenile jurisdiction." *In re C.M.B.*, 266

N.C. App. at 455. It is the North Carolina court that needs to determine whether it is an inconvenient forum and stay its proceeding (which does not terminate jurisdiction) or enter an order that clearly terminates its jurisdiction in the juvenile action. The other state court's determination that it will "transfer" jurisdiction of the North Carolina juvenile proceeding to that state has no effect on the North Carolina district court's jurisdiction in the juvenile proceeding.

A North Carolina court cannot determine that another state is a more convenient forum and dismiss its case or terminate its jurisdiction in deference to the other state's jurisdiction unless a custody action has been commenced in that other state. Where it is determined that another jurisdiction is a more convenient forum, the trial court must stay its proceedings on the condition that a proceeding be promptly commenced in the other designated state. G.S. 50A-207(c); *In re M.M.*, 230 N.C. App. 225 (reversing trial court order that purported to transfer jurisdiction to another state without properly establishing that North Carolina was an inconvenient forum and without staying the North Carolina case, effectively dismissing the case and leaving the child in legal limbo); *In re M.E.*, 181 N.C. App. 322 (affirming three-month stay of proceedings for father to commence custody action in Ohio, which North Carolina court determined was the more appropriate forum). The court is also authorized to impose any other condition it considers just and proper, such as a temporary custody order. G.S. 50A-207(c) and Official Comment.

Resource: Cheryl Howell, *Child Custody: We Can't "Change Venue" to Another State*, UNC SCH. OF GOV'T BLOG: ON THE CIVIL SIDE (Oct. 28, 2016).

(d) No other court would have jurisdiction. A North Carolina court has jurisdiction if no court of any other state would have jurisdiction under any of the criteria in G.S. 50A-201(a)(1), (2), and (3), discussed above. G.S. 50A-201(a)(4); *see Sulier*, 285 N.C. App. 644 (holding North Carolina had jurisdiction by necessity when jurisdiction did not exist in any state under G.S. 50A-201(a)(1), (2), and (3); North Carolina was child's home state although no parent or person acting as a parent resided in North Carolina, there is substantial evidence in North Carolina, and the only other possible state with jurisdiction decided North Carolina was the more appropriate forum).

To determine that no other state would have jurisdiction, the North Carolina court would have to apply the criteria discussed above to any potential state that could have jurisdiction and did not decline jurisdiction. If the North Carolina court finds that another state would have jurisdiction, North Carolina does not have jurisdiction. *Gerhauser*238 N.C. App. 275. If the North Carolina court determines that more than one state would have significant connection jurisdiction, it is not required to identify which of those states has the most significant connection. *Gerhauser*, 238 N.C. App. 275.

2. Modification jurisdiction: exclusive continuing jurisdiction and convenient forum. A North Carolina court may modify a child custody determination made by a court of another state only if two requirements are met. *See Malone-Pass v. Schultz*, 280 N.C. App. 449 (2021). First, North Carolina must have jurisdiction to make an initial custody determination under G.S. 50A-201(a)(1) (home state criteria) or G.S. 50A-201(a)(2) (significant connection

jurisdiction). Second,

- the court of the other state must determine that it no longer has exclusive continuing jurisdiction or that North Carolina would be a more convenient forum or
- either the court of the other state or a North Carolina court must determine that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

G.S. 50A-203; *In re L.T.*, 374 N.C. 567 (2020); *Malone-Pass*, 280 N.C. App. 449. Note, there is an exception for temporary emergency jurisdiction, which is discussed in subsection 3, below.

The first requirement that North Carolina have jurisdiction to make an initial custody determination under home state or significant connection jurisdiction has been addressed by the North Carolina Supreme Court in *In re L.T.*, 374 N.C. 567. The opinion addresses whether North Carolina was the child's home state when a neglect and dependency petition was filed by DSS. Prior to the adjudicatory hearing, the trial court was notified that there was a child custody order from another state and that there were concerns that the child had not lived in North Carolina for six months prior to the commencement of the action. The trial court continued the adjudicatory hearing so an investigation into whether North Carolina had modification jurisdiction could be completed. The order of continuance included a finding that the child had not resided in North Carolina for the previous six months. Later, at the adjudicatory hearing, the father testified that he and the child had been residing in North Carolina since September 2016. The neglect and dependency petition was filed in March 2017. One of the findings in the adjudication order was that the child had resided in North Carolina since September 2016. The supreme court reasoned that the record showed the child had resided in North Carolina for more than six months prior to the filing of the petition such that North Carolina was the child's home state. As a result, North Carolina had jurisdiction to modify the out-of-state custody order. In its opinion, the supreme court explained that the finding in the continuance order was based on preliminary information that had been provided to the court and was superseded by the father's testimony, which provided more accurate information, as the case progressed. The supreme court further noted that specific findings regarding jurisdiction under the UCCJEA are not required and looked to the record when conducting its appellate review.

The North Carolina Court of Appeals addressed modification jurisdiction under the first and second prongs in *Malone-Pass*, 280 N.C. App. 449. Under the first prong, the unchallenged findings of the trial court that the father and children resided in North Carolina for more than six months before the motions were filed in the custody proceeding gave North Carolina home state jurisdiction. Under the second prong, there was a permanent custody order entered in New York that ordered the parties to register the New York order in North Carolina within seven days. The father and children were residing in North Carolina, and the mother registered the New York order and filed a motion in North Carolina. After the father moved with the children to South Carolina, the mother filed a motion to dismiss, which was denied. The court of appeals concluded that the second prong was satisfied by the New York order that relinquished its jurisdiction and ordered the parties to register the New York order in North

Carolina. The court of appeals equated that with a determination by the New York court that North Carolina would be a more convenient forum.

The second requirement of G.S. 50A-203 was also addressed by the court of appeals in *In re D.A.Y.*, 266 N.C. App. 33 (2019). In that case, there was an initial custody order entered in California that awarded custody of the child to the father. After that order was entered, the father and child moved to and remained in North Carolina, and the mother relocated to Nevada. The father initiated a termination of parental rights (TPR) action in North Carolina, but at the time that the TPR petition was filed, the mother had returned to California and was served in California. Because the mother was presently residing in California at the time that the TPR action was commenced, neither state's court could find that she did not presently reside in the other state – California. As a result, subject matter jurisdiction to modify the California custody order required a determination by a California court that it no longer had exclusive continuing jurisdiction or that North Carolina was a more convenient forum. There was no such determination. There is an Official Comment to G.S. 50A-202 regarding exclusive continuing jurisdiction that states "exclusive continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns." This comment applies to whether the other state has exclusive continuing jurisdiction and does not apply to a determination of whether the parent presently resides in the other state. Absent a finding by the other state that it no longer has exclusive continuing jurisdiction, the Official Comment does not confer jurisdiction to North Carolina. In *In re D.A.Y.,* the TPR order was vacated and remanded for dismissal for lack of subject matter jurisdiction given that there was no finding by the California court regarding its lack of exclusive continuing jurisdiction.

Once a North Carolina court has made a child custody determination in compliance with G.S. 50A-201 (initial determination) or 50A-203 (modification), North Carolina has exclusive continuing jurisdiction until

- a North Carolina court determines that neither the child, the child's parents, nor any person acting as a parent has a significant connection with North Carolina and that substantial evidence is no longer available in North Carolina concerning the child's care, protection, training, and personal relationships or
- a North Carolina court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in North Carolina.

G.S. 50A-202(a).

North Carolina loses exclusive continuing jurisdiction when the child, the child's parents, and any person acting as a parent move out of the state. North Carolina does not regain exclusive continuing jurisdiction to modify its own order if the noncustodial parent moves back to North Carolina. Official Comment 2 to G.S. 50A-202. Instead, a North Carolina court may modify its own custody determination only if it has jurisdiction to make an initial custody determination under G.S. 50A-201. G.S. 50A-202(b) and Official Comment 2. *See also In re D.A.Y.*, 266 N.C. App. 33 (discussing the Official Comment and exclusive continuing jurisdiction).

Both the exclusive continuing jurisdiction and modification jurisdiction statutes refer to where the parties "presently reside." G.S. 50A-202(a)(2); 50A-203(2). "Presently resides" means where someone actually lives and does not refer to a technical domicile. Official Comment 2 to G.S. 50A-202; *In re B.L.H.*, 239 N.C. App. 52 (2015) (North Carolina assumed modification jurisdiction when neither parent nor child was presently residing in Virginia, which was the original decree state; mother and child were residing in North Carolina and father, although asserting that his domicile continued to be Virginia, was presently residing in federal prison in Texas). *See Gerhauser v. Van Bourgondien*, 238 N.C. App. 275 (2014) (although North Carolina had initial custody jurisdiction, it lost exclusive continuing jurisdiction to modify its orders when both parents and the children had not resided in North Carolina for several years and North Carolina did not have significant connection jurisdiction). The determinative period of whether a parent presently resides in the other state is at the time of the commencement of the custody action that seeks to modify another state's custody order. *See In re D.A.Y.*, 266 N.C. App. 33 (at the time the TPR action was commenced in North Carolina, mother was presently residing in California when she returned there after a two-year absence).

The modification and exclusive continuing jurisdiction statutes also address a state court's authority to decide whether exclusive continuing jurisdiction remains with the original decree state. *See* G.S. 50A-202; 50A-203. Either the original decree state or the state where the modification is being sought may determine the criteria that address whether the child, the child's parents, and a person acting as a parent do not presently reside in the original decree state. G.S. 50A-202(a)(2) and Official Comment 1; 50A-203(2) and Official Comment. But only the original decree state has the authority to decide (1) whether it lost exclusive continuing jurisdiction because there is no parent, person acting as a parent, or child with a significant connection to the state and substantial evidence regarding the child's care, protection, training, and personal relationship is no longer available there or (2) that the modification state would be a more convenient forum. G.S. 50A-203(1) and Official Comment. *See* G.S. 50A-202(a)(1) and Official Comment 1; *In re J.W.S.*, 194 N.C. App. 439 (2008); *see also In re D.A.Y.*, 266 N.C. App. 33. Inconvenient forum is also discussed in subsection 1, above.

Before North Carolina exercises modification jurisdiction to modify an order from another state when the child, a parent, or a person acting as a parent presently resides in that other state, there must be an order from the original decree state that says it no longer has jurisdiction. *See* Official Comment 1 to G.S. 50A-202. Without such an order, North Carolina does not have modification jurisdiction as demonstrated by the following cases.

- Where mother was presently residing in California after relocating out of state, North Carolina did not have subject matter jurisdiction to modify the California custody order without a finding by the California court that it no longer had exclusive continuing jurisdiction. *In re D.A.Y.*, 266 N.C. App. 33.
- In the case of *In re J.W.S.*, 194 N.C. App. 439, the trial court's order was reversed for lack of subject matter jurisdiction because, although the court had properly exercised temporary emergency jurisdiction, it had not made a proper determination that it had jurisdiction to modify another state's order. New York maintained exclusive continuing

jurisdiction as the mother was still residing there when the North Carolina action was commenced. The record did not show that the New York court had determined that it no longer had exclusive continuing jurisdiction. There was no court order from New York relinquishing jurisdiction; a letter from New York to DSS was not an order directed to the North Carolina trial court.

- Where a New Jersey court had entered multiple child custody orders, the North Carolina trial court did not have jurisdiction to terminate the parental rights of a father who still resided in New Jersey "without an order from the New Jersey court relieving itself of jurisdiction." *In re T.E.N.*, 252 N.C. App. 461, 466 (2017). Although North Carolina was the child's home state, satisfying one condition for modification jurisdiction, the New Jersey court had not determined that it no longer had exclusive continuing jurisdiction or that North Carolina would be a more convenient forum, the second condition for modification jurisdiction. Without the required order, the North Carolina district court had no basis to find that New Jersey had transferred jurisdiction of its proceeding to North Carolina.
- Where an initial custody order was entered in Arkansas, the North Carolina trial court did not have jurisdiction because there was no order from the Arkansas court stating that Arkansas no longer had jurisdiction, Arkansas had not determined that North Carolina would be a more convenient forum, and the children's father continued to reside in Arkansas. *In re N.R.M.*, 165 N.C. App. 294 (2004).
- For purposes of the UCCJEA, a TPR action is considered an action to modify any existing custody order. *See, e.g., In re K.U.-S.G.*, 208 N.C. App. 128 (2010). The *In re K.U.-S.G.* record reflected that the judge in North Carolina had contacted the court in Pennsylvania, which determined that it did not wish to retain jurisdiction. However, the North Carolina court did not have subject matter jurisdiction to hear the TPR action because the record in the North Carolina action did not have an order from the Pennsylvania court that determined Pennsylvania no longer had exclusive continuing jurisdiction or that it relinquished jurisdiction to North Carolina as a more convenient forum.
- Where an initial custody order was entered in Indiana, the North Carolina court erred in determining that the Indiana court had relinquished jurisdiction, and the North Carolina trial court's order terminating respondent's parental rights was vacated for lack of subject matter jurisdiction. *In re J.D.*, 234 N.C. App. 342 (2014). Where the respondent father continued to reside in Indiana, exclusive continuing jurisdiction remained with Indiana. The Indiana court's denial of the grandparents' motion to intervene in the Indiana custody proceeding was not a relinquishment of jurisdiction, and nothing in the record showed a determination by the Indiana court that it no longer had jurisdiction.

When the North Carolina court obtains an order from another state court that relinquishes its jurisdiction, the North Carolina court is not required to conduct a collateral review of that other state's facially valid order. *In re T.R.*, 250 N.C. App. 386 (2016) (the Illinois docket entry, which contained all of the substantive attributes of a court order and could serve as an order in Illinois, was a sufficient order under the UCCJEA to transfer jurisdiction to North Carolina); *In re N.B.*, 240 N.C. App. 353, 354 (2015) (a New York court order that stated it was "relinquishing jurisdiction to the State of North Carolina" was a sufficient relinquishment of jurisdiction despite respondent mother's argument that the New York order was insufficient

under New York law due to its lack of findings indicating the basis for relinquishment of jurisdiction).

3. Temporary emergency jurisdiction. A North Carolina court that does not have initial child custody or modification jurisdiction can exercise temporary emergency jurisdiction to make a child custody determination when two prongs are met:

- the child is present in North Carolina and
- the child has been abandoned or it is necessary to protect the child because the child or their sibling or parent is subjected to or threatened with mistreatment or abuse.

G.S. 50A-204(a). For purposes of the UCCJEA, abandonment is defined as "left without provision for reasonable and necessary care or supervision." G.S. 50A-102(1).

G.S. 50A-204 requires that certain circumstances exist before emergency jurisdiction can be exercised. The North Carolina Supreme Court opinions addressing the need for findings to establish the court's jurisdiction under the UCCJEA have held that the court is not required to make specific findings of fact as to the circumstances. *In re L.T.*, 374 N.C. 567 (2020); *In re A.S.M.R.*, 375 N.C. 539, 546 (2020) and *In re K.N.*, 378 N.C. 450, 456 (2021) (both quoting *In re L.T.*, 374 N.C. at 569). *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). Some court of appeals opinions have held that findings are required, but those opinions have been superseded by implication by the supreme court opinions holding otherwise. For a further discussion regarding findings, see section 3.3.D, below.

When exercising temporary emergency jurisdiction, the court has the authority to enter temporary orders that are meant to allow a court to protect a child in an emergency. Nonsecure custody orders are temporary orders. *See* G.S. 7B-506(a), (e); *In re O.S.*, 175 N.C. App. 745 (2006). The temporary order can protect the child until a state that has jurisdiction to make an initial custody determination or to modify an existing determination enters an order. *See In re Brode*, 151 N.C. App. 690 (2002) (discussing the temporary nature of an order entered pursuant to G.S. 50A-204). The temporary order must specify an adequate period of time for a person to obtain an order in the state with jurisdiction. G.S. 50A-204(c); *In re M.B.*, 288 N.C. App. 351 (2023) (appeal of permanency planning order; holding North Carolina over-extended its temporary emergency jurisdiction; North Carolina court should have communicated with the home state court to resolve the emergency or specify the length of the temporary order); *In re E.J.*, 225 N.C. App. 333 (2013) (holding that the trial court had temporary emergency jurisdiction to enter nonsecure and continued nonsecure custody orders but not an adjudication order). The North Carolina temporary order will be in effect until an order is obtained from the other state with jurisdiction within the specified period or the period expires. G.S. 50A-204(c). The North Carolina court does not have jurisdiction to enter an adjudication order while exercising temporary emergency jurisdiction. *In re J.H.*, 244 N.C. App. 255 (2015); *In re E.J.*, 225 N.C. App. 333; *In re J.W.S.*, 194 N.C. App. 439 (2008).

(a) An action in another state with jurisdiction. If there is an existing custody determination from another state or a custody proceeding has been filed (or is filed) in another state with jurisdiction, the North Carolina court must immediately contact that other state court to

address jurisdiction and how to resolve the emergency. G.S. 50A-204(d); 50A-110; *In re M.B.*, 288 N.C. App. 351. See section 3.3.E, below, discussing communication between the courts. The North Carolina court should defer further proceedings in its action until the other state's court determines whether it will exercise jurisdiction or that North Carolina is a more appropriate forum. *In re J.W.S.*, 194 N.C. App. 439 (appellate court reversed denial of motion to set aside adjudication order and remanded for trial court to contact New York court regarding jurisdiction; trial court had temporary emergency jurisdiction to enter nonsecure custody orders but did not have jurisdiction to enter adjudication order); *In re Brode*, 151 N.C. App. 690 (vacating adjudication order that did not defer adjudication on the merits pending notice from Texas court regarding whether it would exercise jurisdiction). *See* G.S. 50A-201. If the other state determines North Carolina is a convenient forum, upon receipt of an order from the other state, North Carolina then exercises modification jurisdiction, discussed in subsection 2, immediately above.

(b) No action in other state with jurisdiction and North Carolina becomes home state. A North Carolina court that is exercising temporary emergency jurisdiction may acquire initial child custody jurisdiction if (1) it becomes the child's home state, (2) there is not a previous child custody determination made in another state, and (3) a child custody proceeding is not commenced in another state court that has jurisdiction. G.S. 50A-204(b). In *In re N.B.*, 240 N.C. App. 353 (2023), DSS filed a petition alleging abuse, neglect, and dependency before North Carolina had initial custody determination. The court properly exercised temporary emergency jurisdiction when it entered nonsecure custody orders. By the time the adjudication and disposition order was entered, North Carolina had initial custody jurisdiction based on home state as mother and the children had been living in North Carolina for more than six months, and a child custody proceeding had not been initiated in any other state. For a discussion of initial custody jurisdiction based on home state, see subsection 1(a), above.

A temporary order entered in the North Carolina proceeding may become a final order if the order itself so provides. G.S. 50A-204(b) and Official Comment. In one case, *In re M.B.*, 179 N.C. App. 572 (2006), the adjudication order was entered when the court was exercising temporary emergency jurisdiction, and the respondent father appealed. Before the appeal was decided, the trial court ordered that the adjudication order became a final order after finding that North Carolina had become the child's home state and no custody proceeding had been filed in a state with jurisdiction. The respondent father did not appeal that subsequent order. Without addressing whether an adjudication order can be a temporary order that becomes a final order, the appeal was dismissed as moot. Once initial child custody jurisdiction is obtained, the North Carolina court has the authority to fully act under the provisions of the Juvenile Code and enter adjudication and dispositional orders and hear a termination of parental rights (TPR) action. *See, e.g.*, *In re N.T.U.*, 234 N.C. App. 722 (2014) (holding that North Carolina court acquired home state jurisdiction to hear TPR motion); *In re E.X.J.*, 191 N.C. App. 34, *aff'd per curiam*, 363 N.C. 9 .

Resources:
For more on UCCJEA temporary emergency jurisdiction, see
- Sara DePasquale, *Applying UCCJEA Temporary Emergency Jurisdiction in A/N/D Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (March 10, 2017).
- Sara DePasquale, *UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (July 20, 2023).

4. Simultaneous proceedings. The UCCJEA addresses simultaneous proceedings that are occurring in multiple states and seeks to limit the number of states that exercise jurisdiction over a child. *See* G.S. 50A-206. Simultaneous proceedings involve custody actions for the same child that are commenced and have not been resolved in both North Carolina and another state when both states have jurisdiction substantially in conformity with the UCCJEA and neither state is exercising temporary emergency jurisdiction. G.S. 50A-206(a). The language "jurisdiction substantially in conformity with" the UCCJEA has been interpreted by the North Carolina Supreme Court to mean that when an action has been commenced in another state, the North Carolina court must determine whether the other state has substantially the same type of jurisdiction that North Carolina has (e.g., home state jurisdiction), not whether the other state substantially complied with the statutory prerequisites to determine child custody jurisdiction. *Jones v. Whimper*, 366 N.C. 367 (2013).

Before hearing a child custody proceeding, the North Carolina court must examine all pleadings and information supplied by the parties to determine whether a child custody proceeding has been commenced in another state with jurisdiction substantially in conformity with the UCCJEA. G.S. 50A-206(b). When there is a simultaneous proceedings issue, both state courts cannot act (absent an emergency resulting in a court exercising temporary emergency jurisdiction) because the UCCJEA does not authorize concurrent jurisdiction. *See* Official Comment to G.S. 50A-206. This means that a North Carolina court with jurisdiction to make a custody determination may not be able to act if another state also has jurisdiction and is acting with regard to the same child.

When there are simultaneous proceedings, a "first in time" rule applies when determining which state may exercise jurisdiction in the child custody proceeding. Official Comment to G.S. 50A-206. The court where the first action was filed decides the jurisdictional issue. If at the time a custody proceeding is initiated in North Carolina there was a custody action that had been previously commenced in another state, the North Carolina court may not exercise jurisdiction and must stay its proceeding to communicate with that other state court. G.S. 50A-206(a), (b). North Carolina may exercise jurisdiction only when the other state court terminates or stays its proceeding after determining North Carolina is a more convenient forum. G.S. 50A-206(a); 50A-207. The other state court should terminate its proceeding rather than transfer its action to North Carolina because a separate custody proceeding had been commenced in North Carolina. *See* G.S. 50A-206(a). If the other state court does not determine that North Carolina is a more convenient forum, the North Carolina court must dismiss its proceeding. G.S. 50A-206(b). *Jones*, 366 N.C. 367 (North Carolina court properly dismissed custody action after New Jersey court did not determine that North Carolina was a more convenient forum and instead retained jurisdiction in its custody proceeding, which had

not yet been decided and had been commenced when New Jersey was the child's home state, giving New Jersey initial child custody jurisdiction).

There may be a home state when a custody action commences, even though the parties subsequently move out of the state before the action is completed, and a simultaneous issue may arise if a second custody action is filed in another state. *See Jones*, 366 N.C. 367 (New Jersey had home state jurisdiction when action was commenced, even though child and mother did not reside there when North Carolina proceeding was commenced); *see also* Official Comment 2 to G.S. 50A-202 ("Jurisdiction attaches at the commencement of the proceeding"). A simultaneous proceeding issue may arise when there is an existing abuse, neglect, or dependency action that was first initiated in North Carolina but has been inactive due to the waiver of further hearings. *See, e.g.*, *In re C.M.B.*, 266 N.C. App. 448 (2019) (discussing retention of jurisdiction under the Juvenile Code, which is a separate jurisdictional analysis from the UCCJEA); *In re M.E.*, 181 N.C. App. 322 (2007) (juvenile action was "pending").

5. Information concerning child's status (affidavit). Because jurisdiction under the UCCJEA is determined primarily by the past and present location of the child and any prior custody actions, reasonably ascertainable information that is related to the child's living arrangements, location, and possible involvement in custody or other proceedings must be submitted to the court in each party's initial pleading or in an attached affidavit. *See* G.S. 50A-209(a); *In re A.R.G.*, 361 N.C. 392 (2007); *see In re S.E.*, 373 N.C. 360, 365 (2020) (stating in a TPR, "respondent-mother stipulated to the court that the child protective services matter in Oklahoma had been closed, a fact she had a duty to disclose pursuant to N.C.G.S. § 50A-209(a)"). Appellate cases have stated that the better practice is to attach the affidavit as to the child's status to an abuse, neglect, dependency, or termination of parental rights petition (or motion), but failure to file it does not, by itself, deprive the court of subject matter jurisdiction where the court can get necessary information from the record or direct that the information be provided within a reasonable time and there is no prejudice. *See In re A.R.G.*, 361 N.C. at 399 (emphasis in original) (nothing in the statute suggests that the information is jurisdictional; G.S. 50A-209 refers to "reasonably ascertainable" information, "requires *both* parties to submit the information[,]" and authorizes the court to stay the proceeding until the information is obtained); *In re D.S.A.*, 181 N.C. App. 715 (2007); *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Clark*, 159 N.C. App. 75 (2003). The UCCJEA makes clear that "each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the proceeding." G.S. 50A-209(d).

AOC Form:
AOC-CV-609, Affidavit as to Status of Minor Child.

D. Evidence, Findings, and Conclusions of Law

Circumstances must exist to support a court's conclusion that it has jurisdiction under the UCCJEA. *In re J.H.*, 244 N.C. App. 255 (2015); *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). Evidence of those circumstances must be in the record. *In re A.S.M.R.*, 375 N.C. 539 (2020); *In re L.T.*, 374 N.C. 567 (2020); *In re T.J.D.W.*, 182 N.C.

App. 394, *aff'd per curiam*, 362 N.C. 84 (2007); *In re J.B.*, 164 N.C. App. 394 (2004) (vacating and remanding as record was devoid of evidence from which subject matter jurisdiction could be determined). A statement in an order concluding that the court has subject matter jurisdiction is not binding when it is not supported by findings of fact or evidence in the record. *See In re J.A.P.*, 218 N.C. App. 190 (2012) (holding that the North Carolina court lacked subject matter jurisdiction despite a termination of parental rights order concluding that it had subject matter jurisdiction; there were no findings to support the conclusion and nothing in the record to indicate that the New Jersey court determined that it no longer had exclusive continuing jurisdiction, that North Carolina was a more convenient forum, or that either court determined that the child and parents no longer lived in New Jersey).

The North Carolina Supreme Court has explicitly stated "[t]he trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites in the Act were satisfied when the court exercised jurisdiction." *In re L.T.*, 374 N.C. at 569; *In re A.S.M.R.,* 375 N.C. at 546 and *In re K.N.*, 378 N.C. 450, 456 (2021) (both quoting *In re L.T.*). The supreme court looked to *In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84, which determined that the relevant statutes in that case (G.S. 50A-201 and 50A-203(2)) do not require findings of fact but, rather, the circumstances in G.S. 50A-201 must exist and the court must "determine" that the criteria of G.S. 50A-203(2) are met. In *In re A.S.M.R, In re L.T.,* and *In re T.J.D.W.*, each record showed that the applicable provisions of the UCCJEA were satisfied so that the trial court had jurisdiction under the UCCJEA. Further, the language under G.S. 7B-1101 addressing jurisdiction in a termination of parental rights action that the court find it has jurisdiction to make a child custody determination under G.S. 50A-201 (initial custody determination), 50A-203 (modification jurisdiction) or 50A-204 (temporary emergency jurisdiction) does not require a specific finding but rather the record must show the requirements for jurisdiction exist. *In re J.D.O.*, 381 N.C. 799 (2022). (Note that although G.S. 7B-1101 references G.S. 50A-204, a court does not have jurisdiction under the UCCJEA to terminate a parent's rights while exercising temporary emergency jurisdiction under G.S. 50A-204.)

The explicit statement by the North Carolina Supreme Court in *In re L.T.*, 374 N.C. 567; *In re K.N.*, 378 N.C. 450; and again in *In re A.S.M.R.*, 375 N.C. 539 resolves a split in previous appellate opinions about whether specific findings must be included in the order. The line of opinions that hold findings are not a jurisdictional requirement under the UCCJEA should be followed. *See In re N.T.U.*, 234 N.C. App. 722 (2014) (trial court properly entered nonsecure custody orders pursuant to temporary emergency jurisdiction because the circumstances in the case supported emergency jurisdiction even though the order did not include findings that the child was abandoned or that temporary emergency jurisdiction was necessary to protect the child from mistreatment or abuse); *In re J.C.,* 235 N.C. App. 69 (2014) (holding that although it is better practice for the court to make jurisdictional findings, the statute requires that certain circumstances must exist, not that specific findings are made; the evidence supported the court's determination that it had jurisdiction under G.S. 50A-201 to adjudicate the child), *rev'd per curiam on other grounds*, 368 N.C. 89 (2015); *In re E.X.J.*, 191 N.C. App. at 40 (holding that "[i]t is immaterial to the question of the trial court's subject matter

jurisdiction in granting nonsecure custody to DSS that the trial court did not make the necessary findings;" the record established that temporary emergency jurisdiction existed), *aff'd per curiam*, 363 N.C. 9.

Practice Note: Although findings are not a jurisdictional requirement under the UCCJEA, the court of appeals has recognized that including jurisdictional findings is a better practice.

E. Communication Requirements

1. Communication between courts. When child custody actions involve more than one state, courts of different states may communicate with one another concerning the proceedings. G.S. 50A-110(a). In certain circumstances, communication is required and is not discretionary. A North Carolina court must communicate with a court of another state that has made a previous child custody determination or when a child custody proceeding has been commenced in another state when the North Carolina court is exercising temporary emergency jurisdiction (G.S. 50A-204(d); *In re M.B.*, 288 N.C. App. 351 (2023)) or when there is a simultaneous proceeding in another state (G.S. 50A-206(b)). There are also circumstances when a North Carolina court may want to contact another state court to see if that court will decline jurisdiction based on significant connection or inconvenient forum. *See* G.S. 50A-201; 50A-203; 50A-207; 50A-208.

The communication must be between trial courts. *In re J.W.S.*, 194 N.C. App. 439 (2008) (holding that the contact made by a North Carolina county DSS attorney with the New York court that had exclusive continuing jurisdiction did not meet the statutory requirements regarding communication); *In re Malone*, 129 N.C. App. 338 (1998) (reversed and remanded for the North Carolina trial court to directly contact the Florida trial court; DSS efforts to contact agencies in Florida were not sufficient). The form of the communication is not specified in G.S. 50A-110, but the Official Comment recognizes the use of modern communication techniques, including telephone and online communication.

The courts may allow the parties to participate in the communication, but participation by the parties is not mandatory. G.S. 50A-110(b) and Official Comment (recognizing that it can be difficult to schedule communication between the courts because of the judges' schedules such that including the parties may be impractical). If the parties are not allowed or are unable to participate, the court must give them an opportunity to present facts and legal arguments before a decision about jurisdiction is made. G.S. 50A-110(b); *In re C.M.B.*, 266 N.C. App. 448 (2019).

2. Record of communications between courts. A record must be made of all communications, except those concerning scheduling, court records, calendars, or similar matters. Except for communications about such administrative matters, the parties must be informed about communications between the courts and given access to the record. G.S. 50A-110(c), (d). The requirement to make a record of communications between courts is applicable not only to discretionary communications under G.S. 50A-110, but also to "*all* communications [addressed in the UCCJEA.]" *Jones v. Whimper*, 366 N.C. 367, 368 (2013) (emphasis in original). "Record" is defined as "information that is inscribed on a tangible

medium or that is stored in an electronic or other medium and is retrievable in perceivable form." G.S. 50A-110(e). An email between the two courts is a record. *In re C.M.B.*, 266 N.C. App. 448 (2019).

F. Hearings

1. Judicial cooperation and appearance of parties. Courts may request assistance from and may assist courts of other states. Specifically, a court of one state may request that the court of another state hold an evidentiary hearing, order a person to produce evidence, or order an evaluation related to child custody and may request a certified copy of the record of any such hearing, evidence, or evaluation. A court also may request that the court of another state order a party to a child custody proceeding or any person with physical custody of the child to appear in the proceeding with or without the child. A court may assess travel costs and other expenses incurred through these procedures against the parties. G.S. 50A-112.

2. Notice and opportunity to be heard. Before a child custody determination is made, notice and an opportunity to be heard must be given to anyone who would typically be entitled to notice in child custody proceedings in this state, including any parent whose rights have not been terminated and anyone having physical custody of the child. G.S. 50A-205(a). The court may order that the notice given to a party outside the state direct the party to appear in person with or without the child and inform the party that failure to appear may result in a decision adverse to that party. G.S. 50A-210.

3. Testimony in another state. A party to a child custody proceeding in another state may offer their own testimony or other witnesses' testimony by deposition or other means allowable in North Carolina for testimony taken in another state, in a manner determined by the court. The court may allow a person in another state to be deposed or to testify by phone, audiovisual means, or other electronic means and must cooperate with courts of the other state in designating an appropriate location for the deposition or testimony. G.S. 50A-111. *See also* G.S. 7A-49.6 (allowing hearings to be conducted by audio or visual transmission).

G. Deployed Parents

In 2013 the North Carolina legislature adopted the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), creating a new Article 3 in the UCCJEA to address custody and visitation issues when one or both parents are or may be deployed. The Act is codified at G.S. 50A-350 through -396. The definitions of "deploying parent" and "other parent" include a parent of the child or an individual other than a parent with custodial responsibility of a child. G.S. 50A-351(8), (13). Although this Act mostly impacts private custody cases, it appears to apply to an abuse, neglect, or dependency case when the court has entered a permanent plan of custody or guardianship to either a parent or non-parent. The court of appeals recently addressed issues of first impression under the UDPCVA in *Roybal v. Raulli*, 266 N.C. App. 318 (2019).

Resource: For more information, see the Uniform Law Commission website, use the search box for "Deployed Parents Custody and Visitation Act." See also Chapter 13.6 for a discussion of the federal Servicemembers Civil Relief Act (SCRA).

H. Enforcement of Custody Orders under the UCCJEA

1. Enforcement generally. A North Carolina court must enforce a custody determination made by a court of any other state if the other state exercised jurisdiction in substantial conformity with the UCCJEA or if the custody order was entered under factual circumstances meeting the jurisdictional standards of the UCCJEA. G.S. 50A-303(a). A custody order from one state may be registered and confirmed in another state, with or without a simultaneous request for enforcement, allowing for a "predetermination" of the enforceability of the order. *See* G.S. 50A-305 and Official Comment. A court may grant any relief normally available under its law to enforce a registered child custody determination made by a court of another state. G.S. 50A-306(a). Expedited enforcement of a child custody determination can be sought by filing a petition for enforcement, even if the order has not been registered and confirmed. *See* G.S. 50A-308. A North Carolina court does not acquire jurisdiction to modify another state's custody order merely because the order is registered and confirmed here or because a petition to enforce the order is filed here. The court may modify another state's custody determination only pursuant to the UCCJEA's requirements for modification jurisdiction. *See* G.S. 50A-306(b).

AOC Forms:

- AOC-CV-660I, Instructions For Registration Of Foreign Child Custody Order/Instructions For Expedited Enforcement Of Foreign Child Custody Order.
- AOC-CV-660, Petition For Registration Of Foreign Child Custody Order.
- AOC-CV-661, Notice Of Registration Of Foreign Child Custody Order.
- AOC-CV-663, Motion To Contest Validity Of A Registered Foreign Child Custody Order And Notice Of Hearing.
- AOC-CV-664, Order Confirming Registration Or Denying Confirmation Of Registration Of Foreign Child Custody Order.
- AOC-CV-665, Petition For Expedited Enforcement Of Foreign Child Custody Order.
- AOC-CV-666, Order For Hearing On Petition For Expedited Enforcement Of Foreign Child Custody Order.
- AOC-CV-667, Warrant Directing Law Enforcement To Take Immediate Physical Custody Of Child(ren) Subject To A Child Custody Order.
- AOC-CV-668, Order Allowing Or Denying Expedited Enforcement Of Foreign Child Custody Order.

2. Temporary visitation. Even if a North Carolina court does not have jurisdiction to modify an order, it may enter a temporary order enforcing (1) a visitation schedule made by a court in another state or (2) visitation provisions in a child custody determination made by another state that did not set out a specific visitation schedule. G.S. 50A-304(a). A temporary order entered by a North Carolina court that sets out visitation provisions that were not included in the other state's child custody determination must specify a period that the court considers

adequate for the petitioner seeking enforcement in North Carolina to obtain an order from the appropriate state with jurisdiction. G.S. 50A-304(b). The North Carolina temporary order that sets out a visitation schedule will remain in effect until an order is obtained from the other state with jurisdiction or until the specified period in the North Carolina order expires. G.S. 50A-304(b).

3. Registration and confirmation of orders from other states. A custody order from another state may be registered and confirmed with or without a petition for enforcement. G.S. 50A-305(a) and Official Comment (explaining that registration and confirmation allows parties to "predetermine" the enforceability of a custody order before allowing the child to come to the state); *see Hamdan v. Freitekh*, 271 N.C. App. 383 (2020). A person may register an order by sending two copies of the order, one of which must be certified, to the appropriate court with a letter or other document requesting registration; a statement under penalty of perjury that to the best of the person's knowledge and belief the order has not been modified; and the names and addresses of the petitioner and any parent or person acting as a parent who has been awarded custody or visitation in the order. G.S. 50A-305(a). See G.S. 50A-209(e) for exceptions to the requirement that names and addresses be provided. Upon receipt of the request, the court must register the order and send instructions to the petitioner informing the petitioner of the notice requirements for confirmation. G.S. 50A-305(b).

A person seeking to object to registration must request a hearing within twenty days of service of the required notice. G.S. 50A-305(d). If no request for a hearing is made, the order is confirmed as a matter of law and the court must notify the petitioner and all persons who were served of the confirmation. G.S. 50A-305(e). If a hearing is requested and held, the court must confirm the order unless the person objecting to registration can show that

- the court that issued the order did not have appropriate jurisdiction;
- the order has been vacated, stayed, or modified by a court having appropriate jurisdiction; or
- the person contesting registration was entitled to notice in the proceeding in the other state but was not given notice in accordance with the statute.

G.S. 50A-305(d).

Confirmation, either as a matter of law or as the result of a hearing, precludes further attack on the validity of the order for any of the reasons that could have been raised in objection to registration. G.S. 50A-305(f). Although a North Carolina court shall enforce a registered order, it may not modify the order without modification jurisdiction. G.S. 50A-306(b).

4. Expedited enforcement procedure.

(a) Petitioner. A petitioner is a "person" who seeks to enforce another state's child custody determination. G.S. 50A-301(1). The UCCJEA defines "person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity." G.S. 50A-

102(12). Based on this definition, DSS may petition for enforcement of another state's child custody determination even though it was not a party to the previous child custody proceeding. *See* Official Comment to G.S. 50A-102 ("The term 'person' has been added to ensure that the provisions of this Act apply when the State is the moving party in a custody proceeding or has legal custody of a child."); *In re Q.V.*, 164 N.C. App. 737 (2004).

Practice Note: A county DSS that receives a request from another state's child welfare agency to pick up a child who has been brought to North Carolina in violation of an order entered in that other state may file a petition for expedited enforcement in North Carolina. Note that depending on the facts, the request by the out-of-state child welfare agency may also be viewed as a report of suspected abuse, neglect, or dependency to the North Carolina county DSS. If DSS screens in that report and an assessment indicates that the child is abused, neglected, or dependent and the criteria for nonsecure custody are met, DSS may file its own petition in North Carolina with a request for a nonsecure custody order. DSS should notify the North Carolina district court of the other state's court action so that the North Carolina court may appropriately enter a temporary emergency order (i.e., nonsecure custody order) when exercising temporary emergency jurisdiction and contact the other state's court to discuss the proper way to address the emergency and jurisdictional issues.

(b) Petition, timing, and notice. A petition seeking enforcement of a custody order from another state must be verified. G.S. 50A-308(a). Certified copies of the custody order and of any order confirming the registration of the order must be attached to the petition. G.S. 50A-308(a). Without certified copies of the order, the North Carolina court lacks subject matter jurisdiction. *Hamdan v. Freitekh*, 271 N.C. App. 383 (2020) (vacating orders in registration and enforcement action as void for lack of subject matter jurisdiction; record lacked proof that copies of the foreign orders sought to be enforced were certified as true copies; requirement for certified copy is different from the requirement that there be a statement under penalty of perjury from the person who is seeking registration of the order that to the best of their knowledge and belief the order has not been modified). The court of appeals has stated that "a 'certified copy' is ordinarily defined as '[a] copy of a document or record, signed and certified as a *true copy* by the officer to whose custody the original is [e]ntrusted.' " *Hamdan*, 271 N.C. App. at 389 (emphasis in original) (quoting *State v. Gant*, 153 N.C. App. 136, 143 (2002)). The petition must contain all information set out in G.S. 50A-308(b). Upon the filing of the petition, the court must issue an order to the respondent to appear with or without the child at a hearing. The hearing must be scheduled for the next judicial day following service of process, unless that date is impossible, in which case the hearing must be held on the first day possible. The hearing date can be continued only upon the request of the petitioner. G.S. 50A-308(c). The required content of the order that must be sent by the court to the respondent upon the filing of a petition for enforcement is set out in G.S 50A-308(d).

(c) Hearing. At a hearing for enforcement, the court must enforce the order by allowing the petitioner immediate possession of the child, unless the respondent can show that the order

- has not been registered and confirmed and that
  - the issuing court did not have appropriate jurisdiction at the time the order was entered;
  - the order has been stayed, vacated, or modified by a court with appropriate jurisdiction; or
  - the respondent was entitled to notice in the proceeding in the other state, but notice was not given in accordance with the UCCJEA, or
- that the order was registered and confirmed but has been stayed, vacated, or modified by a court with appropriate jurisdiction.

G.S. 50A-310(a).

If the order has been confirmed, the respondent cannot contest enforcement based on any of the grounds that could have been raised in objection to the confirmation at the time of registration. G.S. 50A-305(f).

(d) Law enforcement involvement. A party who files a petition to enforce a custody order may also file a verified application for issuance of a warrant to take physical custody of the child. G.S. 50A-311(a). If the court finds from testimony of the petitioner or other witness, and not upon affidavits or verified pleadings alone, "that the child is imminently likely to suffer serious physical harm or be removed from this State," the court may issue a warrant that

- recites the facts on which the court's conclusion of imminent serious physical harm or removal from the state is based,
- directs law enforcement to take physical custody of the child immediately, and
- provides for the child's placement pending final relief.

G.S. 50A-311(a)–(c).

A warrant to take physical custody of a child issued pursuant to G.S. 50A-311 is enforceable throughout North Carolina. An officer executing a warrant that is complete and regular on its face is not required to inquire into the regularity and continued validity of the order and shall not incur criminal or civil liability for its due service. G.S. 50A-311(e).

If the court does not issue a warrant to take custody of a child, the court should not invoke the assistance of law enforcement. *See Chick v. Chick*, 164 N.C. App. 444 (2004) (holding that the trial court erred in ordering law enforcement to assist with enforcing a Vermont custody order when there was no statutory basis for their participation); *In re Bhatti*, 98 N.C. App. 493 (1990) (holding that the trial court lacked statutory authority to order law enforcement to pick up children in an effort to assist in the enforcement of a Georgia custody order).

Practice Note: A court that finds a child is "imminently likely to suffer serious physical harm" is required under North Carolina's reporting law to make a report to DSS if there is cause to suspect that the child is abused, neglected, or dependent as defined in G.S. 7B-101. *See* G.S. 7B-301(a). If DSS finds a risk of immediate harm, the agency may take temporary custody of the child, file a petition, and seek an order for nonsecure custody. See Chapter 5.5. When DSS involvement is appropriate, the court should make a report to DSS rather than directly ordering DSS to assume custody of the child.

5. Prosecutor's role. G.S. 50A-315 allows a prosecutor or other appropriate public official to bring an enforcement action on behalf of the court under the circumstances described in that statute.

I. Parental Kidnapping Prevention Act: 28 U.S.C. 1738A

The Parental Kidnapping Prevention Act (PKPA) governs interstate child custody proceedings simultaneously with the UCCJEA and provides full faith and credit in every state for custody and visitation orders that are entered in conformity with the provisions of the PKPA. *See Potter v. Potter*, 131 N.C. App. 1 (1998). To ensure that its order will be recognized by other jurisdictions, a state court must exercise jurisdiction over a custody proceeding in compliance with the prescribed jurisdictional requirements in the PKPA. *See* 28 U.S.C. 1738A; *Potter*, 131 N.C. App. 1.

1. Applicability in abuse, neglect, dependency, and termination of parental rights actions. The PKPA applies to custody and visitation determinations. A "custody determination" is defined as a court order, decree, or judgment that provides for the custody of a child and includes permanent, temporary, initial, and modification orders. 28 U.S.C. 1738A(b)(3). A "visitation determination" is a court order, decree, or judgment that provides for the visitation of the child and includes temporary, permanent, initial, and modification orders. 28 U.S.C. 1738A(b)(9). The PKPA does not reference abuse, neglect, dependency, or termination of parental rights (TPR) proceedings or orders. North Carolina appellate courts have held that the PKPA applies to abuse, neglect, dependency, and TPR proceedings. *In re Brode*, 151 N.C. App. 690, 694 (2002) (citations omitted) (holding that the PKPA applies "to all interstate custody proceedings affecting a prior custody award by a different State, including [abuse,] neglect and dependency proceedings"); *In re Bean*, 132 N.C. App. 363 (1999) (holding that the PKPA applies to TPR action). However, other states are split on the issue of the applicability of the PKPA to abuse, neglect, dependency, or TPR proceedings. *Compare In re Higera N.*, 2 A.3d 265 (Me. 2010) (PKPA does not apply to child protective actions, including TPR actions, which are brought by the state agency seeking to protect a child; a state agency is not a "person" or "contestant" involved in a custody determination; discussing the split in the different state courts). Another state's application of the PKPA to a North Carolina abuse, neglect, dependency, or TPR determination will depend on that state's interpretation of the applicability of the PKPA to those proceedings. A North Carolina court must apply the PKPA to another state's child custody determination, including an abuse, neglect, dependency, and TPR order. *In re J.H.*, 244 N.C. App. 255 (2015).

2. Terms. The PKPA has its own applicable terms and definitions. Most of those terms are also used in the UCCJEA and have essentially the same meaning: "child", "home state", "modification/modify", "person acting as a parent", "physical custody", and "State". As explained above, "custody determination" is defined differently in the UCCJEA.

"Contestant" is a term that is used in the PKPA and not in the UCCJEA. A contestant is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 U.S.C. 1738A(b)(2). Depending on a state's custody and visitation laws, this definition may encompass more people than a parent or person acting as a parent, which is what is used in the UCCJEA. As a result, the PKPA may apply to a proceeding to which the UCCJEA does not apply. Because of the PKPA definition of contestant, a court will need to consider the relevant state's laws regarding who has standing to claim a right to custody or visitation with a child. *See* Official Comment 1 to G.S. 50A-201, Official Comment 2 to G.S. 50A-202 (discussing PKPA). In North Carolina, certain third parties (meaning non-parents) may claim a right to custody or visitation; as a result, a "contestant" in North Carolina may encompass more than a parent or person acting as a parent. *See* G.S. 50-13.1(a) (custody action may be brought by "[a]ny parent, relative, or other person, agency . . . claiming the right to custody"); 50-13.2(b1) (addressing grandparent visitation). For cases discussing third-party custody issues and the required relationship between the third party and the child for standing purposes, see *Estroff v. Chatterjee*, 190 N.C. App. 61, 74 (2008) (facts establishing a relationship "in the nature of a parent and child" are sufficient to find that a third party has standing to bring a custody action) and *Ellison v. Ramos*, 130 N.C. App. 389 (1998) (standing requires a showing that the third party is not a "stranger" to the child).

3. Jurisdiction. Through the PKPA, Congress attempted "to create a uniform standard among the states in their exercise of jurisdiction over interstate custody disputes." *In re Brode*, 151 N.C. App. 690, 694 (2002). The PKPA prohibits concurrent jurisdiction by more than one state. *In re Bhatti*, 98 N.C. App. 493 (1990). A state must give full faith and credit to another state's custody order when that state complies with the jurisdictional provisions of the PKPA. 28 U.S.C. 1738A (Title: "Full faith and credit given to child custody determinations"); *Thompson v. Thompson*, 484 U.S. 174 (1988). As a federal law, the PKPA is controlling over any conflicting state custody law. *In re Brode*, 151 N.C. App. 690.

The PKPA is triggered when it has been determined that a prior custody order has been made by another state's court. *In re Brode*, 151 N.C. App. 690. The jurisdictional analysis under the PKPA addresses a state's continuing jurisdiction over child custody proceedings as well as modification and enforcement of other states' custody orders and has substantially the same jurisdictional prerequisites as the UCCJEA.

(a) Enforcement of out-of-state order. The PKPA requires that unless an exception applies, a state court must enforce and not modify another state's child custody or visitation determination when that determination was made in accordance with the PKPA. 28 U.S.C. 1738A(a). An order is made in accordance with the provisions of the PKPA when

- the court has jurisdiction under its own state's laws and
- one of the following conditions is met:
  - the state (1) is the child's **home state** when the proceeding was commenced or (2) had been the child's home state within six months before the proceeding was commenced, the child is absent from state, and a contestant continues to live in the state;
  - it appears that no other state has jurisdiction and it is in the child's best interest that the court assume jurisdiction because the child and their parents or one contestant have a **significant connection** to the state other than mere physical presence and there is **substantial evidence** about the child's care, protection, training, and personal relationships available in the state;
  - the child is physically present in the state and has been abandoned or it is necessary in an **emergency** to protect the child because the child, a sibling, or a parent has been subjected to or threatened with mistreatment or abuse;
  - it appears that no other state has jurisdiction or another state has declined jurisdiction because the state at issue is the **more appropriate forum** and it is in the child's best interest that such court assume jurisdiction; or
  - the court has **continuing jurisdiction**.

28 U.S.C. 1738A(c).

Continuing jurisdiction requires that the state (1) continues to have jurisdiction under its own laws and (2) remains the child's or any contestant's residence. 28 U.S.C. 1738A(d). Although "contestant" is broadly defined as a person who claims a right to custody or visitation with the child, it appears that DSS is not a contestant for purposes of the PKPA. *See In re Bean*, 132 N.C. App. 363 (1999) (affirming a trial court's determination that it did not have jurisdiction under the PKPA to terminate a putative father's rights; petitioners were appointed as custodians of the child in a Florida dependency and neglect action where Florida retained jurisdiction; the jurisdictional analysis focused on the putative father's continuing residence in Florida without any discussion of the Florida DSS). *See also* 28 U.S.C. 1738A(b)(2).

(b) Modification of out-of-state order. A North Carolina court will have jurisdiction to modify another state's child custody or visitation order when North Carolina has jurisdiction to make a child custody determination and the original state no longer has jurisdiction or has declined to exercise jurisdiction. 28 U.S.C. 1738A(f), (h). In *In re Bean*, 132 N.C. App. 363, the North Carolina Court of Appeals affirmed a trial court's determination that it did not have jurisdiction under the PKPA to terminate a putative father's rights because Florida had continuing jurisdiction and had not declined to exercise jurisdiction. There was a previous dependency action in Florida where the court awarded long-term custody of the child to her foster parents and retained jurisdiction. The foster parents/custodians moved with the child to North Carolina and eventually initiated a termination of parental rights (TPR) action in North Carolina against the child's putative father who resided in Florida. The father was a contestant in the TPR action and Florida remained his residence. As a result, North Carolina lacked subject matter jurisdiction under the PKPA to proceed with the TPR action.

(c) Pending custody proceedings. The PKPA prohibits a state court from exercising jurisdiction in any proceeding for a custody or visitation determination that is commenced during the pendency of a proceeding in a court of another state when that other state court is exercising jurisdiction consistently with the provisions of the PKPA to make a custody or visitation determination. 28 U.S.C. 1738A(g). The PKPA does not define when a proceeding is pending. However, when another state had a dependency proceeding where jurisdiction was retained by that state's court after a permanent plan of long-term custody was achieved, the North Carolina Court of Appeals completed a jurisdictional analysis under the continuing jurisdiction provision, not the pending custody proceedings provision, of the PKPA when determining that North Carolina did not have jurisdiction to hear a TPR action. *In re Bean*, 132 N.C. App. 363. In conducting a jurisdictional analysis for an inconvenient forum under the UCCJEA, the court of appeals has held that an abuse, neglect, or dependency proceeding is "pending" because the district court has continuing jurisdiction in that action until the child turns 18. *In re M.E.*, 181 N.C. App. 322, 328 (2007). While not noted in *In re M.E.*, the court's jurisdiction may be terminated by court order. G.S. 7B-201(a); 7B-906.1(d2); 7B-911; *see In re C.M.B.,* 266 N.C. App. 448 (2019) and *McMillan v. McMillan*, 267 N.C. App. 537 (2019) (both discussing terminating juvenile court jurisdiction under G.S. 7B-201 and 7B-911). It is unclear whether the holding in *In re M.E.* applies to the PKPA pending custody proceedings provision.

4. Notice and opportunity to be heard. Before a custody or visitation determination is made, notice and an opportunity to be heard must be given to the contestants, any parent whose rights have not been terminated, and anyone who has physical custody of the child. 28 U.S.C. 1738A(e). The content and form of the notice are not addressed by the statute. An order entered without notice is not entitled to full faith and credit by another state's court, but one can look to other enforcement remedies that are available under state law. *See* Official Comment to G.S. 50A-205 (discussing the PKPA).

3.4 Personal Jurisdiction

A. Introduction

Personal jurisdiction differs from subject matter jurisdiction. Personal jurisdiction relates to the court's authority (or jurisdiction) over a person rather than over the action. Personal jurisdiction is typically obtained by the issuance and proper service of a summons on a person. *In re K.J.L*, 363 N.C. 343 (2009). Respondent parties to an abuse, neglect, or dependency proceeding are served with a summons issued pursuant to G.S. 7B-406. A respondent parent in a termination of parental rights (TPR) action that is commenced by petition is served with a summons issued pursuant to G.S. 7B-1106. Unlike subject matter jurisdiction, personal jurisdiction may be waived by a failure to timely object or obtained by a party's consent or voluntary appearance. *In re K.J.L.*, 363 N.C. 343; *In re M.L.C.*, 289 N.C. App. 313 (2023). A lack of personal jurisdiction over a party will not deprive the court of subject matter jurisdiction over the action. *In re K.J.L*, 363 N.C. 343 (*cited in In re A.L.I.*,

380 N.C. 697 (2022)). Note, however, that personal jurisdiction for out-of-state parents in a TPR action is more complicated and addressed in section 3.4.E, below.

B. Service of Process

1. Who must be served.

(a) Abuse, neglect, dependency. For an abuse, neglect, or dependency petition, the summons must be issued to and served on each party named in the petition, except the juvenile. G.S. 7B-406(a); 7B-407. Service must occur at least five days before the date of the scheduled hearing unless waived by the court. G.S. 7B-407.

Depending on the circumstances, service may be required on several named respondents. Parties "shall" include the following persons: the child's parents (absent statutory exceptions); if the child has a court-appointed guardian or custodian at the time the petition is filed, that guardian or custodian; the child's caretaker (if applicable) when the allegations of the petition relate 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; and the child. G.S. 7B-401.1(b)−(e), (f). Although the statute does not require service of a summons on the child, the clerk is required to provide a copy of a petition alleging abuse or neglect and any notices of hearings to the local guardian ad litem office immediately after a petition is filed. G.S. 7B-408. The clerk is also required to provide a copy of the summons (or notice) and petition to respondent's provisional counsel. G.S. 7B-602(a).

Every petition and summons should name both parents (absent an exception under G.S. 7B-401.1(b)), even if one or both can be identified only as "unknown." Efforts should be made to serve both parents and any other named respondent as expeditiously as possible. However, the court's ability to address the child's circumstances is not dependent on the whether the parents or other named respondents have been served. *See In re K.J.L.*, 363 N.C. 343, 347 (2009) (disavowing interpretation of language in *In re J.T.*, 363 N.C. 1 (2009), to mean that the failure to issue a summons defeats subject matter jurisdiction and explaining that a summons relates to subject matter jurisdiction "only insofar as it apprises the necessary parties that the trial court's subject matter jurisdiction has been invoked and that the court intends to exercise jurisdiction over the case"). The court acquires subject matter jurisdiction and can act to protect the child as soon as a properly signed and verified petition is filed. *See* G.S. 7B-401; 7B-405; *In re T.R.P.*, 360 N.C. 588 (2006).

Although a lack of personal jurisdiction does not defeat a court's subject matter jurisdiction over the proceeding, the North Carolina appellate courts have not addressed whether an abuse, neglect, or dependency case may proceed when there is no personal jurisdiction over any named party. In the juvenile cases decided by the North Carolina Supreme Court that address personal jurisdiction as related to subject matter jurisdiction, the facts in each case involved the trial court having personal jurisdiction over a party who waived any defenses regarding personal jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (holding the failure to issue a summons as a result of the absence of the clerk's signature

on the summons did not defeat subject matter jurisdiction in the neglect and dependency case; noting the court had personal jurisdiction over both respondent parents when they appeared at the hearing, waiving defenses implicating personal jurisdiction); *In re J.T.*, 363 N.C. 1 (decided under previous law that required the juvenile in a TPR action be served with a summons; holding summons-related deficiencies implicate personal, not subject matter jurisdiction; noting the children's GAL and attorney advocate waived defenses implicating personal jurisdiction when they made a general appearance by participating in the TPR proceeding without raising objections regarding personal jurisdiction); *see also In re Poole*, 151 N.C. App. 472 (2002) (affirming child's adjudication as dependent and disposition of custody to relatives when only the respondent mother had been served; holding the trial court had subject matter jurisdiction over the action when only one parent was served; noting that the trial court obtained personal jurisdiction over the father when he appeared in the court three years after the child's adjudication), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151 (2003).

Practice Notes: Although the court may have subject matter jurisdiction to proceed, personal jurisdiction (whether obtained by proper service, a waiver by the respondent, or operation of law) is required for the court to order a specific party to engage in certain actions. *See* G.S. 7B-200(b). The practical effect of an adjudication of a child as abused, neglected, or dependent in a case where personal jurisdiction does not exist over a named respondent is that the court lacks authority to order that named respondent to engage in services or comply with conditions the court has the authority to order under G.S. 7B-904. Separate from the jurisdictional questions, parents and other named respondents have constitutional due process rights. Both of the child's parents and other named respondents should be served whenever possible and as soon as possible. A challenge to the court acting in an abuse, neglect, or dependency proceeding may be raised on constitutional due process grounds. *See In re Poole*, 151 N.C. App. at 477 (Timmons-Goodson, J., dissenting) (noting "the true issue and nature of respondent's argument… is that of due process"), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151; *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).

At every hearing on the need for continued nonsecure custody, at a pre-adjudication hearing, and at the initial dispositional hearing the court is required to inquire about efforts that have been made to locate and serve a missing parent, and findings of those efforts must be made at continued nonsecure custody and initial disposition. G.S. 7B-506(h)(1); 7B-800.1(a)(3); 7B-901(b). At the pre-adjudication hearing, the court must identify the parties to the proceeding and consider whether all summons, services of process, and notice requirements have been met; this inquiry is not limited to respondent parents. *See* G.S. 7B-800.1(a)(2) and (5).

(b) Termination of parental rights. For a termination of parental rights (TPR) proceeding initiated by the filing of a petition, service of the summons is required for

- the parents of the juvenile (except a parent whose rights have already been terminated, who has executed a relinquishment for adoption to DSS or to a licensed child-placing agency that is now irrevocable, who has consented to adoption by the person petitioning for TPR, whose identity is unknown, or who has safely surrendered their infant (absent a court order requiring service of summons));
- a judicially-appointed guardian of the person of the child;
- a court-appointed custodian of the child;
- any county DSS or licensed child-placing agency to whom a parent has relinquished the child for adoption; and
- any county DSS to whom a court has given placement responsibility for the child.

G.S. 7B-1106(a); *see* S.L. 2023-14, sec. 6.2(f) enacting G.S. 7B-1105.1, effective for infants who are safely surrendered on or after October 1, 2023.

No summons is required to be issued to or served on the child or the child's guardian ad litem (GAL) if there is one. However, if the child has a GAL, either the GAL or the child's attorney advocate must be served, pursuant to Rule 5 of the Rules of Civil Procedure, with a copy of all pleadings and other papers required to be served. G.S. 7B-1106(a1).

If an attorney has been appointed for a respondent parent in an underlying abuse, neglect, or dependency case, and if that attorney has not been relieved of responsibility, a copy of all pleadings and other papers required to be served on the respondent must also be served on the respondent's attorney pursuant to Rule 5. G.S. 7B-1106(a2). If a respondent parent is not represented by counsel, provisional counsel is appointed, and the clerk must send a copy of the summons (or notice) and petition to that attorney. G.S. 7B-1101.1(a); *see In re C.T.T.*, 288 N.C. App. 136 (2023) (affirming TPR; examining statute requiring notice of proceeding to provisional counsel).

In the case of an unknown parent, the court shall hold a hearing pursuant to G.S. 7B-1105 and may order service by publication as specified by that statute. For further discussion on a preliminary hearing for an unknown parent, see Chapter 9.6. In the case of an infant who has been safely surrendered, the court must hold a hearing pursuant to G.S. 7B-1105.1. For the surrendering parent, the court may order service by publication as specified in that statute or may order service by a particular method pursuant to Rule 4. For the non-surrendering parent, if their identity is known, the court must order Rule 4 service, but if their identity is unknown, service is made by publication as specified in G.S. 7B-1105.1(e). *See* S.L. 2023-14, sec. 6.2(f), effective for infants safely surrendered on or after October 1, 2023. For further discussion on a preliminary hearing for a safely surrendered infant, see Chapter 9.6.

2. Proper service. Proper service of a summons for an abuse, neglect, or dependency case is addressed in G.S. 7B-407; for termination of parental rights actions, service is addressed in

G.S. 7B-1106. Both statutes require service pursuant to Rule 4 of the Rules of Civil Procedure. G.S. 7B-407 (service on parent, guardian, custodian, or caretaker); 7B-1106(a) (service on a respondent person or agency, with an additional requirement for service by publication on a known parent respondent). For details relating to proper service, see Chapter 4.4.

C. Consent and Waiver Establishing Personal Jurisdiction

When a party has not been served or if there is a defect in service or process, that party's own actions may subject them to the court's jurisdiction. Unlike subject matter jurisdiction, challenges to personal jurisdiction must be timely raised by the parties themselves and can be waived. *See* N.C. R. CIV. P. 12(h)(1); *In re A.L.I.*, 380 N.C. 697 (2022); *In re W.I.M.*, 374 N.C. 922 (2020); *In re J.T.*, 363 N.C. 1 (2009); *In re K.J.L.*, 363 N.C. 343 (2009); *In re M.L.C.*, 289 N.C. App. 313 (2023). The court has personal jurisdiction over a party in an abuse, neglect, or dependency proceeding who has waived service of process. G.S. 7B-200(b).

1. Making an appearance. In the case of *In re A.J.M.*, 177 N.C. App. 745 (2006), service was not completed on the mother, but because she was present in court and did not raise an objection regarding insufficient service of process or personal jurisdiction, her actions amounted to a waiver of her right to challenge personal jurisdiction. *See also In re W.I.M.*, 374 N.C. 922 (2020); *In re K.J.L.*, 363 N.C. 343 (2009); *In re H.T.*, 180 N.C. App. 611 (2006). When a party does not appear in court but their attorney does, if that attorney fails to make the objection and participates in the hearing, a general appearance is made. *In re M.L.C.*, 289 N.C. App. 313 (2023) (attorney's cross-examination of witnesses at TPR hearing was more than a cursory appearance but was a general appearance).

However, in another case the court did not view parents as having consented to jurisdiction by appearing at the hearing when the purpose of their appearance was the timely challenge to the sufficiency of process. *In re Mitchell*, 126 N.C. App. 432 (1997). Additionally, a parent who was not served and who did not appear at the hearing was found not to have made a general appearance when his provisionally-appointed counsel, who should have been dismissed, was present during the hearing. *In re C.A.C.*, 222 N.C. App. 687 (2012).

2. Failing to raise the defense. A parent may waive the defenses of lack of personal jurisdiction or insufficiency of process or service of process by filing an answer, response, or motion or by appearing at a hearing without raising the defense. *See* N.C. R. CIV. P. 12(b), (h); *In re A.L.I.*, 380 N.C. 697 (2022) (determining father waived defense when he wrote letters to the court and participated in the TPR hearing without raising objection to insufficient service of process); *In re M.L.C.*, 289 N.C. App. 313 (2023) (holding respondent waived the defense of lack of personal jurisdiction when her attorney did not object to a lack of personal jurisdiction and participated in TPR hearing); *In re J.W.J.*, 165 N.C. App. 696 (2004) (holding that the respondent waived the defense of lack of personal jurisdiction by mailing a handwritten response to the clerk of court and later filing a formal answer without raising the defense).

The court of appeals has recognized that "litigants often choose to waive the defense of defective service when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process." *In re M.L.C.*, 289 N.C. App. at 316 (quoting *In re Dj.L*, 184 N.C. App. 76, 85 (2007)).

Resource: For information about waiver of service see Emily Turner, *Almost Everything, But Not Quite: What's a General Appearance Again?*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 7, 2022).

D. Acquiring Personal Jurisdiction in Abuse, Neglect, Dependency Cases

1. Statutory provisions. The Juvenile Code specifically addresses personal jurisdiction in abuse, neglect, or dependency proceedings in two separate statutes, and the language in each law differs. The general jurisdiction statute, G.S. 7B-200, provides that the court has jurisdiction over a parent, guardian, custodian, or caretaker of a juvenile who has been *adjudicated* abused, neglected, or dependent if that person has been properly served with a summons pursuant to G.S. 7B-406 or has waived service of process. G.S. 7B-200(b). The referenced summons statute, G.S. 7B-406, requires that the summons advise the parent that *upon service*, jurisdiction over them is obtained and additionally requires the party who is served with the summons to appear for a hearing at the time and place designated in the summons. G.S. 7B-406(a), (c).

The differences in these two statutes relate to the timing of when the court acquires jurisdiction over a party in the proceeding: upon service of the summons or after a juvenile's adjudication. The North Carolina appellate courts have not interpreted the different language used in these two statutes. However, when addressing issues related to personal jurisdiction in abuse, neglect, or dependency proceedings, North Carolina appellate courts appear to look to general principles of personal jurisdiction, which include service of the summons, a party's actions, and whether the party waived any objection to personal jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009); *In re J.D.L.*, 199 N.C. App. 182 (2009). Under general principles of personal jurisdiction, once a party is properly served with a summons or has waived any objection to personal jurisdiction, personal jurisdiction is accomplished; there is no delay. One appellate case specifically recognized that personal jurisdiction was established over the respondent mother when she made a general appearance in the neglect and dependency proceeding at the nonsecure custody hearing, thereby waiving any objection to personal jurisdiction that was based on her not being served with the summons until the day after the adjudication and disposition hearing. *In re S'N.A.S.*, 201 N.C. App. 581 (2009).

Note that a court with personal jurisdiction over a party in an abuse, neglect, or dependency proceeding may only act pursuant to the authority given to it by the Juvenile Code, which varies depending on the stage of the proceeding. For example, a court may not order a parent to engage in services authorized by G.S. 7B-904 until a dispositional (initial, review, or permanency planning) hearing. *See In re A.G.M.*, 241 N.C. App. 426, 433–34 (2015) (citing G.S. 7B-904 when reviewing an adjudication order and stating, "It is also unclear pursuant to what authority the trial court ordered Respondent to engage in therapy."). But a court may order (1) services or other efforts aimed at returning the child to a safe home and (2)

visitation with the child that sets forth duration, frequency, and level of supervision as early as nonsecure custody. G.S. 7B-507(a)(5); 7B-506(g1) (incorporating 7B-905.1). Additionally, a discovery request may include a motion for a physical or mental examination of a party, which requires the court to have jurisdiction over the person. *See* G.S. 7B-700(c); N.C. R. CIV. P. 35. Paternity may also be an issue the court addresses in the juvenile proceeding. The court must have personal jurisdiction over any parties it orders to engage in genetic marker testing pursuant to G.S. 8-50.1(b1).

2. Permanent custodians and guardians. In the course of an abuse, neglect, or dependency proceeding, the court-ordered permanent plan may award custody or guardianship of the child to a person who was not named as a respondent in the proceeding. *See* G.S. 7B-906.2(a); 7B-903(a)(4) and (5); 7B-600(b). Any person who is awarded custody or guardianship as the child's permanent plan automatically becomes a party to the proceeding. G.S. 7B-401.1(c), (d). The court has personal jurisdiction over that person, who is now a party. G.S. 7B-200(b).

E. Out-of-State Parents in Termination of Parental Rights Cases

A court's exercise of personal jurisdiction over a nonresident generally requires both notice and that the individual either has minimum contacts with the state or submits to the court's jurisdiction. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *In re F.S.T.Y.*, 374 N.C. 532 (2020). North Carolina has never required that a parent have minimum contacts with the state for a court in the state to act in a custody action involving that parent's child. *See Harris v. Harris*, 104 N.C. App. 574 (1991). The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) states that personal jurisdiction is not necessary or sufficient to enable a court to make a child custody determination. G.S. 50A-201(c); *In re F.S.T.Y.*, 374 N.C. 532. The Juvenile Code requires only that the parent be served properly. *See* G.S. 7B-1101.

1. Juvenile Code requires only service. G.S. 7B-1101 was amended in 2007 to provide that the court has jurisdiction to terminate a parent's rights, without regard to the parent's state of residence, if

- the court finds that it would have jurisdiction to make an initial custody determination or to modify a custody order under the UCCJEA and
- the nonresident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

In interpreting G.S. 7B-1101, the North Carolina Supreme Court held that the language regarding service on a nonresident parent relates to personal jurisdiction, not subject matter jurisdiction. *In re A.L.I.*, 380 N.C. 697 (2022) (affirming TPR of nonresident father). Unlike subject matter jurisdiction, a defect in personal jurisdiction can be waived, which the father in *In re A.L.I.* did when he participated in the proceeding without raising an objection to insufficient service of process.

Resource: For a discussion of G.S. 7B-1101, see Sara DePasquale, *NC Supreme Court Addresses Jurisdiction in TPRs of Out-of-State Parents*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (April 14, 2022).

2. No minimum contacts required. In *In re F.S.T.Y.*, 374 N.C. 532, 541 (2020), which is a case of first impression, the North Carolina Supreme Court held that "due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings." Although generally, due process requires a nonresident to have "…sufficient 'minimum contacts' with the forum state so 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' " (*In re F.S.T.Y.*, 374 N.C. at 534 quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)), exceptions to minimum contacts have been recognized by the U.S. Supreme Court in status cases (e.g., divorce). In status cases, the trial court's jurisdiction is established by the status of the plaintiff, rather than the location of the defendant. In looking at court opinions from other states and the purposes of the Juvenile Code, the North Carolina Supreme Court held that the status exception applies to TPR proceedings because the child's status to their parent and the child's best interests are at issue. *In re F.S.T.Y.*, 374 N.C. 532. North Carolina has joined other states that have held that minimum contacts are never required in TPR proceedings on the basis that these cases fall within the "status" exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g.*, *In re R.W.*, 39 A.3d 682 (Vt. 2011); *In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734 (Wis. 2003); *S.B. v. State*, 61 P.3d 6 (Alaska 2002).

In *In re F.S.T.Y.*, the supreme court recognized that in North Carolina, the best interests of the child are the paramount consideration in a TPR, and when there is a conflict between the interests of a child and parent, the child's best interests prevail. 374 N.C. 532. *See* G.S. 7B-1100(3). A TPR involves a parent who does not adequately care for their child, and "fairness requires that the State have the power to provide permanence for children living within its borders[,]" which is a matter of state concern. *In re F.S.T.Y.*, 374 N.C. at 540. The supreme court reasoned that the principle of acting in the child's best interests is contradicted by not favoring the child's home state when determining jurisdiction. The supreme court also addressed that even without minimum contacts, the respondent parent continues to have a right to actively participate in the TPR proceeding. Any burden imposed on the respondent parent is mitigated by the appointment of counsel and right to seek participation through remote technology.

In its opinion in *In re F.S.T.Y.*, the supreme court expressly overruled the court of appeals' opinions in *In re Finnican*, 104 N.C. App 157 (1991), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644 (1992) and *In re Trueman*, 99 N.C. App. 579 (1990). 374 N.C. 532. Both those opinions involved a child who was born during the marriage between the mother (petitioner) and the father (respondent) and was the legitimate child of the marriage. Both opinions held that to satisfy due process a nonresident parent must have minimum contacts with the state before a court here may terminate the parent's rights.

The supreme court did not overrule the court of appeals opinions that determined minimum contacts were not required for a child who is born out of wedlock when the respondent father

fails to demonstrate a commitment to the responsibilities of parenthood. *In re Dixon*, 112 N.C. App. 248 (1993) and *In re Williams*, 149 N.C. App. 951(2002). In *Dixon* and *Williams*, the court of appeals held that minimum contacts are not required when a nonresident father of a child born out of wedlock (1) has failed to demonstrate his commitment to his child and (2) such commitment could have been shown by him taking any of the identified statutory steps to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother when he had the opportunity to do so. *See* G.S. 7B-1111(a)(5). In those two opinions, the court of appeals determined that the trial court's assertion of personal jurisdiction over an out-of-state parent who did not grasp the opportunity to demonstrate his commitment to his child who was born out of wedlock does not offend "traditional notions of fair play and substantial justice." *In re Williams*, 149 N.C. App. at 958; *In re Dixon*, 112 N.C. App. at 252. Given the holding in *In re F.S.T.Y.*, 374 N.C. 532, the analysis as to whether the respondent father of a child born out of wedlock demonstrated a commitment to his child is no longer applicable when determining if minimum contacts are required.

Resource: For a discussion of *In re F.S.T.Y.*, see Sara DePasquale, *NC Supreme Court Addresses Jurisdiction in TPRs of Out-of-State Parents*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (April 14, 2022).

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3. Service on respondent temporarily in state. Personal service of process on an out-of-state respondent who is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. *Hedden v. Isbell*, 250 N.C. App. 189 (2016) (trial court acquired personal jurisdiction over defendant when she was personally served with the complaint in North Carolina, rendering minimum contacts analysis unnecessary); *see Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that due process does not bar the exercise of personal jurisdiction over a nonresident defendant based on personal service while the defendant is temporarily in the state).

4. UCCJEA does not require personal jurisdiction. The UCCJEA specifically states that "[p]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination." G.S. 50A-201(c). However, this statute, G.S. 50A-201, addresses subject matter jurisdiction and should not be construed as dispensing with the requirement that parties to a custody action be served. *See* G.S. 50A-108 ("Notice to persons outside State").

3.5 Venue

A. Introduction

It is not unusual for more than one county to have some degree of involvement in an abuse, neglect, or dependency case. A need for an immediate petition may arise when the child is found somewhere other than their county of residence. Families may relocate at some point during the case. A child's placement in another county may occur. One DSS may be asked to handle another county's case due to a conflict of interest.

Venue is the place where the action is located. During an abuse, neglect, or dependency proceeding, there may be a need to transfer venue. The circumstances under which the Juvenile Code permits transfer of venue depend on whether the transfer is pre- or post-adjudication.

Issues of venue should not be confused with jurisdiction. Challenges to venue, unlike challenges to subject matter jurisdiction, must be timely raised by the parties and can be waived. N.C. R. CIV. P. 12(h); *In re M.R.J.*, 378 N.C. 648 (2021).

B. Proper Venue

1. Where to initiate an abuse, neglect, or dependency action. A petition for abuse, neglect, or dependency may be filed in the judicial district in which the child resides or is present at the time the petition is filed. G.S. 7B-400(a). A judicial district may consist of one or more counties. When a petition is filed in a county that is not the child's county of residence, the petitioner must provide a copy of the petition and any notices of hearing to the DSS director in the child's county of residence. G.S. 7B-402(d).

G.S. 7B-400(b) makes clear that when a conflict of interest causes one county DSS to have an assessment conducted by another county DSS, the DSS conducting the assessment may file a petition in either county. *See In re A.P.*, 371 N.C. 14 (2018) (referring to G.S. 7B-400(b)). See Chapter 5.1.B.1 discussing conflict of interest.

2. Defining "residence". The Juvenile Code does not specifically define the term "residence", but G.S. 7B-400(a) references G.S. 153A-257, which determines legal residence for social service purposes as follows:

- A minor has the legal residence of the parent or other relative with whom the child resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, the child has the legal residence of the person with whom they reside. Any other minor has the legal residence of their mother or, if the mother's residence is not known, then the legal residence of their father, or, if the residence of neither parent is known, of the county in which the child is found. G.S. 153A-257(a)(1), (3).
- A person has only one legal residence at a time, and a legal residence continues until the person acquires a new residence. G.S. 153A-257(b).
- The director of the Division of Social Services in the state Department of Health and Human Services is authorized to resolve disputes between counties regarding a child's legal residence in an abuse, neglect, or dependency case for purposes of the provision of services. G.S. 153A-257(d).

Practice Note: A child's absence from their home due to a protection plan or the provision of case management services by DSS will not affect the original venue if it becomes necessary for DSS to file a juvenile petition. G.S. 7B-400(a); *In re M.R.J.*, 378 N.C. 648 (2021) (juvenile was placed with maternal grandmother in South Carolina during the assessment

period and was residing there when the neglect petition was filed in Wake County).

For venue purposes, if parents in County A agree to place their child with a relative in County B as part of a protection plan, DSS in County A can file a petition in the judicial district where County A is located, even though the child has temporarily been placed with a relative in County B. DSS in County A may also file the petition in the judicial district where County B is located if the child is present in County B at the time the petition is filed.

C. Transfer of Venue in Abuse, Neglect, or Dependency Cases

1. Pre-adjudication change of venue. Before adjudication, the court may grant a motion for change of venue for good cause. The statute does not provide guidance regarding what constitutes good cause for a pre-adjudication change of venue. Good cause might exist when a petition is filed in the county where the child is found rather than in the child's or another party's (such as the parent, guardian, custodian, or caretaker) county of residence.

When a change of venue is granted, the identity of the petitioner, which is a county DSS, does not change. G.S. 7B-400(c); *see* G.S. 7B-401.1(a). However, the DSS in the county where the action is transferred may seek to intervene as a county DSS that has an interest in the proceeding. G.S. 7B-401.1(h).

2. Post-adjudication change of venue. Any time after adjudication, a court may transfer venue to another county (even if the petition could not have been filed there), but only after making numerous findings and communicating with the court in the other judicial district. The court may transfer venue on its own motion or on the motion of a party. G.S. 7B-900.1(a).

(a) Factors to be considered. Before ordering that a case be transferred to another county in the post-adjudication phase of the case, the court must consider relevant factors, which may include

- the current residences of the juvenile and the parent, guardian, or custodian and the extent to which those residences have been and are likely to be stable;
- the reunification plan or other permanent plan for the juvenile and the likely effect of a change in venue on efforts to achieve permanence for the juvenile expeditiously;
- the nature and location of services and service providers necessary to achieve the reunification plan or other permanent plan for the juvenile;
- the impact upon the juvenile of the potential disruption of an existing therapeutic relationship;
- the nature and location of witnesses and evidence likely to be required in future hearings;
- the degree to which the transfer would cause inconvenience to one or more parties;
- any agreement of the parties as to which forum is most convenient; and
- the familiarity of the departments of social services, the courts, and the local offices of the guardian ad litem with the juvenile and the juvenile's family.

G.S. 7B-900.1(e).

(b) Required findings. After considering the factors set out immediately above, the court may order transfer only if it finds that

- the present forum is inconvenient;
- transfer is in the juvenile's best interest;
- the parties' rights will not be prejudiced by a change in venue; and
- the DSS directors in the two counties have communicated about the case and either
  - the directors are in agreement with respect to each county's responsibility for providing financial support and services in the case or
  - the director of the state Division of Social Services or their designee has made that determination pursuant to G.S. 153A-257(d).

G.S. 7B-900.1(a), (b).

(c) Communication between judges. Before transferring a case to another judicial district, the court is required to communicate with the chief district court judge or a judge presiding in juvenile court in that district and explain the reasons for the proposed transfer. G.S. 7B-900.1(d).

(d) Objection by judge to transfer. If the judge who is contacted about a proposed transfer makes a timely objection, either verbally or in writing, the court proposing the transfer may order the transfer only after making detailed findings of fact that support a conclusion that the juvenile's best interests require that the case be transferred. G.S. 7B-900.1(d).

(e) Joinder or substitution of DSS as a party and transfer of custody. When the court transfers a case to a different county, the court is required to join or substitute as a party the DSS director in the county to which the case is being transferred and, if the juvenile is in the custody of DSS in the county where the action is pending, transfer custody to the DSS in the county to which the case is being transferred. These orders may be entered, however, only if the DSS director in the receiving county has been given notice and an opportunity to be heard or has waived the right to notice and a hearing. G.S. 7B-900.1(c).

(f) Order and clerical procedure. An order transferring venue of a case must be entered within thirty days after the hearing on the question of transfer. The order must identify the next court action and the date on which the next hearing will be held. The clerk is required to transmit to the court in the other county a copy of the complete record of the case within three business days after entry of the transfer of venue order. The clerk receiving the transferred case is required to promptly assign a file number, ensure that any necessary appointments of new attorneys or guardians ad litem are made, and calendar and give notice of the next court action required in the case. G.S. 7B-900.1(f), (g).

Practice Note: An order transferring venue should address whether and when any appointed counsel and guardian(s) ad litem are released. A phone call from the clerk in the first county to the clerk in the county to which the case is being transferred serves as both a courtesy and a way to ensure that the receiving county is aware of the actions that need to be taken when the case file arrives.

D. Transfer of Venue in Termination of Parental Rights Cases

The termination of parental rights (TPR) statutes do not address venue; instead, the statute that sets forth where the action is commenced is jurisdictional. G.S. 7B-1101 (discussed in section 3.2.B.7, above). Although the Juvenile Code does not address transferring venue in TPR proceedings, the North Carolina Court of Appeals has recognized a respondent parent's right to seek a change in venue. *In re J.L.K.*, 165 N.C. App. 311 (2004) (holding that respondent waived his right to seek a change of venue when he failed to either move for a change in venue or object to venue in his answer pursuant to Rule 12(b) of the Rules of Civil Procedure).

3.6 Overlapping Proceedings

It is not unusual for children, parents, or other caregivers involved in abuse, neglect, or dependency proceedings to have some involvement in other court actions. When proceedings overlap, the parties may face challenges with respect to advocacy strategies, and the parties and the court may face procedural issues. Proceedings that may overlap with abuse, neglect, dependency, or termination of parental rights (TPR) proceedings include (but are not limited to) private custody actions, juvenile delinquency and undisciplined cases, adult criminal court actions, and domestic violence proceedings. Statutes and case law provide limited guidance for navigating overlapping proceedings, so they must generally be analyzed on a case-by-case basis.

A. Civil Custody Proceedings

A civil custody matter may have been decided or may be pending when an abuse, neglect, or dependency proceeding begins, or a civil custody case may be initiated during or as a result of a juvenile case. The relationship between G.S. Chapter 50 civil custody proceedings and abuse, neglect, or dependency proceedings is addressed in both the Juvenile Code and in G.S. Chapter 50.

1. Jurisdiction, consolidation, and stays. As soon as the court obtains jurisdiction over a juvenile as the result of the filing of a petition alleging abuse, neglect, or dependency, any other civil action in the state in which custody is an issue is automatically stayed as to that issue. G.S. 7B-200(c); 50-13.1(i). Effective October 1, 2019, when there is an automatic stay, the court must ensure that a notice is filed in the stayed action (the civil action) if the county and case file number are made known to the court. G.S. 7B-200(c)(1); *see* S.L. 2019-33.

AOC Form:
AOC-J-165, Notice of Stay of Child Custody Issue.

Although there is an automatic stay of the civil custody issue, the court hearing the juvenile case has options with respect to consolidation, transfer, and stay of proceedings.

- The court in the abuse, neglect, or dependency proceeding may order that any civil action or claim for custody filed in the same judicial district be consolidated with the juvenile proceeding. G.S. 7B-200(c)(1), (d). For clarity, orders resulting from consolidated hearings should sufficiently separate the matters considered in the different proceedings by either (1) entering two separate orders that address the separate components of the hearing or (2) subdividing a single order into separate sections to address the evidentiary standard applied, findings of fact, conclusions of law, and appropriate order for each component of the consolidated hearing. *In re R.B.B.*, 187 N.C. App. 639 (2007).
- If the civil custody case is filed in another judicial district, for good cause and after consulting with the court in the other district, the court in the juvenile proceeding may order a transfer of either the civil custody case or the abuse, neglect, or dependency case to allow the proceedings to take place in the same district. G.S. 7B-200(d).
- The court in the abuse, neglect, or dependency proceeding also has the option to proceed in the juvenile case while the civil case remains stayed, or to dissolve the stay of the civil case and stay the abuse, neglect, or dependency proceeding pending a resolution of the civil case. G.S. 7B-200(d).

2. Civil custody as the permanent plan. At any dispositional hearing, the court may order the child placed in the custody of a parent, relative, or other appropriate person. G.S. 7B-903(a)(4). When the court awards custody to a parent or non-parent at a dispositional hearing, it should look to the factors set forth in G.S. 7B-911(c) and determine whether the jurisdiction in the abuse, neglect, or dependency proceeding should be terminated and a civil custody order entered pursuant to G.S. Chapter 50. G.S. 7B-911(a). If the court makes the findings and conclusions specified in G.S. 7B-911(c), including that state intervention through a juvenile court action is no longer required, the court may create a civil custody action under G.S. Chapter 50, enter a custody order in that action, and terminate jurisdiction in the abuse, neglect, or dependency proceeding. The order must comply with the various requirements of G.S. 7B-911. *See In re J.K.*, 253 N.C. App. 57 (2017) (reversing and remanding "custody order" that did not make the findings and conclusions specified in G.S. 7B-911(c), did not terminate the juvenile court's jurisdiction, and did not include provisions transferring jurisdiction to a G.S. Chapter 50 matter).

If a civil custody order already exists, the court would modify that order rather than initiate a new action. G.S. 7B-911(b). The custody action and order survive under G.S. Chapter 50 after the court terminates its jurisdiction in the abuse, neglect, or dependency proceeding. G.S. 7B-201(b). Without a G.S. Chapter 50 custody order, if the court terminates its jurisdiction in the abuse, neglect, or dependency action, the orders entered in that action are vacated and the parties return to their pre-petition legal status unless a law or valid court order in another civil action (such as a termination of parental rights order) provides otherwise. G.S. 7B-201(b).

For further discussion of a G.S. 7B-911 order, see Chapter 7.10.B.4(a).

3. Priority of conflicting orders. If an abuse, neglect, or dependency order conflicts with an order in a civil custody action, the juvenile order controls as long as the court continues to exercise jurisdiction in the juvenile case. G.S. 7B-200(c)(2).

4. Termination of parental rights. The initiation of a termination of parental rights (TPR) proceeding does not trigger the automatic stay of a civil action, as it is not a petition alleging abuse, neglect, or dependency. *See* G.S. 7B-200(c). However, a TPR action that is commenced by petition in the same judicial district as an abuse, neglect, or dependency proceeding may be consolidated with that proceeding. G.S. 7B-1102(c). Also, when there is a TPR action (which is a juvenile proceeding) and a civil action or claim for custody, those actions may also be consolidated. G.S. 7B-200(d). *See Smith v. Alleghany Cnty Dep't of Soc. Servs.* 114 N.C. App. 727 (1994) (the facts identify a consolidated TPR and G.S. Chapter 50 custody action).

B. Juvenile Delinquency and Undisciplined Proceedings

Overlap between the child welfare system and the juvenile justice system is not uncommon. A child who is the subject of an abuse, neglect, or dependency petition may also be the subject of a delinquency or undisciplined petition. Any juvenile who is adjudicated delinquent or undisciplined may be placed in DSS custody at disposition. *See* G.S. 7B-2503(1)c.; 7B-2506(1)c. Before an adjudication in a delinquency or undisciplined proceeding, a juvenile may also be placed in nonsecure custody with a county DSS. G.S. 7B-1902 through -1907. While a juvenile is placed in DSS custody through an order entered in a delinquency or undisciplined proceeding, an abuse, neglect, or dependency case is not created. Instead, DSS is inserted into the delinquency or undisciplined case. If the juvenile is ordered to DSS custody at disposition, certain hearings that apply to abuse, neglect, or dependency cases must be held in the delinquency or undisciplined proceeding. Although DSS is involved in the delinquency proceeding, it is important to remember that the Juvenile Code's Subchapter I (abuse, neglect, dependency, termination of parental rights) and Subchapter II (delinquency and undisciplined) have different goals and procedures. Additionally, the juvenile's entitlement to representation and the nature of the representation differ under the child welfare and juvenile justice systems.

1. Simultaneous proceedings. When a child is the subject of petitions filed in both delinquency or undisciplined and abuse, neglect, or dependency actions, both the court and key people involved with the juvenile need to be aware of both proceedings. If the juvenile is in DSS custody, then DSS as well as the juvenile's parent should be served with pleadings and notices in the delinquency or undisciplined case. G.S. 7B-1805 through -1807. *See* 7B-1501(6) (defining "custodian" as the "person or agency that has been awarded legal custody of a juvenile by a court"). The court in the delinquency or undisciplined action will have jurisdiction over DSS if DSS has been served with a summons. G.S. 7B-1600(c). Unless excused by the court, when DSS, as the child's custodian, receives notice of a hearing in the delinquency or undisciplined action, a DSS authorized representative must attend that hearing. G.S. 7B-2700.

A juvenile court counselor preparing recommendations for the court in a delinquency or undisciplined case or supervising a juvenile on probation should be in close communication with DSS when the court counselor knows DSS is involved with the juvenile's family. A DSS report to the court at a dispositional hearing in an abuse, neglect, or dependency case would not be complete without addressing the juvenile's involvement in a delinquency or

undisciplined matter and, if applicable, the parents' participation in that case. The legislature recognized the need for interagency sharing of information when it enacted G.S. 7B-3100, requiring designated agencies to share information. For more detailed information on access to and sharing of information, see Chapter 14.1.E. For dispositional hearing purposes, a court counselor's presence in an abuse, neglect, or dependency case, and a DSS social worker's presence in a delinquency or undisciplined case, may be critical to the court's ability to obtain complete information and to coordinate services to the child and family.

2. DSS custody from delinquency or undisciplined proceeding.

(a) Nonsecure custody. The court may order that a juvenile it has jurisdiction over because of a delinquency or undisciplined petition be placed in nonsecure custody if the criteria set forth in G.S. 7B-1903(a) are met. *See* G.S. 7B-1902; 7B-1904. The criteria differ from what a court must find when placing a child alleged to be abused, neglected, or dependent in nonsecure custody. *Compare* G.S. 7B-1903(a) *with* 7B-503(a). The juvenile may be placed in nonsecure custody with a designated person or with a county DSS that may place the child in a licensed foster home, DSS-operated facility, or any other home or facility approved by the court. G.S. 7B-1905(a). There is no statutory requirement that DSS receive notice and have an opportunity to be heard before a nonsecure custody order places the child in DSS custody. *Cf.* G.S. 7B-2503(1)c. and 7B-2506(1)c. (both requiring that DSS receive notice and have an opportunity to be heard before a juvenile is placed in its custody at disposition). Hearings on the need for nonsecure custody are required within seven days of the initial order, within seven business days of the initial hearing, and at intervals of no more than thirty days. G.S. 7B-1906. Procedures governing those hearings and the criteria a court must consider are set forth in G.S. 7B-1906.

(b) Disposition. In the dispositional phase of a delinquency or undisciplined case, the court may place a juvenile in the custody of the county DSS where the juvenile resides if the DSS director has been given notice and an opportunity to be heard. *See* G.S. 7B-2506(1)c.; 7B-2503(1)c. The court's placement of a delinquent or undisciplined juvenile in DSS custody does not constitute an adjudication of abuse, neglect, or dependency; instead, the child has been adjudicated delinquent or undisciplined. *See* G.S. 7B-2405; 7B-2409; 7B-2411. The court in the delinquency or undisciplined proceeding does not have subject matter jurisdiction to adjudicate the juvenile abused, neglected, or dependent. As discussed in section 3.2.B.3, above, such an adjudication requires the filing of a properly verified petition by a DSS director that alleges a child's abuse, neglect, or dependency. The juvenile's placement in DSS custody is simply a dispositional alternative in a delinquency or undisciplined case. A juvenile may be placed in DSS custody for reasons that are unrelated to the adequacy of the parent's care.

Although there is not a separate abuse, neglect, or dependency action, the court is required to review the juvenile's dispositional placement of DSS custody under G.S. 7B-906.1 (relating to review and permanency planning hearings in abuse, neglect, or dependency cases). G.S. 7B-2503(1)c.; 7B-2506(1)c. Because the only case in which the court is exercising jurisdiction is the delinquency or undisciplined case, the required G.S. 7B-906.1 hearings occur in the delinquency or undisciplined action, even if local practice is to

schedule the hearings for days on which abuse, neglect, or dependency cases are heard. Because this is the delinquency or undisciplined proceeding, the juvenile is represented by the attorney that is retained or appointed pursuant to G.S. 7B-2000(a) and is not represented by a guardian ad litem (GAL) or attorney advocate. *See* G.S. 7B-601(a); *see also* G.S. 7B-3100(c) (authorizing the juvenile's GAL to share confidential information about the juvenile with the juvenile's attorney in the delinquency or undisciplined action). The court's authority over the parents under Article 27 of the Juvenile Code (G.S. 7B-2700 through -2706) in delinquency cases is somewhat different from the court's authority over parents under G.S. 7B-904 in abuse, neglect, or dependency cases. Effective October 1, 2019, a parent who is indigent is entitled to court-appointed counsel for the delinquency or undisciplined G.S. 7B-906.1 hearings unless that parent makes a knowing and voluntary waiver of that right. G.S. 7B-2506(1)c.; 7B-2503(1)c. It is not clear which statutes govern G.S. 7B-906.1 hearings resulting from a disposition entered in a delinquency or undisciplined action when it comes to the court's authority to order parents to complete certain acts. See Chapter 7 (discussing G.S. 7B-906.1 hearings and resulting orders).

Practice Note: Effective October 1, 2021, G.S. 7B-906.1 creates a review hearing track and a permanency planning hearing track depending on whether custody has been removed from a parent, guardian, or custodian. *See* S.L. 2021-132, sec. 1.(h). In these delinquency cases, with custody being removed from a parent, guardian, or custodian, and placed with DSS, permanency planning hearings apply.

As with the district court's jurisdiction over the abuse, neglect, or dependency proceeding, when a court obtains jurisdiction over a juvenile who is alleged to be undisciplined or for a juvenile who committed a delinquent act at 15 years of age or younger, the court's jurisdiction continues until the juvenile turns 18 (or is emancipated) or the court orders its jurisdiction terminated. G.S. 7B-1600(b); 7B-1601(b). For juveniles who are 16 years old or 17 years old when they commit an offense, juvenile court jurisdiction in the delinquency proceeding continues until the juvenile reaches age 19 or 20, respectively, unless otherwise provided for in statute or the court enters an order that terminates its jurisdiction. G.S. 7B-1601(b1).

The end of probation does not automatically terminate the juvenile court's jurisdiction. When the juvenile's probation ends, the court might terminate its jurisdiction but is not required to do so. If the court's intention is that the juvenile remain in DSS custody until the juvenile turns 18, the court must retain jurisdiction in the delinquency action for the custody order to remain in effect.

DSS may discover that a juvenile placed in its custody is abused, neglected, or dependent. In that case, DSS should file a petition, initiating its own separate abuse, neglect, or dependency proceeding. That separate case will proceed as any other abuse, neglect, or dependency action, although nonsecure custody is unlikely to be necessary since the child will have already been placed in DSS custody. When there is no abuse, neglect, or dependency, a petition should not be filed alleging one of those conditions.

Resources:
For further discussion about an order placing a juvenile in DSS custody through a delinquency proceeding, see

- Sara DePasquale, *When Does Delinquency Result in Abuse, Neglect, or Dependency?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 28, 2019).
- Sara DePasquale & Jacquelyn Greene, *Delinquency and DSS Custody without Abuse, Neglect, or Dependency: How Does That Work?*, JUVENILE LAW BULLETIN NO. 2019/02 (UNC School of Government, July 2019).

AOC Forms:

- AOC-J-441, Order For Nonsecure Custody (Undisciplined/Delinquent).
- AOC-J-461, Juvenile Level 1 Disposition Order (Delinquent).
- AOC-J-462, Juvenile Level 3 Disposition And Commitment Order (When Delinquent Offense Is The Basis Of The Commitment).
- AOC-J-475, Juvenile Level 2 Disposition Order (Delinquent).
- AOC-J-465, Order to Terminate Supervision (Undisciplined/Delinquent).

3.2 Representation of the juvenile. The role of attorneys for juveniles in delinquency proceedings and of guardians ad litem (GALs) in abuse, neglect, or dependency proceedings differ. Attorneys representing juveniles in delinquency and undisciplined proceedings are representing the child's rights and wishes — that is, the child's expressed interests. In contrast, GAL attorney advocates in abuse, neglect, or dependency cases (along with the GAL program staff and volunteer) are representing the best interests of the child, which considers but is not centered on the child's expressed interests. Also, GAL attorney advocates are given broad access to confidential information that may not be available to the juvenile's attorney in a delinquency or undisciplined case. The GAL attorney advocate may share confidential information with the attorney representing the juvenile in the delinquency or undisciplined action. *See* G.S. 7B-601; 7B-3100(c). See Chapters 2.3.D (relating to the child's GAL) and 14.1.D (relating to GAL access to information).

Representation by an appointed attorney is limited to the type of proceeding for which the attorney is appointed. *See* G.S. 7B-601; 7B-2000(a). The appointment and role of attorneys in delinquency or undisciplined proceedings and in abuse, neglect, or dependency proceedings are separate and distinct. The Juvenile Code does not address whether an attorney could or should represent the same child in both types of proceedings. From an ethical perspective, it would be difficult for an attorney to switch between expressed interest representation and best interest representation without encountering conflicts of interest. However, GAL attorney advocates and juvenile defense attorneys can and should communicate and exchange information with one another to the extent that such interaction supports and does not interfere with the goals, privileges, and responsibilities of their respective representations. Similarly, a child's attorney in delinquency or undisciplined proceedings may, with the clients' consent, communicate and coordinate with a parent's attorney in an abuse, neglect, or dependency proceeding to the extent that it is prudent.

C. Criminal Proceedings

Events leading to a petition alleging abuse or neglect may also result in criminal charges. In cases involving abuse, it is not uncommon for a criminal case to be going on simultaneously with a juvenile case. While there is a lack of statutory and case law guidance addressing issues that may arise when criminal and juvenile proceedings overlap, persons involved in both cases need to be able to recognize these issues to prepare for and resolve them in the best possible way.

1. Evidentiary issues. If a witness is called to testify in both cases, issues may arise as to how the witness's testimony in one case might affect the other case. If a child witness is involved in both cases, efforts may be made to avoid unnecessarily repetitive or traumatic interviews of and/or testimony by the child. The Juvenile Code specifically allows the court to authorize the child's guardian ad litem (GAL) who is appointed in the abuse, neglect, or dependency proceeding to accompany the child to court in any criminal action in which the child may be called on to testify in a matter relating to abuse. G.S. 7B-601(b). Some types of evidence may be needed for analysis and/or introduction in both cases, and there may be issues concerning logistics (where, when, and with whom the evidence will be) as well as how the introduction of evidence in one case affects the other case. For an analysis of selected evidence issues, see Chapter 11.

2. Defendant's participation in an abuse, neglect, or dependency proceeding. An attorney representing a parent (or other respondent) in an abuse, neglect, or dependency proceeding should, with the client's consent, consult any attorney who is representing the client in a related criminal matter. Among other things, the two attorneys should confer and advise the client about the nature and extent of the client's participation in the abuse, neglect, or dependency case; witnesses and evidence that might be relevant to both cases; and the theory of and strategy for each case. In the abuse, neglect, or dependency case, any party could call the respondent parent/defendant as a witness. A witness in an abuse, neglect, dependency, or other civil case may assert their Fifth Amendment privilege against self-incrimination and refuse to testify. *Herndon v. Herndon*, 368 N.C. 826 (2016); *In re L.C.*, 253 N.C. App. 67 (2017). Doing so, however, will support an inference that truthful testimony by the witness would have been unfavorable to them. *In re L.C.*, 253 N.C. App. 67; *see, e.g.*, *In re Estate of Trogdon*, 330 N.C. 143 (1991). *See also Lovendahl v. Wicker*, 208 N.C. App. 193 (2010) (discussing the relationship between the timing of overlapping civil and criminal proceedings, specifically involving sanctions against the defendant for his refusal to answer deposition questions based on the privilege against self-incrimination). For further discussion of the application of the right against self-incrimination, see Chapter 11.12.

3. Access to information and people. In criminal cases, access to information is governed by the statutes and cases governing criminal procedure and discovery. In abuse, neglect, or dependency cases, access to information is governed in part by (1) the confidentiality statutes applicable to information obtained by DSS, including who has access to that information with and without a court order (G.S. 7B-302(a1); 7B-2901(b)); (2) information-sharing and discovery provisions in G.S. 7B-700; (3) the ability of both DSS and the child's GAL to access confidential information pursuant to G.S. 7B-302(e) and 7B-601(c); and (4) access to

court records that are withheld from public inspection (G.S. 7B-2901(a)). For a discussion of confidentiality and sharing of information, see Chapter 14. With different standards and procedures for accessing information in criminal court and juvenile court, issues may arise as to what information can be accessed by whom and for what purpose.

Resource: For a discussion of information sharing information about the abuse, neglect, or dependency case to criminal defense attorneys, see Timothy Heinle, *When and How Criminal-Defense Attorneys Can Obtain Access to Confidential Child Welfare and Juvenile Abuse, Neglect, and Dependency Records*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2021/02 (UNC School of Government, Oct. 2021).

Another issue that may arise is an attorney's access to people who are also represented by an attorney. For example, the prosecutor or a defendant's attorney may wish to speak with a child concerning the criminal case, but if the child is represented by a GAL attorney advocate, the attorney advocate's permission is required for another attorney to speak with the child. *See* North Carolina State Bar, RPC 249 (1997) and RPC 61 (1990). Even if a child is not represented (for example, if the child is a witness and not the subject of the abuse, neglect, or dependency action), an attorney who wants to interview the child should consider whether the consent of a parent or guardian or a court order is required and what disclosures must be made to the child. *See* North Carolina State Bar, 2009 Formal Ethics Opinion 7, Interviewing an Unrepresented Child Prosecuting Witness in a Criminal Case Alleging Physical or Sexual Abuse of the Child (Jan. 27, 2012) (ruling that if the prosecuting witness in a criminal physical or sexual abuse case is younger than 14, the prosecutor or defense lawyer may interview the child only with the consent of a parent or guardian or pursuant to a court order).

4. Timing of the two proceedings. The criminal process and the juvenile process move independently of one another and often at very different paces. The Juvenile Code permits continuances in juvenile cases only under limited circumstances and specifically prohibits a continuation for the sole reason of awaiting resolution of a pending criminal charge against a respondent arising out of the same occurrence as the juvenile petition. *See* G.S. 7B-803; *In re Patron*, 250 N.C. App. 375 (2016). See also Chapter 4.5 (discussing continuances). In an abuse, neglect, or dependency action, statutory timelines dictate when hearings must be held, regardless of what is happening in the criminal case.

D. Domestic Violence Protection Proceedings

A parent or child involved in an abuse, neglect, or dependency proceeding may also be involved in a domestic violence protection proceeding that arises before or during the juvenile proceeding. Domestic violence protection proceedings are civil actions brought pursuant to G.S. Chapter 50B.

As defined in G.S. 50B-1(a), "domestic violence" means the commission of one or more of the following acts (but not acts that are in self-defense) upon an aggrieved party or a child who resides with or is in the custody of the aggrieved party, by a person with whom the aggrieved party has or has had a personal relationship:

- attempting to cause bodily injury or intentionally causing bodily injury;
- placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- committing any act defined in G.S. 14-27.21 through -27.33 (rape and other sex offenses).

A domestic violence protection action may be initiated in an existing G.S. Chapter 50 action or as a new civil action, and the initiating party may be self-represented. G.S. 50B-2(a). The district court has jurisdiction over domestic violence protection actions. G.S. 50B-2(a). Chapter 50B contains an extensive list of remedies the court may order as it deems necessary to protect the aggrieved party or child, including provisions addressing temporary custody and visitation and provisions restricting the defendant's contact with the aggrieved party or child. Any part of a domestic violence protective action that constitutes a claim for custody is automatically stayed when there is an abuse, neglect, or dependency proceeding, starting with the filing of the juvenile petition and continuing until the court no longer has jurisdiction over the juvenile proceeding. *See* G.S. 7B-200(c); *In re V.M.F.*, 218 N.C. App. 455 (2012) (unpublished) (remanding for court hearing the neglect action to consider visitation and citing G.S. 7B-200(b) and (c) in holding that the court was not prohibited from considering visitation because of a domestic violence protection order (DVPO) that contained a visitation provision). As with a civil custody action, the court in the juvenile proceeding may consolidate the actions or dissolve the stay of the civil action and stay the abuse, neglect, or dependency proceeding. G.S. 7B-200(c), (d). In addition, if an abuse, neglect, or dependency order conflicts with the custody and visitation provisions of a DVPO, the juvenile order controls as long as the court continues to exercise jurisdiction in the juvenile case. G.S. 7B-200(c)(2).