Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina

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Chapter 11

Evidence[1]

1. This chapter was written by School of Government faculty member John Rubin. Earlier training materials he prepared on this subject and now this chapter owe their start to Ilene Nelson, former administrator of North Carolina's Guardian ad Litem program, who many years ago began writing about how evidence principles apply to juvenile cases.

11.7
Prior Orders and Proceedings and Judicial Notice

A. Generally

Numerous North Carolina appellate decisions, discussed in this section, state that the trial court in a juvenile case may take judicial notice of prior proceedings in the same case. As one juvenile case observed, however, the extent to which the trial court actually may rely on prior proceedings is unclear. *See In re S.W.*, 175 N.C. App. 719, 725 (2006). The most troublesome question is the extent to which a trial court at an adjudication hearing, such as an adjudication hearing in a TPR case, may rely on prior abuse, neglect, and dependency proceedings, including disposition and review hearings at which the rules of evidence do not apply. Juvenile decisions on judicial notice have not clearly answered that question, often bypassing close analysis of the permissible reach of judicial notice by relying on the presumption that the trial court disregarded any incompetent evidence in the judicially noticed matters and made an independent determination of the issues in the current proceeding. *See, e.g., In re J.W.*, 173 N.C. App. 450, 455–56 (2005) (stating these principles), *aff'd per curiam*, 360 N.C. 361 (2006); *In re J.B.*, 172 N.C. App. 1, 16 (2005) (to same effect).

To determine the extent to which the trial court may rely on prior proceedings, three basic questions must be addressed:

- First, what are the different aspects of prior proceedings that potentially could be considered? Prior proceedings may consist of orders and other entries in the court's records, findings and conclusions by the court, reports and other documentary evidence offered by the parties, and testimony by witnesses.
- Second, what are the appropriate legal principles governing consideration of the different aspects of prior proceedings? While the juvenile cases have relied primarily on the doctrine of judicial notice, other doctrines, such as collateral estoppel and the rules on hearsay, may be more appropriate in some instances.
- Third, what is the impact of the information from prior proceedings? Some information may be binding, other information may be admissible but not binding, and other information may be inadmissible if the opposing party objects.

The discussion below addresses the different aspects of prior proceedings and suggests the appropriate treatment for each. The discussion leans more heavily on decisions outside the juvenile context than in other parts of this chapter because those decisions more closely analyze the requirements for judicial notice and other doctrines regulating reliance on prior proceedings. The discussion also attempts to order the North Carolina decisions according to the categories identified below. The decisions themselves do not always characterize the information in that way. The approach below reflects the author's analysis of the controlling principles under North Carolina law. First, however, the discussion describes the doctrine of judicial notice because the juvenile decisions so often refer to it in considering prior proceedings.

Note: The discussion in this section concerns whether information from prior proceedings may be considered at adjudication. Because the rules of evidence do not apply at disposition and other non-adjudication hearings, a court at those hearings may have greater latitude in considering prior proceedings, just as it has greater latitude at non-adjudication hearings in considering evidence that would be inadmissible at adjudication. *See, e.g., In re R.A.H.,* 182 N.C. App. 52, 59–60 (2007) (at a permanency planning hearing, the court could take judicial notice of findings from a previous disposition hearing); *In re Isenhour,* 101 N.C. App. 550, 552–53 (1991) (in a custody review hearing under previous Juvenile Code provisions, the court could take judicial notice of matters in the file in considering the history of the case and conducting the current hearing); *see also State v. Smith,* 73 N.C. App. 637, 638–39 (1985) (at resentencing in a criminal case following appeal, at which rules of evidence did not apply, the court could consider evidence offered at the prior sentencing hearing).

B. Definition of Judicial Notice

1. ***Generally.*** Evidence Rule 201 contains the general definition of judicial notice. It covers "adjudicative facts," meaning it allows a court to take judicial notice of a fact for the purpose of adjudicating the issues in the current case. N.C. R. Evid. 201(a) & commentary. The term "adjudicative fact" should not be confused with facts adjudicated in a previous proceeding, which may or may not be the proper subject of judicial notice (discussed in D., below).

   For a fact to be subject to judicial notice, it must "be one not subject to reasonable dispute." N.C. R. Evid. 201(b). A fact is not subject to reasonable dispute if it either is "generally known within the territorial jurisdiction of the trial court" or "is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* For example, a court may take judicial notice of the time that the sun set on a particular date. *See State v. McCormick,* ___ N.C. App. ___, 693 S.E.2d 195 (2010). The fact to be noticed also must be relevant to the issues in the case as provided in Evidence Rule 401.

   When a court takes judicial notice of a fact on the ground that it is not subject to reasonable dispute, evidence of the fact need not actually be offered in the current proceeding. Further, in a civil case, the taking of judicial notice of a fact removes the fact "from the realm of dispute," and evidence to the contrary "will be excluded or disregarded." 1 Brandis & Broun § 24, at 102; *see also* N.C. R. Evid. 201(g) ("In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed").

2. ***Judicial notice of prior proceedings.*** North Carolina decisions often have observed that a trial court may take judicial notice of its prior proceedings.

   In cases outside the juvenile context, judicial notice has usually been limited to matters of record, such as the date of filing of an action (discussed in C., below). These decisions are consistent with the approach to judicial notice in Evidence Rule 201 because they involved facts that were not subject to reasonable dispute and that required no further proof. Isolated decisions outside the juvenile context have departed from this approach,

allowing the trial court to consider evidence offered in prior proceedings, but these cases do not appear to reflect the general approach to judicial notice; rather, they appear to have involved an effort by the court to fill inadvertent gaps in the evidence in those cases. The decisions also do not appear to impose the usual consequences of judicial notice because they treat the evidence as competent in the current proceeding but not as beyond dispute. *See, e.g., Long v. Long,* 71 N.C. App. 405, 408 (1984) (court could take judicial notice in an alimony suit of information about the husband's expenses from an order for alimony *pendente lite*; note that the decision appears to have been superseded by later decisions, discussed in D.2.b, below); *In re Stokes,* 29 N.C. App. 283 (1976) (court could take judicial notice of an order in an earlier delinquency case involving the same juvenile to show his age and the court's jurisdiction over the juvenile); *Mason v. Town of Fletcher,* 149 N.C. App. 636, (2002) (in a case in which the parties disputed the width of a right-of-way, the court could take judicial notice of a prior case involving the same parties and could consider evidence from that case about the width of the right-of-way).

In juvenile cases, the courts also have approved of the taking of judicial notice of prior proceedings, relying on Evidence Rule 201 in support. In most instances, however, the decisions do not appear to have used judicial notice in the sense meant under that rule. *See, e.g., In re J.W.,* 173 N.C. App. 450, 455–56 (2005) (referring to Evidence Rule 201 but suggesting that the noticed matters were disputed and subject to further proof by stating that the trial court was presumed to have disregarded any incompetent evidence and had to make an independent determination), *aff'd per curiam,* 360 N.C. 361 (2006). The approach taken in juvenile cases, as applied to different aspects of prior proceedings, is discussed in the following sections.

C. Orders and Other Court Records

1. ***Summary.*** This section addresses information entered or appearing in the court's records, such as the date of filing of a case or an order requiring a party to take certain action. It does not address findings and conclusions within a prior order; nor does it deal with reports or other evidence introduced in prior proceedings, which although they become part of the court file are not record entries in the sense discussed in this section.

   A juvenile court may take judicial notice of prior orders by a court and other entries in court records in the sense used here. In a TPR case, for example, it would be appropriate for a trial court to take judicial notice of a prior permanency planning order changing the permanent plan from reunification to adoption. The fact of the prior order and the directives within it are not subject to reasonable dispute and require no further proof to establish them, as contemplated by Evidence Rule 201.

2. ***Judicial notice of record entries.*** North Carolina decisions have routinely approved the taking of judicial notice of entries in court records. Decisions have done so, for example, to determine the chronology of litigation, such as the timeliness of a summons or the filing of an appeal. *See, e.g., In re McLean Trucking Co.,* 285 N.C. 552, 557 (1974) (court could determine the chronology of litigation by taking judicial notice of docketed records); *Gaskins v. Hartford Fire Ins. Co.,* 260 N.C. 122, 124 (1963) (court could determine whether a com-

plaint was filed within the time permitted for submitting a claim of loss by taking judicial notice of the filing date of the complaint); *Massenburg v. Fogg,* 256 N.C. 703, 704 (1962) (docketing of appeal); *Harrington v. Comm'rs of Wadesboro,* 153 N.C. 437 (1910) (issuance of summons); *Slocum v. Oakley,* 185 N.C. App. 56 (2007) (in determining a motion to dismiss the plaintiffs' lawsuit for failure to prosecute, the court could take judicial notice of the plaintiffs' previous dismissal of a related case and other documents in the court's files showing the failure to prosecute the prior case).

Decisions also have allowed judicial notice of the entry of orders to show the existence of the order and its terms. *See, e.g., State v McGee,* 66 N.C. App. 369 (1984) (magistrate's contempt order was properly admitted in evidence because the court could have taken judicial notice of the order, without it being offered into evidence, to determine whether the magistrate had the authority to hold the defendant in contempt; contempt order was reversed, however, where the state relied solely on statements in the magistrate's order and offered no independent evidence of acts of contempt).

Juvenile decisions likewise have allowed judicial notice of the entry of orders and other record entries in prior proceedings. These decisions are consistent with North Carolina decisions on judicial notice outside the juvenile context. *See, e.g., In re A.S.,* ___ N.C. App. ___, 693 S.E.2d 659 (2010) (court of appeals stated that it could take judicial notice of its prior decision in finding that the trial court on remand relied on a finding that the court of appeals had disavowed); *In re S.W.,* 175 N.C. App. 719, 725–26 (2006) (court could take judicial notice of the entry of prior orders terminating the mother's parental rights to three other children); *In re Stratton,* 159 N.C. App. 461, 462–63 (2003) (court could take judicial notice of a termination order to determine whether the current appeal was moot); *In re Williamson,* 67 N.C. App. 184, 185–86 (1984) (court could take judicial notice of a custody order to determine whether the current appeal was moot).

A number of juvenile decisions state generally that the trial court may take judicial notice of prior orders, but they do not identify the parts of the order being noticed or the purpose for which they could be used. *See, e.g., In re S.D.J.,* 192 N.C. App. 478, 487–88 (2008) (stating generally that a court may take judicial notice of prior orders, but also stating that the court is presumed to have disregarded incompetent evidence within the noticed matters). These decisions provide little guidance on the appropriate scope of judicial notice.

D. Findings and Conclusions by Court

1. ***Summary.*** This section deals with findings and conclusions from a prior proceeding, such as a determination at an adjudication hearing that a child is neglected or a finding at a review hearing that a parent is not making progress on certain matters. The applicable doctrine for considering findings and conclusions from prior proceedings is ordinarily *not* judicial notice. The applicable doctrines and their impact appear to be as follows:
   - The court may consider findings and conclusions from orders in prior proceedings if collateral estoppel applies, in which case the findings and conclusions are binding in a later proceeding. Collateral estoppel applies to findings from prior adjudication hearings but not to findings from non-adjudication hearings.

- If collateral estoppel does not apply, prior judgments and orders do not appear to be admissible as evidence of the facts found under the rules of evidence except in limited circumstances.
- Formal concessions in prior proceedings, such as stipulations of fact, are likely binding in later proceedings against the party who made the concession or entered into the stipulation.

2. ***Collateral estoppel.*** The doctrines of res judicata and collateral estoppel permit consideration of findings from prior proceedings because their very purpose is to preclude a party from relitigating claims or issues decided in prior proceedings. Most relevant to juvenile cases is the doctrine of collateral estoppel (or issue preclusion), which bars the parties "'from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.'" *In re N.G.,* 186 N.C. App. 1, 4 (2007) [quoting *In re Wheeler*, 87 N.C. App. 189, 194 (1987)], *aff'd per curiam*, 362 N.C. 229 (2008).

When applicable, the effect of collateral estoppel is comparable to judicial notice, removing the matter from further dispute, but it is misleading to use the term "judicial notice" because it does not adequately identify the requirements for collateral estoppel. *See generally In re C.D.A.W.,* 175 N.C. App. 680, 686–87 (2006) (respondent objected to the court's taking of judicial notice of prior findings, but the court observed that the "basis of respondent's objection is that petitioner should not have the benefit of collateral estoppel with respect to previous findings of fact not determined by the requisite standard of proof required in a termination of parental rights proceeding"; the respondent showed no prejudice in this case), *aff'd per curiam,* 361 N.C. 232 (2007). It would be appropriate, however, for a court to take judicial notice of a prior order for the purpose of establishing the prerequisites of collateral estoppel. *See Eagle v. Johnson,* 159 N.C. App. 701 (2003) (so holding for related doctrine of res judicata).

(a) ***Prior adjudication findings and conclusions.*** Juvenile cases have recognized that the trial court may rely on a prior determination of abuse or neglect in a later TPR case to show the occurrence of prior abuse or neglect. The prior finding or determination is conclusive as to the condition of the child at that time (although it is not conclusive on the question of whether the parents' rights should be terminated because the court still must consider the circumstances since the time of the adjudication as well as the relevant actions or inactions of each parent). *See In re N.G.,* 186 N.C. App. at 4–5; *see also In re A.K.,* 178 N.C. App. 727 (2006) (based on collateral estoppel, the court could rely on a prior adjudication of neglect of one child of the parents in determining in a later case whether another child of the same parents was neglected; the prior adjudication was insufficient alone, however, to establish that the second child was neglected).

The above cases explicitly refer to the doctrine of collateral estoppel, while others state that a determination of abuse or neglect is admissible in a later proceeding. *See, e.g., In re Ballard,* 311 N.C. 708, 713–14 (1984); *In re Brim,* 139 N.C. App. 733, 742 (2000); *In re Byrd,* 72 N.C. App. 277, 279 (1985). The result appears to be the same.

The prior determination at adjudication establishes the matter found for purposes of the subsequent proceeding. *See In re Wheeler,* 87 N.C. App. 189, 194 (1987) (noting similarities in the two approaches).

When collateral estoppel applies, a court may rely on the ultimate conclusion reached in the prior proceeding (for example, that a child was abused) as well as subsidiary findings (for example, that a parent had engaged in a sexual act with the child). *See id.* at 194 (prior finding of sexual abuse of children by father had been fully litigated and was necessary to adjudication of abuse).

(b) ***Prior findings and conclusions from non-adjudication proceedings.*** Recent juvenile decisions have clarified that collateral estoppel applies to findings from a prior proceeding only if the findings were based on clear and convincing evidence, the standard applicable to findings at adjudication. *See In re N.G.,* 186 N.C. App. at 9 (holding that the doctrine of collateral estoppel permits trial courts to rely only on those findings of fact from prior orders that were established by clear and convincing evidence); *In re A.K.*, 178 N.C. App. at 731–32 (to same effect). Collateral estoppel therefore would not apply to findings from non-adjudication hearings, at which the clear and convincing evidence standard does not apply.

Some juvenile decisions have suggested that a court may take judicial notice of findings not subject to the clear and convincing evidence standard, but these decisions appear to be superseded by the above decisions applying collateral estoppel principles. *See In re M.N.C.*, 176 N.C. App. 114, 120–21 (2006) (in a TPR case, permitting the court to take judicial notice of prior findings on the respondent's progress in completing remedial efforts ordered at prior review hearings); *see also In re Johnson*, 70 N.C. App. 383, 388 (1984) (in a TPR case, noting that the trial court reviewed prior orders detailing the parents' lack of progress between the initial juvenile petition and TPR order).

Note: The cases do not distinguish between TPR proceedings by petition, which initiates a new case, and TPR proceedings by a motion in the cause, which is part of an ongoing case; however, the result would appear to be the same. In both instances the findings from prior non-adjudication hearings would not appear to be binding in later proceedings because they would not have been subject to the clear and convincing evidence standard. *See also* 18 James Wm. Moore et. al., Moore's Federal Practice § 134.20[1], at 134-51 (3d ed. 2010) (collateral estoppel limits relitigation of an issue after final judgment; doctrine of the law of the case is similar in limiting relitigation of issues decided at various stages of the same litigation).

Collateral estoppel likely would not apply even if the trial court at a non-adjudication hearing stated that clear and convincing evidence supported its findings. The court's decisions in *In re N.G.* and *In re A.K.* reflect an unwillingness to accord collateral estoppel effect—that is, to bar a party from litigating an issue—based on findings from non-adjudication hearings. In addition, collateral estoppel principles do not apply to bar a party from litigating an issue unless he or she had a full and

fair opportunity to litigate that issue in a prior proceeding. *See Allen v. McCurry,* 449 U.S. 90, 95 (1980) (recognizing that "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case"); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 329 (1971) (recognizing due process basis for the requirement); *In re N.G.,* 186 N.C. App. at 4 (recognizing that doctrine of collateral estoppel operates to preclude parties from retrying "fully litigated issues") (citation omitted). Because of the reduced procedural protections at non-adjudication hearings, collateral estoppel may not apply to findings from non-adjudication hearings for that reason as well. *See generally Wells v. Wells,* 132 N.C. App. 401, 409–15 (1999) (in an alimony case, collateral estoppel did not preclude the wife from relitigating at the final alimony hearing issues ruled on in interim postseparation support hearing in the same case; the court notes the relaxed rules of evidence, the lack of a right to appeal, and other characteristics distinguishing the interim and final hearings); *accord Langdon v. Langdon,* 183 N.C. App. 471, 474 (2007).

(c) ***Hearsay restrictions.*** If collateral estoppel does not apply, findings and conclusions within a prior judgment are ordinarily inadmissible in a later proceeding because they are a form of hearsay—statements made outside the current proceeding, offered as evidence of the truth of those statements. *See generally supra* § 11.5.C (discussing the definition of hearsay). "It is chiefly on this ground that, except where the principle of *res judicata* [or the related principle of collateral estoppel] is involved, the judgment or finding of a court cannot be used in another case as evidence of the fact found." 2 Brandis & Broun § 197, at 109–10; *see also Reliable Props., Inc. v. McAllister,* 77 N.C. App. 783, 787 (1985) ("North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tribunal. This practice remains the same under the new evidence code.") (citation omitted); *cf. Bumgarner v. Bumgarner,* 231 N.C. 600, 601 (1950) (facts found on a motion for alimony pendent lite, a preliminary proceeding in an alimony action, "are not binding on the parties nor receivable in evidence on the trial of the issues").

Findings from a previous judgment are admissible in a later proceeding if the judgment comes within a hearsay exception. *See generally* N.C. R. Evid. 802 ("Hearsay is not admissible except as provided by statute or by these rules."). North Carolina's evidence rules contain one hearsay exception for prior judgments, and ordinarily it would not apply in juvenile cases. *See* N.C. R. Evid. 803(23) & commentary (exception applies to "[j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation"; the commentary notes the need for having an exception because judgments generally cannot be used to prove facts essential to a judgment except where the principle of res judicata applies).[2]

2. When it enacted the rules of evidence, North Carolina chose not to include a second hearsay exception, patterned after Federal Rule of Evidence 803(22), for criminal convictions. The federal hearsay exception allows use of a judgment of conviction to prove "any fact essential to sustain the judgment" in

Juvenile cases have not specifically addressed the applicability of hearsay restrictions to prior findings from non-adjudicatory hearings, such as nonsecure custody or disposition hearings. If collateral estoppel and hearsay principles apply, findings from a non-adjudicatory hearing ordinarily would be inadmissible at an adjudicatory hearing. Of course, this result would not preclude a party from offering testimony or other admissible evidence on the issues that were the subject of the non-adjudicatory findings—for example, evidence of the condition of a parent's home or evidence that a parent had or had not taken certain steps directed by the court. If the rules of evidence do not preclude a party from introducing non-adjudicatory findings at an adjudicatory hearing in a juvenile case, the findings at most would be admissible but not binding (because the findings would not satisfy collateral estoppel requirements). The North Carolina courts have not articulated a rationale, however, for such an approach under the rules of evidence, which apply to adjudicatory hearings. *Cf. In re Ballard*, 63 N.C. App. 580, 590 (1983) (Wells, J., dissenting) (dissent suggests that under due process requirements, a party might be permitted to offer prior findings as some evidence of issues previously heard, subject to rebuttal or refutation; dissent does not address impact of rules of evidence, and it is also unclear whether the prior findings in question were made at an adjudicatory or non-adjudicatory hearing), *rev'd on other grounds*, 311 N.C. 708 (1984).

3. ***Formal concessions; stipulations of fact.*** Formal concessions of a party during litigation, such as stipulations of fact, are considered "judicial admissions." *See In re I.S.,* 170 N.C. App. 78, 86 (2005). They remain in effect for the duration of the case, ordinarily "preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish the stipulated fact." *Id.* [quoting *Thomas v. Poole*, 54 N.C. App. 239, 241 (1981)]; *see also* 2 Brandis & Broun § 198, at 113–14 (describing effect of formal concessions and stipulations and circumstances in which they may not be binding).

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the circumstances described in the exception. Because North Carolina omitted this exception, a criminal conviction is generally not admissible in a later civil case to establish the facts of the offense underlying the conviction. *See* N.C. R. Evid. 803 commentary (noting that exception (22) is reserved for future codification because North Carolina did not adopt the equivalent of the federal hearsay exception for judgments of conviction); *Carawan v. Tate,* 53 N.C. App. 161, 164 (1981) (holding that evidence of conviction of assault was not admissible in a civil action to establish the commission of the assault), *aff'd as modified on other grounds,* 304 N.C. 696 (1982); *see also* 2 Brandis & Broun § 197, at 110 n.74 (collecting cases). Other grounds may still allow use of a criminal conviction or aspects of it. For example, the fact of conviction, as opposed to the facts underlying the conviction, may be used to impeach a witness or, in juvenile cases, to show a basis for abuse designated in the Juvenile Code. *See infra* § 11.8.D.3 (discussing this basis of admissibility of a prior conviction). A guilty plea, being an admission, generally would be admissible in a later civil action against the party who entered the plea. *See supra* § 11.6.B (discussing hearsay exception for admissions of party-opponent); *see also* Michael G. Okun & John Rubin, *Employment Consequences of a Criminal Conviction in North Carolina,* Popular Gov't, Winter 1998, at nn.64-66 and accompanying text (1998), *available at* www.sog.unc.edu/pubs/electronicversions/pg/rubin.htm (discussing the admissibility of a guilty plea as opposed to a conviction); *but see infra* § 11.8.D.3 (explaining that when a party is relying on Evidence Rule 404(b) to show another crime, wrong, or act, the proponent generally may not rely on a criminal conviction).

If a stipulation is from a previous case, it may not preclude a party from litigating the issue in a subsequent case. For purposes of this discussion, however, whether an abuse, neglect, and dependency proceeding is considered a part of or separate from a later TPR proceeding may be inconsequential. In *In re Johnson,* 70 N.C. App. 383, 387–88 (1984), the court considered a prior abuse, neglect, and dependency case to be part of the same "controversy" as a later TPR case and held that a stipulation from the prior proceeding was a binding judicial admission in the later proceeding. If an abuse, neglect, and dependency case should be considered separate from a TPR case, a stipulation from the prior case may still bar relitigation of the issue in the subsequent case based on the principle of "judicial estoppel." *See, e.g., Bioletti v. Bioletti,* ___ N.C. App. ___, 693 S.E.2d 691 (2010) (doctrine of judicial estoppel, which applies to the same *or* related litigation, prevents a party from asserting a legal position inconsistent with one taken earlier in litigation). At the least, a stipulation from a prior case may constitute an "evidential admission," which is not conclusive in a later case but is still admissible. *See* 2 Brandis & Broun § 203, at 130; *UNCC Props., Inc. v. Greene,* 111 N.C. App. 391, 395 (1993) (statement contained in an answer from another proceeding was evidential, not judicial admission).

E. Documentary Evidence, Court Reports, and Other Exhibits

1. ***Summary.*** This section deals with evidence offered in prior proceedings, including reports presented to the court. No established doctrine allows the trial court in one proceeding to take judicial notice of documentary evidence and other exhibits received in prior proceedings. The documentary evidence must satisfy the rules of evidence applicable to the current proceeding. Juvenile decisions, however, appear to allow the trial court to consider documentary evidence from prior proceedings, if admissible in the current proceeding, without the evidence actually being physically reoffered.

2. ***Juvenile cases on documentary evidence.*** Juvenile cases have stated that the trial court may take judicial notice of the underlying case file, including reports submitted to the court in prior disposition hearings. *See, e.g., In re W.L.M.,* 181 N.C. App. 518 (2007). It does not appear, however, that the decisions mean that the information in the reports is conclusively established, as under the traditional approach to judicial notice, or even that the information is admissible in the later proceeding. *See id.* (relying on the presumption that the trial court disregarded incompetent evidence in the files). Rather, it appears that the decisions mean that reports and other evidence received in a prior proceeding do not necessarily have to be physically reoffered into evidence to be considered by the trial court. *See generally In re J.M.,* 190 N.C. App. 379 (2008) (unpublished) (stating that the court at an adjudication hearing may consider prior proceedings but must evaluate the proceedings in accordance with the rules of evidence).

   If this construction is correct, a party still may object to a court report and other documents that were received in a prior proceeding. Thus, a party may object to a document on the ground that the document itself does not meet the requirements for admission under the hearsay exception for business records or another hearsay exception. *See supra* § 11.6.F.2 (discussing the requirements for business records and observing that reports to the court

likely do not satisfy the requirements). If the document is admissible, a party also may have grounds to object to information within the document. *See supra* § 11.6.F.3 (discussing admissibility of information within a business record).

F. Testimony

1. ***Summary.*** This section addresses testimony from prior proceedings, including testimony from adjudication and nonadjudication hearings. Testimony from prior proceedings is hearsay if offered for the truth of the matter asserted in the testimony. It is improper for a trial court to admit testimony from a prior proceeding unless the testimony satisfies a hearsay exception or is offered for a purpose other than its truth, such as impeachment of a witness's current testimony by his or her prior inconsistent testimony.

2. ***Hearsay nature of prior testimony.*** A witness's testimony from a prior proceeding, if offered for its truth, is a form of hearsay because it consists of statements made outside the current proceeding. *See generally supra* § 11.5.C (discussing the definition of hearsay). Even when the testimony is admissible at the prior proceeding—for example, the testimony recounted the witness's own observations and did not consist of hearsay statements—the prior testimony itself is hearsay when offered for its truth and is inadmissible at a later proceeding unless it satisfies a hearsay exception.

   Evidence Rule 804(b)(1) governs "former testimony" and applies to testimony given "at another hearing of the same or a different proceeding." The rule creates an exception for former testimony if two basic conditions are satisfied. First, the witness must be unavailable at the current proceeding. *See* N.C. R. Evid. 804(a) (stating the definition of unavailability); *see generally supra* § 11.6.H.2 (discussing unavailability). Second, the party against whom the former testimony is now offered must have had an opportunity and similar motive to develop the testimony at the prior proceeding. Testimony from a prior nonadjudication hearing, such as a review hearing, may not satisfy this second requirement because the rules of evidence do not apply at such hearings, limiting the opposing party's ability to address the testimony, and because the purposes of review hearings and adjudications differ, which may bear on the opposing party's incentive to address the testimony.

   If the testimony at the prior proceeding was given by a person who is a party in a later proceeding—for example, a parent—the testimony would be admissible against that party as an admission of a party-opponent. *See In re* K.G., 198 N.C. App. 405 (2009) (unpublished) (holding that statements made by respondent-parents at a prior hearing on a domestic violence protective order were admissible as admissions of party-opponents at adjudication in a neglect case). This exception would not permit a party to offer the party's own prior testimony at a later proceeding—for example, DSS could not rely on this exception to offer the prior testimony of one of its employees. *See generally supra* § 11.6.B.3 (discussing the application of the exception to admissions).

   Decisions recognize that judicial notice is not a proper device for considering prior testimony. *See Hensey v. Hennessy,* ___ N.C. App. ___, 685 S.E.2d 541 (2009) (in a case involving a domestic violence protective order, the trial court could not take judicial notice of testimony from prior criminal proceedings; the facts that were the subject of the testimony

must not reasonably be in dispute); *In re J.M.*, 190 N.C. App. 379 (2008) (unpublished) (testimony from a previous proceeding, when offered for the truth of the matter asserted, is hearsay and is not admissible at a proceeding at which the rules of evidence apply unless it satisfies a hearsay exception; judicial notice may not be used as a substitute for complying with hearsay restrictions on the admissibility of former testimony).