# Chapter 7
# Dispositional Phase: Initial, Review, and Permanency Planning

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## 7.1 Introduction and Purpose of Dispositional Phase

### A. Introduction

In this Manual, the term "dispositional phase" refers collectively to initial dispositional hearings, review hearings, and permanency planning hearings that take place after a child has been adjudicated abused, neglected, or dependent. Initial dispositional hearings, review hearings, and permanency planning hearings share most of the same purposes and procedures. *In re Montgomery*, 77 N.C. App. 709 (1985) (stating that a hearing on a motion for review is in the nature of a dispositional hearing). Yet each type of hearing has distinct purposes and procedures as well.

**Note,** this Chapter discusses all three types of hearings, the applicable procedures, and the outcomes that are available in those different hearings. This Chapter is best understood when read in its entirety, as subsections within the Chapter are not meant to be stand-alone explanations of a topic given the regular use of cross-referencing within this Chapter. Checklists at the end of this Manual identify the required findings and outcome options for

orders resulting from each of the three types of dispositional hearings: initial, review, and permanency planning.

Throughout the dispositional phase the court determines and reviews the needs of the child and the family and the best way to meet those needs. The court's guiding principle in the dispositional phase is the child's best interests, which is the paramount consideration or the "polar star" of the Juvenile Code. G.S. 7B-100(5); *In re Montgomery*, 311 N.C. 101, 109 (1984). The court exercises its discretion when determining the child's best interests. *See, e.g.*, *In re N.T.*, 289 N.C. App. 149 (2023) and *In re J.W.*, 241 N.C. App. 44 (2015) (neglect proceedings); *In re A.R.A.*, 373 N.C. 190 (2019) (a termination of parental rights proceeding).

At dispositional hearings of any type, the court may be considering

- whether the child can safely remain at home or be returned home;
- who should have custody of the child;
- where the child should be placed;
- what (if any) visitation is appropriate if the child is out of the home;
- whether to delegate decision-making authority for specific issues involving the child;
- what services the child should receive;
- what services the parents, guardian, custodian, or caretaker over whom the court has personal jurisdiction should receive;
- what directives should be made to the parents, guardian, custodian, or caretaker over whom the court has personal jurisdiction concerning expected changes or accomplishments that would place them in a better position to care for the child;
- whether efforts by DSS to reunify the family have been made and whether they should continue; and
- the date of the next hearing.

*See* G.S. 7B-901 through -906.2.

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

In all cases after a child has been adjudicated abused, neglected, and/or dependent, the next hearing is an initial dispositional hearing. G.S. 7B-901. The court of appeals has described this hearing process as a "statutory two-step" of an adjudication and initial dispositional hearing. *In re K.W.*, 272 N.C. App. 487, 494 (2020).

Effective October 1, 2021, review hearings are held only when custody has not been removed from a parent, guardian, or custodian. In practice, DSS sometimes refers to these types of petitions as "slow petitions" or "compliance petitions." In cases where custody has not been removed from a parent, guardian, or custodian, the court only holds review hearings and never moves to permanency planning hearings. Because only review hearings are held, these cases are on a review hearing track. *See In re J.M.*, 384 N.C. 584, 593 (2023) (referring to "review hearing track"). Review hearings occur after the initial dispositional hearing and continue until and unless the court (1) removes the child from the custody of a parent,

guardian, or custodian; (2) waives further review hearings (until a party files a motion for a review hearing and alleges a significant fact); or (3) terminates its jurisdiction in the abuse, neglect, or dependency action. *See* G.S. 7B-906.1(a), (d)(1a), (d2), (k1).

Also effective October 1, 2021, permanency planning hearings occur only when custody has been removed from a parent, guardian, or custodian. When the court is holding permanency planning hearings, the case is on the permanency planning hearing track. *See In re J.M.*, 384 N.C. at 593 (referring to "permanency planning track"). Review hearings are not held. As with review hearings, a permanency planning hearing occurs after the initial dispositional hearing. However, a permanency planning hearing also occurs after a review hearing when the court removes custody from a parent, guardian, or custodian. *See* G.S. 7B-906.1(a), (d)(1a). When custody is removed at a review hearing, the case essentially switches from a review hearing track to a permanency planning hearing track.

At a permanency planning hearing, the court must determine the best concurrent permanent plans for the child and the steps necessary to accomplish those plans so that permanence is timely achieved for the child. *See* G.S. 7B-906.2. Permanency options include

- reunification;
- adoption;
- guardianship;
- custody;
- for youth ages 16 or 17, Another Planned Permanent Living Arrangement (APPLA); and
- when there has been a termination of parental rights, reinstatement of those rights.

G.S. 7B-906.2(a).

DSS is required to make reasonable efforts to keep the juvenile in the custody of a parent, guardian, or custodian or if the case requires a permanency planning hearing, to achieve one of the identified concurrent permanent plans. *See* G.S. 7B-101(18) (definition of "reasonable efforts"). At permanency planning, a permanent plan of reunification is prioritized. Reunification may be eliminated as a permanent plan only when specific procedures are followed and statutory findings are made. *See* G.S. 7B-906.2(b); 7B-901(c); *see also* G.S. 7B-100(4), (5) (purposes).

The dispositional hearings are informal and inquisitive in nature. *In re K.W.*, 272 N.C. App. 487. The court considers evidence that is relevant, reliable, and necessary to determine the child's needs and most appropriate disposition. G.S. 7B-901(a); *see* G.S. 7B-906.1(c). The court of appeals has held that "[w]hen a trial court's disposition order relies on information gained from individuals addressing the court during the disposition hearing, that information must be in the form of sworn testimony." *In re K.W.*, 272 N.C. App. at 494. There is no burden of proof on any party. *In re L.E.W.*, 375 N.C. 124 (2020). All parties may submit evidence to the court of their perspectives on what the child's and family's needs are and how those needs can be met.

"Dispositional alternatives" or outcomes related to placement, evaluation, and treatment of the child are addressed in G.S. 7B-903. These dispositional alternatives, which can be combined, are available to the court at any hearing that takes place during the dispositional phase of the case. *See* G.S. 7B-903(a); 7B-906.1(d1), (i); *In re J.M.*, 384 N.C. 584.

In addressing the child's placement, the priority is to help the family by providing community-level services while the child remains in the home. *See* G.S. 7B-900. However, if the court determines that the child's safety and welfare require that the child be placed outside their home (or remain outside the home if the child is already placed outside the home), the court will examine placement alternatives and the best strategy for making it possible for the child to return home safely. *See* G.S. 7B-903. If the court determines that the child cannot be returned home within a reasonable period of time, the court must decide what other placement will provide the child with a safe, permanent home within a reasonable period of time. *See* G.S. 7B-906.1.

Regardless of the child's placement, the court may order evaluations, treatment, or services for the child or parents (or sometimes guardians, custodians, or caretakers) to better understand or address their needs. Dispositional outcomes that require parents or others to participate in evaluations, treatment, or classes, or to take other actions to address the conditions that directly or indirectly led to the child's adjudication or removal from home are authorized by G.S. 7B-904 and, indirectly, G.S. 7B-200(b), relating to the court's personal jurisdiction over individuals. The court's authority to enter dispositional orders is not without limits, and the court is not permitted to make dispositional orders that are beyond the scope of the dispositional statutes. *See In re B.O.A.*, 372 N.C. 372 (2019) (affirming TPR; interpreting G.S. 7B-904).

Initial dispositional hearings are addressed in G.S. 7B-901 and review and permanency planning hearings in G.S. 7B-906.1. The initial dispositional hearing is the first hearing in the dispositional phase of the abuse, neglect, or dependency case and is the first hearing where the court has the authority to relieve DSS of making reasonable efforts toward reunification. If the child is placed in DSS custody, the court may order that DSS be relieved of making reasonable efforts for reunification (in practice, often referred to as "cease reasonable efforts" or "cease reunification efforts") if the court makes written findings of specified factors set forth in G.S. 7B-901(c). When reasonable efforts for reunification are ceased at initial disposition, permanency planning is accelerated as a permanency planning hearing must be scheduled within thirty days. G.S. 7B-901(d). As noted by the North Carolina Supreme Court, the Juvenile Code fast-tracks cases to permanency planning when the criteria of G.S. 7B-901(c) are satisfied. *In re N.B.*, 379 N.C. 441 (2021). Note that "reasonable efforts for reunification" and "reunification efforts" appear to be used synonymously throughout the Juvenile Code and case law.

When reunification efforts are not ceased, either a review hearing or permanency planning hearing will be scheduled within ninety days after the initial dispositional hearing, depending on whether custody was removed from a parent, guardian, or custodian. *See* G.S. 7B-906.1(a); *In re J.M.*, 384 N.C. 584. Although the Juvenile Code sets forth this sequential hearing process, the court is not prohibited from conducting the adjudication, initial

dispositional, review, or permanency planning hearings on the same day. *In re E.A.C.*, 278 N.C. App. 608 (2021) and *In re C.P.*, 258 N.C. App. 241 (2018) (both interpreting prior statutory language before amendments made by S.L. 2021-132, sec. 1, effective October 1, 2021).

Both review and permanency planning hearings provide the court with an opportunity to assess what is happening in the case and to determine whether any changes should be made concerning the disposition. *See* G.S. 7B-906.1. The court is required to conduct the applicable review or permanency planning hearings at least every six months unless the court follows the statutory criteria applicable for either a review or permanency planning hearing to waive the regularly scheduled hearings. *See* G.S. 7B-906.1(a), (d2), (k), (k1), (n).

The achievement of certain permanency outcomes will terminate the court's jurisdiction over the action (e.g., adoption) while other permanency outcomes will result in the court retaining jurisdiction without there being any regularly scheduled permanency planning hearings (e.g., guardianship). Review hearings do not result in a permanent plan since the child has not been removed from the custody of a parent, guardian, or custodian – without a removal, reunification is not applicable. The court's jurisdiction will continue unless the court orders its jurisdiction terminated, the child reaches the age of 18 or is otherwise emancipated, or the child is adopted. *See* G.S. 7B-201; 7B-906.1(d2); 48-2-102(b). However, with either review or permanency planning hearings, the court may order its jurisdiction terminated at any time it determines that is in the child's best interests. *See* G.S. 7B-201; 7B-906.1(d2); 7B-911.

**Resources:**
Multiple resources addressing dispositional outcomes for children and issues faced by children and families in foster care, including publications and tools related to specific topics such as physical and mental health issues, child development, child safety, visitation, education, race and ethnicity, substance use, older youth, permanency, incarcerated parents, fatherhood, and much more can be found on the following websites:

- The Child Welfare Information Gateway, a service of the Children's Bureau, which is part of the U.S. Department of Health and Human Services Administration for Children and Families.
- The National Council of Juvenile and Family Court Judges.
- The National Conference of State Legislatures.
- The American Bar Association Center on Children and the Law, and also within that website, *ABA Child Law Practice Today*.

## B. Purpose of Disposition

The Juvenile Code refers specifically to dispositional purposes in both G.S. 7B-100 and 7B-900. Other provisions in the Juvenile Code expand on these purposes. Read collectively, these provisions indicate the following general purposes, which should guide the court in determining dispositional outcomes for any hearing in the dispositional phase. Ultimately, throughout the dispositional phase the court is balancing child safety with family preservation. North Carolina appellate courts have stated, "It is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the

dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)." *In re T.W.*, 250 N.C. App. 68, 71 (2016) (quoting *In re Shue*, 311 N.C. 586, 596 (1984)).

**1. Exercise jurisdiction to address child's needs.** A stated purpose of disposition is to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." G.S. 7B-900. The court must examine the specific needs and limitations of the child and craft a plan that takes into account the child's need for safety, continuity, and permanence, with a preference for the return of the child to their parents and home. *See* G.S. 7B-100(2), (3), (5); 7B-900. In doing so, the court should focus on the conditions that resulted in the adjudication of abuse, neglect, or dependency, with safety as the primary objective. As a corollary, the court also must determine at what point it is no longer necessary or appropriate for the court to continue exercising jurisdiction. *See, e.g.*, G.S. 7B-906.1(d2); 7B-911.

**2. Careful consideration of needs and circumstances.** A disposition should take into consideration the facts, the child's needs and limitations, and the family's strengths and weaknesses. G.S. 7B-100(2). Juvenile Code procedures require the court to take into account information from multiple sources when making dispositional determinations, and the court has wide latitude to consider relevant, reliable, and necessary evidence for dispositional purposes. G.S. 7B-901(a); 7B-906.1(c).

**3. Respect for family autonomy.** Dispositional plans and orders must respect family autonomy and avoid unnecessary or inappropriate separation of children from their parents. *See* G.S. 7B-100(3), (4). When possible, the initial approach should be for a child to remain at home with appropriate community-level services. G.S. 7B-900.

**4. Preference for placement with relative when no reunification.** When a child must be removed from the home, the court must first consider whether a relative is willing and able to provide proper care for the child in a safe home. *See* G.S. 7B-903(a1); 7B-101(19) (definition of "safe home"). In situations where a child is removed from one parent's home but living in the home of another parent is a possibility, placement with the other parent must be considered before other relatives or other placement options are considered.

**5. Fair procedures and protection of rights.** The procedures set forth in the Juvenile Code are meant to assure fairness and equity as well as protect the constitutional rights of juveniles and parents. *See* G.S. 7B-100(1). See Chapter 2.3 and 2.4 (discussing the rights of children and parents).

**6. Child's best interests.** Applying to all aspects of the Juvenile Code, including dispositions, are standards that ensure that the child's best interests are of paramount consideration for the court. *See* G.S. 7B-100(5). The Juvenile Code also refers to the consideration of the child's "health and safety." *See, e.g.*, G.S. 7B-507(a)(1) and (2); 7B-903(a2), (a3).

**7. Safe, permanent home within a reasonable period of time.** The goal of the dispositional phase is to return the child to their home or when that is not possible to a safe, permanent

home within a reasonable period of time. The Juvenile Code specifically refers to the federal Adoption and Safe Families Act (ASFA), which has as one focus timeliness to permanency. G.S. 7B-100(5). See Chapter 1.3.B.6 (discussing ASFA and its impact on the Juvenile Code).

### C. Significant Legislative Changes regarding Review and Permanency Planning Hearings

In 2013, 2015, and 2021 significant changes were made to the Juvenile Code, many of which impact the dispositional phase of abuse, neglect, or dependency proceedings.

Prior to legislative changes in 2013, review hearings were addressed in G.S. 7B-906 and permanency planning hearings in G.S. 7B-907. Both statutes were repealed in 2013 and replaced with G.S. 7B-906.1, which addresses both types of hearings and incorporates most of the language of the two previous statutes.

In 2015, with the enactment of G.S. 7B-906.2, the Juvenile Code mandates concurrent permanency planning in all abuse, neglect, or dependency actions that proceed to a permanency planning hearing. *See* S.L. 2015-136. Additionally, the requirements and timing for when the court is authorized to order DSS relieved of providing reasonable efforts for reunification, often referred to as the cessation of reunification efforts, was changed substantially. Prior to the 2015 legislative changes, G.S. 7B-507 authorized the court in any order that awarded DSS custody of or placement responsibility for the child (e.g., a nonsecure custody, dispositional, review, or permanency planning order) to order that DSS was not required to provide reasonable efforts for reunification. The court was required to first make specific findings designated in former G.S. 7B-507.

Effective for all actions pending or filed on or after October 1, 2015, a court's authority to order the cessation of reasonable efforts changed and is more limited. A court may order the cessation of reasonable efforts for reunification only at the initial disposition or any permanency planning hearing. The criteria a court considers and the required findings a court must make when ceasing reunification efforts differ depending on whether the hearing is the initial dispositional or permanency planning hearing. *See* G.S. 7B-901(c); 7B-906.2(b). See sections 7.8 and 7.9, below (discussing the findings at different hearings and reasonable efforts). Some of the cases cited in this Chapter were decided under the previous statute, which did not distinguish between the type of hearing the order resulted from or when certain findings could be made to support the determination to cease reunification efforts. Court of appeals opinions interpreting the 2015 statutory scheme bifurcated reunification efforts from reunification as a permanent plan. See sections 7.8.A.2, below (discussing initial dispositional hearing), 7.8.C.8, below (discussing permanency planning hearing), and 7.9, below (discussing the findings at different hearings and reasonable efforts).

In 2021, significant amendments to G.S. 7B-906.1 were made, effective for all actions pending or filed on or after October 1, 2021. *See* S.L. 2021-132, sec. 1.(h). Two dispositional tracks were created: one requiring only review hearings when custody has not been removed from a parent, guardian, or custodian, and the other requiring permanency planning hearings only when custody is removed from a parent, guardian, or custodian. *See In re J.M.*, 384 N.C. 584, 593 (2023) (referring to the "review hearing track" and the "permanency planning

track"). This is a departure from the prior sequential process for an abuse, neglect, or dependency action, which required an initial dispositional hearing, followed by a review hearing and then a permanency planning hearing, regardless of whether custody was removed from a parent, guardian, or custodian.

Another significant 2021 amendment makes clear that when a court finds that reunification efforts would clearly be unsuccessful or inconsistent with the child's health or safety such that reunification efforts are ceased, reunification must be eliminated as a permanent plan. G.S. 7B-906.2(b); *see* S.L. 2021-100, sec. 11. This appears to end the ability of the trial court to bifurcate the cessation of reunification efforts from the elimination of reunification as a permanent plan at a permanency planning hearing, superseding *In re C.P.*, 258 N.C. App. 241 (2018) and cases decided thereunder.

## 7.2 Dispositional Hearings

### A. Timing and When Required

There is a sequential process to an abuse, neglect, or dependency proceeding that carries over into the dispositional phase. *See In re T.R.P.*, 360 N.C. 588 (2006); *In re E.A.C.*, 278 N.C. App. 608 (2021). There first must be an adjudication. An initial dispositional hearing follows the adjudication. A review *or* permanency planning hearing follows the initial dispositional hearing. (Note before October 1, 2021, the sequential process typically involved an adjudication, followed by initial disposition, followed by a review hearing, followed by a permanency planning hearing.) Although the Juvenile Code sets forth this sequential hearing process, it does not prohibit the court from conducting the adjudication, dispositional, and permanency planning hearings on the same day. *In re E.A.C.*, 278 N.C. App. 608 and *In re C.P.*, 258 N.C. App. 241 (2018) (both interpreting prior statutory language before amendments made by S.L. 2021-132, sec. 1, effective October 1, 2021). Presumably, this is also true for the adjudication, dispositional, and review hearings when the case is proceeding on the review hearing track.

The Juvenile Code sets forth the maximum time limits that may expire before each type of hearing must be held; however, a case may proceed faster than the outer time limits designated in the Juvenile Code. The process should not be slower than the statutory maximum time limits. The appropriate remedy for a trial court's failure to conduct hearings in the dispositional phase within the statutory time frames is a petition by a party to the court of appeals for a writ of mandamus, not a new hearing. *See In re C.R.L.*, 377 N.C. 24 (2021); *In re T.H.T.*, 362 N.C. 446 (2008) (holding that a writ of mandamus, and not a new hearing, is the appropriate remedy to enforce statutory time limits in an appeal involving delay in entry of an order; stating delay is directly contrary to the child's best interests, which is the polar star of the Juvenile Code); *In re E.K.*, 202 N.C. App. 309 (2010) (addressing delay in permanency planning hearings and entry of the orders). See Chapter 4.5 (discussing continuances, delay, and remedy for delay) and 4.9.D.3 (discussing the elements for seeking mandamus).

**1. Initial dispositional hearing.** The initial dispositional hearing must be held immediately following adjudication and completed within thirty days after the conclusion of the adjudication hearing. G.S. 7B-901. The initial dispositional hearing is the second step of the "two-step adjudication-disposition process." *In re K.W.*, 272 N.C. App. 487, 495 (2020).

**2. Review hearing**. A review hearing must be held within ninety days from the date of the initial dispositional hearing when custody has not been removed from a parent, guardian, or custodian. G.S. 7B-906.1(a). Review hearings continue to be held at least every six months thereafter. G.S. 7B-906.1(a). Review hearings continue until either the court (i) waives further review hearings, (ii) terminates its jurisdiction, or (iii) orders the child's removal from the custody of the parent, guardian, or custodian. Absent extraordinary circumstances, the court may waive further hearings or terminate its jurisdiction when the parent, guardian, or custodian has completed court-ordered services and the juvenile is residing in a safe home. G.S. 7B-906.1(d1), (d2); *see* G.S. 7B-101(19) (definition of "safe home"). If the court retains jurisdiction and waives further review hearings, the court must hold a review hearing if a party files a motion for review and alleges a significant fact. G.S. 7B-906.1(k1).

**3. Permanency planning hearing**. A permanency planning hearing is required within ninety days of the initial dispositional hearing when custody has been removed from a parent, guardian, or custodian. G.S. 7B-906.1(a). A permanency planning hearing must be scheduled sooner when the court orders at initial disposition that reasonable efforts for reunification are not required. Under those circumstances, the permanency planning hearing must be scheduled within thirty days of the initial disposition. G.S. 7B-901(d). A permanency planning hearing must also be scheduled when the case switches from the review hearing track to the permanency planning hearing track. A permanency planning hearing must be scheduled within thirty days of the review where the court orders the child's removal from the custody of a parent, guardian, or custodian. G.S. 7B-906.1(d)(1a). As noted by the North Carolina Supreme Court, the Juvenile Code fast-tracks cases to permanency planning when the criteria of G.S. 7B-901(c) are satisfied (and presumably when the criteria of G.S. 7B-906.1(d)(1a) are satisfied). *In re N.B.*, 379 N.C. 441 (2021). Permanency planning hearings must be held at least every six months unless waived, replaced by a post-termination of parental rights (TPR) review hearing, or until the court no longer has subject matter jurisdiction over the action. *See* G.S. 7B-906.1(a), (k), (n), (o); *see also* G.S. 7B-201 (jurisdiction); 7B-911 (transfer to civil custody action). See Chapters 3.1.C (discussing continuing and ending jurisdiction) and 10.1 (discussing post-TPR review hearings).

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**Legislative Note:** S.L. 2021-132, sec. 1.(h) amending G.S. 7B-906.1(a) appears to have a clerical error that states a review hearing shall be held "if custody has not been removed from a parent, guardian, *caretaker*, or custodian." (emphasis added). All the other statutory changes made by S.L. 2021-132, sec. 1.(h) refer to custody with a parent, guardian, or custodian and do not reference "caretaker." *See* G.S. 7B-906.1(a), (d)(1a), (d2). The statutory changes do not address "caretaker" specifically in terms of the review hearing or permanency planning hearing tracks. This author believes when a juvenile is with a "caretaker," the case proceeds to the permanency planning hearing track since a caretaker is a person who is not a parent, guardian, or custodian and does not have legal custody of the juvenile. *See* G.S. 7B-101(3) (definition of "caretaker"). Without a custody order, the juvenile placed with a

caretaker is not in a legally secure and permanent placement. In reviewing the purposes of the Juvenile Code, a permanency planning hearing that designates concurrent permanent plans would be necessary to achieve a safe, permanent home for the juvenile within a reasonable period of time.

**4. Waiving review and permanency planning hearings.** The Juvenile Code allows the court to depart from the schedule for review and permanency planning hearings in limited circumstances.

**(a) Review hearings.** Absent extraordinary circumstances, a court may waive review hearings (which is when the juvenile has remained in the custody of a parent, guardian, or custodian) when a parent, guardian, or custodian has completed court-ordered services and the juvenile is residing in a safe home. G.S. 7B-906.1(d2); *see* G.S. 7B-101(19) (definition of "safe home"). Instead of waiving review hearings, the court may also terminate its jurisdiction. G.S. 7B-906.1(d2); 7B-911. Unlike the language of G.S. 7B-911 or 7B-906.1(n) (applying to permanency planning hearings), there are no specific findings the court must make to either waive review hearings or terminate jurisdiction under G.S. 7B-906.1(d2). If the court retains jurisdiction and waives review hearings, the court must hold a review hearing when a party files a motion for review and alleges a significant fact. G.S. 7B-906.1(k1).

**Practice Note:** In determining whether to retain jurisdiction and waive review hearings or terminate its jurisdiction, the court should consider the purposes of the Juvenile Code. The court may also look to the language of G.S. 7B-911, requiring the court to consider whether there is a continued need for government intervention. If there is no such need after a parent, guardian, or custodian has completed court-ordered services and the child is residing in a safe home with that parent, guardian, or custodian from whom the child was never removed, a termination of the court's jurisdiction may be more appropriate than retaining jurisdiction and waiving further review hearings.

**(b) Permanency planning hearings.** The requirements for when the district court may waive permanency planning hearings differ depending on whether the juvenile is placed in the custody of a parent or non-parent.

**Custody to a parent.** The court is not obligated to conduct permanency planning hearings when custody has been removed from a parent and legal custody is awarded to either parent. G.S. 7B-906.1(k). No particular findings are required to waive permanency planning hearings when custody has been placed with a parent. Although the court is relieved of the duty to conduct periodic permanency planning hearings, it has discretion to continue to conduct these hearings when it retains jurisdiction over the action. *In re Shue*, 311 N.C. 586 (1984); *In re H.S.F.*, 177 N.C. App. 193 (2006).

**Custody or guardianship to a non-parent.** When custody or guardianship is awarded to a person who is not the child's parent, the court may waive permanency planning hearings, require the custodian or guardian to submit written reports to the court in lieu of the hearings, or order hearings less often than every six months if the court finds by clear,

cogent, and convincing evidence each of the following factors:

- the child has resided in the placement for (1) at least one year or (2) at least six consecutive months and the court enters a consent order applying the procedures of G.S. 7B-801(b1);
- the placement is stable, and continuing the placement is in the child's best interests;
- neither the child's best interests nor the rights of any party require that permanency planning hearings be held every six months;
- all parties are aware that the matter may be brought before the court for review at any time by the filing of a motion or on the court's own motion (note, the motion should be a motion for a permanency planning or G.S. 7B-906.1 hearing); and
- the court order has designated the relative or other suitable person as the child's permanent custodian or guardian of the person.

G.S. 7B-906.1(n). See Chapter 3.1.D (discussing terminology in court orders when G.S. 7B-906.1 hearings are waived).

The court of appeals held that for purposes of the first condition stated above, the period of "at least one year" means a continuous and uninterrupted period of at least twelve months. *In re J.T.S.*, 268 N.C. App. 61 (2019) (vacating portion of permanency planning order that waived G.S. 7B-906.1 hearings when the first finding was based in part on the children having lived cumulatively with their grandparents for at least one year over the course of their lives). The time period must have expired as of the date of the permanency planning hearing. *In re L.G.*, 274 N.C. App. 292 (2020) (remanding permanency planning order; juvenile would have resided in current placement for one year four days after the permanency planning hearing). The court of appeals has also held that a child had lived with a relative for a year even though the child had not lived with the same relative for the entire year. *In re T.P.*, 217 N.C. App. 181 (2011) (finding no error with the trial court's combining time spent with two different sets of grandparents to meet the one-year time period). However, *In re T.P.* was decided under a prior statute requiring that the "juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year." G.S. 7B-906(b)(1), repealed and replaced with G.S. 7B-906.1(n) by S.L. 2013-129. The court of appeals distinguished *In re T.P.* from the facts of *In re J.T.S.* and stated "[w]e cannot say whether this Court would have reached the same result in *T.P.* under N.C.G.S. § 7B-906.1(n)(1)." *In re J.T.S.*, 268 N.C. App. at 72.

A person who was not initially named as a party in the abuse, neglect, or dependency proceeding but who is later awarded permanent custody of, or appointed as a permanent guardian for, the child automatically becomes a party to the proceeding when that arrangement is the child's permanent plan. G.S. 7B-401.1(c), (d). Custodians or guardians who are parties may file a motion under G.S. 7B-906.1 at any time.

Permanency planning hearings are not automatically waived when the court appoints a guardian or places the child in the custody of someone other than DSS or a parent. The hearings must continue until all the conditions in G.S. 7B-906.1(n) are met, and the court makes all the required statutory findings in an order that waives further hearings. Such an

order is commonly referred to as having "waived further reviews" (even when the hearing being waived is a permanency planning hearing).

Appellate courts have repeatedly found error where a trial court has waived further G.S. 7B-906.1 hearings without making all the findings enumerated in G.S. 7B-906.1(n) by clear, cogent, and convincing evidence. *See In re K.L.*, 254 N.C. App. 269 (2017) (holding reversible error when two of the five required findings were not found); *In re E.M.*, 249 N.C. App. 44 (2016) (vacating the order waiving hearings when neither the order nor the record showed the standard of proof the court applied and the court had made only one of the five required findings); *In re P.A.*, 241 N.C. App. 53 (2015) (holding that it was reversible error for the trial court to waive further hearings without making findings of fact on each of the five statutory enumerated criteria).

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**Practice Notes:** Because of the 2021 statutory changes creating different review hearing and permanency planning hearing tracks, using the appropriate terminology for each hearing type is recommended. Rather than state the court is "waiving further reviews", stating the court is "waiving further permanency planning hearings" provides clarity on the applicable track for the proceeding.

When custody is ordered to a parent or non-parent and it seems appropriate for DSS and juvenile court involvement to end, transfer of the abuse, neglect, or dependency proceeding to a G.S. Chapter 50 custody action should be considered. If appropriate, the court enters a G.S. Chapter 50 custody order and terminates its jurisdiction in the juvenile proceeding pursuant to the criteria and procedures of G.S. 7B-911. See section 7.10.B.4(a) (explaining transfer to a civil custody action).

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**(c) Special circumstances: custody with parent and new report made to DSS.** When periodic judicial reviews (review or permanency planning hearings) have been waived because the court has placed custody with a parent, if a new report of suspected abuse, neglect, or dependency is made to DSS, specific procedures under G.S. 7B-401(b) apply. The language of G.S. 7B-401(b) does not differentiate between review hearings and permanency planning hearings and instead refers to "periodic judicial reviews of the placement."

As explained by the court of appeals, there are four criteria that trigger the application of G.S. 7B-401(b):

- the court retained jurisdiction over a child whose custody was granted to a parent;
- the court is not conducting periodic judicial reviews of the child's placement;
- a new report of abuse, neglect, or dependency is received by DSS after hearings have been discontinued by the court; and
- the DSS director determined, based on an assessment of the new report conducted under G.S. 7B-302, that court action is needed.

*In re T.P.*, 254 N.C. App. 286 (2017).

Once periodic review or permanency planning hearings have been waived, G.S. 7B-401(b) impacts the trial court's subject matter jurisdiction to proceed in the action and limits the court's ability to simply hold a review or permanency planning hearing when the criteria of G.S. 7B-401(b) apply. When all four criteria are met, the court will only have subject matter jurisdiction to modify the dispositional order that awarded custody to the parent based on DSS filing a new petition in the existing action and not a motion for a review or permanency planning hearing. DSS sets out the recent allegations of abuse, neglect, or dependency in the new petition. Rather than hold a review or permanency planning hearing on that new petition, the trial court must then conduct a new adjudicatory hearing. If, based on the new petition, the child is adjudicated abused, neglected, or dependent at this second adjudicatory hearing, the court proceeds to a dispositional hearing to modify the existing dispositional order that grants custody to the parent. *See In re T.P.*, 254 N.C. App. 286 (vacating modification of permanency planning order that removed custody of the children from respondent mother resulting from DSS motion for review when G.S. 7B-401(b) was triggered; DSS motion was based on a new report it received and assessed about conditions in the mother's home one week after the court ordered custody to the mother and waived further hearings; holding the court lacked subject matter jurisdiction to proceed on DSS motion for review as the proper pleading required by G.S. 7B-401(b) is a new petition filed in the existing case, which would be followed by a subsequent adjudicatory hearing on that petition).

**(d) The Americans with Disabilities Act does not prevent waiving further hearings.** The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of a physical or mental disability. In *In re A.P.*, 281 N.C. App. 347 (2022), the North Carolina Court of Appeals addressed ADA issues raised by a mother who has an intellectual disability in an appeal of a permanency planning order that awarded custody to the father and waived further hearings. The court of appeals rejected mother's argument that the trial court is required to hold regular hearings rather than waive further hearings because the "abuse, neglect, and dependency proceedings are not 'services, programs, or activities' within the meaning of the ADA, and therefore, the ADA does not create special obligation in such child protection proceedings." *In re A.P.*, 281 N.C. App. at 362. The trial court appropriately followed the requirements of G.S. 7B-906.1(k) and 7B-905.1(d) when waiving further hearings and notifying the parties of their right to file a motion to review visitation. The court of appeals stated, "the ADA did not 'change the obligations imposed by [these] unrelated statutes.' " *In re A.P.*, 281 N.C. App. at 362.

See Chapter 13.5 (discussing the ADA).

**5. Modification hearings under G.S. 7B-1000.** Another type of dispositional hearing is one considering a motion to modify under G.S. 7B-1000. Unlike review or permanency planning hearings, a hearing on a motion to modify is not required to be periodically scheduled but is instead initiated by a party filing a motion (or petition) in the abuse, neglect, or dependency proceeding. G.S. 7B-1000. Significant changes were made to G.S. 7B-1000, effective October 1, 2021. *See* S.L. 2021-100, sec. 16. A motion to modify is appropriate when (1) there is a change in circumstances or the needs of the juvenile require a modification, and (2) the issues that are raised in the motion do not require a review or permanency planning hearing. G.S.

7B-1000(a). The second prong is a departure from the prior version of G.S. 7B-1000 and has the effect of limiting when a hearing on a G.S. 7B-1000 motion to modify, versus a motion for a G.S. 7B-906.1 hearing, is appropriate. See section 7.8.E, below (discussing G.S. 7B-1000).

### B. Notice and Calendaring

DSS is required to make a timely request to the clerk to calendar each review and permanency planning hearing at a juvenile court session. The clerk is required to give fifteen days' notice of the hearing and its purpose to

- the parents,
- the child if 12 or older,
- the guardian,
- the person providing care for the child,
- the custodian or agency with custody of the child,
- the child's guardian ad litem, and
- any other person or agency the court may specify.

G.S. 7B-906.1(b).

For purposes of notice to a person providing care for the child, DSS must either provide the clerk with the name and address of the individual to be given notice or send the notice itself and file with the clerk written documentation that notice of the hearing was sent to the child's current care provider. G.S. 7B-906.1(b).

Unless proper notice of a permanency planning hearing was waived, the court cannot enter a permanency planning order at a hearing for which proper notice was not given. Proper notice includes compliance with the fifteen-day time period as well as stating the purpose of the hearing. *See In re H.L.*, 256 N.C. App. 450 (2017) (appellate review of father's challenge that trial court should not have conducted a combined dispositional, review, and initial permanency planning hearing was waived when father received multiple notices weeks and months before the hearing that it would be combined and father made no objection); *In re K.C.*, 248 N.C. App. 508 (2016) (originally unpublished Aug. 2, 2016, but subsequently published) (vacating permanency planning review orders and remanding for proper permanency planning hearings when respondent objected after receiving eight days' notice that the hearing initially scheduled as a review hearing would be a permanency planning hearing). *See also In re S.C.R.*, 217 N.C. App. 166 (2011) (holding that trial court erred where it authorized a permanent plan at a disposition hearing without the proper notice required for a permanency planning hearing).

Appellate cases have held that respondents waive any objection to lack of such notice by failing to object at trial. *See In re E.A.C.*, 278 N.C. App. 608 (2021) (holding mother waived right to notice when she participated in the permanency planning hearings and objected to the proposed change in the permanent plan but did not object to the holding of a permanency planning hearing); *In re T.H.*, 232 N.C. App. 16 (2014) (holding that respondent could not claim lack of notice where trial court made a "temporary permanent plan" at adjudication and

respondent attended disposition hearing but did not object to a lack of notice at disposition); *In re J.P.*, 230 N.C. App. 523 (2013) (holding that because respondent and counsel attended the disposition hearing in which the trial court announced its intention to enter a permanent plan and they did not object to lack of notice, they waived their right to object).

Regarding a change in the permanent plan, the North Carolina Supreme Court has determined that pre-hearing notice of the change in a recommendation for the permanent plan is not required by the Juvenile Code because a parent is on notice that the plan could change by virtue of the notice designating the hearing as a permanency planning hearing. *In re H.A.J.*, 377 N.C. 43 (2021) (noting the trial court is not obligated to follow the recommendations of the GAL when making a best interests determination in designating the permanent plans). In cases where a TPR hearing is scheduled in the underlying abuse, neglect, or dependency proceeding, and the TPR and dispositional hearings are consolidated, "the parent has necessarily been informed that the child's permanent plan is at issue." *In re A.W.*, 377 N.C. 238, 252 (2021).

## C. Participants

At initial dispositional hearings, in addition to hearing from DSS as the petitioner, the court must give the child and the child's parents, guardian, custodian, and if applicable a caretaker who is a party an opportunity to present evidence and make recommendations about the disposition they believe to be in the child's best interests. *See* G.S. 7B-901(a).

At review and permanency planning hearings, the court is required to consider information from

- the parents,
- the child,
- the guardian,
- any person with whom the child is placed,
- the custodian or agency with custody of the child,
- the child's guardian ad litem, and
- any other person or agency that will aid in its review.

G.S. 7B-906.1(c).

The court must also provide any person the child is placed with the opportunity to address the court about the child's well-being. G.S. 7B-906.1(c).

At any hearing in the dispositional phase, testimony or evidence from persons who are not parties may be considered when the court finds it to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. G.S. 7B-901(a); 7B-906.1(c). The Juvenile Code states specifically that its provisions should not be construed to make any person providing care to a child a party to the proceeding based solely on receiving notice and having a right to be heard. G.S. 7B-906.1(b). See Chapters 5.4 (discussing parties) and 4.7.A (discussing intervention).

Persons whose presence may not be required (unless subpoenaed by a party) but who could potentially provide useful information to the court because of their involvement with the family or knowledge of or expertise on a particular relevant issue include

- relatives or nonrelative kin,
- counselors/therapists,
- medical or other experts,
- previous foster parents or other caregivers,
- school personnel,
- day care providers,
- law enforcement officers,
- juvenile court counselors,
- probation/parole officers, and
- other service providers.

## D. Open or Closed Hearings

Hearings are presumed to be open unless the court specifically excludes the public. The child has the right to request that the hearing be open, and the court must keep the hearing open when the child (or child's GAL) requests it. G.S. 7B-801(b). Otherwise, the court has discretion to exclude the public from all or part of a hearing, but in deciding to do so must consider the circumstances of the case, including

- the nature of the allegations,
- the age and maturity of the child,
- the benefit to the child of confidentiality,
- the benefit to the child of an open hearing, and
- the extent to which an open hearing would compromise the confidentiality afforded the child's record by G.S. 7B-2901.

G.S. 7B-801(a). See Chapter 14.1 (discussing confidentiality and disclosure of juvenile records).

Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure prohibits electronic media and still photography coverage of juvenile proceedings. In some judicial districts local rules may address open hearings.

## E. Evidentiary Standard and Burden of Proof

**1. Relevant, reliable, and necessary evidence.** Hearings in the dispositional phase may be informal, and the court may consider any evidence, including hearsay evidence, it finds to be relevant, reliable, and necessary to determine the child's needs and the most appropriate disposition. *See* G.S. 7B-901(a) (initial dispositional hearing); 7B-906.1(c) (review and permanency planning hearings); *In re J.L.*, 264 N.C. App. 408 (2019); *see In re C.C.G.*, 380 N.C. 23 (2022). Some cases state that the North Carolina Rules of Evidence do not apply to dispositional hearings. *In re J.H.*, 244 N.C. App. 255 (2015) (dispositional hearings are not

governed by the rules of evidence); *In re M.J.G.*, 168 N.C. App. 638 (2005) (formal rules of evidence do not apply at dispositional hearings); *In re Montgomery*, 77 N.C. App. 709 (1985) (unlike adjudication hearing, formal rules of evidence do not apply at dispositional hearings); *see also In re K.W.*, 272 N.C. App. 487 (2020) (initial dispositional hearing considers evidence otherwise barred by the Rules of Evidence). See Chapter 11.1.B (discussing interpretation of this statement).

Although the Rules of Evidence do not apply, the appellate courts have repeatedly held that there must be competent evidence at a permanency planning hearing. *See, e.g., In re J.H.*, 373 N.C. 264 (2020). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re J.M.*, 384 N.C. 584, 591 (2023) (citation omitted). Attorney arguments and reports alone are not competent evidence.

Appellate opinions have addressed the need for sworn testimony at a dispositional hearing. In *In re K.W.*, 272 N.C. App. 487, the court of appeals discussed the evidentiary requirements at an initial dispositional hearing when respondent mother challenged on appeal the lack of sworn testimony. The trial court relied on written reports and findings it made at the adjudicatory hearing. The court of appeals determined there was no error and explained that the initial dispositional hearing is the second step of the statutory two-step hearing process, which first requires a formal and adversarial adjudicatory hearing, followed by the initial dispositional hearing, which is inquisitive and focuses on the best interests of the child. The court of appeals referred to G.S. 7B-901(a), which allows the trial court to rely on written reports and to incorporate findings made at the adjudicatory hearing. The court of appeals reasoned that if those written reports and adjudicatory findings "are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony." *In re K.W.*, 272 N.C. App. at 494. If, however, the initial dispositional order relies on information provided by individuals who address the court at the initial dispositional hearing, that information must be provided through sworn testimony. The court in *K.W.* did not receive new information from individuals but instead relied on reports that were referenced by individuals and its own findings in the adjudication order such that sworn testimony was not required.

In contrast, there must be some oral testimony taken at a permanency planning hearing; otherwise, there is no competent evidence to support the court's findings of fact, resulting in conclusions of law that are made in error. *In re S.P.*, 267 N.C. App. 533 (2019) (vacating and remanding permanency planning order that was based solely on DSS and GAL reports without any testimony; attorney arguments are not testimony); *In re J.T.*, 252 N.C. App. 19 (2017) (vacating and remanding permanency planning order as not supported by competent evidence when the court heard no oral testimony from any witnesses and only heard statements made by attorneys and accepted into evidence reports from DSS and the GAL); *In re D.Y.*, 202 N.C. App. 140 (2010) (reversing and remanding permanency planning order that was based solely on DSS and GAL reports, prior court orders, and attorney arguments; trial court failed to hold proper permanency planning hearing because DSS had presented no competent evidence); *In re D.L.*, 166 N.C. App. 574 (2004) (reversing and remanding permanency planning order based on lack of evidence; DSS presented no testimony, just attorney statements and a DSS summary).

**Practice Note:** Review and permanency hearings are both governed by the same evidentiary standard set forth in G.S. 7B-906.1(c). It is reasonable to apply the holdings in appellate cases addressing that evidentiary standard in a permanency planning hearing to a review hearing conducted under G.S. 7B-906.1.

See Chapters 6.3.C (discussing the handling of different evidentiary standards when adjudication and disposition are combined) and 11 (discussing in detail evidence issues in juvenile proceedings).

**2. No burden of proof.** Juvenile Code provisions related to hearings in the dispositional phase do not place a burden of proof on any party. *In re J.M.*, 384 N.C. 584 (2023); *In re L.E.W.*, 375 N.C. 124, 128 (2020) (quoting *In re L.M.T.*, 367 N.C. 165, 180 (2013), *superseded in part by statute as stated in In re J.M.*, 384 N.C. at 594 n.5); *In re Shue*, 311 N.C. 586 (1984) (earlier version of the Juvenile Code did not place any burden of proof upon the parents or DSS during dispositional or review hearings); *In re E.A.C.*, 278 N.C. App. 608 (2021); *In re E.P.-L.M.*, 272 N.C. App. 585 (2020). The essential requirement is that sufficient competent evidence be presented so that the court can make sufficient findings and a determination regarding the child's best interests. *In re L.M.T.*, 367 N.C. 165, *superseded in part by statute as stated in In re J.M.*, 384 N.C. at 594 n.5, *quoted in In re L.E.W.*, 375 N.C. at 128 and *In re E.A.C.*, 278 N.C. App. at 617. The clear and convincing evidentiary standard does not apply. *See In re L.E.W.*, 375 N.C. 124 (trial court's application of clear and convincing evidence at permanency planning hearing conflicts with the standard of proof that applies; holding application of the stricter standard was harmless error in order eliminating reunification as a permanent plan); *In re B.R.W.*, 278 N.C. App. 382, 392 n.3 (2021) (in appeal of permanency planning order, "this Court reviews whether the trial court's findings of fact were supported by competent evidence, not clear and convincing evidence"), *aff'd*, 381 N.C. 61 (2022).

**3. Reports.** After an adjudication, the court must proceed to the initial dispositional hearing when it receives sufficient social, medical, psychiatric, psychological, and educational information. G.S. 7B-808(a). Reports containing this type of information may be presented to the court by DSS, the child's guardian ad litem (GAL), and the parent at any type of hearing in the dispositional phase of the proceeding. See subsection E.1., above, discussing the need for sworn testimony at the different dispositional hearings.

**(a) DSS reports.** A "predisposition report" is a written report prepared by DSS that provides social, medical, psychiatric, psychological, and educational information, and sometimes recommendations, related to disposition. The court may not receive or consider the predisposition report until the adjudicatory hearing is completed. G.S. 7B-808(a). *Cf.* Chapter 6.3.C (discussing combining of adjudication and disposition hearings while considering certain evidence for dispositional purposes only).

Unless the court makes a written finding that the predisposition report is unnecessary, DSS is required to prepare a predisposition report containing

- the results of any mental health evaluation under G.S. 7B-503(b) (ordered by the court when the alleged abuser has a history of violent behavior against people),

- a placement plan, and
- a treatment plan to meet the child's needs.

G.S. 7B-808(b).

Although not explicitly required at dispositional hearings that are not the initial dispositional hearing, the Juvenile Code contemplates DSS submitting reports for the court's consideration. *See* G.S. 7B-912(b1) (applying to permanency planning hearings, "the department shall include in its report . . . ").

**(b) GAL or parent reports.** The Juvenile Code does not require written reports from parties other than DSS. Nevertheless, the child's GAL typically submits written reports to the court as part of the GAL's duties involving the investigation of facts and the child's needs, identification of resources, exploration of dispositional options, and promotion of the child's best interests. *See* G.S. 7B-601; 7B-700(f); *see In re R.D.*, 376 N.C. 244 (2020) (noting GAL reports are frequently admitted at the dispositional stage of a TPR proceeding). The GAL's report, submitted to the court in the disposition phase of the case, may address many of the issues addressed in the DSS predisposition report and include the same or different recommendations.

Parents (through their attorneys, if represented by counsel) may submit written reports to the court, describing their circumstances and progress, identifying resources, discussing dispositional alternatives, and making recommendations, including their opinions about the best interests of their child. These reports, like the DSS report, can be given to the court only after adjudication. *See In re A.H.*, 250 N.C. App. 546 (2016) (in a termination of parental rights proceeding, respondent mother did not preserve for appeal the trial court's earlier determination to exclude the parent report made at a hearing on a motion in limine when her counsel did not seek to properly introduce the parent report at the disposition hearing); *see also In re H.M.H.*, 208 N.C. App. 568 (2010) (unpublished) (refers to a parent report admitted as evidence that the court considered at a review hearing).

**(c) Sharing of reports.** Both judicial efficiency and the parties' ability to prepare adequately are enhanced if reports to the court are shared among parties before the day of the hearing. The Juvenile Code requires the GAL to share reports and information with all parties before submitting them to the court, but a time frame for sharing the report is not specified. G.S. 7B-700(f). The court may address deadlines for sharing reports at the pre-adjudication hearing. *See* G.S. 7B-800.1(a)(6)–(7) (court shall consider any discovery motions under G.S. 7B-700 and any other issue that can properly be addressed as a preliminary matter).

The chief district court judge may adopt local rules or issue an administrative order establishing time frames and procedures for the sharing of reports, including how a party's objection to the content of another party's report should be handled. The local rules or administrative order

- may prohibit disclosure of the report to the child if the court determines that disclosure is not in the child's best interests,
- may not prohibit a party entitled by law to receive confidential information from receiving that information, and
- may not allow disclosure of any confidential source protected by statute.

G.S. 7B-808(c). *See* G.S. 7B-700(b). See also Chapter 14.1 (discussing other laws related to sharing information in juvenile cases).

**(d) Court's use of reports.** Although the court may consider reports as evidence, reports alone are insufficient to support a permanency planning order; there must be some testimony at the hearing. See subsection E.1, above, discussing published opinions on this issue.

When written reports are admitted as evidence, the appellate courts have distinguished between a court's consideration of the reports and a court's incorporation of entire reports into its order as findings of fact. The appellate opinions sometimes characterize broad incorporation as error, but more often they focus on whether the trial court made sufficient independent findings of fact to show that the court did not improperly delegate its fact-finding function by overreliance on outside reports. *See, e.g.*, *In re J.R.S.*, 258 N.C. App. 612 (2018) (reversing and remanding permanency planning order for lack of findings to support best interests of the child conclusion as trial court should not delegate its fact-finding duty by merely incorporating DSS and GAL reports); *In re H.H.*, 237 N.C. App. 431 (2014) (holding the incorporation of reports by reference is not the equivalent of a finding), *overruled by implication in part on other grounds by In re B.O.A.*, 372 N.C. 372 (2019) (*see In re S.G.*, 268 N.C. App. 360 (2019) (recognizing *In re B.O.A.* overruled *In re H.H.*)); *In re A.S.*, 190 N.C. App. 679 (2008) (explaining that the trial court's finding that the statements in the reports were true did not constitute independent findings and did not tell the appellate court on which statements the court relied), *aff'd per curiam*, 363 N.C. 254 (2009); *In re L.B.*, 181 N.C. App. 174 (2007) (holding that the trial court properly incorporated and made findings of fact based on DSS and guardian ad litem reports).

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**Resource:** For a discussion on the admission versus distribution of court reports and competent evidence, see Timothy Heinle, *What the N.C. Supreme Court's Ruling in In re S.M. may mean for Court Reports In Abuse, Neglect, and Dependency Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (March 10, 2021).

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## 7.3 Best Interests of the Child

The court's decisions related to disposition center on the determination of what is in the child's best interests. *See In re J.H.*, 373 N.C. 264 (2020). North Carolina appellate cases have referred to "best interests" as the "polar star" of the Juvenile Code. *See In re T.H.T.*, 362 N.C. 446, 450 (2008); *In re R.T.W.*, 359 N.C. 539, 550 (2005), *superseded by statute in part as*

*stated by In re A.S.M.R.*, 375 N.C. 539 (2020); *In re Montgomery*, 311 N.C. 101, 109 (1984). See also section 7.1.B, above, discussing purposes of disposition.

As applied to abuse, neglect, or dependency proceedings, there is no specific definition of "best interests" in the Juvenile Code or elsewhere. The determination of best interests is in the trial court's discretion. *In re H.L.*, 256 N.C. App. 450 (2017). An appellate court reviews a trial court's best interests determination for an abuse of discretion. *See, e.g., In re K.P.*, 383 N.C. 292 (2022); *In re B.C.T.*, 265 N.C. App. 176 (2019); *In re J.W.*, 241 N.C. App. 44 (2015) (holding no abuse of discretion when the trial court kept the children in DSS custody rather than return the children to respondent mother's custody); *In re D.S.A.*, 181 N.C. App. 715 (2007) (holding that trial court's determination that it was not in child's best interest to be placed in paternal grandparents' custody was not an abuse of discretion). A trial court abuses its discretion when its "ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.*, 373 N.C. at 268.

A determination that a particular disposition is in a child's best interests is a conclusion of law that must be supported by findings of fact based on competent evidence in the record. *See In re B.C.T.*, 265 N.C. App. 176 (holding findings of fact do not support the conclusion of law; child's express preference is not controlling on the court when making a best interests determination); *In re L.M.*, 238 N.C. App. 345 (2014); *In re Helms*, 127 N.C. App. 505 (1997). In an appellate review, the trial court's findings are not viewed in isolation but instead are considered as part of the totality of all the court's findings. *See In re C.P.*, 252 N.C. App. 118 (2017) (affirming permanent plan of guardianship based on child's best interests; findings of mother's progress should not be viewed in isolation and did not contradict other findings that it was not in child's best interests to return home). The court of appeals has stated that "[a] 'conclusory recitation' of the best interests standard, without supporting findings of fact, is not sufficient" as "magic words", without evidence to support findings of fact, to support the related conclusions of law. *In re B.C.T.*, 265 N.C. App. at 188.

What follows are a few of many cases discussing the court's determination of best interests. However, nearly all appellate cases discussing the sufficiency of the evidence to support a dispositional decision either discuss or mention best interests. Many of these are cited in other sections of this Chapter and elsewhere in this Manual.

- Where a sixteen-year-old child had been in and out of foster care during his life, his mother had made some progress, and the child desired to return to his mother, it was not error for the trial court to conclude that it was nevertheless in the child's best interest to appoint the foster father as the child's guardian. The trial court's findings provided sufficient evidence that the plan for guardianship was in the child's best interest and that the respondent mother could not adequately care for him. *In re L.M.*, 238 N.C. App. 345.
- There was insufficient evidence to support a conclusion that the change in custody from father to mother was in the child's best interest where the only relevant findings were that the child was not totally happy in her current residence; she missed her animals, her mother, her grandfather, and her stepfather (two of whom had neglected her); and she said she was glad that her biological father was in her life. The appellate court also found fault with an indication from the transcript that the principal basis for the change in custody was

the fact that the father was unmarried, citing *Stanley v. Illinois*, 405 U.S. 645 (1972), which explicitly rejected this line of reasoning. *In re H.S.F.*, 177 N.C. App. 193 (2006).

- Evidence of a strong emotional bond between parent and child is critically important but not determinative on the issue of best interest. *In re Shue*, 63 N.C. App. 76 (1983), *aff'd as modified on other grounds*, 311 N.C. 586 (1984).
- Respondent mother asserted that the trial court erred in failing to consider the progress she had made and in ceasing reunification efforts, but the court of appeals found that while the trial court had considered her progress, there was not enough progress for the court to be assured that the children could be safely returned to her care, and the best interests of the children, not the rights of the parents, were paramount. *In re T.K.*, 171 N.C. App. 35, *aff'd per curiam*, 360 N.C. 163 (2005).
- Findings were insufficient to support the best interest determination as to custody outside of respondent's home, where findings were that respondent made diligent efforts to comply with the DSS case plan; both DSS and the GAL noted the absence of safety concerns in the home and recommended custody with respondent; and the trial court's findings that indicated some reservations about custody with the respondent were inadequate to support the best interest determination. *In re J.B.*, 197 N.C. App. 497 (2009).
- Where the trial court had made a finding that return of the child was contrary to the best interests of the child in that conditions leading to removal had not been alleviated, the court of appeals had difficulty determining which "condition" the trial court was referring to. One of the possibilities was the trial court's finding of "sexual deviancy" and that the respondent was bisexual, where the trial court had characterized this lifestyle as "abnormal" and "not conducive to child rearing." The court of appeals rejected such a finding, stating that it is not self-evident that sexual orientation has an adverse effect on the welfare of the child. Even if the court's finding that the parent is bisexual and people who surround her "engage in a similar lifestyle" were supported by evidence, there were no findings linking these circumstances to a negative impact on the child's welfare or on her parents' abilities to care for her. The court of appeals held that these conditions could not be a basis to take custody away from the child's biological parents. *In re M.M.*, 230 N.C. App. 225, 235 (2013) (see also cases cited therein).

## 7.4 Dispositional Alternatives: Placement and Custody

The Juvenile Code refers to placement and custody options as "dispositional alternatives" and enumerates five such options. *See* G.S. 7B-903(a). The court may combine any of those options when it finds the disposition is in the child's best interests. G.S. 7B-903(a); *In re J.M.*, 384 N.C. 584 (2023). The various dispositional alternatives are available at any dispositional hearing. G.S. 7B-903(a); 7B-906.1(d1), (i). Over the course of the dispositional phase of the case, the child's placement is likely to change given the court's consideration of the child's best interests and need for a safe, permanent home within a reasonable period of time and the progress the parents made (or not) in correcting the conditions that led to the child's adjudication and/or removal. *See* G.S. 7B-906.1; 7B-906.2. The supreme court has stated that "[t]he trial court's dispositional choices…are reviewed only for abuse of discretion,

as those decisions are based upon the trial court's assessment of the child's best interests." *In re K.P.*, 383 N.C. 292, 302 (2022) (quoting *In re L.R.L.B.*, 377 N.C. 311, 315) (2021)).

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**Legislative Note:** Effective for all actions pending or filed on or after October 1, 2015, the dispositional alternatives statute, G.S. 7B-903, was amended. The prior version of the statute identified various dispositional alternatives, including the out-of-home placements discussed here, and contained introductory language in G.S. 7B-903(a)(2) about a "juvenile who needs more adequate care or supervision or who needs placement." The court of appeals interpreted that introductory language to be a finding the trial court had to make when it ordered one of the dispositional alternatives that followed the language. *See In re S.H.*, 217 N.C. App. 140 (2011) (reversing and remanding dispositional order for failing to include required finding). That introductory language was removed by S.L. 2015-136, sec. 10, and presumably the finding is no longer required in an order entered pursuant to the current G.S. 7B-903(a)(2).

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## A. Dismiss or Continue the Case

**1. Dismiss the case**. An adjudication that a child is abused, neglected, or dependent allows the court to exercise jurisdiction to decide and enter dispositional orders. If the court determines at the conclusion of a dispositional hearing that there is no need for the continued exercise of jurisdiction by the court, the court has the option to dismiss the case. G.S. 7B-903(a)(1). In practice, this means that the court enters an order that terminates its jurisdiction in the juvenile proceeding. *See* G.S. 7B-201(a); 7B-906.1(d2); *McMillan v. McMillan*, 267 N.C. App. 537 (2019) (juvenile order expressly terminated its jurisdiction under G.S. 7B-201). With an order that terminates the court's jurisdiction, the legal status of the child and custodial rights of the parties revert to the status that existed before the filing of the petition, unless an applicable law or valid order in another civil proceeding provides otherwise, a G.S. Chapter 50 custody order was entered pursuant to G.S. 7B-911, or a termination of parental rights was ordered. G.S. 7B-201(b). See Chapter 3.1.C (relating to ending jurisdiction).

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**Practice Notes:** Dismissal at an initial dispositional hearing is uncommon but is not prohibited. It may be appropriate when circumstances since the filing of the petition have changed to the point that there is no longer a need for court involvement.

For cases on the review hearing track, where custody has never been removed from a parent, guardian, or custodian, absent exceptional circumstances, the court may either dismiss the case by terminating its jurisdiction or waive further review hearings while retaining jurisdiction when the parent, guardian, or custodian has completed the court-ordered services and the juvenile is residing in a safe home. G.S. 7B-906.1(d2).

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**2. Continue the case.** The court has the dispositional alternative of continuing the case to "allow the parent, guardian, custodian, caretaker or others to take appropriate action." G.S. 7B-903(a)(1). For example, the court may find that the family is on track for addressing the conditions that led to the adjudication and may want to give the family more time to progress before entering a dispositional order or dismissing the case. Similarly, the court might hold a dispositional hearing in which the evidence shows what the needs are, what the parents have accomplished so far, and what remains to be accomplished, then continue the case to a

specific time to evaluate the parents' continued progress and determine an appropriate disposition.

Note that this dispositional outcome is rarely used and is different from the continuance of a dispositional hearing. *See* G.S. 7B-803. See section 7.2.A, above (discussing the statutory time requirements for dispositional hearings), and Chapter 4.5 (relating to continuances).

### B. In-Home Supervision and Services

The Juvenile Code sets out a preference for the use of in-home supervision and community-level services by stating that in dispositions "the initial approach should involve working with the juvenile and juvenile's family in their own home." G.S. 7B-900. The court may require that the child be supervised in their own home by DSS or another individual who is available to the court, subject to any conditions the court places on the parent, guardian, custodian, or caretaker. G.S. 7B-903(a)(2); *see In re T.D.N.*, 286 N.C. App. 650 (2022) (facts show at one point child ordered in DSS custody with placement in mother's home with mother supervised at all times by a DSS vetted and approved individual, which was in-home nursing care and father); *In re A.D.*, 278 N.C. App. 637 (2021) (initial dispositional order retained legal custody with children's custodian (respondent) subject to custodian's compliance with the court-ordered protection plan).

When a child remains in the home but is supervised by DSS or another individual, the court may or may not order that DSS or the other individual have legal custody of the child while the parent, guardian, or custodian retains physical custody. If legal custody is ordered to DSS or another individual, that portion of the order would be made under a different dispositional alternative, and the dispositional order would combine the two applicable dispositional alternatives. G.S. 7B-903(a)(2) and (4). In those cases where custody is ordered to DSS or another individual, custody is removed from the parent, guardian, or custodian, placing the case on the permanency planning hearing track. However, if the parent, guardian, or custodian is subject to supervision while retaining custody (presumably legal and physical custody) of the juvenile, the case would proceed on the review hearing track. G.S. 7B-906.1(a). See section 7.2.A., above (discussing review and permanency planning hearings).

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**Practice Notes:** Although permitted by the Juvenile Code, it is uncommon for the court to order someone other than DSS to provide in-home supervision. When that condition is ordered, typically the parent is residing with the person responsible for providing the supervision (e.g., the maternal grandmother, respondent mother, and child reside in the same home, and mother is ordered to be under the supervision of maternal grandmother). The child's guardian ad litem (GAL) cannot serve in the in-home supervisory role, as it is beyond the statutory scope and authority of a GAL's role. *See* G.S. 7B-601.

In-home supervision may be ordered as an initial disposition, but it also may be used later when the court orders the child's return home from foster care or other placement.

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## C. Parent and Out-of-Home Placement Generally

Parent and out-of-home placement dispositional alternatives include

- DSS custody with or without placement authority;
- custody with a parent, relative, other suitable person, or private agency offering placement services; or
- appointment of a guardian.

G.S. 7B-903(a)(4)–(6).

A dispositional alternative may be the child's continuation in the legal and physical custody of the parent. G.S. 7B-903(a)(4); *see In re M.H.*, 272 N.C. App. 283 (2020) (ordering at initial disposition legal and physical custody with mother, whom juvenile was residing with when DSS filed the petition). When the child continues in the home of the parent and custody has not been removed from that parent, the case proceeds on the review hearing track. *See* G.S. 7B-906.1(a). When custody is not ordered to a parent, the child is in an out-of-home placement.

**1. Placement priority: parents and relatives**. Throughout the Juvenile Code it is clear that the preferred placement and permanent plans are the child's remaining in or returning to the child's own home when the child can be safe there. For example, the definition of "reasonable efforts" requires the "diligent use of preventive or reunification services by a department of social services . . . ." G.S. 7B-101(18). Another example requires that a dispositional order that places or continues the child's out-of-home placement must include findings that the child's continuation in or return to their own home would be contrary to their health and safety. G.S. 7B-903(a2). The Juvenile Code defines "return home or reunification" as the child's placement "in the home of either parent" or "in the home of the guardian or custodian from whose home the child was removed by court order." G.S. 7B-101(18c). Given the definition of "return home or reunification", when the court makes a placement decision, it is required to consider placement with a parent. *See also* G.S. 7B-100 (in the purposes statute, referring to rights of child and parents and preventing inappropriate separation of child from parents); 7B-906.2(b) (reunification must be a permanent plan absent statutorily required written findings). The appellate courts have also identified the Juvenile Code's prioritization of the child's placement with their parents. *See In re T.W.*, 250 N.C. App. 68, 71 (2016) and *In re J.D.C.*, 174 N.C. App. 157, 161 (2005) (both quoting *In re Shue*, 311 N.C. 586, 596 (1984), "[i]t is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)") (decided under prior statutory language where there was not review hearing and permanency planning hearing tracks).

When placement with either parent is not possible and the court is ordering the child's out-of-home placement, the court must first consider placement with a relative. *See* G.S. 7B-903(a1). The court of appeals has stated that the Juvenile Code and "precedents mandate 'a preference, where appropriate, to relative placements over non-relative, out-of-home

placements' . . . to maintain familial bonds." *In re A.N.T.*, 272 N.C. App. 19, 27, 29 (2020) (citations omitted). Note that the Juvenile Code does not define "parent," and some appellate opinions have referred to parents as relatives. *See In re J.D.R.*, 239 N.C. App. 63, 73 (2015) (stating the "disposition order removed custody from Mother and placed custody with a relative, Father"). Effective October 1, 2021, the Juvenile Code defines "relative" as "an individual directly related to the juvenile by blood, marriage, or adoption, including, but not limited to, a grandparent, sibling, aunt, or uncle." G.S. 7B-101(18a).

As between a parent and relative, parents, not relatives, have paramount constitutional rights to care, custody and control of their children. *See Graham v. Jones*, 270 N.C. App. 674 (2020) (reversing civil custody order and dismissing custody action; order awarded full physical and legal custody to mother and visitation to grandparents when parent had not acted inconsistently with her parental rights and was not unfit; holding grandparents are third parties to the parent-child relationship and do not have rights that are constitutionally protected; trial court erred when it granted visitation to grandparents); *Eakett v. Eakett*, 157 N.C. App. 550, 554 (2003) (stating in grandparent visitation case, "[t]he grandparent is a third party to the parent-child relationship. Accordingly, the grandparent's rights to the care, custody and control of the child are not constitutionally protected while the parent's rights are protected"). See Chapter 2.4.A (discussing constitutional rights of parents).

At the initial dispositional hearing, the court must inquire into efforts made by DSS to identify and notify parents, relatives, or other persons with legal custody of the child's siblings as potential resources for placement or support. G.S. 7B-901(b). *See also* G.S. 7B-506(h)(2) (similar inquiry at the nonsecure custody stage of the case). At any dispositional hearing, for a court or DSS to consider placement with the child's relative, the relative must be willing and able to provide proper care and supervision in a safe home. *See* G.S. 7B-903(a1); *In re N.K.*, 274 N.C. App. 5 (2020) (court must first make this determination before considering whether the relative placement is in the child's best interests). "Safe home" is defined as "a home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." G.S. 7B-101(19). See section 7.4.D, below (related to custody and placement authority of DSS).

In ordering an out-of-home placement, when there is a willing and able relative with a safe home, the child must be placed with that relative unless the court finds that placement with the relative is contrary to the best interests of the child. G.S. 7B-903(a1). *See In re A.N.T.*, 272 N.C. App. 19 and *In re L.C.*, 253 N.C. App. 67 (2017) (both holding failure to make the finding that a relative placement is contrary to the child's best interests will result in a remand; both vacating and remanding permanency planning orders that did not make required findings about relatives who were identified as possible placement options). Relative priority applies to initial, review (if custody is ordered removed from the parent, guardian, or custodian), and permanency planning hearings and placements. *In re E.R.*, 248 N.C. App. 345 (2016); *In re L.L.*, 172 N.C. App. 689 (2005) (decided under previous statute), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). Placement with an out-of-state relative requires compliance with the Interstate Compact on the Placement of Children (ICPC). G.S. 7B-903(a1). This requirement may result in a delay and/or the inability to order the placement. *See In re J.D.M.-J.*, 260 N.C. App. 56 (2018) (vacating and

remanding permanency planning order awarding custody to out-of-state relatives for failure to comply with ICPC as DSS had not received ICPC notice from receiving state); *In re L.L.*, 172 N.C. App. 689 (ICPC home study not approved until review hearing). See section 7.4.H, below (discussing the ICPC).

The following cases are examples of decisions that reviewed the child's out-of-home placement in a non-relative's home.

- In an initial dispositional hearing, the court determined there was not a relative who could provide proper care and supervision in a safe home. One suggested relative was denied by DSS after a home assessment. The other relative had had placement of the juveniles, but the juveniles were removed by court order after safety concerns arose. The court was not required to make a best interests determination regarding relative placement. *In re N.K.*, 274 N.C. App. 5 (overruling argument that court erred in not making best interest findings).
- In a permanency planning order, although paternal grandmother was interested in being a placement for the juvenile, the court, in ordering placement with nonrelatives, did not make any findings that rejected grandmother as "both willing and able to provide proper care and supervision in a safe home for her granddaughter." *In re A.N.T.*, 272 N.C. App. at 27 (vacating and remanding permanency planning order).
- In a permanency planning order awarding guardianship to a non-relative, the court did not make any findings about the paternal grandmother who both parents preferred as a placement option. Such a finding is statutorily required before the child is placed with a non-relative. *In re D.S.*, 260 N.C. App. 194 (2018) (vacating and remanding order for a new permanency planning hearing).
- When the Indian Child Welfare Act applies, the court is not relieved of its obligation to make the finding under the Juvenile Code that it is contrary to the child's best interests to place the child with a relative when ordering placement with a nonrelative. *In re E.R.*, 248 N.C. App. 345 (2016) (reversing and remanding permanency planning order of guardianship to children's current non-relative placement provider without making findings of fact as to why the children's placement with their paternal grandmother was not in their best interests).
- Where the father had not submitted to a paternity test and DSS had not completed a home study of the father's parents, it was not an abuse of discretion for the court to determine that placement with the father's parents was not in the child's best interest, since the child could be subject to removal from that home. *In re D.S.A.*, 181 N.C. App. 715 (2007).
- It was error for the court to place a child with foster parents without finding that it was contrary to the child's best interests to place her with willing relatives. *In re L.L.*, 172 N.C. App. 689, *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446.
- The trial court did not abuse its discretion in determining that placement with grandparents was not in the child's best interest, where the parents and grandparents were unwilling to consider or explain the source of an infant's serious injuries while in the parents' care, the grandparents were unlikely to deny their daughter access to the child, and it had been recommended that the grandfather attend intensive outpatient substance use treatment. *In re B.W.*, 190 N.C. App. 328 (2008).

When placement with a relative is considered, the court must also determine whether it is in the child's best interest to stay in the community where the child lives, discussed in subsection 3, below.

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**Practice Notes:** When the court considers whether a relative is "willing and able" to care for a child, it is important for the court to make this determination in relation to the child's specific needs (e.g., special needs) and the relative's ability to meet those needs. *See In re N.N.B.*, 271 N.C. App. 199 (2020) (in TPR proceeding on ground of dependency, aunt was willing and available but was not an appropriate placement as child's psychiatric needs required a Level IV PRTF (psychiatric residential treatment facility); noting aunt may be appropriate for a child who does not require a high level of care).

When a child is placed with a relative, depending on the duration of the placement, whether the placement becomes the child's permanent plan, and the location of the placement, a post-adjudication change in venue of the action may be appropriate. See Chapter 3.5.C (discussing change in venue). However, if the relative lives outside of North Carolina, the court cannot transfer the action to another state. When more than one state is involved, the Uniform Child-Custody Jurisdiction Enforcement Act (UCCJEA) applies, and the UCCJEA requires that a court action be initiated in the other state. See Chapter 3.3.C (discussing jurisdictional issues under the UCCJEA).

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

For information, resources, statistics, and summaries of state laws that address kinship (relative) placements including foster care licensing and financial assistance, see the Grandfamilies.org website.

CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Placement of Children with Relatives" (2023).

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For additional discussions about the involvement of relatives in an abuse, neglect, or dependency action, see Chapters 2.2.B.10 (identifying relatives), 2.3.C.3 (discussing relatives and the Foster Care Children's Bill of Rights), and 5.5.C.3 and 5.6.E (discussing similar inquiry at and placement priority at the nonsecure custody stage of the proceeding).

**2. Sibling placement.** Both the Juvenile Code and federal law have a preference for placing siblings together so long as it is not contrary to the safety or well-being of any of the siblings. *See* G.S. 7B-903.1(c1); 42 U.S.C. 671(a)(31). When a juvenile is not placed with a parent or relative, the court may consider placement with nonrelative kin or *other persons with legal custody of the juvenile's sibling*. G.S. 7B-903(a4) (emphasis added); *see* G.S. 7B-101(15a) (definition of "nonrelative kin").

When siblings are removed from their home and placed in DSS custody, DSS is required to make reasonable efforts to place the siblings together. Reasonable efforts are not required if DSS documents that placing the siblings together would be contrary to the safety or well-being of any of the siblings. If reasonable efforts to place the siblings together are unsuccessful, DSS must make reasonable efforts to provide for frequent sibling visits and ongoing interaction between the siblings. These efforts are not required if DSS documents that visits or interaction between the siblings would be contrary to the safety or well-being of any of the siblings. G.S. 7B-903.1(c1); *see* 42 U.S.C. 671(a)(31); G.S. 7B-505(a1) (applying at nonsecure custody stage).

Although there are limits on the number of children who can reside in a licensed foster home, G.S. 131D-10.2C authorizes an exception when there is written documentation submitted to the agency with authority to license the foster home that siblings are being placed together. Documentation in each sibling's out-of-home family services plan must include specific information identified in G.S. 131D-102.C. *See* S.L. 2023-82.

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**Practice Note:** Although the Juvenile Code has a preference for joint sibling placement when siblings are placed in DSS custody, the federal preference is not limited to that one dispositional alternative. In considering the best interests of the juveniles, the court may consider a joint sibling placement when ordering any dispositional alternative regardless of whether the children are in DSS custody, e.g., guardianship. If the siblings are not placed together, the court may also order sibling visitation. *See* G.S. 7B-905.1 (the court shall order visitation that is in the juvenile's best interests).

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**3. Child's own community.** In determining an out-of-home placement, the court must consider whether it is in the child's best interests to stay in the child's own community rather than move elsewhere. G.S. 7B-903(a1).

In addition, federal education and child welfare laws require that DSS consider the child's educational stability and make assurances that the placement considers the appropriateness of the child's current educational setting and proximity of the placement to the school the child was enrolled in at the time of each placement (school of origin). DSS must ensure that the child remains in the school of origin, unless there is a determination that it is not in the child's best interests to do so. For a discussion of the Every Student Succeeds Act and the Fostering Connections to Success and Increasing Adoptions Act as related to school stability, see Chapter 13.7.

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**Practice Note:** The court's consideration of community ties is broad and suggests that the court might examine factors such as

- the child's school, the impact of changing schools, and the best interest determination as to whether the child will remain in their school of origin;
- ties with or support from siblings, relatives, or friends in the community and the impact that relocating could have on such ties or support;
- the child's current receipt of services from specific individuals or agencies in the community and the impact of disrupting, changing, or losing relationships with particular

service providers;
- the child's involvement with specific activities or groups and the impact of changing or losing that involvement (e.g., music, scouts, church, sports, etc.); and
- the location of the parents and the effect of a particular placement on the child's ability to see their parents (note that the court is required to address visitation under G.S. 7B-905.1; see section 7.5, below, for a discussion of visitation).

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**4. Required findings.** Anytime a dispositional order places or continues the child in an out-of-home placement, the order must contain findings

- that the child's continuation in or return to their own home would be contrary to the child's health and safety (G.S. 7B-903(a2));
- whether DSS has made reasonable efforts to prevent the need for the child's placement, based on the child's health and safety as the paramount concern when determining if the efforts were reasonable (note that in cases where reasonable efforts were precluded because of an immediate threat of harm to the child, the order must have a finding that placement is necessary to protect the child) (G.S. 7B-903(a3); *see In re N.B.*, 240 N.C. App. 353 (2015) (holding findings that DSS made reasonable efforts to eliminate the need for an out-of-home placement were supported by evidence of social worker's contact with mother since previous review hearing that showed social worker was involved in scheduling and supervising visits between mother and children and social worker informed mother of children's medical issues and coordinated contact between mother and children's therapist)); and
- addressing visitation (G.S. 7B-905.1).

See sections 7.9, below (discussing reasonable efforts), and 7.5, below (discussing visitation).

**5. Meaning and impact of "custody" and "placement".** The term "custody" is not defined in the Juvenile Code and is used in more than one way. "Custody" may refer to a temporary legal arrangement or a more permanent arrangement. Temporary custody, nonsecure custody, and custody granted at disposition are all different. *See, e.g.,* G.S. 7B-500; 7B-505; 7B-903(a)(4). See also Chapter 5.5 (discussing temporary and nonsecure custody).

A custody order entered after adjudication (whether at an initial dispositional, review, or permanency planning hearing) is a dispositional alternative. Only an order entered at a permanency planning hearing can award custody as the permanent plan for the child. *See In re D.C.*, 183 N.C. App. 344 (2007) (decided under prior law) (holding that it was error for the trial court to order a permanent plan of custody when the parent had not received notice that the hearing was a permanency planning hearing). See also section 7.10, below, related to permanent placement options. "Custody" may refer to a civil custody order entered pursuant to G.S. 7B-911 and G.S. Chapter 50. See section 7.10.B.4(a), below, relating to civil custody orders.

Although the term "nonsecure custody" is only used in Article 5 of the Juvenile Code, which addresses the pre-adjudication phase of a case, the trial court's use of the term "non-secure custody" at disposition when ordering the dispositional alternative of custody to DSS was not

error as the term " 'non-secure custody' merely distinguishes the custody from 'secure custody,' in which the juvenile is placed in a detention facility or other government-supervised confinement." *In re J.W.*, 241 N.C. App. 44, 52 (2015) (rejecting respondent's argument that the court erred in awarding DSS "non-secure custody" at the dispositional hearing; note that the distinction between "nonsecure custody" granted in the pre-adjudication phase of the case under Article 5 of the Juvenile Code and the use of the term "non-secure custody" in the dispositional phase was not addressed); *see also In re K.S.D-F.*, 375 N.C. 626 (2020) (in case where permanency had been achieved and court waived further hearings, trial court had jurisdiction to enter nonsecure custody order on motion for review filed by DSS; court had retained jurisdiction over the case after permanency was achieved).

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**Practice Note:** Assumptions tend to be made concerning the authority and duties that accompany an order giving one "custody," but because "custody" does not have one distinct meaning and is not statutorily defined, it is important for the court to make its intentions clear when ordering custody. To avoid problems surrounding the meaning of custody, the court should anticipate questions that might arise with respect to the authority or duties of the person or agency receiving "custody" and specifically address them in the order. Note that "custodian" is defined as "the person or agency that has been awarded *legal custody* of a juvenile by a court." G.S. 7B-101(8) (emphasis added).

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Legal custody, physical custody, placement, and placement authority are not the same thing and are not automatically tied to one another. Consider the following:

- The Juvenile Code refers to "custody or placement responsibility" with DSS. *See* G.S. 7B-903.1(b), (c), (d); 7B-905.1(b), (b1); 7B-906.1(f), (*l*). *See also* G.S. 7B-507(a)(4) (an order placing child in nonsecure custody with DSS shall specify that placement and care are DSS's responsibility unless the court orders a specific placement). Presumably when an order grants custody to DSS without designating a specific placement, DSS has both custody and placement responsibility with the authority to make placement decisions and arrangements for the child's placement. When the order awards custody to DSS and specifies the child's placement, DSS is awarded legal custody without the authority to make decisions related to the child's placement.
- The court may not order physical custody with one person and physical placement without custody with another person. The phrase "physical custody" is used "to refer to the rights and obligations of the person *with whom the child resides*." *In re H.S.F.*, 177 N.C. App. 193, 202 (2006) (emphasis in original) (quoting 3 Suzanne Reynolds, Lee's *North Carolina Family Law* § 13.2, at 13–16 (5th ed. 2002)). An order granting physical custody to mother and physical placement with paternal grandfather without a grant of custody purported to grant physical custody to a parent who did not reside with the child and physical placement of the child with a person with no custodial rights or the legal ability to make daily decisions regarding the child's welfare. *In re H.S.F.*, 177 N.C. App. 193. However, a person with custody may choose to place the child with a selected caretaker while still retaining custody. In *In re D.L.*, 215 N.C. App. 594 (2011), the court of appeals held the trial court did not abuse its discretion when it sanctioned respondent mother's decision that the children would live with relatives while keeping custody with the respondent mother rather than ordering custody to DSS or the relative caretakers. The

court of appeals distinguished *In re D.L.* from *In re H.S.F.* and emphasized that the trial court had not ordered physical placement of the children with the relative but had approved the mother's decision about where the children should be placed.

- Although legal custody is not defined, North Carolina appellate courts have described legal custody as referring "generally to the right and responsibility to make decisions with important long-term implications for a child's best interests and welfare." *In re M.M.*, 249 N.C. App. 58, 61 (2016) (quoting *Peters v. Pennington*, 210 N.C. App. 1, 17 (2011)).
- A court may order joint legal custody to both a parent and another person, with physical custody to the other person. See section 7.4.E.4, below (discussing joint custody).

### D. DSS Custody

The court may order the child to be placed in DSS custody in the county of the child's residence. If the child's residence is in another state, the court may place the child in the physical custody of DSS in the county where the child is found so that DSS can return the child to the responsible authorities in their home state. G.S. 7B-903(a)(6). Determining residence may involve looking at whether North Carolina is the child's home state. When the child's home state is North Carolina, the provision addressing the return of the child to the child's home state does not apply, even if the parents live in another state. *See In re N.P.*, 376 N.C. 729 (2021) (affirming TPR, rejecting mother's argument that in underlying neglect action child should have been transferred to Virginia, the state where the parents live; North Carolina was the child's home state; child resided in North Carolina with a person acting as her parent for more than six months before the TPR petition was filed).

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**Practice Notes:** A court in North Carolina cannot "transfer" custody of the child to an agency in another state unless a valid order giving that agency custody is already in place. DSS should contact the appropriate child welfare agency in the other state to discuss the assumption of custody by that agency. However, neither DSS nor the court can force a person or agency in another state to initiate a court action in that state. If a custody action already exists in the child's home state, procedures in G.S. Chapter 50A, the UCCJEA, should be used. The court cannot "transfer" an entire abuse, neglect, or dependency proceeding to another state. See Chapter 3.3 (explaining the UCCJEA).

In an abuse, neglect, or dependency action, if the adjudication occurred somewhere other than the county of the child's legal residence (e.g., a DSS petitioner is the county DSS where the child was found and it filed the court action in its own county) or if the disposition involves placement in a different county, involvement of another county DSS and/or a transfer of venue may be appropriate. See Chapters 3.5.C (discussing transfer of venue) and 4.7 (discussing intervention).

**Resource:** For DSS policies and procedures related to child placement, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning" and "Cross-Function," available here.

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**1. Notice to GAL of change in placement.** When DSS has custody or placement responsibility for a child, it must notify the child's guardian ad litem (GAL) of an intention to change the child's placement unless prevented from giving notice by emergency circumstances. When emergency circumstances exist, DSS must notify the GAL or the attorney advocate within seventy-two hours of a placement change unless local rules require that notification be made sooner. G.S. 7B-903.1(d).

**2. Court approval for return home and/or unsupervised visitation.** Once the court orders that DSS has custody of or placement responsibility for a child, DSS may not permit unsupervised visitation with, or a return of physical custody to, the parent, guardian, custodian, or caretaker from whom the child was removed without a hearing at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(c); *see* G.S. 7B-101(19) (definition of "safe home"). S*ee also In re H.S.F.*, 177 N.C. App. 193 (2006) (holding that it was error for the court to return the child home to the mother without finding that the child would receive proper care and supervision in a safe home); *In re A.S.*, 181 N.C. App. 706 (holding that it was not error for the trial court to limit visitation or refuse to return the children home where the trial court found that the conditions that led to removal from the home were still present and that return to the home would be contrary to the welfare of the children), *aff'd per curiam*, 361 N.C. 686 (2007). See section 7.5, below (discussing visitation).

DSS may not recommend unsupervised visits with, or the child's return of physical custody to, the removal parent, guardian, custodian, or caretaker without first observing two visits between the child and the removal parent, guardian, custodian, or caretaker. Each observed visit must be at least one hour, and the observations must be at least seven days apart. Both observations must occur within thirty days before the hearing where DSS recommends unsupervised visits with or the return of physical custody to the removal parent, guardian, custodian, or caretaker. DSS must provide documentation of the observed visits to the court for the court to consider when DSS is recommending unsupervised visits with, or the return of physical custody to, the removal parent, guardian, custodian, or caretaker. G.S. 7B-903.1(c).

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**Practice Notes:** The statutory provision requiring DSS observations of visits between the child and the removal parent, guardian, custodian, or caretaker is referred to as "Rylan's Law."

This requirement only applies to DSS recommendations made about unsupervised visits or the child's return to the physical custody of the *removal* parent, guardian, custodian, or caretaker and does not apply to the *non-removal* parent, guardian, custodian, or caretaker. Additionally, this requirement only applies to DSS. The child's guardian ad litem, a parent, or any other respondent may recommend and present evidence at a dispositional hearing that supports unsupervised visits with, or the child's return of physical custody to, the removal parent, guardian, custodian, or caretaker without their having observed any visits. The court will base its decision on what it determines is in the child's best interests based on the evidence presented at the hearing.

Because the observations must occur within thirty days of the hearing where DSS is making the recommendation for unsupervised visits with, or the child's return to, the physical custody of the removal parent, guardian, custodian, or caretaker, any continuance of a hearing will require additional observations made by DSS if the thirty-day window cannot be satisfied before the new hearing date.

**3. DSS authority to consent to child's medical care.** When DSS has custody of a child, unless the court orders otherwise, DSS may arrange for, provide, or consent to the child's

- routine medical or dental treatment or care, including treatment for common pediatric illnesses and injuries that require prompt attention;
- emergency medical, surgical, psychiatric, psychological, or mental health care or treatment; and
- testing and evaluation in exigent circumstances.

G.S. 7B-505.1(a); 7B-903.1(e). *See also In re Stratton*, 153 N.C. App. 428 (2002) (holding that parents whose children were adjudicated neglected and dependent and placed in foster care did not have the authority to object to DSS's decision to immunize the children; decided before the enactment of G.S. 7B-505.1, effective for all cases pending or filed on or after October 1, 2015, which requires DSS to obtain a court order or authorization from the child's parent, guardian or custodian to immunize a child when it is known that the parent has a bona fide religious objection to the standard schedule of immunizations).

For all other medical care or treatment, DSS must obtain authorization to consent to the child's treatment from the child's parent, guardian, or custodian. If the parent, guardian, or custodian does not authorize DSS to consent (or does not consent themselves), DSS must obtain a court order that authorizes the director to provide consent for any nonroutine or nonemergency medical care for a child in its custody. There must be a hearing, and the court must find by clear and convincing evidence that the care, treatment, or evaluation that DSS is requesting the authority to consent to is in the child's best interests. G.S. 7B-505.1(c); 7B-903.1(e). There is a non-exhaustive list in G.S. 7B-505.1(c) of the type of treatment and care that necessitates DSS obtaining a court order authorizing it to consent to that treatment for the child.

When care or treatment is provided to a child in DSS custody, DSS must make reasonable efforts to (1) promptly notify the parent, guardian, or custodian that the care will be or has been provided and (2) give frequent status reports on the care and treatment provided to the child. G.S. 7B-505.1(d); 7B-903.1(e). The parent, guardian, or custodian has a right to copies of any records or results of medical evaluations when the parent, guardian, or custodian requests those records from DSS; however, there is an exception for a Child Medical Evaluation or records prohibited from disclosure by G.S. 122C-53(d). G.S. 7B-505.1(d); 7B-903.1(e). *See* S.L. 2023-96, enacting G.S. 108A-75.4 incorporating G.S. 7B-505.1 for a child medical evaluation conducted by a Children's Advocacy Center and amending G.S. 7B-505.1(f), effective July 1, 2024. In addition, the health care provider who treats the child must disclose confidential information about the child to the parent, guardian, or custodian and to DSS unless a court order or federal law prohibits such disclosure. G.S. 7B-505.1(f); 7B-

903.1(e). *See* S.L. 2023-96, amending G.S. 7B-505.1(f) to address child medical evaluations performed by a provider rostered with the North Carolina Child Medical Evaluation Program, effective July 1, 2024.

Note that the medical evaluations and treatment discussed in G.S. 7B-505.1 differ from the court's authority to order that the child receive an evaluation and necessary treatment pursuant to G.S. 7B-903(d). See section 7.6, below (discussing court-ordered evaluations and treatment of the child).

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**Resource:** For more information about the medical consent statute when children are ordered in DSS custody, G.S. 7B-505.1, see Sara DePasquale, *New Law: Consenting to Medical Treatment for a Child Placed in the Custody of County Department*, UNC SCH. OF GOV'T: COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG (Nov. 6, 2015).

**NCDHHS DSS Forms:**

- DSS-1812, General Authorization for Treatment and Medication.
- DSS-1812ins, General Authorization for Treatment and Medication Instructions.

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**4. Reasonable and prudent parent standard.** Effective October 1, 2015, North Carolina adopted the federal "reasonable and prudent parent standard" required by the Preventing Sex Trafficking and Strengthening Families Act. See Chapter 1.3.B.10 (discussing the federal law and its impact on North Carolina law). The "reasonable and prudent parent standard" is "characterized by careful and sensible parental decisions that are reasonably intended to maintain the health, safety, and best interests of the child while at the same time encouraging the emotional and developmental growth of a child that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities." G.S. 131D-10.2A(a); 42 U.S.C. 675(10)(A).

Unless the court orders otherwise, a placement provider for a child in DSS custody (e.g., a relative or foster parent) must use the reasonable and prudent parent standard to provide or withhold permission related to the child's participation in normal childhood activities. The placement provider does not need prior approval from DSS or the court. *See* G.S. 7B-903.1(b); 131D-10.2A(c), (e). Normal childhood activities include overnight activities that are not in the direct supervision of the placement provider for periods up to seventy-two hours; for example, a childhood sleepover. G.S. 131D-10.2A(e); *see* 42 U.S.C. 671(a)(24). If the court determines that it is not in the child's best interests for a placement provider to make these decisions, it shall order alternative parameters for the approval of a child's participation in normal childhood activities. G.S. 7B-903.1(b).

DSS is authorized by statute to make decisions for a child in its custody that are generally made by a child's custodian, unless federal law prohibits DSS from exercising that authority. G.S. 7B-903.1(a); *see* G.S. 131D-10.2A(c); 7B-906.1(*l*). For example, a DSS representative is prohibited from making decisions as the child's parent under the federal Individuals with Disabilities in Education Act (IDEA) regarding special education eligibility and services even though DSS may make other educational decisions, such as which school the child enrolls in.

See Chapter 13.7 (discussing the Every Student Succeeds Act regarding school placement decisions) and 13.8 (discussing IDEA). The court may delegate any part of the authority granted to DSS to the child's parent, foster parent, or other individual. G.S. 7B-903.1(a).

At a permanency planning hearing for a child in DSS custody who is at least 14 years old, the court must make an inquiry and specified findings related to the reasonable and prudent parent standard and participation in age- or developmentally-appropriate activities. *See* G.S. 7B-912(a). See section 7.8.C.9, below (discussing required findings at permanency planning hearing).

As part of the recognition and acceptance of the reasonable and prudent parent standard for children in foster care, amendments were made to laws outside of the Juvenile Code to address barriers that existed for teens in foster care who sought to obtain a driver's license. *See* G.S. 20-11 (application for driver's license); 48A-4 (purchase of automobile insurance).

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**Practice Note:** It may be helpful at a child and family team meeting to discuss and review "The Reasonable and Prudent Parenting Activities Guide" created by the North Carolina Department of Health and Human Services, Division of Social Services. Through this meeting, the parties may learn whether a disagreement exists warranting court intervention. The court may address the issue raised before it by delegating or limiting a placement provider's or DSS's authority over certain decisions, such as a child's participation in a contact sport, staying overnight at a particular individual's home, or attending a specific religious service. It may be also helpful for the court and others to know what activities the child was engaged in to ensure the child's participation may continue.

**Resources:**
For more information about the reasonable and prudent parent standard, see

- DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.
- Sara DePasquale, *Children in Foster Care, "Normal Childhood Activities," and the "Reasonable and Prudent Parent" Standard*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 16, 2015).

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## E. Custody with a Parent, Relative, Other Suitable Person, or Private Agency

**1. Custody to a parent, relative, other suitable person, or private agency.** The court may order that the child be placed in the custody of "a parent, relative, private agency offering placement services, or some other suitable person." G.S. 7B-903(a)(4). This gives the court broad authority to place custody with someone other than DSS. If custody is ordered to a parent, guardian, or custodian such that the juvenile has not been removed from the home, the case proceeds on the review hearing track. If, however, the child has been removed from the custody of a parent, guardian, or custodian, the case proceeds on the permanency planning hearing track.

Custody with a non-parent that is designated as a permanent placement must be made in the context of a permanency planning hearing. See sections 7.2.A.3, above; 7.8.C, below

(discussing permanency planning); and 7.10.B.4, below (discussing custody as a permanent plan). As a permanent plan, the best interests of the child standard is not applicable unless the court concludes that the parents are unfit, have neglected the child, or have acted inconsistently with their constitutionally protected status as parents. See section 7.10.B.5, below.

However, any time the court orders custody with a parent or other appropriate person, it must determine whether jurisdiction in the juvenile proceeding should be terminated and custody awarded through a G.S. Chapter 50 order using the procedure of G.S. 7B-911. This occurs when the case is on the review hearing or permanency planning hearing track. *See* G.S. 7B-906.1(d2) (applying G.S. 7B-911 to review hearings). If custody is ordered to a parent or to a person the child was living with when the petition alleging abuse, neglect, or dependency was filed, the procedures of G.S. 7B-911 do not require that placement with that parent or person be first designated the child's permanent plan. G.S. 7B-911(c)(2)b. This means the court may terminate its jurisdiction and enter a G.S. Chapter 50 custody order prior to a permanency planning hearing. See section 7.10.B.4–5 below, for a discussion of G.S. 7B-911 procedures and the conclusion about the parents' constitutional rights before custody to a third party is ordered.

See section 7.3, above (relating to the court's focus on the child's best interests in determining out-of-home placement).

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**Practice Notes:** When the court retains jurisdiction, DSS remains a party even when custody has been ordered to another person (including the parent) and is responsible for scheduling hearings pursuant to G.S. 7B-906.1(a). G.S. 7B-906.1(b). *See* G.S. 7B-401.1(a). The court should make clear its expectations with respect to DSS's supervising the child's placement, providing services, and preparing reports for the court.

The Juvenile Code defines a "custodian" as the person or agency who has been awarded legal custody of a child by a court. G.S. 7B-101(8). Before October 1, 2013, the definition of "custodian" also included a person other than the child's parent or legal guardian who assumed the status and obligation of a parent without being awarded legal custody by a court. This part of the definition was removed by S.L. 2013-129, sec. 1. A person who would have satisfied that criteria is now considered a "caretaker." There are some appellate opinions that were decided under the former language of the statute that refer to what is now considered a "caretaker" as a "custodian."

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**(a) Parent.** The provision allowing custody to a parent may apply in various circumstances, including when

- a child remains in the custody of a parent, placing the case on the review hearing track;
- a child is removed from the home of one parent (the "removal parent") and placement with the other parent (the "non-removal parent") is appropriate;
- the child has been in the custody of someone other than a parent and the court determines that custody should be returned to the parent (but see section 7.4.D.2, above (relating to requirements before DSS may recommend returning physical

custody of the child to the removal parent)); or
- one parent needs a court order of custody to establish and protect their rights to the child in relation to the other parent.

The Juvenile Code prioritizes reunification with a parent (as discussed in section 7.4.C, above). It is error for the court to fail to consider giving custody to a parent where placement with a parent is a possibility. *See In re S.J.T.H.*, 258 N.C. App. 277 (2018) (reversing initial dispositional order granting custody to DSS; remanding to enter new order granting father, the non-removal parent, custody absent findings he acted inconsistently with his parent rights); *In re Eckard*, 148 N.C. App. 541 (2002) (holding that the trial court erred when it refused to consider whether the biological father of the child, who had entered the case late, was a candidate for custody of the child after it ceased reunification efforts with the mother). See section 7.10.B.5, below (discussing the inapplicability of the best interest standard between a parent and non-parent when there is a fit and able parent).

**(b) Relative.** When custody is not ordered to a parent, willing relatives who can provide a safe home are always the preferred out-of-home placement option unless the court finds that the placement is contrary to the child's best interest. G.S. 7B-903(a1); *In re D.S.*, 260 N.C. App. 194 (2018); *In re E.R.*, 248 N.C. App. 345 (2016); *see* G.S. 7B-101(18a) (definition of "relative"). See section 7.4.C, above (preference for relatives).

**(c) Other suitable person.** The "catch-all" provision in G.S.7B-903(a)(4) permits the court to place custody with "some other suitable person." Nonrelative kin, a person with legal custody of the child's sibling, friends of the family, or others can be given custody of the child if deemed "suitable" by the court. *See* G.S. 7B-800.1(a)(4); 7B-901(b) (court inquiry about notification to other persons with legal custody of the child's siblings as potential resource for placement and support); *see also* G.S. 7B-101(15a) (definition of "nonrelative kin").

**(d) Private agency.** While custody with a "private agency offering placement services" is permissible, it would be rare for the court to order this instead of ordering custody with DSS.

**2. Verification required**. Before the court orders custody to an individual who is not the child's parent, the Juvenile Code requires the court to verify that the person receiving custody of the child understands the legal significance of the placement and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4); 7B-906.1(j). See section 7.4.G, below (discussing the verification requirement in greater detail).

**3. Return to caregiver with violent history.** When a child is removed from the home due to physical abuse, DSS must conduct a review of the background of the alleged abuser, and if there is a history of violent behavior against people, DSS must petition the court to order the alleged abuser to submit to a mental health evaluation. G.S. 7B-302(d1); 7B-503(b). When the court has determined the child suffered physical abuse by that person, before it may order the

child returned to that person's custody, the court must consider the opinion of the mental health professional who performed the evaluation. G.S. 7B-903(b).

**4. Joint custody is permissible.** The court may order joint custody. In the case of *In re B.G.*, 197 N.C. App. 570 (2009), the trial court awarded joint legal custody of a child to her father and her maternal aunt and uncle, giving physical custody to the aunt and uncle. The court of appeals rejected the father's argument that joint legal custody was not an authorized dispositional alternative after reviewing G.S. 7B-903(a) and finding it allowed the trial court to combine any of the applicable dispositional alternatives and did not prohibit joint legal custody. (The permanency planning order awarding joint custody was reversed, however, because the trial court's findings of fact were insufficient to support application of the best interests standard as there were no findings about whether the father acted inconsistently with his parental rights; see section 7.10.B.5, below (discussing required findings addressing parents' constitutional rights)). *See In re J.M.*, 384 N.C. 584, 592 (2023) (stating "the court may select among or combine various alternatives for disposition…").

**5. Changes to the custody order.** When the court orders custody, the court may order a new dispositional alternative that changes custody based on the child's best interests pursuant to a G.S. 7B-906.1 hearing. The court is not required to hold a modification hearing based upon a motion to modify the existing custody order because of changes in circumstances or the needs of the juvenile brought pursuant to G.S. 7B-1000. *See In re J.S.*, 250 N.C. App. 370 (2016) (decided under prior version of G.S. 7B-1000). See section 7.8.E, below (discussing G.S. 7B-1000).

**6. Consideration of transfer to civil custody action**. Whenever the court places custody with a parent or other appropriate person, the court is required to determine whether jurisdiction in the juvenile proceeding should be terminated and custody of the child awarded to the parent or other appropriate person under G.S. Chapter 50 civil custody provisions. G.S. 7B-911(a). The court is not required to make a finding about whether jurisdiction in the juvenile proceeding should be terminated and the action transferred to a G.S. Chapter 50 custody proceeding. *In re Y.I.*, 262 N.C. App. 575 (2018). Transferring the abuse, neglect, or dependency action to a civil custody case pursuant to G.S. 7B-911 is appropriate when the need for state intervention through a juvenile court action has ended, but there is a need to have a custody order remain in effect. See section 7.10.B.4(a), below, for details of G.S. 7B-911.

## F. Guardianship

**1. Appointment.** The appointment of a guardian of the person for the juvenile is a dispositional alternative. G.S. 7B-903(a)(5). The court may appoint a guardian of the person when it finds that it would be in the best interests of the child. G.S. 7B-600(a). However, guardianship as a permanent plan may be ordered only in the context of a permanency planning hearing. See sections 7.2.A.3, above; 7.8.C, below (discussing permanency planning); and 7.10.B.3, below (discussing guardianship as a permanent plan). When guardianship is a permanent plan, the best interests standard is not applicable unless the court concludes that the parents are unfit, have neglected the child, or have acted inconsistently with their constitutionally protected status as parents. *Cf. In re S.J.T.H.*, 258 N.C. App. 277 (2018)

(reversing *initial dispositional order* of DSS custody when court did not make findings about father's paramount constitutional rights); *In re K.C.*, 288 N.C. App. 543 (2023), *supersedeas allowed* (N.C. June 8, 2023) (vacated initial dispositional order that placed the juvenile in the temporary custody of relatives after conducting a de novo review of the trial court's determination that the father acted inconsistently with his parental rights and holding the findings do not support that conclusion; there is a dissent in part that the determination about the parent's constitutional rights was unnecessary and improper at initial disposition since that is a temporary and not permanent order; as of the date of this publication, this opinion is currently before the supreme court. See section 7.10.B.5, below.

See sections 7.3, above (relating to the court's focus on best interests in determining out-of-home placement), and 7.4.C.1, above (discussing placement priority and relatives).

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**Practice Note:** Guardianship may be ordered as a temporary measure, as a disposition, or as a permanent plan. *See In re E.C.*, 174 N.C. App. 517 (2005) (a guardian may be appointed at any time in an abuse, neglect, or dependency proceeding when the court finds it is in the child's best interests); *see also In re H.L.*, 256 N.C. App. 450 (2017) (guardianship is permitted by G.S. 7B-903(a)(5) at the initial disposition). In addition to a dispositional alternative, G.S. 7B-600(a) authorizes the court to appoint a guardian of the child's person when no parent appears at a hearing with the child.

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**2. Verification required**. Before the court appoints as a guardian of the child's person an individual who is not the child's parent, the Juvenile Code requires the court to verify that the proposed guardian of the person understands the legal significance of the appointment and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4); 7B-600(c); 7B-906.1(j). See section 7.4.G, below (discussing the verification requirement in greater detail).

**3. Role of guardian.** "Guardian" is not defined by the Juvenile Code, but the governing statute, G.S. 7B-600, specifies the guardian's roles and responsibilities. A guardian of the person appointed for the child pursuant to G.S. 7B-600

- operates under the supervision of the court, with or without bond;
- files reports only when required by the court;
- has care, custody, and control of the child;
- may arrange a suitable placement for the child;
- may represent the child in any legal action in any court; and
- may consent to certain actions on the part of the child in place of the parent, including (i) marriage; (ii) enlisting in the military; (iii) enrollment in school; and (iv) necessary remedial, psychological, medical, or surgical treatment.

G.S. 7B-600(a). Note that marriage emancipates the juvenile and results in the termination of the court's jurisdiction in the abuse, neglect, or dependency proceeding. *See* G.S. 7B-3509; 7B-201(a).

**Practice Notes**: In addition to its meaning under the Juvenile Code, the term "guardian" can be used in relation to a person appointed by the clerk of superior court, pursuant to G.S. Chapter 35A, as guardian of the person, guardian of the estate, general guardian, ancillary guardian, or standby guardian of a minor. A guardian appointed under G.S. 7B-600 in an abuse, neglect, or dependency action does not have all the rights and responsibilities as a guardian appointed for the child pursuant to G.S. Chapter 35A in a proceeding before the clerk of superior court. A G.S. 7B-600 guardian is not a "guardian of the estate" with authority to manage the child's property, estate, or business affairs. *See* G.S. 35A-1202(9); *see also* G.S. 35A-1221 through -1228 (process and criteria for appointment of guardian of estate for a minor). Unlike a guardian of the person appointed by the clerk pursuant to G.S. Chapter 35A, a G.S. 7B-600 guardian does not have authority under the Juvenile Code or the adoption statutes to consent to the child's direct placement adoption or execute a relinquishment to an agency for the child's adoption. *See* G.S. 48-1-101(8) (definition of "guardian").

Additionally, a guardian appointed under G.S. 7B-600 is completely different from the child's guardian ad litem (GAL) appointed pursuant to G.S. 7B-601. See Chapter 2.3.D (discussing the child's GAL). The term "guardian", by itself, does not refer to a GAL appointed pursuant to G.S. 7B-601, G.S. 7B-602, or Rule 17 of the Rules of Civil Procedure. Appointment of a guardian pursuant to G.S. 7B-600 does not substitute for the appointment of a GAL in the abuse, neglect, dependency, or termination of parental rights action.

**4. Duration of the guardianship.** The authority of the guardian continues until the guardianship is terminated by court order; the court terminates its jurisdiction in the abuse, neglect, or dependency action; or the child is emancipated or reaches the age of 18, whichever occurs first. G.S. 7B-600(a); *see* G.S. 7B-201(a) (termination of jurisdiction); Article 35 of G.S. Chapter 7B (emancipation). When guardianship is for a temporary period or is ordered as a disposition that is not the permanent plan, the court may terminate the guardianship based on a determination that it is no longer in the child's best interests. *See* G.S. 7B-600. *See also In re J.D.C.*, 174 N.C. App. 157 (2005) (holding the G.S. 7B-600(b) criteria to terminate a guardianship order that is the child's permanent plan is inapplicable to the termination of a dispositional order that appointed a guardian but was not the child's permanent plan); *In re E.C.*, 174 N.C. App. 517 (2005) (holding only where guardianship is the permanent plan is the court required to make a finding under G.S.7B-600(b) before terminating the guardianship). When guardianship is awarded as the permanent plan for the child, the guardian automatically becomes a party to the case and the guardianship can be terminated only when one of the certain circumstances specified in G.S. 7B-600(b) is satisfied. *See* G.S. 7B-600(b); 7B-401.1(c) (parties). See section 7.10.B.3, below (discussing details related to guardianship as a permanent plan).

### G. Verification of Understanding of Legal Significance and Adequate Resources

Before placing a child in the custody or guardianship of someone other than a parent, the court must verify that the person receiving custody or guardianship understands the legal significance of the placement or appointment and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4) and (5); 7B-600(c). This same

determination is required by G.S. 7B-906.1(j) when the court awards custody or appoints a guardian at a review or permanency planning hearing.

The Juvenile Code does not require the court to make specific findings related to the verification. *In re K.P.*, 383 N.C. 292 (2022); *In re J.M.*, 271 N.C. App. 186 (2020), *In re J.D.M.-J.*, 260 N.C. App. 56 (2018), and *In re N.B.*, 240 N.C. App. 353 (2015) (all citing *In re J.E.*, 182 N.C. App. 612 (2007)). However, appellate cases have required that there be competent evidence in the record to support the court's verification. *See In re K.P.*, 383 N.C. 292 (reversing in part and remanding to court of appeals; holding testimony of DSS social worker and proposed custodian was sufficient to verify understanding of legal significance and adequate resources); *In re P.L.E.*, ___ N.C. App. ___, 891 S.E.2d 613 (2023) (holding no competent evidence to support verification of understanding of legal significance when testimony only focused on financial resources and a financial affidavit that included a description of legal responsibilities was unsigned); *In re J.M.*, 271 N.C. App. 186 (holding testimony of foster father, foster mother, and social worker about the foster parents' understanding of their appointment was sufficient evidence to support the court's findings, such that the trial court performed its duty to verify); *In re J.D.M.-J.*, 260 N.C. App. 56 (vacating custody order; evidence that DSS was in the process of assessing the feasibility of the placement and had no concerns about the proposed custodians' income without proof of the amount of income was too vague and was insufficient to support the findings; nor was there evidence through testimony or a signed guardianship agreement that supported the finding of their understanding of the legal significance of the placement); *In re P.A.*, 241 N.C. App. 53 (2015) (holding that this requirement was not met when there was inadequate evidence in the record as to the proposed guardian's resources; the proposed guardian's own unsworn testimony asserting that her resources were sufficient was simply her subjective opinion and was not evidence of her actual resources); *In re J.E.*, 182 N.C. App. 612 (holding in the context of a permanency planning hearing that the trial court's determination was satisfactory where it had received into evidence and considered a home study conducted by DSS indicating that grandparents had a clear understanding of the enormity of the responsibility of caring for the children, that they were committed to raising the children, and that they were financially capable of providing for the children).

Testimony from the proposed custodian or guardian is not required as the statute does not require that the proposed guardian or custodian demonstrate to the court their understanding; however, it may be a best practice. *In re S.B.*, 268 N.C. App. 78 (2019). The proposed guardians or custodians do not have to "demonstrate to the trial court a practical application of this understanding prior to or during the [permanency planning] hearing." *In re B.H.*, 278 N.C. App. 183, 190 (2021) (citation omitted). Competent, reliable, and relevant evidence may include testimony from others, e.g., the social worker or a court summary/report. *See In re B.H.*, 278 N.C. App. 183 (verification of co-guardians' understanding based on one proposed guardian's testimony that both understood (referred to "we") and social worker's testimony and home study that both guardians understood; affirmative answer of "yes" to question of whether guardians understood was sufficient); *In re S.B.*, 268 N.C. App. 78 (verification of guardian's understanding based on social worker's testimony and DSS summary submitted to the court was sufficient evidence).

The court's verification that the person receiving custody or guardianship understands the legal significance and their responsibilities applies to each person receiving custody or guardianship. *In re P.L.E.*, ___ N.C. App. ___, 891 S.E.2d 613; *In re B.H.*, 278 N.C. App. 183. In the case *In re L.M.*, 238 N.C. App. 345 (2014), the trial court properly verified this as to the foster father, but not the foster mother, although both were being awarded guardianship. The order of guardianship for the foster father was affirmed, but the order of guardianship for the foster mother was vacated and remanded.

The trial court must make an independent determination based on the evidence that is presented that the resources available to the potential guardian or custodian will be adequate. *In re P.A.*, 241 N.C. App. 53. Effective October 1, 2019, the Juvenile Code was amended to state "the fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." G.S. 7B-906.1(j); *see* G.S. 7B-600(c) (applying to guardianship only); 7B-903(a)(4) (applying to custodian only); *see also In re K.P.*, 383 N.C. 292 (reversing in part and remanding to court of appeals; verification was satisfied; juvenile resided with proposed custodians for seven months and testimony addressed financial resources of proposed custodians). Prior to this amendment, the Juvenile Code did not address any factors for determining whether the proposed guardian or custodian will have adequate resources. In addressing the 2019 legislative amendment, the court of appeals has stated that evidence of the juvenile's stable placement with the custodian or guardian for at least six consecutive months "does not *per se* compel a conclusion that the 'person receiving custody [or guardianship] . . . understands the legal significance of the placement.' " *In re J.C.-B.*, 276 N.C. App. 180, 188 (2021).

The court of appeals has recognized that the case law examining a trial court's determination of adequate resources has "addresse[d] this situation from numerous angles, none of them precisely on point." *In re N.H.*, 255 N.C. App. 501, 503 (2017). In some cases, the court of appeals has looked to whether there was evidence of monthly income and expenses and whether the income was sufficient to meet the expenses. *See In re K.B.*, 249 N.C. App. 263 (2016) (holding insufficient evidence to make verification); *In re N.H.*, 255 N.C. App. 501 (although a close call, affirming verification of adequate resources); *In re T.W.*, 250 N.C. App. 68 (2016) (reversing order; resources were inadequate). When determining whether the income is adequate, applying for assistance programs or accepting financial support from family members does not preclude a verification of adequate resources. *See In re S.B.*, 268 N.C. App. 78 (finding of adequate resources was based on part-time income, receipt of support from family, and awareness of eligibility to seek child support from child's parents); *In re C.P.*, 252 N.C. App. 118 (2017) (noting proposed guardian's seeking TANF benefits demonstrated his preparation for the financial burden of caring for the child). In other cases, the court has looked to whether the evidence shows that the proposed guardian or custodian will have adequate resources moving forward, rather than allowing the trial court to rely on the past care provided to the child. *See In re N.H.*, 255 N.C. App. 501 (Dillon, J., concurring). The 2019 statutory amendments allow for the court's consideration of past care provided to the child but does not preclude the evidence and consideration of current and future resources.

**Practice Note:** The court should consider both income and services available to the child and caregiver. Some caregivers may not be willing to apply for available monetary benefits, such as TANF (Temporary Assistance for Needy Families), because doing so will create a reimbursement obligation for the child's parents and a duty on the part of the caregiver to cooperate with efforts to obtain support from the child's parents. (Note, however, that a caregiver may be excused from the duty to cooperate if they can provide evidence to support a claim that doing so would not be in the child's best interest.) Some services and benefits, such as scheduling of mental health or therapy appointments, may not continue when DSS is no longer the child's custodian. The caregiver may need to apply for other services, such as transportation or day care, which had been provided without cost when the child was in DSS custody and now may become an expense for the caregiver.

**Resource:** For a discussion about appellate opinions addressing the verification of adequate resources (prior to the October 1, 2019 statutory amendments), see Sara DePasquale, *Show Me the Money: Verification of Adequate Resources Required when Ordering Custody or Guardianship to a Non-Parent in an A/N/D Action*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 25, 2017).

## H. Interstate Compact on the Placement of Children

**1. Introduction and purpose**. The Interstate Compact on the Placement of Children (ICPC) governs the placement of children in foster care, adoptive homes, and institutions across state lines. The ICPC is a binding statutory agreement that has been adopted in all fifty states, the District of Columbia, and the U.S. Virgin Islands. It consists of ten different articles, and in North Carolina, it is codified at Article 38 of the Juvenile Code, G.S. 7B-3800 *et seq.* The district court has exclusive original jurisdiction over ICPC proceedings. G.S.7B-200(a)(1).

The ICPC establishes uniform legal and administrative procedures the states follow when placing children in out-of-state foster care and preadoptive placements. Its purpose is to protect children by having the two involved states (the sending state and the receiving state) work together to ensure appropriate foster care and adoption placements of children across state lines. The ICPC provides a framework for exchanging information, evaluating potential placements and the child's circumstances, and ensuring that the child receives adequate care and protection in the receiving state while the sending state retains jurisdiction over the child. *See* G.S. 7B-3800, Art. 1, Art. V.

This section provides only an overview of the ICPC and is not intended to be a comprehensive guide.

**2. State and agency structure.** Each state has a Compact Administrator. *See* G.S. 7B-3806. A national association of Compact Administrators referred to as the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) adopts regulations that are key to interpreting and applying the ICPC. G.S. 7B-3800, Art. VII. There are twelve regulations. Effective October 1, 2019, the AAICPC regulations were enacted into North Carolina law through G.S. 7B-3807, but the codifying statute was repealed effective October 1, 2021. *See* S.L. 2019-172, sec. 11 (enacting G.S. 7B-3807) and S.L. 2021-100, sec.

19 (repealing G.S. 7B-3807). As a result, the regulations appear to provide guidance but are not binding law in North Carolina.

North Carolina's Compact Administrator and staff are located in the Division of Social Services within the state's Department of Health and Human Services (DHHS). The Compact Administrator and staff handle all incoming and outgoing referrals for interstate placements. Although DHHS manages the incoming and outgoing referrals, the county DSS initiates the incoming referrals and assesses the receiving referrals. When a county DSS is considering an out-of-state foster care or preadoptive placement, it should not delay making a referral under the ICPC. *See In re K.B.*, 290 N.C. App. 61 (2023) (discussion of DSS delay in seeking an ICPC home study after an out-of-state relative was identified and trial court orders included a provision that this relative be investigated as a placement option).

DHHS oversees the investigation of proposed placements in North Carolina to determine whether the placement is consistent with or contrary to the child's best interests. The ICPC office at DHHS has the authority to request necessary supporting or additional information and may treat the ICPC request as expired if that information is not provided to the office within ten business days from the date of the notice for more information. G.S. 7B-3808.

**3. Source of requirements and procedures.** As an interstate compact, the ICPC does not require congressional approval. *In re R.S.*, 470 Md. 380 (2020). Requirements and procedures related to the ICPC are determined by the ten ICPC statutory articles found in state law at G.S. 7B-3800 and by G.S. 7B-3808. The North Carolina Administrative Code also includes provisions addressing interstate placement of children under the ICPC. *See* 10A N.C.A.C. Subchapter 70C; 10A N.C.A.C 70H.0301 and .0407(e). In addition to state law, there are the twelve AAICPC regulations, some of which have undergone amendments to clarify certain issues. Effective October 1, 2019, those regulations were enacted into law in North Carolina through the creation of G.S. 7B-3807, but G.S. 7B-3807 was repealed effective October 1, 2021. *See* S.L. 2019-172, sec. 11 (enacting G.S. 7B-3807) and S.L. 2021-100, sec. 19 (repealing G.S. 7B-3807). Some of the amended regulations conflict with earlier North Carolina appellate court decisions interpreting the ICPC statute. Finally, the North Carolina DHHS Division of Social Services policies and procedures provide a framework for compliance with the ICPC.

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**Resources:**

For North Carolina's policies, procedures, and explanations related to interstate placement, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Interstate Compact on the Placement of Children," available here.

Additional information about the ICPC in North Carolina, including Compact Administrator contact information, can be found on the "North Carolina" page on the ICPC State Pages website. Information for other states can also be found on the ICPC State Pages website by viewing the map and clicking on a particular state.

Information about the ICPC and the AAICPC regulations can be found on the American Public Human Services Association website under "Ways to Engage", "Affinity Groups" "AAICPC".

**4. Applicability of ICPC.** The ICPC applies to the interstate placement of a child made by a "sending agency"

- in foster care (which may be a child-caring institution) or
- as a preliminary placement to a possible adoption.

G.S. 7B-3800, Art. III(a); *see* G.S. 7B-3800, Art. II(d) (definition of "placement").

A "sending agency" includes DSS, the court, a child-placing agency, or a person (which may be a parent or guardian). G.S. 7B-3800, Art. II(b).

However, the ICPC does not apply to the sending or bringing of a child into a receiving state by the child's

- parent,
- stepparent,
- grandparent,
- adult sibling,
- adult uncle or aunt, or
- nonagency guardian

when the child is left with any of these relatives or a nonagency guardian in the receiving state. G.S. 7B-3800, Art. VIII. The exclusion from application of the ICPC occurs only when both the person making the placement and the placement recipient belong to the above classes of individuals.

The ICPC also does not apply to

- a juvenile who is adjudicated delinquent but is not being ordered to an out-of-state institution (e.g., the juvenile is placed on probation);
- any child placed in a facility for the sole purpose of education;
- any child placed in a medical facility for the sole purpose of medical care;
- any child placed pursuant to any other interstate compact (e.g., Interstate Compact on Juveniles, Interstate Compact on Mental Health); or
- child placements handled in court cases of paternity, divorce, custody, and probate.

*See* G.S. 7B-3800, Art. II(d) (definition of "placement"), Art. VI.

**5. The ICPC and placement with a non-removal parent or relative.** In 2004 the North Carolina Court of Appeals held that the provisions of the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother. *In re Rholetter*, 162 N.C. App. 653 (2004). In that case, the children had been removed from the

custody of the father and stepmother in North Carolina, based on adjudications of abuse and neglect, and placed in DSS custody. The court eventually gave custody to the mother who lived in South Carolina, even though two home studies by South Carolina declined to approve the placement. The court of appeals held that the award of full custody to a non-removal parent was not a "placement" under the ICPC. The court found that the language of the ICPC statute was "clear and unambiguous" and that, because the trial court had not placed the children "in foster care or as a preliminary [placement] to adoption," the ICPC did not apply. *In re Rholetter*, 162 N.C. App at 664.

However, in 2011 and 2012, the AAICPC substantially rewrote some of the ICPC regulations, including Regulation 3, which covers definitions, placement categories, applicability, and exemptions. Under Regulation 3, placement categories that require compliance with the ICPC include placements with parents and relatives when the other parent or relative is not making the placement. The definition of "foster care" was also amended to include 24-hour-a-day care provided by the child's parent by reason of a court-ordered placement (and not by virtue of the parent-child relationship). However, the amended regulations exempt the ICPC from a placement with a parent if all of the following apply:

- the parent is not the parent from whom the child was removed;
- the court has no evidence that the parent is unfit;
- the court does not seek any evidence from the receiving state regarding the parent's fitness; and
- the court relinquishes jurisdiction over the child immediately upon placement with the parent.

The language of the AAICPC regulations that include parents in the definition of "foster care" has been rejected by some state courts as contravening the plain meaning of the statutory terms of "foster care" and "adoption" and exceeding the scope of the ICPC statute. Applying the same reasoning as the North Carolina Court of Appeals in *In re Rholetter*, 162 N.C. App. 653, the Connecticut Supreme Court concluded that the ICPC's language, "placement in foster care or as a preliminary to a possible adoption," does not include placement with a noncustodial parent. *See* G.S. 7B-3800, Art. III. The court went on to say that "it is reasonable to conclude that the drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests." *In re Emoni W.*, 48 A.3d 1, 8 (Conn. 2012). The court went on to state in a footnote that even if the ICPC regulations have the force of law, they are invalid under state law to the extent they impermissibly expand the scope of the Compact itself. *In re Emoni W.*, A.3d at 7 n.8.

Similarly, the Texas Court of Appeals held the ICPC does not apply to interstate placements of children with their parents. In *In re C.R.-A.A.*, 521 S.W.3d 893 (Tex. App. 2017), the Texas court looked to the Texas version of the ICPC, which specifically refers to out-of-state placements of children into foster care or preliminary to adoptions, and held the unambiguous meaning of the words made the ICPC inapplicable to interstate placements with parents. The Texas court further noted that its conclusion was supported by the state's

statutory definitions of "foster care", foster home", and "adoption". The Texas court also stated the regulation contravened the statutory language.

The Indiana Court of Appeals has also held that the child welfare agency and the trial courts should not be applying the ICPC to out-of-state parents given its previous holding that the regulations exceed the scope of the statute limiting the ICPC to foster care and preadoptive placements, neither of which applies to parents. In 2018, the Indiana court stated, "So, yet again, we hold as plainly and unambiguously as possible, unless and until the statute is amended, the ICPC does not apply to placement with an out-of-state parent." *In re B.L.P.*, 91 N.E.3d 625, 631 (Ind. Ct. App. 2018); *see In re D.B.*, 43 N.E.3d 599 (Ind. Ct. App. 2015).

Maryland joined the states that have held the ICPC does not apply to non-removal parents who lived out of state on the grounds that the regulation as applied to parents (1) impermissibly exceeds the scope of the statute since natural parents do not adopt their own children and foster care involves placement outside of a parent's home and (2) violates the court's constitutional responsibility to safeguard a parent's paramount constitutional rights by transferring the discretion to determine if the parent is fit from the court to a social worker conducting the ICPC home study. *In re R.S.*, 235 A.3d 914 (Md. 2020). Other states have examined the amended regulations and have held the ICPC does not apply to placements with out-of-state parents. *See, e.g., A.G. v. Cabinet for Health and Fam. Serv.*, 621 S.W.3d 424 (Ky. 2021); *In B.H.*, 456 P.3d 233 (Mont. 2020); *In re S.R.C.-Q.*, 367 P.3d 1276 (Kan. Ct. App. 2016); *In re Welfare of Ca.R.*, 365 P.3d 186 (Wash. Ct. App. 2015); *In re Patrick S. III*, 218 Cal. App. 4th 1254 (2013).

In a case involving an out-of-state father who resided in North Carolina, the New York Court of Appeals (which is its highest court) held that the ICPC does not apply to out-of-state noncustodial parents who seek custody of their children. The child had been living in New York with their mother and was ultimately determined to be neglected and placed in the custody of New York DSS. Father, who was residing in North Carolina, sought placement, and the ICPC process was initiated. North Carolina's ICPC authority denied the ICPC request. Later, father sought to obtain custody through a New York custody action, but the case was dismissed because of the denied ICPC. Father appealed and prevailed. The New York court reasoned that (1) the language of the statute applying the ICPC to foster care and preadoptive placements was clear and unambiguous and applies to substitutes for parental care such that the regulation that applies to parents is inconsistent with the statute; (2) the application to noncustodial parents is inconsistent with the requirement that the sending agency continues to have financial responsibility for the support and maintenance of the child while the child is in the placement; and (3) applying the regulation to noncustodial parents is inconsistent with the State's statutory framework in child protection, which prioritizes keeping families together and recognizes the paramount rights of parents to care and custody of their child. *In re D.L. v. S.B.*, 201 N.E.3d 771 (N.Y. 2022).

However, there is a split in the state appellate decisions on this issue as other states have reached the opposite conclusion and apply the ICPC to placements with out-of-state parents that do not meet the exception set forth in the AAICPC regulations. The Arizona Court of Appeals found the trial court was a "sending agency" and held that compliance with the

ICPC regulations was required for placements with parents and relatives if none of the enumerated exceptions applied. *Ariz. Dep't of Econ. Sec. v. Stanford*, 323 P.3d 760 (Ariz. Ct. App. 2014). The court reasoned that the ICPC should be "interpreted liberally because 'the primary purpose of the ICPC is to protect children by making certain they are placed in a safe environment.' " *Ariz. Dep't of Econ. Sec.*, 323 P.3d. at 764-65. The Montana Supreme Court also applied the ICPC to placements with out-of-state parents after noting that "Montana has joined [the ICPC] by statute and for which the Department has adopted by rule the regulations of the Association of the ICPC" when applying AAICPC Regulation 3 to the out-of-state father. *In re J.H.*, 367 P.3d 339, 344 (Mont. 2016); *cf. In B.H.*, 456 P.3d 233. Florida has also held the ICPC applies to out-of-state parents. *Dep't of Child. and Fams. v. C.T.*, 144 So.3d 684 (Fla. Dist. Ct. App. 2014).

To date, North Carolina's appellate courts have not addressed the application of the amended AAICPC regulations to an out-of-state parent. However, *In re Rholetter*, 162 N.C. App. 653, was decided on the language of the statute, G.S. 7B-3800, and did not discuss the AAICPC regulations in effect at the time, which were before the amendments. Regarding "foster care" and parents, a recent North Carolina Supreme Court opinion examining a termination of parent rights (TPR) appeal under G.S. 7B-1111(a)(2) looked to the definition of "foster care" in G.S. 131D-10.2(9) and stated, "the plain meaning of the term 'foster care' presumes that the child has been physically separated and is living apart from his or her parents." *In re K.H.*, 375 N.C. 610, 615 (2020) (reversing TPR; period of time juvenile and minor parent were placed together while in nonsecure custody cannot be included in determinative time period for the juvenile being placed in foster care as required by G.S. 7B-1111(a)(2)). In practice in North Carolina, there is uncertainty about whether the holding of *In re Rholetter* or Regulation 3 (covering definitions, placement categories, applicability, and exemptions) applies to out-of-state parents, resulting in some trial courts applying the holding in *In re Rholetter* and others following Regulation 3.

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**Practice Note:** When the ICPC does not apply, AAICPC Regulation 3 allows a state to request a "courtesy check" of a non-removal parent's home by the receiving state, without invoking the full ICPC home study process. Whether to conduct a courtesy check is in the discretion of the receiving state. When placement with a non-removal parent is made without ICPC compliance or with only a courtesy check, the receiving state has no responsibility for supervising or monitoring the placement.

**Resource:** Sara DePasquale, *A/N/D, ICPC, and Out-of-State Parents: Say What?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 25, 2015).

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The Juvenile Code states that when the court places the child in out-of-home care with a relative outside of North Carolina, that dispositional placement "must be in accordance with the Interstate Compact on the Placement of Children." G.S. 7B-903(a1); *see In re K.B.*, 290 N.C. App. 61 (2023). AAICPC Regulation 3 makes it clear that the ICPC applies to out-of-state placements with relatives. The North Carolina Court of Appeals has addressed the application of the ICPC to relative placement. Although compliance with the ICPC takes time, it is not mutually exclusive of the preference in the Juvenile Code for relative placement. *In re L.L.*, 172 N.C. App. 689 (2005) (holding the trial court must give out-of-

state relatives priority consideration for placement unless it finds such placement is contrary to the child's best interests), *abrogated on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). See section 7.4.C.1, above (discussing placement priority). Although placement with an out-of-state relative cannot occur until the completion of a favorable ICPC home study, "there is no obligation under the ICPC that a home study be completed *to rule out* an out-of-state relative as a placement option." *In re K.B.*, 290 N.C. App. at 65 (emphasis in original) (holding no abuse of discretion in order awarding guardianship to in-state relative with whom the children had been placed for several years without waiting for a completed home study on an out-of-state relative when findings and conclusions supported the guardianship order).

When determining whether the ICPC applies, the court of appeals has looked to whether the dispositional order involves a "placement." In *In re V.A.*, 221 N.C. App. 637 (2012), the court of appeals reversed the dispositional order that awarded legal custody to DSS and placed the child with her maternal great-grandmother in South Carolina when the concurrent permanent plan was reunification and adoption. The court of appeals held the placement fell under the category of both foster care and a placement preliminary to a possible adoption, and in a footnote referred to Regulation 3 regarding foster care. As a result, the placement required strict compliance with the ICPC, which had not happened as the placement had not been approved by South Carolina. In contrast, in *In re J.E.*, 182 N.C. App. 612 (2007), the permanency planning order awarded guardianship, pursuant to G.S. 7B-600, to an out-of-state relative. The court of appeals held the ICPC did not apply because guardianship was not a placement in foster care or preliminary to adoption. The court of appeals also noted that neither G.S. 7B-600 nor the former permanency planning statute (G.S. 7B-907, now G.S. 7B-906.1) refer to the ICPC.

The court of appeals later examined both *In re V.A.* and *In re J.E.* and held that the ICPC applied to out-of-state relatives. In *In re J.D.M.-J.*, 260 N.C. App. 56 (2018), the trial court, in a permanency planning order, awarded custody of the children to relatives who lived outside of North Carolina. That order was vacated due to the failure to comply with the ICPC; North Carolina had not received the required ICPC notice from the receiving state prior to the entry of the order awarding custody to the out-of-state relatives. In *In re J.D.M.-J.*, the court of appeals further identified a conflict between the two earlier opinions, *In re V.A.* and *In re J.E.*, and followed *In re V.A.* because it relied upon an earlier opinion that had been decided before *In re J.E.* *See In re Civil Penalty*, 324 N.C. 373 (1989) (holding a panel of the court of appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court); *Graham v. Deutsche Bank Nat'l Tr. Co.*, 239 N.C. App. 301 (2015) (when there is a conflicting line of cases, the older of the two cases must be followed). However, in *In re J.D.M.-J.*, the court of appeals did not address an even older case that was relied upon in *In re J.E.* or the differences in the relative placement, specifically, whether the placement was meant to be temporary (e.g., foster care) or was the achievement of the child's permanent plan (e.g., guardianship or permanent custody). In the most recent case addressing the ICPC and relative placement, the court of appeals looked to *In re J.E.* and its holding that the ICPC was not required for a guardianship order to an out-of-state relative, and stated in the case before it, where permanent guardianship was ordered, "assuming the ICPC applies." *In re K.B.*, 290 N.C. App. at 65. The dissent, however, discussed how the majority's reliance on *In re J.E.*

was misplaced because of the holding in *In re J.D.M.-J.* and stated "the ICPC definitively applies. . . where there is a potential placement with an out-of-state relative." *In re K.B.*, 290 N.C. App. at 71.

**Resource:** For a further discussion of *In re J.D.M.-J.*, see Sara DePasquale, *The ICPC Applies to an Out-of-State Placement with a Relative in an A/N/D Case, But Is There More to Consider?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Aug. 24, 2018).

**6. The ICPC and visitation.** The ICPC applies only to interstate placements of children, not visits. AAICPC Regulation 9 defines a visit according to the purpose, duration, and intention behind a child's stay. The purpose of a visit is to provide the child with a social or cultural experience of a short duration, such as a camp stay or visit with a friend or relative. A stay for such a purpose that is less than thirty days is presumed to be a visit. A stay of more than thirty days is presumed to be a placement. If, however, for a school-aged child, a stay is more than thirty days but less than the duration of a school vacation period (e.g., forty-five days during a summer break), it can be considered a visit and does not require ICPC approval. A stay that does not have a terminal date will be considered a proposed placement and should not occur without ICPC approval. AAICPC Regulation 9.

If, however, the sending state has requested a home study or supervision and sends the child to stay with the proposed caregiver in the receiving state, there is a rebuttable presumption that it is a placement and not a visit.

Note that if a court in North Carolina does not follow the ICPC requirements, another state can decline to monitor the placement or provide services.

**7. Summary requirements of the ICPC and Regulations.** The sending agency is required to "comply with each and every requirement" set forth in G.S. 7B-3800, Art. III.

**(a) Notice and best interest.** When the ICPC applies, prior to sending or bringing a child from one state to another, the sending agency (which includes the court) must furnish the receiving state with written notice of its intention to send, bring, or place the child in the receiving state. G.S. 7B-3800, Art. III(b) (see the Article for the content of the notice). The receiving state may then request any supporting or additional information it deems necessary. G.S. 7B-3800, Art. III(c); *see* G.S. 7B-3808. The sending agency may not send or bring the child into the receiving state until the receiving state notifies the sending agency in writing that the proposed placement does not appear to be contrary to the interests of the child. G.S. 7B-3800, Art. III(d).

**NCDHHS DSS Form:**
DSS-1837, Interstate Compact on the Placement of Children Request (ICPC 100A) with Instructions.

**(b) Social history, case plan, and review.** The sending agency (e.g., a DSS caseworker) must prepare a packet containing items such as the child's social, medical, and educational history; the current status of any court case involving the child; and information about the

person being considered for placement in the receiving state. The packet will first be sent to the central ICPC office (in North Carolina, the Division of Social Services at DHHS) in the sending state where it will be examined and, if approved, sent to the receiving state. Once it arrives in the receiving state's central ICPC office, the packet will be examined, and if everything is in order it will be sent to the child welfare agency (in North Carolina, the county DSS) office in the community where the prospective placement is located. *See* "ICPC FAQ" on the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) section of the American Public Human Services Association website. *See also* AAICPC Regulation 1 for specific requirements; G.S. 7B-3808 (ICPC office's right to request additional information).

**(c) Reports, recommendations, approval or denial.** The local agency receiving the packet will evaluate the prospective home for placement, and a completed home study report will be sent to the central ICPC office in the receiving state. The home study must be completed by the receiving state within sixty days. *See* 42 U.S.C. 671(a)(26)(A); AAICPC Regulation 2(7). The central ICPC office reviews the report, determines whether ICPC requirements have been met, and either approves or denies the recommendation of the report. If the placement is approved, once all plans and agreements have been completed, the child is moved to the receiving state. The placement may not be approved if the local agency recommends against the placement or the Compact Administrator determines that a lawful placement cannot be completed unless the problems can be remedied. The decision to approve or deny the placement should be made as soon as practicable but no later than 180 days from the receipt of the initial request for a home study. AAICPC Regulation 2(8). If a placement is denied, a request for reconsideration may be made by the sending state within ninety days from the date the receiving state signs the denial of the placement. The receiving state has sixty days to complete its reconsideration. AAICPC Regulation 2(9). Whether the placement is approved or denied, there are requirements related to copies of specific documents and reports that must be sent to the sending or receiving state's central office. *See* "ICPC FAQ"; *see also* ICPC Regulation 1.

**(d) Jurisdiction and responsibility for child under the ICPC.** The sending agency retains jurisdiction over the child to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child until the child is adopted, reaches the age of majority, becomes self-supporting, or is discharged with the concurrence of the receiving state. This jurisdiction includes the power to return the child to the sending state or transfer the child to another location. The sending agency also continues to have financial responsibility for the support and maintenance of the child during the period of placement. However, a public agency may enter into an agreement with an agency in a receiving state to provide services as an agent for the sending agency. G.S. 7B-3800, Art. V. Financial responsibility and agreements between agencies are also addressed in G.S. 7B-3801, 7B-3802, and 7B-3803.

**NCDHHS DSS Form:**
DSS-1838, Interstate Compact Report on Child's Placement Status (ICPC 100B) with Instructions.

**(e) Expedited placement procedures.** An issue with the ICPC is the length of time it can take for states to process cases and approve interstate placements. AAICPC Regulation 7 was adopted to allow for expedited ICPC procedures when a judge finds a child meets the criteria for priority ICPC status.

Criteria for an expedited placement decision are

- the child is under the jurisdiction of the court as a result of a DSS action and has been removed from a parent, and
- the out-of-state placement being considered is with the non-removal parent, a stepparent, grandparent, adult aunt or uncle, adult sibling, or guardian, and
    - the child sought to be placed is four years of age or younger (includes older siblings sought to be placed in the same proposed placement);
    - the child currently is placed in an emergency placement;
    - the child is unexpectedly dependent due to sudden or recent incarceration, incapacitation, or death of a parent or guardian; or
    - the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource.

AAICPC Regulation 7(5). See subsection 5, above (discussing whether the ICPC applies to a non-removal parent).

Regulation 7 outlines the manner in which the process is expedited and includes specific time frames for completing different steps.

**NCDHHS DSS Form:**
DSS-1839, Regulation 7 Form Order For Expedited Placement Decision Pursuant to the ICPC.

**8. Illegal placements.** G.S. 7B-3800, Art. IV addresses placements made in violation of the ICPC. Violations are punishable according to the laws of each state involved. In addition, violations constitute grounds for the suspension or revocation of any license, permit, or other authorization under which the sending agency operates.

## 7.5 Visitation

### A. Order Must Address Visitation When Out-of-Home Placement

Anytime custody is removed from a parent, guardian, or custodian, or placement outside the home is continued, the order must address visitation, which may include no visitation, that is in the child's best interest and consistent with the child's health and safety. G.S. 7B-905.1(a). Visitation is only required to be addressed for a parent, guardian, or custodian. *In re S.G.*, 268 N.C. App. 360 (2019). It is reversible error to not comply with the visitation statute – G.S. 7B-905.1 – in a disposition order. *See, e.g.*, *In re S.G.*, 268 N.C. App. 360; *In re J.D.M.-J.*, 260 N.C. App. 56 (2018); *In re J.R.S.*, 258 N.C. App. 612 (2018) (applying to custodians); *In re*

*J.H.*, 244 N.C. App. 255 (2015).

An appellate court reviews a visitation order for an abuse of discretion. *In re A.J.L.H.*, 384 N.C. 45 (2023) (discussing role of appellate court when reviewing order of visitation); *In re J.L.*, 264 N.C. App. 408 (2019) (order disallowing visitation); *In re Y.I.*,262 N.C. App. 575 (2018) (order setting conditions of visitation); *In re C.S.L.B.*, 254 N.C. App. 395 (2017) (order allowing visitation but delegating judicial function of court to guardians).

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**Practice Note:** Although the court of appeals has interpreted the language of G.S. 7B-905.1 to require the trial court to address visitation with a parent, guardian, or custodian, the trial court is not precluded from ordering visitation with another person that it believes is consistent with the child's health and safety and is in the child's best interests. For example, the child may have a strong bond with a relative, including a sibling with whom the child is not placed. *See* G.S. 7B-903.1(c1) (addressing frequent visitation between siblings who are not placed together).

**Resources**:
For state policy on visitation (parent/child visitation/family time) and sibling visitation, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.

For a discussion about including family pets in visitation, see Sara DePasquale, *Foster Care and Family Time – What about the Pets*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (June 1, 2022).

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The current visitation statute, G.S. 7B-905.1, was enacted by S.L. 2013-129, sec. 24 and applies to all actions pending or filed on or after October 1, 2013. Prior to 2013, visitation was addressed in G.S. 7B-905(c), which had different requirements. Opinions based on the former statute may be based on language that no longer appears in the Juvenile Code. *See In re J.H.*, 244 N.C. App. 255 (addressing change from G.S. 7B-905(c) to 7B-905.1).

Note that G.S. 7B-506(g1) makes clear that G.S. 7B-905.1 provisions regarding visitation apply to orders for continued nonsecure custody. See Chapter 5.5.C and 5.6 (discussing nonsecure custody and continued nonsecure custody).

**1. Minimum outline of visits required**. When visitation is ordered, the order must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b), (c). All three criteria must be ordered. *See In re J.R.*, 279 N.C. App. 352 (2021) (remanding order to specify minimum frequency as the order established supervised visits of four hours per month but did not unambiguously establish the minimum frequency and length of visits); *In re E.P.-L.M.*, 272 N.C. App. 585 (2020) (vacating and remanding order to address frequency and length of visits when mother, a North Carolina resident, was not travelling to Georgia for visitation with child who resided there with father); *In re S.G.*, 268 N.C. App. 360 (2019) (remanding order to address minimum duration of visits); *In re J.D.M.-J.*, 260 N.C. App. 56 (2018) (remanding for compliance with G.S. 7B-905.1; order did not contain minimum length, frequency, or whether visits should be supervised); *In re J.H.*, 244

N.C. App. 255 (2015) (remanding visitation order to comply with G.S. 7B-905.1(c) after the order appealed from failed to establish the duration of the monthly supervised visits between the child and respondent mother). See subsection 4, below, discussing order of no visitation.

The statutory requirement that visitation orders indicate the minimum frequency and length of visits has been interpreted by the court of appeals to mean that the trial court must provide a framework for the visits but that the order itself does not have to include the particular time and place for visits. *In re J.R.*, 279 N.C. App. 352 (order that authorized mother and guardian to determine day and time of each visit was not an abuse of discretion); *In re N.B.*, 240 N.C. App. 353 (2015) (holding the order complied with G.S. 7B-905.1 when it provided for visits at a minimum of one hour once per month, to be supervised by the family therapist, the date and time of which was to be coordinated with the family therapist). *Cf. In re A.P.*, 281 N.C. App. 347 (2022) (recognizing order that awarded custody to father specified minimum frequency and length of visits and visits must be supervised; holding court improperly delegated its authority to father by allowing him to choose location and supervisor when father testified he did not want mother to be part of child's life and did not want to facilitate or supervise the visits).

The minimum outline required by G.S. 7B-905.1 is satisfied when two orders addressing visitation provisions are read together. *See In re J.C.*, 283 N.C. App. 486 (2022) (affirming visitation order when previous order setting forth minimum outline remained in effect); *In re L.Z.A.*, 249 N.C. App. 628 (2016) (affirming order of supervised visitation in accordance with the current plan when the current visitation plan was memorialized in the court's previous order that identified the frequency of two days a week, the duration of two hours per visit, and that supervision was required); *In re J.W.*, 241 N.C. App. 44 (2015) (affirming dispositional order that provided for weekly, supervised visits with the child and stated that all prior orders remain in full force and effect; prior order provided for weekly two-hour supervised visits with one child and weekly one-hour supervised visits with the other child; read together, the orders, complied with G.S. 7B-905.1).

The court may not delegate its judicial function of establishing the minimum outline for visitation by giving discretion to an individual to reduce or change the terms of the visitation. *See In re N.K.*, 274 N.C. App. 5 (2020) (vacating and remanding visitation order; court must exercise its own discretion in establishing minimum outline; order did not deny visitation or establish a minimum outline; order delegated authority to allow visits and set the terms of visitation to three therapists who worked with the mother and children); *In re J.M.*, 273 N.C. App. 280 (2020) (vacating and remanding visitation portion of order for improperly delegating to guardian the unilateral authority to modify the conditions or duration of visits); *In re C.S.L.B.*, 254 N.C. App. 395 (2017) (holding visitation order complied with minimum outline but improperly delegated the court's judicial function to the court-appointed guardians who were authorized to unilaterally modify the visitation based on their "concerns" about mother's substance use or discord with the children's father during the visits); *In re J.D.R.*, 239 N.C. App. 63 (2015) (holding despite a minimum outline for some of mother's visits, the order impermissibly delegated substantial discretion over other kinds of visitation based on her complying with certain conditions). But where a caretaker who is not entitled to visitation

under G.S. 7B-905.1 has an order of no visitation, the trial court did not err when ordering that any contact be recommended by the child's therapist. *In re S.G.*, 268 N.C. App. 360.

A trial court does not abuse its discretion and does not impermissibly delegate its authority by entering a dispositional order that allows DSS to *expand*, not reduce, visitation. *In re K.W.*, 272 N.C. App. 487 (2020) (affirming visitation order; relying on *In re L.Z.A.*, 249 N.C. App. 628, which affirmed an order that provided for the statutory minimum outline and gave DSS discretion to expand visits). In *In re K.W.*, the court of appeals distinguished the discretion given to DSS to expand visits from prior opinions that held the court cannot delegate this authority to a custodian or guardian. The court of appeals relied in part on the significant discretion the legislature provided to DSS in managing visits set forth in G.S. 7B-905.1(b). *See also In re J.M.*, 273 N.C. App. 280 (recognizing distinction established in *In re K.W.*, 272 N.C. App. 487). See subsection 5, below (discussing discretion afforded to DSS).

**2. Cost of supervision.** Although G.S. 7B-905.1 does not address payment for the cost of supervised visitation, the appellate courts have held that the court must address the responsibility for the costs of that visitation. *See In re K.M.*, 277 N.C. App. 592 (2021) (vacating and remanding portion of order that did not assign cost of visitation facility fee to the guardians). A court may order a parent or other party to pay the costs associated with supervised visitation if they have an ability to pay. *In re K.M.*, 277 N.C. App. 592 (court found that the parent did not have ability to pay supervised visitation facility fee and that guardians did have the ability). The ability to pay must be based on present, not past, ability. *In re L.G.A.*, 277 N.C. App. 46 (2021) (vacating and remanding for additional findings on mother's ability to pay costs of supervised visitation after her release from incarceration; order could not be based on mother's two previous jobs she held prior to her current incarceration).

Before the court orders a parent (or other party) to pay for supervised visitation, the trial court must make findings of the cost of visitation and the parent's ability to pay. *See In re J.C.*, 368 N.C. 89 (2015) (vacating and remanding order that made no findings about respondent mother's ability to pay for supervised visitation; without such findings appellate court was unable to review for an abuse of discretion); *In re E.P.-L.M.*, 272 N.C. App. 585 (2020) (vacating and remanding visitation order to address findings regarding mother's ability to pay costs of supervision); *In re J.T.S.*, 268 N.C. App. 61 (2019) and *In re Y.I.*, 262 N.C. App. 575 (2018) (both vacating portion of the order to address who bears the cost of visitation and if responsibility with mother, that she has the ability to pay); *In re E.M.*, 249 N.C. App. 44 (2016) (vacating portion of the order requiring respondent to pay for cost of visitation and remanded for findings of fact regarding cost and respondent's ability to pay).

**3. Electronic communication.** In the case *In re T.R.T.*, 225 N.C. App. 567 (2013), the court of appeals held that communication via Skype is a form of electronic communication that cannot take the place of face-to-face visitation required by the Juvenile Code (decided under former statute). In so ruling, the court looked to G.S. 50-13.2(e), after finding the Juvenile Code was silent as to electronic communication. Under G.S. 50-13.2(e), electronic communication may supplement visitation and is not a replacement or substitution for custody or visitation. As a result, electronic communication alone is a denial of visitation that requires specific findings. *See also In re K.B.*, 290 N.C. App. 61 (2023), *In re J.C.*, 283 N.C.

App. 486 (2022), *In re K.W.*, 272 N.C. App. 487 (2020) (all citing *In re T.R.T.*, 225 N.C. App. 567, when holding parents' electronic-only visitation was a denial of visitation). See subsection 4, immediately below (discussing findings when visitation is denied). The court of appeals has stated that G.S. 7B-905.1(a) does not contain a provision that "the trial court must expressly find that in-person visitation is inappropriate" but rather the order must "provide for visitation that is in the best interests of the juvenile…, *including no visitation*." *In re J.C.*, 283 N.C. App. at 493 (emphasis in original) (affirming order of electronic visitation when record is clear the court considered the children's best interests in making its decision and stating "visitation 'would be inappropriate in light of the specific facts under consideration.' ").

The impracticality of in-person visits due to distance and cost when a parent does not live near their child are not sufficient factors alone to eliminate any possibility of in-person visits. *In re K.B.*, 290 N.C. App. 61. When electronic communication supplements visitation, the order must comply with G.S. 50-13.2(e), which provides specific guidelines relating to best interest, availability of equipment, and other factors. *In re T.R.T.*, 225 N.C. App. 567.

When a court orders a temporary suspension of visits based on specific circumstances that exist, it may exercise its discretion to order electronic communication between the parent and juvenile during the period of suspended visitation so long as that electronic communication is not intended to permanently replace or substitute for in-person visitation. Appropriate findings should also be made. *In re K.M.*, 277 N.C. App. 592 (2021) (determining court provided a contingency during the period of suspension instead of an order of no visitation; contingency was weekly video contact between mother and son when supervised visitation was temporarily suspended because supervised visitation center was temporarily closed due to COVID-19; order contained findings that any visitation other than supervised visitation in a visitation center would be contrary to the juvenile's best interests and inconsistent with his health and safety). For a discussion of suspended visitation, see subsection 7, below.

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**Practice Note:** In relying on G.S. 50-13.2(e), the court reasoned that while G.S. 50-13.2(a) explicitly limits its application to custody orders entered under G.S. 50-13.2, nothing in subsection (e), dealing with electronic communications, limits its application in that way. Therefore, the court said G.S. 50-13.2(e) is a generic provision that applies to all custody actions. This reasoning raises a question as to whether other subsections of G.S. 50-13.2 could apply to orders under the Juvenile Code when they deal with matters not addressed by the Juvenile Code.

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**4. No visitation**. The Juvenile Code requires that visitation orders be consistent with the health and safety of the child and in the child's best interest. G.S. 7B-905.1(a). While the court must address visitation, it may order no visitation. G.S. 7B-905.1(a).

Before ordering no visitation, appellate opinions have required that the court make a finding the parent has forfeited their right to visitation or that it is in the child's best interests to deny visits as visitation would be inappropriate under the circumstances. *See In re C.C.G.*, 380 N.C. 23 (2022) (holding no abuse of discretion when court ceased visitation between child and mother; findings showed the child's behaviors improved when she was not having contact

with her mother while her behaviors regressed when she did have contact with her mother; mother was inappropriate during visits; and mother failed to comply with her case plan); *In re K.B.*, 290 N.C. App. 61 (2023) (holding abuse of discretion in ordering electronic only visitation without making the required findings); *In re N.L.M.*, 283 N.C. App. 356 (2022) (holding no abuse of discretion when order of no visitation with mother and father while criminal charges related to the children's alleged abuse were pending and father failed to comply with mental health treatment; court determined visitation was not in the children's best interests); *In re K.W.*, 272 N.C. App. 487 (2020) (holding no abuse of discretion when court ordered electronic visitation only after finding mother caused the children to experience significant distress); *In re J.L.*, 264 N.C. App. 408 (2019) (holding no abuse of discretion when court denied visitation; the ultimate finding that visitation was not in the child's best interests and consistent with his health and safety was supported by evidence of respondent's long history with DSS and removal of her other children, minimal progress with her case plan; failure to utilize her visitation; and execution of a relinquishment for adoption); *In re W.H.*, 261 N.C. App. 24 (2018) (holding no abuse of discretion when order ceased visitation between father and his sons after considering father's conduct toward his daughters and determining visitation was against all the children's best interests, health, and safety).

In some opinions published in 2023, the court of appeals added required findings when ordering no visitation. Under these opinions, the trial court must make relevant findings under G.S. 7B-906.1(d) and (e) that address whether it is possible for the juvenile to be placed with a parent within the next six months and if not, why it is not in the child's best interests to do so, and reports about visitation that has occurred and whether there is a need to create, modify, or enforce visitation. *In re P.L.E.*, ___ N.C. App. ___, 891 S.E.2d 613 (2023) (vacating and remanding visitation portion of permanency planning order to comply with G.S. 7B-906.1). Further, in *In re A.J.L.H.*, 289 N.C. App. 644 (2023), *writ of supersedeas granted* (N.C. Aug. 30, 2023), the court of appeals reversed an order of no visitation that did not address the parent's constitutional rights. The case involved four juveniles and four parents; three of the parents were ordered no visitation. The order did not contain any findings or conclusions addressing each parent's unfitness or conduct inconsistent with their constitutionally protected parental rights. The court also did not consider factors or make specific determinations of factors that affect visitation between each child and each parent. Factors referred to by the court of appeals include (i) whether a parent has a long history with DSS, (ii) if the issues resulting in the child's removal are similar to previous issues that led to another child's removal, (iii) whether the parent failed to or minimally participated in their case plan, (iv) whether a parent failed to consistently attend visitation, and (v) whether a parent relinquished their rights. This opinion appears to add the criteria that when ordering no visitation, a court must conclude a parent is unfit or has acted inconsistently with their parental rights. *See also In re M.S.*, 289 N.C. App. 127 (2023) (discussing parents' constitutional rights in order of no visitation). For a discussion of parents' constitutional rights, see Chapter 2.4 and section 7.10.B.5, below.

**5. DSS responsibility; court approval**. If DSS has custody or placement responsibility for the child, the court may order DSS to arrange, facilitate, and supervise a court-approved visitation plan consistent with the best interests of the child. Although the plan must indicate the minimum frequency and length of visits and whether the visits must be supervised, unless the

court orders otherwise, DSS has the discretion to do the following:

- determine who will supervise visits when supervision is required;
- determine the location of visits; and
- change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances.

G.S. 7B-905.1(b).

Limited and temporary changes must be communicated promptly to the affected party, and ongoing changes must be communicated in writing to the party, stating the reason for the change. G.S. 7B-905.1(b).

If a child is in the custody or placement responsibility of DSS, the director may not allow unsupervised visitation with the parent, guardian, custodian, or caretaker from whom the child was removed without a hearing at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(c); 7B-101(19) (definition of "safe home"). Further, DSS may not recommend unsupervised visits with the removal parent, guardian, custodian, or caretaker without first conducting two observations of visits between the child and that parent, guardian, custodian, or caretaker within thirty days of the hearing where the DSS recommendation for unsupervised visits will be made. G.S. 7B-903.1(c). See section 7.4.D.2, above (discussing return home or unsupervised visits with removal parent, guardian, custodian, or caretaker).

**6. Guardians and custodians.** If the child is placed or remains in the custody or guardianship of a relative or other suitable person, any visitation order must specify the minimum frequency and length of the visits and whether the visits must be supervised. The court may authorize additional visitation agreed upon by the respondent and custodian or guardian. G.S. 7B-905.1(c). Determination of visitation rights is a judicial function that cannot be delegated to the child's custodians, guardians, or others. *See In re C.S.L.B.*, 254 N.C. App. 395 (2017) (vacating and remanding visitation order as unilateral right of the guardians to suspend visits based on "concerns" about mother's substance use or discord with the children's father during visitation was improper delegation of judicial function); *In re J.D.R.*, 239 N.C. App. 63 (2015) (remanding order related to visitation; although the father did not have complete authority to determine visitation, the degree of delegation given to father by the court to determine visitation by mother went too far); *In re M.M.*, 230 N.C. App. 225 (2013); *In re L.B.*, 181 N.C. App. 174 (2007).

**7. Suspension of visitation**. The court's order concerning visitation may specify conditions under which visitation may be suspended. G.S. 7B-905.1(a); *In re K.M.*, 277 N.C. App. 592 (2021) (holding no abuse of discretion when court in the same order (i) awarded supervised visitation at a visitation center based on findings that any other type of supervised visitation would be contrary to the child's best interests and inconsistent with health and safety and (ii) temporarily suspended that visitation until the center or another appropriate visitation center was available; the identified visitation center was temporarily closed due to the COVID-19 pandemic).

When DSS has custody or placement responsibility, DSS may temporarily suspend all or part of the visitation plan if DSS makes a good faith determination that the plan is not consistent with the child's health and safety. DSS will not be subject to a motion to show cause for the suspension; however, it must expeditiously file a motion for review and request that a hearing be scheduled within thirty days (unless a review or permanency planning hearing is already scheduled to be heard within thirty days of the suspension of visits). G.S. 7B-905.1(b).

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**Resource:** Sara DePasquale, *Court of Appeals Addresses Temporary Suspension of Supervised Visits in an A/N/D Order*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 1, 2021).

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**8. No denial because of positive drug screen results.** Effective October 1, 2021, G.S. 7B-905.1(b1) was enacted and addresses visitation and a parent's positive drug screen result. When a court orders visitation (supervised or unsupervised) between a parent and a child who is in the custody or placement responsibility of a DSS, a parent's positive drug screen result alone is insufficient to deny the parent court-ordered visits. However, a specific visit may be cancelled if at the time of the visit, the parent (1) is under the influence of drugs or alcohol and exhibits behavior that may create an unsafe environment for the child or (2) appears to be actively impaired. G.S. 7B-905.1(b1).

When unsupervised visitation is ordered and a parent has a positive drug screen, DSS must expeditiously file a motion for review and request that the hearing be scheduled within thirty days. The purpose of the hearing is for the court to review the visitation plan to ensure the child's safety. A director may temporarily impose supervision requirements to all or part of the visitation plan while the hearing on the motion for review is pending. Any limited and temporary change to the visitation plan must be promptly communicated to the affected party. G.S. 7B-905.1(b1).

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**Practice Note:** Although the language of the statute does not explicitly prohibit a court from entering an order that conditions visits on a parent's negative drug screens, G.S. 7B-905.1(b1) prohibits the denial of visitation based on a parent's positive drug screen result alone. Courts should consider this new limitation when designing visitation plans so that the visitation order does not conflict with the statute.

**Resource:** For a discussion of G.S. 7B-905.1(b1), see Timothy Heinle, *Parents and Drugs: Takeaways from S.L. 2021-100 and 132, and a Recent U.S. Dept. of Justice Investigation*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (March 2, 2022).

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**9. The juvenile's preference.** Although not specifically addressed in G.S. 7B-905.1, the court of appeals discussed the role of the child's preference regarding visitation in *In re J.C.-B.*, 276 N.C. App. 180 (2021). In that case, at a permanency planning hearing the court ordered no contact between the juvenile and mother until recommended by the juvenile's therapist. In addition to addressing the improper delegation of a judicial function to a therapist, the court of appeals referred to G.S. 7B-906.1(c), which requires the trial court to consider information from the juvenile and the juvenile's guardian ad litem (GAL) at a permanency planning hearing. Although a trial court is not bound by a child's express wishes, "the child's wishes are part of the totality of circumstances the trial court must consider, and consider those

wishes more particularly as a child approaches majority." *In re J.C.-B.*, 276 N.C. App. at 192. In this case, the GAL did not inform the court of the juvenile's express wishes, nor did the 16-year-old juvenile testify. The court of appeals determined the GAL's failure to convey this information was a violation of the GAL's duties under G.S. 7B-601 and the requirements of G.S. 7B-906.1(c) and reversed and remanded the order for a new hearing. *See also In re A.J.T.*, 374 N.C. 504 (2020) (in a TPR appeal, child's preference regardless of age is not controlling); *In re A.K.O.*, 375 N.C. 698, 706 (2020) (vacating and remanding TPR; noting proper weight should be given to 17-year-old juvenile's preference; distinguishing the same considerations as not applying to 9-year-old sibling); *In re B.R.W.*, 278 N.C. App. 382, 394 (2021) (stating in appeal of permanency planning order, "[a]lthough the children's preferences are not controlling, the trial court may consider their preferences along with other evidence."), *aff'd* , 381 N.C. 61 (2022).

See Chapter 2.3.D.4 (discussing the role of the juvenile's GAL).

## B. Review of Visitation Plan, Notice to Parties, Mediation

Before October 1, 2021, G.S. 7B-905.1(d) provided that when the court retains jurisdiction [in the juvenile proceeding], all parties must be informed of the right to file a motion for review of any visitation plan. Effective October 1, 2021, G.S. 7B-905.1(d) clarifies that when the court *waives permanency planning hearings and retains jurisdiction*, all parties must be informed of the right to file a motion for review. (emphasis added). *See In re J.M.*, 276 N.C. App. 291 (2021) (before amendment to G.S. 7B-905.1(d) was enacted, limiting G.S. 7B-905.1(d) to cases where the court retains jurisdiction and waives further hearings), *rev'd on other grounds*, 384 N.C. 584 (2023). This statutory amendment that limits when the court must inform the parties of the right to file a motion for review of a visitation plan supersedes opinions finding error and vacating and remanding that portion of the dispositional order for compliance with G.S. 7B-905.1(d) when further hearings had not been waived. *See In re N.L.M.*, 283 N.C. App. 356 (2022) (discussing statutory amendment).

Prior to or at a hearing to review visitation, the court may order DSS or the GAL to investigate and make written recommendations and provide testimony as to appropriate visitation. After a proper motion, notice, and a hearing to review visitation, the court may establish, modify, or enforce a visitation plan that is in the child's best interest. G.S. 7B-905.1(d).

To resolve visitation issues, the court may order the parents, guardian, or custodian to participate in custody mediation where such programs have been established (pursuant to G.S. 7A-494). When the court refers a case to custody mediation, it must specify the issues for mediation, including but not limited to whether visitation must be supervised and whether overnight visitation may occur. Participants in custody mediation may not consent to a change in custody. A copy of any mediation agreement must be provided to the parties and counsel and must be approved by the court. G.S. 7B-905.1(d). Mediation of visitation issues is subject to the provisions of G.S. 50-13.1(d) through (f), which address

- circumstances for dismissal of mediation and having the action heard in court;
- privacy and confidentiality of mediation proceedings as well as inadmissibility in court;
- mediator's authority to interview the child and others; and
- applicability or inapplicability of privilege, immunity, etc.

**AOC Form:**
AOC-J-135, Order and Notice to Mediation in Juvenile Proceeding (Abuse/Neglect/Dependency).

## 7.6 Evaluation and Treatment of Child

### A. Court's Authority to Order Evaluation and Treatment

Regardless of the child's placement and other dispositional plans, the Juvenile Code authorizes the court to order that the child be examined by a physician, psychiatrist, psychologist, or other qualified expert to determine the child's needs. Once the examination is completed, the court must conduct a hearing to determine whether the child needs treatment and, if so, who should arrange and pay for the treatment. G.S. 7B-903(d).

See section 7.4.D.3, above (discussing medical consent for evaluation and treatment of a child placed in DSS custody).

### B. Hearing to Determine Treatment Needs and Payment

After completion of a court-ordered evaluation, the court must have a hearing to determine the child's treatment needs. G.S. 7B-903(d). This hearing may be a stand-alone hearing that only addresses the child's treatment needs or may be combined with an initial dispositional, review, or permanency planning hearing.

**1. County involvement.** Since treatment may involve county services and county finances, the county manager (or other person designated by the chair of the board of county commissioners) of the county of the child's residence must be notified of the hearing and given an opportunity to be heard. G.S. 7B-903(d).

**2. Treatment arrangements.** Subject to G.S. 7B-903.1, if the court finds that the child needs medical, surgical, psychiatric, psychological, or other treatment, the court must permit the parent or other responsible person to arrange for the treatment. However, if the parent declines or is unable to make the necessary arrangements, the court may order the needed treatment and direct the county to arrange for it. The statute requires DSS to recommend a facility that will provide treatment for the juvenile. G.S. 7B-903(d). If the child needs psychological or psychiatric treatment, DSS ordinarily would coordinate with the managed care organization in planning for the child's treatment, discussed in subsection 4, below. See section 7.6.C. (discussing mental health treatment at a hospital).

**3. Treatment costs.** Whether or not the parent arranges for treatment, the court may order the parent or other responsible parties to pay the cost of the child's treatment or care. G.S. 7B-903(d); 7B-904(a). If the court finds that the parent is unable to pay the cost, the court must order the county to arrange and pay for the treatment. G.S. 7B-903(d).

**4. Mental illness or developmental disability.**

**(a) Mental health services.** The Juvenile Code states that if the court determines the child may be mentally ill or developmentally disabled, the court may order DSS to coordinate with the appropriate representative of the area mental health, developmental disabilities, and substance use services authority or other managed care organization responsible for managing public funds for mental health and developmental disabilities to develop a treatment plan for the child. G.S. 7B-903(e).

**Practice Notes:** Because the area authority or other managed care organization is not a party to the action, the court should refrain from ordering the area authority or managed care organization to provide services. But see section 7.6.C., below (discussing mental health treatment at a hospital and emergency hearing on placement and payment).

**(b) Commitment.** The court has no authority to commit a child directly to a state hospital or developmental center for persons with intellectual and developmental disabilities. Any such order is void. If the court determines that the best service for the child is institutionalization, admission should be pursuant to the voluntary consent of the child's parent, guardian, or custodian. If the parent, guardian, or custodian refuses to consent, the court's signature may be substituted for the purpose of consent. G.S. 7B-903(e).

If the treatment institution refuses admission to a child referred by the court, or discharges the child prior to the completion of treatment, the institution must submit to the court a written report stating

- the reasons for denying admission or for early discharge,
- the child's diagnosis,
- indications of mental illness or intellectual and developmental disabilities and the need for treatment, and
- the location of any facility known to have an appropriate treatment program for the child.

G.S. 7B-903(e).

**Resource:** Sara DePasquale, *Children in DSS Custody Who Need Treatment in a PRTF: There's a Disconnect*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 1, 2016).

## C. Mental Health Treatment at Hospital Emergency Department and Emergency Motion.

Significant legislative changes were made by S.L. 2021-132, Part V. to address situations

where a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment. Effective October 1, 2021, a new statute in G.S. Chapter 122C addresses care coordination for the juvenile by DSS, the LME/MCO or prepaid health plan (PHP), the hospital, and the North Carolina Department of Human Services (DHHS): G.S. 122C-142.2. Effective January 1, 2022, a new statute in the Juvenile Code, G.S. 7B-903.2, authorizes an emergency motion and hearing to address compliance with the requirements of G.S. 122C-142.2. Note that these two statutes are limited to when a juvenile is in DSS custody and presented to a hospital emergency department for mental health treatment. As a result, these statutes do not apply to discharges from other facilities or situations where a juvenile is receiving mental health treatment (e.g., an involuntary commitment or a discharge from a psychiatric residential treatment facility).

**1. Juvenile presenting at hospital for mental health treatment.** When a juvenile who is in DSS custody presents to a hospital emergency department for mental health treatment and it is determined that the juvenile should not remain at the hospital and there is no immediately available appropriate placement for the juvenile, the DSS director must contact the appropriate LME/MCO or PHP within twenty-four hours of that determination to request an assessment. G.S. 122C-142.2(b). Within five business days of the director's request, the LME/MCO or PHP must, when applicable or required by their contract with DHHS, arrange for an assessment of the juvenile by the juvenile's clinical home provider, the hospital (if able or willing), or another qualified clinician. G.S. 122C-142.2(c). Depending on the level of care recommended by the assessment, DSS and the LME/MCO or PHP must act as provided for in the following table. G.S. 122C-142.2(d).

| Recommendation | DSS | LME/MCO or PHP |
|---|---|---|
| Level I group home or traditional foster home | Identify and provide for placement within five business days of the recommendation.<br><br>Transport the juvenile to the identified placement within five business days. | |
| Level of care requiring prior authorization by LME/MCO or PHP | Place juvenile in appropriate placement within five business days of identification by LME/MCO or PHP of a provider.<br><br>Transport juvenile to the identified placement. | Authorize appropriate level of care and identify appropriate providers within five business days of the recommendation.<br><br>Assign care coordinator for duration of LME/MCO or PHP provision of services. |

If the recommendations of the assessment differ or if DSS or the LME/MCO or PHP is unable to identify a provider, DSS must immediately notify the Rapid Response Team at DHHS. G.S. 122C-142.2(f). The Rapid Response Team consists of representatives from the Division of Social Services; the Division of Mental Health, Developmental Disabilities, and Substance Use Services; the Division of Child and Family Well-Being, and the Division of Health Benefits at DHHS. G.S. 122C-142.2(g); *see* S.L. 2023-65, secs. 3.4 and 5.2.

Information sharing by DSS to the Rapid Response Team is permitted by G.S. 7B-302(a1)(1), and the information remains confidential and is not a public record. G.S. 122C-142.2(f). The Rapid Response Team evaluates the information provided to it and coordinates a response to address the juvenile's immediate needs. G.S. 122C-142.2(g). The response may include

- Identifying an appropriate level of care;
- Identifying appropriate providers or placement;
- Referring the juvenile to qualified service providers;
- Developing an action plan to meet the juvenile's needs;
- Developing a plan to ensure the relevant parties fulfill their responsibilities to the juvenile.

G.S. 122C-142.2(g).

While the juvenile is staying at the hospital, DSS must provide ongoing case management to address the juvenile's educational and social needs. The hospital must cooperate with DSS to provide access to the juvenile. G.S. 122C-142.2(e).

**2. Emergency motion for placement and payment.** When DSS or the LME/MCO or PHP does not fulfill its responsibilities under G.S. 122C-142.2, any party to the abuse, neglect, or dependency action, the hospital, DHHS, or the LME/MCO or PHP may file a motion in the abuse, neglect, or dependency action to address the juvenile's continued stay at the hospital. G.S. 7B-903.2(a). The motion must contain a specific description of which requirements under G.S. 122C-142.2 were not completed. G.S. 7B-903.2(b).

**(a) Limited appearance.** DHHS, the LME/MCO or PHP, or the hospital may make a limited appearance in the juvenile proceeding for the sole purpose of addressing the motion and complying with orders on the motion, either by filing the emergency motion or by being served with the motion. G.S. 7B-903.2(a), (c). Service of the motion must be made by Rule 5 service on each party to the juvenile proceeding, the hospital, the LME/MCO or PHP, and DHHS. G.S. 7B-903.2(c). DSS must provide the movant, when so requested, with the case file number, the juvenile's name, and the addresses of all parties and attorneys in the juvenile matter so service may be made. G.S. 7B-903.2(d).

**(b) The hearing.** The hearing is held in the district court with jurisdiction over the juvenile proceeding and is conducted in accordance with G.S. 7B-801 (addressing open versus closed hearings and consent order procedures). The Rules of Evidence apply, and any person or party served with the motion may request to be heard by the court and present

evidence. G.S. 7B-903.2(e). The standard of proof is clear and convincing evidence. *See* G.S. 7B-903.2(f), (g). The issues determined are whether it is medically necessary for the juvenile to remain in the hospital and whether DSS or the LME/MCO or PHP fulfilled its obligations under G.S. 122C-142.2. *See* G.S. 7B-903.2(f), (g). If the juvenile is discharged from the hospital and placed by DSS, the court dismisses the motion. G.S. 7B-903.2(i).

**Practice Note:** If the court dismisses the motion because the child has been discharged, and there is a request for monetary relief, the court should consider dismissing without prejudice so that the moving party may file a separate action outside of the juvenile proceeding for the monetary relief requested.

**(c) The order.** The order must be entered within seventy-two hours of the hearing being completed. G.S. 7B-903.2(h). In its order, the court must make written findings of fact and conclusions of law that include whether (1) the movant proved by clear and convincing evidence that there is no medical necessity for the juvenile to remain in the hospital and (2) the responsible party (DSS, LME/MCO or PHP) did not satisfy the applicable requirements of G.S. 122C-142.2. G.S. 7B-903.2(f). The court may order the following relief:

- The responsible party pay reasonable hospital charges for the juvenile's continued admission at the hospital, starting with when it was no longer medically necessary for the juvenile to remain in the hospital;
- The responsible party pay for any property damage the juvenile caused after it was no longer medically necessary for the juvenile to remain in the hospital;
- The responsible party satisfy the statutory requirements of G.S. 122C-142.2(b) through (f);
- Any other relief the court finds appropriate; however, each party has the burden of paying its own costs.

G.S. 7B-903.2(g), (j).

**(d) Ongoing hearings.** The clerk must schedule a subsequent hearing for review within thirty days of the order being entered. G.S. 7B-903.2(h). If the juvenile is discharged from the hospital and placed by DSS, the court dismisses the motion to address the juvenile's continued stay at the hospital. G.S. 7B-903.2(i).

## 7.7 Court's Authority over Parents and Others

The court has jurisdiction over the parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent, if that person has been properly served, has waived service, or has automatically become a party pursuant to G.S. 7B-401.1(c) or (d) by being awarded custody or guardianship as a permanent plan. G.S. 7B-200(b); *see* G.S. 7B-904(d1). See Chapter 3.4 (related to personal jurisdiction).

The court is specifically authorized to direct certain orders to parents, guardians, custodians, and caretakers, but the court's authority is limited by the Juvenile Code. *See* G.S. 7B-904. However, a court does not necessarily abuse its discretion when declining to enumerate specific requirements. *See In re E.A.C.*, 278 N.C. App. 608 (2021) (no abuse of discretion when court stated it was not specifying the acts the mother should or should not do and mother was aware of and attempting to participate in DSS case plan; any injury to mother by court not specifying the acts for her to complete was harmless).

The court's dispositional authority to impose conditions on the respondents requires "a nexus between the step ordered by the court and a condition [of abuse, neglect, or dependency] that is found or alleged to have led to or contributed to the adjudication" or court order removing custody of the juvenile from the respondent. *In re S.G.*, 268 N.C. App. 360, 368 (2019) (quoting *In re T.N.G.*, 244 N.C. App. 398, 408 (2015)). However, the court's authority is not limited to only those issues that directly address the reasons for the child's removal or adjudication but may include services that "could aid 'in both understanding and resolving the possible underlying causes' of the actions that contributed to the trial court's removal decision" or adjudication. *In re S.G.*, 268 N.C. App. at 368 (quoting *In re A.R.*, 227 N.C. App. 518, 522 (2013)). "Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the *authority to order a parent to take any step reasonably required to alleviate any condition* that directly or indirectly contributed to causing the juvenile's removal from the parental home." *In re S.G.*, 268 N.C. App. at 371 (emphasis in original) (quoting *In re B.O.A.*, 372 N.C. 372, 381 (2019)).

The court's authority to order a respondent to undergo treatment and take steps to remedy the conditions that led to the child's adjudication or removal from the parent's custody exists in the dispositional phase of the proceeding. The court should not order the respondent to undergo treatment or take additional actions in an adjudication order. *See In re A.G.M.*, 241 N.C. App. 426 (2015) (noting that it is unclear pursuant to what authority the court, in an adjudication order, required respondent mother to participate in therapy). But note that G.S. 7B-507 authorizes the court at nonsecure custody to "order services or other efforts aimed at returning the juvenile to a safe home."

## A. Treatment and Counseling

**1. Participation in child's treatment.** If the court finds that it is in the child's best interests, the court may order a parent, guardian, custodian, stepparent, adult member of the child's household, or an adult entrusted with the child's care to participate in the child's medical, psychiatric, psychological, or other treatment. G.S. 7B-904(b).

**2. Evaluations and treatment of parents and others.** When in the child's best interests, the court may order a parent, guardian, custodian, stepparent, adult member of the child's household, or an adult entrusted with the child's care to undergo treatment or counseling directed toward remediating or remedying behaviors or conditions that indirectly or directly led or contributed to the child's adjudication or to the court's decision to remove the child from that person's custody. G.S. 7B-904(c); *see In re B.O.A.*, 372 N.C. 372 (2019) (analyzing G.S. 7B-904 in a TPR; holding conditions of removal include all the factors, both those that

are indirect and direct, that contributed to the child's removal); *In re A.R.*, 227 N.C. App. 518 (2013) (holding that it was within the trial court's authority to order the parents to comply with mental health assessments and recommendations, substance use evaluations, and random drug screens, which were reasonably related to aiding the parents in correcting the conditions that led to the children's removal; the children's removal was related to domestic violence and the court-ordered conditions were to assist respondents in understanding and resolving the possible underlying causes of the domestic violence); *In re A.S.*, 181 N.C. App. 706 (holding that the trial court did not abuse its discretion in ordering the father to undergo a psychological evaluation, have a substance use assessment, and enroll in parenting classes, where DSS and the GAL recommended evaluations and classes and the trial court found them to be in the best interests of the children), *aff'd per curiam*, 361 N.C. 686 (2007). Additionally, the court may order that the parent or other person comply with a plan of treatment approved by the court to maintain or regain custody of the child. G.S. 7B-904(c).

## B. Parenting Classes, Transportation, Remedial Steps, and Other Orders

The court may order a parent, guardian, custodian, or caretaker who has been served with a summons (or has otherwise submitted to the court's jurisdiction) to

- attend and participate in parenting classes, if classes are available in the judicial district where they reside;
- provide transportation for the child to keep appointments for any treatment ordered by the court (if the child is in that person's home and to the extent the person is able to provide transportation); or
- take appropriate steps to remedy conditions in the home that led or contributed to the child's adjudication or to the court's removal of custody of the child from that person.

G.S. 7B-904(d1).

**1. Addressing indirect or direct causes of removal or adjudication.** The supreme court in *In re B.O.A.*, 372 N.C. 372 (2019), an appeal of a termination of parental rights (TPR) based on failure to make reasonable progress to correct the conditions of removal, analyzed the language of G.S. 7B-904(d1)(3) – "take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." In that opinion, the supreme court held that an expansive reading of that language is appropriate, meaning the trial court has authority to order the parent to take steps to alleviate the conditions that directly or indirectly caused the child's removal. The trial court is not limited to those allegations in the petition that immediately led to the child's removal. The supreme court reasoned that a child's removal "is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation," and a trial court gains a better understanding of the family dynamic as the case progresses and may modify and update a case plan accordingly. *In re B.O.A.*, 372 N.C. at 384–85. A more restrictive reading (as had been applied by the court of appeals) "would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency." *In re B.O.A.*, 372 N.C. at 385.

The court of appeals applied the holding of *In re B.O.A.* in *In re S.G.*, 268 N.C. App. 360 (2019). In that case, respondent parents appealed an initial dispositional order that required them to complete a mental health and substance use assessment and follow all recommendations, submit to random drug screens, and obtain and maintain safe and stable housing when the children were removed due to a non-accidental injury (bruising on the forehead and eyelid) to one of the children, respondents' failure to take responsibility for the injury, and mother's willingness to continue to expose the children to the father, putting the children at risk of harm. The court of appeals affirmed the dispositional order, holding there was no abuse of discretion by the trial court as the ordered steps would assist the court and the parties in understanding whether substance use and mental health issues were underlying causes of the children's adjudication and removal. In applying the holding of *In re B.O.A.*, the court of appeals noted that its earlier decisions that applied a more restrictive reading, including but not limited to *In re H.H.*, 237 N.C. App. 431 (2014) and *In re W.V.*, 204 N.C. App. 290 (2010), were overruled by the supreme court holding in *In re B.O.A.*, 372 N.C. 372.

Without explicitly interpreting the language of G.S. 7B-904(d1)(3), previous appellate cases have applied the more expansive interpretation set out in *In re B.O.A.*, 372 N.C. 372. *See In re D.L.W.*, 368 N.C. 835 (2016) (discussing G.S. 7B-904(d1)(3) in a TPR case; noting the order requiring respondent to create a budgeting plan was appropriate when findings in the adjudication order indicated domestic violence, a lack of consistent and adequate housing, and the parents' inability to meet the children's basic needs as reasons for children's removal and adjudication); *In re T.N.G.*, 244 N.C. App. 398 (2015) (holding court did not exceed its dispositional authority in an order directing respondent father to maintain stable employment and obtain a domestic violence offender assessment and follow recommendations when the record established a nexus between the child's court-ordered removal from respondent's custody and the circumstances that led to removal, as set out in an addendum to the petition that alleged respondent was unemployed and unable to care for the child and DSS had concerns about respondent's admitted domestic violence history).

The appellate courts have found a sufficient nexus between the step the parent is ordered to take and the condition that was found or alleged to have resulted in the juvenile's adjudication in the following cases.

- Father had to complete a substance use assessment, submit to random drug screens, and meet DSS's approval for housing and employment in a neglect case based on domestic violence. The components addressing substance use " 'could aid in both understanding and resolving the possible underlying causes of' domestic violence" as father stated to responding law enforcement that mother was upset because he had been drinking. *In re J.C.*, 283 N.C. App. 486, 499 (2022). Further, father failed to work with DSS to show proof of income and did not complete his domestic violence classes, which indicate whether respondents were maintaining a safe and stable home environment.
- Mother had to provide proof of sufficient income since the condition resulting in the children's adjudication was a lack of care and supervision. Proof of income was reasonably related to ensuring adequate care and supervision, which includes a safe home environment. The parents and children were residing with paternal grandmother who was threatening toward mother and was the caretaker for the juvenile who was injured by

non-accidental means. Another step requiring that mother refrain from allowing her mental health to interfere with her parenting was reasonably related to the children's removal as mother conspired with father and paternal grandmother to create false explanations about the cause of the child's injury and there were concerns about domestic violence in the home. *In re W.C.T.*, 280 N.C. App. 17 (2021).

**2. Medication-assisted treatment.** Treatment for a substance use disorder may involve medication-assisted treatment (MAT). Effective October 1, 2021, the Juvenile Code specifically addresses MAT. For purposes of court-ordered case plans, MAT is defined as "the use of pharmacological medications administered, dispensed, and prescribed in a Substance Abuse and Mental Health Services Administration (SAMHSA) accredited and certified opioid treatment program (OTP) or by a certified practitioner licensed in this State to practice medicine, in combination with counseling and behavioral therapies, to provide a whole patient approach to the treatment of substance use disorders." G.S. 7B-904(c1).

Under G.S. 7B-904(c1), when the court has ordered an individual to comply with a plan of treatment of their substance use disorder, that individual is not violating the court order when they are complying with their MAT. *See In re A.B.C.*, 374 N.C. 752, 770 (2020) (Earls, J., dissenting) (in TPR proceeding where respondent mother is participating in a methadone program, dissent discusses drug addiction as a brain disease and states, "[a] parent who is following a doctor's orders in a treatment program should not have that fact held against her, just as one would not conclude that a diabetic relying on medication to control their diabetes rather than diet and exercise is failing to make reasonable progress towards good health[;]" further stating "it is for a medical professional, not the trial court, to determine whether and how respondent's duly prescribed medications should be discontinued.").

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**Practice Note:** "Medication-assisted treatment" is commonly referred to in the medical field as "medication for opioid use disorder" or "MOUD".

**Resource:** For a discussion of MAT and the Americans with Disabilities Act, see Timothy Heinle, *Parents and Drugs: Takeaways from S.L. 2021-100 and 132, and a Recent U.S. Dept. of Justice Investigation*, UNC SCHOOL OF GOV'T: ON THE CIVIL SIDE BLOG (March 2, 2022).

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### C. Cost Responsibilities

For a discussion of orders that required a respondent parent to pay the cost of supervised visitation, see section 7.5.A.2, above.

**1. Child support.** If the child is in the legal custody of someone other than a parent, the court may order the parent to pay a reasonable sum to cover (in whole or in part) the support of the child if the court finds that the parent is able to do so. The amount of child support is determined according to G.S. 50-13.4(c) and the Child Support Guidelines. G.S. 7B-904(d). The court must find the parent has an ability to pay support and determine a reasonable sum. *In re A.M.*, 247 N.C. App. 672 (2016) (remanding child support portion of dispositional order for further findings; noting the order contained no findings about the mother's income, ability to work, or ability to pay; the reasonable needs of the children; or an appropriate amount of

support). If the child is in the custody of DSS and the court finds that the parent is unable to pay the cost of the child's care, the cost must be paid by the county DSS (unless the child is receiving care in a state or federal institution). G.S. 7B-904(d). The court does not have the authority to order a parent to contact a child support enforcement agency to arrange to pay child support. *In re A.S.*, 181 N.C. App. 706, *aff'd per curiam*, 361 N.C. 686 (2007). However, when a child is placed in foster care, DSS has an obligation to seek support from the child's parents. If support is not addressed in a court order entered in the abuse, neglect, or dependency action, DSS can pursue support through the IV-D child support enforcement program.

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**Federal Guidance:** The Administration for Children and Families (ACF) Children's Bureau and the Office of Child Support Services issued guidance on July 29, 2022 that encourages child welfare agencies to not automatically refer parents who are in the reunification process to the IV-D agency for child support. One rationale for this guidance is that many of the parents live in poverty, and a child support obligation used to offset the cost of foster care negatively impacts families who are trying to maintain economic stability and reunify with their children.

**Resource:** Federal guidance from ACF and the Office of Child Support Enforcement is in the "Joint Letter Regarding the Assignment of Rights to Child Support for Children in Foster Care."

**Practice Note:** When child support is ordered, the orders usually are not entered in juvenile court. Child support generally is best dealt with through the IV-D Child Support Enforcement office. The court may order DSS to pursue the establishment, modification, or enforcement of a support obligation through the IV-D office. A parent may volunteer to go to the child support enforcement office. The parent generally is legally responsible for the financial support of a minor child whether or not the parent has a formal support obligation through agreement or court order. *See In re S.E.*, 373 N.C. 360, 366 (2020) (affirming TPR on ground of willfully failing to pay reasonable cost of care; lack of court order or notice to pay child support is not a defense; "parents have an inherent duty to support their children"); *In re D.C.*, 378 N.C. 556 (2021) (relying on *In re S.E.* and doctrine of *stare decisis*).

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**2. Treatment of child or participating adult.** Regardless of whether the parent arranges for treatment for the child, the court may order the parent "or other responsible parties" to pay for the cost of treatment or care ordered by the court, including treatment in which the parent or others are ordered to participate. G.S. 7B-903(d); 7B-904(a), (b). If the court finds that the parent is unable to pay the cost of the child's treatment, the court must order the county to pay for treatment. G.S. 7B-903(d). See section 7.6, above (evaluation and treatment of child).

**3. Treatment of parent or others.** If the court orders treatment for the parent (or other respondents), the court may order that person to pay the cost of their own treatment. If the court finds that the parent or other person is unable to pay, the court may

- order the person to receive treatment currently available from the area mental health program (local management entity) or

- if the court has conditioned the child's legal custody or placement with that person on that person's compliance with treatment, charge the cost of treatment to the child's county of residence.

G.S. 7B-904(c).

### D. Failure to Comply with Court Orders

On motion of a party or on the court's own motion, the court may issue an order for a parent, guardian, custodian, or caretaker who has been served with a summons in an abuse, neglect, or dependency proceeding to show cause why they should not be found in contempt (civil or criminal) for willfully failing to comply with a court order. G.S. 7B-904(e). Contempt proceedings are governed by Chapter 5A of the General Statutes.

**AOC Form:**
AOC-J-155, Motion and Order to Show Cause (Parent, Guardian, Custodian or Caretaker in Abuse/Neglect/Dependency Case).

**Practice Note:** Although G.S. 7B-904(e) refers to a parent, guardian, custodian, or caretaker who is served with a copy of the summons, no such limitation appears in G.S. Chapter 5A. The juvenile court may have personal jurisdiction over a respondent who has not been properly served with a summons in the abuse, neglect, or dependency proceeding (e.g., when proper service is waived or a guardian or custodian automatically becomes a party pursuant to G.S. 7B-401.1(c) or (d)). *See* G.S. 7B-200(b). See also Chapter 3.4 (discussing personal jurisdiction).

### E. Court's Authority over DSS

The court's authority over DSS is clear in some circumstances and less clear in others. Throughout the Juvenile Code, the court is authorized to order DSS to take certain actions. For example, when a child is placed outside the home, the court "may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court." G.S. 7B-905.1(b). At the nonsecure custody stage, the court may order services or other efforts aimed at returning the child to a safe home, and when the court orders that the child's placement and care are DSS's responsibility, the order states DSS is to provide or arrange for the child's placement. G.S. 7B-507(a)(4) and (5). The court may also grant DSS the authority to make medical decisions for the child for treatment or care that is neither routine nor emergency care pursuant to G.S. 7B-505.1. The court may order DSS to make diligent efforts to notify relatives and other persons with legal custody of the child's siblings of the child's placement in nonsecure custody. G.S. 7B-505(b). At initial disposition and permanency planning, the court may determine whether DSS should continue to make reasonable efforts for reunification. G.S. 7B-901(c); 7B-906.2(b). At permanency planning, the court must order DSS to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable. G.S. 7B-906.2(b). See sections 7.9, below (relating to reasonable efforts), and 7.10, below (discussing concurrent permanent plans). Although there are numerous provisions throughout the Juvenile Code that authorize the court to direct DSS

to conduct certain actions, the Juvenile Code is not entirely clear about the court's authority to order DSS to take actions beyond those specifically required or authorized.

### F. Court's Authority over Child's GAL

The Juvenile Code does not specifically address the court's authority over the child's guardian ad litem (GAL). However, the court presumably has the authority to order a GAL to fulfill their statutory responsibilities but not to do things beyond the scope of those responsibilities, such as provide transportation or supervise visits. *See* G.S. 7B-601. See also Chapter 2.3.D (relating to the GAL role and responsibilities).

### G. Limitations on Court's Dispositional Authority

The court's authority in juvenile dispositions is limited to statutory options and existing programs or programs for which the funding and machinery for implementation are in place. In the absence of a statute providing otherwise, the court generally has no authority over agencies or individuals who are not parties to the case. Absent a general appearance, due process requires that a person (or organization) who will be subject to a court's order be given reasonable notice and opportunity to be heard before any proceeding that results in entry of an order against that person or a deprivation of that person's rights. *See Helbein v. S. Metals Co.*, 119 N.C. App. 431 (1995).

- The court could not require DSS to implement the creation of a special type of foster home. *In re Wharton*, 305 N.C. 565 (1982).
- Where there was no alternative education program for an expelled/suspended student, the court could not send the student back to public school absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow for a return to school. *In re Jackson*, 84 N.C. App. 167 (1987).
- In a delinquency case, the court had no authority to order the state to develop and implement specific treatment programs and facilities. *In re Swindell*, 326 N.C. 473 (1990).
- There was no statutory authorization for the court to grant legal and physical custody of a child to the Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Use Services. *In re Autry*, 115 N.C. App. 263 (1994), *aff'd per curiam*, 340 N.C. 95 (1995).
- Although the Juvenile Code allows the court to order a parent to "pay a reasonable sum that will cover in whole or in part the support of the juvenile," the statute does not give the trial court authority to order a parent to contact a child support enforcement agency. *In re A.S.*, 181 N.C. App. 706, *aff'd per curiam*, 361 N.C. 686 (2007); *In re Cogdill*, 137 N.C. App. 504 (2000) (decided under former law).

## 7.8 Dispositional Considerations and Findings

As discussed throughout this Chapter, the court must consider a variety of factors and decide numerous issues during the dispositional stage of an abuse, neglect, or dependency proceeding, with the child's best interests as the paramount consideration. In addition to

custody; placement; visitation; decision-making; evaluation and treatment services for the child; payment for services and/or child support; and services for and/or conditions placed on the parent, guardian, custodian, or caretaker, the Juvenile Code places specific requirements on the court regarding inquiries, findings, and possible outcomes at the different dispositional hearings. Different requirements apply to the initial, review, and permanency planning hearings.

Note that significant changes related to the timing and findings of orders eliminating reasonable efforts for reunification resulted from S.L. 2015-136, effective for actions pending or filed on or after October 1, 2015. Before that date, the court had the authority to order the cessation of reasonable efforts based on any statutorily enumerated finding in any order placing or continuing the placement of a child in DSS custody. *See* G.S. 7B-507 prior to S.L. 2015-136. Now, a court may only order the cessation of reasonable efforts for reunification at an initial dispositional hearing or a permanency planning hearing, and the criteria upon which the court may base its order differs in each type of hearing. *See* G.S. 7B-901(c); 7B-906.2(b).

## A. Initial Dispositional Hearing

**1. Inquiry as to missing parent, paternity, and relatives required.** At the initial dispositional hearing, the court is required to

- inquire about the identity and location of any missing parent and whether paternity is an issue;
- make findings about efforts to locate and serve a missing parent and to establish paternity if paternity is an issue; and
- inquire about efforts made to identify and notify parents, relatives, or other persons with legal custody of the child's sibling as potential resources for placement or support.

G.S. 7B-901(b). *See* G.S. 7B-505(b) (DSS must file with court at nonsecure custody hearings information about its attempts to identify and notify relatives or other persons with legal custody of the juvenile's sibling).

The court may order specific efforts be made to identify and locate a missing parent or to establish paternity. G.S. 7B-901(b).

See Chapter 5.4.B.5−7 (discussing missing or unknown parents and paternity).

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**Practice Note:** While the Juvenile Code does not specifically address the issues of missing parents, paternity, or locating relatives in the context of review and permanency planning hearings, the court should address these issues at any hearing where they may have ongoing relevance. *See In re A.E.C.*, 239 N.C. App. 36 (2015) (vacating and remanding TPR order and order ceasing reunification efforts for father who made a late appearance in the case; the facts showed that at a permanency planning hearing, the child's GAL reported mother's husband was not the child's father based on paternity tests conducted in another court; no findings were made at the permanency planning hearing that he was not the father and no inquiries were made into paternity; putative father eventually contacted court and DSS after

being notified by mother that he was possible father; his paternity was established; court was required to address reunification efforts with the father).

**2. Consideration of G.S. 7B-901(c) factors and reasonable efforts.** At the initial dispositional hearing, when the court is placing the child in DSS custody, it may order reasonable efforts for reunification are not required. The court must make written findings of a specific factor identified in G.S. 7B-901(c) before making such an order, and those findings are that a court of competent jurisdiction

- determines or has determined that the parent has committed, encouraged the commission of, or allowed to be committed against the juvenile any of the following aggravated circumstances: sexual abuse, chronic physical or emotional abuse, torture, abandonment, chronic or toxic exposure to alcohol or controlled substances that caused an impairment or addiction in the juvenile, or any other conduct that increased the enormity or added to the injurious consequences of the abuse or neglect (G.S. 7B-901(c)(1));
- has terminated involuntarily the parent's rights to another child (G.S. 7B-901(c)(2)); or
- determines or has determined that a parent committed, or aided, attempted, conspired, or solicited to commit, murder or involuntary manslaughter of the parent's child; committed sexual abuse or felony assault causing serious bodily injury to the parent's child; or has been required to register as a sex offender (G.S. 7B-901(c)(3)).

When the court makes one of those written findings, it must order reasonable efforts for reunification are not required unless it concludes that compelling evidence warrants continued reunification efforts. G.S. 7B-901(c). When the court determines that reunification efforts are not required, a permanency planning hearing must be scheduled within thirty days. G.S. 7B-901(d). See section 7.2.A, above (discussing timing of dispositional hearings). The court at the initial dispositional hearing is not addressing permanent plans even though a court may order DSS relieved of making reasonable efforts.

**Practice and Legislative Note:** Prior to June 25, 2018, the language of G.S. 7B-901(c)(1) and (3) stated "a court of competent jurisdiction *has determined. . . .*". In *In re G.T.,* 250 N.C. App. 50 (2016), *aff'd per curiam*, 370 N.C. 387 (2017), the appellate courts held that the statutory language required that the determination be made in an order entered prior to the initial dispositional hearing. The statute was amended, effective for all dispositional orders effective on or after June 25, 2018, to add "determines," thus enabling the court to make a finding based on evidence presented at the initial dispositional hearing. *See* S.L. 2018-86.

The supreme court addressed the cessation of reunification efforts under G.S. 7B-901(c) in *In re L.N.H.*, 382 N.C. 536 (2022). In that opinion, the supreme court determined that when a court relieves DSS of reunification efforts at initial disposition and refers to "aggravating circumstances," that reference is sufficient to invoke G.S. 7B-901(c). However, a statement that there are aggravating circumstances without an explanation of what those aggravating circumstances are is not a valid finding under G.S. 7B-901(c) to support ceasing reunification efforts.

Also in *In re L.N.H.*, the supreme court examined G.S. 7B-901(c)(1)f., which involves "any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect." The language "any *other* act, practice, or conduct" requires "that the evidence in aggravation involve something in addition to the facts that rise to the initial adjudication of abuse and/or neglect." *In re L.N.H.*, 382 N.C. at 547–48 (emphasis in original). Because the adjudication was based on the mother burning the juvenile's feet and leaving the juvenile alone on the front porch, those actions were not conduct that increased the enormity or added to the injurious consequence of the abuse or neglect. However, when the abuse or neglect constitutes another factor, in this case, G.S. 7B-901(c)(3), which includes felony assault resulting in serious bodily injury, reunification efforts can be ceased when the finding of that other factor is made. As a result, the supreme court vacated and remanded the portion of the initial dispositional order that ceased reunification efforts under G.S. 7B-901(c)(1)f. for the court to make findings addressing G.S. 7B-901(c)(3)(iii). *See In re C.P.*, 289 N.C. App. 267 (2023) (unpublished) (applying the holding of *In re L.N.H.*, vacating portion of order that ceased reunification efforts under G.S. 7B-901(c)(1)f. and remanding for findings addressing whether reunification efforts should be ceased under G.S. 7B-901(c)(3)(iii)).

The court's authority to order the cessation of reasonable efforts for reunification based upon a G.S. 7B-901(c) factor is limited to the initial dispositional hearing; G.S. 7B-901(c) factors are not applicable at a permanency planning hearing. *See In re T.W.*, 250 N.C. App. 68 (2016) (reversing order ceasing reunification efforts after making a finding of a G.S. 7B-901(c) factor at the permanency planning hearing). Similarly, the more "lenient" requirements of different G.S. 7B-906.2(b) findings, which authorize the court to eliminate reunification efforts, are limited to a permanency planning hearing. The G.S. 7B-906.2(b) findings cannot be applied at the initial dispositional hearing or included in that order. *See In re J.M.*, 255 N.C. App. 483 (2017) (vacating portion of combined initial dispositional and permanency planning order that released DSS from providing reasonable efforts upon finding that those efforts would clearly be unsuccessful or inconsistent with the child's health and safety). An order that follows an initial dispositional hearing implicates the statute governing initial dispositional hearings, G.S. 7B-901(c), and requires the trial court to make a finding of one of the G.S. 7B-901(c) factors before it orders reunification efforts are not required. The requirement that a court find one of the G.S. 7B-901(c) factors cannot be eluded by combining an initial dispositional and a permanency planning hearing in a single order. *In re J.M.*, 255 N.C. App. 483. *See* G.S. 7B-906.2(b). See also section 7.8.C, below (discussing permanency planning hearings and reunification efforts).

The court is only required to make G.S. 7B-901(c) findings when the child is in DSS custody. *See In re H.L.*, 256 N.C. App. 450 (2017) (award of guardianship at initial disposition was proper under G.S. 7B-903(a)(5) and did not require the findings of G.S. 7B-901(c)). The court is not required to make findings specified in G.S. 7B-906.1 at an initial dispositional hearing; findings required by that statute apply to review and permanency planning hearings and should be made at the subsequently scheduled G.S. 7B-906.1 hearing. *See In re L.Z.A.*, 249 N.C. App. 628 (2016).

Cases finding a factor under G.S. 7B-901(c) exists warranting an order relieving DSS of reunification efforts include

- Parents had their rights to other children involuntarily terminated, which was proved by the admission of certificated copies of the TPR petitions and orders. *In re M.S.*, 289 N.C. App. 127 (2023).
- Mother committed an act or conduct that increased the enormity of and added to the injurious consequences of the neglect of her infant when she continued to provide an implausible explanation for her other child's death; colluded with father, who was charged with that child's murder, to conceal the truth from the court; and continued her relationship with father. *In re A.W.*, 377 N.C. 238 (2021).

## B. Required Criteria for Review and Permanency Planning Hearings

Although cases will proceed on either (i) the review hearing track when custody has not been removed from a parent, guardian, or custodian, or (ii) on the permanency planning hearing track, when custody has been removed from a parent, guardian, or custodian, the court is required to consider the criteria in G.S. 7B-906.1 (discussed in subsections 1 to 6, below) at both hearings and to make written findings concerning any criteria (or factors) that are relevant. The North Carolina Supreme Court has held a factor is relevant when "there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court." *In re E.S.*, 378 N.C. 8, 12 (2021) (quoting *In re C.J.C.*, 374 N.C. 42, 48 (2020) (cleaned up)) (referencing factors in G.S. 7B-1110 that are relevant in dispositional stage of a TPR). The court of appeals has stated that a relevant factor is one that has "an impact on the trial court's decision[.]" *In re S.Z.H.*, 247 N.C. App. 254, 265 (2016) (citations omitted) (addressing dispositional stage of TPR).

Referring to its opinions addressing relevant factors in the dispositional stage of a TPR, the North Carolina Supreme Court has recognized that the language in G.S. 7B-906.1(d), requiring the court to consider the factors and make written findings on those that are relevant, is "virtually identical" to the language in 7B-1110(a), the dispositional statute for TPR. *In re A.P.W.*, 378 N.C. 405, 411 n.4 (2021). Thus, a trial court need not make findings as to each of the seven factors in G.S. 7B-906.1(d) but only for those factors that are relevant or, in other words, for which conflicting evidence was presented.

**1. Reunification efforts.** The court must consider services offered to prevent the removal of or to reunite the child with either parent (whether or not the child resided with the parent at the time of removal) or with the guardian or custodian from whom the child was removed. G.S. 7B-906.1(d)(1). The court must also consider whether efforts to reunite the child with either parent clearly would be unsuccessful or inconsistent with the child's health or safety and need for a safe, permanent home within a reasonable period of time (regardless of whether the child lived with the parent, guardian, or custodian at the time of removal). G.S. 7B-906.1(d)(3).

If, at a review hearing, the finding that efforts would be unsuccessful or inconsistent with the child's health or safety is made, the court is not authorized by G.S. 7B-906.1(d)(3) to order the cessation of reunification efforts. Instead, the court must schedule a permanency planning

hearing within thirty days. *See In re T.W.*, 250 N.C. App. 68 (2016) (decided under prior version of statute). Note that under the 2021 statutory amendments, the permanency planning hearing must be scheduled within thirty days if the court removes custody from the parent, guardian, or custodian. *See* G.S. 7B-906.1(d)(1a).

If, at a permanency planning hearing, the court finds that efforts would be unsuccessful or inconsistent with the child's health or safety, the court is not authorized to cease reunification efforts and eliminate reunification as a permanent plan unless it also makes the required findings under the concurrent permanency plans statute, G.S. 7B-906.2. See subsection C.8, below (discussing reasonable efforts findings at permanency planning hearings).

**2. Continuation in home of parent, guardian, or custodian.** The court must consider reports on the juvenile's continuation, and appropriateness of that continuation, in the home of a parent, guardian, or custodian. If, at a review hearing, the court removes the child from the custody of a parent, guardian, or custodian, it must schedule a permanency planning hearing within thirty days to address permanent plans for the child, unless the hearing was noticed and heard as a permanency planning hearing. G.S. 7B-906.1(d)(1a); *see* G.S. 7B-906.1(d1) (authorizing any dispositional alternative at review hearing). See sections 7.9.D, below (relating to ceasing reunification efforts, including case law on evidence and findings for ceasing reunification efforts), and 7.10, below (discussing concurrent permanent plans).

**3. Visitation.** The court must consider reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan according to G.S. 7B-905.1. G.S. 7B-906.1(d)(2); *In re C.C.G.*, 380 N.C. 23 (2022) (affirming permanency planning order that modified visitation by ceasing visitation between mother and child after considering DSS and guardian ad litem reports and social worker testimony). See section 7.5, above (related to visitation).

**4. Placement.** The court must consider reports on the placements the child has had, goals of a foster care placement, and the appropriateness of the foster care plan, as well as the role the current foster parent will play in planning for the child. G.S. 7B-906.1(d)(4). *See also In re L.L.*, 172 N.C. App. 689 (2005) (holding that trial court erred in failing to address the goals for foster care and the role of the foster parents), *abrogated in part on other grounds in In re T.H.T.*, 172 N.C. App. 689 (2005).

**5. Independent living.** If the child is 16 or 17 years old, the court must consider a report on an independent living assessment of the child and, if appropriate, an independent living plan. G.S. 7B-906.1(d)(5). See Chapters 8.3 (discussing Foster Care 18−21) and 1.3.B.7 (discussing the Foster Care Independence Act).

**6. Any other criteria.** The court may consider any other criteria it deems necessary. G.S. 7B-906.1(d)(7).

## C. Permanency Planning Additional Requirements

Citing G.S. 7B-906.1(g) and (i), the court of appeals has stated that "[t]he purpose of a permanency planning hearing is to identify the 'best permanent plans to achieve a safe, permanent home for the juvenile' consistent with the juvenile's best interests." *In re L.G.*, 274 N.C. App. 292, 297 (2020). At permanency planning, the court must adopt concurrent permanent plans and identify a primary and secondary plan until a permanent plan has been or is achieved. G.S. 7B-906.2(a1), (b). See section 7.10.A, below.

The court must consider and make findings of relevant criteria addressed in G.S. 7B-906.1(d) (see section 7.8.B., immediately above) and consider additional criteria that are set forth in various other statutes. As the court of appeals noted, the Juvenile Code requires multiple layers of inquiry and resulting findings and conclusions of law. *See In re K.L.*, 254 N.C. App. 269 (2017). While there is a need to address specifically the relevant criteria, appellate courts have not had the expectation that the findings include a formal listing of the factors in the Juvenile Code or that they be expressly denominated as such, where it can be concluded from the findings that the relevant criteria were considered. *See In re T.R.M.*, 188 N.C. App. 773 (2008).

The following statutory criteria (or factors) must be considered, with findings made as to those that are relevant or every factor listed. The specific statute itself indicates whether findings of all or only relevant enumerated factors must be made. Failure to comply with the applicable statute will result in a remand. *See In re L.R.L.B.*, 377 N.C. 311 (2021), *In re J.M.*, 271 N.C. App. 186 (2020), and *In re D.A.*, 258 N.C. App. 247 (2018) (all vacating and remanding permanency planning order for failing to make required G.S. 7B-906.2(d) findings); *In re C.P.*, 258 N.C. App. 241 (2018) (reversing and remanding permanency planning order granting guardianship when mandated finding of G.S. 7B-906.1(e)(1) not made); *In re K.L.*, 254 N.C. App. 269 (reviewing whether court made findings required by G.S. 7B-906.1(d), (e), (i), (n) and 7B-906.2(b), (c), (d); reversing and remanding for additional necessary findings). The exact statutory language is not necessarily required. The North Carolina Supreme Court held that the use of the actual statutory language in making findings is best practice, but the statute does not demand that the trial court's order contain a verbatim recitation of its language. *In re J.M.*, 384 N.C. 584 (2023) (recognizing the exact statutory language is not required; noting that reliance on permanency planning cases that interpreted the statutory language of the Juvenile Code prior to 2015 amendments, such as *In re L.M.T.*, 367 N.C. 165 (2013), should not be relied upon going forward); *In re L.M.T.*, 367 N.C. 165 (reversing the court of appeals, which had reversed the trial court; the order embraced the substance of the statutory provisions; decided under former statute).

**1. Returning home.** The court must consider whether it is possible for the child to be placed with a parent immediately or within the next six months, and if not, why placement with a parent is not in the child's best interest. G.S. 7B-906.1(e)(1). *See also In re L.G.*, 274 N.C. App. 292 (2020); *In re C.P.*, 258 N.C. App. 241 (2018); *In re I.K.*, 227 N.C. App. 264 (2013); *In re J.V.*, 198 N.C. App. 108 (2009); *In re J.S.*, 165 N.C. App. 509 (2004); *In re Ledbetter*, 158 N.C. App. 281 (2003) (all cases in which the trial court erred by failing to make adequate findings as to why it was not in the child's best interest to return home). However, the child

cannot be returned home unless the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(c); *see* G.S. 7B-906.1(*l*); *see also* G.S. 7B-101(19) (definition of "safe home"). See section 7.4.D.2, above (relating to court requirements for returning a child home).

Appellate cases have stated that in determining whether it is possible for the child to return home within six months of the permanency planning hearing, the court must look at the progress the parents have made in eliminating the conditions that led to the removal of the child. *In re J.V.*, 198 N.C. App. 108; *In re T.K.*, 171 N.C. App. 35, *aff'd per curiam,* 360 N.C. 163 (2005). The fact that parents have made some progress does not ensure that the child will be returned home. *See In re T.K.*, 171 N.C. App. 35 (upholding the trial court's determination that while the mother had made progress, the progress was insufficient for the court to be assured that the children could be safely returned to her care and that the best interests of the children, not the rights of the parents, were paramount), *aff'd per curiam,* 360 N.C. 163. Some other issues related to this permanency planning requirement that have been addressed in appellate cases include the following:

- A finding that the juvenile's return home within the next six months is possible materially contradicted finding that reunification clearly would be unsuccessful such that reunification was eliminated as a permanent plan and DSS was relieved of making reasonable efforts with mother. *In re T.D.N.*, 286 N.C. App. 650 (2022) (vacating and remanding permanency planning order that was contradictory regarding the elimination of reunification as a permanent plan with case plan requirements mother must complete; contradictions were more than clerical errors).
- A trial court's finding that the juvenile's return to the home was "improbable," rather than not possible (using a term other than the one in the statute) did not require a remand. Although it is the better practice for the court to use the words of the statute in its findings, the court sufficiently addressed the issue of whether it was possible for the juvenile to be returned home immediately or within the next six months and why it was not in the juvenile's best interests to return home. *In re T.R.M.*, 188 N.C. App. 773 (2008).
- The fact that the court has made guardianship the permanent plan for a child does not eliminate the requirement that the court address whether it is possible for the child to return home. *In re J.V.*, 198 N.C. App. 108.
- The court reversed and remanded where the trial court's order failed to clarify which findings related to which parent and included insufficient findings to support the ultimate finding (or conclusion) that it was contrary to the child's best interest to be returned to respondent. *In re H.J.A.*, 223 N.C. App. 413 (2012).

**2. Guardianship or custody.** Where the child's placement with a parent is unlikely within six months, the court must consider whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents. G.S. 7B-906.1(e)(2). See sections 7.4.C.1, above (placement priority); 7.4.E and F, above (custody and appointment of guardian). The trial court is not required to make findings about whether the respondent parent retains each right or responsibility the parent had before the order granting guardianship or custody. With the exception of visitation, the parent's rights and responsibilities are lost when the court does not

provide otherwise in the order that places the child in the custody or guardianship of someone other than a parent. *In re M.B.,* 253 N.C. App. 437 (2017). Before ordering custody or guardianship to a person other than a parent, the court must verify that the potential guardian or custodian understands the legal significance of the placement or appointment and will have adequate resources to appropriately care for the child. G.S. 7B-906.1(j). See section 7.4.G, above (discussing verification requirement).

- A permanent plan placing a child in guardianship with a half-sibling's grandparents was upheld where the child was bonded with the grandparents and lacked interest in visiting the mother, and the mother failed to undergo ordered psychological evaluation, conquer anger problems, and comply with orders to eliminate contact between her child and her sex offender boyfriend. *In re L.B.*, 181 N.C. App. 174 (2007).
- The trial court erred in failing to consider the biological father as a potential candidate for custody because of his late appearance in the case. *In re Eckard*, 148 N.C. App. 541 (2002) (citing G.S. 7B-907(b)(2), now 906.1(e)(2), for the requirement that the father be considered).

**3. Adoption.** Where the child's placement with a parent is unlikely within six months, the court must consider whether adoption should be pursued and, if so, any barriers to adoption, including whether a TPR should be considered. G.S. 7B-906.1(e)(3). *See In re Z.J.T.B*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to make no finding as to whether adoption should be pursued). See section 7.8.D, below (explaining when DSS may be required to initiate TPR). See also Chapter 9 (discussing TPR).

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**Practice Note:** When the child to be adopted is age 12 or older, the child's consent to their own adoption is required unless the court in the adoption proceeding waives the requirement after finding it is not in the child's best interest to require their consent. G.S. 48-3-601(1); 48-3-603(b)(2). The child's desire to be adopted, especially when the child is age 12 or older, may be relevant when considering this factor. See Chapter 9.12.C.4.(e) (discussing juvenile's consent to adoption).

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**4. Change in current placement.** Where the child's placement with a parent is unlikely within six months, the court must consider whether the child should remain in the current placement or be placed in another permanent living arrangement and why. G.S. 7B-906.1(e)(4). *See In re Z.J.T.B*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to fail to examine whether the children's placement should change and why); *In re Ledbetter*, 158 N.C. App. 281 (2003) (holding that it was error for the trial court to change a child's custody without adequately explaining in its findings why the change was being made).

**5. Reasonable efforts to implement permanent plan.** At hearings after the initial permanency planning hearing, the court must address whether DSS has made reasonable efforts to implement the permanent plan for the child. G.S. 7B-906.1(e)(5). See section 7.9, below (discussing reasonable efforts).

**6. Other criteria.** The court may consider any other criteria it deems necessary. G.S. 7B-906.1(e)(6). *See In re J.M.D.*, 210 N.C. App. 420 (2011) (holding that even if none of the

other statutory criteria were relevant the trial court should have made findings as to "other criteria" relevant to the purpose of the permanency planning hearing).

**7. Permanent plan.** At the conclusion of each permanency planning hearing, the court must make specific findings as to the best permanent plans to achieve a safe, permanent home for the child within a reasonable period of time. G.S. 7B-906.1(g). *See* G.S. 7B-906.2; *In re D.A.*, 262 N.C. App. 559 (2018) (holding the trial court erred in failing to adopt a permanent plan as required by G.S. 7B-906.2); *In re T.W.*, 250 N.C. App. 68, 72 (2016) (stating "[o]bviously, a court presiding at a permanency planning hearing will always consider a permanent plan of care for the juvenile and, indeed, must 'adopt concurrent permanent plans and … identify the primary plan and secondary plan.' "). See section 7.10, below, for further explanation of concurrent permanency planning and the options for a permanent plan.

**8. Reasonable efforts findings.** At each permanency planning hearing, unless reasonable efforts to reunify were previously ceased, the court must make a finding about whether DSS's efforts to reunify were reasonable. G.S. 7B-906.2(c); *see In re A.P.W.*, 378 N.C. 405 (2021) (although not using the term "reasonable" or "reasonableness," court made findings when referring to DSS's efforts in considering relative placement for the children, supervised visitation with transportation for father provided, a voluntary support agreement with DSS, development and implementation of a case plan tailored to assist parents in correcting conditions that led to children's removal for reunification, drug screens for father, home inspections of mother's residence, and attempts to verify father's reported residences). The supreme court, when concluding the trial court found DSS's efforts for reunification were reasonable and satisfied the substance of G.S. 7B-906.2(c), stated its (the supreme court's) "conclusion is further supported by the failure of respondent-father to identify how DSS's efforts for reunification were not reasonable." *In re A.P.W.*, 378 N.C. at 421 (father argued unreasonable time limits were imposed on his contact with his children but trial court, not DSS, imposed limitations; DSS "is not obliged to defy the trial court's orders" to meet the reasonable efforts standard).

The court may order reunification efforts ceased at the initial disposition or any permanency planning hearing. *See* G.S. 7B-901(c) and section 7.8.A.2, above (related to ceasing reasonable efforts at initial disposition); G.S. 7B-906.2(b) (related to ceasing reasonable efforts at a permanency planning hearing); *In re H.L.*, 256 N.C. App. 450 (2017) (trial court complied with G.S. 7B-906.2 when ceasing reunification efforts and eliminating reunification as a permanent plan at first permanency planning hearing after finding further reunification efforts would be unsuccessful). In every subsequent permanency planning hearing, the court must make written findings about the efforts DSS has made toward the primary and secondary permanency plans that were in effect before the hearing and determine whether those efforts were reasonable to timely achieve permanency for the child. G.S. 7B-906.2(c); *see In re K.L.*, 254 N.C. App. 269, 282 (2017) (reversing and remanding order that made no findings of whether DSS made reasonable efforts to reunify with respondent mother; noting the record shows "DSS completely disregarded its statutory duty to 'finalize the primary and secondary' plans until relieved by the trial court.").

Although G.S. 7B-906.2(d) does not explicitly refer to "reasonable efforts," the court must also make written findings of each of the following four factors regarding the parent, which demonstrate the parent's success or failure toward reunification – whether the parent is

- making adequate progress within a reasonable period of time under the plan;
- actively participating or cooperating with the plan, DSS, and the child's guardian ad litem (GAL);
- remaining available to the court, DSS, and the child's GAL; and
- acting in a manner that is consistent with the child's health or safety.

G.S. 7B-906.2(d). *See In re L.R.L.B.*, 377 N.C. 311 (2021) (remanding permanency planning order for failing to make required G.S. 7B-906.2(d) findings); *In re J.M.*, 271 N.C. App. 186 (2020) (vacating and remanding portion of permanency planning order for failing to make required finding under G.S. 7B-906.2(d)(2) and (d)(3) about the parent remaining available to the court, DSS, and GAL); *In re D.A.*, 258 N.C. App. 247 (2018) (vacating and remanding permanency planning order for failing to make required G.S. 7B-906.2(d)(4) finding whether parents acted in a manner inconsistent with the child's health and safety); *In re K.L.*, 254 N.C. App. 269 (reversing and remanding order for additional findings when order did not address mother's progress, shortcomings, or failure to accomplish permanent plan or mother's cooperation or lack thereof with DSS; noting evidence showed DSS offered no assistance to mother). See section 7.9, below (discussing reasonable efforts).

The court's findings of these four factors do not address the ultimate finding of fact to support an order eliminating reunification as a permanent plan under G.S. 7B-906.2(b), which is that reunification efforts clearly would be unsuccessful or inconsistent with the child's health or safety. *See In re D.A.*, 258 N.C. App. at 254 (although addressing findings under G.S. 7B-906.2(d), stating "[t]he order also contains no findings that embrace the requisite ultimate finding that 'reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety' "). A reviewing court will not make ultimate findings on behalf of the trial court or draw inferences. *See In re T.W.*, 250 N.C. App. 68 (2016) (vacating permanency planning order eliminating reunification efforts for failure to make findings under G.S. 7B-906.2(b); remanding for further proceedings). Additional findings are required by G.S. 7B-906.2(b) related to reasonable efforts clearly being unsuccessful or inconsistent with a child's health and safety before the court may cease reunification efforts and eliminate reunification as a concurrent permanent plan at a permanency planning hearing. See sections 7.9 and 7.10.A, below, for a discussion of reasonable efforts, those necessary findings, and concurrent permanency planning.

**9. Youth in DSS custody at age 14 and older.** At every permanency planning hearing where the juvenile is 14 years old or older and in DSS custody, the court must inquire and make findings of each of the following:

- the services provided to assist the juvenile in making a transition to adulthood,
- the steps DSS is taking to ensure the placement provider for the juvenile follows the reasonable and prudent parent standard, and

- whether the juvenile has regular opportunities to engage in age- or developmentally-appropriate activities.

G.S. 7B-912. *See* G.S. 7B-906.2(e); 131D-10.2A (reasonable and prudent parent standard). See section 7.4.D.4, above (discussing reasonable and prudent parent standard and normal childhood activities).

**Juveniles Who Are 17 Years Old.** At each permanency planning hearing after the juvenile turns 17 years old, the court must inquire as to whether the juvenile has important documentation that will help their transition to adulthood and determine the person or entity that will assist the juvenile in obtaining the documents before the juvenile turns 18. The documents include the juvenile's

- birth certificate,
- social security card,
- health insurance information,
- driver's license or other identification card,
- educational or medical records that are requested by the juvenile, and
- information about how the juvenile may participate in Foster Care 18–21.

G.S. 7B-912(b). See also Chapters 1.3.B.10 (discussing the Preventing Sex Trafficking and Strengthening Families Act) and 8.3 (explaining Foster Care 18−21).

For each permanency planning hearing after the juvenile turns 17 years old, DSS must include in its report to the court all of the following:

- efforts DSS has made to identify and secure viable placement options for the juvenile for when the juvenile turns 18;
- a list of appropriate adults who can be resources for the juvenile when the juvenile turns 18;
- contact information for the person responsible for the Foster Care 18–21 program in the county DSS who has custody or placement responsibility for the juvenile or the county DSS where the juvenile plans to reside after turning 18;
- whether the juvenile has information about how to maintain contact with their siblings, parents, or relatives, if appropriate;
- whether DSS has given the juvenile a point of contact for Medicaid and to maintain medical services the juvenile will be eligible for when turning 18; and
- whether DSS has provided the juvenile with information about educational, vocational, or job plans for when the juvenile turns 18.

G.S. 7B-912(b1). See Chapter 8.3 (discussing Foster Care 18–21).

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**Resources:**

For state policy on transition services from foster care to adulthood, including the NC LINKS, TRIP (Transportation Really Is Possible), and Foster Care 18−21 programs, see DIV. OF SOC.

SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.

For materials, training, and tools related to older children in foster care and aging out of foster care, see the "Youth Engagement Project" page of the ABA Center on Children and the Law website.

### D. Initiation of Termination of Parental Rights Proceeding under Certain Circumstances

The court is also required to consider whether a proceeding to terminate parental rights should be initiated so that the child may find permanency outside of their parent's home. The Juvenile Code specifies three circumstances in which DSS is required to initiate a termination of parental rights (TPR) proceeding. The circumstances are

- the child is in the custody or placement responsibility of DSS and has been placed outside the home for twelve of the most recent twenty-two months;
- a court has determined that the parent has abandoned the child; or
- a court has determined that the parent has committed murder or voluntary manslaughter of another child of the parent or has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent.

G.S. 7B-906.1(f).

When one of these circumstances exists, DSS must initiate TPR proceedings unless

- the court finds that guardianship or custody with a relative or other suitable person is the permanent plan for the child;
- the court makes specific findings as to why initiation of TPR proceedings is not in the child's best interest; or
- the court finds that reasonable efforts to reunify the family are still required and that DSS has not provided the family with the services DSS deems necessary for reunification.

G.S. 7B-906.1(f); *see In re J.M.*, 384 N.C. 584 (2023) (facts show court determined DSS should not initiate a TPR because filing a petition was not in the bests interests of the children who had a bond with their parents).

When a TPR is determined to be necessary to achieve the permanent plan for the child, DSS must file a TPR petition or motion within sixty days of the date the permanency planning order is entered unless the court makes written findings as to why this sixty-day time frame cannot be met. When the court finds the sixty-day period cannot be met, it must specify the time within which the TPR petition or motion must be filed. G.S. 7B-906.1(m). Note that the sixty-day time requirement is directory, and failure by DSS to file a TPR petition or motion within the sixty days will not deprive the court of subject matter jurisdiction in the TPR proceeding. *See In re T.M.*, 182 N.C. App. 566 (holding that the trial court was not deprived of subject matter jurisdiction when the TPR filing occurred after the sixty-day period and that

there was no error where no prejudice was shown from the delay), *aff'd per curiam*, 361 N.C. 683 (2007).

In *In re A.A.S.*, 258 N.C. App. 422 (2018), the court of appeals examined the 2015 statutory scheme requiring concurrent permanency planning and stated that G.S. 7B-906.2 "clearly contemplates the use of multiple, concurrent plans including reunification and adoption." *In re A.A.S.*, 258 N.C. App. at 428. The court of appeals distinguished prior cases, including *In re A.E.C.*, 239 N.C. App. 36 (2015), which were decided under the former statutory scheme where concurrent permanency planning was not mandated, and held that the filing of a termination of parental rights petition or motion to achieve a primary plan of adoption when a secondary plan of reunification remains does not explicitly or implicitly eliminate reunification as a permanent plan.

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**Practice Note:** Although the Juvenile Code directs DSS to initiate the TPR action, the child's GAL, a court-appointed guardian of the child's person, or the person with whom the child has resided with for a continuous period of eighteen months or more, has standing to and may initiate a TPR action. *See* G.S. 7B-1103(a)(2), (5), and (6). The timeliness of filing the TPR petition or motion is important. If an appeal of an order eliminating reunification as a permanent plan is pending, the trial court continues to exercise jurisdiction in the abuse, neglect, or dependency action (unless otherwise directed by the appellate court) but may not proceed with a TPR action. G.S. 7B-1003. If a child's permanent plan is adoption and a TPR is required, the achievement of that plan will be delayed if there is a pending appeal of an order eliminating reunification as a permanent plan since the TPR action cannot proceed until the appeal is resolved. See Chapter 12.5.A.3 (discussing appeal of an order eliminating reunification as a permanent plan).

**Resource:** Sara DePasquale, *What Can the District Court Do in an A/N/D or TPR Action when an Appeal is Pending?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Aug. 2, 2019).

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## E. Hearing to Modify Dispositional Order

The Juvenile Code allows a party to file a motion (or petition) to modify an order entered in the abuse, neglect, or dependency action. G.S. 7B-1000. Upon such motion (or petition), the court may conduct a modification hearing, after providing notice to the parties, to determine whether the order is in the child's best interests. G.S. 7B-1000(a).

Significant changes were made to G.S. 7B-1000, effective October 1, 2021. A motion to modify is appropriate when (1) there is a change in circumstances or the needs of the juvenile require a modification, and (2) the issues that are raised in the motion do not require a review or permanency planning hearing. The second prong was added by S.L. 2021-100 and has the effect of limiting when a G.S. 7B-1000 motion, versus a motion for a G.S. 7B-906.1 hearing, is appropriate.

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**Practice Note:** Whether a case requires a review or a permanency planning hearing under G.S. 7B-906.1 will depend on whether the case was on the review or permanency planning hearing track and the type of relief being requested in the motion seeking to modify the dispositional

order. For example, if the relief sought is a change in the dispositional alternative (e.g., custody and/or placement), a G.S. 7B-906.1 hearing is required. However, a motion seeking a modification on decision-making authority would not need a G.S. 7B-906.1 review or permanency planning hearing. For example, a party may seek to modify an order addressing (i) medical consent issues under G.S. 7B-505.1(c) and 7B-903.1(e) or (ii) decisions made under the reasonable and prudent parent standard under G.S. 7B-903.1(b).

The applicable standard in the modification hearing is either proof of a change in circumstances or the needs of the juvenile. G.S. 7B-1000(a). In *In re A.C.*, 247 N.C. App. 528 (2016), the court of appeals addressed the criteria of G.S. 7B-1000. Distinguishing the standard applicable to a G.S. 7B-1000 motion to modify from a motion to modify a G.S. Chapter 50 civil custody order, the court of appeals held that G.S. 7B-1000 allows for a modification based on a change in the needs of the juvenile or a change in circumstances and that the burden is on the moving party to prove the changes that support the modification being sought. The changes must have either occurred or been discovered since the time of the order sought to be modified, but the court may consider historical facts of the case to determine whether a change has occurred. When a change has occurred, the court applies the best interests of the child standard in making any modifications to the order. In *In re A.C.*, the movant alleged a change in circumstances (not the needs of the juvenile), and the trial court properly determined that a substantial change in circumstances existed, and a modification of the order was in the child's best interests.

A motion to modify may be filed at any time after the juvenile has been adjudicated abused, neglected, or dependent so long as the court has retained jurisdiction. G.S. 7B-1000(b). This means that a modification motion may be filed before or after permanency has been achieved. When a motion to modify has been filed after the juvenile's guardian ad litem (GAL) and/or a respondent parent's attorney has been released, the court must reappoint a GAL and attorney advocate to the juvenile and/or appoint provisional counsel to the respondent parent. G.S. 7B-1000(c), (d); *see* G.S. 7B-602 (appointment of provisional counsel). When the juvenile's GAL and attorney advocate are reappointed, the clerk must provide the motion and any notice of hearing to the GAL and attorney advocate, and the hearing cannot occur until the GAL and attorney advocate are reappointed. G.S. 7B-1000(c).

## 7.9 Reasonable Efforts

### A. Introduction

In abuse, neglect, or dependency proceedings "reasonable efforts" is a term of art that originated with the federal Adoption Assistance and Child Welfare Act of 1980. Reasonable efforts requirements have been part of the North Carolina Juvenile Code since 1988. *See* S.L. 1987-1090. The Adoption and Safe Families Act (ASFA) was enacted in response to a recognition that the child welfare system was overburdened and moved slowly, that some children were spending what many professionals thought to be an unreasonable portion of their childhoods in foster care, and that efforts to assist parents in correcting conditions that led to a child's removal often were insufficient. The changes also reflected an increased

awareness that children's perception of time is different from that of adults. A period of three days, three months, or three years as experienced by judges, attorneys, social workers, and parents is not comparable to that same period in the life of a child. ASFA focused on the child's safety, explicitly addressed permanency for children, included timelines to move a case forward, and made changes to reasonable efforts provisions initially enacted by the Adoption Assistance and Child Welfare Act. See Chapter 1.3.B.3 and 6 (providing more information on the Adoption Assistance and Child Welfare Act and ASFA).

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**Resources:**
CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children" (2020).

JUDGE LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE (2nd ed.), available on the National Council of Juvenile and Family Court Judges website.

For a comprehensive discussion on the reasonable efforts requirements, see the white paper from the YOUTH LAW CENTER, "Making Reasonable Efforts: A Permanent Home for Every Child" (2000). For guidance on what constitutes reasonable efforts, see the material starting on page 66 of this resource.

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## B. Statutory Definitions: Reasonable Efforts, Return Home, Reunification

The Juvenile Code defines "reasonable efforts" as DSS's diligent use of

- preventive or reunification services "when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time" or
- permanency planning services to develop and implement a permanent plan for the juvenile, if the court has determined that the juvenile is not to be returned home.

G.S. 7B-101(18).

The Juvenile Code defines "return home or reunification" as "placement of the juvenile in the home of either parent or placement of the juvenile in the home of a guardian or custodian from whose home the child was removed by court order." G.S. 7B-101(18c). This definition was added to the Juvenile Code in 2013 and supersedes the holding of the court of appeals in *In re J.M.D.*, 210 N.C. App. 420 (2011), that a child is returned home only when placed back in the home from which the child was removed.

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**Practice Notes:** The Juvenile Code appears to use the term "reunification efforts" interchangeably with "reasonable efforts" for reunification. There is no definition of "reunification efforts."

Because reunification refers to the child's placement with either parent or with a guardian or custodian from whose home the child was removed, reasonable efforts and reasonable efforts

findings must be made with respect to both parents and, if the child was removed by court order from the home of a custodian or guardian, that person as well. *See In re A.E.C.*, 239 N.C. App. 36 (2015).

### C. Required Findings

In any case in which the child is placed in the custody or placement responsibility of DSS, the Juvenile Code requires the court to make findings at each placement stage of the proceeding about whether DSS has made reasonable efforts to prevent the child's need for placement. *See* G.S. 7B-507(a)(2) (nonsecure custody phase); 7B-903(a3) (dispositional phase). A finding that reasonable efforts to prevent the child's placement were precluded by an immediate threat of harm to the child or a finding that reasonable efforts were not made by DSS does not prevent the court from ordering the child's out-of-home placement when the court finds that the child's placement is necessary for their protection. G.S. 7B-903(a3); *see* G.S. 7B-507(a)(2). The court must make a finding that the child's continuation in or return to their own home would be contrary to the child's health and safety. G.S. 7B-903(a2). Additionally, different findings regarding reasonable efforts are required at different stages in an abuse, neglect, or dependency action as discussed in earlier sections of this Chapter.

Although the child's best interests is the primary standard used throughout the Juvenile Code, some of the statutes related to reasonable efforts refer to the child's health and/or safety as the paramount concern when addressing reasonable efforts. *See* G.S. 7B-507(a)(2); 7B-903(a3); 7B-906.1(d)(3); 7B-906.2(b).

**Practice Note:** The statute and appellate cases refer to reasonable efforts findings, but the determination as to reasonable efforts is a conclusion of law. *See, e.g., In re N.L.M.*, 283 N.C. App. 356, 360 (2022) (stating "[t]he reasonable efforts determination is a conclusion of law because it 'require[s] the exercise of judgment.' " (citation omitted)); *In re E.G.M.*, 230 N.C. App. 196, 211 (2013) (stating "[d]espite its statutory designation as a finding or 'ultimate finding'… the determination that grounds exist to cease reunification efforts under [statutory language that such efforts would clearly be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time] is in the nature of a conclusion of law that must be supported by adequate findings of fact."); *In re Helms*, 127 N.C. App. 505, 510−11 (1997) (stating that "reasonable efforts and best interest determinations are conclusions of law because they require the exercise of judgment.").

Recent appellate opinions have looked at whether DSS has made reasonable efforts. It is clear from the case law that although DSS is required to provide reasonable efforts, those efforts need not be "exhaustive." *In re H.P.*, 278 N.C. App. 195, 208 (2021) (quoting *In re A.A.S.*, 258 N.C. App. 442 (2018)) (determining DSS did not make reasonable efforts to prevent the children's removal). Reasonableness requires that the reunification efforts of DSS be "diligent." *See In re J.C.-B.*, 276 N.C. App. 180, 190 (2021) (citing G.S. 7B-101(18)).

In determining what constitutes reasonable efforts, there is no standard that has been applied but rather different appellate opinions have made different findings. However, the court of appeals looked to a prior published opinion that examined a federal regulation that establishes:

> a nonexclusive list of services which may satisfy the reasonable efforts requirement . . . . i.e., crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker….

*In re N.L.M.*, 283 N.C. App. 356, 361 (2022) (quoting *In re D.M.*, 211 N.C. App. 382, 386 (2011)).

The appellate court is bound by findings made in previous final orders when determining whether DSS made reasonable efforts. *In re J.M.*, 384 N.C. 584 (2023) (reversing court of appeals; appeal of permanency planning order cannot be transformed to a collateral attack on a final adjudication order; court of appeals could not determine reasonable efforts were not made when DSS did not interview other children who resided in the home who may have provided an explanation for how the infant was injured when the adjudication order, which was not appealed, found that the nonaccidental injuries could not have occurred by anyone other than respondents).

In the following cases, the North Carolina appellate courts determined that DSS made reasonable efforts.

- *In re N.L.M.*, 283 N.C. App. 356 (unchallenged findings support conclusion that DSS made reasonable efforts, including a court-approved kinship placement; a transitional living plan for the 14-year-old juvenile; mental health treatment for a juvenile; referrals to services for parenting, mental health assessment and services, and substance use assessment and services; random drug screens; domestic violence services; and follow-up records requests from the referred service providers; mother refused all services).
- *In re A.P.*, 281 N.C. App. 347 (2022) (DSS made reasonable efforts when it made referrals for mother to complete her case plan, attempted to engage mother in services that were recommended in her psychological evaluation, attempted to enroll mother in an assisted living facility that would provide mother with independent living skills programming, monitored mother's compliance and progress with her case plan, and assisted with supervised visits where there was a parenting teacher present).
- *In re C.C.G.*, 380 N.C. 23 (2022) (DSS repeatedly contacted and attempted to contact mother, including when she was incarcerated and refused to meet; maintained contact with the child and the child's placement providers; obtained an updated psychological evaluation for the child; coordinated a supervised visit for mother that mother cancelled; offered transportation assistance that mother rejected; and held child and family team meetings).
- *In re R.G.L.*, 379 N.C. 452 (2021) (DSS referred the parents to substance use treatment and a parenting program, requested random drug screens, established supervised visits with the child, provided a housing list to the parents, met with the parents every three months to review the case plan and address additional concerns including the parents' need for counseling, changes to their work schedule, and a plan of care for their child, and referred father to a neurologist to address his sleep issues).

In other opinions, the court of appeals determined that DSS did not make reasonable efforts.

- *In re S.D.*, 276 N.C. App. 309 (2021) (DSS created a case plan, held regular child and family team meetings, linked mother with mental health services and parenting education, confirmed mother completed services, facilitated visits, and ensured the juvenile's medical and developmental needs were met but did not provide mother with meaningful assistance to obtain housing; instead, DSS provided mother an unvetted list of addresses obtained from a third party and referred her for subsidized housing, which had a three-year waiting list).
- *In re J.C.-B.*, 276 N.C. App. 180, 191 (reasonable efforts in support of reunification "were arguably non-existent" since the time of the previous appeal of permanency planning order eliminating reunification; DSS did not request a home assessment of mother's home in Texas and successfully requested the court order no contact between mother and child; efforts of contacting and visiting with the juvenile while in placement and collateral contacts to service providers were about the child's well-being and not how to reunify mother and child; contact with mother, permanency planning hearings, and strengths and needs assessments monitored progress toward reunification but the record does not show any concrete steps or timelines for reunification were established).

Beyond the possibility of being reversed on appeal and delaying permanency for a child, the Juvenile Code does not specify consequences for a court's failure to make findings about reasonable efforts or for the failure of a DSS to actually make reasonable efforts. The findings and the efforts themselves are conditions of the state's receipt of federal child welfare funding. Consequences to the state for failing to adhere to reasonable efforts requirements, if they occur, would come from the federal government, which can withhold or recoup funding the state receives under Title IV-E of the Social Security Act if these and other conditions are not met. See Chapter 1.2.C and 1.3.B (providing more information on Title IV-E and other federal programs, as well as state compliance with federal laws).

### D. Ceasing Reasonable Efforts

The court of appeals has noted that the essential aim of dispositional hearings is to reunite a child who has been removed from their parent's care, and as a result of that purpose, the Juvenile Code limits when a court may order that reasonable efforts to reunify a parent with their child are not required. *In re T.W.*, 250 N.C. App. 68 (2016); *see In re J.M.*, 276 N.C. App. 291 (2021) (goal of juvenile court is reunification), *rev'd on other grounds*, 384 N.C. 584 (2023). As of October 1, 2015, the court's authority is limited to the initial dispositional and permanency planning hearings. *See* G.S. 7B-901(c); 7B-906.2(b). See sections 7.8.A.2, above (discussing initial dispositional hearing), and 7.8.C.8, above (discussing permanency planning hearing).

An amendment to G.S. 7B-906.2(b), effective October 1, 2021, requires that a finding that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health or safety "shall eliminate reunification as a [permanent] plan." *See* S.L. 2021-100, sec. 11. The addition of this language appears to supersede court of appeals opinions that bifurcated the cessation of reunification efforts from the elimination of reunification as a permanent plan at a

permanency planning hearing. This 2021 statutory amendment responds to the court of appeals encouragement for "the North Carolina General Assembly to amend these statutes to clarify their limitations" so as "[t]o avoid confusion of our DSS workers and trial courts and to promote permanency for children . . . . " *In re M.T.-L.Y.*, 265 N.C. App. 454, 466 (2019). See section 7.10.A, below, for further discussion of reunification as a permanent plan.

**Practice Note:** Appellate opinions often refer to permanency planning orders that have ceased reunification efforts and eliminated reunification as a permanent plan as an appeal of an order ceasing reunification efforts. *See, e.g., In re M.T.*, 285 N.C. App. 305 (2022).

Appellate cases involving challenges to orders ceasing reunification efforts have focused on determining whether the trial court made appropriate findings that address the specific requirements of the applicable statute, whether the findings were based on competent evidence in the record, whether the findings supported the court's conclusion of law, and whether the trial court abused its discretion. *See In re J.R.,* 279 N.C. App. 352 (2021) (affirming permanency planning order; findings were based on "credible" evidence including DSS court report admitted to evidence, two GAL reports, a letter from service provider, and DSS social worker testimony); *In re I.K.,* 260 N.C. App. 547 (2018) (vacating and remanding permanency planning order where evidence could support findings of either parents' reasonable progress or minimal and insufficient progress on their case plans; the findings were not sufficiently specific to allow the appellate court to determine what evidence the trial court relied on to conclude reunification efforts should cease); *In re P.T.W.*, 250 N.C. App. 589 (2016) (affirming order ceasing reunification efforts; findings supporting cessation of reunification efforts were supported by competent evidence – the DSS social worker's testimony and DSS court summary, neither of which were contradicted by respondent mother). The facts and conclusions must be based on evidence *presented at the hearing* that results in an order ceasing reunification efforts. *In re P.T.W.,* 250 N.C. App. 589 (emphasis in original). Note that as of October 1, 2015, the applicable statutes are G.S. 7B-901(c) and 7B-906.2(b); prior to that date, the applicable statute was G.S. 7B-507.

Where court orders have failed to address the specific requirements of the applicable statutes, appellate cases have found reversible error. *See, e.g., In re L.R.L.B.,* 377 N.C. 311 (2021) and *In re J.M.*, 271 N.C. App. 186 (2020) (both remanding for additional findings required by G.S. 7B-906.2(d)); *In re D.A.*, 258 N.C. App. 247 (2018) (vacating and remanding order for additional findings required by G.S. 7B-906.2); *In re K.L.,* 254 N.C. App. 269 (2017) (reversing and remanding order for additional findings required by G.S. 7B-906.1 and 7B-906.2); *In re A.E.C.*, 239 N.C. App. 36 (2015) (vacating and remanding the court's order to cease reunification efforts where that order and the order terminating parental rights failed to determine whether DSS had made reasonable efforts to reunify, whether reunification would be futile, or why placement with the father was not in the child's best interest).

However, the exact statutory language is not required. The supreme court held that the use of the actual statutory language in making findings is best practice, but the statute does not demand that the trial court's order contain a verbatim recitation of its language. *In re J.M.*, 384 N.C. 584 (2023) (recognizing the exact statutory language is not required; noting that reliance on permanency planning cases that interpreted the statutory language of the Juvenile

Code prior to 2015 amendments, such as *In re L.M.T.*, 367 N.C. 165 (2013), should not be relied upon going forward); *In re H.A.J.*, 377 N.C. 43 (2021) (affirmed order eliminating reunification; G.S. 7B-906.2(d) findings were made although exact statutory language was not used); *In re J.H.*, 373 N.C. 264 (2020) (affirmed order "ceasing reunification"); *In re L.E.W.*, 375 N.C. 124 (2020) (affirmed order eliminating reunification as a permanent plan).

In some circumstances, deficiencies with findings of fact that exist in an order eliminating reunification efforts may be cured in a subsequent order terminating parental rights. This may happen when a termination of parental rights (TPR) action is filed within the statutory time period affecting an appeal of an order eliminating reunification such that the appeals of the two orders are heard together. *See In re L.M.T.*, 367 N.C. 165 (reviewing G.S. 7B-1001(a)(5) (*see also* G.S. 7B-1001(a)(8)); holding legislature unambiguously instructed the appellate courts to review the appeal of an order ceasing reunification together with an appeal of a TPR order, allowing incomplete findings of fact in the cease reunification order to be cured by findings of fact in the TPR order); *In re M.T.-L.Y.*, 265 N.C. App. 454 (stating TPR order included supplemental findings to support permanency planning order that ceased reunification efforts); *In re J.T.*, 252 N.C. App. 19 (2017) (vacating order ceasing reunification efforts and TPR order; neither order contained sufficient findings to eliminate reunification efforts); *In re D.C.*, 236 N.C. App. 287 (2014) (deficiency in permanency planning order was cured by TPR order). See Chapter 12.4.A.5 (discussing in detail the requirements for an appeal of an order eliminating reunification).

The requirements of the statute authorizing the cessation of reunification efforts based on whether those efforts clearly would be unsuccessful or inconsistent with the child's health, safety, and need for a safe, permanent home have been found to be satisfied where the trial court relates its findings to one of those prongs. The court of appeals cannot "simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home." *In re I.R.C.*, 214 N.C. App. 358, 363 (2011) and cases cited therein at 364 (decided under former G.S. 7B-507). *See In re T.W.*, 250 N.C. App. 68 (quoting *In re I.R.C.*, 214 N.C. App. at 363−64); *see also In re J.P.*, 230 N.C. App. 523 (2013) (holding that the trial court did relate its findings to a conclusion of law setting forth the basis for ceasing reunification efforts; decided under former statute). Note that the former statute authorizing the cessation of reasonable efforts, G.S. 7B-507, was based on a finding that efforts clearly would be "futile" (now replaced with "unsuccessful") or inconsistent with the child's health, safety, "and need for a safe, permanent home within a reasonable period of time" (now referring solely to the child's "health and safety"; however, a reasonable period of time is referred to throughout the Juvenile Code).

At a permanency planning hearing, when ceasing reunification efforts and eliminating reunification as a permanent plan, the court must make findings under both G.S. 7B-906.2(b) and (d). *See In re L.E.W.*, 375 N.C. 124.

In an opinion addressing the cessation of reunification efforts and resulting elimination of reunification as a permanent plan, the court of appeals stated "[p]arental compliance with a case plan alone is not always sufficient to preserve parental rights" because "parents must

demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors." *In re M.T.*, 285 N.C. App. 305, 332 (2022) (citations omitted).

The North Carolina Supreme Court has addressed the standard of review of an order ceasing reunification: "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law" and " . . . whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. at 267 (this appeal involved a permanency planning order that ceased reunification efforts and eliminated reunification as a permanent plan). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re J.M.*, 384 N.C. at 591 (citation omitted). The standard is not clear and convincing evidence. *See In re L.E.W.*, 375 N.C. 124 (affirming permanency planning order that eliminated reunification as a permanent plan; application of the clear and convincing evidence standard conflicted with the competent evidence standard that applies but was harmless error); *see also In re B.R.W.*, 278 N.C. App. 382, 392 n.3 (2021) (in appeal of permanency planning order, "this Court reviews whether the trial court's findings of fact were supported by competent evidence, not clear and convincing evidence"), *aff'd*, 381 N.C. 61 (2022).

The following cases address the sufficiency of the evidence and findings to support an order ceasing reunification efforts and have found them sufficient.

- Finding under G.S. 7B-906.2(b) that reunification efforts would be unsuccessful or inconsistent with the children's health, safety, and welfare were based on (1) mother's failure to make adequate progress on her case plan because the services she completed (a parental capacity evaluation and parenting classes) did not address the reasons why the children were placed in DSS custody and (2) the lack of explanation for the child's nonaccidental injuries while in the sole care of mother and father. These findings were supported by the evidence, and the trial court's view of the evidence was reasonable and withstood appellate scrutiny. *In re M.T.*, 285 N.C. App. 305.
- Findings addressed each of the G.S. 7B-906.2(d) factors although the exact statutory language was not used. Mother did not make adequate progress or actively participate in her case plan and was acting inconsistently with the children's health and safety. DSS did coordinate with mother, and mother remained available to the trial court and DSS. The findings also address whether reunification efforts would be unsuccessful or inconsistent with the children's health and safety and need for a safe, permanent home within a reasonable period of time. *In re H.A.J.*, 377 N.C. 43.
- The trial court's extensive findings about the respondent making "some progress" on her parenting skills but was not able to safely parent her children was supported by the evidence, which included the parent being unemployed and unable to provide for herself and her children for a six-month period and the need to discontinue parent coaching due to her being argumentative and her lack of progress. *In re J.H.*, 373 N.C. 264.
- The findings supported conclusion to cease reunification efforts when they showed mother failed to verify with DSS her participation in substance use treatment and her employment and living arrangements; did not comply with the family services agreement, visitation schedule, drug testing, or the requirement that she attend her child's medical appointments; violated the safety plan; and tested positive for drugs. Although a parent

may partially perform a required condition, that partial performance does not necessarily prevent the court from concluding the performance is inadequate. *In re M.T.-L.Y.*, 265 N.C. App. 454.

- Findings that father had not made progress on his case plan, missed a Child and Family Team meeting (CFT), refused social worker home visits, and visitation had not been increased supported conclusion to cease reunification efforts. *In re J.A.K.*, 258 N.C. App. 262 (2018).
- The findings and evidence showing respondent mother's failure to comply with her case plan, demonstrate sustained parental improvements, and maintain stable housing; substantiation by DSS for sexual abuse of another one of her children who was not the subject of the court action; and lack of awareness of her history of domestic violence with the children's father supported an order ceasing reunification efforts after concluding those efforts would be inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable time. Although one finding of fact regarding mother's failure to reengage in therapy was not supported by competent evidence, the remaining findings of fact support the court's ultimate decision to cease reunification efforts. *In re P.T.W.*, 250 N.C. App. 589.
- The findings supported the conclusion of law that a reunification plan with respondent mother would be futile or inconsistent with the child's need for a safe, permanent home within a reasonable period of time where they showed the parent educator who was working with mother was concerned about mother's ability to protect her child and that mother was aware of one of the children's father's sexual abuse of another one of her children, was not prepared for visits and did not interact with and comfort her child at visits, and moved in with a man upon whom she was dependent despite knowing recommendations for reunification would not be made if there were concerns about her living, parenting, and financial situation. *In re E.M.*, 249 N.C. App. 44 (2016).
- Findings in the reunification order that the mother had failed to attend visits or complete her case plan, had pending criminal charges, had not participated in drug screens, and that the children could not go home for at least six months were sufficient to suggest that reunification efforts would be futile. *In re H.D.*, 239 N.C. App. 318 (2015).
- Reviewing the permanency planning order together with the TPR order, the court of appeals found that the detailed findings in the TPR order relating to the respondent mother's drug use, failures of treatment, and relapses up until the time of the TPR hearing were sufficient to support cessation of reunification efforts. *In re D.C.*, 236 N.C. App. 287.
- The supreme court found the findings were sufficient to support the trial court's order ceasing reunification efforts where respondent mother's drug use and domestic violence problems were worsening, and she was covering these problems up and refusing to acknowledge them. *In re L.M.T.*, 367 N.C. 165, *superseded in part by statute as stated in In re J.M.*, 384 N.C. 584.
- The court of appeals agreed with respondent mother that some findings of fact in an order ceasing reunification efforts were unsupported, but the court determined that they were not material to the trial court's decision, and other findings were sufficient to support ceasing reunification efforts. Supported findings established continuing verbal aggression and significant conflict between the parents, that the parents had not successfully engaged in couples therapy, that the mother had made only limited progress on treatment goals

and had a pattern of poor parenting, and that the child had been detrimentally affected. *In re A.Y.*, 225 N.C. App. 29 (2013).

- An order to cease reunification efforts was upheld where findings were that mother failed to comply with the terms of a case plan regarding the child's sibling, that the father failed to seek necessary medical care despite being prompted, and that both parents had intellectual disabilities. Also, the mother did not understand the reason for DSS involvement, and she shared characteristics with parents who have been known to abuse their children. Despite intensive case management offered to respondents, there were missed appointments and an inability to contact or locate the child and mother. Both the mother and father would need ongoing support to effectively parent, and there did not appear to be a person available to supervise the parents if child was placed in their home or the home of a relative. *In re C.M.*, 183 N.C. App. 207 (2007).
- In determining whether to continue reunification efforts or change the permanent plan, it was permissible for the court to consider the cost of providing services deemed necessary for reunification. Here, the court concluded that because the mother would need help twenty-four hours a day to cope with and care for her children, "reunification is possible but not financially practical." *In re J.J.*, 180 N.C. App. 344, 350–51 (2006), *aff'd*, 362 N.C. 172 (2008).

The following cases have found the evidence and findings insufficient to support an order eliminating reunification efforts.

- Findings focused on domestic violence between the parties, which was the underlying issue in the action, but evidence showed parents participated in their case plan services, had no reports of domestic violence in 580 days, the child was bonded with her parents and visits went well, and DSS had earlier dismissed the neglect petition regarding the younger sibling who remained in the parents' care. The court of appeals stated, "[i]t is wholly inconsistent and inexplicable for an infant to be left in the care of Respondents, but for [the juvenile] to remain in a placement with the foster parents." Findings that the trial court is mandated to make under G.S. 7B-906.2(d) were not made and some findings were unsupported by the evidence. *In re A.W.*, 280 N.C. App. 162, 173 (2021).
- Findings required by G.S. 7B-906.2(b) and (d) were not made. Court did not consider mother's progress in securing housing given the impact of Hurricane Florence and the resulting scarcity of housing; mother's poor credit score that eliminated many rental units; and mother's income, which was too much to qualify for some subsidies but not enough to afford many of the homes that were available. Findings also did not address whether mother was participating in the case plan or cooperating with DSS and the child's guardian ad litem (GAL); whether she remained available to the court, DSS, and the GAL; and whether she was acting in a manner that was inconsistent with the juvenile's health or safety. The evidence shows mother was participating in the plan and cooperating with all the parties. *In re S.D.*, 276 N.C. App. 309 (2021).
- Findings that the "home remains an injurious environment" and that "a return home would be contrary to the best interests of the juvenile" do not constitute a finding that reunification efforts would be unsuccessful or inconsistent with the child's health or safety as required by G.S. 7B-906.2(d). *In re D.A.*, 258 N.C. App. at 254 (vacating and

remanding permanency planning order to determine whether to cease reunification efforts with mother).

- The court of appeals vacated a permanency planning order that ceased reunification efforts with respondent father and as a result vacated the TPR order that was heard together on appeal with the permanency planning order. At the permanency planning hearings, the trial court heard no oral testimony and instead heard statements from the attorneys, which are not evidence, and accepted court reports submitted by DSS and the child's guardian ad litem (GAL). Relying on previous opinions, the court of appeals stated, "reports incorporated by reference in the absence of testimony are insufficient to support the trial court's findings of fact" and determined the findings in the permanency planning order were unsupported by competent evidence and its conclusions of law were in error. In looking to the TPR order, the court of appeals found the TPR order did not cure the deficiencies in the permanency planning order. *In re J.T.*, 252 N.C. App. at 21.
- The court's findings under G.S. 7B-906.2(d) of mother's refusal to engage in treatment, pending criminal charges, failure to attend the permanency planning hearing due to oversleeping, her aggressive behavior toward the proposed guardians at a child and family team meeting, and her acting inconsistently with her parental rights do not address the ultimate finding of fact required by G.S. 7B-906.2(b) to support the cessation of reunification efforts – whether efforts would clearly be unsuccessful or inconsistent with the child's health or safety. An appellate court will not make that inference. *In re T.W.*, 250 N.C. App. 68 (vacating permanency planning order and remanding for further proceedings).
- The court of appeals reversed and remanded a permanency planning order that ceased reunification efforts with respondent father, holding that the evidence did not support the trial court's findings related to reunification efforts, and the findings did not support the conclusion that reunification efforts should cease. The findings failed in several respects to meet the requirements of [former statutes] G.S. 7B-907(b) and 7B-507. There was insufficient evidence of risk of abuse by the father; some findings were mere recitations of evidence; some findings were contrary to evidence that the father was not likely to abuse the child; and findings did not explain why the child could not be returned home or why not returning home was in her best interest. *In re I.K.*, 227 N.C. App. 264 (2013).
- Evidence was insufficient to support an order ceasing reunification efforts with respondent mother where DSS recommended reunification; injuries to the child occurred while in the care of someone the mother was no longer seeing; the mother had a low I.Q. but no severe mental health issues that would interfere with her ability to parent; mother understood her poor choices leading to abuse and had grown and matured to a level as to not be a danger to the child; and the mother continued to pay child support, visit the child regularly, stay employed, and comply with her case plan. Also, the trial court had failed to consider changed conditions, which in this case were highly relevant. *In re Eckard*, 148 N.C. App. 541 (2002).

**E. The Americans with Disabilities Act.** The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of a physical or mental disability. In *In re A.P.*, 281 N.C. App. 347 (2022), the North Carolina Court of Appeals addressed ADA issues raised by a mother who has an intellectual disability in an appeal of a permanency planning order that achieved permanency for the child when awarding custody to the father, thus eliminating reunification

as a permanent plan with the mother. In relying on its holding in *In re C.M.S.*, 184 N.C. App. 488 (2007), which addressed the ADA as applied to a termination of parental rights action, the court of appeals held when a trial court concludes that " 'DSS has made reasonable efforts to reunify and to eliminate the need for placement of the juvenile,' it necessarily complied with the ADA's directive that a parent not be 'excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program.' " *In re A.P.*, 281 N.C. App. at 354 (citations omitted). The conclusion that DSS made reasonable efforts when it (i) made referrals for mother to complete her case plan, (ii) attempted to engage mother in services that were recommended in her psychological evaluation, (iii) attempted to enroll mother in an assisted living facility that would provide mother with independent living skills programming, (iv) monitored mother's compliance and progress with her case plan, and (v) assisted with supervised visits where there was a parenting teacher present were supported by competent evidence.

In *In re A.P.*, mother also challenged the adequacy of the services provided by DSS, arguing those services did not comply with the ADA. The court of appeals held that mother waived this argument for appellate review because she did not raise the issue before the trial court. The adequacy of services under the ADA cannot be raised for the first time on appeal. The time to address the adequacy of the services provided and need for accommodations under the ADA is when the trial court adopts a service plan, either before or during the permanency planning hearing, so that reasonable accommodations can be made. *In re A.P.*, 281 N.C. App. 347; *see also In re S.A.*, 256 N.C. App. 398 (2017) (unpublished) (holding mother with a physical disability waived the issue of whether the services were adequate under the ADA for appellate review when she did not raise it before or during the permanency planning hearing).

See Chapter 13.5 (discussing the ADA).

## 7.10 Concurrent Permanency Planning and Outcomes

At the conclusion of the permanency planning hearing, the court must make specific findings required by the various applicable statutes, discussed throughout this Chapter. The court also must make determinations related to the best plans of care to achieve a safe, permanent home for the child within a reasonable period of time. The court has the same dispositional alternatives and authority over parents and others that it has at the initial dispositional and review hearings.

### A. Concurrent Permanency Planning

The Juvenile Code mandates concurrent permanency planning in all actions filed or pending on or after October 1, 2015. *See* S.L. 2015-136, sec. 14. However, effective for all actions filed or pending on or after October 1, 2021, permanency planning does not occur when the abuse, neglect, or dependency action is on the review hearing track only. When on the review hearing track only, a permanency planning hearing is never scheduled. *See* G.S. 7B-906.1(a). In review hearing track cases, the juvenile has never been removed from the custody of a parent, guardian, or custodian. *See* G.S. 7B-906.1(a). There is no permanent plan to achieve

since there was no removal. Instead, the juvenile is residing in what the court has found to be a safe home while the parent is completing court-ordered services. *See* G.S. 7B-906.1(d2). The purpose of the Juvenile Code is achieved, and the case may conclude with the court ordering the termination of its jurisdiction once the parent, guardian, or custodian has successfully completed court-ordered services. *See* G.S. 7B-906.1(d2); *see also* G.S. 7B-101(19) (definition of "safe home"); 7B-100 (purpose of Juvenile Code).

There are six types of permanent plans:

- reunification,
- adoption,
- guardianship with relatives or others,
- custody to a relative or other suitable person,
- Another Planned Permanent Living Arrangement (APPLA) for youth who are 16 or 17 years old, and
- reinstatement of parental rights (when parental rights have been terminated).

G.S. 7B-906.2(a). *See* G.S. 7B-101(18c) (definition of "reunification"); 7B-600 (appointment of guardian); 7B-903(a) (dispositional alternatives); 7B-911 (transfer to a G.S. Chapter 50 custody action); 7B-912(c), (d) (APPLA); 7B-1114 (reinstatement of parental rights); G.S. Chapter 48 (adoption).

At any permanency planning hearing, the court must adopt concurrent permanent plans that the court finds are in the child's best interests unless a permanent plan has been achieved. G.S. 7B-906.2(a), (a1). In its permanency planning order, the court must identify the primary and secondary plans and order DSS to make efforts toward finalizing each plan. In its order, the court may also specify the efforts that are reasonable to timely achieve permanency for the child. G.S. 7B-906.2(a), (b). The court of appeals has recognized that G.S. 7B-906.2 "clearly contemplates the use of multiple, concurrent plans including reunification and adoption." *In re A.A.S.*, 258 N.C. App. 422, 428 (2018).

**1. Concurrent permanent plans not required.** Concurrent permanency planning must continue until a permanent plan is or has been achieved. G.S. 7B-906.2(a1); *In re S.B.*, 268 N.C. App. 78 (2019) (applying G.S. 7B-906.2(a1) and noting a secondary plan is not needed in an order that establishes a permanent plan).

**2. Priority for reunification; eliminate reunification.** Reunification must be a primary or secondary plan unless

- the court made a G.S. 7B-901(c) finding in an initial dispositional order,
- the court made a G.S. 7B-906.1(d)(3) finding in a review or permanency planning hearing order,
- the permanent plan is or has been achieved pursuant to G.S. 7B-906.2(a1), or
- the court, at a permanency planning hearing, makes written findings under G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or would be inconsistent with the child's health or safety and also makes each of the findings under G.S. 7B-

> 906.2(d), which focus on the parent's actions and demonstrate their degree of success or failure toward reunification. *See In re L.E.W.*, 375 N.C. 124 (2020).

G.S. 7B-906.2(b).

In examining the statutory language of G.S. 7B-906.2(b), the supreme court applied the rules of statutory construction and stated "the use of the disjunctive term "or"… demonstrates that the satisfaction of any one of the … delineated circumstances which are identified in the statute, even to the exclusion of the remaining… circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan." *In re K.P.*, 383 N.C. 292, 305 (2022) (reversing in part and remanding to court of appeals; permanency planning order awarding custody as the permanent plan and eliminating reunification satisfied G.S. 7B-906.2(b)). *See In re A.C.*, 280 N.C. App. 301, 307 (2021) ("Following the 2019 amendment [to G.S. 7B-906.2(b)], findings that reunification clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety are required to cease reunification (*i.e.*, remove reunification as a primary or secondary plan), but are not required if the permanent plan has already been achieved.").

Findings are also required by G.S. 7B-906.2(d). *In re K.L.*, 254 N.C. App. 269 (2017) (reversing and remanding permanency planning order that achieved a permanent plan of custody to an adult sibling to make required findings under various statutes, including G.S. 7B-906.2(b) and (d)). See sections 7.8.A.2; 7.8.C.8; and 7.9, above (discussing reasonable efforts and findings to cease those efforts at initial dispositional and permanency planning hearings).

When reunification is eliminated as a permanent plan, that parent's rights are not terminated and any belief that parental rights have been terminated is mistaken. *See In re M.A.*, 374 N.C. 865 (2020) (permanency planning order eliminating reunification did not terminate parental rights; father's rights were not terminated until the TPR order was entered). When reunification is eliminated as a permanent plan, DSS is implicitly relieved of its duty to provide reunification efforts. *In re A.P.W.*, 378 N.C. 405, 410 n.3 (2021). However, a parent may still take steps to address the issue that led to the juvenile's adjudication. *See In re M.A.*, 374 N.C. 865 (after the permanency planning order that eliminated reunification as a permanent plan, father could have continued to address the issues that led to juvenile's adjudication, which in this case was domestic violence). The supreme court has stated that a permanency planning order that eliminates reunification "does not foreclose the possibility that one or both respondents might one day regain custody" of their children. *In re J.M.*, 384 N.C. 584, 602 (2023).

A line of court of appeals opinions that allowed for a bifurcation of ceasing reunification efforts and eliminating reunification as a permanent plan and requiring that reunification be a permanent plan at the first permanency planning hearing have been "effectively abrogate[d]" by statutory amendments made in 2019 and 2021. *See In re A.H.A.*, 268 N.C. App. 152, n. 4 (2019) (unpublished) (addressing S.L. 2019-33); S.L. 2021-100, sec. 11 (amending G.S. 7B-906.2(b) to require that reunification be eliminated as permanent plan); S.L. 2019-33 (amending G.S. 7B-906.2(b), effectively superseding *In re C.P.*, 258 N.C. App. 241 (2018),

which interpreted former version of G.S. 7B-906.2(b) and held that the Juvenile Code requires that reunification be part of an initial concurrent permanent plan).

An order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) may be appealed. The North Carolina Supreme Court has addressed the standard of review of an order ceasing reunification: "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law" and ". . . whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. 264, 267 (2020) (this appeal involved a permanency planning order that ceased reunification efforts and eliminated reunification as a permanent plan). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re J.M.*, 384 N.C. at 591 (citation omitted). The standard is not clear and convincing evidence. *See In re L.E.W.*, 375 N.C. 124 (affirming permanency planning order that eliminated reunification as a permanent plan; application of the clear and convincing evidence standard conflicted with the competent evidence standard that applies but was harmless error); *see also In re B.R.W.*, 278 N.C. App. 382, 392 n.3 (2021) (in appeal of permanency planning order, "this Court reviews whether the trial court's findings of fact were supported by competent evidence, not clear and convincing evidence"), *aff'd*, 381 N.C. 61 (2022).

The statute governing appeals of G.S. 7B-906.2(b) orders eliminating reunification as a permanent plan, G.S. 7B-1001(a)(5) and (a)(8), has complex requirements related to the timing and manner of the appeal that depend on whether the appealing party is a parent, custodian, or guardian, and on whether a TPR petition is filed within sixty-five days of the entry and service of the permanency planning order. When reunification continues as a concurrent plan, the order does not meet the criteria of G.S. 7B-1001(a)(5) and (a)(8) to allow for an appeal. *In re A.A.S.*, 258 N.C. App. 422 (2018) (distinguishing prior cases, including *In re A.E.C.*, 239 N.C. App. 36 (2015), that were decided under former statutory scheme that did not require concurrent permanency planning; holding the filing of a termination of parental rights to achieve a primary plan of adoption when a secondary plan of reunification remains does not explicitly or implicitly eliminate reunification as a permanent plan). These requirements are explained in Chapter 12.4.A.5.

In *In re C.S.L.B.*, 254 N.C. App. 395 (2017), the court of appeals stated that the respondent mother conflated removing reunification as a permanent plan with ceasing reunification efforts. (Note that under current G.S. 7B-906.2(b), when reunification efforts are ceased, reunification as a permanent shall be eliminated.) Respondent mother appealed a permanency planning order that awarded the primary permanent plan of guardianship with a relative and retained a secondary plan of reunification. Respondent mother appealed because the order did not contain the findings required by G.S. 7B-906.2(b) to eliminate reunification as a permanent plan. The court of appeals held reunification had not been eliminated as a permanent plan as the order specifically included a secondary permanent plan of reunification. However, the court of appeals agreed with respondent mother that the trial court should not have waived further review hearings as all of the required G.S. 7B-906.1(n) findings were not made. See section 7.2.A.4, above (discussing waiving review hearings). The court of appeals continued its analysis and looked to G.S. 7B-906.2(b) and 7B-906.1(d) and (e) and held the trial court erred in relieving DSS and the child's guardian ad litem (GAL), stating

"[m]oreover, by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have [DSS] provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts." *In re C.S.L.B.*, 254 N.C. App. at 398 (vacating portion of order) (note that the order met the criteria of G.S. 7B-1001(a)(4) as an order that changed the legal custody of the juvenile).

Note that in *In re C.S.L.B.*, 254 N.C. App. 395, the trial court did not apply G.S. 7B-906.2(a1), which states "concurrent planning shall continue until a permanent plan has been achieved." Under G.S. 7B-906.2(a1), the trial court was authorized (but was not required) to enter a guardianship order as the achieved permanent plan without a secondary permanent plan being ordered. Additionally, the court of appeals did not address the language of G.S. 7B-601(a), which states the child's GAL appointment "shall terminate when the permanent plan has been achieved for the juvenile and approved by the court." See subsection B, immediately below, for a discussion of achieving a permanent plan.

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**Practice Note:** If the court orders a secondary plan, even when a permanent plan has been achieved, under *In re C.S.L.B.*, 254 N.C. App. 395, the court should not relieve DSS from providing reasonable efforts to achieve that secondary plan. If the court would like to relieve DSS from making reasonable efforts toward the secondary plan, it should order the singular plan that is achieved and eliminate any secondary plan as permitted by G.S. 7B-906.2(a1).

**Resources:**
For the state policy regarding permanency planning, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.

DSS has a category of services designed for family reunification. For an explanation, policies, and procedures regarding these services, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Cross Function," specifically "Intensive Family Preservation Services (IFPS Family Service Manual)" available here.

See the following publications by CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES,

- "Concurrent Planning for Timely Permanence" (2018)
- "Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children" (2020).
- "Supporting Successful Reunifications" (2017).

In addition to the publications, multiple resources related to permanency plans are accessible through the Child Welfare Information Gateway, U.S. Department of Health and Human Services website. See "Reunifying Families," and "Permanency."

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## B. Achieving a Permanent Plan

Permanent placements can be ordered only in the context of permanency planning hearings that are properly noticed as such (unless the party has waived notice). *See* G.S. 7B-906.1(b);

*see In re K.C.*, 248 N.C. App. 508 (2016) (originally unpublished Aug. 2, 2016, but subsequently published) (vacating and remanding permanency planning review orders granting custody to paternal grandparents when parent objected at permanency planning hearing to deficient notice but court proceeded with permanency planning hearing). See section 7.2.B, above (discussing notice). Because a permanency planning hearing is not scheduled in cases that proceed on the review hearing track only, a permanent plan does not apply to those cases. *See* G.S. 7B-906.1(a), (d2).

Once a permanent plan is achieved the court is no longer required to order concurrent planning. G.S. 7B-906.2(a1); *In re S.B.*, 268 N.C. App. 78 (2019).

**1. Reunification.** Reunification is achieved when the child is placed in the home of either parent (regardless of whether the child was removed from that parent's home) or the guardian or custodian from whose home the child was removed by order of the court. G.S. 7B-101(18c); *see In re E.Y.B.*, 277 N.C. App. 385 (2021) (unpublished) (reunification is not limited to biological parents and occurred in this case with the juvenile's custodian). The permanent plan of reunification may be achieved in a variety of ways. If the court dismisses the case (meaning terminates its jurisdiction), the legal status of the child and the custodial rights of the parties revert to what they were before the court action was commenced (unless there has been a termination of parental rights, a G.S. Chapter 50 custody order was entered pursuant to G.S. 7B-911, or an order in another civil action provides otherwise). *See* G.S. 7B-201(b); 7B-807(a); 7B-903(a)(1). If the court does not dismiss the action, achievement of reunification as a permanent plan occurs through a custody order, which is a permissible dispositional alternative. G.S. 7B-903(a)(4). When custody is awarded to a parent (or custodian or guardian from whom the child was removed), the court must consider whether its jurisdiction should be terminated pursuant to G.S. 7B-911 and a custody order entered pursuant to G.S. Chapter 50. See subsection 4, below (discussing G.S. 7B-911 and transfer to a G.S. Chapter 50 custody action).

If the court does not transfer the juvenile proceeding to a G.S. Chapter 50 custody proceeding, it must retain jurisdiction if it intends for the G.S. 7B-903(a)(4) custody order to survive. *See* G.S. 7B-201(b). When the court retains jurisdiction and custody is ordered to a parent (after the juvenile has been removed), the court is relieved from holding regularly scheduled permanency planning hearings. G.S. 7B-906.1(k). However, a party may file a motion for a permanency planning hearing at any time, which the court must hold. *See* G.S. 7B-906.1(n). Note when a child is reunified with a parent and permanency planning hearings are waived, any new report of abuse, neglect, or dependency that results in DSS determining court action is needed must comply with the procedure of G.S. 7B-401(b). *See In re T.P.*, 254 N.C. App. 286 (2017) discussed in section 7.2.A.4(c), above.

**2. Adoption.** For children who cannot return home, placement options have varying degrees of finality or "permanence." An adoption is the permanency option with the greatest degree of legal finality. An adoption is a separate proceeding, initiated by the adoption petitioner. *See* G.S. 48-2-301(a). It is a special proceeding that is heard before the clerk of superior court, unless the action is transferred to district court as a result of a question of fact, request for equitable relief, or equitable defense. G.S. 48-2-100(a); 48-2-601(a1). In some cases, a

termination of parental rights (TPR) of one or both parents will be required, and in other cases, relinquishments will be obtained from the necessary persons whose consents are required, allowing the adoption to proceed without a TPR action. *See* G.S. 48-2-603(a)(4). The final decree of adoption results in a complete substitution of the family and establishes a parent-child relationship between the child and adoption petitioner(s). G.S. 48-1-106(a), (b). *But see* G.S. 48-1-106(d) (exception for stepparent adoption). With the final decree of adoption, the child has achieved permanency, and the district court's jurisdiction in the juvenile proceeding terminates with the entry of the final decree. *See* G.S. 48-2-102(b); *In re W.R.A.*, 200 N.C. App. 789 (2009). For a further discussion of adoptions, see Chapter 10.3.

**3. Guardianship.** The court may award guardianship of the person to a non-parent as the child's permanent plan. G.S. 7B-903(a)(5); 7B-906.2(a)(3); 7B-600(b). When the court orders guardianship as a permanent plan for the child and appoints a guardian under G.S. 7B-600, the guardian automatically becomes a party to the proceeding. G.S. 7B-401.1(c). The duties and responsibilities of the child's guardian are discussed in section 7.4.F, above. The guardianship may not be terminated unless the court finds that

- the relationship between the guardian and the juvenile is no longer in the juvenile's best interest;
- the guardian is unfit;
- the guardian has neglected their duties; or
- the guardian is unwilling or unable to continue to perform those duties.

G.S. 7B-600(b).

The court must verify and make certain findings before ordering guardianship, as discussed in sections 7.4.F and G, above. Before the court can award guardianship as the permanent plan, it must also make findings about the parent's constitutional rights since guardianship awards care, custody, and control of the child to a non-parent. See subsection 5, below (discussing required findings regarding parent's constitutional rights).

For a guardianship order to remain in effect and be enforced or modified, the court must retain jurisdiction over the abuse, neglect, or dependency action. *See* G.S. 7B-201(b). However, the court may order that permanency planning hearings be waived, held less often than every six months, or be substituted by written reports submitted by the guardian to the court in an order that makes all the required G.S. 7B-906.1(n) findings by clear and convincing evidence. See section 7.2.A.4, above (discussing waiving permanency planning hearings).

When hearings are waived, a party has a right to file a motion for a permanency planning hearing. G.S. 7B-906.1(n). If a party files a motion under G.S. 7B-906.1 when a permanent plan of guardianship is in place, before conducting the hearing the court may do one or more of the following:

- order DSS to conduct an investigation and file a written report and give testimony regarding the performance of the guardian,

- utilize the community resources in behavioral sciences and other professions in the investigation and study of the guardian,
- ensure that a guardian ad litem (GAL) for the child has been appointed pursuant to G.S. 7B-601 and has been notified of the pending motion, and
- take any other action necessary to make a determination.

G.S. 7B-600(b1).

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**Practice Note:** When state intervention through a juvenile court proceeding is no longer necessary, the court should consider entering a custody order (where the court's jurisdiction in the abuse, neglect, or dependency action may terminate upon the entry of a G.S. 7B-911 order that transfers the action to a G.S. Chapter 50 civil custody action, discussed in subsection 4(a), immediately below) rather than a guardianship order, which requires that the court retain jurisdiction in the abuse, neglect, or dependency proceeding.

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**4. Custody.** A permanent plan of custody involves an award of custody of the child to someone who is not the child's parent because an order of custody to a parent after a child has been removed constitutes the permanent plan of reunification. Because the permanent plan of custody is to a non-parent, the court must make findings regarding the parents' constitutional rights, discussed in subsection 5, below. Additional considerations and criteria the court must consider and satisfy are discussed in sections 7.4.E and G, above.

**(a) Transfer to G.S. Chapter 50 custody action.** When the court places custody with a parent or other appropriate person, the court must determine whether jurisdiction in the abuse, neglect, or dependency proceeding should be terminated and custody awarded pursuant to G.S. Chapter 50. G.S. 7B-911(a). Through G.S. 7B-911, the court is transferring the juvenile proceeding to a G.S. Chapter 50 custody proceeding. Any subsequent action, such as a modification or enforcement action, would occur in the G.S. Chapter 50 proceeding.

The court of appeals has concluded that G.S. 7B-911 does not require the court to make a finding about whether jurisdiction should be terminated in the juvenile proceeding and the matter transferred to a G.S. Chapter 50 custody action. *In re Y.I.*, 262 N.C. App. 575 (2018). Additionally, a trial court may terminate jurisdiction in the juvenile proceeding without having to follow the transfer requirements of G.S. 7B-911. G.S. 7B-201; *McMillan v. McMillan*, 267 N.C. App. 537 (2019) (although trial court intended to transfer juvenile proceeding to G.S. Chapter 50 custody action, it never entered a Chapter 50 custody order; trial court did expressly terminate its jurisdiction in the juvenile proceeding under G.S. 7B-201). If the court terminates its jurisdiction in the juvenile proceeding without entering a G.S. Chapter 50 order, the parties return to pre-petition legal and custodial status (absent a termination of parental rights order). *See* G.S. 7B-201(b).

The transfer of an abuse, neglect, or dependency proceeding to a G.S. Chapter 50 custody action should occur only when (1) there is a need for a custody order to remain in effect and be enforceable and modifiable and (2) continued state intervention through a juvenile court proceeding is no longer necessary or appropriate. *See* G.S. 7B-911; 7B-201(b).

Terminating jurisdiction in the abuse, neglect, or dependency action, by itself, nullifies any custody order entered in that case, and the legal status of the child and custodial rights of the parties revert to the status that existed before the filing of the abuse, neglect, or dependency petition (unless another valid order has been entered or a parent's rights have been terminated). *See* G.S. 7B-201(b). The G.S. Chapter 50 civil custody order will remain in effect and be subject to modification upon a showing of a substantial change in circumstances and enforcement by the district court in the G.S. Chapter 50 action until the child reaches age 18 or is otherwise emancipated.

Under G.S. 7B-911, the juvenile court may enter a new or modify an existing civil custody order and terminate jurisdiction in the abuse, neglect, or dependency case only if the court finds that

- there is not a need for continued state intervention through a juvenile court proceeding and
- placement with the person being awarded custody has been the permanent plan for the child for at least six months, unless that person is a parent or the person with whom the child was living when the petition was filed.

G.S. 7B-911(c)(2). *See In re J.K.*, 253 N.C. App. 57 (2017); *In re J.M.D.*, 210 N.C. App. 420 (2011); *Sherrick v. Sherrick*, 209 N.C. App. 166 (2011).

The court must make the necessary findings under G.S. 7B-911. *See In re S.M.L.*, 272 N.C. App. 499 (2020) (remanding for entry of an order to include appropriate findings; order that was subject of appeal failed to make 7B-911(c)(2)a. finding); *In re J.D.M.-J.*, 260 N.C. App. 56 (2018) (vacating and remanding order for court to make findings under G.S. 7B-911(c)(2)); *In re J.D.R.*, 239 N.C. App. 63 (2015) (order terminating jurisdiction was reversed and remanded because the trial court failed to make finding required by G.S. 7B-911(c)(2)a. as to continued state intervention).

The court must also follow the procedures set forth in G.S. 7B-911. *See In re J.K.*, 253 N.C. App. 57 (holding compliance with procedures of G.S. 7B-911 is jurisdictional; remanding order for inclusion of provisions required by G.S. 7B-911 when transferring an abuse, neglect, or dependency proceeding to a G.S. Chapter 50 civil action, creating a new G.S. Chapter 50 action); *see Sherrick*, 209 N.C. App. 166 (holding procedures of G.S. 7B-911 affect subject matter jurisdiction, which cannot be conferred by consent; holding failure to terminate jurisdiction in juvenile proceeding prevents case from being transferred to a civil custody action such that district court has no jurisdiction to act under G.S. Chapter 50).

If there is no existing civil custody action, the court must instruct the clerk to treat the custody order entered pursuant to G.S. 7B-911 as initiating a civil custody action. The court must designate the parties to the action and determine the most appropriate caption for the action. The filing fees are waived unless the court orders one or more of the parties to pay the filing fee. The order constitutes a custody determination and any motion to

enforce or modify the custody order must be filed in the newly created G.S. Chapter 50 action pursuant to the requirements of G.S. Chapter 50. G.S. 7B-911(b).

If the custody order is entered in an existing civil action and the person who is being awarded custody is not a party to that action, the court must order that the person be joined as a party and that the caption be modified accordingly. An order that is filed in an existing action resolves any pending claim for custody and modifies any custody order previously entered in that action. G.S. 7B-911(b).

Any order entered pursuant to G.S. 7B-911 must satisfy all the requirements for a civil custody order and should not simply refer to or incorporate a juvenile court order. A modification order must satisfy all requirements for modifying a civil custody order. These requirements include proper findings and conclusions that support the creation or modification of a G.S. Chapter 50 custody order. G.S. 7B-911(c)(1). *See also* G.S. 50-13.2; 50-13.5; 50-13.7; *In re S.M.L.*, 272 N.C. App. 499 (remanding for entry of a new order; findings addressing substantial change in circumstances affecting the child's best interests, which were necessary to modify an existing G.S. Chapter 50 order, were not made); *In re E.P.-L.M.*, 272 N.C. App. 585 (2020) (findings that child was adjudicated abused, neglected, and dependent due to mother's actions, including false allegations of sexual abuse resulting in repeated and unnecessary invasive medical procedures and interviews, supported conclusion of substantial change in circumstances affecting the child); *In re J.B.*, 197 N.C. App. 497 (2009) (holding that the necessary findings were lacking).

**Note,** a thorough description of the requirements of a valid initial or modification civil custody order is beyond the scope of this Manual. *See, generally,* G.S. 50-13.1, 50-13.2, 50-13.7, and cases decided thereunder.

Although there are two different actions – the abuse, neglect, or dependency proceeding and the G.S. Chapter 50 case – the court may enter one order for placement in both court files. However, the order must be sufficient to support both the necessary findings terminating jurisdiction in the juvenile proceeding and the initial or modified civil custody order. *See Sherrick*, 209 N.C. App. 166; *In re A.S.*, 182 N.C. App. 139 (2007) (holding there is no requirement that there be two separate orders).

**(b) Jurisdiction retained in the abuse, neglect, dependency action**. When the trial court orders custody as a permanent plan pursuant to G.S. 7B-903(a)(4) and determines that the criteria of G.S. 7B-911 are not satisfied, it retains jurisdiction over the abuse, neglect, or dependency proceeding. The custody order is effective and can be enforced and modified by the juvenile court while the court continues to exercise jurisdiction in the juvenile action. G.S. 7B-201(b). Review of the custody order will take place periodically pursuant to G.S. 7B-906.1, unless the requirements for waiving permanency planning hearings in G.S. 7B-906.1(n) or the criteria of G.S. 7B-906.1(k) are met or the court terminates its jurisdiction. See section 7.2.A.4, above (discussing waiver of permanency planning hearings). If the criteria for waiving permanency planning hearings are met, a custody order in an abuse, neglect, or dependency action can remain in place with little court

> oversight. Even when permanency planning hearings are not required, any party may file a motion under G.S. 7B-906.1. When the court orders custody as a permanent plan for the child, the custodian automatically becomes a party to the proceeding. G.S. 7B-401.1(d); *see In re M.N.*, 260 N.C. App. 203 (2018).

See also Chapter 3.1.C (discussing continuing or ending jurisdiction) and 3.1.D (discussing terminology related to continuing and ending jurisdiction).

**5. Findings as to parent's constitutional rights before custody or guardianship to non-parent.** Parents have paramount constitutional rights to care, custody, and control of their children. See Chapter 2.4.A for a discussion of parents' rights to raise their children and when the state may interfere with those rights.

In the permanency planning stage of an abuse, neglect, or dependency action, before the court may order custody or guardianship with a non-parent, the court must find the parent is unfit, has neglected the child's welfare, or has acted inconsistently with their constitutional rights. *See Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994); *In re B.G.*, 197 N.C. App. 570 (2009) (permanent custody order); *In re D.M.*, 211 N.C. App. 382 (2011) (permanent custody order); *In re R.P.*, 252 N.C. App. 301 (2017) (permanent guardianship order); *In re J.C.-B.*, 276 N.C. App. 180 (2021) (permanent custody order). These three conditions (or conduct) – unfitness, neglect, acting inconsistently with constitutional rights – are different determinations. *See In re B.R.W.*, 278 N.C. App. 382 (2021) (distinguishing between the determination of unfitness and the determination of acting inconsistently with parental rights), *aff'd*, 381 N.C. 61 (2022). Not all cases include all three elements; for example, a parent may act inconsistently with their parental rights but not be unfit or have abused or neglected their child. *In re B.R.W.*, 278 N.C. App. 382 (affirming determination that mother acted inconsistently with her parental rights by leaving children with grandparents for indefinite period of time with no intention (express or implied) that the arrangement was temporary; reversing determination that mother was unfit based on progress mother made during DSS case), *aff'd*, 381 N.C. 61.

The determination that a parent is unfit, has neglected the child's welfare, or has acted inconsistently with their constitutionally protected status must be supported and found by clear and convincing evidence. *Price*, 346 N.C. 68; *Owenby v. Young*, 357 N.C. 142 (2003); *In re J.C.-B.*, 276 N.C. App. 180; *In re J.L.*, 264 N.C. App. 408 (2019); *In re E.M.*, 249 N.C. App. 44 (2016). Clear and convincing evidence "should fully convince . . . . [and] is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters . . . . such that a factfinder applying that evidentiary standard could reasonably find the fact in question." *In re J.C.-B.*, 276 N.C. App. at 184 (quoting *In re A.C.*, 247 N.C. App. 528, 533 (2016)); *see In re H.N.D.*, 265 N.C. App. 10, 13 (2019) (quoting *In re Mills*, 152 N.C. App. 1, 13 (2002)); *see also In re A.C.*, 280 N.C. App. 301 (2021) (vacating and remanding permanency planning order; standard regarding parental unfitness was based on sufficient and competent evidence; court must apply the clear and convincing evidence standard); *In re K.L.* 254 N.C. App. 269 (2017) (reversing permanent custody order; holding court's conclusion of parent's unfitness or acting inconsistently with parental rights was unsupported by findings of fact).

The court's determination as to whether a parent acted inconsistently with their parental rights is a question of law that is reviewable de novo. *See, e.g.*, *In re B.R.W.*, 381 N.C. 61; *Boseman v. Jarrell*, 364 N.C. 537 (2010). The trial court determines how much weight to give the evidence when making its findings, and the appellate court will not reweigh that evidence on appeal. *In re J.M.*, 271 N.C. App. 186 (2020) (holding trial court properly found mother was an unfit parent).

The determination as to a parent's conduct is required when the court orders *permanent* custody to a non-parent even though the previous order, which was not a permanent custody order, had awarded custody to a different non-parent (*e.g.*, DSS). *In re D.A.*, 258 N.C. App. 247 (2018) (emphasis on "*permanent*" custod*y* in opinion). The finding about the parent's conduct is required even when the child has been previously adjudicated as neglected and dependent. *See In re A.W.*, 280 N.C. App. 162, 169 (2021) (quoting *In re R.P.*, 252 N.C. App. 301, 304 (2017)) (vacating and remanding permanency planning order appointing guardian; no findings were made based on clear and convincing evidence that parents were unfit or acted inconsistently with their constitutionally protected status); *In re R.P.*, 252 N.C. App. 301 (reversing permanent guardianship order that made no reference to father's constitutionally protected status; rejecting GAL argument that parental conduct leads to an adjudication and constitutes some showing of unfitness); *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011) (holding in a custody case between the child's mother and grandparents that a finding that the children had been adjudicated dependent in an earlier proceeding was not, by itself, sufficient to support a conclusion that the mother had acted in a manner inconsistent with her parental status). *But see In re J.R.*, 279 N.C. App. 352, 360 (2021) (distinguishing *Rodriguez v. Rodriguez* as an adjudication of dependency and not abuse or neglect; stating "[n]eglect 'clearly constitute[s] conduct inconsistent with the protected status parents may enjoy' " (citation omitted) (without addressing a juvenile's adjudication being about the status of the child and not the fault or culpability of the parent); further finding mother did not comply with case plan).

There is no bright-line test when determining if a parent has acted inconsistently with their parental rights. *See In re A.C.*, 247 N.C. App. 528 (examining the mother's conduct and intentions and holding that she acted inconsistently with her parental rights). A conclusion to cease reunification efforts or eliminate reunification as a permanent plan is insufficient. *See In re A.W.*, 280 N.C. App. 162 (vacating and remanding permanency planning order appointing guardian; noting no explanation for how parents can be fit and proper parents for their younger child who resided with them but not for the juvenile who had been adjudicated neglected and dependent when the main concern was a history of domestic violence between the parents). The determination is not based on whether the conduct consisted of good or bad acts but rather the court considers the voluntariness of the parent's actions and the relinquishment of exclusive parental authority to a third person. *Mason v. Dwinnell*, 190 N.C. App. 209 (2008). As part of its analysis, the court looks at the parent's intentions. *Mason*, 190 N.C. App. 209; *In re A.C.*, 247 N.C. App. 528; *In re B.R.W.*, 278 N.C. App. 382 (and cases cited therein), *aff'd*, 381 N.C. 61 (2022). The court is not required to find that a parent's conduct is willful and intentional. *In re J.R.*, 279 N.C. App. 352 (distinguishing permanency planning order appointing a guardian from an appellate opinion considering an order terminating parental rights on a ground that expressly requires willfulness, willful

abandonment in G.S. 7B-1111(a)(7)). When determining whether a parent is unfit or acted inconsistently with his or her parental rights, "evidence of a parent's conduct should be viewed cumulatively." *Owenby*, 357 N.C. at 147. However, one factor that is not relevant in determining whether a parent is unfit or has acted inconsistently with their parental rights is socioeconomic status. *In re K.C.*, 288 N.C. App. 543 (2023), *supersedeas allowed* (N.C. July 8, 2023). Socioeconomic factors include the parent's place of residence, frequent moves, occasional lack of heat, not cleaning a home regularly, choice in spouse or babysitter, lack of relatives living nearby, a history of not maintaining stable employment, and job loss. *Dunn v. Covington*, 272 N.C. App. 252 (2020).

The best interests of the child standard is not applicable to an order granting permanent custody or guardianship to a non-parent until after the court has found that the parent is unfit, has neglected the child, or has acted inconsistently with their constitutionally protected parental rights. *See In re B.R.W.*, 278 N.C. App. 382 (affirming order granting guardianship of children to grandmother when affirming determination that mother acted inconsistently with her constitutional parental rights and reversing determination that mother was unfit), *aff'd*, 381 N.C. 61; *In re C.P.*, 252 N.C. App. 118 (2017); *In re A.C.*, 247 N.C. App. 528. However, when the court is deciding custody between two parents, which may be an issue in an abuse, neglect, or dependency proceeding when reunification with either parent is an option and the parents do not reside together, the court need only make its determination based on the child's best interests and is not required to first find one of the parents is unfit, has neglected the child, or acted inconsistently with their constitutional rights. *Routten v. Routten*, 374 N.C. 571 (2020) (expressly overruling *Moore v. Moore*, 160 N.C. App. 569 (2003), which applied the constitutional analysis to a proceeding between two parents; holding the trial court did not err in awarding sole legal and physical custody to father with no visitation to mother based solely on the children's best interests); *Owenby*, 357 N.C. 142.

Constitutional issues not raised at trial cannot be considered for the first time on appeal. *See In re J.M.*, 384 N.C. 584 (2023); *In re T.P.*, 217 N.C. App. 181 (2011). See Chapter 12.3.A (discussing preservation of issues for appeal).

When awarding custody or guardianship to a non-parent, a parent may waive their right to appeal the trial court's finding regarding the parent's constitutionally protected status prior to the court looking to best interests when the parent does not raise the issue before the trial court and had the opportunity to do so. *See In re J.M.*, 384 N.C. 584 and *In re J.N.*, 381 N.C. 131 (2022) (both holding father waived appellate review of permanency planning order when he had notice of a recommendation for the elimination of reunification and failed to argue the change would be improper on constitutional grounds); *In re W.C.T.*, 280 N.C. App. 17 (2021) and *In re C.P.*, 258 N.C. App. 241 (2018) (both holding mother waived appellate review of dispositional order by failing to raise at the hearing her constitutionally protected status when she had the opportunity to do so); *In re I.K.*, 260 N.C. App. 547 (2018) (vacating and remanding guardianship order; respondents did not waive appellate review of trial court's failure to make findings as to their constitutionally protected status when prevented by trial court from making those arguments); *In re R.P.*, 252 N.C. App. 301 (2017) (holding father did not waive his right to findings as to his constitutionally protected status as there was not a proper hearing on the issue for the father to raise an objection on constitutional grounds).

The court of appeals has recognized that its opinions are inconsistent on when a parent waives the right to appellate review of a court order determining their paramount constitutional rights. *See In re A.C.*, 280 N.C. App. at 306 ("This Court would benefit from the guidance of our Supreme Court concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court."). The supreme court provided that guidance in two recent opinions: *In re J.N.*, 381 N.C. 131 and *In re J.M.*, 384 N.C. 584. In both cases, the fathers were on notice that the achievement of a permanent plan other than reunification was being recommended. In both cases, the fathers did not raise their constitutional rights, despite arguing for reunification, and having an opportunity to raise the issue. The supreme court held that the fathers did not preserve the issue for appellate review.

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**Practice Note:** North Carolina appellate opinions addressing the issue of parent's constitutional rights before the application of the best interests of the child standard in abuse, neglect, or dependency cases have been applied to appeals of permanency planning orders awarding custody or guardianship to non-parents. However, in *In re S.J.T.H.*, 258 N.C. App. 277 (2018), the court of appeals reversed and remanded an initial dispositional order that placed the child in DSS custody rather than with the non-removal parent. In relying on a previously published opinion reviewing a permanency planning order, the court of appeals discussed a parent's constitutional rights and the need for a finding of parental unfitness or actions that are inconsistent with their constitutionally protected status and directed the trial court "to enter a new order addressing respondent's rights and granting him custody unless DSS presents clear, cogent, and convincing evidence which would support another disposition." *In re S.J.T.H.*, 258 N.C. App. at 280.

More recently, the court of appeals in *In re K.C.*, 288 N.C. App. 543 (2023) vacated an initial dispositional order that placed the juvenile in the temporary custody of relatives after conducting a de novo review of the trial court's determination that the father acted inconsistently with his parental rights and holding the findings do not support that conclusion. There is a dissent in part that the determination about the parent's constitutional rights was unnecessary and improper at initial disposition since that is a temporary and not permanent order. As of the date of this publication, this opinion is currently before the supreme court and a writ of supersedeas was issued on June 8, 2023.

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**6. APPLA.** APPLA stands for "Another Planned Permanent Living Arrangement." It is a term that arose from the federal Adoption and Safe Families Act (ASFA). The term is not defined in the Juvenile Code.

APPLA is the least preferred permanent plan as it is only available for children who do not have the option of reunification, adoption, custody, or guardianship. *See* G.S. 7B-912(c). In response to a recognition that APPLA was being used routinely and with young children, restrictions on its use were included in the federal Preventing Sex Trafficking and Strengthening Families Act. See Chapter 1.3.B.10 (discussing that federal law). As a result of that federal law, the Juvenile Code was amended effective for all actions filed or pending on or after October 1, 2015 and for the first time specifically addressed APPLA.

The Juvenile Code identifies APPLA as one of the possible permanent plans for a juvenile in foster care. *See* G.S. 7B-906.2(a)(5). APPLA may be the juvenile's primary permanent plan only when all of the following conditions apply:

- the juvenile is 16 or 17 years old;
- DSS has made diligent efforts to permanently place the juvenile with a parent or relative or in a guardianship or adoptive placement;
- there are compelling reasons that it is not in the juvenile's best interests to be permanently placed with a parent or relative or in a guardianship or adoptive placement; and
- APPLA is the best permanent plan for the juvenile.

G.S. 7B-912(c).

The court must approve APPLA before it becomes a primary permanent plan, and the court must first question the juvenile and make written findings addressing the juvenile's desired permanency outcome. G.S. 7B-912(c), (d). The Juvenile Code does not address when APPLA may become a secondary permanent plan.

A juvenile with a permanent plan of APPLA remains in DSS custody and will age out of foster care. Planning for a successful transition to adulthood and preparing the youth is especially important. The Juvenile Code requires the court to make certain inquiries and DSS to include specific information in its report to the court that address a juvenile's transition to adulthood. *See* G.S. 7B-912. The court has authority to specify efforts DSS must make to achieve this permanent plan, and the findings the court makes under G.S. 7B-912 for juveniles who are 14 years old and older and the information contained in the DSS report may help the court determine what efforts are reasonable and required. *See* G.S. 7B-906.2(b). See section 7.8.C.9 (discussing G.S. 7B-912). When the juvenile ages out of foster care, they will be eligible for Foster Care 18−21 if they meet the educational, employment, or medical condition/disability criteria of that program. See Chapter 8.3 (discussing Foster Care 18−21).

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**Resource:** For the state policy on APPLA, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.

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**7. Reinstatement of parental rights.** North Carolina is in the minority of states that authorize the reinstatement of parental rights after those rights have been terminated by a court. The Juvenile Code identifies reinstatement of parental rights as a permanent plan for the child. *See* G.S. 7B-906.2(a)(6). Reinstatement is an option in very limited circumstances. Absent a finding of extraordinary circumstances, the reinstatement of parental rights is available for a child who is at least 12 years of age. The child must be without a legal parent, not in an adoptive placement, and unlikely to be adopted within a reasonable period of time. The TPR order must have been entered at least three years before the motion to reinstate parental rights is filed. G.S. 7B-1114(a). The child must be in the custody of DSS. G.S. 7B-1114. The criteria, process, and possible outcomes are governed by G.S. 7B-1114. A reinstatement of parental rights "restores all rights, powers, privileges, immunities, duties, and obligations of the parent as to the juvenile, including those relating to custody, control and support…."

G.S. 7B-1114(k). See Chapter 10.4 (discussing reinstatement of parental rights circumstances, procedures, and orders).

**Resources:**
For the state policy on reinstatement of parental rights, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Permanency Planning," available here.

See the "Reinstatement of Parental Rights State Statute Summary" on the National Conference of State Legislatures website.

## 7.11 Dispositional Orders

### A. Timing

Orders from initial disposition, review, permanency planning, and modification hearings must be reduced to writing, signed, and filed with the clerk within thirty days of the completion of the hearing. G.S. 7B-905(a); 7B-906.1(h); 7B-1000(e). If the order is not entered within thirty days, the juvenile clerk must schedule a hearing at the next juvenile session of court for a determination and explanation of the reason for the delay and for any needed clarification as to the contents of the order. The order must then be entered within ten days of this follow-up hearing. G.S. 7B-905(a); 7B-906.1(h); 7B-1000(e). The appropriate remedy for a trial court's failure to enter a timely order is a petition to the court of appeals for a writ of mandamus to require the trial court to proceed to judgment. *In re T.H.T.*, 362 N.C. 446 (2008). See Chapter 4.9.C (discussing what constitutes entry of the order) and 4.9.D (discussing the effect of and the remedy for delay).

### B. General Requirements

**AOC Form:**
AOC-J-154, Juvenile Disposition Order (Abuse, Neglect, Dependency).

**Resource**: See Janet Mason, *Drafting Good Court Orders in Juvenile Cases*, JUVENILE LAW BULLETIN NO. 2013/02 (UNC School of Government, Sept. 2013).

This section discusses the specific requirements that apply to any dispositional order. For more information about orders, see Chapter 4.9. In addition to the general requirements, the Juvenile Code has specific requirements that apply to different orders, depending on whether the order is an initial, review, permanency planning, or transfer to G.S. Chapter 50 order and what is actually being ordered (e.g., out-of-home placement). Those specific requirements are discussed in the applicable sections throughout this Chapter. See Checklists at the end of this Manual, which summarize the requirements for initial dispositional, review, and permanency planning orders, respectively.

Generally, the Juvenile Code requires the following for any dispositional order.

**1. Findings and conclusions.** The order must contain appropriate findings of fact and conclusions of law. G.S. 7B-905(a). See Chapters 4.9.B and 12.8.C (discussing findings and conclusions and the standard of review).

**(a) Findings of fact.** The Juvenile Code specifies certain required findings in dispositional orders, depending on the outcomes ordered and the type of dispositional hearing. Failure to include required findings in an order has been found by appellate courts to be reversible error. *See, e.g.*, *In re D.A.*, 258 N.C. App. 247 (2018); *In re K.L*, 254 N.C. App. 269 (2017); *In re M.M*., 230 N.C. App. 225 (2013); *In re H.J.A*., 223 N.C. App. 413 (2012). However, the North Carolina Supreme Court has held that while the better practice is to include statutory language, an order need not recite the exact language of a statute but must address the substance of the concerns contained in the statute. *In re L.M.T*., 367 N.C. 165 (2013) (affirming an order ceasing reunification efforts under G.S. 7B-507; decided under former statute); *In re A.P.W*., 378 N.C. 405, 412 (2021) (quoting *In re L.M.T*., 367 N.C. at 168) (holding findings addressed the substance of the required statutes when eliminating reunification as a permanent plan). *See In re J.M*., 384 N.C. 584 (2023) (recognizing the exact statutory language is not required; noting that reliance on permanency planning cases that interpreted the statutory language of the Juvenile Code prior to 2015 amendments, such as *In re L.M.T*., 367 N.C. 165, should not be relied upon going forward). Requirements for findings related to specific dispositional outcomes are discussed throughout this Chapter.

**(b) Conclusions of law.** Determinations of reasonable efforts, best interests, and whether a parent has acted inconsistently with their parental rights are conclusions of law because they require an exercise of judgment. *See In re Helms*, 127 N.C. App. 505 (1997). The determinations must be supported by specific findings.

**(c) Incorporation of reports.** Generally, there must be some oral testimony at a dispositional hearing where reports are submitted for those reports to constitute competent evidence that supports a court's findings of fact. *In re S.P.*, 267 N.C. App. 533 (2019); *In re J.T*., 252 N.C. App. 19 (2017). However, the court of appeals distinguished the initial dispositional hearing from other dispositional hearings and held there was no error when the trial court relied on reports and adjudicatory findings without receiving any sworn testimony when no new evidence was received at the initial dispositional hearing. *See In re K.W*., 272 N.C. App. 487 (2020).

The court cannot simply adopt DSS, GAL, or other reports as its only findings or substitute reports for the court's independent determination. *See In re M.M.*, 230 N.C. App. 225; *In re Harton*, 156 N.C. App. 655 (2003). Written reports may be incorporated and findings may be based on those reports so long as the court does its own independent review. *See In re C.M*., 183 N.C. App. 207 (2007) (holding that psychological evaluations and a GAL report were properly incorporated because the court made extensive findings showing that the court made its own determinations with respect to the facts); *In re J.S*., 165 N.C. App. 509 (2004) (holding that the trial court erred by entering a two-page order

that broadly incorporated written reports from DSS and a mental health expert as its findings of fact). *See also In re H.J.A.*, 223 N.C. App. 413 (noting that recitation of testimony and incorporation of reports without specific findings were insufficient). It is error for the court to generally find statements in reports to be true without specifying the statements in the reports upon which the court is relying. *In re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009); *see also In re S.J.M.*, 184 N.C. App. 42 (2007), *aff'd per curiam*, 362 N.C. 230 (2008); *In re Ivey*, 156 N.C. App. 398 (2003). See section 7.2.E.3, above (discussing the court's use of reports). See Chapter 4.9.B.2 (discussing reports and documents in an order).

**(d) Recitation of testimony.** Recitations of the testimony of witnesses do not constitute findings of fact. *In re L.B.*, 184 N.C. App. 442 (2007) (finding no prejudice, however, when the trial court's conclusions were supported by other proper findings). *See also In re M.M.*, 230 N.C. App. 225. See Chapter 4.9.B.2 (discussing recitation of allegations or testimony).

**(e) Arguments of counsel not evidence.** Arguments of counsel may not be considered as evidence. *In re J.T.*, 252 N.C. App. 19; *In re K.S.*, 183 N.C. App. 315 (2007); *In re D.L.*, 166 N.C. App. 574 (2004).

**2. Precise terms.** The court must state with particularity, both orally and in the written order, the precise terms of the disposition. It must include the type of disposition, the duration, and the person responsible for carrying out whatever the disposition requires, as well as the person or agency in whom custody is vested. G.S. 7B-905(a).

**3. Set next hearing.** If practicable, the order should set the date for the next hearing. Under G.S. 7B-906.1(a), a review or permanency planning hearing must be scheduled within ninety days of the initial dispositional hearing. An exception applies that accelerates a permanency planning hearing to within thirty days when the court orders the cessation of reunification efforts at an initial dispositional hearing. G.S. 7B-901(d); *see In re N.B.*, 379 N.C. 441 (2021) (court acted in accordance with Juvenile Code when fast-tracking case to permanency planning when the criteria of G.S. 7B-901(c) found). Review and permanency planning hearings must be scheduled at least every six months, unless the criteria to waive further hearings are satisfied. G.S. 7B-906.1(a), (d2), (k), (n). If, at a review hearing, the court removes custody from a parent, guardian, or custodian, the case switches from the review hearing track to the permanency planning hearing track and a permanency planning hearing must be scheduled within thirty days (unless the hearing was noticed and heard as a permanency planning hearing). G.S. 7B-906.1(d)(1a). See section 7.2.A, above (discussing timing of dispositional hearings).

**4. Compliance with UCCJEA, ICPC, MEPA, and ICWA.** All dispositional orders must comply with the

- UCCJEA (Uniform Child-Custody Jurisdiction and Enforcement Act), ensuring that the court has subject matter jurisdiction (see Chapter 3.3);
- ICPC (Interstate Compact on the Placement of Children), which ensures an appropriate

process of placing children across state lines (see section 7.4.H, above);
- MEPA (Multiethnic Placement Act), which prohibits the use of a child's or prospective foster or adoptive parent's race, color, or origin to delay or deny placement (see Chapter 13.3); and
- ICWA (Indian Child Welfare Act), ensuring that when an "Indian child" is the subject of the action, placement preferences are followed, active efforts are provided, the burdens of proof required by ICWA are applied, and a qualified expert witness testifies about whether the child's continued custody with a parent or Indian custodian is likely to result in serious emotional or physical damage to the child (see Chapter 13.2).

## C. Consent Orders

Consent orders are permitted only when

- all parties are present or represented by counsel who is present and authorized to consent;
- the child is represented by counsel; and
- the court makes sufficient findings of fact.

G.S. 7B-801(b1). See Chapter 6.5 (providing more detail on consent orders).

## D. Status of Jurisdiction

The Juvenile Code states that one purpose of disposition is to "achieve the objectives of the State in exercising jurisdiction." G.S. 7B-900. The Juvenile Code provides that once jurisdiction is obtained in an abuse, neglect, or dependency proceeding, it continues until terminated by the court or until the juvenile reaches age 18 or is otherwise emancipated, whichever occurs first. G.S. 7B-201(a); *see In re A.K.G.*, 270 N.C. App. 409 (2020) (dismissing appeal as moot; when juvenile turned 18, district court lost jurisdiction and permanency planning order was no longer in effect); *In re C.M.B.*, 266 N.C. App. 448 (2019) (under G.S. 7B jurisdiction, only a North Carolina court can enter order terminating its own jurisdiction). For a full discussion of continuing or ending jurisdiction, including the effect of terminating jurisdiction and why the term "closing" a case is problematic, see Chapter 3.1.C and D.

The court has jurisdiction to modify any disposition made in the abuse, neglect, or dependency proceeding until jurisdiction is terminated. G.S. 7B-906.1; 7B-1000(b). *See also In re H.S.F.*, 177 N.C. App. 193 (2006); *In re J.S.*, 165 N.C. App. 509 (2004).

During an appeal of a dispositional order, the court continues to have jurisdiction to conduct review and permanency planning hearings, unless directed otherwise by an appellate court. G.S. 7B-1003(b). But see Chapter 12.4 and 12.11 (providing details and limitations on what disposition orders may be appealed and how disposition orders and the court's jurisdiction are affected by appeals).

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**Resource:** Sara DePasquale, *What Can the District Court Do in an A/N/D or TPR Action when an Appeal is Pending?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Aug. 2, 2019).

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