2025 Intensive Parent Defender Training: Termination of Parental Rights

March 6 –7, 2025 / Chapel Hill, NC

Co-sponsored by UNC School of Government & NC Office of Indigent Defense Services

Thursday, March 6

8:45 to 9:00	**Welcome and Program Overview** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
9:00 to 10:00	**Seven Steps to Avoid TPR** *Wendy Sotolongo, Chief Parent Defender* Indigent Defense Services, Durham, NC
10:00 to 10:15	*Break*
10:15 to 10:45	**Parent Representation at TPR** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
10:45 to 11:45	**Commencement & Reviewing Pleadings** *Lyana Hunter, Assistant Public Defender* District 5, New Hanover County, NC
11:45 to 12:30	*Lunch*
12:30 to 1:15	**Motions Practice** *Wendy Sotolongo, Chief Parent Defender* Indigent Defense Services, Durham, NC
1:15 to 1:45	**Individual Work** (handout to be distributed)
1:45 to 4:30	**Adjudication (Grounds)** (with breaks at instructors' discretion) *Annick Lenoir-Peek, Deputy Parent Defender* Indigent Defense Services, Durham, NC *Sara DePasquale, Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
4:30	*End of Day 1*

Friday, March 7

8:45 to 10:30 **Evidence at TPR** (with a break at instructor's discretion)
Timothy Heinle, Teaching Assistant Professor
UNC School of Government, Chapel Hill, NC

10:30 to 10:45 *Break*

10:45 to 12:15 **Disposition (Best Interests)**
Sydney Batch, Partner
Batch, Poore, & Williams, PC, Chapel Hill, NC

12:15 to 1:00 *Lunch*

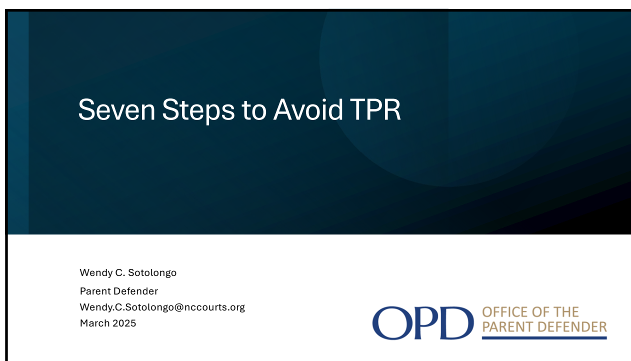
1:00 to 2:00 **Post-TPR Responsibilities**
Jacky Brammer, Assistant Parent Defender
Indigent Defense Services, Durham, NC

2:00 to 2:15 *Break*

2:15 to 3:15 **Trauma Informed TPR Practices [Ethics]**
Hon. C. Renee Little, District Court Judge
N.C. District Court 26, Mecklenburg County, NC

3:15 *End of program*

This program offers an estimated 10.5 hours of CLE credit, including 1.0 hours of ethics CLE credit, pending Bar approval.

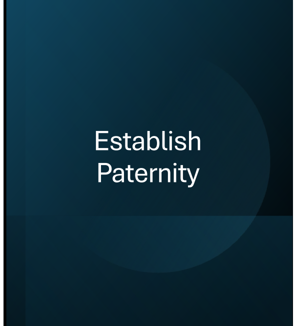


1

Seven Steps to Avoid TPR

1. Establish paternity
2. Find a relative or kinship placement option
3. Address child support
4. Get findings on reasonable efforts
5. Advocate for visits
6. Document barriers caused by poverty
7. Case plan amendments

2

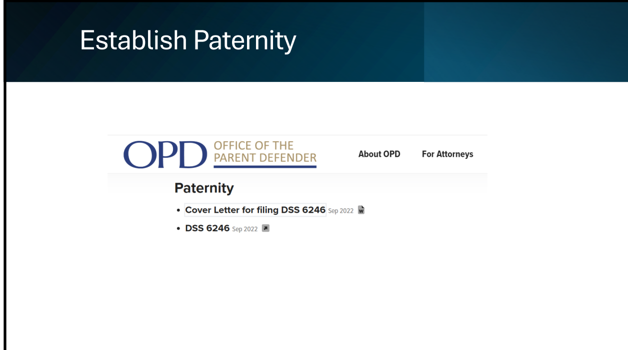


G.S. 7B-1111(a)(5)
The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:

a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
c. Legitimated the juvenile by marriage to the mother of the juvenile.
d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

3

Establish Paternity



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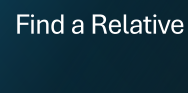
Establish Paternity

- The court is required to determine if paternity is an issue in an A/N/D case. G.S. 7B-506(h)(1) (continued NSC hearing); 7B-800.1(a)(3) (pre-adjudication hearing); 7B-901(b) (initial dispositional hearing).
- Examples of when paternity is an issue include when (1) there is a legal father and a putative father; (2) there is more than one putative father; or (3) there is a putative father whose paternity has not been established through a judicial determination.
- Paternity may be established in the A/N/D proceeding. See, e.g., *In re S.D.*, 374 N.C. 67 (2020) and *In re S.D.C.*, 373 N.C. 285 (2020).
- G.S. 8-50.1(b1). In any civil action in which the question of paternity arises, on motion of a party the court must order the mother, the child, and the "alleged father-defendant" to submit to one or more blood or genetic marker tests. The court may order the party seeking the test to pay for it.
  - ✓ In DSS cases, generally the agency will arrange and pay for the testing.
- The court should not proceed with a paternity adjudication until all necessary parties are named and the court has personal jurisdiction over them.
- G.S. 49-14. In a civil action, proof of paternity shall be by clear, cogent, and convincing evidence.

AND/TPR Manual Chapter 5

5

Find a Relative



G.S. 7B-101 Definition. Relative. – An individual directly related to the juvenile by blood, marriage, or adoption, including, but not limited to, a grandparent, sibling, aunt, or uncle.

Preference in the juvenile code:

- G.S. 7B-503, 7B-505, 7B-506 - NSC
- G.S. 7B-903 - Dispositional alternatives
- G.S. 7B-906.1 - Review and PP Hearings
  - ✓ relative
  - ✓ nonrelative kin
  - ✓ other persons with legal custody of a sibling of the juvenile

6

Relative and Kin Placement

- Separating children from their families is a traumatic experience for everyone involved. When children must be placed in out-of-home care, one way to mitigate that trauma is to place children in the best possible setting right from the start: with a family. Numerous studies have established that placing children with kin — whether biological relatives or chosen family (fictive kin) — is the best option for children, resulting in better behavioral health and well-being, increased stability, and higher levels of permanency than their peers placed with non-relative caregivers. Kinship care allows children to remain connected to their family and community, which helps reduce the trauma associated with being separated from their parents.
  https://www.casey.org/first-placement-family-placement/
- Remember that the Sequentiality Effect or the Snowball Effect applies in these cases: the decision to remove a child which is often done with incomplete facts and on an *ex parte* basis becomes self-perpetuating in subsequent hearings. In other words, once a child is removed from his or her home, not only is it difficult to get that child back in the home but it becomes more difficult the longer the child stays out of the home.

7

Relative and Kin Placement

- With your client, create a list of possible relative or kinship placements. Get your client's permission to contact each person and explain the home study process.
  - ✓ Ask if they are willing to be a placement resource.
  - ✓ Ensure they know about any behavioral needs of the child and have assessed their own caretaking ability.
  - ✓ Talk them through the home study process.
- Only pass on to the social worker the names of relatives or kin who are willing to serve as a placement resource once they understand what it entails. Request home studies (in state or out of state) in writing (via email). Set deadlines in the request.
- Ask the court to set deadlines.
- Ask for a copy of the completed kinship care assessment form. ncdhhs-5204
- Use the OPD Resources for ICPC requests. https://ncparentdefender.org/trial-attorney-resources/

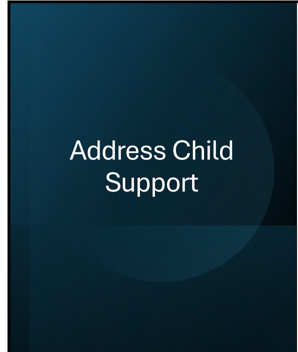
8

Relative and Kin Placement

- The court notes that a timely evaluation of potential placements is "critical to expedite the permanency and stability for a child and to provide the court with the thorough information needed to evaluate whether the placement is in the best interest of the child." Sl. Op. at 2. DSS was ordered to complete an ICPC home study and failed to timely do so. The trial court has discretion to hold parties accountable, including "requiring DSS to show cause for repeatedly ignoring a court order." Sl. Op. at 10.
- The determination of a child's best interests and ultimate placement decision lies with the trial court, notwithstanding the recommendations of DSS.

In re K.B., 386 N.C. 68 (2024)

9



7B-1111. Grounds for TPR

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

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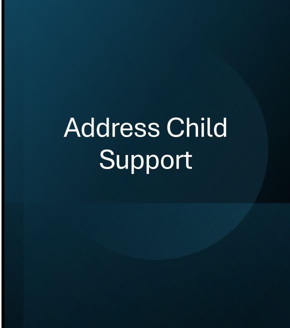

Respondent-mother's argument that she did not know she had to pay a reasonable portion of the cost of care for her children or how to do so is fundamentally without merit. The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children. See In re T.D.P., 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004)

...

Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful.

In re S.E., 373 N.C. 360 (2020)

11

Address Child Support

Motion the court to order that your client does not have to pay child support while the A/N/D case is pending. Use the following for support:

1. In July 2022, the Administration for Children and Families' (ACF) Children's Bureau (CB) and Office of Child Support Enforcement (OCSE) issued guidance on when it is appropriate to pursue child support for foster care placement. ACF suggested that child welfare agencies only pursue child support in very rare circumstances. The policy acknowledges that many of the families involved in the child welfare system are living in poverty.
2. The child support amount does not go to the foster home. Instead, the foster home is paid through a different mechanism.
3. Make a list of expenses for each item listed on the case plan or the court order to show how much your client is expending each month.

Monthly Memo #4-Waiving Child Support

12

Reasonable Efforts Findings

G.S. 7B-906.1

(f) In the case of a juvenile who is in the custody … of a county [DSS] and has been in placement outside the home for 12 of the most recent 22 months, … the director of the [DSS] shall initiate a proceeding to terminate the parental rights of the parent unless the court finds any of the following:

…

3) The department of social services has not provided the juvenile's family with services the department deems necessary when reasonable efforts are still required to enable the juvenile's return to a safe home.

13

Reasonable Efforts

G.S. 7B-906.1(d)

At each hearing, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to prevent the removal or reunite the juvenile with either parent whether or not the juvenile resided with the parent at the time of removal or the guardian or custodian from whom the child was removed.

G.S. 7B-906.1(e)

At any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

14

Reasonable Efforts Findings

"The **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."

G.S. 7B-101(18)

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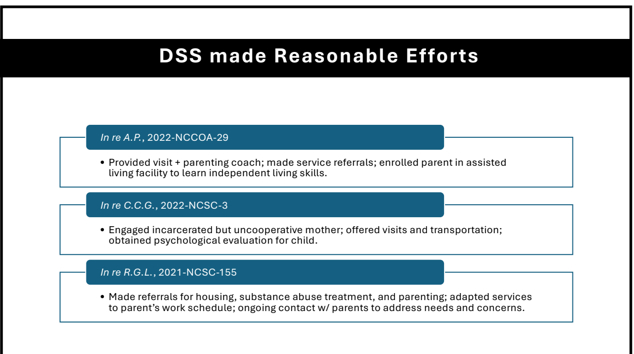

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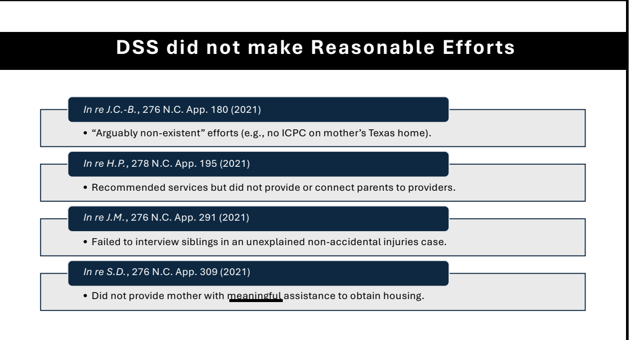

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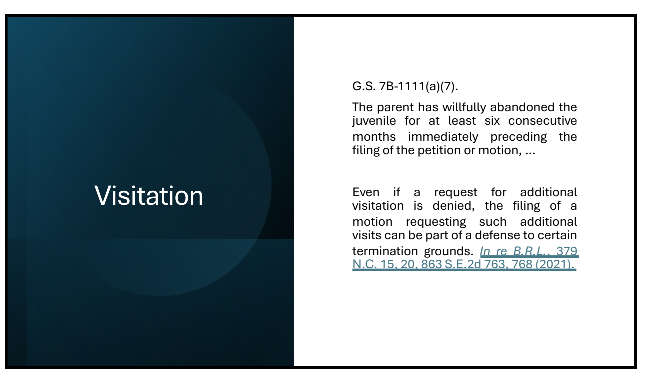

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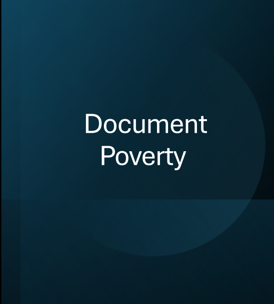
Visitation

- Get a copy of the current Family time and contact plan
- File a motion for review pursuant to G.S. 7B-1000.
  - ✓ Present relatives or supportive people willing to serve as visitation supervisors as an alternative to a social worker or DSS employee.
  - ✓ Advocate for less restrictive contact such as eyes-only or monitored.
  - ✓ Present alternatives to the standard 1-hour supervised visits at DSS. List possible places for visits in the community such as parks, fast-food play areas, bowling alleys, and malls.
  - ✓ Suggest normal family activities, such eating lunch with children at school, attending sports practices and games, going to church and church events together, and attending school events such as open houses, field trips and book fairs.
  - ✓ Cite to the DSS Manual for state policy supporting the importance of family time. The Manual includes suggestions sanctioned by State policy (p. 84).

19



GS. § 7B-1111(a)(2).

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

20

Document Poverty

[T]he findings the trial court relied on to conclude Ms. Cole acted inconsistent with her constitutionally-protected status included that she was temporarily "homeless"; that she had "removed herself from the [Dunns'] home"; that she "not until recently, maintained gainful and continuous employment"; and that she previously "only worked sporadically." All of these are socioeconomic factors that may be relevant to a "best interest of the child" analysis but have no relevance to the preliminary question of whether Ms. Cole is unfit or has acted inconsistent with her constitutionally-protected status.

Dunn v. Covington, 272 N.C. App. 252 (2020)

The trial court, however, expressed concern that Ms. Nesbitt had paid the last two months rent with money from her income tax returns but failed to provide a plan for paying future rent. While we acknowledge this as a legitimate concern, we also recognize that making ends meet from month to month is not unusual for many families particularly those who live in poverty. However, we do not find this a legitimate basis upon which to terminate parental rights.

In re Nesbitt, 147 N.C. App. 349 (2001)

21

Document Poverty

The Court of Appeals reversed when it appeared that the mother's meager income may have been the basis for the termination, something that the trial court could not do.

The SW reported that the only thing standing in the way of reunification was "a lack of safe, stable, and appropriate housing."

In re S.D., 243 N.C. App. 65 (2015)

Earls, J., dissenting

"It is hard to imagine what she could possibly do differently at this time, before she has custody of her children or even a reasonable expectation that they will be returned to her custody imminently, to satisfy the requirements of a larger home and better transportation. Her ability to plan for obstacles is surely affected by her finances. Earning a low income while working in a full-time job is not itself evidence that there is a likelihood of future neglect."

In re J.J.H., 376 N.C. 161 (2020)

22

Document Poverty

Document the costs and impact of each case plan or court ordered requirement.

1. Fees for required treatment (DV classes, SA/MH treatment, drug tests)
2. Costs of attending required treatment (transportation)
3. Costs and impact of other requirements
   a. Stable housing (monthly rent, deposit, utility deposits)
   b. Stable employment (commute costs, uniforms, rigid schedule)
   c. Visitation center costs

➢ Tuesday's Tip #25 - Poverty

23

Case Plan Amendments

The trial court has broad discretion to amend a case plan during the pendency of a juvenile case.

In re B.O.A., 372 N.C. 372 (2019).

It is undisputed respondent-father did not complete an assessment to evaluate his propensity for violence. However, the trial court struck this requirement after DSS was unable to offer guidance on where he could complete this service…

In re B.F., I.F., No. COA24-175, Filed 15 January 2025

Tuesday's Tip #8 - Cookie Cutter Case Plans

24

Relinquishment

G.S 7B-1111(a)(9)

The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home…

25

Relinquishment

DSS Policy

Sometimes the child's parent(s) recognize they cannot be the permanent family for the child. When they know and respect the care their child is receiving from the foster family, they may voluntarily relinquish their parental rights, so the child can be adopted by that family. The advantage in this situation is that it allows for the possibility that the child and birth parent continue some relationship while the child is raised by a committed and caring adoptive family.

https://policies.ncdhhs.gov/wp-content/uploads/Permanency-Planning-Manual-Oct-2024.pdf

If the child is already living in the home of the applicants, strong consideration should be given to placement with these persons, taking into account the length of time the child has been in the home, the depth and degree of bonding that has occurred, and the child's ability to move from the home and form satisfactory attachments in another home and with another family. Unless it can be clearly documented that placement with the current caretakers is contrary to the child's welfare and best interests, this should be the first consideration for adoption.

https://policies.ncdhhs.gov/wp-content/uploads/adoptions-1.pdf

26

Relinquishment

Open Adoption

In general, State law does not prohibit postadoption contact or communication. Because adoptive parents have the right to decide who may have contact with their adopted child, they can allow any amount of contact with birth family members, and such contacts often are arranged by mutual understanding without any formal agreement.

Child Welfare Information Gateway. Postadoption contact agreements between birth and adoptive families (2018).

G.S. 48-3-610. Collateral agreements.

If a person executing a consent and the prospective adoptive parent or parents enter into an agreement regarding visitation, communication, support, and any other rights and duties with respect to the minor, this agreement shall not be a condition precedent to the consent itself, failure to perform shall not invalidate a consent already given, and the agreement itself shall not be enforceable.

- Bethany Christian Services encourages openness in adoption and understands everyone's journey in adoption is unique. Our hope is for adoptive parents, adoptees and birth families to have genuine relationships with one another and that all members' attitudes and actions will honor these lifelong connections.

27

Relinquishment

If the parents are married to one another and live together, they both must execute a relinquishment. G.S. 48-3-701(a). Presumably, if the parents are not married, or if they are married but not living together, one parent may execute a relinquishment. A minor parent has the legal authority to execute a relinquishment. G.S. 48-3-605(b); see G.S. 48-3-702(b). A parent who has been adjudicated incompetent may execute a relinquishment so long as the procedures set forth in G.S. 48-3-602 are followed.

https://civil.sog.unc.edu/a-guide-to-relinquishments-and-post-relinquishment-review-hearings/

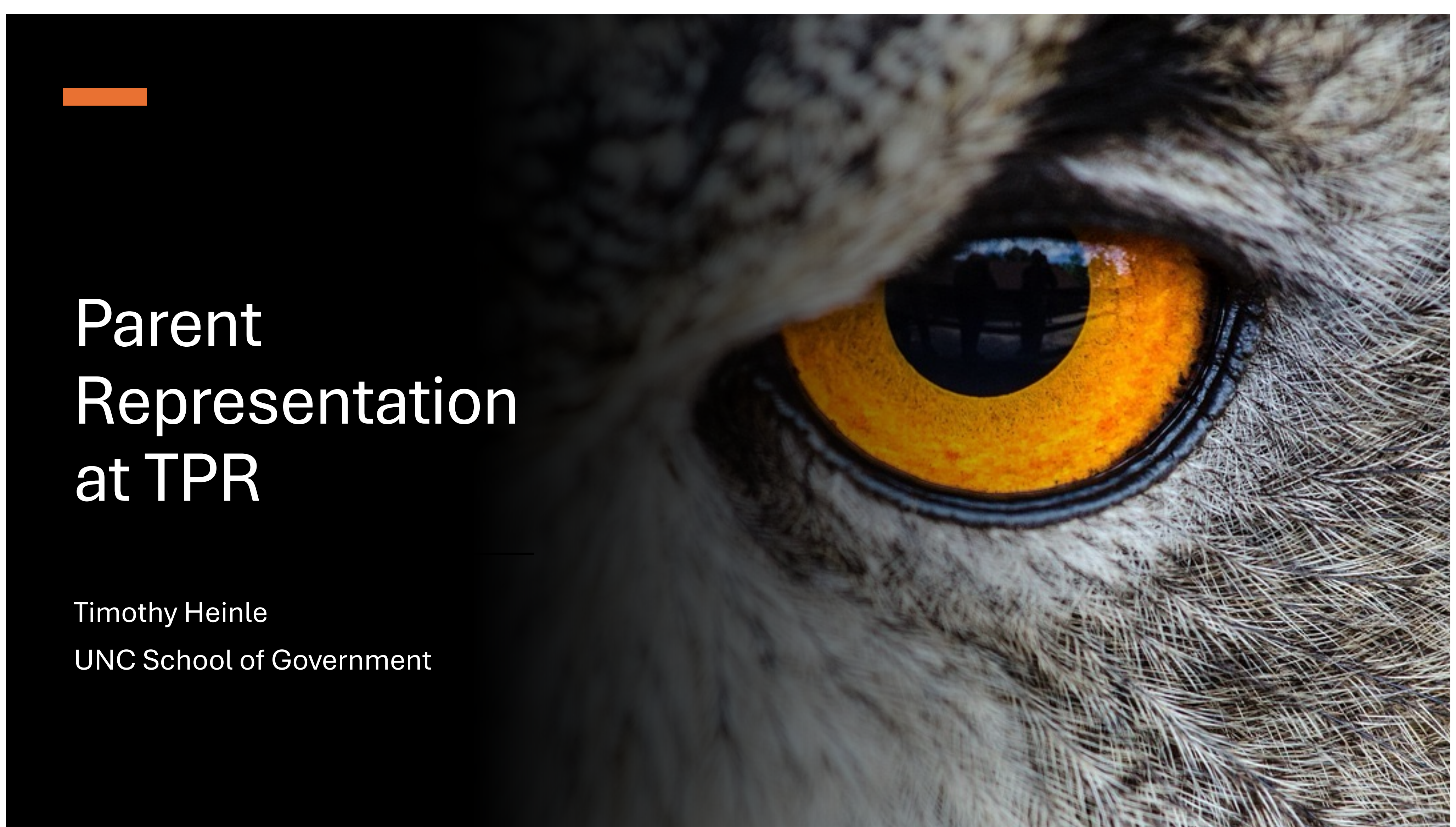
7B-909.1. Relinquishment to a department of social services.

Before the relinquishment of a juvenile to a department of social services for the purpose of adoption may be executed by a parent who is a respondent in an action under this Subchapter and (i) whose retained counsel has entered a notice of appearance or (ii) who has an attorney whose provisional appointment has been confirmed by the court, each of the following shall occur:

1) Notice shall be given by any reasonable and timely means of communication to the parent's counsel or, if such counsel is unavailable, to the partner or employee at the attorney's office that the department has made arrangements for the parent to execute a relinquishment at a specific date, time, and location.
2) The parent shall be advised of the right to seek the advice of the parent's counsel prior to executing the relinquishment and to have the parent's counsel present while executing the relinquishment.

28

29


Parent Representation at TPR
Timothy Heinle
UNC School of Government

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A Respondent Parent's Right to Retain Counsel: Lessons from a New Court of Appeals Decision, In re A.K.

This entry was contributed by Timothy Heinle on August 21, 2024 at 9:18 am and is filed under Child Welfare Law.

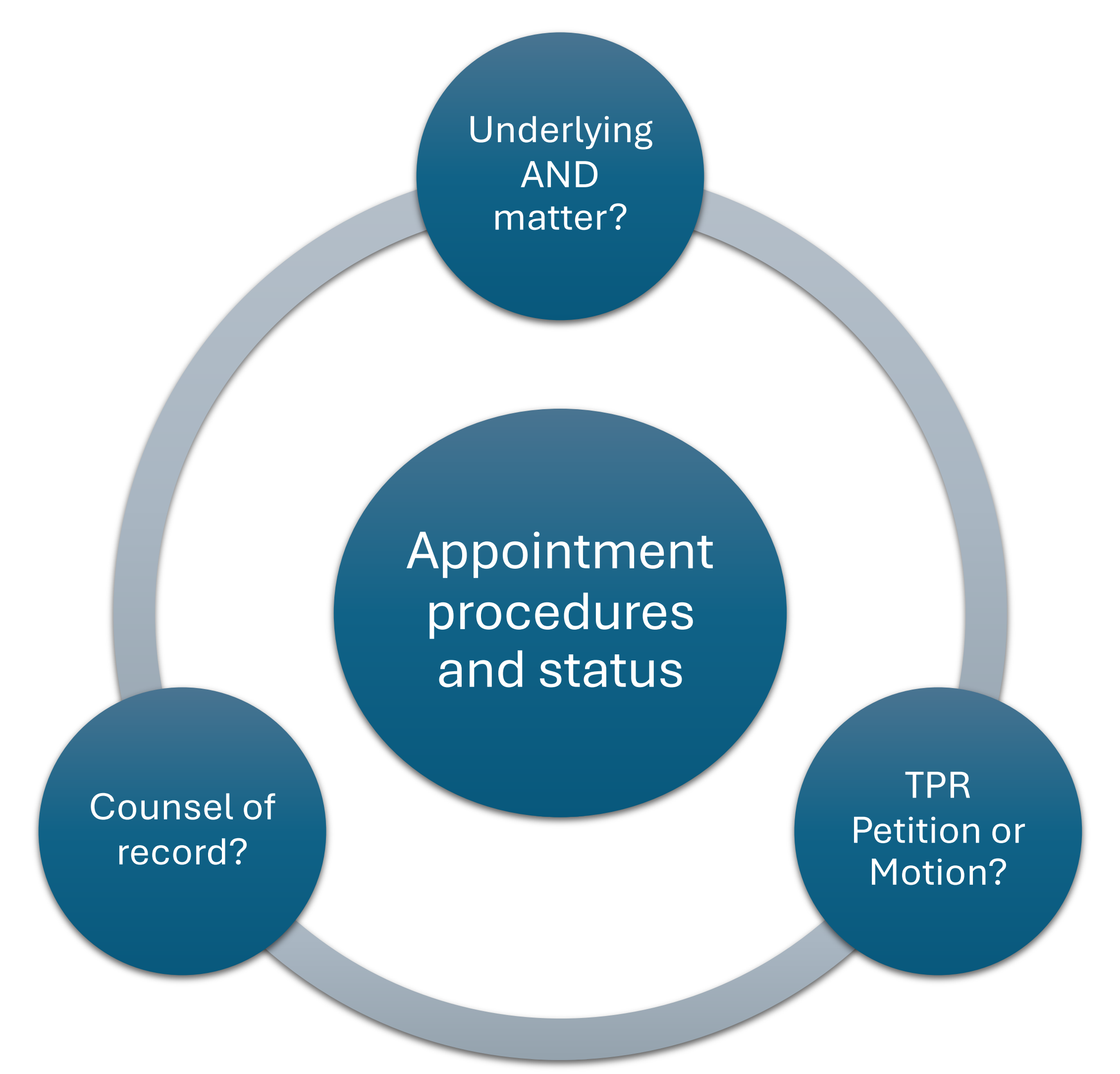
A recent decision by the North Carolina Court of Appeals considers the right of a respondent parent in a juvenile abuse, neglect, or dependency (AND) proceeding to hire counsel of their own choosing and what standards, if any, a retained attorney must meet to be allowed to represent a parent. *In re A.K.*, __ N.C. App. __ (August 6, 2024). The case also includes discussion of the procedures for appointing a

Includes right of parent to **hire** counsel of their choosing.

In re A.K., __ N.C. App. __ (Aug. 6, 2024)

§ 7B-1101.1. Parent's right to counsel; guardian ad litem.

(a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services. When a petition is filed, unless the parent is already represented by


Underlying AND matter?
Appointment procedures and status
Counsel of record?
TPR Petition or Motion?

Underlying AND matter?

Appointment procedures and status

Counsel of record?

TPR Petition or Motion?

If...

✓ There is no underlying AND matter
✓ TPR is filed

→ Provisional counsel is appointed.

Underlying AND matter?

Appointment procedures and status

Counsel of record?

TPR Petition or Motion?

If…

✓ There is an underlying AND matter
✓ No attorney represents Parent in AND
✓ TPR *petition* is filed

→ <u>Provisional</u> counsel is appointed.

Underlying AND matter?

Appointment procedures and status

Counsel of record?

TPR Petition or Motion?

If…

✓ There is an underlying AND matter
✓ No attorney represents Parent in AND
✓ TPR *motion* is filed

→ Parent given notice of right to request attorney. If requested, provisional counsel is appointed.

Underlying AND matter?

Appointment procedures and status

Counsel of record?

TPR Petition or Motion?

If…

- ✓ There is an underlying AND matter
- ✓ You represent Parent in AND matter
- ✓ TPR *petition or motion* is filed

→ You are confirmed counsel for Parent.

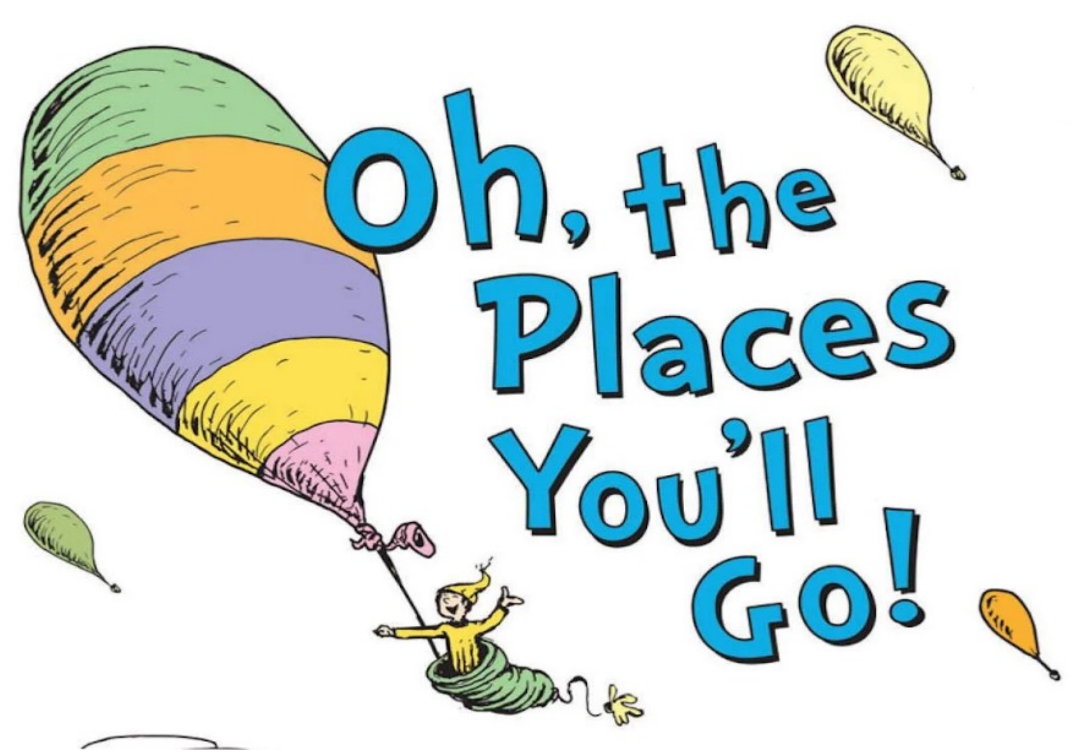
In all other situations, counsel is provisional (until released or confirmed).

A TPR is filed (petition or motion)

You represent a parent in an underlying AND matter

You are confirmed counsel in the TPR.

You're appointed. What happens next?



Provisional Counsel: Confirmed or Dismissed?

At the first hearing after service upon the respondent parent, the court must dismiss provisional counsel if the parent:

- ❑ Does not appear at the hearing*;
- ❑ Does not qualify for appointed counsel;
- ❑ Retained counsel; or
- ❑ Waives counsel.

G.S. 7B-1101.1(a)

**See, e.g., In re R.A.F.*, 384 N.C. 505 (2023)

Provisional Counsel: Your Role

"The purpose of provisional counsel is to ensure a respondent parent's rights are adequately protected for termination proceedings."

In re C.T.T., 288 N.C. App. 136, 142 (2023) (citation omitted)

Confirmed Counsel: Your Role

Represent the parent's express wishes and protect client's rights.

- ❑Communicate with the client
- ❑Offer/challenge evidence
- ❑Make objections and preserve issues for appeal
- ❑File pleadings (e.g., answer(?), motions, and notice of appeal)

THE FIRST SEVEN DAYS
AS A PARENT DEFENDER

TIMOTHY HEINLE

Appendix: Templates and Checklists

Case-File Insert

Key Case Information

File number	
Client's name	
Client's address	
Client's telephone	
Client's date of birth	
Social worker's name and contact	
Guardian ad litem's name and contact	
Hearing date(s)	

Client Notes (e.g., diagnoses, medications, service providers)

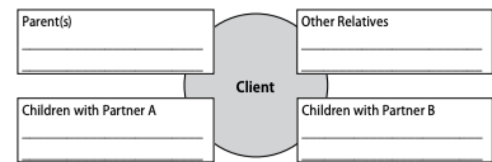
____

____

____

Quick Time Tracker

Date	Time spent	Work performed



What if your client does not attend the hearing?

- Continuance before possible withdrawal
- "Fundamental duty" of advocacy.
- Allowing attorney to "not participate" denies client effective assistance of counsel.
- Procedural safeguards > challenges posed by client's absence.

In re S.N.W., 204 NC App 556 (2010)

Withdrawal of Confirmed Counsel

When moving to "destroy weakened familial bonds," State "must provide the parents with fundamentally fair procedures."

In re K.M.W., 376 N.C. 195, 208 (2020)

Withdrawal of Confirmed Counsel

Attorney's motion must be

1. based on justifiable cause,
2. with prior notice to client of intent, and
3. granted by the court only after inquiry into cause and notice.

Notice

EXAMPLE

- Parents & attorneys were absent.
- DSS Attorney relays message :
  - No contact with clients.
  - Wish to be excused from serving as counsel at TPR.
- Court:
  - Attorneys are excused.
  - TPR petitions granted.

Court must inquire as to efforts attorney made to give notice before granting withdrawal or "relieving an attorney from any obligation to actively participate."

In re D.E.G., 228 N.C. App. 381, 386-87 (2013);
See also Rule 16 of General Rules of Practice

Notice

EXAMPLE

- Client with history of unstable housing absent from TPR.
- Attorney MOT to continue:
  - Unsure why client was absent.
  - Client may be confused re: dates.
  - Communication has been hard.
- MOT to continue denied.
- MOT to withdraw granted.

Error where "record is devoid of any evidence whatsoever" Parent received notice. "Superficial inquiry" insufficient.

In re M.G., 239 N.C. App. 77, 84-5 (2015)

Notice

EXAMPLE

- Client absent when TPR called.
- Attorney MOT to withdraw:
  - Encouraged client to attend.
  - Client requested withdrawal.
- Cert. of Service (DSS)
- MOT granted

Error to grant MOT without further inquiry into surrounding circumstances.

In re K.M.W., 376 N.C. 195 (2020)

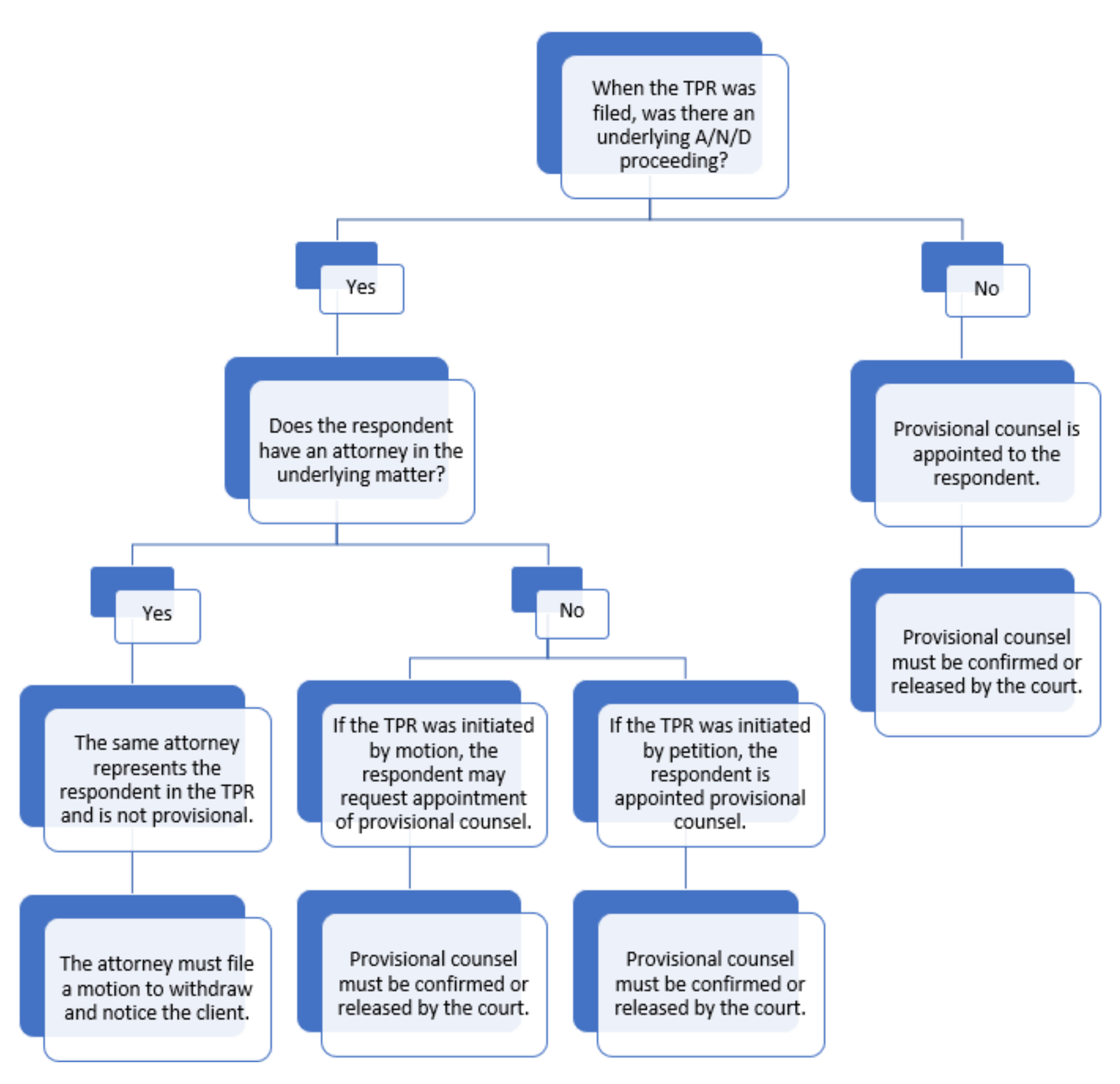
“[W]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has **no discretion** and must grant the party affected a reasonable continuance or deny the attorney’s motion for withdrawal.”

In re D.E.G., 228 N.C. App. 381, 386 (2013) (emphasis added)

To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing

This entry was contributed by Timothy Heinle on April 9, 2021 at 3:15 pm and is filed under Child Welfare Law.

Consider the common scenario in which a proceeding under Article 11 of G.S. Chapter 7B is filed to terminate a parent's rights to their child. How and when an attorney is appointed for the respondent parent in a termination of parental rights proceeding (TPR), whether the attorney is provisional or confirmed, and how the attorney may withdraw, depends on a few factors. Ongoing confusion on these points has led to several appeals in recent years, including a new ruling by our Supreme Court. *See In re K.M.W.*, 376 N.C. 195 (2020). This post reviews the governing principles under North Carolina case law and statutes.



Right to Counsel: Caveats

Waiver of counsel: inquiries + determinations

- Are parents present?
  - If so, are they represented?
    - If not represented,
      - do they want counsel, and
      - are they indigent?

Sufficient to engage in "a fairly lengthy dialogue with [a respondent parent] to determine awareness of her right to counsel and the consequences of waiving that right."

In re J.M., 273 N.C. App. 280, 289 (2020); G.S. 7B-1109(b)

Waiver of counsel: inquiries + determinations

Court discretion to allow parent to waive counsel.

- Must make inquiry (knowing and voluntary);
- Findings that support conclusions required.

In re K.M.W., 376 N.C. 195 (2020); G.S. 7B-1101.1(a)

Waiver of counsel: discretion (example)

Court did not abuse its discretion in denying RM's waiver attempt given (i) possibility of related criminal charges, and (ii) concerns abusive boyfriend coerced her to waive counsel.

In re J.R., 250 N.C. App. 95 (2016)

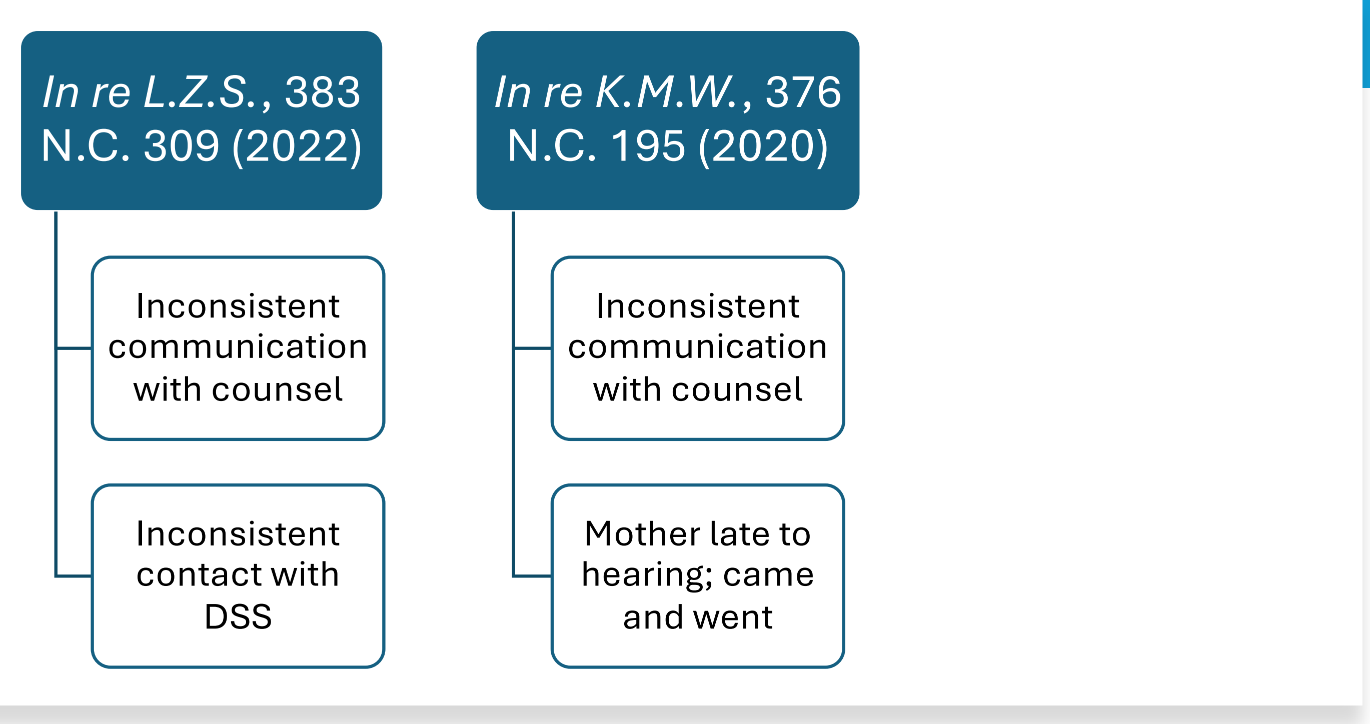
Right to Counsel: Caveats

Forfeiture of counsel

- Statutory right to counsel is not absolute.*
- Based on parent's "egregious, dilatory, or abusive conduct" that "totally undermine[s] the purposes of the right [to counsel] by making representation impossible and seeking to prevent trial from happening at all."**
  - *C.f.* Waiver (knowing and voluntary)

**In re D.T.P.*, 291 N.C. App. 165 (2023); ** *In re K.M.W.*, 376 N.C. 195, 209 (2020) (citations omitted)

Forfeiture of counsel? No.



Forfeiture of counsel? Yes.

Parents Forfeited Their Right to Court-Appointed Counsel in TPR: What Is the Law for Attorney Representation of Parents in A/N/D and TPR Actions?

This entry was contributed by Sara DePasquale on December 6, 2023 at 5:55 pm and is filed under Child Welfare Law.

North Carolina law requires that parents in abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) cases receive court-appointed counsel if they are indigent. G.S. 7B-602; 7B-1101.1. Parents also have a right to knowingly and voluntarily waive their statutory right to counsel. *Id.* The question of whether a parent may forfeit their right to counsel in a juvenile proceeding based on their

Multiple AND + TPR attorneys
- RF (five) and RM (six)
- All withdrew

Calculated plan to delay TPR
- Several invalid COA + SCOTUS appeals (dismissed)
- Instructed counsel to w/d near hearing dates

Forced out TPR counsel
- Filed civil actions against attorneys while TPR pending (dismissed)

Parent's conduct

Court's process

In re D.T.P., 291 N.C. App. 165 (2023)

Additional Resources for Parent Defenders

- Office of the Parent Defender: Tuesday Tips, Monthly Memos, and Brief Banks (https://ncparentdefender.org/for-attorneys/)

- Abuse, Neglect, Dependency, + TPR Manual, including
  - Rights of Parents, generally (Ch. 2),
  - Rule 17 GALs for Parents (Ch. 2.4.F.), and
  - TPRs (Ch. 9) (https://www.sog.unc.edu/resources/microsites/abuse-neglect-dependency-and-termination-parental-rights)

- SOG On the Civil Side Blog (https://civil.sog.unc.edu/)

- Heinle@sog.unc.edu

A Respondent Parent's Right to Retain Counsel: Lessons from a New Court of Appeals Decision, In re A.K.

A recent decision by the North Carolina Court of Appeals considers the right of a respondent parent in a juvenile abuse, neglect, or dependency (AND) proceeding to hire counsel of their own choosing and what standards, if any, a retained attorney must meet to be allowed to represent a parent. *In re A.K.*, __ N.C. App. __ (August 6, 2024). The case also includes discussion of the procedures for appointing a Rule 17 guardian ad litem to a respondent parent – an issue I will explore in a later post. This post focuses on what the opinion in *A.K.* does – and does not – tell us about a parent's right to hire counsel.

A Parent's Right to Counsel, Generally

When an AND petition or a petition to terminate parental rights (TPR) is filed, the juvenile's parent has a statutory right to counsel, absent certain exceptions. *See* G.S. 7B-602(a); 7B-1101.1(a). Provisional counsel must be appointed for each parent named in the petition but must be dismissed at the first hearing if one of these statutory factors applies: the parent fails to appear at the hearing, the parent has retained private counsel, the parent is not indigent, or the parent knowingly and voluntarily waives their right to counsel. G.S. 7B-602(a)(a1); 7B-1101.1(a)(a1). If none of the statutory factors are satisfied, the court must confirm the appointed counsel. G.S. 7B-602(a); 7B-1101.1(a).

The remainder of this post will consider the right to retained counsel in the AND context. My colleague, Sara DePasquale, and I have each previously published posts related to provisional counsel at a TPR proceeding. One post, which can be found here, considered how to determine whether a parent attorney was provisional or confirmed, and what it means for withdrawal by the attorney. The other post explored issues related to waiver and forfeiture of counsel by parents at TPR, and can be found here.

A New Court of Appeals Decision: *In re A.K.*

Background. Recently, the Court of Appeals published its decision in *In re A.K.*, __ N.C. App__ (August 6, 2024). The case involves a neglect petition that was filed by Guilford County DSS and alleged domestic discord, mental health issues, and concerns over the children's welfare and lack of access to education and medical services. When the petition was filed, the court appointed provisional counsel to the respondent mother pursuant to G.S. 7B-602(a). While initially represented by provisionally appointed counsel at the continued nonsecure custody hearing, two days prior to the first setting for pre-adjudication, adjudication, and disposition, a private attorney retained by the respondent mother filed a notice of appearance and served the notice on opposing counsel and the child's GAL.

After discussing mother's representation, the court continued the hearing and sua sponte appointed a Rule 17 GAL for mother. No decision on mother's counsel was made. At the next scheduled hearing, the trial court addressed the mother's request to be represented by her retained attorney. The trial court noted that not everyone is qualified to work in an AND proceeding "because of its specialized nature," making it "extremely different" from other courts. Sl. Op. at 17. After conducting an inquiry, the court determined that the attorney did not meet the requirements set forth by the judicial district's local rules for court-appointed attorneys and was unqualified to appear in AND court. The trial court stated that the retained counsel's lack of qualifications was severe enough that the court was concerned it "most likely would end up terminating [mother's] parental rights," despite DSS having expressed that reunification was the goal. Sl. Op. at 18.

In its adjudication order, the court found that (1) mother's retained attorney lacked sufficient knowledge of the juvenile laws and lacked the experience and competence necessary to represent parents in AND matters, and (2) representation by her retained counsel was not in the mother's best interests. The order explained the court's concerns that the mother would "suffer irreparable harm to her parental rights," and thus found that "despite the fact that [this attorney] is retained…his representation would be detrimental." Sl. Op. at 16. The court released the retained attorney and ordered that appointed counsel remain in the case.

The juveniles were adjudicated neglected, and a disposition order was later entered. The respondent mother timely appealed both orders.

The appeal. Among other issues raised on appeal, the mother argued that parents have a right to hire an attorney of their choosing, and that by denying her that right, the court failed to comply with G.S. 7B-602(a) and violated her due process and constitutional rights.

Standard of review. Addressing the applicable standard of review, the Court of Appeals noted that it was unable to find prior cases dealing with a trial court's refusal to allow a respondent parent to be represented by a retained attorney who had filed notice of his appearance and attended the hearing. Looking to *In re K.M.W.*, 376 N.C. 195 (2020), the Court applied a *de novo* standard of review since the issue involved a conclusion of law addressing the parent's right to counsel based on statutory criteria. A de novo standard of review is also applied "where constitutional rights are implicated." Sl. Op. at 12. The Court distinguished the present case from cases that applied an abuse of discretion standard when a parent sought a continuance to allow time to hire private counsel, or where a respondent seeks to replace a court-appointed attorney with another appointed counsel. *Id*.

Qualifications of retained counsel. In response to concerns raised about his qualifications to represent the mother in an AND matter, mother's retained counsel argued that there were no special standards he needed to meet because he was retained and not court appointed. The Court of Appeals agreed. The Court pointed to the local rules of the judicial district which set the requirements, experience, and training necessary for an attorney to be considered for appointment

to a parent in an AND matter. Those rules do not apply to privately retained counsel, however. Addressing the required qualifications for a privately retained attorney, the Court stated, "[t]he only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina." Sl. Op. At 19. DSS argued that trial courts have inherent authority over the attorneys appearing before, but the Court explained that inherent authority applies to unethical or potentially unethical behavior by an attorney. In this case, the mother's retained counsel had acted appropriately and there were no concerns about unethical behavior.

Similarly, the Court rejected an argument by DSS that allowing an inexperienced attorney to represent a parent may violate the Rules of Professional Conduct, specifically Rule 1.1, Competence. The Court reasoned that a lack of experience by an attorney who is otherwise licensed to practice law in North Carolina is not a sufficient basis to deny a motion to substitute counsel. Every attorney is new to a specific area of law at first, the Court said. While agreeing that AND proceedings are specialized in nature, the Court held that a trial court's inherent authority over the attorneys who appear before it does not go so far as to give courts the unrestrained authority to deny retained counsel based only on that attorney's lack of particular experience.

Holding. Whether the trial court "simply failed to comply" with the statutory requirement that trial courts "shall dismiss" provisional counsel under certain conditions, or whether the court misapprehended the law as it relates to qualifications necessary to serve as a parent attorney, the Court of Appeals held that the trial court erred in denying the respondent mother representation by retained counsel. Sl. Op. at 22.

Takeaways, limits, and open questions

Through *In re A.K.*, the Court of Appeals has reaffirmed the right of parents in AND proceedings to retain an attorney of their choosing. When a parent exercises that right, trial courts must dismiss provisionally appointed counsel for the parent, without considering the possible lack of AND experience on the part of the privately retained counsel. Local rules that govern court appointed counsel in AND proceedings do not apply to privately retained counsel and do not limit a parent's right to hire counsel.

Note that the Court of Appeals' ruling in *In re A.K.* does not change the Rules of Professional Conduct, including Rule 1.1 on competence. Attorneys must be competent, meaning they must have "the legal knowledge, skill, thoroughness, and preparation reasonably necessary" to represent a client. N.C. R. of Prof'l Cond., R. 1.1. But there is no requirement that a lawyer have "special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar," and in fact a new lawyer may be as competent as a seasoned one. *Id*. at Cmt. [2]. Additionally, a lawyer may act to represent a client where competence is achievable through preparation. *Id*. at Cmt. [4]. If the lawyer is not competent, they may associate with a lawyer who is. *Id*.

Remember too, the holding in *In re A.K.* does not necessarily apply to situations where a parent is requesting additional time to hire an attorney, or to a parent who wants the court to substitute one appointed attorney with a different appointed attorney. Other situations or questions that were not necessarily addressed by *In re A.K.* include:

- If a judicial district has local rules that establish minimum qualifications for *retained* attorneys to represent clients in AND proceedings, what effect would those rules have, if any, on a parent's right to retain counsel? Could a court prevent a licensed attorney who is retained but is otherwise "unqualified" under the local rules to appear on behalf of a parent?
- *In re A.K.* dealt with the appointment of provisional counsel under G.S. 7B-602(a) and the release of said counsel if a parent hires an attorney prior to the first hearing. What if a parent hires private counsel later in the proceeding, after provisional counsel had been confirmed? Or what if the parent has been determined to have forfeited counsel and later tries to hire their own attorney? Does the timing relative to the proceeding affect the parent's right to be represented by privately retained counsel of the parent's choosing?
- The question of a party's mental capacity to hire counsel is a significant one, and is an issue faced by all courts and not just in AND proceedings. For reasons that are beyond the scope of this post, a Rule 17 GAL was appointed to the respondent mother in *In re A.K.*, and in a way that concerned the Court of Appeals but was not ultimately an issue ruled on by the Court. In a future post, I will address the Rule 17 GAL lessons to be found in *K.*, but questions remain as to whether a parent who has been appointed a Rule 17 GAL has the capacity and right to hire their own counsel (and whether the court must accept that counsel)?

Reach out to me anytime at Heinle@sog.unc.edu if you have questions or want to discuss issues related to this post or your own cases.

Parents Forfeited Their Right to Court-Appointed Counsel in TPR: What Is the Law for Attorney Representation of Parents in A/N/D and TPR Actions?

North Carolina law requires that parents in abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) cases receive court-appointed counsel if they are indigent. G.S. 7B-602; 7B-1101.1. Parents also have a right to knowingly and voluntarily waive their statutory right to counsel. *Id*. The question of whether a parent may forfeit their right to counsel in a juvenile proceeding based on their behaviors had not been answered until recently. Three appellate opinions address the issue and answer that question. Parents can and have forfeited their statutory right to court-appointed counsel. To get to forfeiture, you first need to understand the rules related to a parent's statutory right to court-appointed counsel.

The Statutory Right to Counsel

Provisional to Confirmed Counsel

When a petition alleging a juvenile is abused, neglected, and/or dependent is filed in district court, the clerk must appoint provisional counsel for each parent named as a respondent in the petition. G.S. 7B-602(a). The court reviews the appointment of provisional counsel at the first hearing in the action. If the parent (1) does not appear, (2) does not qualify due to indigency, (3) retains their own attorney, or (4) waives their right to counsel, provisional counsel is released. *Id.* If none of the four factors apply, the court confirms the attorney's appointment, meaning the attorney is now the attorney of record representing the parent in the case. *Id.* A confirmed attorney may seek to terminate their representation but may only do so by filing a motion to withdraw. The motion must be based on justifiable cause; the attorney must give (or attempt to give) prior notice to their client of their intent to withdraw, and the court determines whether to grant the motion. *See* In re D.E.G., 228 N.C. App. 381 (2013).

As with an A/N/D case, when a TPR petition is filed, the clerk must appoint provisional counsel to the respondent parent. G.S. 7B-1101.1(a). However, if there is an underlying A/N/D case, and a TPR motion (rather than a petition) is filed in the A/N/D action, provisional counsel is not automatically appointed. Instead, the respondent parent may contact the clerk to request provisional counsel or appear at court and request the appointment of counsel. G.S. 7B-1106.1(b)(4); *see* 7B-1101.1(a).

The court in a TPR action reviews the appointment of provisional counsel at the first hearing after the parent has been served. G.S. 7B-1101.1(a). The court applies the same four factors in an A/N/D case to determine whether to release provisional counsel: the parent (1) does not appear, (2) does not qualify due to indigency, (3) retains their own attorney, or (4) waives their right to counsel. *Id.* If one of the factors apply, the court releases provisional counsel, and if none of the

factors apply, the court confirms the attorney's appointment. *Id.*

There are two differences in the A/N/D and TPR statutes to be aware of. First, unlike the TPR statute, the A/N/D statute does not state at the first hearing *after a parent has been served* and does not appear, provisional counsel is released. *Compare* G.S. 7B-602(a) *to* 7B-1101.1(a). Despite the absence of the language – after a parent has been served – in the A/N/D statute courts should consider a parent's due process rights to notice when deciding whether to release provisional counsel at the first hearing where the parent has not been served and does not appear. Second, regardless of whether a TPR petition or motion is filed, when there is an underlying A/N/D action where the respondent parent is represented by an attorney, that attorney continues to represent the parent in the TPR action. *See* G.S. 7B-1106.1(b)(3). The attorney is not provisional counsel. *See In re D.E.G.*, 228 N.C. App. 381. For more information on continued attorney representation in a TPR action and the need for a motion to withdraw, see my colleague's, Timothy Heinle's, post here.

If provisional counsel is released, under both the A/N/D and TPR statute, "the court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding." G.S. 7B-602(a); 7B-1101.1(a). This means the court may reappoint counsel after provisional counsel has been released. One stage where reconsideration can occur is the preadjudication hearing in an A/N/D case and the pretrial hearing in a TPR case. G.S. 7B-800.1(a)(1) (A/N/D); 7B-1108.1(a)(1); *see* In re R.A.F., 384 N.C. 505 (2023) and In re C.T.T*.,* 288 N.C. App. 136 (2023) (both affirming release of provisional counsel in a TPR and looking to G.S. 7B-1108.1). Additionally, at the TPR adjudication hearing, G.S. 7B-1109(b) requires the court to ask if the parents are present and if so whether they are represented by an attorney. If they do not have an attorney and are indigent, the court must ask if they want to be represented and if so, appoint an attorney and continue the hearing so that the attorney can prepare a defense*. Id.; see* In re K.W.M., 376 N.C. 195 (2020).

For both A/N/D and TPR actions, appointments of counsel are made in accordance with the rules adopted by the North Carolina Office of Indigent Defense Services. G.S. 7B-602(a); 7B-1101.1(a).

Knowing and Voluntary Waiver

Both G.S. 7B-602 (A/N/D) and 7B-1101.1 (TPR) provide that when a parent qualifies for appointed counsel, the court may allow the parent to proceed without counsel. The court must first examine the parent on the record and make findings of fact sufficient to show that the parent's waiver of counsel is knowing and voluntary. G.S. 7B-602(a1); 7B-1101.1(a1); *see In re K.M.W.*, 376 N.C. 195 (TPR); In re J.M., 273 N.C. App. 280 (2020) (remanding for entry of written findings of fact about whether mother's waiver of counsel was knowing and voluntary). The court of appeals has determined that the required court inquiry regarding a parent's knowing and voluntary waiver is

sufficient when the trial court engages in “a fairly lengthy dialogue with [a respondent parent] to determine her awareness of her right to counsel and the consequences of waiving that right.” *In re J.M.*, 273 N.C. App. at 289 (quoting *In re A.Y.*, 225, N.C. App. 29, 39 (2013); determining mother’s waiver was knowing and voluntary). Whether a parent has waived their right to counsel is a conclusion of law. *In re K.M.W.*, 376 N.C. 195.

The AOC has a form for a “Waiver of Parent’s Right to Counsel” that applies to A/N/D and TPR proceedings. AOC-J-143.

The court should clarify with the parent whether their waiver is for all counsel such that the parent intends to represent themselves or whether the waiver is for court-appointed counsel because the parent is privately retaining counsel. *See In re K.M.W.*, 376 N.C. 195 (reversing TPR; mother’s waiver was only for court-appointed counsel not all counsel; when retained counsel was permitted to withdraw, waiver was not to represent herself).

Although a parent may represent themselves, the court of appeals has held that a parent does not have a statutory or constitutional right to self-representation in an A/N/D proceeding. The court exercises discretion in deciding whether to allow a parent to waive counsel and represent themselves. *See* In re J.R., 250 N.C. App. 195 (2016) (holding no abuse of discretion when the court denied mother’s request to proceed pro se given possibility of criminal charges arising from the same incident and finding that her waiver was not knowing and voluntary because she was influenced and possibly coerced by her abusive boyfriend to waive counsel). Presumably, this holding applies to TPR actions as well.

Forfeiture of Counsel

Although parents have a statutory right to counsel, that right is not absolute when there is a forfeiture. See In re D.T.P., ___ N.C. App. ___ (2023). A forfeiture of counsel is based upon the respondent parent’s behavior. The parent’s actions must be “egregious dilatory or abusive conduct” that “totally undermine[s] the purposes of the right itself by making representation impossible and seeking to prevent the trial from happening at all.” *In re K.M.W.*, 376 N.C. at 209 (quoting *State v. Simpkins*, 373 N.C. 530, 541 (2020) and *quoted in In re D.T.P.*, Sl. Op. at 8)). Whether a respondent has forfeited their right to counsel is a conclusion of law and is reviewed do novo. *In re K.M.W.*, 376 N.C. 195.

A forfeiture of counsel differs from a waiver of counsel. Unlike a waiver, which involves an intentional and knowing relinquishment of the right to counsel, a forfeiture of counsel is based on the respondent’s actions. A forfeiture of counsel does not require that the trial court make an inquiry about a respondent’s knowing and voluntary waiver. Instead, the court concludes there is a forfeiture based on findings, supported by evidence, about the parent’s conduct. Presumably, because the parent forfeited their right to counsel, the court would not have to make the inquiry under G.S. 7B-1109 at a TPR hearing as to whether the parent desires court appointed counsel

resulting in an appointment of counsel and continuance of the case.

Three recent appellate opinions address forfeiture of a parent's right to court-appointed counsel in a juvenile proceeding. The first two opinions were published by the North Carolina Supreme Court and briefly discussed forfeiture while focusing more on the attorneys' motions to withdraw without prior notice to their clients. In looking at the facts in each case, the supreme court determined the parents' conduct was not a forfeiture because their conduct was not egregious, dilatory, or abusive. *See* In re L.Z.S*.,* 383 N.C. 309 (2022) (reversing order allowing attorney to withdraw; reversing permanency planning order eliminating reunification; father not maintaining consistent communication with his attorney and DSS is not conduct rising to forfeiture); *In re K.M.W.*, 376 N.C. 195 (reversing trial court's order allowing attorney to withdraw; reversing TPR; mother's late arrival at the hearing, briefly leaving hearing, and not maintaining consistent contact with her attorney is not a forfeiture). But in the most recent opinion, the issue was forfeiture of counsel. In *In re D.T.P.*, ___ N.C. App. ___, the court of appeals affirmed the district court's conclusion that both parents' separately and together forfeited their right to court-appointed counsel in a TPR.

In re D.T.P. started in 2017, when a juvenile neglect petition was filed in district court. During that neglect action, each parent had multiple attorney appointments and attorney motions to withdraw that were granted. A TPR was filed in 2021, and mother and father had court-appointed counsel. Ultimately, both attorneys filed a motion to withdraw that was granted because mother and father, acting pro se, filed a civil action against their attorneys (and others). The court held a hearing to address the status of parent's representation, where the parents represented themselves and testified. At the conclusion of that hearing, the court issued a memo that determined "the [Parents], by their intentional acts, have forfeited the right to Court appointed counsel." Sl. Op. at 4. Later, the TPR hearing was held, and the parents represented themselves. After hearing, the court entered TPR orders for each parent and a "Forfeiture Order." Sl. Op. at 5. The parents appealed.

The court of appeals examined the trial court's findings in the Forfeiture Order, which included (1) the father had five different attorneys and the mother six; (2) the parents had a calculated plan to delay the court proceedings consisting of several invalid appeals to the court of appeals and the U.S. Supreme Court, all of which were dismissed; (3) the parents used the practice of having their attorneys file motions to withdraw at or near the time of the TPR hearing so that new attorneys would be appointed to delay the TPR hearing; and (4) the parents filed a lawsuit against their attorneys to cause the attorneys to file a motion to withdraw; the lawsuit was dismissed. The court of appeals determined the findings were supported by evidence including the parents' notices of appeal, several motions for and orders of withdrawal, several appointment of counsel orders, the lawsuit the parents filed against their attorneys, and the parents' testimony acknowledging they knew attorney withdrawal resulted in a delay of the hearing.

Based on its findings, the trial court concluded, and the court of appeals affirmed, that the parents forfeited their right to counsel. The order determined that the parent's conduct was egregious, dilatory, and abusive; undermined the purpose of the right to counsel by making representation

impossible; and sought to prevent the TPR from occurring in a timely manner. The order further decreed "respondent parents shall not have new court appointed attorneys appointed in the matters pending before this Court." Sl. Op. at 6.

Reading these cases together, the parent's actions are crucial. Just as important is the process for determining whether a parent has forfeited their right to counsel. The process in *In re D.T.P*. involved (1) holding a separate hearing that was held before the TPR adjudicatory hearing to address the status of parent representation, which allowed the parents time to prepare a defense on their own, (2) specific and detailed findings about the parent's conduct, which were all supported by evidence, (3) ultimate findings about the type of conduct (egregious, dilatory, abusive), and the impact on the hearing (delay) and attorney representation (impossible), and (4) the conclusion of forfeiture.

We now know a parent can forfeit their statutory right to court-appointed counsel in an A/N/D and TPR proceeding. Most cases involving forfeiture are in the criminal arena and may provide guidance on a party's conduct and whether it rises to the level for forfeiture. For more information about forfeiture of counsel, see my colleague's, Brittany Bromell's post: N.C. Supreme Court Weighs in Again, on Forfeiture of Counsel.

To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing

Consider the common scenario in which a proceeding under Article 11 of G.S. Chapter 7B is filed to terminate a parent's rights to their child. How and when an attorney is appointed for the respondent parent in a termination of parental rights proceeding (TPR), whether the attorney is provisional or confirmed, and how the attorney may withdraw, depends on a few factors. Ongoing confusion on these points has led to several appeals in recent years, including a new ruling by our Supreme Court. *See In re K.M.W.*, 376 N.C. 195 (2020). This post reviews the governing principles under North Carolina case law and statutes.

Appointment of Counsel

Underlying Matter. Often, if a Department of Social Services (DSS) believes that a child is abused, neglected, or dependent, the agency will file a petition in district court. G.S. 7B-402. In some instances, this proceeding leads to the later filing of a TPR petition by DSS to aid in achieving a permanent plan for the child. When a TPR petition is filed, the original juvenile abuse, neglect, or dependency action is casually referred to as the "underlying matter." It is not necessary that there be an underlying matter for a TPR to be filed; however, the existence (or nonexistence) of an underlying matter, and whether a parent has an attorney in that underlying matter, are important factors in the questions this post explores.

The statutory right to counsel. To ensure that a parent's due process rights in a TPR are protected, a parent has a statutory right to counsel. G.S. 7B-1101.1(a); *In re K.M.W.*, 376 N.C. 195 (2020). "When a petition [for a TPR] is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent named in the petition." G.S. 7B-1101.1(a). At the first hearing held after a parent is served, the court decides to dismiss or confirm the attorney's appointment depending on several considerations, including whether the parent appears at the hearing, is indigent, has retained counsel, or makes a knowing and voluntary waiver of the right to counsel. *Id.*

TPRs initiated by motion. If there is an underlying matter, a TPR may be commenced by the filling of a motion in that proceeding rather than by a separate petition. G.S. 7B-1102. The procedure for appointing counsel to a respondent parent in a TPR differs when the proceeding is brought by motion in the underlying matter. There, notice to the parent of the TPR motion must indicate "that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel." G.S. 7B-1106.1(b)(4). This means that if the parent has an attorney in the underlying proceeding, the same attorney represents the respondent parent in the TPR. If the parent does not have an attorney in the underlying proceeding, the parent must request an

attorney, who is considered provisional until confirmed by the court. This request requirement differs from TPR cases initiated by petition, in which an attorney is automatically appointed for the parent. (Whether it is reasonable to require that a parent request an attorney when a TPR begins by motion rather than by petition is a question worth considering but is beyond the scope of this post.)

The attorney in the underlying matter is not provisional counsel in the TPR. Unless a court orders otherwise, the statutes indicate that an attorney for a parent in an underlying proceeding continues representation as the non-provisional attorney for the respondent parent in the TPR. In other words, the same attorney is confirmed counsel in both the underlying and TPR proceedings, whether the TPR is initiated by petition or motion. *See, e.g.,* G.S. 7B-1101.1(a) (requiring a clerk to appoint provisional counsel "unless the parent is already represented by counsel"); G.S. 7B-1106(a2) (requiring service of a TPR on an attorney if the "attorney has been appointed for a respondent pursuant to G.S. 7B-602 and has not been relieved of responsibility"); G.S. 7B-1106(b)(4) (requiring notice to a parent that "is not already represented by appointed counsel" of how to request counsel); G.S. 7B-1106.1(b)(3) (requiring whenever a motion for a TPR is filed, notice "that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court").

Our appellate courts have recognized that a parent's attorney in an underlying proceeding ordinarily continues as non-provisional counsel in a subsequent TPR. In *In re D.E.G.*, 228 N.C. App. 381, 388 (2013), the Court of Appeals held that in a TPR "the appointment of provisional counsel is unnecessary in the event that 'the parent is already represented by counsel'" in an underlying proceeding. Two years later, in *In re M.G.*, 239 N.C. App. 77, 86 (2015), the Court of Appeals held that a parent's attorney in an underlying action does "not assume a provisional role in the TPR" and, thus, the court was not "excused from the necessity for compliance with the usual procedures required" before permitting withdrawal.

Withdrawal of Appointed Counsel

How does an attorney's status as provisional or confirmed in a TPR affect an attorney who needs to withdraw? What must the attorney and court each do before the attorney may withdraw?

Notice to the client. "When the State moves to destroy weakened familial bonds"—that is, terminate parental rights—"it must provide the parents with fundamentally fair procedures." *In re K.M.W.*, 376 N.C. 195, 208 (2020). For example, an attorney who has entered an appearance cannot withdraw without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211 (1965). "[W]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion and must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *In re D.E.G.*, 228 N.C. App. 381, 386 (2013) (citation and internal quotation marks omitted). This

requirement is consistent with the obligations under the Rules of Professional Conduct for attorneys terminating representation of a client. *See* N.C. Rules of Prof'l Conduct r.1.16 (N.C. State Bar 2003).

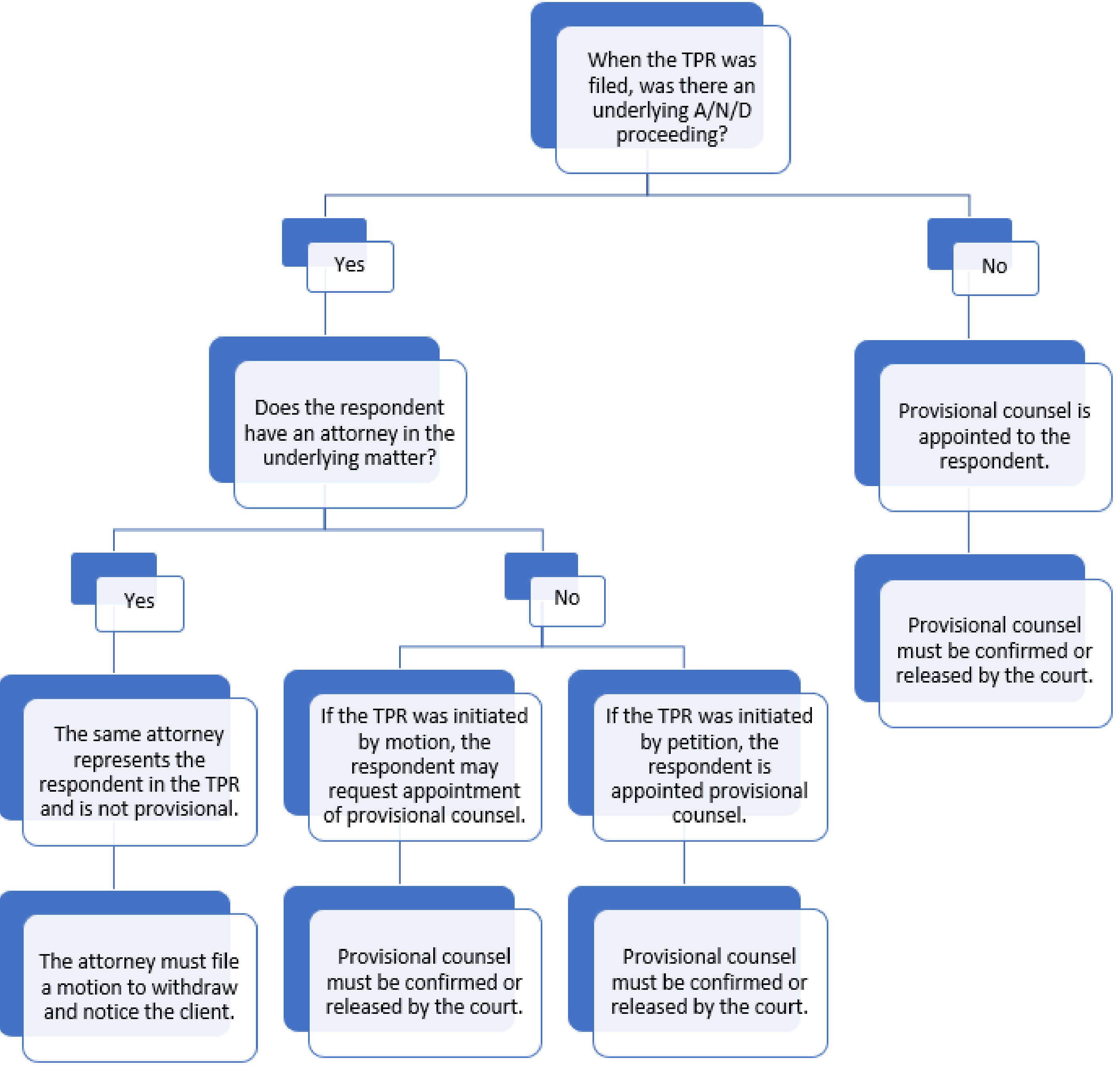
At the new hearing date, if the parent is present, the court would decide whether (1) the attorney should be permitted to withdraw, (2) the parent is making a knowing and voluntary waiver of their right to counsel, (3) new counsel should be appointed , and (4) the TPR hearing should proceed or be continued to allow for time to prepare. If the parent is not present at the new hearing date, the court could decide whether to grant the motion to withdraw and whether to proceed with the TPR. The court must ask what efforts the attorney made to provide notice of the intent to withdraw "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate" in a TPR." *In re D.E.G.*, 228 N.C. App. at 386-87; *see also In re M.G.*, 239 N.C. App. at 84-5 (vacating a TPR order where the court improperly allowed counsel to withdraw "after conducting a superficial inquiry" and without receiving "any evidence whatsoever" that the client had prior notice); *In re K.M.W.*, 376 N.C. at 211 (holding that an attorney at a TPR was improperly permitted to withdraw, despite explaining that he was doing so at the client's request, when the client was not present, the certificate of service on the withdrawal motion showed that only DSS had been served with a copy, and the court did not inquire further about whether the client was given notice).

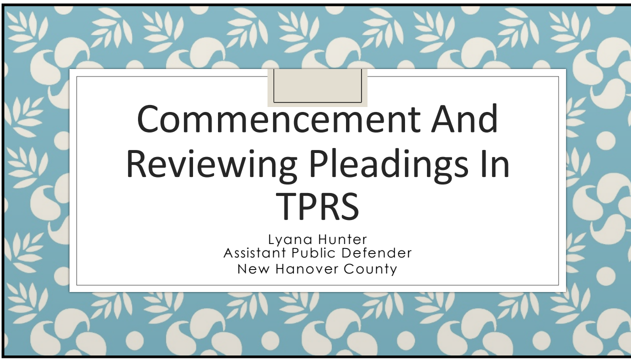
What It All Means

If a parent has counsel in an underlying matter, and a TPR petition or motion is filed, the same attorney will represent the respondent parent in the TPR. The attorney is not provisional. If the attorney moves to withdraw, there must be justifiable cause, notice given—or sufficient efforts to give notice—to the client of the attorney's intent, and court approval. The court does not have discretion to allow the withdrawal if the attorney has not provided the client notice.

If there is no underlying action, or there is one but for whatever reason the parent is unrepresented, an attorney appointed to the respondent parent in the TPR is provisional. The court would then confirm or release the provisional counsel. G.S. 7B-1101.1(a).

Below is a diagram illustrating these principles. Please reach out to me if you would like help figuring out the appropriate steps in your case.


Respondent's Counsel in a TPR: Provisional or Confirmed?
When the TPR was filed, was there an underlying A/N/D proceeding?
Yes
No
Does the respondent have an attorney in the underlying matter?
Provisional counsel is appointed to the respondent.
Provisional counsel must be confirmed or released by the court.
Yes
No
The same attorney represents the respondent in the TPR and is not provisional.
If the TPR was initiated by motion, the respondent may request appointment of provisional counsel.
If the TPR was initiated by petition, the respondent is appointed provisional counsel.
The attorney must file a motion to withdraw and notice the client.
Provisional counsel must be confirmed or released by the court.
Provisional counsel must be confirmed or released by the court.



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Our Journey

- Oh s&%$ a TPR has been filed – now what?
- Review pleadings
- Do I have a complete file?
- Client meeting
- Timelines, outlines, timelines
- Grounds outline
- Best Interests outline
- Research applicable case law
- Did someone say a Trial notebook?
- Pre-adjudication hearing
- Final thoughts

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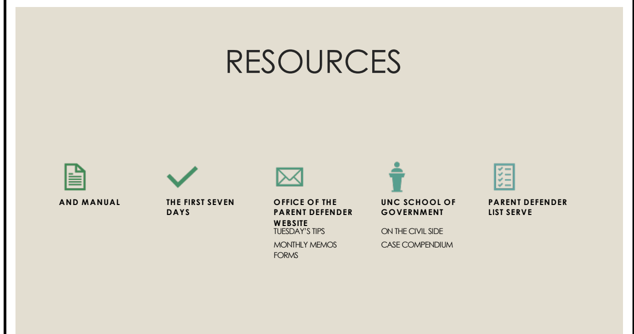

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Review SOG "The First Seven Days"

(by Timothy Heinle)

- Short book that provides a clear path for what to do in the first seven days after you are assigned a case
- Helpful for NSC/initial A/N/D filings but also ANY new A/N/D filings
- Review the filings
- Create a file
- Initial client contact
- Evidence gathering and fact finding
- Potential alternative placements and caregivers
- Motions and other requests
- Appendix with templates and checklists

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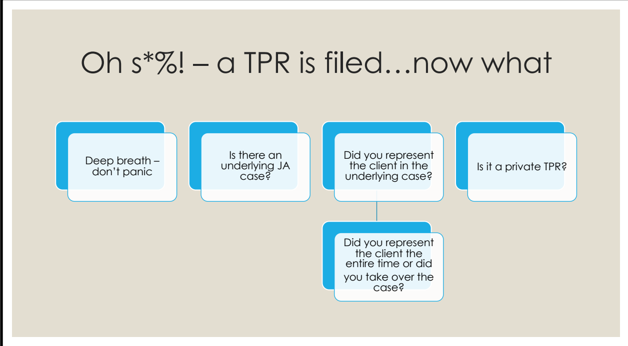

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Review Pleadings - Overview

- Take notes as you are reviewing pleadings – sticky notes?
- Statutory requirements – check out TPR hearing Checklist 8 from AND Manual
  - SUBJECT MATTER JURISDICTION
    - Person has standing to file?
    - Does petition/motion request relief?
    - Is matter filed in judicial district where juvenile resides in, is found in or is in county where DSS or licensed child-placing agency with legal custody is located at the time the petition is filed
    - Does NC have jurisdiction under UCCJEA pursuant to NCGS 50A
      - Initial custody proceeding?
      - NC entered prior child custody order → NC has exclusive continuing jurisdiction
      - Another state has entered a custody order but NC can modify
        - Child, child's parents & any other person acting as a parent do not presently reside in the other state
        - Other state's court has relinquished jurisdiction to NC – memorialized in court order
  - OUT OF STATE RESPONDENT PARENT
    - Minimum contacts w/ NC not required

6

Review Pleadings continued…

- Does the petitioner have custody? Are they a biological parent?
- Can't just cut and paste statute → needs to provide facts
  - entitled to notice of the reasons the TPR is being pursued
  - Need to be able to defend against allegations
- How long has the child been in NC?
  - Is there an order ceding jurisdiction to NC?
- Private TPRs are notorious for not meeting statutory criteria
- Sticky notes for potential issues with pleadings → also start your "to-do" list
- If it references family court filings, criminal proceedings, etc. – add to your list of things to explore further

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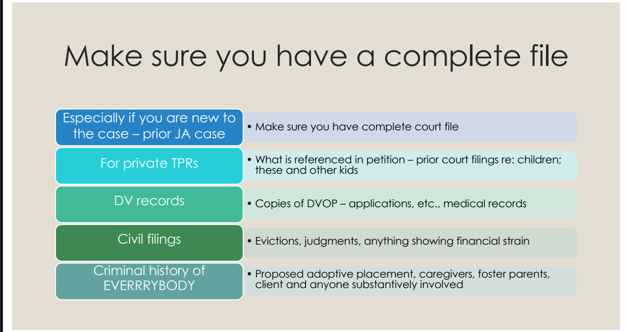

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Things to consider with your client

- Are we going to present evidence
- Do we have witnesses
- Give client a to-do list – work on all of the above
- Have real conversations about what this will look like if we win or lose
- Explore and explain all options
- Relinquishments? Not contest TPR but no relinquishment?
- Are we going to file an answer?
- Are we going to request discovery, i.e. interrogatories, request for production of documents? → private TPRs
  - Very helpful for cross – see what Petitioner/witnesses divulge
  - Not completely forthcoming → hit 'em

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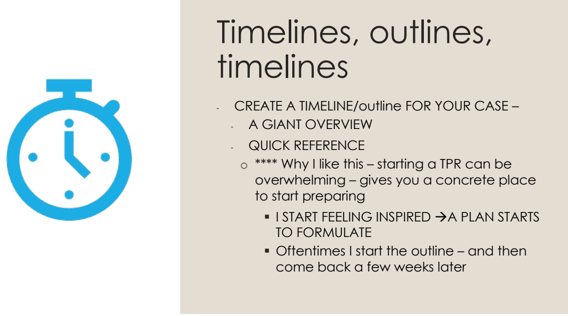

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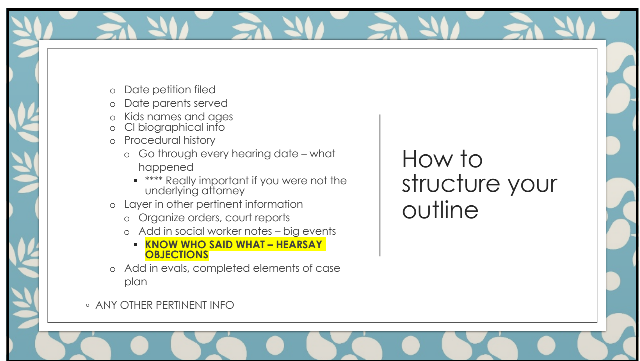

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Sample outline

- CLIENT NAME
- TPR FILED 10/20/2023
- RF NAME – RF
- JUVENILE, 6/16/20 – 4

- **TPR heard 11/27/23 & 12/13/23 – TPR granted and order filed 2/9/24**
- **RM filed notice of appeal 3/7/24**
- **During prep of file for appeal – clerk noticed no service on RM**
- **No record of service on RM**
- **Court lacked personal jurisdiction to TPR RM**
- **DSS filed Motion to set aside TPR order 4/23/24**
- **Motion granted 5/2/24 – order entered**

13

Sample outline continued

- GROUNDS:
  - NEGLECT
    - Adjudicated neg 2/23/22
    - SA
    - DSS provided services from 7/2021 to 1/2022
      - SA, DV, housing instability
      - RM continued to test positive – heroin and coke
      - Many referrals to treatment programs
      - Not made sufficient progress
  - WILLFULLY LEFT JUVENILE IN FOSTER CARE/PLACEMENT
    - Participated in many treatment programs without making sufficient progress
    - Continues to use illegal substances
    - Non-compliant with recommended services
    - Visitation never progressed to unsupervised
  - Been in pre-adoptive home since 8/25/23 – prior foster placement wouldn't commit to adoption
    - Paternal cousin DOE – who had been approved for respite was contacted at time of placement change but couldn't take JUVENILE

14

Sample outline continued

- ORIGINAL PETITION FILED 1/13/22

- 5/4/23 – PPH plan changed to adoption, concurrent plan remains reunification
  - MGPs hadn't visited since 1/2023 according to FM at the time
  - Half sister – NAME expressed interest in placement – denied home study due to prior involvement w the agency in BLANK County
    - Letter from BLANK County 3/29/23 – didn't complete home study because of DSS history w RELATIVE and her husband, due to serious DV in the presence of their children leading to DSS filing a petition & adjudicating the kids neglected on 1/7/2020.

- 1/3/23 – PPH – juvenile moved to foster care 10/27/22
  - Had been w MGM but she used SUBSTANCES in front of child and other juvenile (other sibling?) – MGM was arrested and charged
    - Open CPS case re MGM as of 10/26/22 – MGM found unconscious in the home & EMS called
    - MGM acknowledged use as recent lapse in sobriety
    - Inhaled computer duster in presence of LEO and SS and was arrested
    - OTHER JUV described observing MGM
    - * convicted of inhaling toxic vapors – misdemeanor child abuse charges dismissed
  - Primary plan still guardianship, 2ndary reunification

15

Sample outline continued

- 8/11/22 – PPH – plan change to guardianship w/ concurrent reunification
  - PROVIDER NAME & SW NAME testified
  - Placed w MGM NAME & husband
  - RM had been at a SEX TRAFFICKING SAFE HOUSE – non-compliant
  - Visiting at MGPs house 7/31/22 – VISITS DISRUPTIVE
    - GAVE KIDS part of a CBD gummy to "calm down" – RM admitted to SW
- 6/8/22 – PPH
  - Parents non-compliant, not participating
  - Not visiting consistently

16

Sample outline continued

- 2/23/22 – adj/dispo
  - Stipulation to neglect by both parents
    - Been working w fam since 7/2021 – SA, DV & housing
    - RM longstanding issue w SA – lost custody of older child due to SA issues MGPs have custody of OLDER SIBLING
    - 7/23/21 – RM overdosed on heroin & coke – treated at NHRMC
    - 9/7/21, 9/15/21 - tested positive for prescribed bup. & cocaine w The Carter Clinic
    - 11/21 – admitted to coke & Xanax use – TSP used
    - RM participated in MULTIPLE TREATMENT FACILITIES – LIST ALL
    - DX – opioid dependence, coke use, depression, anxiety, bipolar disorder → not participating in treatment
    - 1/12/22 – RM admitted to using 15 bags of heroin a day
    - DV altercations w parents – 1/6/22 – LEO responded to DV at hotel where RPs were staying
    - RF has lengthy criminal history – drug charges, 2021 conviction of poss of heroin
    - RF refused to cooperate with ongoing treatment case
    - RPs Lack housing

17

Sample outline continued

  - 1/27/22 – RM appeared impaired during visit and admitted to coke and heroin use
  - Paternal aunt – NAME approved to provide respite care
  - Recs for RM:
    - Psych eval & follow recs
    - CCA and follow recs
    - Empowerment services
    - Submit to random urine and hair screens
    - Obtain/maintain stable housing
    - Obtain/maintain stable employment
    - Execute releases for DSS/GAL
    - DSS shall provide vendor agreements if needed
    - Weekly visits sup by DSS or designee
- 1/26/22 NSC
  - MGPs unwilling to supervise visits for RPs

18

Create outline of grounds

- Cut and paste actual statute
- Fill in facts alleged in petition
- Can even start to include argument on why they haven't met their burden
- PRIVATE TPR – Remain laser focused on TPR REQUIREMENTS – NOT A FAMILY COURT CASE
- Think about evidence and illustrative exhibits
- Photographs, maps, items

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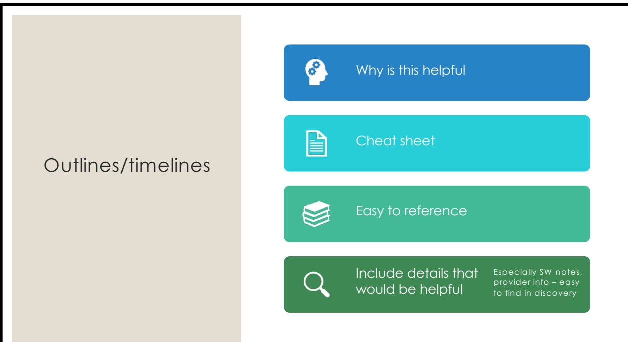

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Create outline for best interests

- Plug in statutory requirements – add your facts (specifics covered in later session)
  - Look at child's age
  - Likelihood of adoption
  - Whether termination will aid in achieving PP
  - Bond between child and parent
  - Quality of relationship between child and proposed adoptive parent
  - Any other relevant consideration
- Summarize the facts alleged in petition to support it – prepare counter-argument
- Think about things that might help with storytelling

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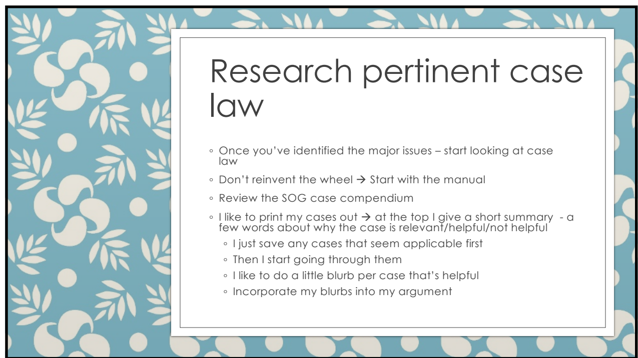

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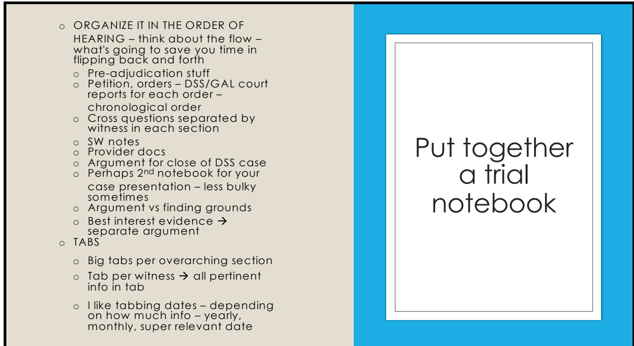

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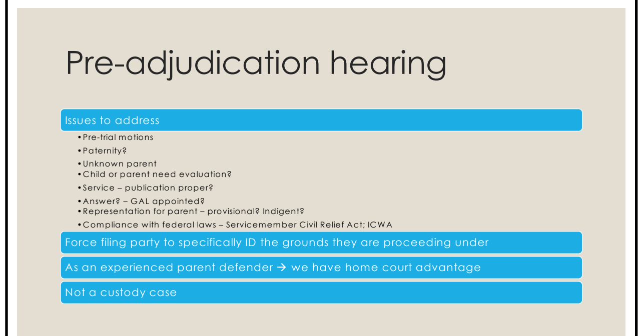

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Final thoughts

- Don't procrastinate
- Start with the easy (but time consuming) part first – outlines!
- Find your process
- Remember every case is different
- Even if you think your client has no shot → still need to prepare
- You could win!

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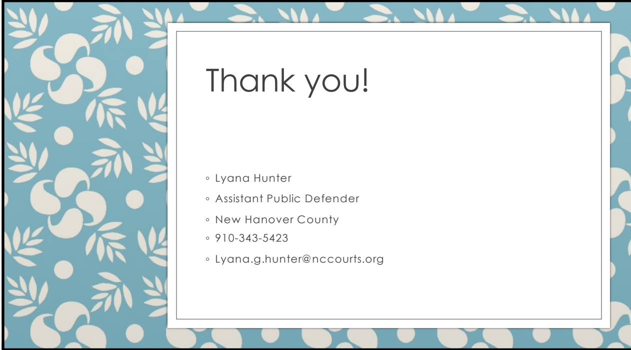

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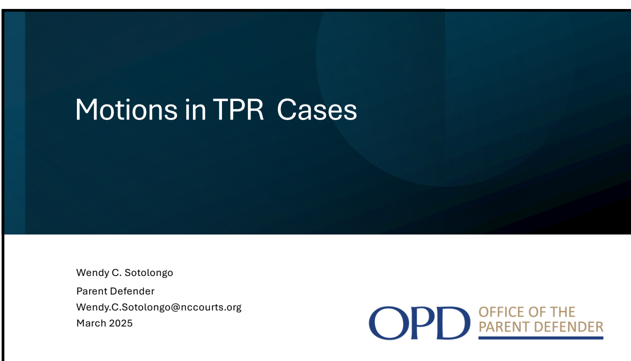

Wendy C. Sotolongo
Parent Defender
Wendy.C.Sotolongo@nccourts.org
March 2025

OPD OFFICE OF THE PARENT DEFENDER

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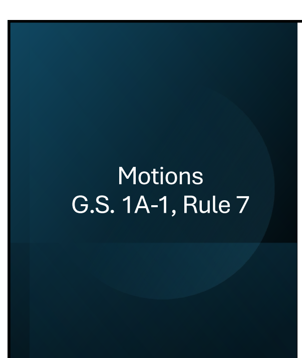

Rule 7. Pleadings allowed; motions.

(b) Motions and other papers. -

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. **The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.**

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

2

Motions-Procedure

- Format Requirements: G.S. 1A-1, Rule 10, Form of pleadings
- Signature Requirements: G.S. 1A-1, Rule 11, Signing and verification of pleadings
- Service Requirements: G.S. 1A-1, Rule 5, Service and Filing of pleadings and other papers
- Timing of Hearing: G.S. 1A-1, Rule 6(d), Time

3

§ 7B-1108.1. Pretrial hearing

(a) The court shall conduct a pretrial hearing. … At the pretrial hearing, the court shall consider the following:

1) Retention or release of provisional counsel.
2) Whether a guardian ad litem should be appointed for the juvenile …
3) Whether all summons, service of process, and notice requirements have been met.
4) Any pretrial motions.
5) Any issues raised by any responsive pleading, including any affirmative defenses.
6) Any other issue which can be properly addressed as a preliminary matter.

(b) Written notice of the pretrial hearing shall be in accordance with G.S. 7B-1106 and G.S. 7B-1106.1.

4

Motions-Pretrial

- Motion to Stay – Servicemember Civil Relief Act*
- Motion for Rule 4 Service (when TPR is filed as a motion)*
  - ✓ G.S. 7B-1102(b)
- Motion for Extension of Time to File an Answer*
- Motion for Foreign Language Interpreter/Translator (AOC-G-107)
- Motion to Dismiss
  - ✓ Rule 12(b)(6)*
  - ✓ Lack of personal jurisdiction
  - ✓ Lack of subject matter jurisdiction
  - ✓ Lack of standing - G.S. 7B-1103

*On OPD website: https://ncparentdefender.org/parent-representation-forms/

5

Motions-Pretrial

- Motion for Discovery*
- Motion for Costs of Deposition*
- Motion to Quash*
- Motion for Funds for Expert Assistance*

*On OPD website: https://ncparentdefender.org/parent-representation-forms/

6

Discovery-How to Get it

- STATUTE- G.S. 7B-700
- LOCAL RULES
- RULES OF CIVIL PROCEDURE

7

Discovery- G.S. 7B-700

G.S. 7B-700. Sharing of information; discovery.

(a) Sharing of Information. - A department of social services is authorized to share with any other party information relevant to the subject matter of an action pending under this Subchapter...

(b) Local Rules. - The chief district court judge may adopt local rules or enter an administrative order addressing the sharing of information among parties and the use of discovery.

8

Discovery-Local Rules

- Forms:
- Alexander
- Harnett
- Iredell
- Johnston
- Lee
- Mecklenburg (in rules)
- Wake

9

Discovery- G.S. 7B-700

1. Draft a Motion for Discovery detailing the specific information sought. Include in the motion efforts made to obtain the information via voluntary information sharing.
2. Prepare a Notice of Hearing with a hearing date that is within 10 business days of the date the motion will be filed.
3. File the Motion and Notice of Hearing with the juvenile clerk. Be sure the motion is added to the calendar.
4. Serve the Motion and Notice of Hearing on all parties pursuant to Rule 5 of the Rules of Civil Procedure.
5. Prepare and file your Certificate of Service with the juvenile clerk.

10

Discovery-Rules of Civil Procedure

G.S. 1A-1, Rule 26. General provisions governing discovery.

(a) Discovery methods. - Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

11

Discovery-Rules of Civil Procedure

- Interrogatories, G.S.1A-1, Rule 33.
- Requests for Production of Documents, G.S. § 1A-1, Rule 34.
- Depositions, G.S. 1A-1, Rule 32.
  - ✓ Depositions are usually taken after other discovery
  - ✓ Must follow IDS' policy on depositions
  - ✓ Depositions may be taken of either party and/or non-party witnesses
  - ✓ A deposition is "testimony" and can be used to later impeach the deponent during testimony
  - ✓ The deposition may also be used as substantive evidence

12

Motions-Pretrial

- Motion to Recuse*
- Motion for Rule 17 GAL for Client (Order-AOC-J-206)
- Motion for Paternity Testing
- Motion to Change Venue
- Motion to Determine Role of GAL for child in private TPR
  - ✓ For a discussion of 2022 Formal Ethics Opinion 1 about an attorney acting in both GAL roles, see Timothy Heinle, New Ethics Opinion on Dual Role GAL-Attorney Advocates in Juvenile Proceedings, UNC SOG: On the Civil Side Blog (Aug. 17, 2022).

*On OPD website: https://ncparentdefender.org/parent-representation-forms/

13

Motions-Pretrial

- Motion for Writ for incarcerated parent to be brought to hearing (AOC-G-112)
- Motion to Allow Remote Testimony*
- Motion in Limine*
- Motion for Bifurcated Hearing
- Motion to Sequester

*On OPD website: https://ncparentdefender.org/parent-representation-forms/

14

Motions-Trial

- Motion to Continue
  - ✓ Tuesday's Tip #21 Constitutionalizing Continuances
- Motion to Dismiss for Insufficient Evidence
  - ✓ G.S. 1A-1, Rule 41(b). "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."
  - ✓ "We note that by presenting evidence, defendant waived his right to appeal the denial of his motion to dismiss made at the close of plaintiff's evidence." *Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989). *Karger v. Wood*, 174 N.C. App. 703, 706, 622 S.E.2d 197, 200 (2005).

15

Motions-Post Hearing

- ➢Motion to Re-Open the Evidence*
- ➢G.S. 1A-1, Rule 58. Entry of judgment
- ➢G.S. 1A-1, Rule 59. New trials; amendment of judgments
- ➢G.S. 1A-1, Rule 60. Relief from judgment or order
- ➢Motion to Stay
- ➢Motion for Review (when appeal pending)

*On OPD website: https://ncparentdefender.org/parent-representation-forms/

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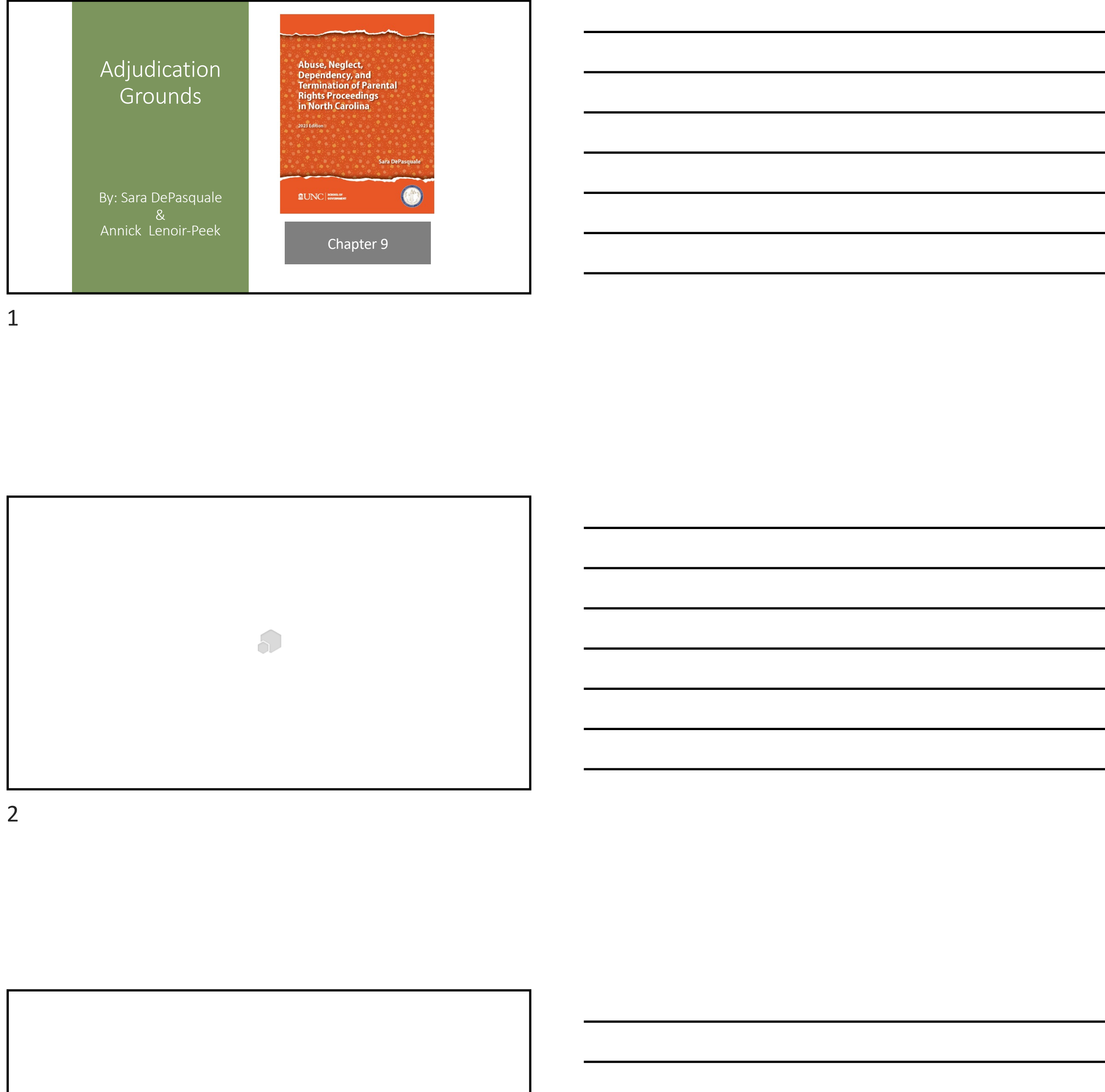

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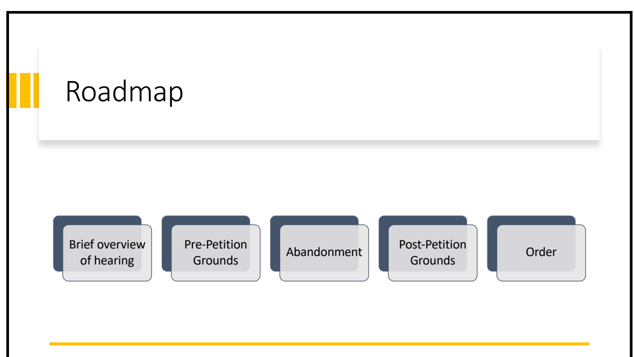

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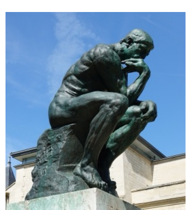
Authority / Discretion of the Judge



- Determine admissibility
- Determine credibility
- Draw inferences
- Assign weight
- Question witnesses

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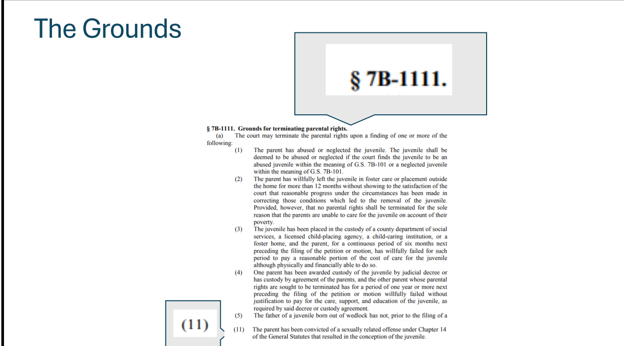

The Grounds

§ 7B-1111.

§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a

(11)

(11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.

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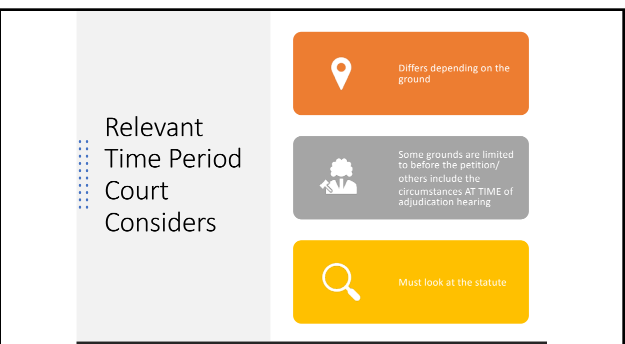

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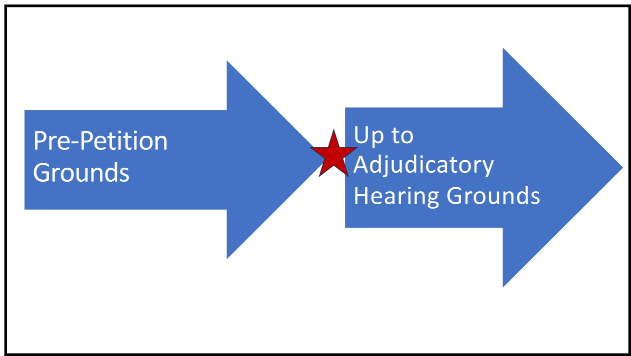

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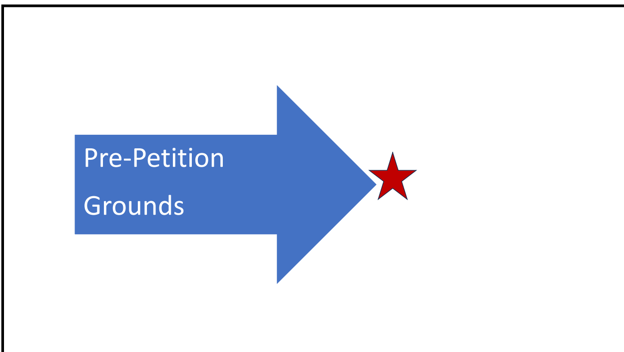

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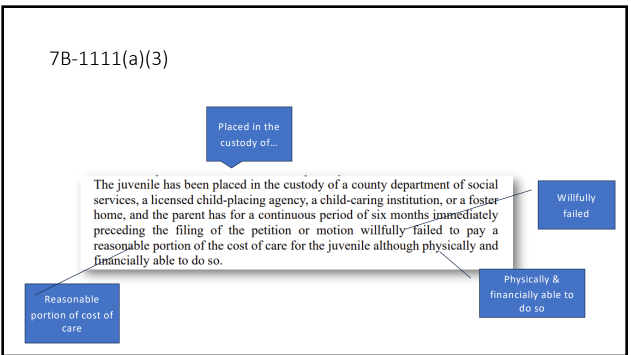

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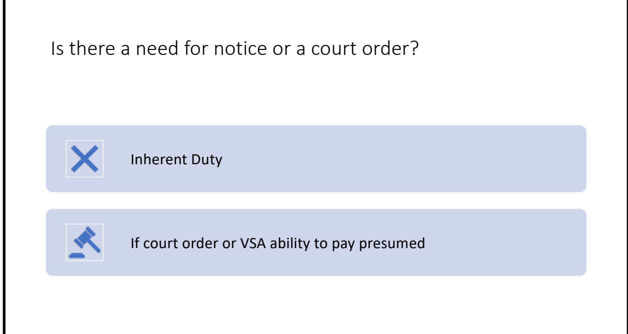

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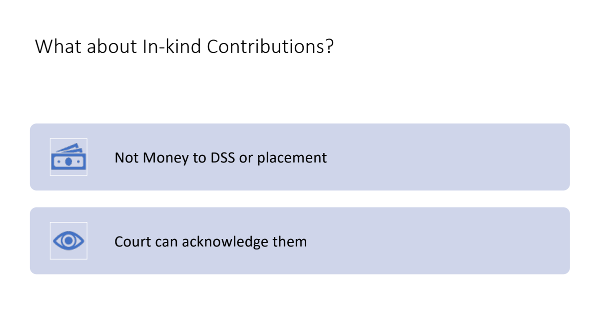

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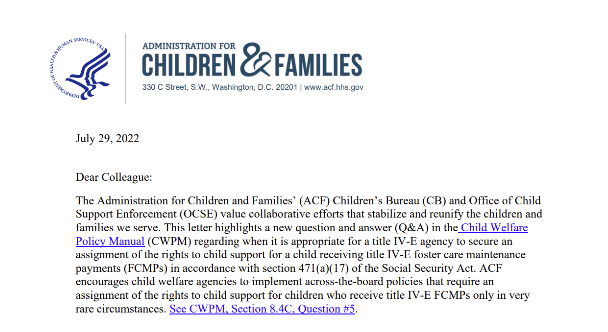

ADMINISTRATION FOR CHILDREN & FAMILIES
330 C Street, S.W., Washington, D.C. 20201 | www.acf.hhs.gov

July 29, 2022

Dear Colleague:

The Administration for Children and Families' (ACF) Children's Bureau (CB) and Office of Child Support Enforcement (OCSE) value collaborative efforts that stabilize and reunify the children and families we serve. This letter highlights a new question and answer (Q&A) in the Child Welfare Policy Manual (CWPM) regarding when it is appropriate for a title IV-E agency to secure an assignment of the rights to child support for a child receiving title IV-E foster care maintenance payments (FCMPs) in accordance with section 471(a)(17) of the Social Security Act. ACF encourages child welfare agencies to implement across-the-board policies that require an assignment of the rights to child support for children who receive title IV-E FCMPs only in very rare circumstances. See CWPM, Section 8.4C, Question #5.

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The problem with this ground?

19

How do we attack this ground if child support is court ordered?

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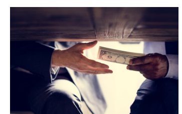
How do we attack this ground if child support has not been court ordered?



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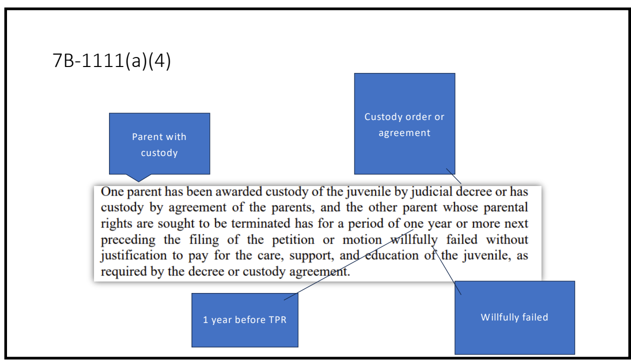

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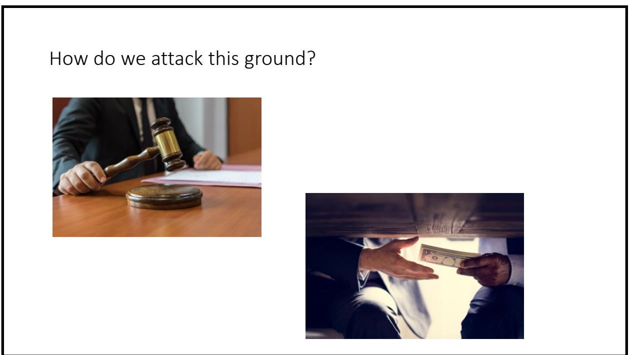

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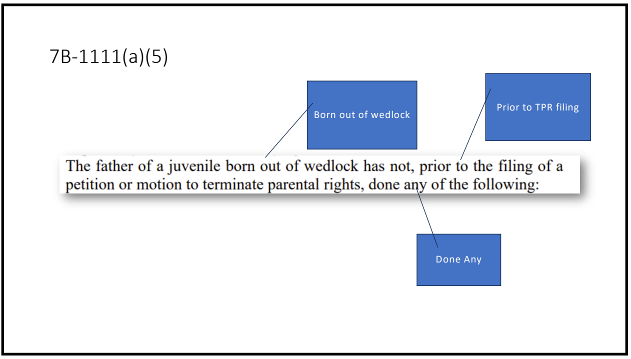

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a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

DHHS Certified Reply

NC Department of Health and Human Services
Division of Social Services

AFFIDAVIT OF PATERNITY

CHILD'S INFORMATION	
Name of Child – *First, Middle, Last (As it appears on Birth Certificate)*	
Place of Birth *(City, State)*	Date of Birth *(MM, DD, YYYY)*

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
N. C. VITAL RECORDS

AFFIDAVIT OF PARENTAGE FOR CHILD BORN OUT OF WEDLOCK
(Type or print all information)

We hereby affirm that ____ *(Full Name of Child)* ____ *(Social Security Number, if Available)*
who was born ____ *(Date of Birth)*, in ____ *(City, County of Birth)* at ____ *(Name of Hospital or Institution--If neither, street address)*
is the natural child of ____ *(Full Name of Father)* ____ *(Social Security Number)*
____ *(Father's Address)*
and ____ *(Mother's Full Name Prior to First Marriage)* ____ *(Social Security Number)*
____ *(Mother's Address)* ____ *(County of Residence)*
Affidavit signed at ____ *(Name of Hospital, Child Support Services, Clerk of Court, Other)*

27

28

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.

c. Legitimated the juvenile by marriage to the mother of the juvenile.

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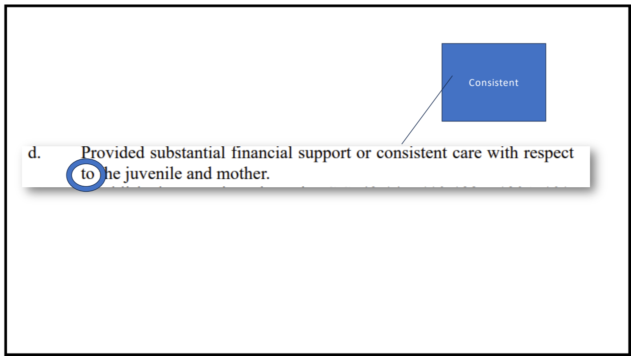

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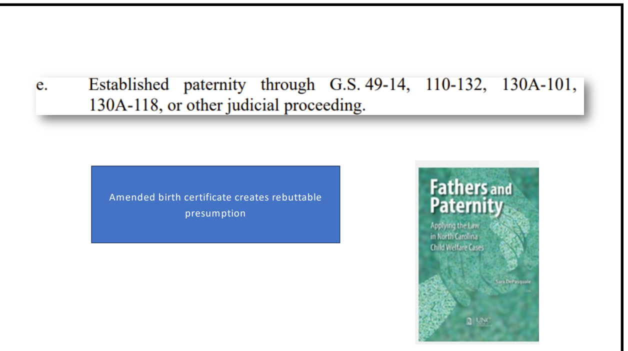

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Question

"Putative father" ground cannot be adjudicated if father's inaction was caused by the child's mother hiding the child's existence from the father.

- ❑ True
- ❑ False

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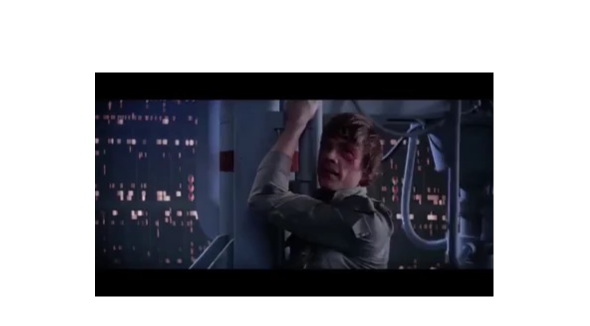

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7B-1111(a)(8)

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or has committed murder or voluntary manslaughter of the other parent of the child.

36

Burden in TPR is clear and convincing evidence

The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of plea.

37

How do we attack this ground?

38

7B-1111(a)(10)

After relinquishment TPR needed for adoption in another jurisdiction

(10) Where the juvenile has been relinquished to a county department of social services or a licensed child-placing agency for the purpose of adoption or placed with a prospective adoptive parent for adoption; the consent or relinquishment to adoption by the parent has become irrevocable except upon a showing of fraud, duress, or other circumstance as set forth in G.S. 48-3-609 or G.S. 48-3-707; termination of parental rights is a condition precedent to adoption in the jurisdiction where the adoption proceeding is to be filed; and the parent does not contest the termination of parental rights.

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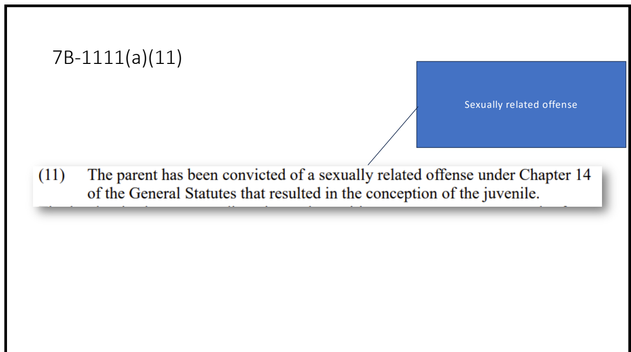

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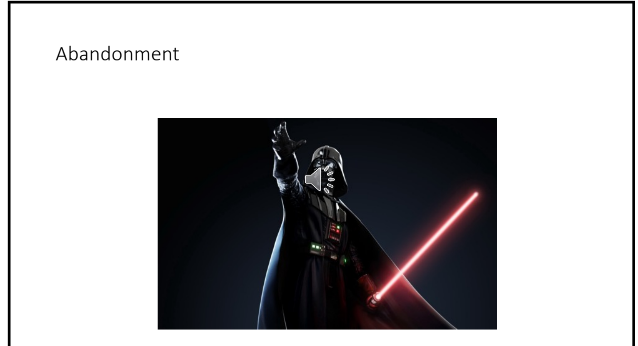

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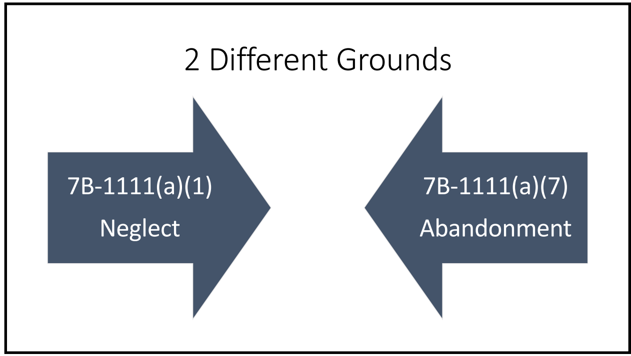

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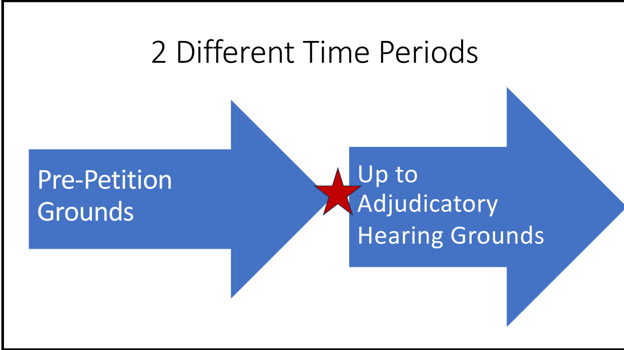

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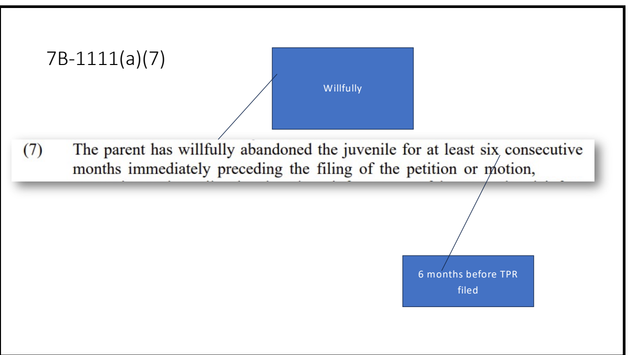

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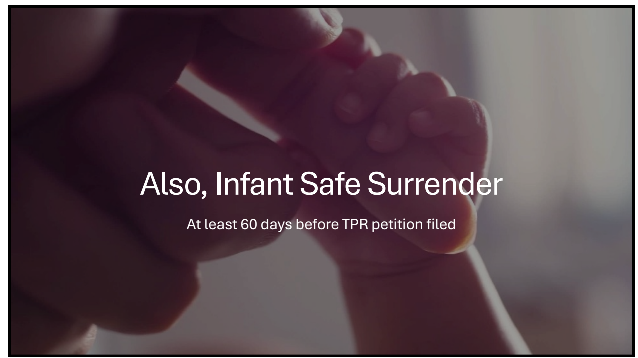

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7B-1111(a)(1)

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(15) Neglected juvenile. – Any juvenile less than 18 years of age (ii) whose parent, guardian, custodian, or caretaker does any of the following:

b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.

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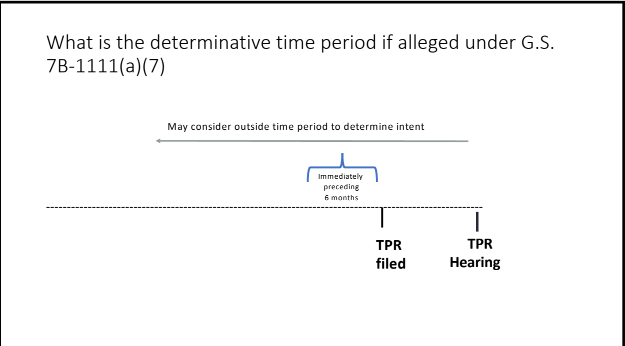
What is the determinative time period if alleged under G.S. 7B-1111(a)(7)



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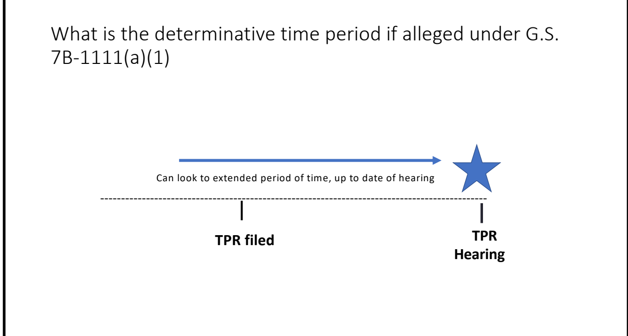

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"evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child."

Willfulness = Question of Fact

Requires Intention → Purpose & Deliberation

Can look to financial support & emotional contributions

50

Single act

- "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest."
  - Affirmed when
    - One $500 child support payment made
    - One phone call made
    - A visit

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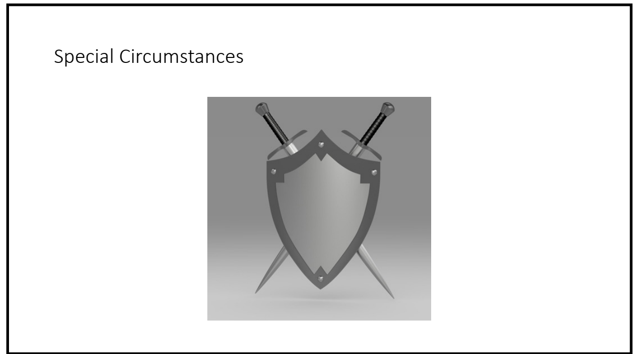

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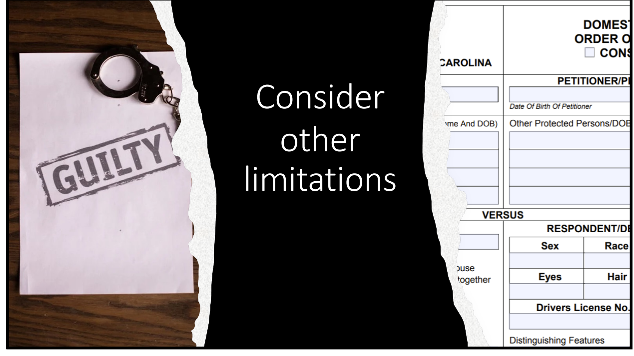

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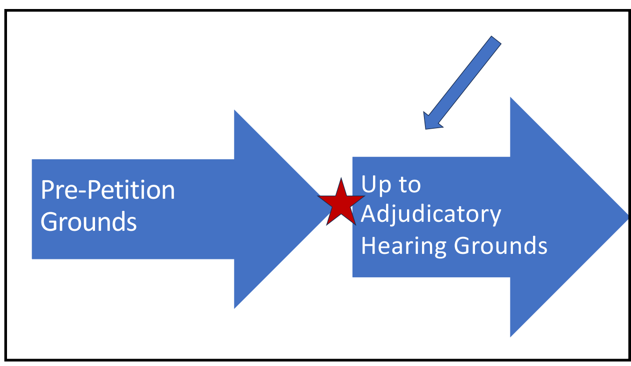

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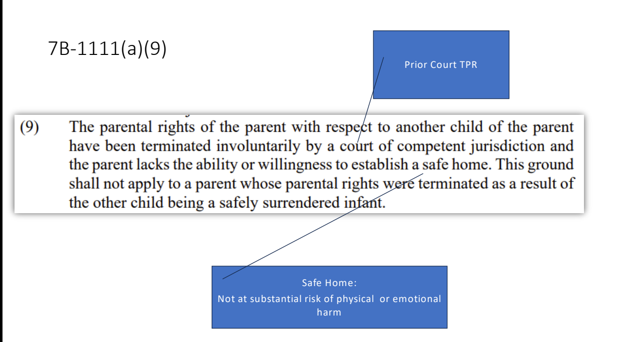

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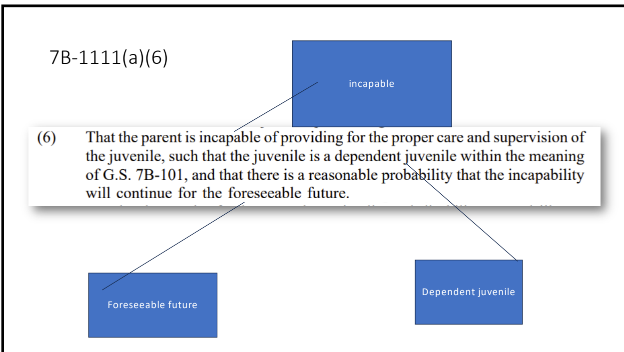

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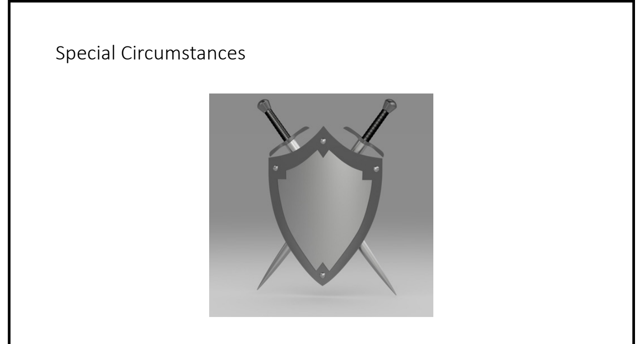
Any other cause or condition

Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

62

Special Circumstances



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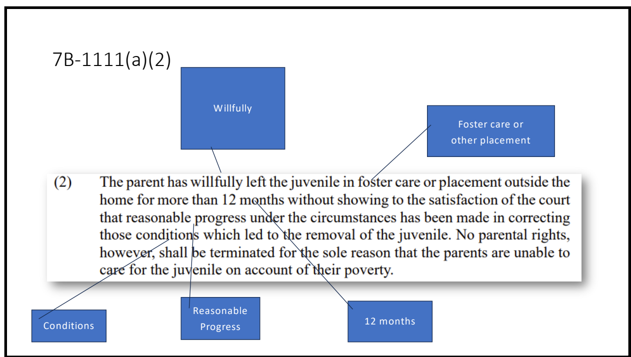

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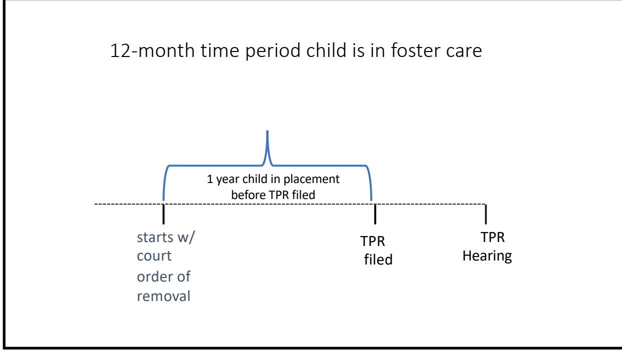

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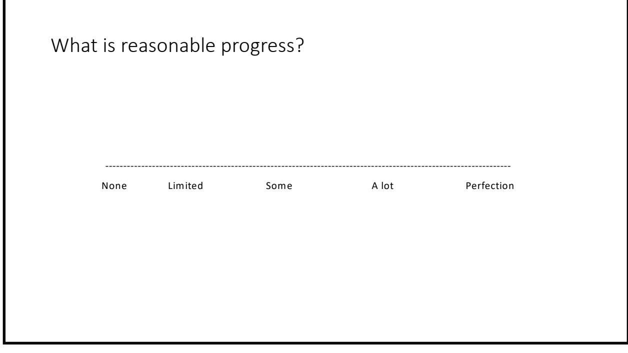

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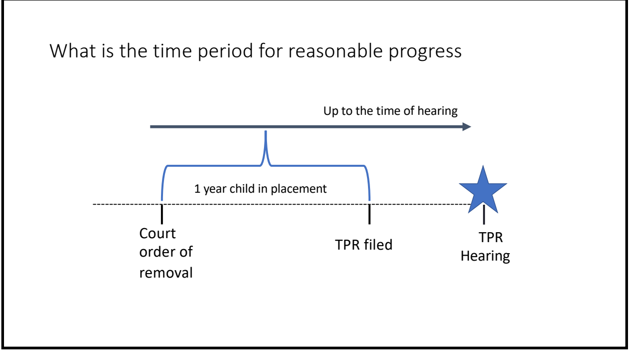

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Poverty may not be basis for termination

The trial court however, expressed concern that Ms. Nesbitt had paid the last two months rent with money from her income tax returns but failed to provide a plan for paying future rent. While we acknowledge this as a legitimate concern, we also recognize that making ends meet from month to month is not unusual for many families particularly those who live in poverty. However, we do not find this a legitimate basis upon which to terminate parental rights.

70

Poverty

- Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.

Santosky v. Kramer, referring to Smith v. Organization of Foster Families, 431 U.S. 816 (1977)

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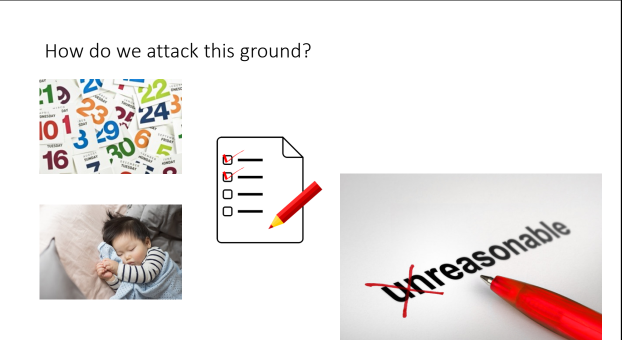
How do we attack this ground?



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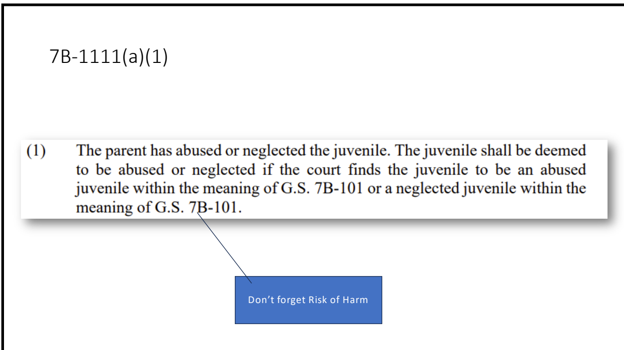

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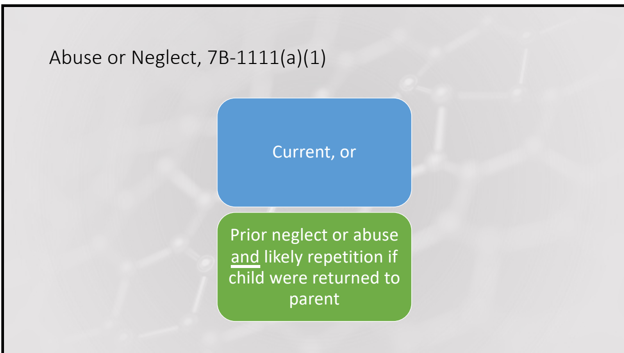

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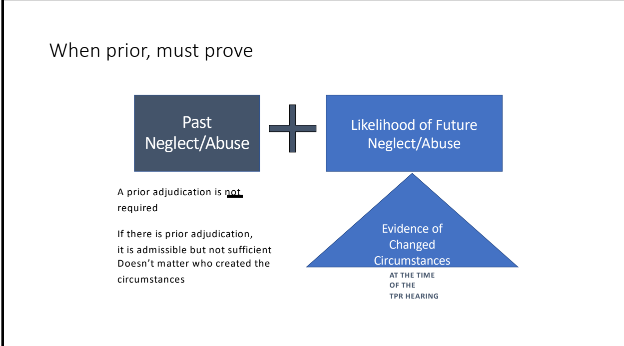

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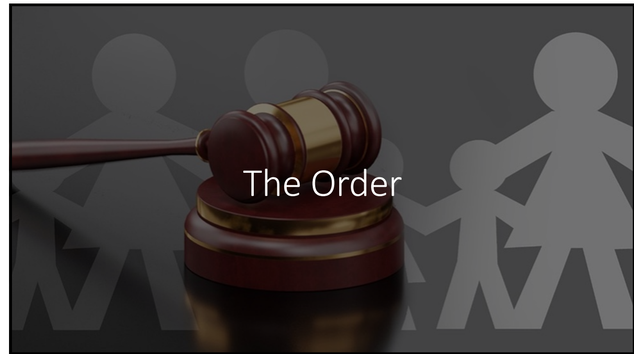

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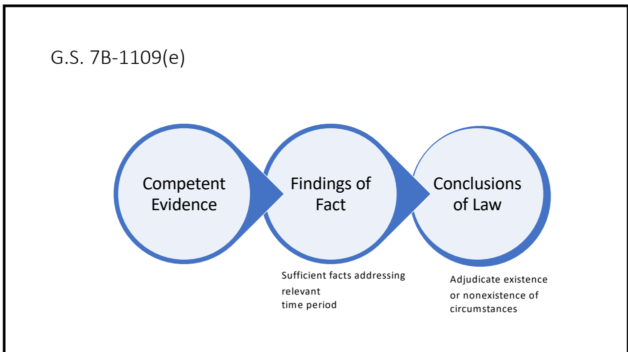

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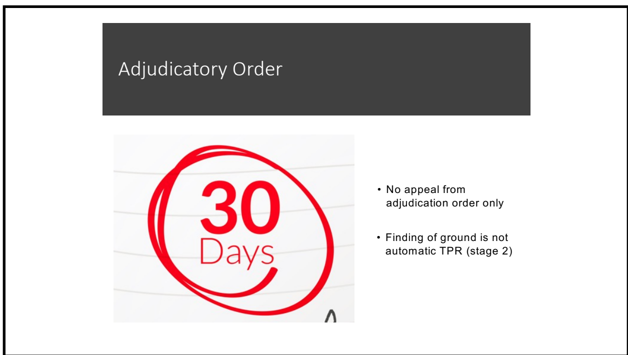

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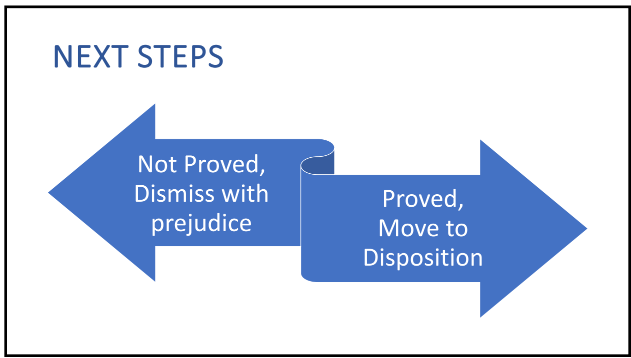

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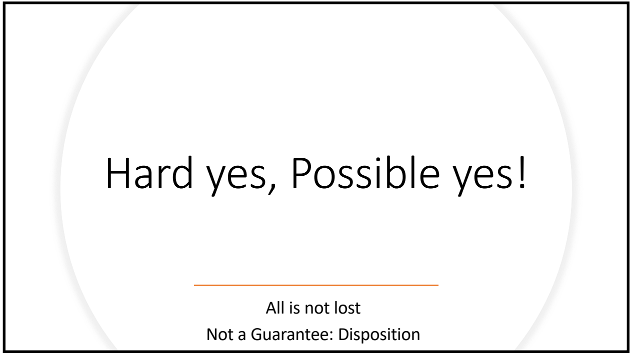

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§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:

a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.

c. Legitimated the juvenile by marriage to the mother of the juvenile.

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or

unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant as a safely surrendered infant pursuant to Article 5A of this Subchapter for at least 60 consecutive days immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

(9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home. This ground shall not apply to a parent whose parental rights were terminated as a result of the other child being a safely surrendered infant.

(10) Where the juvenile has been relinquished to a county department of social services or a licensed child-placing agency for the purpose of adoption or placed with a prospective adoptive parent for adoption; the consent or relinquishment to adoption by the parent has become irrevocable except upon a showing of fraud, duress, or other circumstance as set forth in G.S. 48-3-609 or G.S. 48-3-707; termination of parental rights is a condition precedent to adoption in the jurisdiction where the adoption proceeding is to be filed; and the parent does not contest the termination of parental rights.

(11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.

(b) The burden in these proceedings is on the petitioner or movant to prove the facts justifying the termination by clear and convincing evidence.

§ 7B-101. Definitions.

As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. - Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree forcible rape, as provided in G.S. 14-27.21; second-degree forcible rape as provided in G.S. 14-27.22; statutory rape of a child by an adult as provided in G.S. 14-27.23; first-degree statutory rape as provided in G.S. 14-27.24; first-degree forcible sex offense as provided in G.S. 14-27.26; second-degree forcible sex offense as provided in G.S. 14-27.27; statutory sexual offense with a child by an adult as provided in G.S. 14-27.28; first-degree statutory sexual offense as provided in G.S. 14-27.29; sexual activity by a substitute parent or custodian as provided in G.S. 14-27.31; sexual activity with a student as provided in G.S. 14-27.32; unlawful sale, surrender, or purchase of a minor, as provided in G.S. 14-43.14; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-205.3(b); and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others;

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or

g. Commits or allows to be committed an offense under G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) against the child.

(9) Dependent juvenile. - A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

(15) Neglected juvenile. - Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does any of the following:

a. Does not provide proper care, supervision, or discipline.

b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.

c. Has not provided or arranged for the provision of necessary medical or remedial care.

d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.

e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S.14-321.2.

g. Has placed the juvenile for care or adoption in violation of law.

In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

(19) Safe home. - A home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.

§ 7B-1109. Adjudicatory hearing on termination.

(a) The hearing on the termination of parental rights shall be conducted by the court sitting without a jury and shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, counsel shall be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant the parents such an extension of time

as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion.

(c) The court may, upon finding that reasonable cause exists, order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the juvenile's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the juvenile is at issue, the court may order a similar examination of any parent of the juvenile.

(d) The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. The rules of evidence in civil cases shall apply. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights.

§ 7B-1110. Determination of best interests of the juvenile.

(a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest....
Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(b) Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion, but only after setting forth the facts and conclusions upon which the dismissal or denial is based. (c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

Evidence in TPR Proceedings

Timothy Heinle
UNC School of Gov't
Heinle@sog.unc.edu

Values, Not Just Rules

- Avoid unreliable evidence
  - E.g., personal knowledge, hearsay, opinion, competency
- Minimize prejudicial distractions
  - E.g., relevance
- Promote social policies
  - E.g., privilege
- Ensure fairness
  - E.g., predictability and notice

For the Truth

Out-of-court statement
+ Offered to prove the truth of what was said

The value of the evidence depends on the credibility of the out-of-court declarant.

To test the declarant's credibility,

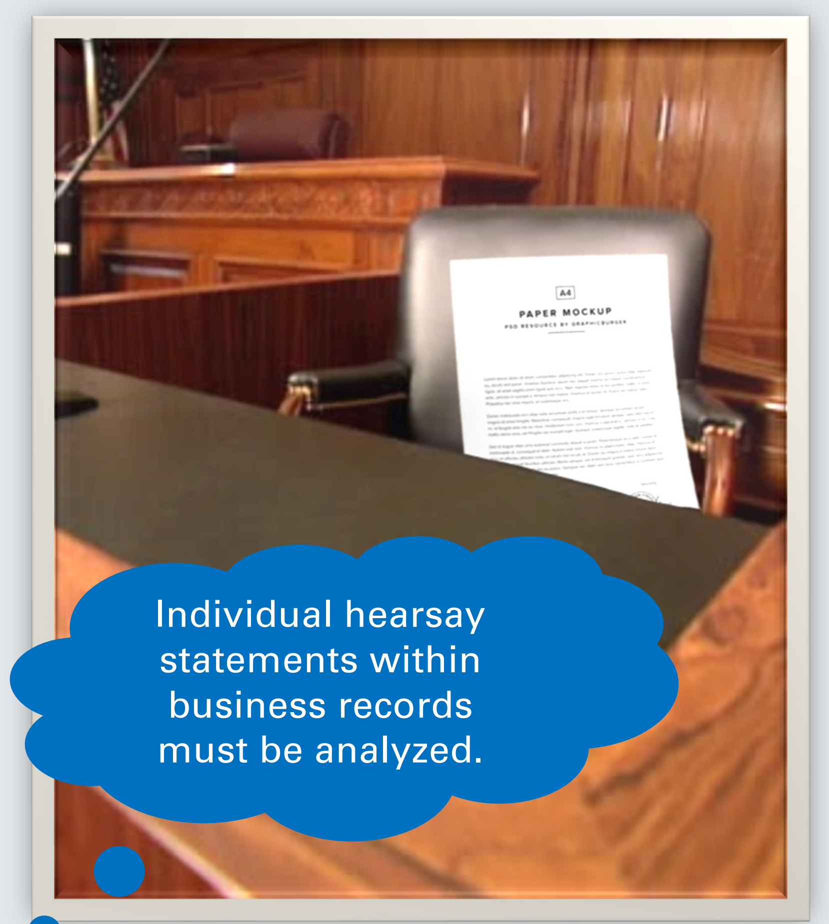
i. the declarant must be subject to cross-examination, or
ii. the statement must satisfy a hearsay exception.

Not for the Truth

Out-of-court statement
+ Offered for reasons other than the truth

The value of the evidence usually depends on the credibility of the in-court witness.

An in-court witness' credibility is tested by being subject to cross-examination.



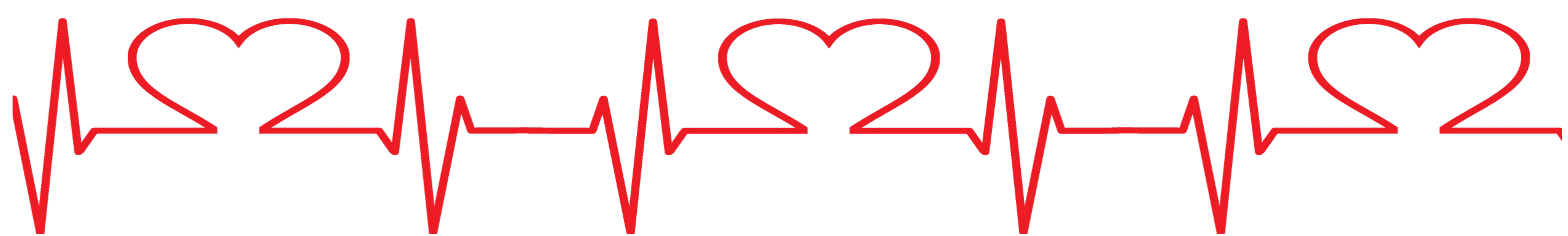
Reconceptualizing
Business and Public Records

Record must be competent to testify.

- Is it a (i) business (ii) record?
- Prepared in ordinary course of business?
- At/near the time of the event?
- Info from someone with knowledge?
- With a duty to report accurately?
- Sworn to by
  - Testimony, or
  - Affidavit with notice to parties?

Medical Diagnosis or Treatment Exception

- Did the declarant understand the statement would lead to medical d/t?
- Was the statement reasonably pertinent to medical d/t?



Circumstances indicate whether a young declarant had a medical treatment motive.

Purpose of Examination

- Explained to child
- In age-appropriate manner

The Truth

- Importance of being truthful
- Demonstrated ability to differentiate between truth and lies

The Interview

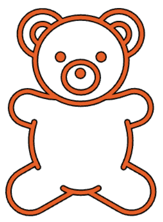
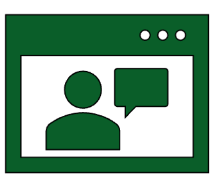
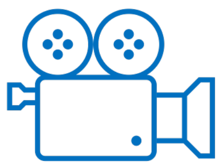
- Medical or non-medical interviewer
- Leading nature of questions

The Interview Setting

- Medical?
- Child friendly?
- Private?

Time Between Incident and Exam

Video-recorded Exams

To be admissible, must:

✓ Satisfy medical d/t exceptions, and

✓ Be authenticated by
- a witness who was present, or, if unavailable,
- proof of recording circumstances.

Admission of “Party-Opponent”

- Statement must be:
  - Declared or endorsed,
  - By a party-opponent, and
  - Offered against that party

Ma’am, while you were in your backyard, what did you hear the Respondent Father say to Jonny?

DSS

Rule 801(d)

Admission of "Party-Opponent"

- Statement must be:
  - Declared or endorsed,
  - By a party-opponent, and
  - Offered against that party

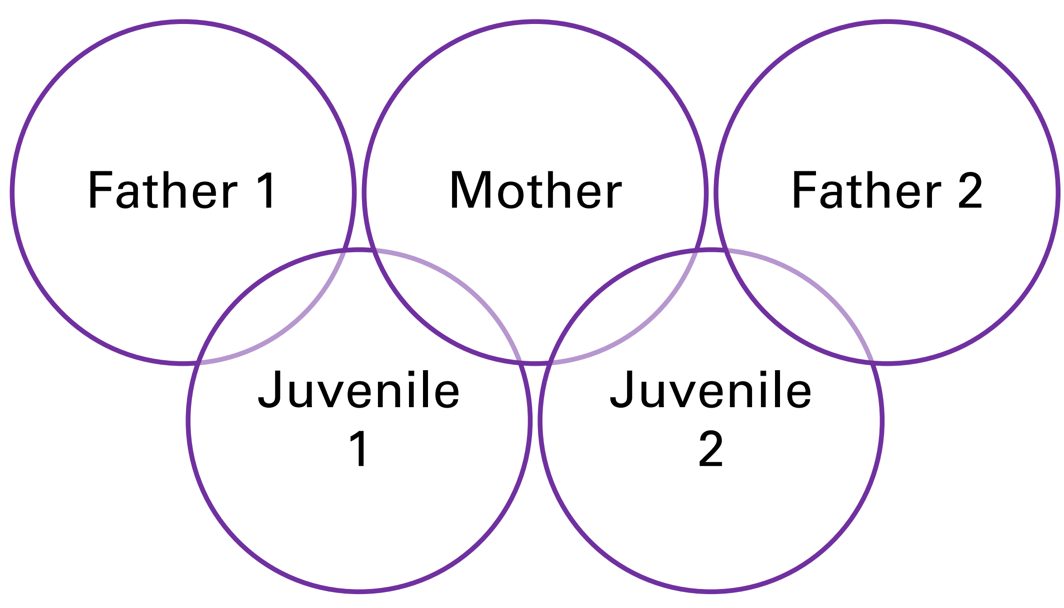
What if someone *else* says something about a party opponent out of court?

What if the out-of-court statement was made by the juvenile?

Rule 801(d)

DSS files TPR petitions as to all parents...

“I saw Father 1 at the grocery store recently. He said, ‘Their mom is using cocaine again.’”



Hearsay Exceptions under Rule 804

Unavailable means the declarant is

I. privileged from testifying,
II. refusing to testify despite a court order to do so,
III. claiming, under oath, to having a lack of memory about the statement,
IV. unable to testify because of a physical or mental illness, or death, or is
V. absent and reasonable means to procure the declarant have been unsuccessful.

Hearsay Exception: Former Testimony

An exception to the hearsay exclusion applies to testimony:

(i) by a witness who testified in the same or a different proceeding;

(ii) that is now offered against the same party or a different party who had similar opportunity and motive to question; and

(iii) given by a witness who is now unavailable under the Rule.

RF accused of hitting child → PGM testifies in criminal trial → PGM dies → RF wants to admit former testimony at TPR hearing

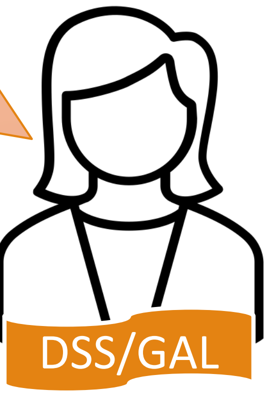
G.S. 8C, Rule 804(b)(1)

Residual hearsay
A/N/D Manual, 11.6.C.7., page 11-46+

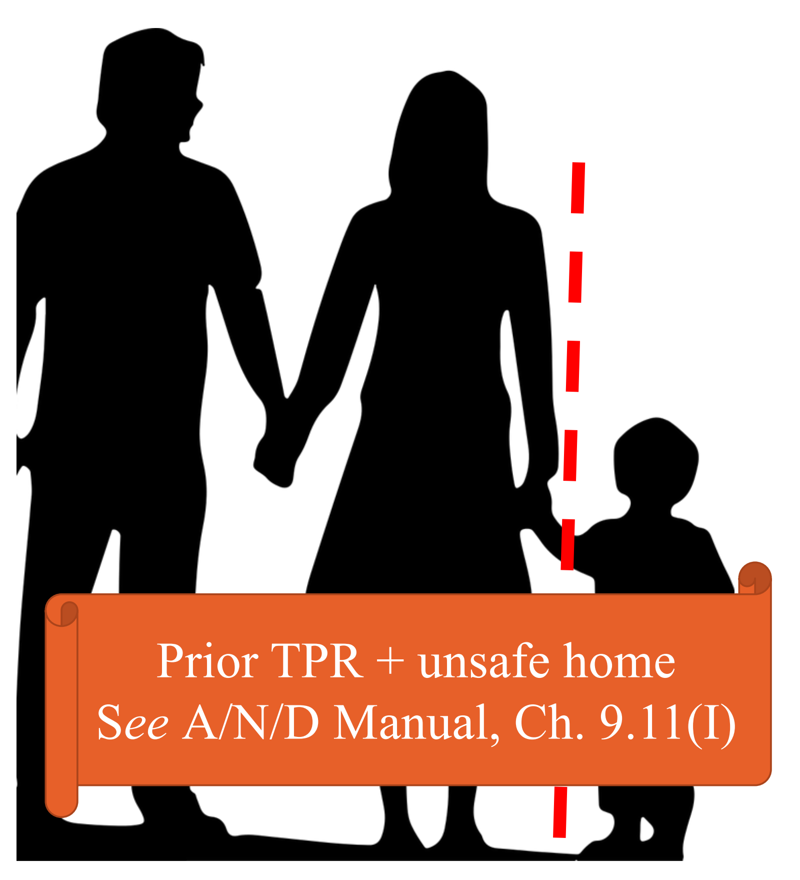
! Accommodations

“Your Honor, we plan to call the juvenile to testify.”

“Objection! Testifying would be harmful to the juvenile.”



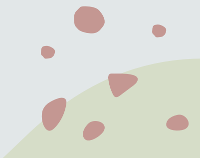
Got any priors?



Judicial Notice, Traditionally

A fact "not subject to reasonable dispute." N.C. Evid. R. 201(b).

Ex: 105-mile distance between parents' residence in Rowan County and foster placement in Ashe County. *In re A.D.*, 285 N.C. App. 88 (2022).



Framework for Judicial Notice at TPR

Conclusive

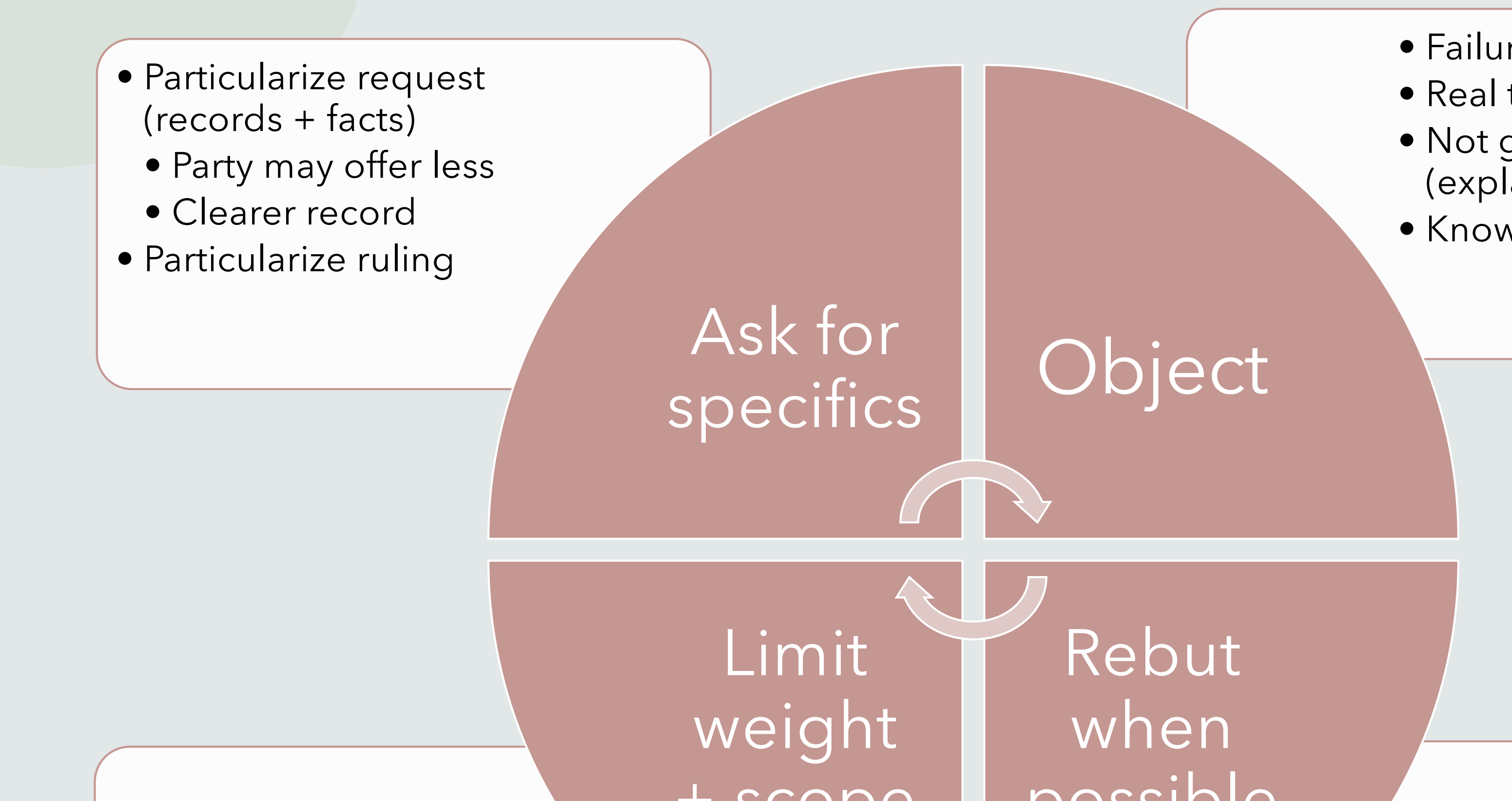
- Adjudicatory FOF/COL
  Collateral estoppel
  Judicial admissions
  Matters of record (e.g., filing dates; decretals)
- Facts are conclusively accepted and not subject to reasonable dispute.
  N.C. R. Evid. 201(b); -(g)

Rebuttable

- Non-adjudicatory findings of fact and conclusions of law.
- Parties may (i) offer contrary evidence, (ii) argue evidence was not competent, or (iii) ask court to limit weight.

Evidentiary

- Evidence from all prior proceedings.
- General objection likely insufficient, but party may object if evidence is now inadmissible under the Rules.


Particularize request (records + facts)
Party may offer less
Clearer record
Particularize ruling
Ask for specifics
Object
Failure = waiver (A.B.)
Real time + closing
Not generalized (explain basis)
Know the file!
Limit weight + scope
Rebut when possible
Trial court determines weight (B.A.J.)
Current > old
Limit affect of notice to problem, not current condition or progress
Argue admissibility
Cross witnesses
Contrary evidence

Evidentiary Standard At Disposition

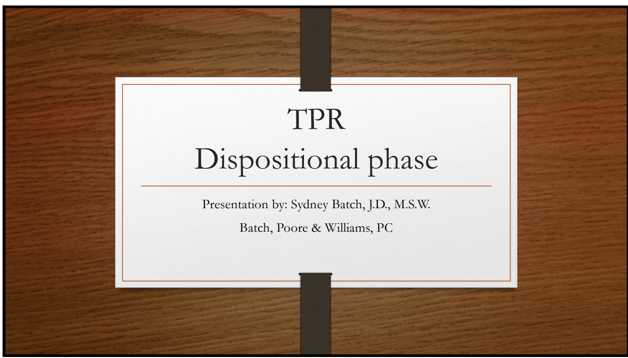
G.S. 7B-1110(a)

Rules of Evidence do not apply; however, evidence must always be

- relevant,
- reliable, and
- necessary.

Trial courts have "broad discretion regarding the receipt of evidence" outside of adjudication, but the "reservoir of discretion is not limitless."

In re R.D., 376 N.C. 244, 253 (2020);
See also G.S. 7B-901; -906.1(c); and -1110(a).



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Second Phase in TPR hearing

- Dispositional hearing is the second phase of a TPR hearing.
- Does not have to be held immediately after the adjudication hearing, but typically is.
- Our Supreme Court has stated that the dispositional hearing is not adversarial..... ***In re R.D.***, 376 N.C. 244 (2020)
  - There is the law and then there is reality.
- Court must hear testimonial evidence on whether termination is in the juvenile's best interest.

2

Second Phase in TPR hearing (cont.)

- The trial court can terminate a parent's parental rights if it finds it is in the best interests of the child.
- The court has two options at the conclusion of evidence:
  - Grant TPR
  - Deny TPR and dismiss the TPR petition
- Court's only authority is to determine BI – cannot issue other orders such as issuing a no contact order or a change in custody. *See In re P.L.E.*, ___ N.C. App. ___, 891 S.E.2d 613 (2023)

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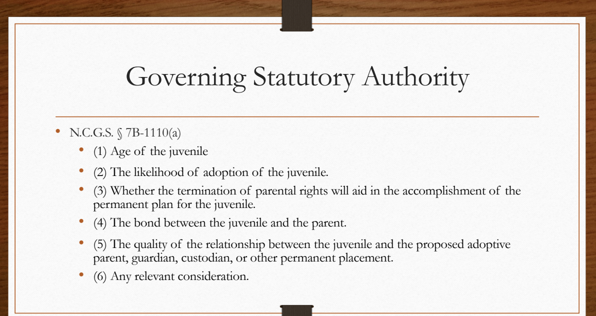

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Likelihood of Adoption

- Is the child in a current adoptive placement?
  - # of previous placements
  - Length of current placement
- No adoptive placement:
  - Prospective families identified?
  - Has the child met any families?
- Dynamics of adoptive family
  - Birth children, other foster children
  - Relationship between child and other people in the home
  - Single parent vs. two-parents
  - Sibling sets and sibling bonds
  - Any possible cultural/religious challenges.

6

Likelihood of Adoption (cont.)

- Does the child have:
  - Cognitive or physical disabilities?
  - Mental health issues?
  - Issues with bonding?
- Child's race, gender and sexual orientation
- Are both parents' rights being terminated?
- Use social science research and adoption data to argue that it is unlikely for the child to be adopted.

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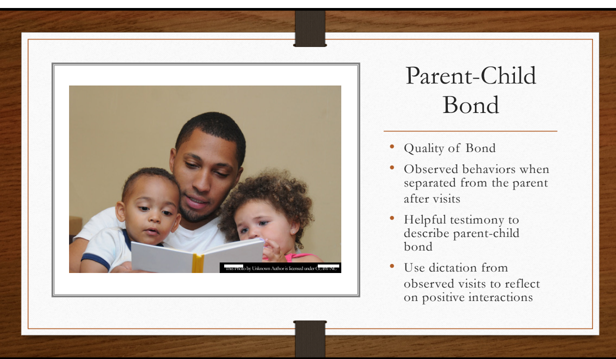

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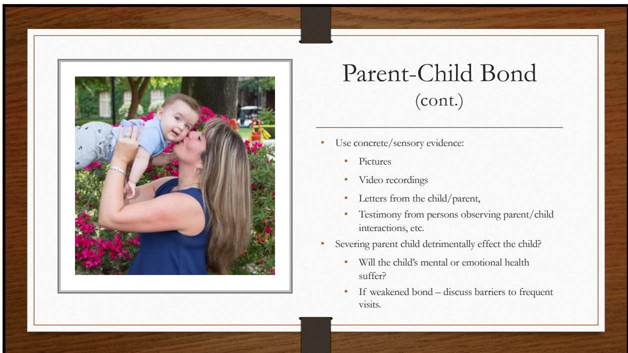

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Quality of Relationship b/t child and proposed adoptive placement

- Length of placement
- Relationship to other persons in the home, including other children?
- Child-prospective parent bond?
- Single vs. married couple
- Individual child's characteristics (gender identity, religion, sexual orientation)

10

Any Relevant Factors

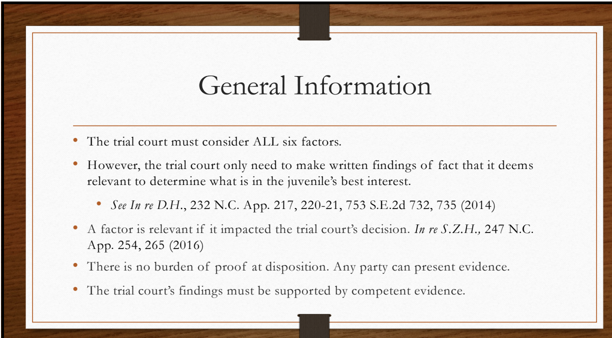
- Different plans for different siblings
  - Are children placed in different homes?
  - Is one child being adopted and others are not?
  - Will the proposed placements preserve the sibling bonds?
  - Are some children being adopted and others remain with a parent?
- Will the child will consent to an adoption?
- Are there relatives or other fictive kin who can assume custody or guardianship?

11

Any Relevant Factors (cont.)

- Willingness of prospective parent to maintain contact with the biological parent
- Willingness of prospective parent to maintain contact with birth family/relatives
- Whether child's cultural heritage will be preserved/respected
  - Ask for examples of ways this will be encouraged
- Ongoing sibling contact
- Will special needs of the minor child be met?

12



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Standard of Review

- Lower standard than what is required at the adjudicatory phase of clear, cogent and convincing
- Standard: Abuse of Discretion
- What does abuse of discretion mean?
  - "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)
- The trial court's findings of fact must by supported by competent evidence. *In re C.B.*, 375 N.C. 556, 560, 850 S.E.2d 324, 328 (2020)

14

Evidentiary Standard

- Evidentiary rules are relaxed, same standard as PPHs, review hearings and disposition hearings.
- Evidence must be necessary, reliable and relevant.
- The trial court determines the weight and credibility given to evidence.
- If helpful, make a motion that adjudicatory evidence be incorporated by reference in the dispositional phase of the hearing.
- Remember to still object, as the rules of evidence still apply. (E.g.: compound questions, badgering a witness, foundation and qualifying experts, due process and constitutional issues)

15

To Bifurcate or Not to Bifurcate?

- The trial court does not have to bifurcate the adjudication and dispositional hearing. *See In re S.M.M.*, 374 N.C. 911 (2020)
- If the trial court consolidates the hearing it must still make separate inquiries regarding adjudicatory and dispositional grounds.
- The trial court cannot rely on evidence that was introduced during the disposition hearing to support adjudicatory findings if the hearing was bifurcated. *In re Z.J.W.*, 376 N.C. 760 (2021)

16

To Bifurcate or Not to Bifurcate? (cont.)

- Short answer: ALWAYS ASK TO BIFURCATE
- Reasons:
  - There are two different evidentiary standards in TPR hearings.
  - Appellate counsel will thank you and speak highly of you.
  - It is better for judicial economy and decreases the likelihood of evidentiary objections
- Reality: It is in the judge's discretion whether to bifurcate or not, making it more important to be vigilant for purposes of evidentiary rulings.

17

Practice Tips (if hearing is not bifurcated)

- Object without being objectionable
- Remind the judge that you are not trying to be difficult or argumentative in objecting.
- Remember there is no such thing as standing objections in NC no matter what the judge or counsel say
- If your objection is denied, ask the judge to make a determination on what the judge is accepting the evidence for – grounds, BI or both.
- Remind the judge that when asking for a ruling that you are asking to preserve the Record on Appeal

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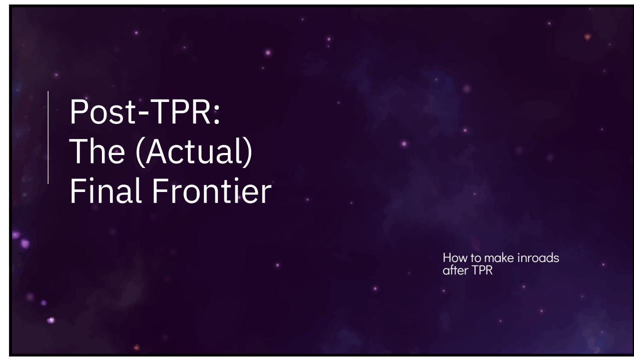

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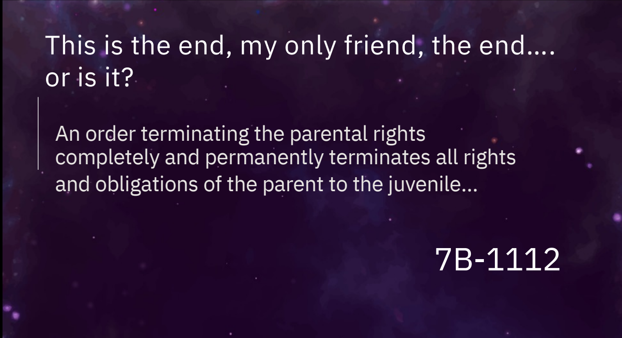

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Post-TPR Cliff's Notes

- After hearing and oral rendition, but prior to entry of order
  - Review draft orders, consider motion to reopen the evidence – Rule 58, *In re B.S.O.*, 225 N.C. App. 541 (2013)
  - Discuss right to appeal with client – IDS Rule 1.7
- Within **10 days** of entry of order
  - Motion for more findings – Rule 52(b) – combine with notice of appeal of TPR?
  - Motion to "reconsider"/amend judgment or for new trial – Rule 59(a), (e) – separate appeal – 1-277(a)
  - Can be combined with motion to stay – Rule 62(b)
- Within **30 days** of entry of order
  - Notice of appeal – 7B-1001
  - Can be combined with motion to stay – 7B-1003(a), Rule 62(d)- and motion for visits
- Within **6 months** of hearing and every six months thereafter until permanency achieved
  - Post-TPR hearing – 7B-908(b) – birth parent can potentially participate if there is a NOA and stay in effect
- Within **1 year** of order being "entered or taken"
  - Motion for relief b/c mistake, fraud, new evidence – Rule 60(b)(1), (2), (3) – separate appeal – 7A-27(b)(2)
  - Can be incorporated into appeal of TPR order with a *Bell* motion – *Bell v. Martin*, 43 N.C. App. 134 (1979)
- Within "reasonable time" of order being "entered or taken"
  - Motion for relief from order based on order being void or other reason – Rule 60(b)(4), (5), (6) – separate appeal
- After 3 years since entry of order
  - Motion for reinstatement of parental rights – 7B-1114(a) – birth parent can't make motion, not a party, and not entitled to appointed counsel – 7B-1114(a), (d)
  - Must be granted or dismissed within 1 year – 7B-1114(j)

4

First step: it ain't over til it's over

- Orders/judgments are not final until they are written, signed, and filed –
  - RCP 58
  - *Scoggin v. Scoggin*, 250 N.C. App. 115 (2016) (written order controls over oral rendition)
  - Draft orders – should be circulated, common practice
    - 97 Formal Ethics Opinion 5 (1998)
- Trial court has discretion to allow motion to reopen the evidence even after oral rendition
  - *In re B.S.O.*, 225 N.C. App. 541 (2013)
  - "A trial court must always hear any relevant and competent evidence concerning the best interests of the child."
    - *In re S.M.M.*, 374 N.C. 911, 915 (2020), *In re Shue*, 311 N.C. 586 (1984)
  - If denied, make offer of proof
    - *In re K.J.E.*, 288 N.C. App. 325 (2023)
- IDS Rule 1.7, 1.9, NCGS 7A-452
  - Scope of appointment in TPR cases extends through "judgment," notice of appeal, and assisting appellate counsel

5

Next step – Appeal

- If, after discussion of right to appeal, client wants to appeal, then appeal
  - IDS Rule 1.7
  - 30 days – 7B-1001 – File yet or wait?
- Signing notice of appeal is not endorsement of merits **or** general appearance as appellate counsel
  - RCP 3.1; 2008 Formal Ethics Opinion 17; NCRAP 33(a)
  - Not, RCP 11
- Assist and stay in contact with appellate counsel
  - NCRAP 3.1(h); IDS Parent Attorney Performance Guidelines 7.1(g)
- Compensated scope of representation for trial counsel includes authorized activity trying to challenge an appealed order or assist with the appeal – even if "released" in TPR order
  - 7A-452; IDS Rule 1.9(a), 3.2(j); IDS Parent Attorney Performance Guidelines 7.1(f)

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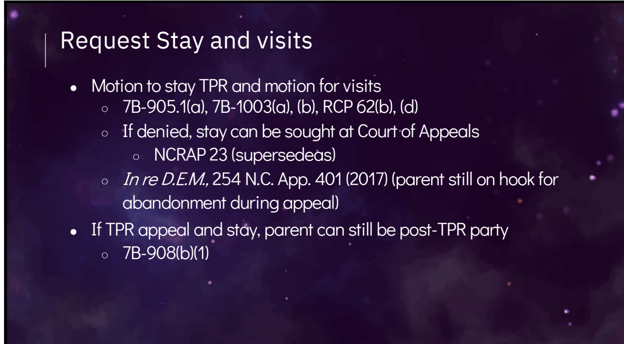

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Post-trial motion principle

- Something new, different – pending charges, absent parent, preadoptive, ICPC
- *In re K.C., M.A.*, 292 N.C. App. 231 (2023)
- Gray area, panel conflicts but two principles
  - Trial court's wide discretion
    - "practically unlimited" – *Anderson v. Hollifield* – 345 N.C. 480 (1997)
    - "rare" – *In re A.J.L.H.*, 384 N.C. 45 (2023)
    - "grand reservoir of equitable power to do justice" – *Branch Bank v. Tucker*, 131 NC App 132 (1998)
  - No second bites at apple
    - "not limitless" – *In re R.D.*, 376 NC 244 (2020)
    - "new matter, not what was tried before" – *Peagram v. King*, 9 NC 605 (1823)

10

Post-trial motions – w/in 10 days

- Motion to "reconsider"/Motion for "reconsideration"
  - Not really a thing - *Doe v. City of Charlotte*, 273 N.C. App. 10 (2020)
  - RCP 7(b) (general motions)
- Motion for new trial/Motion to amend judgment
  - Must be made **within 10 days of entry of judgment**
  - Time can be tolled re: service – check RCP 58 or contact OPD
  - RCP 52(b) - *Reints v. Wb Towing*, 289 N.C. App. 653 (2023) (combine w/ appeal)
  - RCP 59(a), (e) – amend judgment OR new trial
    - Irregularities – misconduct, surprise – not 2 bites at apple
    - New evidence* - due diligence
    - Insufficient evidence or verdict contrary to law
    - Legal error w/ objection preserving issue

11

Post-trial motions – w/in 1 year

- Motion for relief from judgment
  - Substantive errors – RCP Rule 60(b) (not 60(a))
    - Timing
    - **1 year**
      - excusable neglect, fraud
        - due diligence, no 2 bites at apple
      - new evidence* (not in time for RCP 59)
    - "**Reasonable time**" for catchall

12

Post-trial motions and Notice of Appeal

- General rule in civil cases – NOA divests trial court of jurisdiction
  - NCGS 1-294
- Post-trial motions in conjunction with appeal, appellate courts
  - *Bell v. Martin*, 43 N.C. App. 134 (1979)
  - Pre-ROA docketing – trial court can rule
  - Post-ROA docketing – trial court can consider, not rule
  - Explicitly only applies to RC9 60 (but probably RCP 59, too)
- RCP 52, 59, 60 can be independently appealable
  - Request findings of fact in order
  - Timing, tolling, appealability – NCGS 1-277, 7A-27(b)(2), NCRAP 3(c)(3)
    - contact OPD

13

Post-TPR reviews

- Birth parent still a party if appeal and stay – 7B-908(b)(1)
  - Timing – w/in 6 months of TPR hearing and continuing every 6 months until adoption decree
  - Cannot be waived
  - PPH evidence rules – relevant, reliable, necessary
  - "Every reasonble effort" – 7B-908(a)
  - Evalute plan(s), efforts, placement, and adoption listing
  - Concurrent planning *may* continue
  - Could be part of TPR appeal via ROA supplement
    - *In re D.J.*, 378 N.C. 565 (2021) - ICWA

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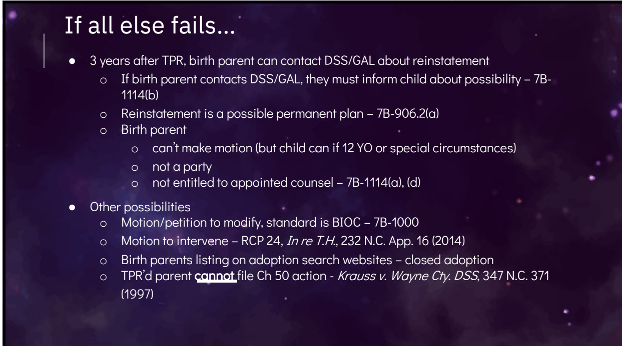

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STATE OF NORTH CAROLINA
COUNTY OF **[County]**

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
[File #]

IN THE MATTER OF:

MINOR CHILD

MOTION TO RE-OPEN THE EVIDENCE

NOW COMES the Respondent **[Mother/Father]**, by and through counsel, and respectfully requests this Court to re-open the evidence in regards to the termination of their parental rights, and shows the Court:

1. On [DATE], [County] DSS filed a Petition/Motion to Terminate Parental Rights.
2. On [DATE], this matter came before this Court for hearing regarding the termination of parental rights.
3. On [DATE], Respondent [**Mother/Father]** was not present at the hearing. A motion to continue made by Respondent's counsel was denied.
4. Respondent [**Mother/Father**] was not present at the [DATE] hearing because [THEY WERE IN THE HOSPITAL, IN ANOTHER COURTHOUSE, CAR TROUBLE, ARRESTED, ETC]. A copy of the document showing Respondent's circumstances is attached hereto.

   OR

5. On [DATE], Respondent [**Mother/Father]** was found not guilty of [CRIMINAL CHARGES] and was released from jail. A copy of the document showing Respondent's release/not guilty verdict is attached hereto.

   OR

6. On [DATE], Respondent [**Mother/Father]** inherited her grandparent's home and is no longer living in a homeless shelter.

   OR

   [Any other circumstance that would affect why the condition no longer exists – such as winning the lottery, receiving a huge settlement check, DNA confirms that the respondent is not the father, the adoptive placement disrupted, or the client was confused as to court dates based on different case numbers, etc. The idea is to attach proof if you can, either in a copy of the document or an affidavit.]
7. An Order has not been entered terminating Respondent's rights as of this date per N.C. Rule of Civil Procedure 58.
8. The termination of parental rights is a drastic remedy that involves terminating the constitutionally protected right to parent.
9. Respondent has a right to present evidence and testify on her/his behalf that were impeded due to the above-listed circumstance.
10. That in the interest of fairness and equity described in N.C. Gen. Stat. § 7B-100, this Court should wait to sign an Order Terminating Parental Rights and allow the re-opening of the evidence so that Respondent can submit their evidence for consideration.
11. That Rule 59 (a)(1) allows the reopening of a case in the event that there is "Any irregularity by which any party was prevented from having a fair trial…"
12. The Court of Appeals has recognized that the right to re-open evidence is available to parties in Juvenile Court proceedings. *In re B.S.O., 225 N.C. App. 541 (2013)*.

NOW THEREFORE, Respondent respectfully moves this court to re-open the evidence regarding the termination of their parental rights and not enter an order until such time as Respondent has been able to present their evidence to this Court.

This the ______ day of ______________, 201__.

____

Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO RE-OPEN THE EVIDENCE has been served on the parties listed below by:

( ) depositing said notice in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

[Insert name and address of attorney or party served in this manner]

( ) hand-delivery to the attorney or party by leaving it at the attorney's office with a partner or employee.

[Insert name of attorney served in this manner]

( ) sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time.

[Insert name and fax number of attorney served in this manner]

THIS the _______ day of _________________, 201_.

____
[Name]
Attorney at Law
[Address]
[Telephone #]

STATE OF NORTH CAROLINA
_____________ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. __ J ____

IN RE:________________	)	
a minor juvenile	)	Motion to Stay Decision
	)	And Continue Visits
	)	Pending Appeal

****

NOW COMES the Respondent, ____________________, by and through counsel, pursuant to N.C. Rule of Civil Procedure 62(d), and hereby moves this Court for an Order to Stay the Enforcement of the Order Terminating Parental Rights while an appeal is pending and moves the Court for an Order allowing the Respondent visits with his/her child. In support of this Motion, the Respondent shows the following:

1. Respondent is the mother/father of the above named juvenile(s).

2. The above named juvenile(s) is/are in the custody of the ______________ Department of Social Services (DSS) pursuant to a court order.

3. On ____________[DATE] the court rendered its decision to terminate the Respondent's parental rights. No written order has been filed.

4. Prior to the hearing to terminate parental rights, Respondent and the juvenile(s) enjoyed [weekly/monthly/whatever the case may be] visitation as follows: [list days, times, location, supervised or not].

5. Respondent intends to file a Notice of Appeal to the order terminating his/her parental rights once the written order has been filed.

6. According to the report(s) filed in court in both the underlying file and in the termination hearing, the visits have gone well and are not harmful to the child.

7. That in the event Respondent is successful in his/her appeal, the parent/child bond will be weakened by the failure to have contact during the year or so it is anticipated an appeal will take.

8. That a stay for this purpose is in keeping with the purposes of the Juvenile Code. For example, N.C. Gen. Stat. § 7b-906.2(b) recognizes that reunification remains a primary or secondary plan until reunification efforts are ceased or a permanent

plan achieved. *See In re D.E.M.*, 254 N.C. App. 401 (2017), where the Court of Appeals said a parent can request a stay and visits during an appeal of termination order.

9. Even once the appeal is ongoing, the trial court maintains authority and jurisdiction to enter orders in the best interest of the child, including stays and orders for visitation. N.C.G.S. 7B-905.1; 7B-1003; *In re D.W.*, 289 N.C. App. 720, 889 S.E.2d 252 (2023) (unpublished) (considering but ultimately affirming trial court's denial of a post-termination motion for visitation).

WHEREFORE, the Respondent respectfully moves the Court to:

1. Stay so much of the trial court's decision rendered on ___________[DATE] as ceases visits between Respondent and the above-mentioned juvenile(s) while the appeal is pending.

2. For such other and proper relief as this Court may deem just and proper under the circumstances.

Respectfully submitted this the _____ day of ______________, 20__.

____
Attorney
Attorney for Respondent
Address
City, State, Zip
(phone)
(fax)
e-mail address

<u>ALL PARTIES MUST BE SERVED, INCLUDING DSS, ATTORNEY ADVOCATE AND OTHER PARENT ATTORNEYS</u>

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO STAY DECISION PENDING APPEAL has been served on the parties listed below by:

( ) depositing said notice in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

[Insert name and address of attorney or party served in this manner]

( ) hand-delivery to the attorney or party by leaving it at the attorney's office with a partner or employee.

[Insert name of attorney served in this manner]

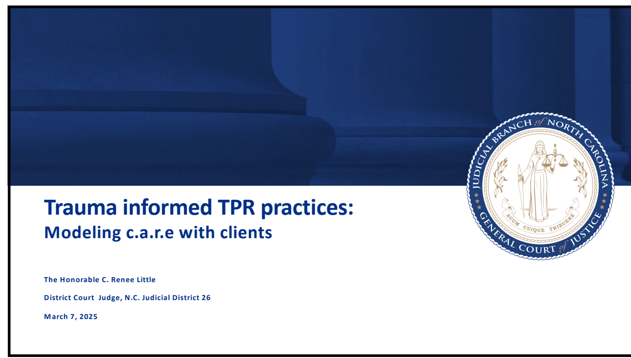
( ) sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time.

[Insert name and fax number of attorney served in this manner]

THIS the _______ day of _________________, 20__.

____

[Name]
Attorney at Law
[Address]
[Telephone #]



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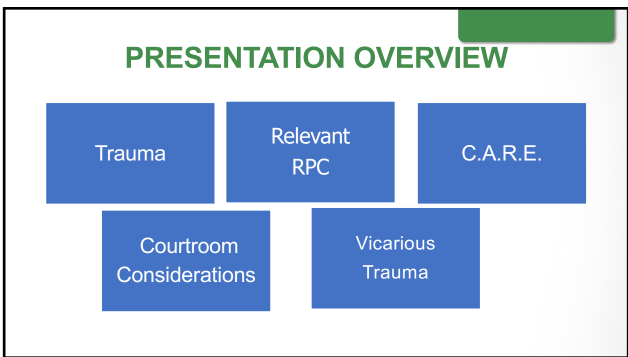

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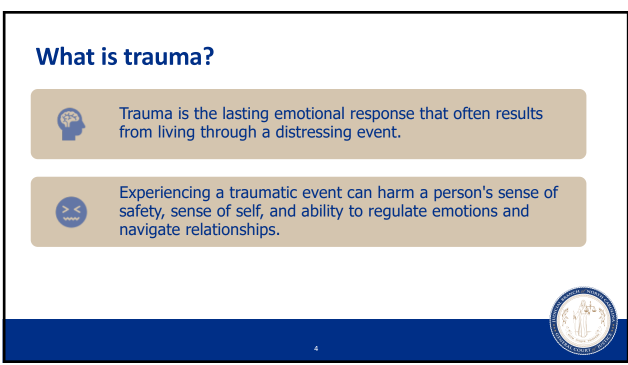

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The Three Es in Trauma

Events	Experience	Effects
Events/circumstances cause trauma.	An individual's *experience* of the event determines whether it is traumatic.	*Effects* of trauma include adverse physical, social, emotional, or spiritual consequences.

Slide 7

SAMHSA

Image: From SAMHSA's SAMHSA's Trauma-Informed Approach slide deck.

5

5

Adverse childhood experiences (ACES) – the Big 10

- Physical abuse
- Sexual abuse
- Emotional abuse
- Physical neglect
- Emotional neglect
- Violence against a mother
- Parental divorce
- Household member with substance use/abuse issues
- Household member with mental illness
- Incarcerated household member

6

6

"Trauma is not just an event that took place sometime in the past; it is also the imprint left by that experience on the mind, brain, and body."

~bessell van der kolk, m.d.
the body keeps score

7

7

Trauma informed lawyering

- **Basic Characteristics**:
  - 1. Identifying trauma
  - 2. Adjusting the attorney-client relationship
  - 3. Adapting litigation strategy
  - 4. Preventing vicarious trauma

From The Pedagogy Of Trauma-informed Lawyering, Sarah Katz & Deeya Haldar

8

8

9

Relevant Rules of Professional conduct

- 0.1 Preamble: A Lawyer's Responsibilities
- 1.1 Competence
- 1.3 Diligence
- 1.4 Communication
- 1.6 Confidentiality
- 1.14 Client with Diminished Capacity
- 2.1 Advisor

0.1 Preamble: A Lawyer's Responsibilities

- [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having **special responsibility for the quality of justice**.
- [2] As a representative of clients, a lawyer performs various functions. As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As **evaluator**, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
- [4] In all professional functions a lawyer should be **competent, prompt, and diligent**. A lawyer should **maintain communication** with a client concerning the representation. A lawyer should keep in **confidence** information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
- [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, **the administration of justice**, and the **quality of service** rendered by the legal profession . . .

Rules 1.1, 1.3 - COMPETENCE AND DILIGENCE

- **Rule 1.1 Competence**

  A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, **thoroughness, and preparation reasonably necessary** for the representation.

- **Rule 1.3 Diligence**

  A lawyer shall act with reasonable **diligence** and **promptness** in representing a client.

Rule 1.4 communication

- (a) A lawyer shall:

  (1) **promptly inform** the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
  (2) reasonably **consult with the client** about the means by which the client's objectives are to be accomplished;
  (3) keep the client **reasonably informed** about the status of the matter;
  (4) **promptly comply** with reasonable requests for information; and
  (5) **consult with the client** about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- (b) A lawyer shall **explain** a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

13

13

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

- (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

  (1) to comply with the Rules of Professional Conduct, the law or court order;
  (2) to prevent the commission of a crime by the client;
  (3) to prevent reasonably certain death or bodily harm; . . .

- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

14

14

Rule 1.14 Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a **normal client-lawyer relationship** with the client.

- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take **reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, **seeking the appointment of a guardian ad litem or guardian**.

- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the **extent reasonably necessary to protect the client's interests**.

15

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Rule 2.1 Advisor

- In representing a client, a lawyer shall exercise independent, professional judgment and **render candid advice**. In rendering advice, a lawyer may refer not only to law, but also to **other considerations** such as moral, economic, social, and political factors that may be relevant to the client's situation.

16

16

Model C. A. R. E.

- Communication & Connection
- Awareness & Advocacy
- Respect & Reliability
- Educate, Empower, Encourage

17

17

C – Communication & Connection

- **Client Relationship**
  - Get to know your clients; establish trust
  - Create a safe and supportive environment
  - Collaborate with Client on strategies, questions
- **Communicate with Respect**
  - Avoid patronizing or accusatory tones; minimize legal jargon
  - Speak with client consistently and promptly
- **Cultivate Connection**
  - Validate your client's emotions and experiences
  - Recognize common interests, goals
  - Convey support and solidarity (physical gestures)

18

18

A - Awareness & Advocacy

- Actively listen
- Acknowledge trauma/Assume ACEs
- Avoid legal jargon, triggering language
- Ask about support systems
- Advise clients of potential outcomes
- Ask for Rule 17 GAL when needed
- Adapt questions to minimize trauma
- Ask open ended questions
- Seek feedback from clients

19

19

R- Respect & Reliability

Throughout Representation

- Reinforce safety and trust
- Recognize your client's strengths
- Refer client to relevant services
- Respect your client's pace

During Hearing

- Request breaks as needed
- Remind Court of DV protocols/sensitive issues
- Recess between hearings or key testimony ("Take a Beat")
- Request final visit or phone call

20

20

E – Educate, empower, encourage

- **Educate your Client about Court Process**
  - Explain Roles of the Players
  - Explain the Appellate Process
- **Explain the TPR process**
  - Review the alleged grounds
  - Explain "Best Interest"
- **Equip and Prep Your Client for Success**
  - Request access to Courtroom prior to hearing
  - Prepare Testimony, Preview Evidence
- **Ensure Your Client Is Heard**
  - Ask for feedback after testimony
  - "Is there anything else you would like to share?"
- **Encourage Your Client** - Give them Hope, Discuss Next Steps

EDUCATE

ENCOURAGE

EQUIP

EXPECT

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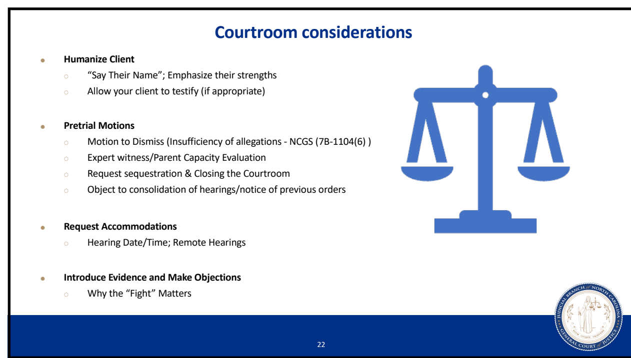

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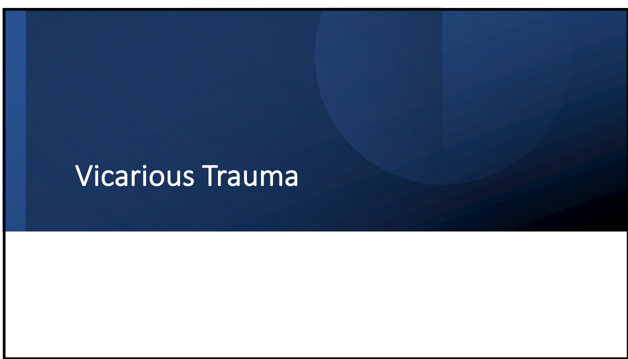

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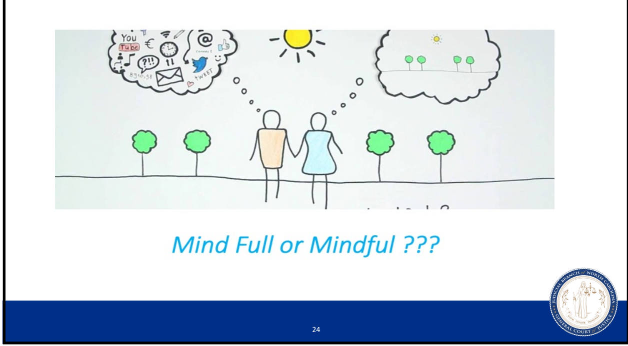

24

Self-Care Tips for Lawyers

- **Connect** with friends and family
- **Recognize** your Triggers
- **Exercise**
- **Read**
- **Take** Personal Time/Quiet Time
- **Check-in** with colleagues
- **Seek help/counseling** if you need it
- **Remember** your **WHY**

25

26

26

WHAT CAN YOU DO?

- Educate Yourself:
  - READ THE BODY KEEPS SCORE BY BESSEL VAN DER KOLK
  - READ THE PEDAGOGY OF TRAUMA-INFORMED LAWYERING BY SARAH KATZ AND DEEYA HALDAR
  - PARTICIPATE IN MOTIVATIONAL INTERVIEWING TRAINING IF YOU HAVE A CHANCE

27

27

CREDIT & RESOURCES

- North Carolina State Bar, Rules of Professional Conduct www.ncbar.gov
- American Bar Association, Strategies for A Trauma Informed Law Practice and Establishing a Trauma-Informed Lawyer-Client Relationship, www.aba.org
- SAMHSA, Concept of Trauma and Guidance for a Trauma-Informed Approach, www.samhsa.gov

28

28

DISCUSSION

29

29

UNC
SCHOOL OF
GOVERNMENT

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Legislative Changes in Child Welfare: The Short Session

The North Carolina General Assembly made some changes to child welfare laws during this short session. Many of these changes have taken effect and some will be effective by January 1, 2025. All the amendments are important for those of you who practice in this area to be aware of.

S.L. 2024-33: An Act to Make Various Changes and Technical Corrections to the Laws Governing the Administration of Justice

Grandparents' Role When Parents Deceased

Section 25 addresses the role of grandparents in an abuse, neglect, dependency, and termination of parental rights (TPR) action when the child's parents are deceased. Effective for all petitions filed or pending on or after July 8, 2024, under the new G.S. 7B-401.1(e1), a grandparent may intervene in an abuse, neglect, or dependency action when one of the following circumstances exists: 1) both of the child's parents are deceased; or 2) one of the child's parents is deceased and the other parent is unknown or their rights have been terminated. *See* G.S. 7B-401.1(h) as amended. Also effective for TPR petitions or motions filed on or after July 8, 2024, under the new G.S. 7B-1103(a)(8), a grandparent has standing to initiate a TPR when all of the child's known parents are deceased and the grandparent is seeking to the terminate the rights of an unknown parent.

Safe Babies Court

The North Carolina Administrative Office of the Courts (AOC) adopted one of the recommendations of the Chief Justice's ACES-Informed Courts Task Force – create a Safe Babies Court (SBC). Currently, there are five pilot counties that will implement SBC: Brunswick, Durham, New Hanover, Mitchell and Yancey. See the North Carolina Safe Babies Court Fact Sheet for more information. Section 13 of S.L. 2024-33 creates a new Article 5B in G.S. Chapter 7B ("Safe Babies Court") that consists of G.S. 7B-535 and 7B-536. SBC is defined at G.S. 7B-536(a)(7) as:

[t]he innovative court program implementing a community engagement and systems change initiative focused on improving how the courts, department of social services, and related child?serving organizations work together to improve and expedite services for young families with at least one child who is no more than 3 years of age involved in juvenile actions alleging abuse, neglect, or dependency.

The purpose of SBC is "to improve the long?term well?being of parents, children, and families involved with the department of social services and the juvenile court by providing them with trauma?informed support and services and to achieve timely permanence, reduce generational trauma, and eliminate maltreatment." G.S. 7B-535(a). A party's participation in SBC is voluntary. *See* G.S. 7B-535(c).

SBC involves the work of state and local community coordinators, who are AOC employees. *See* G.S. 7B-536(a)(2). Information shared with the coordinators is privileged except for a communication made in furtherance of a crime or fraud or when the coordinator is obligated to make a mandatory report. G.S. 7B-536(d). Coordinators are not competent to testify in the abuse, neglect, or dependency action. *Id.*

Information sharing and the confidentiality of records are addressed in G.S. 7B-536. The AOC Director is the custodian of SBC records, which are records made or received by SBC coordinators that are not filed in the juvenile court record for the abuse, neglect, and dependency action. G.S. 7B-536(b). SBC records are not public records and may only be disclosed in two circumstances. First, the AOC Director may, in his discretion and without a court order, authorize the disclosure of de-identified records. G.S. 7B-536(c); *see* G.S. 7B-536(a)(3) (defining "de-identified record"). Second, the court in the abuse, neglect, or dependency case may order disclosure for good cause to a party after a party files a motion in the action, if Rule 5 notice has been provided to the parties and AOC Director, and a hearing is held. G.S. 7B-536(c). Before ordering disclosure, the court must conduct an in camera review of the SBC records. *Id.* The child's guardian ad litem may share information at SBC meetings when they believe disclosure is in the juvenile's best interests. G.S. 7B-536(e).

S.L. 2024-34: An Act Making Modifications to Laws Pertaining to Health and Human Services

Extension of payments to unlicensed relative caretakers

In the long session, the General Assembly required the NC Department of Health and Human Services (DHHS) to develop and implement a policy that allows relatives who are caring for children in the custody of a department of social services (DSS) and who are unlicensed as foster parents to receive monthly financial payments at half the rate of a licensed foster care provider. This financial assistance has been extended to individuals who are providing full-time foster care to a child in DSS custody that the caretaker is related to and "if applicable, any half siblings, regardless of their [the half-sibling's] relationship to the kinship caregiver." Part IV, Section 4. This allows siblings to be placed together and for the caretaker to receive financial assistance for all the children to whom they are providing full-time care. *See* G.S. 7B-505(a1); 7B-903.1(c1) (prioritizing siblings being placed together). These amendments became effective on July 8, 2024. For more information about relative placement, licensing, and financial assistance, see this blog post written by my colleague, Timothy Heinle.

Infant Safe Surrender

Part V, section 5 makes two amendments to the new infant safe surrender laws enacted in the long legislative session. The first amendment clarifies that an infant may be safely surrendered by a parent to a first responder "who is on duty." G.S. 7B-521(2). This makes it clear that a law enforcement officer, certified emergency medical services worker, or firefighter must be on duty for

the infant to be deemed safely surrendered. Bringing an infant to the home of a first responder who is not on duty is not an option. With this amendment, all the professionals to whom an infant may be safely surrendered must be on duty (or at a health care facility if they are a health care provider or DSS office if they are DSS worker).

The second amendment to the safe surrender laws allows DSS to seek an ex parte court order finding the infant has been safely surrendered and confirming DSS has legal custody of the infant for the purposes of obtaining the child's birth certificate, social security number, or State or federal benefits once the required publication of the infant's safe surrender is *initiated* rather than *completed*. G.S. 7B-525(a); *see* G.S. 7B-526 (required notice by publication). These two amendments apply to all infants who are safely surrendered on or after October 1, 2024.

S.L. 2024-26: Addressing Human Trafficking Awareness Training

This session law makes several amendments to laws and enacts new laws related to human trafficking, including requiring human trafficking awareness trainings to specified categories of persons; victim confidentiality in criminal actions; the disclosure of certain criminal convictions related to sexually violent offenses, human trafficking, and sexual exploitation of a minor in Chapter 50 civil custody proceedings; the prohibition of viewing pornography on government networks and devices; and other changes. For purposes of this post, only the changes that impact child welfare are discussed.

A minor victim of human trafficking is an abused and neglected juvenile. *See* G.S. 7B-101(1)(i) and (15)(i). Because of that, training addressing human trafficking should include a section on minor victims of human trafficking, including sex and labor trafficking.

Human Trafficking Awareness Training

Effective June 28, 2024, Section 8 requires the NC DHHS Division of Social Services to expand, implement, and develop new trainings to provide guidance on human trafficking for all county social services staff including attorneys and directors. The training is to be developed in consultation with the North Carolina Human Trafficking Commission. Delivery of the training may be made in the State's Learning Management System, webinars, and regularly scheduled training calls; the biannual conferences for the Social Services Attorneys; and the DSS Directors' biannual regional meetings or ongoing monthly meetings.

Sections 1 through 3 enact G.S. 130A-511 and 42A-139. These two new laws require the NC Department of Labor (DOL) to provide training on human trafficking awareness to all employees of lodging establishments (e.g., housekeeping, food and beverage servers, and check- in/-out workers); property managers and their employees who provide housekeeping or check-in/-out services for vacation rentals; and third-party contractors who are providing services to the lodging establishment or vacation rental. The training is to be developed by the DOL in consultation with

the North Carolina Human Trafficking Commission, DHHS, and the North Carolina Restaurant and Lodging Association. The training must be provided at no cost and can be provided electronically or in-person; it is not available to the public. The training must begin for lodging employees who start on or after July 1, 2025 or for employees of vacation rentals initially listed on or after July 1, 2025, be completed within 60 days, and occur every 2 years. For employees of lodging establishments who started before July 1, 2025 or for vacation rentals listed prior to July 1, 2025, the training must be completed before June 30, 2027 and occur every 2 years.

Reporting Suspected Human Trafficking

Effective June 28, 2024, the new G.S. 130A-511 and 42A-130 require lodging establishments and property managers of vacation rentals to implement procedures for reporting suspected human trafficking to local law enforcement and the National Human Trafficking Hotline. The law does not address reporting suspected minor victims of human trafficking to a county DSS, but the universal mandated reporting law for abuse, neglect, and dependency requires such a report. *See* G.S. 7B-301. Lodging establishments or vacation rentals may need to include a provision in their procedures that address minor victims of human trafficking and an additional report to the county DSS. Law enforcement officers are included in the universal mandated reporting law, so any law enforcement officer who receives a report of suspected human trafficking of a minor victim and has cause to suspect the minor is a victim of human trafficking is obligated to report to the county DSS.

Viewing Pornography Prohibited from Government Devices

Section 6 enacts G.S. 143-805, which requires public agencies and the judicial and legislative branches to prohibit the viewing of pornography on any government device by their employees, elected officials, appointees, and students by January 1, 2025. *See* G.S. 143-805(g)(4) (defining "pornography") and (g)(5) (defining "public agency"). A government device includes a cell phone, laptop, computer, or other device that is capable of connecting to a network and is owned, leased, maintained, or controlled by the public agency. *See* G.S. 143-805(b)(1) (definition of "device"). The prohibition also includes viewing pornography over the network of a public agency or the judicial or legislative branch. *See* G.S. 143-805(b)(3) (definition of "network").

It is possible that some abuse, neglect, or dependency cases include evidence that may constitute pornography under the broad definition in the new law. Although there is not an exception that explicitly addresses county DSS cases of child abuse, neglect, or dependency, G.S. 143-805(d) carves out some exceptions that may apply. Those exceptions include "investigating or prosecuting crimes, … or performing actions related to other law enforcement purposes," as sometimes a county DSS may coordinate with law enforcement when investigating abuse. *See* G.S. 7B-307(a). Another exception is "participating in judicial or quasi-judicial proceedings." When a petition alleging abuse, neglect, or dependency, the termination of parental rights, or requesting a review of placement on the Responsible Individuals List is filed, a judicial proceeding is initiated. These cases are covered by this exception. A third exception is "[p]rotecting human life."

Depending on the facts of an abuse, neglect, or dependency action, this exception may apply, albeit rarely.

By January 1, 2025, the State Chief Information Officer must publish recommendations for what is appropriate under the exceptions. Also by January 1, 2025, each public agency and the legislative and judicial branches must have policies addressing this prohibition on their networks and devices, and the policies must include disciplinary actions for any violations. Agencies and the judicial branch should consider how to address juvenile abuse, neglect, and dependency cases where "pornography" (as defined by the new law) may be evidence in the case.

You are on Notice: Pleading Requirements, a Recent N.C. Supreme Court Opinion, and Parent Representation

Consider an attorney who is appointed to represent an indigent parent in a juvenile abuse, neglect, and dependency (A/N/D) proceeding. The attorney reviews the petition which was prepared using form AOC-J-130. Perhaps only the box for neglect is marked but the written allegations mirror the statutory definition of abuse. Or perhaps no boxes are checked but the petition has a prior custody order attached to it. What grounds for adjudication are alleged here? Does it matter what boxes are checked or what portions of a petition are completed? Are magic words or statutory citations required? What if this was a termination of parental rights (TPR) petition where a statutory citation for an alleged ground was not included?

Read on to learn what constitutes sufficient notice in a juvenile pleading, including a review of the takeaways from a recent N.C. Supreme Court ruling addressing sufficiency of pleadings in a TPR proceeding.

Abuse, neglect, and dependency petitions

A basic tenet of our judicial system is that the person named as a defendant or respondent in a proceeding is entitled to know the nature of the allegations they face. This notice requirement is part of procedural due process. In A/N/D proceedings, only the conditions alleged in a juvenile petition may be considered, proven, and adjudicated. *In re D.C.*, 183 N.C. App. 344, 359 (2007). Amendments to conform to the evidence are not permitted. *In re D.R.J.*, 2022-NCSC-69.

Numerous appellate decisions have sought to clarify what constitutes sufficient notice for purposes of an A/N/D petition. The opinions hold that it is not necessarily a fatal error if the petition does not have the correct box of an adjudication ground checked. *See, e.g.*, *In re K.B.*, 253 N.C. App. 423 (2017) (holding that a petitioner who failed to check the dependency box but who alleged that a parent “failed to provide proper supervision” and “was unable to provide an alternative placement resource” encompassed the language of G.S. 7B-101(9) and thus provided sufficient notice to the parent). The appellate courts consider the entire petition to determine whether the allegations provide the respondent with sufficient notice of what is at issue. Does the petition contain the statutory language of a ground? Are the facts sufficient to support that alleged ground? If yes, the petition is sufficient even if the proper box is not checked.

The boxes checked on a petition are not entirely irrelevant, however. In 2020, the Court of Appeals heard the appeal of an order adjudicating a juvenile abused and neglected based in part on the juvenile’s unexplained leg injuries. *In re K.L.*, 272 N.C. App. 30 (2020). The abuse checkbox on the petition was marked and allegations regarding his leg fractures were included, but the checkbox for

neglect was blank. The Court of Appeals held that the trial court lacked subject matter jurisdiction to adjudicate neglect where the petition only alleged abuse. *Id.* at 47. The Court acknowledged that it is not fatal error if a petitioner fails to check the appropriate boxes; however, here the petition was not checked for neglect *and* no separate claim of neglect was made in the written factual allegations. The allegations about the unexplained leg injury did not encompass the language of G.S. 7B-101(15), which defines neglect. *Id.* at 49. The Court reversed the adjudication of neglect and remanded the issue of abuse to the trial court. *Id.* at 54.

A lesson for parent attorneys. A trial or appellate court may determine that a respondent was given sufficient notice of an allegation even if the petitioner does not expressly refer to a specific ground for adjudication or fails to check the appropriate boxes. Parent attorneys should consider the possible allegations that arguably flow from the petition, including any attachments. Be prepared to challenge any ground that may be anticipated from the pleadings and to object when a ground is raised that was not alleged through notice pleading.

TPR petitions and motions

A TPR may be initiated by the filing of either a petition or when there is an existing A/N/D matter, by a motion. G.S. 7B-1102, 7B-1104. Regardless of whether a petition or motion is used to initiate a TPR, the pleading must include factual allegations that would permit a court to determine that at least one ground for terminating a parent's rights exist. G.S. 7B-1104(6). Like in A/N/D proceedings, our appellate courts have wrestled with the question of what sufficient notice for purposes of a TPR is.

A TPR pleading must put a respondent on notice "as to what acts, omissions or conditions are at issue," and cannot merely recite statutory language. *In re B.C.B.*, 374 N.C. 32, 34 (2020). Like an A/N/D petition, a TPR petition without a statutory citation may still be sufficient. *See In re A.H.*, 183 N.C. App. 609 (2007) (holding that a TPR petition provided sufficient notice of a dependency allegation where the petition did not cite to G.S. 7B-1111(a)(6) but did use language that mirrored the language of the ground). The statutory language of the ground without any alleged facts to support the ground, however, is insufficient. *See In re J.S.K.*, 256 N.C. App. 702 (2017) (holding that a TPR motion that contained both statutory citations and language for the alleged grounds but without the bolstering of factual allegations amounted to bare statutory recitations that failed to provide sufficient notice to the respondent).

An attachment to the petition may provide additional basis for notice of the facts and grounds alleged. *See In re B.C.B.*, 374 N.C. 32 (2020) (holding that a TPR petition provided sufficient notice of grounds of abandonment and failure to make child support payments where the petition did not explicitly reference the father's willfulness but contained statutory citations and incorporated prior orders that provided additional context to the allegations); *see also In re Quevedo*, 106 N.C. App.

574 (1992) (holding that a custody order attached and incorporated by reference contained sufficient facts to overcome the otherwise deficient pleadings).

(For additional examples and of TPR pleadings that provided respondents with sufficient or insufficient notice, see Section 9.5.C. of The Abuse, Neglect, Dependency, and Termination of Parental Rights Manual, beginning on page 9-23.)

A recent N.C. Supreme Court decision about insufficient notice

Attachments to pleading. Recently, the NC Supreme Court held that an attachment to a petition does not necessarily provide sufficient notice to a respondent. In *In re D.R.J.*, 2022-NCSC-69, the Department of Social Services (DSS) filed a motion in an existing A/N/D proceeding seeking to terminate a father's parental rights for failure to pay support and for dependency pursuant to G.S. 7B-1111(a)(3) and 7B-1111(a)(6). *In re D.R.J.* at ¶5. Attached to the TPR motion and incorporated by reference were a series of prior court orders spanning a period of years, including the initial adjudication order, multiple disposition orders, and a permanency planning order. *Id*. at ¶14. The trial court granted the motion; however, the court's order was based on neglect (G.S. 7B-1111(a)(1)) and the failure to make reasonable progress (G.S. 7B-1111(a)(2))—grounds that were not alleged in the motion. *Id*. at ¶13. The father appealed, arguing that the motion failed to provide sufficient notice of the G.S. 7B-1111(a)(1) and (2) grounds used to terminate his parental rights. *Id*. at ¶12.

On appeal, the guardian ad litem (GAL) and DSS argued that the motion provided the father with sufficient notice despite not citing the additional grounds used to terminate the father's rights. *Id*. at ¶14. The GAL argued that the attached orders coupled with additional factual allegations in the motion provided sufficient notice of the grounds ultimately found by the court. *Id*. DSS went a step further, arguing that the motion incorporated "generally all of the prior orders and court reports" from the underlying matter and those attached orders alone provided sufficient notice. *Id*. at ¶¶15, 17.

In its ruling, the Court rebuffed the notion that incorporating a series of orders by reference, or incorporating all prior orders generally by reference, provided sufficient notice. *Id*. at ¶17. The Court reasoned that adopting the holding argued for by the GAL and DSS would "nullify the notice requirement" of G.S. 7B-1104(6) in that it would "contravene the delineation of specific grounds for terminating parental rights." *Id*. The Court further reasoned that such a holding would "require a respondent parent to refute any termination ground that could be supported by any facts alleged in any document attached to a termination motion or petition." *Id*.

Partial statutory language. The GAL also argued the father was provided sufficient notice because the TPR motion contained an allegation that he had not corrected the conditions that led

to the initial adjudication, reflective of the statutory language of the grounds found in G.S. 7B-1111(a)(1) and (2). *Id.* at ¶14. The N.C. Supreme Court was unpersuaded, finding that the TPR motion failed to contain even a bare recitation of the additional grounds identified in the trial court's order. The Court reasoned that the statement that "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child" as neglected did not adequately reflect the statutory language for those grounds. *Id.* at ¶17.

Takeaway. In reversing the trial court's order, the Court considered that DSS could have included the additional grounds in its motion but did not. The Court held that the GAL and DSS' argument "constitute[d] an impermissible attempt to conform the termination of parental rights motion to the evidence presented at the termination hearing." *Id.* at ¶18. *In re D.R.J.* serves as a helpful benchmark in determining what does and does not constitute sufficient notice for TPR pleadings.

Waiver and preservation of an insufficiency argument. A respondent who fails to argue at trial that they did not receive sufficient notice of an allegation has not waived that argument *if* the first reference to the allegation appears the trial court's written order. *Id.* at ¶20-21. (reasoning such a holding would be illogical where "the first and only available time to challenge the adjudication" is on appeal); *see also In re K.L.*, 272 N.C. App. 30 (2020) (holding that a respondent cannot be said to have waived the argument they were provided insufficient notice of neglect where neglect was not referenced in the petition, the arguments of counsel, or the oral rendition of the trial court's order).

However, if references to a ground or condition not alleged in the pleadings are made through evidence or arguments during an A/N/D or TPR hearing, respondent's counsel should argue insufficient notice, raising the argument on the record and preserving it for a possible appeal. There is no black and white test for sufficiency of notice and attorneys must be diligent in protecting their client's rights.

NC Supreme Court Addresses Jurisdiction in TPRs of Out-of-State Parents

In the last two years, the North Carolina Supreme Court has published two opinions that answer questions raised about whether a North Carolina district court has personal and/or subject matter jurisdiction to terminate the parental rights of a parent who lives outside of North Carolina. Both opinions are cases of first impression. Both opinions held that the district court had personal jurisdiction over the respondent parent. One opinion held the district court also had subject matter jurisdiction in the TPR action. Both opinions affirmed the challenged TPR orders. Both opinions overturn previous court of appeals opinions on the issues raised. Here's what you need to know.

No Minimum Contacts Required: *In re F.S.T.Y.,* 374 N.C. 532 (2020)

The first opinion, *In re F.S.T.Y.*, 374 N.C. 532 (2020), addressed whether due process requires an out-of-state parent to have minimum contacts with North Carolina before terminating the rights of that parent. The Supreme Court held that "due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings." *In re F.S.T.Y.*, 374 N.C. at 541. In its reasoning, the Supreme Court noted that although due process generally requires a nonresident to have "…sufficient 'minimum contacts' with the forum state so 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' ", the U.S. Supreme Court has recognized exceptions to minimum contacts in status cases (e.g., divorce). *In re F.S.T.Y.*, 374 N.C. at 534 quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)).

The opinion in *F.T.S.Y.* explains that in status cases, the trial court's jurisdiction is established by the status of the plaintiff, rather than the location of the defendant. In looking at appellate opinions from other states and the purposes of the North Carolina Juvenile Code (G.S. Chapter 7B), the N.C. Supreme Court held that the status exception applies to TPR proceedings because the child's status to their parent and the child's best interests are at issue. With this opinion, North Carolina has joined other states that have held that minimum contacts are never required in TPR proceedings on the basis that these cases fall within the "status" exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g.*, *In re R.W.*, 39 A.3d 682 (Vt. 2011) and cases cited in *In re F.S.T.Y*.

In its opinion, the N.C. Supreme Court further recognized that in North Carolina, the best interests of the child are the paramount consideration in a TPR, and when there is a conflict between the interests of a child and parent, the child's best interests prevail. *See* G.S. 7B-1100(3). Because a TPR involves a parent who allegedly does not adequately care for their child, "fairness requires that the State have the power to provide permanence for children living within its borders[,]" which is a matter of state concern. *In re F.S.T.Y.*, 374 N.C. at 540. The N.C. Supreme Court reasoned that not favoring the child's home state when determining jurisdiction would run contrary to the

principle of acting in the child's best interests. The N.C. Supreme Court further held that even without minimum contacts, the respondent parent continues to have a right to actively participate in the TPR proceeding and that any burden imposed on the out-of-state respondent parent is mitigated by the appointment of counsel (*see* G.S. 7B-1101.1) and right to seek participation through remote technology (*see* G.S. 50A-111; 7A-49.6).

Prior to *In re F.S.T.Y.*, there were four opinions published by the North Carolina Court of Appeals that addressed personal jurisdiction in a TPR of nonresident parents. In all four opinions, the respondent parent whose rights were terminated were fathers. The opinions addressing whether minimum contacts were required split (2 and 2) based upon whether the child was born in wedlock. *In re F.S.T.Y*. expressly overruled two of the court of appeals' opinions: *In re Finnican*, 104 N.C. App 157 (1991), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644 (1992) and *In re Trueman*, 99 N.C. App. 579 (1990). Both those opinions involved a child who was born during the marriage between the mother (petitioner) and the father (respondent) and was the legitimate child of the marriage. Both opinions held that to satisfy due process a nonresident parent must have minimum contacts with the state before a court in North Carolina may terminate the parent's rights*. In re F.S.T.Y*. did not overrule the two other opinions that determined minimum contacts were not required for a child who is born out of wedlock when the respondent father fails to demonstrate a commitment to the responsibilities of parenthood – *In re Dixon*, 112 N.C. App. 248 (1993) and *In re Williams*, 149 N.C. App. 951 (2002). Note that the analysis the court of appeals applied in these two opinions is no longer law given the holding of *In re F.S.T.Y*.

G.S. 7B-1101 Service Requirements on Nonresident Parents Impacts Personal Jurisdiction, Not Subject Matter Jurisdiction: *In re A.L.I.*, 2022-NCSC-31.

The Juvenile Code addresses jurisdiction in TPRs in G.S. 7B-1101. The title of G.S. 7B-1101 is "Jurisdiction," but the statute does not identify whether it applies to subject matter jurisdiction or personal jurisdiction. Instead, the statute consists of a single paragraph that addresses several different factors. In prior opinions, the court of appeals has looked to the language of G.S. 7B-1101 when holding the district court lacked subject matter jurisdiction in a TPR action where the provisions of this statute were not followed. (For a discussion of the cases that hold G.S. 7B-1101 equates the county in which the TPR action is filed with subject matter jurisdiction, see my earlier blog post here.)

One sentence of G.S. 7B-1101 specifically addresses nonresident parents:

> Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 *and that process was served on the nonresident parent pursuant to G.S. 7B-1106*.

G.S. 7B-1101 (emphasis added).

The referred to statute, G.S. 7B-1106, governs issuance and service of the summons in a TPR proceeding.

Recently, the N.C. Supreme Court decided *In re A.L.I.*, 2022-NCSC-31, which examines the language of G.S. 7B-1101 when making a determination as to whether the district court had subject matter jurisdiction over the nonresident father whose parental rights were terminated. In *A.L.I.*, the father whose parental rights were terminated was incarcerated, and therefore, residing in New York. The father wrote letters to the court, participated in the hearing remotely, and was represented by court appointed counsel. On appeal, father's sole challenge was to the district court's lack of subject matter jurisdiction, arguing it was lacking because he was not served pursuant to G.S. 7B-1106 as required by G.S. 7B-1101. The father relied on an unpublished court of appeals opinion, *In re P.D.*, 254 N.C. App. 852 (2017), that vacated a TPR order for lack of subject matter jurisdiction when the nonresident parent was not served as required by G.S. 7B-1106.

In *A.L.I.*, the Supreme Court answered the question as to whether the provision of G.S. 7B-1101 that addresses nonresident parents applies to subject matter or personal jurisdiction. The Supreme Court held the language applies to personal jurisdiction and reiterated that unlike subject matter jurisdiction, personal jurisdiction is a defense that can be waived by the parties. In *A.L.I.*, the Supreme Court discussed two prior opinions – *In re K.J.L*., 363 N.C. 343 (2009) and *In re J.T.*, 363 N.C. 1 (2009) – both of which distinguished the difference between subject matter jurisdiction and defects in personal jurisdiction. In *K.J.L.*, despite no summons being issued, the Supreme Court held the summons applies to personal jurisdiction and not subject matter jurisdiction and determined that the parent waived the defense that there was no summons when making a general appearance in the action. In *J.T.,* the summons did not name the juveniles and were not served on the juveniles or their GAL (which was required under the statutory language at that time), and the Supreme Court determined those defects applied to personal jurisdiction, not subject matter jurisdiction. The Supreme Court held the juveniles waived their defense by making a general appearance through their GAL's and attorney advocate's participation in the TPR proceeding, without objection. In both opinions, the Supreme Court determined the district court had subject matter jurisdiction to proceed in the juvenile actions.

Relying on that precedent, in *A.L.I.* the Supreme Court stated, "[a] parent's status as a nonresident does not alter the fact that arguments of insufficient service of a summons pertain to personal jurisdiction rather than subject matter jurisdiction[;] . . . the issuance and service of a summons do not affect a trial court's subject matter jurisdiction in a TPR action." 2022-NCSC-31, ¶¶ 9, 10. Here, the father who was a nonresident parent waived his defense of a lack of personal jurisdiction when he participated in the TPR proceeding without objecting to the service defect.

The holding of *In re A.L.I.* supersedes the court of appeals holding in *In re P.D.*, 254 N.C. App. 852

(2017) (unpublished). You may remember from my last blog post, announcing the February 2022 edition of the Abuse, Neglect, Dependency and TPR Manual, that this area of the law is constantly changing. Well, the *A.L.I.* opinion further illustrates that point. Note that *A.L.I.* should replace any reference to *In re P.D.* in Chapter 3 (Jurisdiction) and Chapter 9 (TPR) of the Manual.