

Delinquency and DSS Custody without Abuse, Neglect, or Dependency: How Does That Work?

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In North Carolina, a juvenile¹ may be actively involved with both the state Division of Adult Correction and Juvenile Justice (DACJJ) and a county child welfare department, which is typically a department of social services (DSS). One of the ways a juvenile is involved with both DACJJ and DSS is when a juvenile is ordered to DSS custody in a delinquency action.² The court in the delinquency action can direct that the juvenile be placed in DSS custody in one of three ways: (1) by ordering nonsecure custody, which can occur as early as the filing of the petition,³ (2) by entering a dispositional order, which occurs only after the juvenile is adjudicated delinquent,⁴ and (3) by entering a guardianship order, which can occur at any time in the action.⁵ The criteria and procedures that apply to each of these types of delinquency orders differ, yet they all share one common characteristic: the juvenile involved has not been alleged, substantiated, or adjudicated to be abused, neglected, or dependent, and there is/has been no corresponding abuse, neglect, or dependency court action. Instead, the juvenile involved has been placed in DSS custody or guardianship in an action that was commenced because of the juvenile's alleged delinquent behavior.

A delinquency action differs from an abuse, neglect, or dependency action in various and significant ways, including (1) the basis for initiating the particular type of action, (2) the purpose of the action, (3) the laws and procedures governing the action, (4) the parties to the action and their rights, and (5) the ultimate outcome. The purposes, laws, and procedures of the delinquency action are the core legal foundation for the cases described in this bulletin. Some laws applicable to abuse, neglect, or dependency actions are incorporated into the delinquency statutes when the juvenile is placed in DSS custody. However, those abuse, neglect, or dependency laws do not fit squarely into a delinquency action, creating a complicated and unclear process. When a juvenile is placed in DSS custody through a delinquency order, the lack of clarity about

1. Under the delinquency and abuse, neglect, or dependency statutes, "juvenile" is defined very specifically, and the meaning of the term can vary based on a young person's age. For purposes of this bulletin, "juvenile" is limited to the definition that applies to delinquency cases under Chapter 7B, Section 1501, Subsections (7) and (17) of the North Carolina General Statutes (hereinafter G.S.). Until December 1, 2019, a delinquent juvenile is a person who is at least 6 years old and less than 16 years old who is not emancipated, married, or a member of the Armed Forces. Effective December 1, 2019, the maximum age is raised to 18, which will result in an increased number of juveniles alleged and adjudicated delinquent. *Compare* G.S. 7B-101(14) ("juvenile" in an abuse, neglect, or dependency case is a person younger than 18 who is not emancipated, married, or a member of the Armed Forces).

2. Other ways a juvenile may be involved with both the juvenile justice and child welfare systems are when the juvenile is (1) the subject of an abuse, neglect, or dependency action and is subsequently the subject of a delinquency petition or (2) the subject of a delinquency action and, during that proceeding, there is cause to suspect that the juvenile is abused, neglected, or dependent, resulting in a mandated report to a county department of social services (DSS) and a subsequent abuse, neglect, or dependency case. This bulletin does not discuss the process for youth involved with both systems through one of these two pathways. Additionally, "undisciplined" youth may also be ordered into the custody of a county DSS through a nonsecure custody, disposition, or guardianship order. G.S. 7B-1903; -2503; -2001. This bulletin addresses DSS custody orders only in the context of delinquency proceedings.

3. G.S. 7B-1905(a).

4. G.S. 7B-2506(1)c.

5. G.S. 7B-2001.

the process that results from a reading of laws, appellate opinions, and policies, and the absence of an underlying abuse, neglect, or dependency action, raises many questions. Those questions include (1) which procedures control, (2) what laws apply, and (3) what rights the parties have.

This bulletin explores the issues that arise when a juvenile has been placed in DSS custody through a delinquency order,⁶ examining the laws that are current through the 2017–2018 session of the North Carolina General Assembly. It is organized as follows: Part One discusses the prevalence of these types of court orders, Part Two addresses parents' constitutional rights, Part Three covers delinquency nonsecure custody orders placing a juvenile in DSS custody, Part Four deals with delinquency dispositional orders placing a juvenile in DSS custody, Part Five focuses on DSS guardianship orders in delinquency proceedings, and Part Six emphasizes federal funding issues related to a juvenile's placement in foster care through a delinquency action.

Through the discussion of the different types of delinquency orders (nonsecure custody, dispositional, and guardianship, discussed in Parts Three through Five), the following questions are examined:

- What is the nature of the order?
- What process is required and what issues arise from that process because of gaps, uncertainties, and/or conflicts in the laws?
- What are the elements of the order?
- What ongoing process, if any, is required to review the order?
- What is the order's impact on parents' constitutional rights to the care, custody, and control of their child?
- When and how does the order terminate?

Recognizing that readers have different levels of experience and knowledge—ranging from novice to expert—related to the laws that apply in abuse, neglect, or dependency actions versus delinquency actions, the discussion in Parts Three through Five starts with an introductory overview of the particular type of order, the criteria applicable to it, and the governing process before moving on to the more complicated questions that arise when DSS becomes the guardian or custodian of a juvenile. When possible, answers to such questions will be provided; however, some of the issues raised in this bulletin remain unresolved.

Part One: Prevalence

There are no reliable statistics on the question of how often juveniles in North Carolina are placed into DSS custody solely as the result of a delinquency proceeding. While DACJJ tracks the number of juveniles placed in its custody very closely, it does not collect data on the number of DSS placements made through a delinquency proceeding. These types of DSS placements fall within a landscape that differs from all other foster care placements. The vast majority of foster care placements are driven through the standard abuse, neglect, or dependency pathway, which in North Carolina involves a state-supervised, county-administered system made up of the 100 county DSS's and the state Department of Health and Human Services (DHHS). Although DHHS collects and maintains data from the state's 100 counties, it does not document the

6. The issue of whether a youth involved in a delinquency proceeding should be placed in DSS custody is beyond the scope of this bulletin.

number of juveniles who are placed in the custody of a county DSS through a court order in a delinquency proceeding. An individual county DSS might maintain this information, but there is not a central repository for the data. Although these placements involve a court order, the state's court case management system for juvenile proceedings, JWisE, also does not capture the number of children who are ordered into DSS custody in a delinquency proceeding.

North Carolina does not appear to be alone regarding an absence of data collection specific to this population. Two national surveys, the Census of Juveniles in Residential Placement and the Juvenile Residential Facility Census, explicitly exclude facilities for dependent/neglected youth and foster homes from their counts.⁷ Data pertaining exclusively to juveniles placed into DSS custody as the result of a court order in a delinquency case is, therefore, difficult to identify both at the state and national level. Additionally, not all states permit the placement of juveniles in foster care through a delinquency action.⁸

While concrete data regarding prevalence is not available, it is possible that use of DSS custody in the context of a delinquency case may increase once the Juvenile Justice Reinvestment Act (JJRA)⁹ takes full effect on December 1, 2019. The JJRA raises the age of juvenile court jurisdiction to include youth who allegedly commit offenses (that would be crimes were they adults) when they are 16 or 17 years old.¹⁰ Currently (and until December 1, 2019), these youth are processed as adults in criminal court for any criminal charge. The criminal court does not have the authority to place a 16- or 17-year-old youth in DSS custody for either pretrial custody or sentencing after conviction. DSS custody therefore has never been available for cases in which the defendant is 16 or 17 years old at the time of the alleged offense.

Following JJRA implementation, the number of juvenile delinquency petitions filed is expected to increase substantially.¹¹ The use of nonsecure custody, guardianship, or a dispositional alternative placing a juvenile in DSS custody will now become available to the juvenile court in these cases involving older adolescents.¹² It is projected that there will be 3,465 new Level 1 and Level 2 dispositions following JJRA implementation.¹³ Placement into DSS custody will be one of many dispositional options available to the court in these cases. Given the

7. See Juvenile Justice Geography, Policy, Practice & Statistics (JJGPS), *Systems Integration*, "Reported Data," JJGPS.ORG, <http://www.jjgps.org/systems-integration#reported-data> (last visited Dec. 13, 2018), and Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Compendium of National Juvenile Justice Datasets*, "Juvenile Residential Facility Census," OJJDP.GOV, <https://www.ojjdp.gov/ojstatbb/compendium/asp/Compendium.asp?selData=9> (last visited Dec. 13, 2018). While the JJGPS's national data-collection efforts address systems integration measures, the JJGPS only collects data on the number of youth who are under the care of the state child welfare system and then transferred into the custody of the state juvenile justice system.

8. There is no statutory authority for transferring into DSS custody a juvenile adjudicated delinquent in Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Maryland, New Mexico, Oklahoma, South Dakota, Utah, and Washington.

9. S.L. 2017-57, §§ 16D.4.(a)–16D.4.(tt).

10. *Id.* § 16D.4.(a).

11. N.C. DEP'T OF PUB. SAFETY, DACJJ, JUVENILE JURISDICTION ADVISORY COMMITTEE—JUVENILE AGE INTERIM REPORT 32 (Mar. 1, 2018), <https://www.ncdps.gov/documents/juvenile-jurisdiction-advisory-committee-juvenile-age-interim-report-march-2018>.

12. The JJRA limits the court's ability to issue a delinquency dispositional order placing a juvenile in DSS custody to juveniles who are under the age of 18. See S.L. 2017-57, § 16D.4.(g).

13. *Id.* See also G.S. 7B-2508(c), (d) (Level 1 disposition is known as "Community Disposition" and Level 2 as "Intermediate Disposition").

potential for increased use of DSS custody as a result of JJRA implementation, it is important to understand the complex legal structure that governs delinquency cases that result in DSS custody orders.

Part Two: Parents' Constitutional Rights

Parents have a constitutional right to raise their children.¹⁴ Given that the three types of delinquency orders that place a juvenile in DSS custody—nonsecure custody, dispositional, and guardianship—impact parents' rights, understanding parents' constitutional rights and the circumstances under which the state may interfere with those rights is crucial.

One stated purpose of the North Carolina Juvenile Code (G.S. Chapter 7B) as applied to delinquency cases is to “provide uniform procedures that assure fairness and equity [and] that protect the constitutional rights of juveniles, *parents*, and victims”¹⁵ A parent's substantive and procedural rights are affected in a delinquency action. This part of the bulletin sets forth the legal framework of those rights, as it shapes the discussion of how each of the different DSS custody orders addressed in Parts Three through Five of this bulletin impact a parent's constitutional rights.

Substantive Rights: Care, Custody, and Control

It is well-settled law that parents have the right to rear their children without state interference. The U.S. Supreme Court has long recognized that parents have a constitutional liberty interest in the companionship, custody, care, and control of their children.¹⁶ This liberty interest arises from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.¹⁷ The Supreme Court has also recognized that parents' rights are not absolute.¹⁸ There is a presumption that parents act in their children's best interests, but when a parent is unfit, the state may intervene.¹⁹

Both the North Carolina Supreme Court and Court of Appeals have adopted the U.S. Supreme Court's holdings regarding parents' constitutional rights. The North Carolina appellate courts recognize parents' paramount constitutional liberty interest in the care, custody, and control of their children and limit a state's or third party's interference with those rights to when the parent is unfit, has neglected the child, or has acted inconsistently with his or her paramount constitutional rights as a parent.²⁰

14. See *Troxel v. Granville*, 530 U.S. 57 (2000).

15. G.S. 7B-1500(4) (emphasis added).

16. See, e.g., *Troxel*, 530 U.S. at 65, and cases cited therein (stating that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court;” declaring a non-parent visitation statute unconstitutional as applied where grandparents were awarded visitation rights based solely on the lower court's determination of the children's best interest, without a finding of parental unfitness or any special weight given to the parents' determination of the children's best interests).

17. *Troxel*, 530 U.S. 57.

18. *Id.*

19. *Id.*

20. See, e.g., *Petersen v. Rogers*, 337 N.C. 397 (1994); *Price v. Howard*, 346 N.C. 68 (1997); *Adams v. Tessener*, 354 N.C. 57 (2001); *Owenby v. Young*, 357 N.C. 142 (2003); *Diehl v. Diehl*, 177 N.C. App. 642 (2006); *In re D.M.*, 211 N.C. App. 382 (2011).

The general rule in a custody dispute between a parent and a non-parent is that the parent is entitled to custody unless clear and convincing evidence supports a determination that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's protected status as a parent.²¹ If the court determines that one of those circumstances exists by clear and convincing evidence, the court may apply a "best interest" determination when ordering custody between a parent and non-parent.²² A parent may waive his or her right to the court finding that addresses the parent's constitutionally protected status when the parent does not raise the issue before the trial court and had an opportunity to do so.²³

Abuse, neglect, and abandonment by a parent constitute conduct inconsistent with the parent's protected status; other conduct must be evaluated on a case-by-case basis to determine whether it is inconsistent with a parent's constitutionally protected rights.²⁴ There is no bright-line test for determining if a parent has acted inconsistently with his or her parental rights.²⁵ The determination is not based on whether the conduct consisted of good or bad acts; instead, the court considers the voluntariness of the parent's actions and whether there has been a relinquishment of exclusive parental authority to a third person.²⁶ As part of its analysis, the court looks at the parent's intentions.²⁷ Additionally, "evidence of a parent's conduct should be viewed cumulatively."²⁸

Although a delinquency action is not a traditional custody proceeding, as with a civil custody action or an abuse, neglect, or dependency action, a delinquency order that affects a parent's substantial rights—including the juvenile's custody—is explicitly acknowledged by the Juvenile Code.²⁹ The delinquency statutes and appellate cases are silent about whether findings related to a parent's conduct and his or her paramount constitutional rights to care, custody, and control of the child are required when custody is removed from a parent and placed with DSS through a delinquency order.

Procedural Rights

Both of a juvenile's parents are parties to a delinquency action.³⁰ As a party, each parent is entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures.³¹ Some of those rights are recognized in the Juvenile Code. For example,

21. See the cases cited *supra* note 20.

22. *Price*, 346 N.C. 68; *Owenby*, 357 N.C. 142.

23. See *In re R.P.*, ___ N.C. App. ___, 798 S.E.2d 428 (2017) (holding father did not waive his right to the findings as there was not a proper hearing on the issue for the father to raise an objection on constitutional grounds); *In re C.P.*, ___ N.C. App. ___, 812 S.E.2d 188 (2018) (mother failed to preserve the issue when she failed to raise it at permanency planning hearing resulting in guardianship order).

24. *Price*, 346 N.C. 68.

25. *Boseman v. Jarrell*, 364 N.C. 537 (2010); *In re A.C.*, 247 N.C. App. 528 (2016).

26. *Mason v. Dwinell*, 190 N.C. App. 209 (2008).

27. *Mason*, 190 N.C. App. 209; *A.C.*, 247 N.C. App. 528.

28. *Owenby v. Young*, 357 N.C. 142, 147 (2003).

29. See, e.g., G.S. 7B-1805(b)(3)a. ("the court . . . will have jurisdiction to enter orders affecting substantial rights of the juvenile and of the parent . . . including orders that . . . [a]ffect the juvenile's custody").

30. G.S. 7B-1807.

31. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds); see also *In re H.D.F.*,

parents must be named in the petition;³² be summonsed to appear in court;³³ receive notice of all scheduled hearings;³⁴ and have the right to introduce evidence, participate in hearings, and appeal certain orders.³⁵ Although the juvenile court has jurisdiction over the juvenile's parents and may modify their custodial rights, parents do not have a statutory right to counsel, or to appointed counsel if indigent, in the delinquency action.³⁶ Unless parents retain their own attorneys, they will be unrepresented in the various hearings held in delinquency actions.

Substantively and procedurally, parents' rights are implicated by the three types of delinquency orders that place a juvenile in DSS custody—nonsecure custody, dispositional, and guardianship. How those rights are affected depends on the type of custody order at issue. These matters are addressed as part of the comprehensive discussion of each type of order examined in Parts Three through Five of this bulletin.

Part Three: Nonsecure Custody in Delinquency Proceedings

In a delinquency proceeding, the court may order a juvenile into the custody of DSS through a nonsecure custody order pursuant to G.S. 7B-1903(a).

The Nature of the Order

Nonsecure custody can be used in a juvenile delinquency case (1) while an adjudication of a petition is pending and (2) after an adjudication when either the disposition or placement pursuant to a disposition is pending.³⁷ In this context, nonsecure custody offers the juvenile a residential setting outside of his or her home, as opposed to placing the juvenile in a more correctional, secure facility. The transfer of custody to DSS for nonsecure custody shifts the juvenile into a foster care setting. The court may opt for this setting if, for example, (1) the delinquency case involves victims who are in the home and the juvenile does not pose a broader risk to public safety or (2) the parents refuse to allow their child to return home during the pendency of a delinquency adjudication. This use of nonsecure custody is driven by reasons that are very different than those justifying a juvenile's placement in nonsecure custody in the context of an abuse, neglect, or dependency action.³⁸ Yet, functionally, a youth in a delinquency case can be placed in the same nonsecure DSS custody setting as a youth who is alleged to be abused, neglected, or dependent.

197 N.C. App. 480 (2009) (reversing a neglect adjudication when the required notice of key events in the proceeding was not given to the *pro se* respondent parent).

32. See, e.g., G.S. 7B-1802.

33. See, e.g., G.S. 7B-1805.

34. G.S. 7B-1807.

35. See, e.g., G.S. 7B-2405; -2501(b); -2604(a).

36. Note that section 15 of proposed House Bill 301 (H. 301) of the 2019 Legislative Session of the General Assembly amends G.S. 7B-2506(1)c. and entitles indigent parents to court-appointed counsel in placement review hearings conducted pursuant to G.S. 7B-906.1 when a juvenile is ordered into DSS custody as a delinquency dispositional alternative. See Part Four of this bulletin for a discussion of those hearings. House Bill 301 appears to limit court-appointed attorney representation to those hearings only and does not address the dispositional hearing that takes place when the court is first considering DSS custody or hearings related to orders for nonsecure custody or guardianship with DSS.

37. See G.S. 7B-1902; -1903 (a)–(c).

38. Compare G.S. 7B-1903 (applying to delinquency) with 7B-503 (applying to abuse, neglect, or dependency).

The Juvenile Code does not define the term “nonsecure custody”. Although it involves the juvenile’s placement in an out-of-home residential setting, it is unclear whether nonsecure custody includes physical custody, legal custody, or both. Regardless of the type of custody that is involved, the nonsecure custody setting is intended to last only as long as is needed to complete the adjudication process or obtain a longer-term dispositional placement.³⁹

Delinquency Nonsecure Custody Process and Issues That Arise from That Process

Initial Delinquency Nonsecure Custody Order Process

Once the petition alleging that a juvenile is delinquent is filed and a request for nonsecure custody is made, the court has authority to place the juvenile into nonsecure custody.⁴⁰ District court judges are authorized by statute to issue nonsecure custody orders, and chief district court judges are statutorily allowed to delegate this authority to the chief court counselor or the chief court counselor’s counseling staff by administrative order.⁴¹ It is therefore possible that a juvenile court counselor is unilaterally making the initial decision to place a juvenile into nonsecure custody outside of a hearing. It is also possible for a juvenile to be ordered into a nonsecure custody setting at any court appearance while adjudication, disposition, or placement is pending.

Placement into nonsecure custody can be ordered only if the statutory criteria provided in G.S. 7B-1903(a) are met. According to this criteria, nonsecure custody can be ordered only after the court considers releasing the juvenile to a parent, guardian, custodian, or other responsible adult.⁴² Further, nonsecure custody cannot be ordered unless the criteria pictured in Figure 1, below, are met.⁴³ Before a court can issue a nonsecure custody order, the criteria required by boxes 1 through 3 in the figure must be found, including at least one of the criteria set out in boxes 2a through 2g.⁴⁴

If the statutory criteria for nonsecure custody are met, custody can be given to DSS or to a person designated in the order for temporary residential placement.⁴⁵ Before placing the juvenile in nonsecure custody with DSS, the court must consider and give priority to placement with a fit and willing relative who is able to provide proper care and supervision to the juvenile.⁴⁶ If such placement is not available or is contrary to the juvenile’s best interests, nonsecure custody can be ordered to DSS.⁴⁷ The Interstate Compact on the Placement of Children (ICPC) applies to out-of-state nonsecure custody placements.⁴⁸

39. G.S. 7B-1903(a)–(c).

40. G.S. 7B-1902; -1903(a).

41. G.S. 7B-1902. The reader is advised to check with the office of the clerk of superior court to see if his or her local judicial district has such an order in place.

42. G.S. 7B-1903(a).

43. G.S. 7B-1903(a)(1) also allows for the use of nonsecure custody if the juvenile is a runaway and consents to nonsecure custody. While it is possible that a juvenile alleged to be delinquent might also run away, juveniles who run away fall into the category of “undisciplined” youth under G.S. 7B-1501(27)(a). This bulletin does not address the use of DSS custody in the context of undisciplined juvenile matters. Therefore, the use of nonsecure custody for youth who run away is not addressed here.

44. G.S. 7B-1903(a), (b).

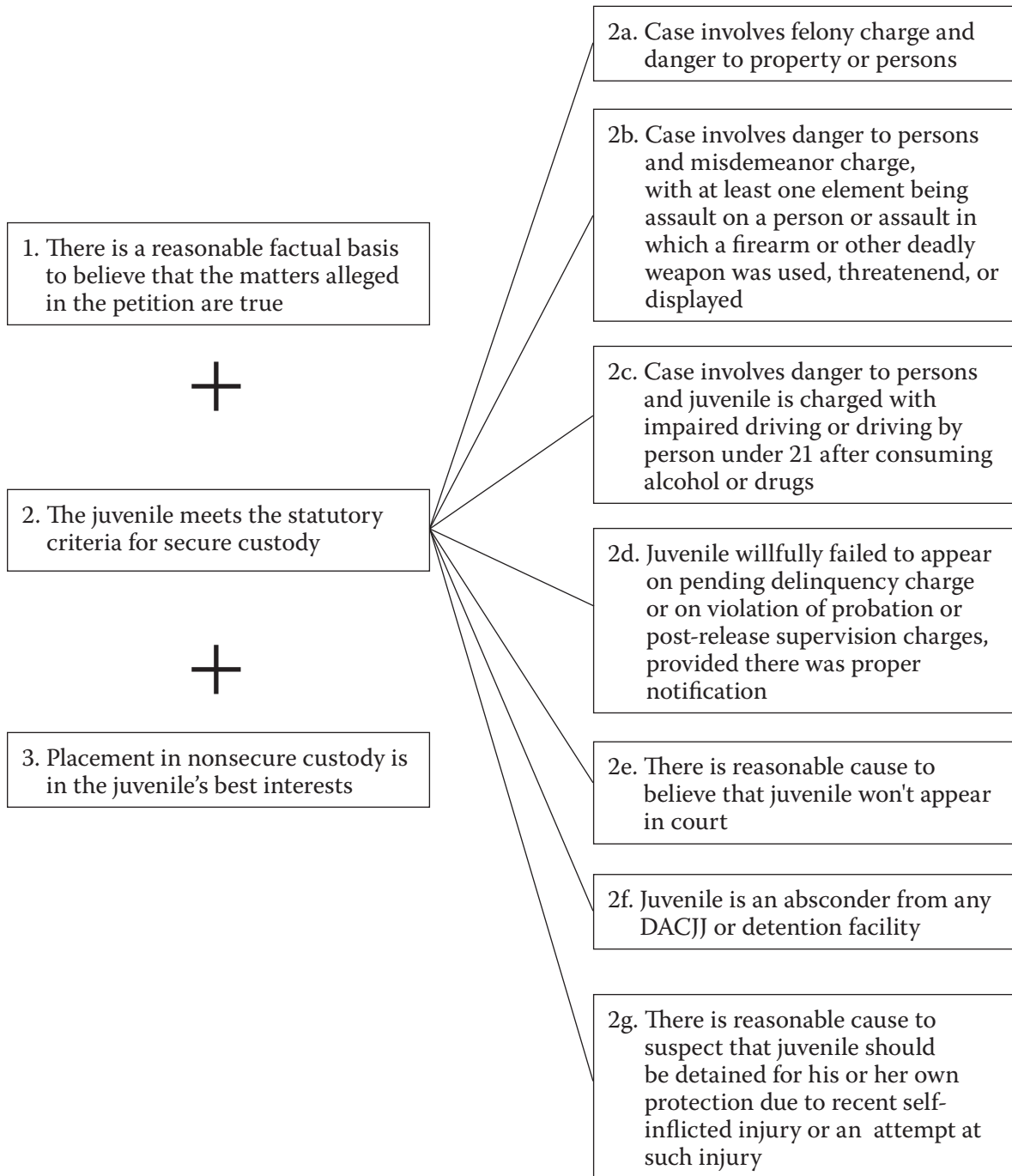
45. G.S. 7B-1905(a).

46. *Id.*

47. *Id.*

48. *Id.* See also G.S. 7B-3800 (ICPC).

Figure 1. Criteria for Nonsecure Custody Order in Delinquency Action



Juveniles are not likely to be represented by counsel if the initial nonsecure custody order is made immediately following the filing of the delinquency petition. Those custody orders are often issued outside of a formal court hearing. The court counselor requests that the judge⁴⁹ sign the order or, if authorized by administrative order, the court counselor issues the initial order. A juvenile will begin to be represented by counsel once his or her case is formally scheduled for court.⁵⁰

Role of DSS in Initial Delinquency Nonsecure Custody Orders

While nonsecure custody orders can place the juvenile in DSS custody, no Juvenile Code provision mandates that DSS receive notice or have an opportunity to be heard prior to the entry of the initial nonsecure custody order. The absence of DSS involvement in this initial process can create several gaps. The court is awarding physical and/or legal custody to an agency over which it has no personal jurisdiction. The court is not given an opportunity to hear the DSS perspective regarding placement or service availability, either through DSS or other options of which DSS may be aware. DSS also may have no familiarity with the juvenile and/or family prior to the entry of the order placing the juvenile in its nonsecure custody, making immediate arrangements for placement and/or services difficult. The ability to use federal Title IV-E funding to support the foster care placement of the child will also be compromised if DSS does not have the opportunity to be heard on the initial placement into foster care.⁵¹ This requirement for the use of federal foster care funding is discussed in Part Six of this bulletin.

Elements of the Initial Delinquency Nonsecure Custody Order

The initial nonsecure custody order must be in writing.⁵² It also must direct law enforcement or other authorized person to assume custody of the juvenile and make due return on the order.⁵³ A copy of the order must be provided to the parent, guardian, or custodian, and a copy of the delinquency petition and the order has to be provided to the person or agency with whom the

49. G.S. 7B-1804 provides that a magistrate has authority to accept the petition for filing in emergency situations when the office of the clerk is closed and the petition is required to obtain a secure or nonsecure custody order. However, there is no express statutory authority for a magistrate to issue a nonsecure custody order. G.S. 7B-1907 authorizes telephonic approval of a nonsecure custody order, and thus it is possible that the first nonsecure custody order in a delinquency case may be approved telephonically by the judge or the court counselor (if designated by administrative order). In this circumstance, the magistrate would sign the nonsecure custody order as the “person receiving telephonic approval” of that order. See LaToya Powell, *The Magistrate’s Role in Filing Juvenile Delinquency and Undisciplined Petitions*, ON THE CIVIL SIDE: A UNC SCH. OF GOV’T BLOG (Oct. 5, 2016), <https://civil.sog.unc.edu/the-magistrates-role-in-filing-juvenile-petitions/>.

50. G.S. 7B-1906(c).

51. Title 42, Chapter 7, Subchapter IV, Part E of the United States Code (referred to as Title IV-E of the Social Security Act), “Federal Payments for Foster Care and Adoption Assistance,” outlines federal law with which a state must comply in order to receive federal funding for foster care and adoption assistance services within the state. See also N.C. DIV. OF SOC. SERVS., CHILD WELFARE SERVS., CHILD WELFARE FUNDING MANUAL § 1500.II.B.2.D.1.D. (Apr. 2017) (hereinafter CHILD WELFARE FUNDING MANUAL), <https://www2.ncdhhs.gov/info/olm/manuals/dss/csm-78/man/Section%201500.pdf>.

52. G.S. 7B-1904.

53. *Id.*

juvenile is being placed.⁵⁴ DSS should therefore receive a copy of the order if they are ordered to take nonsecure custody of the juvenile.

The North Carolina Administrative Office of the Courts (AOC) has developed a form order for nonsecure custody that is intended for use in delinquency matters, AOC-J-441.⁵⁵ This form tracks many of the statutory requirements already identified in this section. Several additional findings are also included on the form order, including

- continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;
- DSS made reasonable efforts to prevent or eliminate the need for placement, with space to detail those efforts;
- efforts to prevent the need for placement were precluded by an immediate threat of harm to the juvenile, and placement in the absence of such efforts was reasonable, with space to detail the immediate threat of harm; and
- DSS did not make reasonable efforts to prevent or eliminate the need for placement and those efforts were not precluded by an immediate threat of harm to the juvenile.

These specific findings are not required by the Juvenile Code; however, they serve an important financial interest. These findings are present on the AOC form in order to preserve potential federal Title IV-E funding for the use of foster care placements in this context. See Part Six of this bulletin for further details.

Delinquency Continued Nonsecure Custody Order Process

Juveniles who are ordered into nonsecure custody are entitled to regular, ongoing hearings to make new determinations about the need for continued nonsecure custody. An initial hearing on the need to continue a nonsecure custody order must be held within seven calendar days of a juvenile's initial entry into nonsecure custody.⁵⁶ However, if the initial nonsecure custody order was issued by a juvenile court counselor, then a hearing on the need for continued custody must be held more quickly.⁵⁷ This first hearing on the need for continued nonsecure custody may not be continued or waived.⁵⁸ If a juvenile is continued in nonsecure custody at this initial hearing, a subsequent hearing on continued nonsecure custody must be held within seven business days.⁵⁹ Hearings then must be held at least every thirty days if nonsecure custody is continued.⁶⁰ These subsequent hearings on the need for nonsecure custody may be continued if the juvenile

54. *Id.*

55. N.C. Administrative Office of the Courts, Order for Nonsecure Custody (Undisciplined/Delinquent), AOC-J-441, https://www.nccourts.gov/assets/documents/forms/j441-en.pdf?ZMMIs0qF9x3G7oOMbdcm9V_aSsKb6cDN.

56. G.S. 7B-1906(a).

57. *Id.* (providing that, if the initial nonsecure custody order was issued by a juvenile court counselor, the first hearing on that order must be held on the day of the next regularly scheduled session of district court in the city or county where the order was entered. If the next regularly scheduled session of district court in that locality will not occur prior to the expiration of seven calendar days, then the hearing can be conducted at another regularly scheduled district court session in the same district).

58. *Id.*

59. G.S. 7B-1906(b).

60. *Id.*

consents through counsel.⁶¹ This hearing schedule remains the same anytime a juvenile is held in nonsecure custody, including following adjudication pending disposition and following disposition while awaiting placement.

The need for continued nonsecure custody pursuant to the criteria set out in G.S. 7B-1903 must be determined at each of these hearings (see Figure 1).⁶² The court must receive testimony and allow the juvenile, the juvenile's parent, and any guardian⁶³ or custodian⁶⁴ an opportunity to introduce evidence and examine witnesses.⁶⁵ The usual rules of evidence do not apply.⁶⁶ The State bears the burden of proving, by clear and convincing evidence, that restraints on the juvenile's liberty are necessary and that there is no acceptable less intrusive alternative in order to extend the nonsecure custody order.⁶⁷ This structure is similar to the nonsecure custody structure in an abuse, neglect, or dependency action.⁶⁸ However, the fundamental criteria on which a decision to order nonsecure custody is made focus on elements related to the juvenile's behavior as it relates to the delinquency proceeding. This is substantially different than the criteria that govern nonsecure custody determinations in abuse, neglect, or dependency proceedings.⁶⁹

Role of DSS in Subsequent Delinquency Nonsecure Custody Orders

One of the procedural issues that arises when a juvenile is placed in DSS nonsecure custody involves the role of DSS in the proceeding. If nonsecure custody includes legal custody, DSS becomes the juvenile's custodian.⁷⁰ Once DSS has been appointed custodian of the juvenile, DSS becomes a party to the proceeding.⁷¹ Therefore, DSS should receive notice of and be provided an opportunity to be heard at all nonsecure custody hearings that occur after the juvenile is

61. *Id.*

62. G.S. 7B-1906(e).

63. The juvenile may have a guardian of the person appointed (1) through the clerk of superior court pursuant to G.S. Chapter 35A, Article 6 if he or she has no natural guardian or (2) in the delinquency proceeding pursuant to G.S. 7B-2001. Although not discussed in this bulletin, if a juvenile is the subject of an abuse, neglect, or dependency action, he or she may have a guardian appointed in that action pursuant to G.S. 7B-600. There may also be a guardianship order entered by another state that is entitled to full faith and credit.

64. G.S. 7B-1501(6) (definition of "custodian").

65. G.S. 7B-1906(d).

66. *Id.*

67. *Id.*

68. The designated time periods to conduct hearings on the need for continued nonsecure custody in a delinquency action mirror the time periods in an abuse, neglect, or dependency action. *See* G.S. 7B-506(a), (e), and (f), "Hearing to determine the need for continued nonsecure custody." However, in an abuse, neglect, or dependency proceeding, the first hearing on the need for nonsecure custody may be continued (but cannot be waived) for up to ten business days if the parent, guardian, custodian, or caretaker and the juvenile's guardian ad litem (if appointed) consent.

69. *Compare* G.S. 7B-1903 (applying to delinquency actions) *with* 7B-503 (applying to abuse, neglect, or dependency actions).

70. *See* G.S. 7B-1501(6) ("custodian" is defined as "the person or agency that has been awarded legal custody of a juvenile by a court").

71. G.S. 7B-1807.

initially placed in DSS custody. As custodian, DSS has the statutory right to introduce evidence, to be heard in their own behalf, and to examine witnesses at nonsecure custody hearings.⁷²

However, if nonsecure custody solely transfers physical custody of the juvenile to DSS, DSS has placement responsibility for the juvenile but is not the juvenile's custodian.⁷³ There is nothing in the nonsecure custody statute that requires the participation of the person or agency who has physical custody or placement authority for the juvenile in the hearing on the need for continued nonsecure custody. DSS clearly has relevant information for the parties and the court regarding the juvenile's placement. To present that information, DSS could participate in the hearing on the need for continued nonsecure custody as a witness. Because delinquency cases are civil in nature,⁷⁴ it may be possible for DSS to file a motion to intervene under Rule 24 of the North Carolina Rules of Civil Procedure. However, the DSS interest in intervening related to nonsecure custody will be time-limited, lasting only as long as the juvenile is ordered into DSS nonsecure custody.

Elements of Delinquency Continued Nonsecure Custody Orders

Many of the requirements that attach to the initial nonsecure custody order attach to any continued nonsecure custody order as well. For example, every nonsecure custody order must be in writing.⁷⁵ Also, like the initial order, subsequent orders can only be issued if the juvenile meets the statutory criteria laid out in Figure 1.⁷⁶ However, there is an elevated statutory standard for orders that continue nonsecure custody following the initial order. G.S. 7B-1906 explicitly requires that these continuation orders contain appropriate findings of fact that include the evidence relied on in deciding to continue nonsecure custody and the purposes of continued nonsecure custody.⁷⁷ Form AOC-J-441 can be used for all nonsecure custody orders.

Can Delinquency Nonsecure Custody Orders Be Appealed?

Only final orders are appealable in delinquency proceedings.⁷⁸ This includes (1) any order finding an absence of jurisdiction, (2) any order which in effect determines the action and prevents a judgment from which an appeal could be taken, (3) an order of disposition, and (4) an order modifying custodial rights.⁷⁹ While nonsecure custody orders modify custody by placing a juvenile into the custody of either DSS or another person, these orders are temporary in nature. It is therefore difficult to see how a nonsecure custody order could be considered final. There are no appellate cases that address the finality of an order of nonsecure custody in the context of a delinquency case.

While there does not appear to be a right to an appeal of a nonsecure custody order, it is possible that relief could be sought pursuant to a writ of certiorari. Rule 21 of the North Carolina Rules of Appellate Procedure allows for appellate review when no right of appeal from an

72. G.S. 7B-1906(d).

73. See *supra* note 70.

74. *In re Bullabough*, 89 N.C. App. 171 (1988).

75. G.S. 7B-1906(g).

76. G.S. 7B-1906(e).

77. G.S. 7B-1906(g).

78. G.S. 7B-2602.

79. *Id.*

interlocutory order exists.⁸⁰ However, the absence of case law based on writs of certiorari filed in response to nonsecure custody orders suggests that this is not standard practice in North Carolina. This may be related, in part, to the very short-term nature of these orders.

Impact on Parents' Constitutional Rights

The Juvenile Code neither defines “nonsecure custody” nor addresses whether nonsecure custody involves legal custody, physical custody, or both. This is in stark contrast to the Juvenile Code’s specificity when referencing “temporary custody”⁸¹ before a delinquency petition is filed and commitment to a youth development center after an adjudication when a Level 3 disposition⁸² (the maximum disposition level available to the court) is ordered. In both circumstances, custody of the juvenile is limited to physical custody.⁸³ The impact of a nonsecure custody order (whether initial or continued) on a parent’s constitutional rights varies depending on the type of custody that is ordered—physical, legal, or both.

The Juvenile Code also does not define “legal custody” or “physical custody.” North Carolina’s appellate courts have described “legal custody” as referring “generally to the right and responsibility to make decisions with important long-term implications for a child’s best interests and welfare.”⁸⁴ Types of decisions falling under this definition include those related to education, health care, religion, discipline, and people with whom the juvenile may associate.⁸⁵ Physical custody involves the physical care and supervision of the juvenile.⁸⁶ Physical custody includes making decisions that involve the child’s daily routine and not matters with long-range consequences.⁸⁷

A transfer of physical custody of the juvenile has less of an impact on parents’ rights than a transfer of both legal and physical custody. If DSS is given only physical custody of a juvenile, the parents retain decision-making authority over the juvenile for issues that have long-range consequences, including educational, religious, and medical issues. So long as DSS does not place a juvenile with his or her parent, a transfer of physical custody of the juvenile to DSS through a nonsecure custody order results in the parent’s loss of the right to have the child reside with him or her for the duration of the nonsecure custody order. The juvenile’s removal from his or her parent’s physical custody is based on the actions of the juvenile and the need to

80. N.C. R. App. P. 21(a)(1).

81. When the criteria of G.S. 7B-1900 and -1901 are met, a law enforcement officer may take physical custody of a juvenile without a court order and provide personal care and supervision to the juvenile until a secure or nonsecure custody order can be obtained. Temporary custody may only occur for a maximum of twelve hours, unless one of those hours falls on a weekend or legal holiday, in which case the maximum time period is twenty-four hours.

82. See G.S. 7B-2506(24); -2508(e); -2513.

83. G.S. 7B-1901 (“temporary custody means the taking of physical custody . . .”); -2513(g) (“Commitment of the juvenile to [DAC]] for placement in a youth development center transfers only physical custody of the juvenile. Legal custody remains with the parent, guardian, custodian, agency, or institution in whom it was vested”).

84. *In re M.M.*, ___ N.C. App. ___, ___, 795 S.E.2d 222, 224 (2016) (quoting *Peters v. Pennington*, 210 N.C. App. 1, 17 (2011)).

85. See, e.g., *Diehl v. Diehl*, 177 N.C. App. 642 (2006); *Petersen v. Rogers*, 337 N.C. 397 (1994).

86. See G.S. 50A-102(14) (definition of “physical custody” under the Uniform Child Custody Jurisdiction Enforcement Act); see also *id.* § 7B-1901 (“temporary custody means the taking of physical custody and providing personal care and supervision . . .”).

87. See *Diehl*, 177 N.C. App. 642; *In re H.S.F.*, 177 N.C. App. 193 (2006).

protect the public from the juvenile's behavior. A nonsecure custody order placing the juvenile in the physical custody of DSS has no less of an impact on a parent's rights than the juvenile's placement in secure custody, which is a more restrictive placement that involves a restraint on the juvenile's liberty when he or she is placed in a locked facility.⁸⁸

A change in legal custody from a parent to DSS has a significant impact on the parent's constitutional rights. The parent no longer retains the right to make decisions that have a long-term impact on his or her child. It is an open question as to whether the Juvenile Code intended to and authorizes this transfer of legal rights at nonsecure custody when a nonsecure custody order is meant to be temporary in nature. In addition, the order is based on the juvenile's alleged behavior and not the parent's conduct.

The absence of a statutory definition of "custody" gives the court latitude in designing the nonsecure custody order.⁸⁹ The North Carolina Court of Appeals has suggested that courts and attorneys use precision when fashioning custody orders, so as to avoid later confusion and/or litigation.⁹⁰ This may include specifying whether the nonsecure custody order is for physical custody, legal custody, or both. When specifying the nonsecure custody terms, the court in the delinquency proceeding should be mindful of parents' constitutional rights as well as the purpose of nonsecure custody as provided for in the Juvenile Code.

How and When a Delinquency Nonsecure Custody Order Terminates

The requirement that the court assess the basis for nonsecure custody, make written findings, and issue a new order at each nonsecure custody hearing means that every nonsecure custody order should last only until the next hearing date. A juvenile is either released from custody at the hearing or a new order for continued nonsecure custody is entered. As described above, continued nonsecure custody hearings are required seven and fourteen days after the initial order is entered.⁹¹ They are then required every thirty days.⁹²

Part Four: DSS Custody as a Dispositional Alternative

In a delinquency proceeding, the court may order a juvenile into the custody of DSS through an order of disposition pursuant to G.S. 7B-2506(1)c. Unlike most delinquency dispositional alternatives, a disposition placing a juvenile in DSS custody requires a two-step process: (1) the hearing and resulting delinquency dispositional order that places the juvenile in DSS custody initially and (2) regular periodic placement review hearings and resulting orders conducted pursuant to G.S. 7B-906.1, a statute that applies to abuse, neglect, or dependency actions. The process and orders for each step differ and are analyzed and discussed in this Part through two separate sections:

- Section 1: Delinquency Dispositional Order Placing the Juvenile in DSS Custody
- [Section 2: G.S. 7B-906.1 Placement Reviews of a DSS Custody Delinquency Disposition](#)

88. See G.S. 7B-1906(g); -1905(b), (c); see also *id.* §§ 7B-1501(8) (definition of "detention"), -1501(9) (definition of "detention facility").

89. See *Patterson v. Taylor*, 140 N.C. App. 91 (2000) (interpreting "joint custody" as applied in a G.S. Chapter 50 action).

90. *Id.*; *Carpenter v. Carpenter*, 225 N.C. App. 269 (2013).

91. G.S. 7B-1906 (a), (b).

92. G.S. 7B-1906(b).

Part Four, Section One: Delinquency Dispositional Order Placing the Juvenile in DSS Custody

The Nature of the Order

If a juvenile is found responsible for an act of delinquency during the adjudication stage of the delinquency case, the case moves to disposition. At disposition the court determines the consequences for the adjudication of delinquency. DSS custody and placement is one of the available dispositional alternatives in many cases and can result in a juvenile entering foster care as a result of a delinquency adjudication.⁹³ Designating DSS as the custodian of a juvenile in this context authorizes DSS to make various decisions related to the juvenile that may include placement and other decisions usually made by a child's custodian, including medical and educational decisions.⁹⁴ The Juvenile Code does not define "custody" and does not specify whether custody includes physical custody, legal custody, or both. DSS decision-making authority will depend on the type of custody that is ordered.

The purpose of disposition in a delinquency proceeding is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State, including public protection.⁹⁵ The Juvenile Code requires that dispositions

- promote public safety;
- emphasize accountability and responsibility for the juvenile's conduct by the juvenile and his or her parent, guardian, or custodian; and
- provide consequences, treatment, training, and rehabilitation to move the juvenile to a place of nonoffending, responsible, and productive community membership.⁹⁶

Delinquency Disposition Process and Issues That Arise from That Process

Parties

Parties at the dispositional hearing include the juvenile prosecutor and the juvenile. The juvenile has a right to an attorney, who advocates for the expressed interests of the juvenile.⁹⁷ In addition, unless excused by the court, the parent, guardian, or custodian who receives notice of the hearing is required to attend.⁹⁸ Willful failure of a parent, guardian, or custodian to attend the hearing after receiving notice is grounds for contempt.⁹⁹ Unlike the juvenile, there is no statutory right to counsel for parents, guardians, or custodians, so unless they retain their own attorneys,

93. For limitations on the use of DSS custody as a dispositional alternative, see G.S. 7B-2508(e) (allowing only commitment in a youth development center for Level 3 delinquency dispositions) and S.L. 2017-57, § 16D.4.(g) (limiting the court's capacity to order DSS custody as a delinquency dispositional option to youth who are under the age of 18).

94. See G.S. 7B-903.1.

95. G.S. 7B-2500.

96. *Id.*

97. G.S. 7B-2000. See also N.C. COMM'N ON INDIGENT DEF. SERVS., PERFORMANCE GUIDELINES FOR APPOINTED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS AT THE TRIAL LEVEL, Guideline 2.1(a) (2007) (hereinafter IDS PERFORMANCE GUIDELINES), http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Juv_Del_perf_guides_1-08.pdf.

98. G.S. 7B-1807; -2700.

99. G.S. 7B-2700.

they will represent themselves at the dispositional hearing. Both the juvenile and his or her parent, guardian, or custodian have a statutory right to present evidence, and they are allowed to advise the court regarding what they think will be in the juvenile's best interest.¹⁰⁰

Considerations

Placement in the custody of DSS is a dispositional alternative that is available for juveniles who meet the criteria for Level 1 or Level 2 dispositions.¹⁰¹ Courts are free to combine a disposition that includes DSS custody with any of the other dispositional alternatives available for each Level.¹⁰² For example, a court may order a juvenile to a term of probation supervision and to placement in DSS custody.

Dispositional hearings in delinquency matters are allowed to be informal and the court can consider any evidence, including hearsay evidence, that is relevant, reliable, and necessary to determine the juvenile's needs and the most appropriate disposition.¹⁰³ Courts are required to design dispositions that protect the public and meet the needs and best interests of the juvenile based on the following five factors:

1. the seriousness of the offense,
2. the need to hold the juvenile accountable,
3. the importance of protecting public safety,
4. the degree of culpability, and
5. the rehabilitation and treatment needs of the juvenile.¹⁰⁴

The dispositional alternatives statute, G.S. 7B-2506, provides a little more guidance as to the appropriate circumstances for selecting DSS custody, stating that DSS custody may be ordered "[i]n the case of any juvenile who needs more adequate care or supervision or who needs placement."¹⁰⁵ The North Carolina Court of Appeals has ruled that a finding of the need for more adequate care or supervision is required in the abuse, neglect, or dependency context prior to the selection of DSS custody as a dispositional alternative.¹⁰⁶ However, whether

100. G.S. 7B-2501(b).

101. Dispositional options in delinquency proceedings are guided by a statutorily prescribed level system that is grounded in (1) classification of offenses as minor, serious, or violent and (2) the delinquency history level of the juvenile. G.S. 7B-2508(f). The range of dispositional alternatives available in Level 1 and Level 2 dispositions include DSS custody. *Id.* §§ 7B-2508(c), (d). Following implementation of the JJRA on December 1, 2019, courts will only be allowed to order DSS custody as a term of a delinquency disposition for juveniles who are under age 18. S.L. 2017-57, § 16D.4.(g).

102. *See, e.g., In re K.L.D.*, 210 N.C. App. 747, (2011) (upholding a disposition that included the following four dispositional alternatives: participation in a wilderness program, confinement for 14 days at an approved detention facility, 50 hours of community service, and supervised probation for a period of 12 months).

103. G.S. 7B-2501(a).

104. G.S. 7B-2501(c).

105. G.S. 7B-2506(1). This language also applies when the court is ordering supervision of the juvenile in their own home or custody to a parent, guardian, custodian, relative private agency, or some other suitable person.

106. *In re S.H.*, 217 N.C. App. 140 (2011). Note that the abuse, neglect, or dependency dispositional statute, G.S. 7B-903, was amended by S.L. 2015-136, § 10, removing the language, "In the case of any juvenile who needs more adequate care or supervision or who needs placement."

explicit findings are required and what circumstances constitute a need for more adequate care or supervision of a juvenile adjudicated delinquent has not been established in statute or by the courts.

There is a small body of case law that illustrates the use of DSS custody as a dispositional alternative in delinquency matters. For example, in *In re K.T.L.*,¹⁰⁷ an 8-year-old child was adjudicated delinquent for involuntary manslaughter. The trial court found that the juvenile was in need of placement in a twenty-four-hour monitoring facility for further evaluation and that the juvenile's parents were not willing to authorize such a placement.¹⁰⁸ The court ordered the juvenile into DSS custody so that DSS could authorize and consent to placement in a Level III or IV residential treatment facility for up to 90 days for evaluation.¹⁰⁹ A need for services was also the rationale for use of DSS placement in *In re M.B.*,¹¹⁰ an unpublished decision. The risk and needs assessment revealed that M.B. had high needs due to a learning disability, ADHD, explosive mood disorder, a behavioral emotional disorder, and substantiated abuse by a caregiver.¹¹¹ The trial court chose to order that the juvenile be placed in DSS custody in the Yadkin County Group Home so that he could access appropriate counseling and spend weekends with his family.¹¹²

In *In re E.M.*,¹¹³ a juvenile was committed to the physical custody of a youth development center (YDC)¹¹⁴ and was also placed in the legal custody of the Mecklenburg County Department of Social Services. While the court's opinion does not explain why the decision was made to send the youth to a YDC and to place him in the legal custody of DSS, the use of both placement mechanisms suggests that the youth may not have had a viable custodial arrangement to return to once the YDC commitment period ended or that he lacked an available parent, guardian, or custodian to make decisions regarding his care. This case illustrates that courts may turn to DSS custody for a youth who is adjudicated delinquent when that juvenile does not have a willing or adequate caregiver, even if the youth is initially committed to a YDC.

Two decisions from the early 1980s set some limits on how courts can use DSS placements, preventing courts from ordering the development of new treatment/service programs and setting some boundaries regarding the use of costly out-of-state programs. In *In re Wharton*,¹¹⁵ the North Carolina Supreme Court held that district courts do not have the authority to require counties to spend large sums of money to create such programs. The juvenile in this case was adjudicated delinquent for attempted breaking and entering with the intent to commit murder

107. 177 N.C. App. 365 (2006).

108. *Id.*

109. *Id.* Note that the levels referred to here are based on classifications within the mental health system and are separate and distinct from the dispositional levels that apply in delinquency actions.

110. 175 N.C. App. 793 (2006) (unpublished).

111. *Id.*

112. *Id.*

113. ___ N.C. App. ___, 823 S.E.2d 674 (2019). *E.M.* has been temporarily stayed by the North Carolina Supreme Court at the time of the writing of this bulletin. While the holding in the case is therefore subject to change, the fact that DSS custody was used as a disposition by the district court will not change. See the supreme court's docket sheet for this case at <https://appellate.nccourts.org/dockets.php?court=1&docket=1-2019-0046-001&pdf=1&a=0&dev=1>.

114. G.S. 7B-2513(g) (when a juvenile is committed to a youth development center, only physical custody transfers; "[l]egal custody remains with the parent, guardian, custodian, agency, or institution in whom it was vested").

115. 305 N.C. 565 (1982).

therein. He presented with significant mental health needs and was diagnosed with moderate intellectual disability. The trial court ordered the Guilford County Department of Social Services to create a foster home, in conjunction with the “Mental Health, Mental Retardation and Substance Abuse Authority,” to provide treatment and services to meet the needs of this and other similarly situated juveniles.¹¹⁶ The supreme court found this to be beyond the district court’s authority, noting that “there is a limit to what the court can do by fiat.”¹¹⁷ The state high court also found that ordering a juvenile adjudicated delinquent into DSS custody for placement at a costly out-of-state school was beyond the district court’s authority in *In re Brownlee*.¹¹⁸ While the district court found that the juvenile had a history of both repeated hospitalizations and custody placements with the Department of Human Resources, Division of Youth Services (then the juvenile justice authority in North Carolina), and that the Brown School in Texas was the only placement that could meet the juvenile’s emotional and educational needs, the supreme court found that the disposition was contrary to the community-based emphasis in the delinquency dispositional alternatives in the Juvenile Code and to “the best interest of the state in the utilization of its resources and those of its inferior components.”¹¹⁹ While the use of DSS placement as a disposition in a delinquency proceeding can be helpful in accessing certain kinds of services for juveniles, it is also clear that there are limits on what a district court can require of DSS and county resources.

Role of DSS in Delinquency Dispositional Orders Placing Juveniles in DSS Custody

A local DSS is not a party in a delinquency proceeding if it has not been named custodian or guardian of the juvenile. If DSS is not a party in the proceeding, it would usually not be provided notice of an initial dispositional hearing in a delinquency matter. However, unlike the nonsecure custody statute, the dispositional alternatives statute, G.S. 7B-2506, requires that the local DSS be given notice and an opportunity to be heard before the court can order a juvenile into DSS custody as a delinquency disposition.¹²⁰ This structure guarantees that the DSS perspective will be heard by the court prior to the entry of a dispositional order that includes placing the juvenile in DSS custody. The notice also gives DSS the opportunity to become familiar with the juvenile, his or her family, and the issues that are present and to consider what services are appropriate and available, within the community and/or through a DSS placement. DSS capacity to examine these factors will be impacted by the length of notice it receives. The information DSS gathers can be presented to the court at the dispositional hearing. The capacity for DSS to be heard on placement prior to the issuance of the court order placing the juvenile in DSS custody is also necessary to access federal Title IV-E funding to support the foster care placement of the juvenile, as discussed in Part Six of this bulletin.

116. *Id.* at 567.

117. *Id.* at 574.

118. 301 N.C. 532 (1981).

119. *Id.* at 554–55.

120. G.S. 7B-2506(1)c.

Elements of the Delinquency Dispositional Order

All dispositional orders in delinquency cases must contain written findings of fact and conclusions of law.¹²¹ They must also contain the precise terms of the disposition, including the kind and duration of the disposition, the person responsible for carrying it out, and the person or agency in whom custody is vested.¹²² The North Carolina Court of Appeals also recently clarified that orders of disposition in delinquency cases must address each of the five G.S. 7B-2501(c) factors that must be considered by the court in designing the disposition.¹²³

Dispositional orders that place juveniles in the custody of DSS are also required to contain a finding that continuation in the juvenile's own home would be contrary to the juvenile's best interest.¹²⁴ This requirement is necessary for the juvenile's placement in foster care to be eligible for federal Title IV-E funding, as discussed in Part Six of this bulletin. As with the Administrative Office of the Courts' (AOC) form order for nonsecure custody, the AOC form orders for delinquency Level 1 and Level 2 dispositions contain additional findings that are not required by the statute but are necessary to access IV-E funding.¹²⁵

District courts have the authority to issue orders that apply to a juvenile's parents as part of a delinquency disposition. The trial court may require parents¹²⁶ to

- attend parental responsibility classes if available in the judicial district in which they reside;¹²⁷
- pay the cost of court-ordered medical, surgical, psychiatric, psychological, or other evaluation or treatment of the juvenile;¹²⁸
- participate in the court-ordered medical, psychiatric, psychological, or other evaluation or treatment of the juvenile;¹²⁹

121. G.S. 7B-2512(a).

122. *Id.*

123. *In re I.W.P.*, ___ N.C. App. ___, 815 S.E.2d 696 (2018). For more information, see Jacquelyn Greene, *Getting Beyond the Checkboxes: Delinquency Dispositional Orders*, ON THE CIVIL SIDE: A UNC SCH. OF GOV'T BLOG (Nov. 28, 2018), <https://civil.sog.unc.edu/getting-beyond-the-checkboxes-delinquency-dispositional-orders/>.

124. G.S. 7B-2506(1)c.

125. See N.C. Administrative Office of the Courts, Juvenile Level 1 Disposition Order (Delinquent), AOC-J-461, <https://www.nccourts.gov/assets/documents/forms/j461-en.pdf?YdNB53aaW1QwEoeDZnLm2xaF4CfSACrE>, and Juvenile Level 2 Disposition Order (Delinquent), AOC-J-475, https://www.nccourts.gov/assets/documents/forms/j475-en.pdf?Weish9NvTcZSe0sEZ0TjsKEHE0j6_xrU (including potential findings that efforts to prevent the need for placement were precluded by an immediate threat of harm and that placement in the absence of efforts was reasonable, that reasonable efforts were made to prevent the need for placement, or that there was opportunity for reasonable efforts to prevent the need for placement but those efforts were not made).

126. Orders relating to parental responsibility classes (G.S. 7B-2701) and to compliance and assistance with the juvenile's compliance with court orders (G.S. 7B-2703) can also be applied to the juvenile's custodian or guardian.

127. G.S. 7B-2701.

128. G.S. 7B-2702(a).

129. G.S. 7B-2702(b).

- undergo psychiatric, psychological, or other evaluation, treatment, or counseling directed toward remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or the removal of custody from the parent;¹³⁰
- comply with a plan of evaluation or treatment approved by the court;¹³¹
- pay the cost of the parents' evaluation or treatment or receive evaluation and treatment from the area mental health program;¹³²
- provide transportation for the juvenile to keep an appointment with a juvenile court counselor or to comply with other court orders;¹³³
- provide cooperation and assistance to the juvenile in complying with the terms and conditions of probation or other court orders;¹³⁴ or
- pay for the support of the juvenile and for the juvenile's probation supervision fees and appointed attorneys' fees, or assign private insurance to cover medical costs for the juvenile while in out-of-home placement.¹³⁵

The Juvenile Code explicitly provides that if a juvenile is placed in DSS custody and the court finds that the parent is not able to pay the cost of supporting the juvenile, the county with custody of the juvenile is responsible for the cost of care in any setting other than an institution owned or operated by the State or federal government.¹³⁶ As discussed in Part Six, these costs are borne by the usual foster care funding streams.

Can Delinquency Dispositional Orders Be Appealed?

Orders of disposition in delinquency matters are final orders and can therefore be appealed if notice of appeal is given in open court or in writing within ten days after entry of the order.¹³⁷ Parties who are allowed to appeal include the juvenile; the parent, guardian, or custodian of the juvenile; a county; or the State.¹³⁸

Both the State and its counties are limited to certain criteria for appeals. The State may only appeal an order that (1) finds a state statute unconstitutional, (2) terminates the prosecution by upholding a defense of double jeopardy, (3) holds that a cause of action is not stated under a statute, or (4) grants a motion to suppress.¹³⁹ A county is only allowed to appeal orders in which the county has been ordered to pay for the medical, surgical, psychiatric, psychological, or other evaluation or treatment of a juvenile or the medical, psychiatric, psychological, or other evaluation or treatment of a parent.¹⁴⁰ There are no such limits on appeals for juveniles or their parents, guardians, or custodians. DSS, if awarded legal custody of a juvenile, becomes a

130. G.S. 7B-2702(c).

131. *Id.*

132. G.S. 7B-2702(d).

133. G.S. 7B-2703(a).

134. G.S. 7B-2703(b).

135. G.S. 7B-2704. *See also* N.C. Administrative Office of the Courts, Supplemental Order to Parent, Guardian, or Custodian of Undisciplined or Delinquent Juvenile, AOC-J-463, <https://www.nccourts.gov/assets/documents/forms/j463-en.pdf?uA4xZZcbJtGYb5WK8wAcRKWpXfPgVAcP>.

136. G.S. 7B-2704.

137. G.S. 7B-2602.

138. G.S. 7B-2604(a).

139. G.S. 7B-2604(b).

140. G.S. 7B-2604(c).

custodian and would, therefore, have standing to appeal any dispositional order that places a juvenile who has been adjudicated delinquent into its legal custody. If, however, only physical custody is awarded to DSS, it is not a custodian and, as such, its right to appeal would be limited to the issues permitted by statute.¹⁴¹

Impact on Parents' Constitutional Rights

The impact on a parent's constitutional rights will depend on the type of custody that is awarded to DSS—physical custody, legal custody, or both. The delinquency dispositional statute, G.S. 7B-2506, does not refer to “legal custody” but instead uses the terms “custody” and “physical custody,” neither of which are defined.¹⁴² The distinction in the law between “custody” and “physical custody” is based on whether a juvenile has a legal residence in North Carolina.¹⁴³ “Custody” (as opposed to “physical custody”) is used in connection with any juvenile with a legal residence in North Carolina. The use of the general term “custody” appears to authorize the district court to order physical and/or legal custody of a juvenile from North Carolina to DSS.

North Carolina appellate courts have interpreted the terms “physical custody” and “legal custody.” “Physical custody” involves the physical care and supervision of the juvenile and includes making decisions regarding the child's daily routine rather than on matters with long-range consequences.¹⁴⁴ “Legal custody” refers “generally to the right and responsibility to make decisions with important long-term implications for a child's best interests and welfare,”¹⁴⁵ such as on issues related to education, health care, religion, discipline, and people with whom the juvenile may associate.¹⁴⁶

A transfer of physical custody of a juvenile has less of an impact on parents' rights than a transfer of both legal and physical custody. The parents retain decision-making authority over the juvenile for issues that have long-range consequences. The parents lose the right to have the child reside with them and to decide where the child lives during the period DSS has physical custody of him or her. However, a juvenile's placement in the physical custody of DSS has no less of an impact on parents' rights than the juvenile's commitment to a youth development center (YDC), which is the most restrictive placement available to the court as a Level 3 disposition.¹⁴⁷

141. *See id.*

142. *See* G.S. 7B-2506(1)c. (establishing that juveniles with legal residency outside of North Carolina may be ordered into the “physical custody” of the DSS in the county where the juvenile is found so that the DSS can return the juvenile to responsible authorities in his or her home state. Juveniles with residency in a North Carolina county may be placed in the “custody” of that county DSS). *See also In re Leonard*, 77 N.C. App. 439 (1985) (interpreting “found” in the termination of parental rights statute to mean where the juvenile is actually present); *In re J.L.K.*, 165 N.C. App. 311 (2004).

143. G.S. 7B-2506(1)c.

144. *See Diehl v. Diehl*, 177 N.C. App. 642 (2006); *In re H.S.F.*, 177 N.C. App. 193 (2006); *see also* G.S. 50A-102(14) (definition of “physical custody” under the Uniform Child Custody Jurisdiction Enforcement Act).

145. *In re M.M.*, ___ N.C. App. ___, ___, 795 S.E.2d 222, 224 (2016) (quoting *Peters v. Pennington*, 210 N.C. App. 1, 17 (2011)).

146. *See, e.g., Diehl*, 177 N.C. App. 642; *Petersen v. Rogers*, 337 N.C. 397 (1994).

147. G.S. 7B-2513(g) (commitment to a YDC transfers physical custody only; legal custody remains with the parent, guardian, custodian, or agency in whom it was vested). *See also id.* §§ 7B-2506(24) (dispositional alternative that commits the juvenile to the Division of Juvenile Justice for placement in a YDC; “custody” is not referred to in this subsection); -2508(e) (“Level 3 – Commitment”).

A change in legal custody from a parent to DSS has a significant impact on that parent's constitutional rights to the care, custody, and control of his or her child. The parent no longer retains the right to make decisions that have a long-term impact on the child. As discussed in Part Two of this bulletin, the State may not interfere with parents' paramount constitutional rights to the care, custody, and control of their children absent parental unfitness or actions that are inconsistent with parental rights.¹⁴⁸ There is no requirement in the Juvenile Code that the court must find by clear and convincing evidence that a parent is unfit, has neglected his or her child, or has otherwise acted inconsistently with his or her constitutional rights before awarding custody to a third party. It is an open question as to whether such a finding is required in the context of a delinquency proceeding before the juvenile may be ordered to DSS "custody."

When DSS is awarded custody of a juvenile, it obtains certain rights to and obligations toward that juvenile. Those rights and obligations are not specified in the delinquency statutes, but there are some references to the decision-making authority of DSS with custody of a juvenile in an abuse, neglect, or dependency case. Under G.S. 7B-903.1(a), DSS has the authority "to make decisions about matters . . . that are generally made by a juvenile's custodian, including but not limited to, educational decisions and consenting to the sharing of the juvenile's information" unless otherwise prohibited by federal law. However, "[t]he court may delegate any part of this authority to the juvenile's parent, foster parent, or another individual."¹⁴⁹ As a result, the court may order that the parent retain certain decision-making rights, similar to how a parent automatically retains his or her legal custodial rights when a juvenile is committed to a YDC.¹⁵⁰ A placement provider (e.g., a foster parent) also has authority to grant or deny permission for a juvenile to participate in "normal childhood activities" without first seeking court or DSS approval.¹⁵¹ But the court may determine that the statutory authority provided to a placement provider is not in the juvenile's best interest and enter an order that establishes different parameters for the approval of a child's participation in such activities,¹⁵² such as (1) requiring the approval of the court, DSS, or the juvenile's court counselor or (2) keeping that decision with the juvenile's parent(s). DSS also has the statutory authority to arrange for, and to consent to, routine or emergency medical care and testing and evaluation in exigent circumstances for a juvenile who is placed in its custody.¹⁵³ Authorization for care, treatment, or evaluation that is not routine or that does not involve an emergency is vested in the juvenile's parent, guardian, or custodian, unless the parent, guardian, or custodian authorizes DSS to provide consent for such care, treatment, or evaluation or unless, after a hearing, the court finds by clear and convincing evidence that the care, treatment, or evaluation is in the juvenile's best interests.¹⁵⁴

The absence of a statutory definition of "custody" gives the court latitude in designing the custody order for the delinquent juvenile.¹⁵⁵ The North Carolina Court of Appeals has suggested that courts and attorneys use precision when fashioning a custody order, including defining "legal custody" and "physical custody," so as to avoid later confusion and/or

148. See, e.g., *Adams v. Tessener*, 354 N.C. 57 (2001).

149. G.S. 7B-903.1(a).

150. See G.S. 7B-2513(g).

151. G.S. 7B-903.1(b).

152. *Id.*

153. G.S. 7B-505.1 (incorporated by reference into G.S. 7B-903.1(e)).

154. *Id.*

155. See *Patterson v. Taylor*, 140 N.C. App. 91 (2000) (interpreting "joint custody" as applied in a G.S. Chapter 50 action).

litigation.¹⁵⁶ For clarity, the court in the delinquency proceeding should designate whether DSS has physical custody, legal custody, or both and also specify whether DSS has placement authority for the juvenile. Presumably, an order that places a juvenile in DSS custody but designates a specific placement (e.g., “the home of X”) does not give DSS placement authority. The order may also address the specific rights that remain with the parents. When specifying the custody terms and accompanying responsibilities in the delinquency dispositional order, the court should be mindful of the parents’ constitutional rights, as well as of limitations provided for in the Juvenile Code.

Procedurally, parents do not have a statutory right to counsel at the delinquency dispositional hearing even though their custodial rights may be affected by an order placing the juvenile in DSS custody. Therefore, most parents will appear without counsel. In contrast, in an abuse, neglect, or dependency action, parents have a statutory right to counsel and, when indigent, to court-appointed counsel absent a knowing and voluntary waiver of that right.¹⁵⁷ Also, in an abuse, neglect, or dependency action, the North Carolina Office of Indigent Defense Services (IDS) has a policy (Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings) that recognizes the procedural due process rights of the parties in the action.¹⁵⁸ Regarding non-parent respondents who do not have a statutory right to counsel in an abuse, neglect, or dependency action, the IDS policy looks to whether the court determined as a matter of law that constitutional due process under the *Matthews v. Eldridge*¹⁵⁹ three-prong balancing test¹⁶⁰ requires the appointment of counsel. If so, IDS will pay for the representation pursuant to G.S. 7A-498.3(a)(1).¹⁶¹ There is no similar IDS policy addressing a parent’s constitutional due process rights and attorney representation in a delinquency dispositional hearing where custody of the juvenile to DSS is an issue. It is possible that a court may determine in a particular case that a parent who is indigent has constitutional due process rights that require the appointment of an attorney for the dispositional hearing, but it is not known if IDS will approve payment for that attorney.

156. *Id.*; *Carpenter v. Carpenter*, 225 N.C. App. 269 (2013).

157. G.S. 7B-602(a), (a1); *see In re J.R.*, ___ N.C. App. ___, ___, 791 S.E.2d 922 (2016) (holding that a parent does not have a statutory or constitutional right to self-representation in an abuse, neglect, or dependency action).

158. OFFICE OF INDIGENT DEF. SERVS., APPOINTMENT OF COUNSEL FOR NON-PARENT RESPONDENTS IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (hereinafter IDS POLICY) (effective July 2, 2008), <http://www.ncids.org/Rules%20%20Procedures/Policies%20By%20Case%20Type/AND-TPR/AppointmentsCounselNon-parentRespondents.pdf> (last visited Mar. 13, 2019).

159. 424 U.S. 319 (1976).

160. The IDS Policy states the three prongs are “1) the nature of the private interest at stake; 2) the nature of the government’s interest, including the cost to the State of providing a particular form of process; and 3) the likelihood of error if that form of process is not provided.”

161. IDS POLICY.

Part Four, Section Two: G.S. 7B-906.1 Placement Reviews of a DSS Custody Delinquency Disposition

The statute that governs dispositions in delinquency cases provides that placements into DSS custody in the context of a delinquency disposition are to be reviewed pursuant to G.S. 7B-906.1, the review and permanency planning hearings statute applicable to abuse, neglect, and dependency actions.¹⁶² These regular periodic review hearings are not required for other delinquency dispositions and involve a second procedural step that is unique to delinquency dispositions placing a juvenile in DSS custody.

As a delinquency action, the review proceeding is governed by the relevant delinquency statutes found in the Juvenile Code as well as by G.S. 7B-906.1. The delinquency statutes and 7B-906.1 do not fit neatly together. There are differences between the two types of actions that raise questions as to how to apply G.S. 7B-906.1 in the delinquency action as the parties, representation, timing, remedies, and purposes differ. Additionally, the hearing under 7B-906.1 is not a discrete proceeding but is, instead, part of one continuous case with several interrelated stages¹⁶³ and does not exist in isolation. Other abuse, neglect, or dependency statutes are explicitly referred to or are implicated. Because this is a delinquency—and not an abuse, neglect, or dependency—action, it is unclear as to whether those other abuse, neglect, or dependency statutes apply. Little to no guidance is provided in law, policy, or appellate opinions. Yet it is critically important to understand how the abuse, neglect, or dependency statute applies to these DSS custody orders in delinquency cases.

Nature of the Proceeding and Order

Delinquency Is Separate and Distinct from Abuse, Neglect, or Dependency

The court's authority to act in delinquency cases is limited by the Juvenile Code. The court's subject matter jurisdiction exists through the delinquency action, which commenced with the filing of a verified petition alleging the juvenile's delinquency.¹⁶⁴ The basis of the juvenile's placement in DSS custody is a dispositional order entered as a result of an adjudication of delinquency.¹⁶⁵ The orders that are entered in the delinquency action after a G.S. 7B-906.1 hearing are part of the delinquency disposition.

The application of G.S. 7B-906.1 does not convert a delinquency action into an abuse, neglect, or dependency action. There is no mechanism anywhere in the Juvenile Code to authorize converting a delinquency action into an abuse, neglect, or dependency action upon the entry of a dispositional order that awards custody of a juvenile to a county DSS.¹⁶⁶

162. G.S. 7B-2506(1)c. (effective before and after Dec. 1, 2019).

163. See *In re* T.R.P., 360 N.C. 588 (2006).

164. G.S. 7B-1804. See also *id.* §§ 7B-1802; -1803.

165. See G.S. 7B-2506 (“[t]he court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives . . .”). See also *id.* §§ 7B-2405 (“The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent.”); -2409 (“The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt.”).

166. In contrast, see G.S. 7B-911, which allows for an abuse, neglect, or dependency action to be transferred to a G.S. Chapter 50 civil custody action after the court (1) makes certain findings, (2) determines that state intervention through a juvenile court proceeding is no longer necessary, and (3) orders the termination of its jurisdiction in the abuse, neglect, or dependency proceeding.

A delinquency dispositional order does not result from an allegation, substantiation, or conclusion that the juvenile is abused, neglected, or dependent; instead, it results from an adjudication of delinquency and is based on the factors found in G.S. 7B-2501(c). The court lacks authority to adjudicate a juvenile abused, neglected, and/or dependent in a delinquency action because the necessary statutory procedures for such an adjudication have not been followed.¹⁶⁷ An abuse, neglect, or dependency action is a separate action that occurs only after a county DSS files a verified petition containing appropriate allegations in the district court.¹⁶⁸ DSS has not taken this step when the court orders the juvenile into DSS custody as a delinquency disposition.

If the court, court counselor, DSS worker, or any other individual or institution has cause to suspect that the juvenile is abused, neglected, or dependent (in addition to being delinquent), that individual or institution is mandated to make a report to the county DSS where the juvenile resides or is found.¹⁶⁹ There is no exception to the reporting mandate for a child who is currently placed in DSS custody.¹⁷⁰ Upon receipt of such a report, the county DSS determines whether an assessment is warranted and, if so, whether protective services and/or a petition alleging abuse, neglect, or dependency are required.¹⁷¹ Any court action initiated by DSS filing a petition alleging a juvenile's abuse, neglect, or dependency proceeds as a separate action from the delinquency action.¹⁷²

Placement Review

The language of G.S. 7B-2506(1)c., the delinquency dispositional statute that places a juvenile in DSS custody, states “[t]his placement shall be reviewed in accordance with G.S. 7B-906.1.” However, there are two different types of hearings that are designated in G.S. 7B-906.1: a review hearing and a permanency planning hearing. In both types of hearings, the court reviews the child's placement and plan, including whether progress has been made on the plan, to determine if the juvenile's needs and best interests are being met.¹⁷³ Permanency planning hearings have an additional purpose, which focuses on the child achieving a safe, permanent home within a reasonable period of time.¹⁷⁴ To achieve that ultimate purpose, the court must identify and order

167. See *T.R.P.*, 360 N.C. 588 (affirming court of appeals decision vacating custody review order and dismissing neglect action for lack of subject matter jurisdiction because there was not a properly verified petition; the filing of a properly verified petition making appropriate allegations of abuse, neglect, or dependency establishes the court's subject matter jurisdiction); *In re S.D.A.*, 170 N.C. App. 354 (2005) (vacating adjudication and disposition orders and remanding for dismissal; trial court lacked subject matter jurisdiction when the procedures of G.S. 7B-302 were not followed, as there was no substantiation of abuse or neglect).

168. G.S. 7B-401.1(a) through -405; *T.R.P.*, 360 N.C. 588.

169. G.S. 7B-301; -1700.1. See *id.* §§ 7B-101(1) (“abused juvenile[.]”), (9) (“dependent juvenile”), (15) (“neglected juvenile”).

170. See G.S. 7B-310.

171. G.S. 7B-302(a), (c), (d); -403; Title 10A, Chapter 70A, Section .0105(g) of the North Carolina Administrative Code; see *S.D.A.*, 170 N.C. App. 354.

172. For more information about the separate abuse, neglect, or dependency process and whether delinquent acts equate to abuse, neglect, or dependency, see Sara DePasquale, *When Does Delinquency Result in Abuse, Neglect, or Dependency?*, posted on the following blogs: ON THE CIVIL SIDE: A UNC SCH. OF GOV'T BLOG (May 28, 2019), <https://civil.sog.unc.edu/when-does-delinquency-result-in-abuse-neglect-or-dependency/>; N.C. CRIM. L.: A UNC SCH. OF GOV'T BLOG, <https://nccriminallaw.sog.unc.edu/when-does-delinquency-result-in-abuse-neglect-or-dependency/#more-11109>.

173. See G.S. 7B-100; -900; -906.1(a), (c)-(e).

174. G.S. 7B-100(5); -906.1(g); -906.2(b), (c).

concurrent permanent plans for the child, review the progress made in finalizing a permanent plan, and, when necessary, make a new permanent plan for the juvenile.¹⁷⁵ Permanent plans can range from reunification with a parent to the child’s adoption, which severs the parent’s legal relationship and rights to his or her child.¹⁷⁶

The purposes of a delinquency disposition focus on protecting the public and emphasize accountability and rehabilitation so that the juvenile can become a productive community member.¹⁷⁷ The delinquency dispositional statute makes no reference to permanency planning or achieving a safe, permanent home for the juvenile. It is, therefore, unclear whether the placement review required by G.S. 7B-2506(1)c. in the delinquency action occurs solely as review hearings or whether permanency planning hearings must also be conducted. The differences in those hearings and resulting orders are significant.

The limiting language of “this placement shall be reviewed” found in G.S. 7B-2506(1)c. appears to conflict with the statute’s general reference to G.S. 7B-906.1. This apparent conflict could be a result of 2013 statutory amendments. Prior to October 1, 2013, review and permanency planning hearings were codified in two different statutes: G.S. 7B-906 (“review of custody order”) and 7B-907 (“permanency planning hearing”). The delinquency dispositional statute at that time required that the placement of a juvenile in DSS custody be reviewed in accordance with the “review-of-custody-order” statute, G.S. 7B-906. Permanency planning was not incorporated into the delinquency disposition. Both G.S. 7B-906 and the permanency planning hearing statute, G.S. 7B-907, were repealed effective October 1, 2013.¹⁷⁸ The two separate statutes were replaced with one combined “[r]eview and permanency planning hearings” statute, G.S. 7B-906.1, where different subsections apply to the different types of hearings.¹⁷⁹ The delinquency dispositional statute placing the juvenile in DSS custody was also amended to refer to the new G.S. 7B-906.1, without any references to specific subsections, for the court’s review of the juvenile’s placement in DSS custody.¹⁸⁰ No other amendments were made to the language of G.S. 7B-2506(1)c., and there are no explicit references in the delinquency statutes to permanency planning.

Delinquency G.S. 7B-906.1 Review Process and Issues That Arise from That Process

Because the delinquency dispositional statute placing a juvenile in DSS custody incorporates G.S. 7B-906.1 for regular placement reviews, both types of hearings designated in 7B-906.1—review and permanency planning (hereinafter collectively referred to as “906.1 hearing”)—are discussed in this bulletin. The different issues that arise when conducting a review or permanency planning hearing under 7B-906.1 in the delinquency action are highlighted below.

Parties and Representation in the 906.1 Hearing

The State is a party in the delinquency matter. It is represented by a prosecutor in all contested delinquency hearings, including dispositional hearings.¹⁸¹ Because it is unknown whether any issue the court must consider at the 906.1 hearing will be contested by one of the parties, the

175. G.S. 7B-906.1(a); -906.2; *see id.* § 7B-100(5).

176. *See* G.S. 7B-906.2(a); 48-1-106(c).

177. *See* G.S. 7B-2500.

178. S.L. 2013-129, § 25.

179. *Id.* § 26. *Compare* G.S. 7B-906.1 subsection (d) (“at each hearing”) *with* subsection (e) (“at any permanency planning hearing”).

180. S.L. 2013-129, § 40 (amending G.S. 7B-2506(1)c.).

181. G.S. 7B-2404(a).

State should be represented by the prosecutor at that hearing. A juvenile court counselor, who is an employee of the state Division of Adult Correction and Juvenile Justice, may also appear to provide the court with evidence regarding compliance and progress related to any court-ordered supervision.

As the subject of the delinquency action, the juvenile is a party.¹⁸² The juvenile is summonsed to appear and receives notice of all scheduled hearings.¹⁸³ The juvenile is, therefore, expected to appear at each scheduled hearing in the delinquency action. This differs from an abuse, neglect, or dependency action where the juvenile is a party but is not served with a summons and is only entitled to receive notice of certain hearings when he or she is age 12 or older.¹⁸⁴

Additionally, in a delinquency action, the juvenile is entitled to court-appointed counsel, is presumed to be indigent, and does not have the right to self-representation.¹⁸⁵ The juvenile should be represented by his or her appointed (or privately retained) counsel in all proceedings.¹⁸⁶ The 906.1 hearing that reviews the juvenile's dispositional placement is a proceeding in the delinquency action and, as such, the juvenile's attorney should appear and represent the juvenile. The representation provided by an attorney appointed in the delinquency action differs from the representation a juvenile receives in an abuse, neglect, or dependency action, where a 906.1 hearing is most frequently held. In an abuse or neglect action, the juvenile is *always* represented by a G.S. 7B-601 guardian ad litem (GAL), while in a dependency action, the juvenile *may be* represented by a 7B-601 GAL.¹⁸⁷ The duties of a 7B-601 GAL include investigating facts, the juvenile's needs, and community and family resources; exploring dispositional options; reporting to the court when the juvenile's needs are not being met; and protecting and promoting the juvenile's best interests and legal rights.¹⁸⁸ In contrast, a juvenile defense attorney represents the juvenile's expressed preference while also protecting the juvenile's due process rights.¹⁸⁹ Expressed preferences and best interests do not always align and, in fact, may sometimes directly conflict. Although the court may want to appoint a 7B-601 GAL for purposes of the 906.1 hearing, the court's authority to make such an appointment is limited to situations when a petition alleging a juvenile is abused, neglected, or dependent is filed and when certain criteria are met in a termination of parental rights action.¹⁹⁰ The court is without statutory authority to appoint a 7B-601 GAL in a delinquency proceeding.

Both of a juvenile's parents are parties to the delinquency action.¹⁹¹ Although the court has jurisdiction over the juvenile's parents and may modify their custodial rights, parents do not have a statutory right to counsel, or to appointed counsel if indigent, in the delinquency action.¹⁹² In contrast, parents are entitled to counsel, and when indigent to court-appointed

182. See, e.g., G.S. 7B-1802; -1805.

183. G.S. 7B-1805 (issuance of summons); -1806 (service of summons); -1807 (notice of hearings).

184. G.S. 7B-406(a) (issuance of summons excludes juvenile); -906.1(b)(ii) (notice of hearing).

185. G.S. 7B-2000; -2405(2), (6).

186. G.S. 7B-2000(a).

187. G.S. 7B-601(a). See *In re J.H.K.*, 365 N.C. 171 (2011) (in each case, the GAL program works as a team that consists of the attorney advocate, a GAL volunteer, and local GAL program staff).

188. G.S. 7B-601(a).

189. IDS PERFORMANCE GUIDELINES, Guideline 2.1(a) (see note 97, *supra*).

190. G.S. 7B-601(a); -1108(b) (appointment of a GAL in termination of parental rights proceedings).

191. G.S. 7B-1807.

192. See note 36, *supra*, explaining proposed House Bill 301 of the 2019 Legislative Session of the General Assembly, which would amend G.S. 7B-2506(1)c. to entitle indigent parents to court-appointed counsel in G.S. 7B-906.1 hearings held in delinquency actions.

counsel, in an abuse, neglect, or dependency action.¹⁹³ Unless a parent retains his or her own attorney, he or she will be unrepresented in the 906.1 hearing held as a result of a delinquency dispositional order.¹⁹⁴

Table 1. Comparison of Parties and Representation in Abuse, Neglect, Dependency vs. Delinquency Actions

	Delinquency	Abuse, Neglect, Dependency
Parties	<ul style="list-style-type: none"> • State (represented by Prosecutor) • Juvenile • Parents • Guardian • Custodian 	<ul style="list-style-type: none"> • County DSS (Petitioner) • Juvenile • Parents • Guardian (if in place when petition is filed or if named in child’s permanent plan) • Custodian (if in place when petition is filed or if named in child’s permanent plan) • Caretaker (under certain circumstances)
Representation for Juvenile	Court-appointed counsel; presumption of indigency; counsel represents the express interests of the juvenile	7B-601 GAL team, which must include an attorney advocate; represents the child’s best interests
Parents Have Right to Counsel?	No ^a	Yes
Custodian or Guardian Have Right to Counsel?	No	Payment for counsel may be made by IDS pursuant to policy addressing constitutional due process rights ^b

a. See note 36, *supra*, discussing proposed House Bill 301, which would entitle indigent parents to court-appointed counsel in delinquency 906.1 hearings resulting from a juvenile’s delinquency disposition in DSS custody.

b. See IDS POLICY (discussed in more detail in notes 158, 160, and 161, *supra*).

193. G.S. 7B-602; see *In re J.R.*, ___ N.C. App. ___, 791 S.E.2d 922 (2016) (holding that a parent does not have a statutory or constitutional right to self-representation in an abuse, neglect, or dependency action).

194. This might change, however, if House Bill 301, discussed in notes 36 and 192, *supra*, becomes law.

If a juvenile has a guardian or legal custodian, that guardian or legal custodian is also a party to the delinquency action and is involved in the same way that the juvenile's parents are involved.¹⁹⁵ A guardian or legal custodian has no statutory right to counsel, or to court-appointed counsel in the case of indigency, in either the delinquency or the abuse, neglect, or dependency action. (See Table 1, above.)

The Role of DSS in the 906.1 Hearings

Although DSS is neither named in the petition nor served with the summons when a delinquency action is initiated, DSS becomes the juvenile's legal custodian upon the entry of the dispositional order placing the juvenile in the legal custody of DSS.¹⁹⁶ As the juvenile's custodian, DSS is a party to the delinquency action and has a right to present evidence and advise the court of what it believes is in the juvenile's best interests.¹⁹⁷ The county DSS is represented by its own attorney. A DSS director, social worker, or other employee may also appear at the hearing to provide evidence to the court.

If DSS is awarded physical—but not legal—custody of the juvenile, it is not a custodian and, therefore, is not a party. However, G.S. 7B-906.1 addresses DSS's role in the 906.1 hearing, which includes requesting that the hearing be calendared, receiving notice, and providing evidence to the court.¹⁹⁸

Timing and Notice of 906.1 Hearings

Under G.S. 7B-906.1, the court must conduct regular periodic reviews within specified statutory time periods. Review hearings are held within ninety days of the dispositional hearing and after that in intervals of at least every six months.¹⁹⁹ Within twelve months of the initial order that removes custody of the juvenile, the court review must be a permanency planning hearing.²⁰⁰ Every review hearing under 7B-906.1 that is scheduled after the first permanency planning hearing must be designated as a permanency planning hearing rather than as a review hearing.²⁰¹ Like review hearings, permanency planning hearings must be held at least every six months or earlier.²⁰² These time periods represent the maximum time limits for when review and permanency planning hearings must occur. This allows the court and/or the parties flexibility to schedule hearings sooner than the designated maximum time limits. In some circumstances, the court may require written reports in place of the hearings, waive the hearings, or

195. G.S. 7B-1807; *see, e.g., id.* §§ 7B-1802; -1805; -2405.

196. G.S. 7B-1501(6) (definition of "custodian"). Note that if DSS was awarded legal custody of the juvenile through a nonsecure custody order prior to the entry of the dispositional order, DSS became the juvenile's legal custodian at that time.

197. *See* G.S. 7B-2501(b); *see also id.* § 7B-906.1(c).

198. G.S. 7B-906.1(b), (c).

199. G.S. 7B-906.1(a) (note that the time period for the first review hearing refers to the initial dispositional hearing held pursuant to G.S. 7B-901, which occurs in an abuse, neglect, or dependency proceeding).

200. *Id.*

201. *Id.*

202. *Id.*

schedule the hearings at longer intervals than within every six months;²⁰³ however, those circumstances are not likely to occur in a delinquency proceeding.

By law, the DSS director (or an authorized representative) must request that the clerk of superior court calendar each review or permanency planning hearing at a juvenile court session.²⁰⁴ In practice, some clerks will calendar the hearing for a juvenile court session addressing delinquency matters and others will calendar the hearing for a juvenile court session addressing abuse, neglect, or dependency matters. Regardless of which juvenile court session conducts the hearing, the proceeding remains a delinquency proceeding.

Under G.S. 7B-906.1, the clerk must give fifteen days' notice of any hearing and its purpose (review or permanency planning) to specified individuals and agencies, including the juvenile's parents, guardian, or custodian; the juvenile if age 12 or older; the juvenile's guardian ad litem (hereinafter 7B-601 GAL); the person providing care for the juvenile;²⁰⁵ and any other person or agency the court specifies. Because this is a delinquency proceeding, notice should be provided to all the parties in that action and not just those persons or entities specified in G.S. 7B-906.1. This includes the State and the juvenile regardless of age. In addition, the juvenile is represented by an attorney in the delinquency action and not by a 7B-601 GAL.²⁰⁶ As such, the juvenile's attorney should be provided with notice.

Evidence in the 906.1 Hearing

Like the dispositional hearing in the delinquency proceeding, the 906.1 hearing may be informal.²⁰⁷ The rules of evidence do not apply.²⁰⁸ The court may consider any evidence, including hearsay, that it considers to be relevant, reliable, and necessary to determine the juvenile's needs and the most appropriate disposition.²⁰⁹ At each hearing, the court considers information from the juvenile; his or her parents, guardian, and/or custodian; and the person who is providing care to the juvenile (even though he or she is not a party to the proceeding).²¹⁰ The court may also hear from any other person who is not a party.²¹¹ Although these hearings are informal, competent evidence must be admitted so as to support the court's findings and conclusions of law.²¹² There must be some sworn testimony at the hearing, as the North Carolina Court of Appeals has repeatedly held that court reports in the absence of sworn testimony are insufficient

203. The circumstances are when either (1) custody of the juvenile is placed with a parent or (2) the court finds all the factors set out in G.S. 7B-906.1(n). G.S. 7B-906.1(k). G.S. 7B-906.1(n) requires that the court hold a hearing if a party files a motion for review. *See also In re P.A.*, 241 N.C. App. 53 (2015) (failure to make findings of fact of each of the enumerated criteria in G.S. 7B-906.1(n) is reversible error).

204. G.S. 7B-906.1(b). *See id.* § 7B-101(10) (definition of "director").

205. *See* G.S. 7B-906.1(b) (DSS must provide the clerk with either the person's name and address or written documentation that the person was sent notice of the hearing).

206. G.S. 7B-2000. *See id.* § 7B-601 (appointment of a GAL in an abuse, neglect, or dependency action).

207. *See In re J.H.*, 244 N.C. App. 255 (2015).

208. *Id.*

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

210. G.S. 7B-906.1(b), (c) (note that the juvenile's GAL is also identified in the statute but is not appointed in a delinquency proceeding).

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

212. *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017).

to support a trial court's findings at a 906.1 hearing.²¹³ Additionally, arguments made by attorneys are not evidence.²¹⁴ An attorney is not a witness.

Considerations in Review Hearings under G.S. 7B-906.1 and Resulting Orders

In a 906.1 review hearing, the court focuses on both the appropriateness of the juvenile's placement and the juvenile's foster care plan with the recognition that the juvenile needs a safe, permanent home within a reasonable period of time.²¹⁵ The North Carolina appellate courts have stated that "one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite parent(s) and the child, after the child has been taken from the custody of the parent(s)."²¹⁶ The delinquency statutes do not recognize the need for the juvenile to achieve a safe, permanent home within a reasonable period of time, presumably because a delinquency action has a different purpose than an abuse, neglect, or dependency action. Yet the juvenile who has been adjudicated delinquent may have been removed from his or her home and placed in DSS custody when he or she needed placement or more adequate care or supervision.²¹⁷ Given the interaction of these statutes, the court in a delinquency disposition placement review of the juvenile's placement in DSS custody should be considering whether it is appropriate to reunite the juvenile with his or her parents.

When conducting a 906.1 review hearing, the court looks at the juvenile's needs and applies a best interests of the child standard.²¹⁸ The juvenile's needs and best interests are also factors in the dispositional stage of the delinquency action.²¹⁹

During each review hearing, the court considers a variety of factors that are specified in G.S. 7B-906.1, including

- the juvenile's placement(s), the appropriateness of the current placement, and the goals of the juvenile's foster care plan, including the foster parents' role;
- services that have been offered to reunify the juvenile with (1) either parent or (2) the guardian or custodian from whom the juvenile was removed;²²⁰
- whether efforts to reunify the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health and safety and need for a safe, permanent home within a reasonable period of time;
- whether termination of parental rights should be considered;
- visitation;
- if the juvenile is 16 or 17, an independent living assessment and plan; and
- any other factor deemed necessary by the court.²²¹

213. *Id.*; *In re D.Y.*, 202 N.C. App. 140 (2010); *In re D.L.*, 166 N.C. App. 574 (2004).

214. *Id.*

215. See G.S. 7B-906.1(d); -100(5); see also *id.* § 7B-101(19) (definition of "safe home").

216. *In re T.W.*, ___ N.C. App. ___, ___, 796 S.E. 2d 792, 794 (2016) (quoting *In re Shue*, 311 N.C. 586, 596 (1984)).

217. G.S. 7B-2506(1)c.

218. G.S. 7B-906.1(c), (i); *In re A.P.*, ___ N.C. ___, 812 S.E.2d 840 (2018); *Shue*, 311 N.C. 586 (construing earlier version of the Juvenile Code). See G.S. 7B-100(5).

219. G.S. 7B-2501(c); see also *id.* § 7B-2506(1)c. (referring to best interests).

220. See G.S. 7B-101(18) (definition of "reasonable efforts" in the context of "reunification services by a department of social services").

221. G.S. 7B-906.1(d).

The court must make written findings of those statutory factors that are relevant.²²² Because these placement review hearings are being conducted in a delinquency action and not an abuse, neglect, or dependency action, the purposes of the delinquency disposition may impact what the court determines is relevant.

Changing of Juvenile's Placement by DSS

In an abuse, neglect, or dependency action, when DSS has custody or placement responsibility for a juvenile, G.S. 7B-903.1 (another abuse, neglect, or dependency statute incorporated into G.S. 7B-906.1(l)) imposes limitations. When DSS intends to change the juvenile's placement, it must give the juvenile's guardian ad litem (7B-601 GAL) notice of its intent, unless an emergency situation prevents it from doing so.²²³ In that case, DSS must notify the 7B-601 GAL or attorney advocate within seventy-two hours of the placement change or at an earlier time if established by local rule.²²⁴ In a delinquency action, the juvenile is not represented by a 7B-601 GAL but by a defense attorney. There is a question as to whether notice of an intent by DSS to change placement should be provided to the juvenile's attorney. Providing such notice would ensure that the juvenile's attorney is aware of the placement change and can consult with his or her client to determine whether a motion for review is needed to address a proposed or completed placement change with which the juvenile disagrees.

Visitation

One of the factors a court must consider under G.S. 7B-906.1 is visitation.²²⁵ Specifically, the court is to consider whether visitation has taken place and whether a visitation plan under G.S. 7B-905.1 (another abuse, neglect, or dependency statute) is needed.²²⁶ Visitation is relevant in an abuse, neglect, or dependency action, where G.S. 7B-905.1 clearly applies. 7B-905.1 requires that any order that removes a juvenile from the custody of a parent, guardian, or custodian or continues the juvenile's out-of-home placement must provide for an appropriate visitation plan that is based on the best interests of the child and is consistent with his or her health and safety. When custody is with DSS, the court's order must include the minimum frequency and duration of visits and whether the visits must be supervised.²²⁷ There are also circumstances in which the court may deny visitation²²⁸ or in which judicial authorization is required before DSS can allow unsupervised visits.²²⁹

222. *Id.*

223. G.S. 7B-903.1(d).

224. *Id.*

225. G.S. 7B-906.1(d)(2).

226. *Id.*

227. G.S. 7B-905.1(b). See *In re J.D.M.-J.*, ___ N.C. App. ___, 817 S.E.2d 755 (2018), which refers to *In re J.P.*, 230 N.C. App. 523 (2013), a case decided under the former visitation statute, which reversed and remanded the visitation portion of a dispositional order for additional findings and conclusions required by statute.

228. See *In re T.W.*, ___ N.C. App. ___, ___, 796 S.E.2d 792 (2016) (order denying visitation is based on findings that parent forfeited that right or that visitation is not in the child's best interests); *In re T.R.T.*, 225 N.C. App. 567 (2013) (addressing argument that court order mandating visitation by electronic communication (Skype) and allowing for no in-person visitation amounted to a denial of visitation).

229. See G.S. 7B-903.1(c) (prohibiting DSS from allowing unsupervised visits with a parent, guardian, or custodian from whose home the juvenile was removed without a court hearing where the court

In contrast, the delinquency statutes do not discuss visitation. The absence of any visitation requirements in the delinquency statutes raises the question of whether the court must address visitation in the 906.1 review hearing, and in its resulting order, or whether the court may find that visitation is not relevant.

Although this is an open question, it appears that even if it is not *required* to do so, the district court *may* address visitation in a delinquency disposition. In the case of *In re J.S.W.*,²³⁰ one of the appellate issues involved a juvenile's request for home and overnight visits when the juvenile had been committed to the custody of a youth development center. In that case, the trial court, on a motion to review the disposition, denied the juvenile's request for visitation after prioritizing punishment as one of the dispositional objectives designated in G.S. 7B-2501. The court of appeals determined that the trial court did not abuse its discretion when it denied visitation after it considered the criteria set out in G.S. 7B-2501 and balanced the importance of protecting the public safety with the juvenile's rehabilitative needs and gave more weight to punishment and protection.²³¹

If the juvenile court addresses visitation, it is unclear what factors it should consider and what terms and/or conditions, if any, are required in a visitation order. The failure to address visitation such that DSS determines whether and under what conditions visitation will occur may be an improper delegation of the court's authority.²³² The North Carolina appellate courts have not addressed the issue of visitation in cases where a juvenile is placed in DSS custody through a delinquency dispositional order. However, the best interests of the juvenile may require that the court enter an order that addresses visitation, in part to clarify the responsibilities and expectations of all the involved parties.

Authority to Modify the Disposition

Another question that arises in the 7B-906.1 review hearing is whether the court has the authority to modify the juvenile delinquency disposition placing the juvenile in DSS custody. 7B-906.1 explicitly authorizes the court to maintain the juvenile's placement or order a different placement or any disposition authorized by G.S. 7B-903, which is the dispositional alternatives statute that applies to abuse, neglect, or dependency actions.²³³ The dispositional alternatives in an abuse, neglect, or dependency case are different from the dispositional alternatives in a delinquency action.²³⁴ There are five dispositional alternatives available under G.S. 7B-903(a). Only

finds that the juvenile will receive proper care and supervision in a safe home). *See also id.* §§ 7B-906.1(l) (incorporating G.S. 7B-903.1); 7B-101(19) (definition of "safe home").

230. 211 N.C. App. 620 (2011).

231. *Id.*

232. *See, e.g., In re M.A.B.*, 170 N.C. App. 192 (2005) (no delegation of authority found when statute regarding restitution did not mandate that court set the amount to be paid but instead stated that court *may* determine the amount); *In re J.D.R.*, 239 N.C. App. 63 (2015) (determining that court impermissibly delegated its authority under G.S. 7B-905.1); *Woodring v. Woodring*, 227 N.C. App. 638, 647 (2013) (citations omitted) ("court may not award custodial parent exclusive control over visitation . . . 'To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.'").

233. G.S. 7B-906.1(i).

234. *Compare* G.S. 7B-903 (five alternatives applying to abuse, neglect, or dependency) *with* G.S. 7B-2506 (twenty-four alternatives applying to delinquency).

three of these dispositional alternatives²³⁵ are also available as a delinquency disposition under G.S. 7B-2506(1). While the two types of actions may share these dispositional alternatives, there are some differences in how they are interpreted and/or applied, as detailed in Table 2.

Table 2. Dispositional Alternatives Available in Both Abuse, Neglect, Dependency and Delinquency Actions, with Differences Identified (in Italics)

G.S. 7B-903 (A/N/D)	G.S. 7B-2506 (Delinquency)
Require that the juvenile be supervised in his or her home by DSS or another individual, subject to court-specified conditions placed on the parent, guardian, custodian, or <i>caretaker</i>	Require that a juvenile be supervised in his or her own home by DSS, <i>a juvenile court counselor, or other personnel as may be available to the court</i> , subject to court-specified conditions placed on the parent, guardian, custodian, or <i>the juvenile</i>
Place the juvenile in the custody of a parent, relative, other suitable person, or private agency; <i>the court must also consider whether jurisdiction should be terminated and whether a G.S. Chapter 50 custody order should be entered pursuant to G.S. 7B-911</i> ²³⁶	Place the juvenile in the custody of a parent, relative, other suitable person, or private agency
Place the juvenile in DSS custody	Place the juvenile in DSS custody

There is no question that a court may review and maintain the juvenile’s placement in DSS custody, which would not be a modification of the delinquency disposition. Modifying the disposition is more complex, as it raises questions regarding proper procedures and the court’s authority. For example, is the court’s authority limited to those dispositional alternatives available under G.S. 7B-2506(1)c., ruling out the options provided for by G.S. 7B-903, despite the language of G.S. 7B-906.1(i)? Before the court may modify the disposition, is a G.S. 7B-2600 motion and review hearing required?²³⁷ These questions have not been answered. In addition, G.S. 7B-903.1(c) requires that before DSS can recommend that the juvenile be returned to the physical custody of a parent, guardian, custodian, or caretaker from whose home the juvenile was removed, DSS must observe at least two visits that support its recommendation.²³⁸ This provision assumes that the circumstances of the child’s status as abused, neglected, or dependent were created by that parent, guardian,

235. Separate from G.S. 7B-2506, the dispositional hearing statute, G.S. 7B-2501(d), authorizes the court to dismiss or continue the case for no more than six months to allow the family to meet the juvenile’s needs through a plan approved by the court, which is similar to another dispositional alternative available under G.S. 7B-903(a)(1).

236. G.S. 7B-911 requires the court to determine whether jurisdiction in the abuse, neglect, or dependency proceeding should be terminated and custody awarded through a G.S. Chapter 50 civil custody order, thereby transferring the case to a civil custody action. There is no similar transfer provision in a delinquency proceeding.

237. G.S. 7B-2600(a) authorizes the court, upon motion in the cause or petition and after notice, to modify or vacate dispositional orders in a delinquency action.

238. G.S. 7B-906.1(l), incorporating G.S. 7B-903.1(c) (note that (1) the observed visits must be at least one-hour long and held at least seven days apart and (2) DSS must provide documentation of the observed visits to the court).

custodian, or caretaker.²³⁹ However, it is unclear whether this provision applies when DSS custody resulted from a disposition in a delinquency matter, where the juvenile's act of delinquency formed the basis of the court action and resulting disposition.

Given that the court's authority to act exists within the delinquency action, it is prudent to follow the procedures and remedies provided for in the delinquency statutes when modifying a delinquency disposition. Available procedures include both the regular G.S. 7B-906.1 hearings to review placement and, upon a motion or petition, a G.S. 7B-2600 review hearing that may result in a modification or vacation of the delinquency disposition based on changes in circumstances or the needs of the juvenile. Conducting a review hearing under *both* statutes provides clarity to all of the participants that the court may enter an order that modifies the disposition. A review hearing under G.S. 7B-2600 would implicate all of the appropriate dispositional alternatives under G.S. 7B-2506, which would remove any confusion as to which dispositional alternatives are available to the court. Additionally, a review hearing under G.S. 7B-2600 would enable the court to modify not just the DSS custody order but other terms of the disposition as well. If the court does modify the disposition such that the juvenile is no longer in DSS custody, no further 7B-906.1 placement reviews would occur. Instead, any needed reviews would have to occur within the confines of the delinquency statutes.

Considerations in Permanency Planning Hearings under G.S. 7B-906.1 and Resulting Orders

Permanency planning hearings held under G.S. 7B-906.1 involve all of the issues that are raised in review hearings, with additional considerations that contemplate when and how the juvenile will achieve a permanent plan.²⁴⁰ The focus of permanency planning is to obtain a safe, permanent home within a reasonable period of time for a juvenile who has been adjudicated abused, neglected, or dependent.²⁴¹ At permanency planning, the court must establish a permanent plan for the juvenile.²⁴² The spectrum of options for a safe, permanent home range from reunification with a parent to the child's adoption.²⁴³

A safe, permanent home for a juvenile in a delinquency action is simply not contemplated by the North Carolina delinquency statutes, other than through the reference to a G.S. 7B-906.1 review of the delinquency disposition placing the juvenile in DSS custody. In contrast, other states that allow for a foster care placement as a delinquency disposition expressly require that these placements undergo regular permanency hearings. Some of those delinquency statutes replicate the permanency hearing structure found in the abuse and neglect statutes. For example, New York's delinquency statute includes a provision entitled "Permanency hearing," which sets out a permanency hearing schedule for youth who are adjudicated delinquent, placed with social services, and residing in a foster home or non-secure facility.²⁴⁴ The statute provides direction as to who is required to file the petition for the permanency hearing and when, notice,

239. See the definitions of "abused juvenile[]", "dependent juvenile", and "neglected juvenile" in G.S. 7B-101(1), (9), and (15), respectively.

240. See, e.g., G.S. 7B-906.1(d) (applying to both review and permanency planning hearings), (e) & (f) (applying to permanency planning hearing); -906.2 (applying to permanency planning hearing); -912 (applying to permanency planning hearing).

241. See G.S. 7B-906.1(a), (g); -906.2. See also *id.* § 7B-101(19) (definition of "safe home").

242. *In re D.A.*, ___ N.C. App. ___, 822 S.E.2d 664 (2018).

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

244. N.Y. FAM. CT. ACT § 355.5 (McKinney 2019).

and factors and circumstances that must be considered by the court.²⁴⁵ It also clarifies that the court cannot reduce or terminate the placement of the juvenile prior to the period of placement ordered as the delinquency disposition.²⁴⁶ In Maine, the delinquency statute specifically refers to conducting review and permanency planning hearings and incorporates four child welfare statutes.²⁴⁷

Statutory structures like the ones found in New York and Maine ensure that the permanency planning hearings necessary to claim federal Title IV-E funding (as discussed in Part Six) are held at the time and in the manner necessary to allow for the use of federal funds to support the juvenile's foster care placement. The North Carolina statute merely directs courts to hold G.S. 7B-906.1 placement reviews when DSS custody has been ordered as a delinquency disposition; it does not address the role of permanency planning. The question remains as to whether the 7B-906.1 review of the juvenile's placement in DSS custody limits the 7B-906.1 hearing to a review hearing only.

If permanency planning hearings are conducted in a delinquency action, the court looks to the needs of the juvenile and applies a best interests of the child standard, just like it does in delinquency disposition and 7B-906.1 review hearings.²⁴⁸ At each permanency planning hearing, the court must consider the criteria set forth in G.S. 7B-906.1, some of which also apply to the review hearing and some of which only apply when the juvenile is not placed with a parent, which is presumably the case when the juvenile has been ordered to DSS custody.²⁴⁹ The statutory factors the court must consider when the juvenile is not placed with a parent include

- whether the juvenile can be placed with a parent within the next six months and, if not, why such a placement is not in the child's best interests;
- when placement with a parent is unlikely within the next six months,
 - whether guardianship or custody to a relative or other suitable person should be ordered and, if so, what rights and responsibilities should remain with the parents,
 - whether adoption should be pursued and, if so, whether there are any barriers to the adoption, and
 - whether the juvenile should stay in his or her current placement or move to a different permanent living arrangement and why;
- whether DSS has since the initial permanency planning hearing made reasonable efforts to implement the juvenile's permanent plan; and
- any other factor deemed necessary by the court.²⁵⁰

245. *Id.*

246. *Id.*

247. ME. REV. STAT. ANN. tit. 15, § 3315(1) (2017) (incorporating ME. REV. STAT. ANN. tit. 22, §§ 4005 (appointment of guardian ad litem for child, and attorney for indigent parents and custodians), 4038 (judicial review hearings), 4039 (law enforcement assistance for enforcement of a custody order change), and 4041 (rehabilitation and reunification services and when they may be discontinued)).

248. G.S. 7B-906.1(c), (i); -2501. *See also* G.S. 7B-100(5); *In re* A.P., ___ N.C. ___, 812 S.E.2d 840 (2018); *In re* Montgomery, 311 N.C. 101 (1984).

249. *See* G.S. 7B-906.1(d) (applying to review and permanency planning hearings), (e) (applying to permanency planning hearings when the juvenile is not placed with a parent). Note that there are situations when DSS places the juvenile with a parent, which is typically referred to in practice as a "trial home placement."

250. G.S. 7B-906.1(e).

As with a review hearing, the court must make written findings of those statutory factors that are relevant.²⁵¹ Because these hearings are being conducted in a delinquency action and not in an abuse, neglect, or dependency action, the purposes of the delinquency disposition may impact what the court determines is relevant.

Like in a review hearing, a permanency planning hearing is not governed exclusively by G.S. 7B-906.1 but instead relies upon other abuse, neglect, or dependency statutes, none of which are incorporated into the delinquency disposition statute. Yet permanency planning cannot occur in the absence of those other statutes.

Additional considerations and findings are required in every permanency planning hearing that involves a juvenile who is age 14 or older and in DSS custody.²⁵² In such cases, the court must inquire about and make findings as to

- services provided to assist the juvenile in transitioning to adulthood,
- steps being taken by DSS to ensure that the juvenile’s placement provider is following the “reasonable and prudent parent standard,”²⁵³ and
- whether the juvenile has regular opportunities to engage in age- or developmentally-appropriate activities.²⁵⁴

For juveniles in DSS custody who are going to age out of foster care at age 18, at the last permanency planning hearing, which must occur at least ninety days before the juvenile turns 18, the court must

- inquire about whether the juvenile has a copy of his or her birth certificate, Social Security card, health insurance information, identification card or driver’s license, and any medical or educational records the juvenile requests and
- determine who should assist the juvenile in obtaining these documents prior to the juvenile’s 18th birthday.²⁵⁵

Regardless of the juvenile’s age, at the end of each permanency planning hearing, the court must make specific findings as to the best permanent plans for the juvenile to achieve a safe, permanent home within a reasonable period of time.²⁵⁶ The court will order concurrent permanent plans, with a primary and secondary plan designated, until a permanent plan has been achieved.²⁵⁷ There are six possible permanent plans,²⁵⁸ four of which are available to all juveniles:

- reunification,²⁵⁹
- adoption,²⁶⁰

251. *Id.*

252. G.S. 7B-906.2(e); -912(a).

253. *See* G.S. 131D-10.2A (explaining this standard).

254. G.S. 7B-912(a).

255. G.S. 7B-912(b).

256. G.S. 7B-906.1(g). *See id.* § 7B-906.2 (permanent plans).

257. G.S. 7B-906.2(a), (a1).

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

259. G.S. 7B-101(18b) (definition of “return home or reunification”).

260. G.S. 7B-906.2(a)(2). Note that an adoption is covered by a separate, special proceeding governed by G.S. Chapter 48.

- guardianship,²⁶¹ and
- custody to a suitable person who is not the juvenile's parent.²⁶²

Two permanent plans have limiting criteria:

- Another planned permanent living arrangement (APPLA) may be a primary plan for a 16- or 17-year-old juvenile when placement with a parent, relative, guardian, or adoptive home is not in the juvenile's best interests and the criteria of G.S. 7B-912 are met.²⁶³
- Reinstatement of parental rights is a possible plan when the juvenile's parents' rights have previously been terminated and the procedures and criteria of G.S. 7B-1114 are satisfied.²⁶⁴

Of all the permanent plans available to the court, reunification is prioritized.²⁶⁵ Reunification must be designated as a primary or secondary plan absent a finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety.²⁶⁶

At each permanency planning hearing where the court orders concurrent permanent plans, the court must order DSS to make efforts toward finalizing the primary and secondary plans and may specify the reasonable efforts that are needed for the juvenile to timely achieve permanence.²⁶⁷ The court must also make findings about the efforts provided by DSS and whether they were reasonable.²⁶⁸

The Juvenile Code defines "reasonable efforts" as

- "[t]he diligent use of preventive or reunification services by [DSS] when a juvenile remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time"²⁶⁹ or
- when a court determines that the juvenile will not return home, "the diligent and timely use of permanency planning services by [DSS] to develop and implement a permanent plan for the juvenile."²⁷⁰

At every permanency planning hearing, the court must also make each of the following written findings, which focus on whether the parent

- is making adequate progress under the plan within a reasonable period of time;
- is actively participating and cooperating with the plan, DSS, and the juvenile's guardian ad litem (GAL);

261. G.S. 7B-906.2(a)(3); -600.

262. G.S. 7B-906.2(a)(4).

263. G.S. 7B-906.2(a)(5); -912(c), (d).

264. G.S. 7B-906.2(a)(6).

265. See G.S. 7B-100(4), (5); -906.2(b).

266. G.S. 7B-906.2(b). See *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (the findings designated in G.S. 7B-901(c) are not applicable outside of the initial dispositional hearing conducted pursuant to G.S. 7B-901 and are not available at a permanency planning hearing).

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

268. See G.S. 7B-906.2(c).

269. G.S. 7B-101(18). Note that the term "reunification efforts" is used throughout various abuse, neglect, or dependency statutes, e.g., G.S. 7B-906.2(b), yet that term is not defined in the Juvenile Code. It appears that the term "reunification efforts" is used synonymously with "reasonable efforts" that are designed for reunification purposes.

270. *Id.*

- remains available to the court, DSS, and the juvenile's GAL; and
- is acting in a manner that is inconsistent with the juvenile's health or safety.²⁷¹

In a delinquency action, the juvenile is not represented by a GAL but by a juvenile defense attorney. The parent, therefore, will not have any interaction with a GAL. It is unclear whether the court must find that there is no GAL for the juvenile when addressing these mandatory statutory findings.²⁷² Of note, these required findings focus only on the juvenile's parent, whereas reviews of delinquency dispositions focus on both compliance and progress on the part of the juvenile as well as on any compliance and progress on the part of a parent if the parent was the subject of any portions of the delinquency dispositional order.

The Impact of 906.1 Hearings on Parents' Constitutional Rights

The delinquency disposition order that placed a juvenile in DSS custody impacted the constitutional rights of the juvenile's parent(s). The review of that placement in accordance with G.S. 7B-906.1 further impacts parental rights. Specifically, 906.1 hearings address the reasonable efforts that must be made by DSS to reunify the juvenile with his or her parents, focusing on issues such as what efforts were made, whether they were reasonable, and if they should cease. Related to the matter of reasonable efforts is the court's determination of the child's concurrent permanent plans, which range from reunification with a parent to the child's adoption. The court must consider whether a termination of parental rights is necessary to achieve the juvenile's primary permanent plan.²⁷³ One question that arises in such cases is whether a permanent plan that deprives a parent of his or her constitutional rights to the care, custody, and control of his or her child because of a delinquency adjudication, which is based on the juvenile's conduct rather than on the parent's conduct, exceeds the scope and purpose of the delinquency statutes.

Reunification Efforts

Review hearings and permanency planning hearings impact parental rights in considerably different ways. In both types of hearings, the court may make a finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety.²⁷⁴ However, if the court makes that finding in a review hearing, it does not have authority to relieve DSS of the duty to make those efforts. The court only has authority to enter an order relieving DSS of its duty to make reasonable efforts to reunify the juvenile with either parent in a permanency planning hearing.²⁷⁵ This difference in the court's authority means that reasonable efforts for reunification must continue during the review hearing stage of the action but may be stopped at permanency planning.

271. G.S. 7B-906.2(d).

272. See *In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017) (reversing and remanding for additional findings; trial court did not make required findings under G.S. 7B-906.2(d), including findings about mother's cooperation, or lack thereof, with DSS).

273. G.S. 7B-906.1(m); see also *id.* §§ 7B-906.1(d)(6), (f).

274. G.S. 7B-906.1(d)(3); -906.2(b).

275. *In re T.W.*, ___ N.C. App. ___, ___, 796 S.E.2d 792, 795 (2016) (stating that "[G.S.] 7B-906.1(d)(3) does not expressly authorize the ceasing of reunification efforts" but triggers the court's duty to start the permanency planning process, which requires a permanency planning hearing where reunification efforts may be ceased).

Consideration of the Termination of Parental Rights

A parent is not only at risk of losing reunification efforts during permanency planning—he or she is also at risk of losing his or her parental rights. G.S. 7B-906.1 requires the court to consider whether a termination of parental rights (TPR) is necessary.²⁷⁶ If the primary permanent plan is adoption and a TPR is needed to achieve that plan, the DSS director is required to initiate a TPR within sixty days from the entry of the permanency planning order unless the court makes findings as to why that cannot happen and specifies a different time frame.²⁷⁷ In the event that a TPR is necessary, it is not part of the delinquency action but must be pursued as a separate action.²⁷⁸

Of note, G.S. 7B-906.1(f) requires the DSS director to commence a TPR proceeding when a juvenile has been in DSS custody and has been placed outside of his or her home for twelve of the most recent twenty-two months. There is an exception to this mandate if the court finds that (1) the TPR is not in the child’s best interests and why, (2) guardianship or custody with a suitable person who is not the juvenile’s parent is the permanent plan, or (3) DSS has not provided the juvenile’s family with necessary services when reasonable efforts are still required for reunification.²⁷⁹ Given the objectives of a delinquency disposition, a court at a review or permanency planning hearing could find that a TPR is not in the juvenile’s best interests, relieving DSS of the obligation to initiate a TPR when statutory time limits are reached.

The Juvenile Code does not explicitly contemplate the need to terminate a parent’s rights as part of a delinquency disposition. The laws of other states do. For example, Maine has a delinquency statute titled “termination of parental rights” that explicitly applies the TPR statutes to the delinquency proceeding.²⁸⁰ A TPR appears to be contrary to North Carolina’s objectives in a delinquency action, which include “providing appropriate rehabilitative services to juveniles and their families”²⁸¹ and “[e]mphasiz[ing the] accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile’s conduct.”²⁸²

Elements Related to the Delinquency 906.1 Order

The findings and elements of a review versus a permanency planning order differ and are discussed in their respective sections above. However, unlike in the delinquency dispositional statutes, G.S. 7B-906.1 imposes a time limit (in addition to other requirements) for when a 906.1 review or permanency planning order must be entered. The order must be in writing, signed, and entered within thirty days of the completion of the hearing.²⁸³ If the order is not timely entered, the court must schedule a subsequent hearing at the first session of court that hears juvenile matters.²⁸⁴ The purpose of this subsequent hearing is to determine and explain the reasons for the delay and obtain any needed clarification as to the order’s contents.²⁸⁵ Within ten days of that subsequent hearing, the order should be entered.²⁸⁶

276. G.S. 7B-906.1(d)(6), (f); *see also id.* § 7B-906.1(e)(3).

277. G.S. 7B-906.1(m).

278. TPR proceedings are codified at G.S. Chapter 7B, Subchapter I, Article 11.

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

280. ME. REV. STAT. ANN. tit. 15, § 3315-A (applying ME. REV. STAT. ANN. tit. 15, §§ 4051–4059).

281. G.S. 7B-1500(2)b.

282. G.S. 7B-2500(2).

283. G.S. 7B-906.1(h).

284. *Id.*

285. *Id.*

286. *Id.*

Can Delinquency 906.1 Orders Be Appealed?

The Juvenile Code limits which orders may be appealed and who may appeal those orders.²⁸⁷ Although the order results from a 906.1 hearing, it is entered in a delinquency action and, as such, may be appealed under the statute governing orders entered in a delinquency proceeding.²⁸⁸ Only *final* orders are appealable in delinquency proceedings.²⁸⁹ “Final” in this context includes (1) any order finding an absence of jurisdiction, (2) any order which in effect determines the action and prevents a judgment from which an appeal could be taken, (3) an order of disposition, and (4) an order modifying custodial rights.²⁹⁰ Any modification of the delinquency disposition entered as part of the 906.1 hearing would constitute an order of disposition and, therefore, could be appealed.

How and When Delinquency Dispositional Orders Placing Juveniles in DSS Custody Terminate

While some dispositional alternatives in delinquency matters are bound by statutory time limits, there is no express time limit on dispositions that place juveniles into DSS custody. The juvenile remains in DSS custody through the delinquency dispositional order until the court (1) modifies the disposition such that the juvenile is not in DSS custody, (2) enters an order terminating jurisdiction, or (3) loses jurisdiction once the juvenile reaches the age limit for delinquency jurisdiction.

Impact of Termination of Probation on DSS Custody Disposition

In some cases, a juvenile may be placed in DSS custody and simultaneously placed on probation. An initial period of probation may last for only 12 months; it may then be extended for an additional 12 months at a time.²⁹¹ There is no similar time requirement for DSS custody dispositions. Thus, if a juvenile’s disposition orders both DSS custody and probation, the probation term will have a specific end date, while the DSS custody placement will likely not.

Confusion may occur when a juvenile’s probation terminates but the dispositional order also includes placement in the custody of DSS. Because these are two separate terms of the disposition that are subject to different time periods, a termination of probation does not automatically terminate the DSS custody order. The termination of probation also does not automatically terminate the court’s jurisdiction in the delinquency matter. This means that the dispositional order placing the juvenile in DSS custody continues, even after probation ends, until and unless (1) the court modifies the disposition to remove the juvenile from DSS custody, (2) the court enters an order terminating its jurisdiction in the delinquency action, or (3) the juvenile ages out of juvenile court jurisdiction.

Figures 2a and 2b illustrate how a disposition that includes a term of probation and placement in DSS custody can conclude.

287. For delinquency matters, see G.S. 7B-2602 (orders); -2603 (transfer order); -2604 (proper parties); for abuse, neglect, or dependency matters, see G.S. 7B-1001 (orders); -1002 (proper parties).

288. G.S. 7B-2602. Note that the right to appeal in G.S. 7B-1001 applies only to “a juvenile matter under this Subchapter,” which is Subchapter I, applicable in abuse, neglect, or dependency actions. Delinquency actions are governed by Subchapter II.

289. G.S. 7B-2602.

290. *Id.*

291. G.S. 7B-2510(c).

Figure 2a. Robby

On his 15th birthday, Robby was placed on probation and ordered into DSS custody. He received an original term of probation for 12 months. His probation was extended for a second 12-month term. At the end of that second term, the court terminated probation pursuant to G.S. 7B-2511 but did not address DSS custody or the termination of juvenile court jurisdiction. As a result, Robby’s placement in DSS custody continued and the court retained jurisdiction over the case until Robby turned 18. The automatic termination of juvenile jurisdiction with Robby’s 18th birthday ended both the dispositional order into DSS custody and the entire delinquency matter.

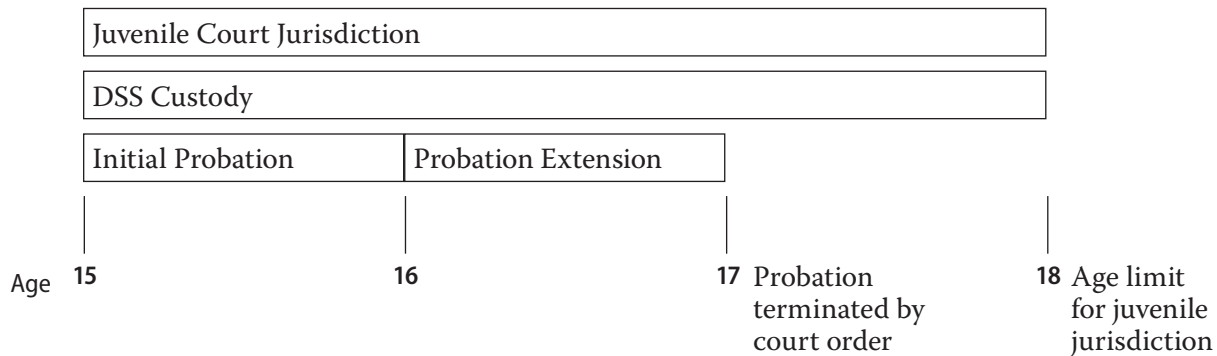
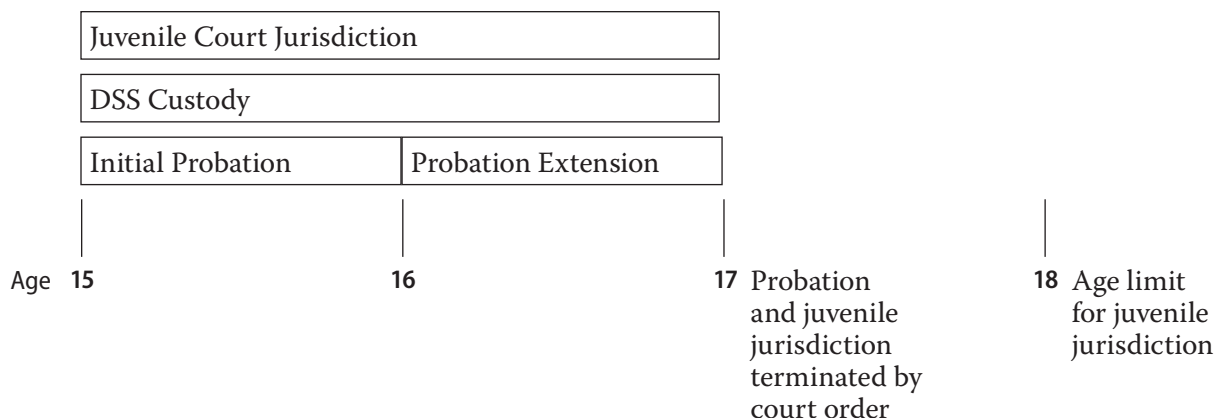


Figure 2b. Melissa

Melissa, who is the same age as Robby, received the same disposition as Robby. She was placed on an initial 12-month term of probation and ordered into DSS custody. Like Robby, Melissa’s probation was extended for one additional 12-month term. Melissa returned to court at the end of the second term of probation. The court terminated her probation and also entered an order terminating juvenile court jurisdiction in the case. The dispositional order placing Melissa into DSS custody also ended with the termination of jurisdiction in the case. Melissa therefore completed her probation and her time in DSS custody as a result of the delinquency matter at the same time. The court had the option of retaining jurisdiction but modifying the dispositional order to not only terminate probation but also to modify the custody order portion of the order and remove Melissa from DSS custody. For example, the court could have shifted custody of Melissa to a relative instead of DSS. In that circumstance, probation and DSS custody would have ended at the same time, while the court retained jurisdiction in the delinquency case until her 18th birthday.



Foster Care at Age 18 and Older

When the Juvenile Justice Reinvestment Act (JJRA) becomes effective on December 1, 2019, the jurisdictional age limits for juveniles who commit an offense prior to age 16 will remain the same (age 18) as they are now. However, for juveniles who commit an offense at age 16, under the JJRA, jurisdiction will last until terminated by order of the court or until the juvenile turns 19.²⁹² Juvenile court jurisdiction for juveniles who commit an offense at age 17 will last until terminated by court order or until the juvenile turns 20.²⁹³ The JJRA's extended delinquency jurisdiction for older adolescents raises a new question. Can a person who was ordered into DSS custody before turning 18 remain in DSS custody for the duration of juvenile court jurisdiction?

Currently, children must be under the age of 18 to fall within the jurisdiction of the abuse, neglect, or dependency statutes.²⁹⁴ If a juvenile who is placed in foster care, including through a delinquency disposition,²⁹⁵ remains in care when he or she turns 18, the juvenile, now a young adult, can continue to receive foster care services until age 21 by *voluntarily* participating in North Carolina's Foster Care 18–21 program.²⁹⁶ This extended foster care benefit is available for those juveniles who (1) have been adjudicated delinquent, (2) were placed in foster care as a delinquency disposition, (3) age out of foster care upon turning 18, and (4) meet statutory eligibility criteria.²⁹⁷ That young adult's participation in North Carolina's extended foster care program requires the execution of a voluntary placement agreement (VPA) between the eligible young adult and a county DSS and at least one judicial review of that VPA.²⁹⁸ That judicial review is not part of the delinquency proceeding but instead involves a new case file and new juvenile file number.²⁹⁹

The new jurisdictional framework for any youth who is responsible for an act of delinquency at age 16 or 17 (under the JJRA) could result in the court ordering DSS custody as a disposition.

292. S.L. 2017-57, § 16D.4.(b).

293. *Id.*

294. G.S. 7B-201(a). *See id.* §§ 7B-101(1) (defining “abused juvenile[.]” as a juvenile less than 18 years old), -101(14) (defining “juvenile” as a person who has not reached his or her 18th birthday and is not married, emancipated, or a member of the Armed Forces).

295. G.S. 131D-10.2(9) (definition of “foster care” includes delinquent children who receive “the continuing provision of the essentials of daily living on a 24-hour basis” and “who, due to similar problems of behavior or family conditions, are living apart from their parents, relatives, or guardians in a family foster home or residential child-care facility”). *See also id.* §§ 131D-10.2(8) (definition of “family foster home”), (13) (definition of “residential child-care facility”).

296. G.S. 131D-10.2B (provides the statutory basis for foster care until age 21). *See also* N.C. DEP'T OF HEALTH & HUMAN SERVS., DIV. OF SOC. SERVICES, CHILD WELFARE SERVICES MANUAL (hereinafter CHILD WELFARE SERVICES MANUAL) 1201—Child Placement Services, § XII (Dec. 2016) (includes more detailed information on extended foster care), <https://www2.ncdhhs.gov/info/olm/manuals/dss/csm-10/man/>; Sara DePasquale, *Foster Care Extended to Age 21*, ON THE CIVIL SIDE: A UNC SCH. OF GOV'T BLOG (Jan. 11, 2017); Sara DePasquale & Jan Simmons, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA ch. 8, § 8.3 (UNC School of Government, 2017 ed.), available free of charge at <https://www.sog.unc.edu/resources/microsites/abuse-neglect-dependency-and-termination-parental-rights>.

297. *See* G.S. 108A-48(c) (listing the eligibility criteria related to participation in educational or vocational programs, employment, and existing medical condition or disability).

298. G.S. 7B-910.1; CHILD WELFARE SERVICES MANUAL, 1201—Child Placement Services § XII.C.; *see also* G.S. 7B-401.1(i) (designating parties to the judicial review).

299. N.C. ADMIN. OFFICE OF THE COURTS, RECORDS OF THE CLERK OF SUPERIOR COURT, Rules of Recordkeeping Ch. XII, Rules 12.1.2, 12.3 (Oct. 6, 2017); *see* G.S. 7B-200(5a) (district court jurisdiction).

The dispositional order continues for the duration of the court’s jurisdiction, which is until the juvenile’s 19th (delinquent act at age 16) or 20th (delinquent act at 17) birthday, unless otherwise modified or terminated by court order. The JJRA modified the delinquency dispositional statute, limiting the capacity of the court to order DSS custody as a term of a disposition to juveniles under the age of 18.³⁰⁰ However, it is not clear how this amendment applies to youth who were ordered into DSS custody prior to turning 18 and who remain under the jurisdiction of the court past age 18 in the delinquency proceeding.

The age limit on the dispositional option of DSS custody contained in the JJRA applies to two other dispositional options as well. It includes placing the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person and ordering supervision of the juvenile in his or her own home by DSS, a juvenile court counselor, or other personnel as may be available to the court.³⁰¹ The intent of the new age limit is unclear because not all of these dispositional options involve a change in custody. If the action of being placed in the custody of another was intended to last only until age 18 under this amendment, then inclusion of court-ordered in-home supervision by an outside entity would seem to be misplaced. Absent clear statutory intent, the question remains as to whether a juvenile who is placed in DSS custody prior to age 18 and who remains under juvenile jurisdiction at age 18 and/or 19 can continue in DSS custody.

It is unclear whether the court can order a juvenile into DSS custody past his or her 18th birthday and up to age 19 and 20. The definition of “foster care” expressly allows for “the continuing provision of the essentials of daily living on a 24-hour basis for . . . delinquent *children* (emphasis added) . . .”³⁰² “Child” in the context of the law governing the provision of foster care is defined as any *unemancipated* individual under the age of 21.³⁰³ However, the North Carolina Supreme Court has held that “[t]he age of emancipation is precisely fixed – eighteen.”³⁰⁴ It is therefore unclear how a juvenile between the ages of 18 and 20 could ever be unemancipated, triggering eligibility under the definition of child for foster care purposes.

If an 18- or 19-year-old can continue in foster care, it will create a new population of young adults in foster care who are separate and distinct from those young adults who enter into a VPA with a county DSS for participation in the Foster 18–21 program.³⁰⁵ This may require DSS to develop additional—and new—capacity to care for 18- and 19-year-olds who are court-ordered into foster care as a result of an adjudication of delinquency. If it is problematic at the local level for DSS to place a “juvenile” over 18 who is ordered in its custody, (1) the court could place a time limit on the portion of the disposition placing the juvenile in DSS custody so that custody will terminate at age 18 or (2) DSS could file a motion to modify the delinquency disposition prior to the juvenile’s 18th birthday to seek a disposition stating that DSS will no longer have custody of the juvenile after the juvenile reaches the age of majority. However, the juvenile

300. G.S. 7B-2506(1).

301. *Id.*

302. G.S. 131D-10.2(9).

303. G.S. 131D-10.2(3).

304. *Shoaf v. Shoaf*, 282 N.C. 287, 291 (1972). See G.S. 48A-2 (“Age of minors”); 7B-3400 (“Juvenile under 18 subject to parents’ control”). See also *id.* §§ 7B-3505 (allowing emancipation at age 16 via a court-ordered decree), -3509 (providing for emancipation of a juvenile through marriage). See generally G.S. Chapter 7B, Article 35.

305. See G.S. 131D-10.2B; 108A-48(c), (d); CHILD WELFARE SERVICES MANUAL, 1201—Child Placement Services, § XII.

may still voluntarily choose to participate in the Foster Care 18–21 program if the DSS custody order terminates upon the juvenile’s 18th birthday (and not before). It is critical that any court order placing the juvenile into DSS custody remain in effect on the juvenile’s 18th birthday in order for the juvenile to be eligible to opt into the Foster Care 18–21 program.

It is also possible that a juvenile who is approaching his or her 18th birthday and automatic emancipation will seek a modification of a dispositional order that places him or her in DSS custody to state that DSS custody will end upon his or her turning 18. While the issue of the court’s authority to order an adult to remain in DSS custody is unresolved, it seems likely that, at a minimum, the court would need to address decision-making authority for certain services if DSS custody continues for a young adult in this situation, as certain rights automatically transfer to the juvenile upon turning 18.³⁰⁶

If there are concerns about how long a juvenile will remain in foster care and under what conditions, those issues should be raised at the 906.1 review hearing. Any order that modifies the disposition should be conducted pursuant to G.S. 7B-2600.

Part Five: DSS Guardianship

In a delinquency action, the court may appoint a guardian of the person (guardian) for the juvenile pursuant to G.S. 7B-2001. In practice, some juvenile courts have appointed DSS as that guardian.³⁰⁷ A delinquency order appointing DSS as a juvenile’s guardian differs in both character and procedure from a delinquency nonsecure custody and a dispositional order that places the juvenile in DSS custody. However, these three different types of delinquency orders share one common characteristic—custody of the juvenile is awarded to DSS in the delinquency action and not in a separate and simultaneous abuse, neglect, or dependency action.

The Nature of the Delinquency Guardianship Order

The Juvenile Code does not define “guardian of the person,” but the North Carolina Supreme Court has concluded that the plain and unambiguous meaning of the term requires a relationship that is established by a legal process that gives the guardian the legal authority and duty to care for another’s person.³⁰⁸ The delinquency statute authorizing the appointment of a guardian for a juvenile, G.S. 7B-2001, specifies the guardian’s rights and responsibilities. This law provides

306. *See, e.g.*, G.S. 115C-109.2(a)(2) (when a child with a disability turns 18, the “rights accorded to parents under this Article and IDEA [Individuals with Disabilities Education Act] transfer to the child”). *See also* G.S. Chapter 90, Article 1A (“Treatment of Minors” places limits on when a minor may consent to medical care; no such limitation applies to adults). The JJRA did not contain any age restriction on the age at which a juvenile in a delinquency matter can be ordered into DSS custody pursuant to a nonsecure custody order. The issue of decision-making authority for juveniles in DSS custody at age 18 or older will also arise if the court orders a juvenile age 18 or older into nonsecure DSS custody in a delinquency proceeding. Therefore, should an order for nonsecure custody to DSS be issued for a juvenile who is over age 18, that order should include only physical custody.

307. *See, e.g.*, *State v. Benitez*, ___ N.C. App. ___, 813 S.E.2d 268 (2018) (DSS was appointed as juvenile’s guardian pursuant to G.S. 7B-2001 after court found that no parent, guardian, or custodian had appeared with the juvenile, who lived with an uncle who did not have legal custody of him and whose mother and father were believed to be in El Salvador).

308. *State v. Oglesby*, 361 N.C. 550 (2007) (interpreting the term “guardian” as it is used in the context of a custodial interrogation of a juvenile under G.S. 7B-2101). *See Benitez*, ___ N.C. App. ___, 813 S.E.2d

that the guardian operates under the court's supervision and, unless the court orders otherwise, has the care, custody, and control of the juvenile. Specific authority provided to the guardian (absent a court order stating otherwise) includes arranging for a suitable placement for the juvenile; representing the juvenile in legal actions before a court; and consenting to the juvenile's (1) remedial, psychological, medical, or surgical treatment; (2) school enrollment; (3) military enlistment; and/or (4) marriage.³⁰⁹

The rights of a guardian specified in G.S. 7B-2001 are consequential. For example, if the juvenile marries after obtaining consent from the guardian, the juvenile is emancipated under North Carolina common law.³¹⁰ The phrase "care, custody, and control of the juvenile" applies to parents' paramount constitutional rights to raise their children,³¹¹ and it also applies to the authority and responsibilities of the court-appointed guardian.

Delinquency Guardianship Process and Issues That Arise from That Process

In a delinquency action, the juvenile court may appoint a guardian for a juvenile "[i]n any case when no parent, guardian, or custodian appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile."³¹² The applicable delinquency statute does not address the purpose of the guardianship, persons the court should consider when naming a guardian, specific factors for the court to consider in making the guardianship decision, or what processes the court should use in entering and terminating a guardianship order. Apart from the requirements that (1) a guardianship be in the juvenile's best interests or (2) no parent, guardian, or custodian appeared in a delinquency hearing with the juvenile, there do not appear to be any other required statutory findings of fact or conclusions of law that must be made by the court before it can enter an order appointing a guardian for the juvenile.

Once a guardian is appointed in the delinquency action, there is no statutory requirement for ongoing reviews of the guardianship order. This differs from the procedures requiring (1) hearings on the need for continued nonsecure custody and (2) ongoing reviews under G.S. 7B-906.1 when a dispositional order places a juvenile in DSS custody. Instead, depending on when in the delinquency action the guardian is appointed, the court would simply schedule and hold hearings as required, such as continued nonsecure custody, adjudication, disposition, or post-dispositional hearings. There is no requirement that in those hearings the court must review the guardianship appointment and consider whether it should continue and/or be modified in any way. Without review hearings pursuant to G.S. 7B-906.1, any foster care placement resulting from the appointment of DSS as the guardian of a juvenile in a delinquency proceeding will not be eligible for federal funding to support the foster care placement, as discussed in Part Six.

268 (concluding that the legal process referred to by the state supreme court in *Oglesby* means a court proceeding).

309. G.S. 7B-2001(1)-(4).

310. See G.S. 51-2(a1) (an unemancipated 16- or 17-year-old may marry with the written consent of his or her guardian); 7B-3509 (a minor is emancipated upon marriage).

311. See, e.g., the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 65 (2000), and the discussion in Part Two of this bulletin.

312. G.S. 7B-2001.

Role of DSS in Delinquency Guardianship Proceedings

There is no statutory requirement that DSS must receive notice or have the opportunity to be heard before the court appoints it as the juvenile's guardian. The fact that DSS has no involvement prior to and at the hearing in which the court is considering appointing DSS as the juvenile's guardian can create several important gaps.

In naming DSS guardian of a juvenile, the court is awarding guardianship to an agency over which it has no personal jurisdiction. The court does not have the opportunity to hear the DSS perspective regarding placement or service availability, either through DSS or via other options of which DSS may be aware. DSS may seek a limited role as the juvenile's guardian; propose an alternative type of order that is available to the court at the given stage of the delinquency proceeding (e.g., nonsecure custody or a disposition placing the juvenile in DSS custody); or suggest a different option for who should serve as the guardian. If the court decides to order guardianship to DSS, DSS may request that the appointment order include language necessary for the placement to be eligible for Title IV-E funding (discussed in more detail in Part Six). Without any notice prior to the entry of an order naming it as a juvenile's guardian, DSS may have no familiarity with the juvenile and/or family. This lack of familiarity may make immediate arrangements for placement and/or services difficult.

Once DSS is appointed guardian, it becomes a party and will be entitled to notice of all scheduled hearings in the delinquency proceeding.³¹³

Elements of the Delinquency Guardianship Order

North Carolina law is silent about what must be included in a guardianship order entered pursuant to G.S. 7B-2001. There are no required findings that must be included by the court in the guardianship order. Presumably, the findings supporting the basis for the appointment—no parent, guardian, or custodian appeared at the hearing or it is in the juvenile's best interests—should be included. Additionally, if DSS is appointed as guardian and intends to place the juvenile in foster care, the order should include the findings that are necessary to obtain federal IV-E funding (discussed in more detail in Part Six) to financially support the foster care placement.

Regarding the decretal portion of the order, the statute authorizes the court to determine what rights the guardian has, whether the appointment will be with or without bond, and whether reports from the guardian must be filed with the court.³¹⁴

Can the Delinquency Guardianship Order Be Appealed?

The Juvenile Code specifies what types of final orders are subject to appeal in delinquency actions.³¹⁵ Related to guardianship, "a final order shall include . . . any order modifying custodial rights."³¹⁶ A guardianship order modifies custodial rights and, therefore, may be appealed. However, the appeal may only be brought by the juvenile, his or her parent, a guardian, or a custodian.³¹⁷ If DSS is appointed as guardian, it, along with the juvenile, his or her parent, or a custodian, would have standing to appeal the order making that appointment.

313. G.S. 7B-1807.

314. G.S. 7B-2001.

315. See G.S. 7B-2602.

316. G.S. 7B-2602(4).

317. G.S. 7B-2604.

Impact on Parents' Constitutional Rights

A guardianship order granting the guardian the care, custody, and control of the child removes those rights from the parent.³¹⁸ The parent no longer retains his or her constitutional rights to make decisions that have both short- and long-term impacts on his or her child. These decisions include issues related to the child's living arrangements, people with whom the child associates, the child's educational and medical needs, religion, and more. The appointment of a guardian has an extreme impact on parents' rights.

The award of guardianship to a non-parent based on the statutory factors of the child's best interests or a parent's failure to appear in a delinquency hearing conflicts with federal and state case law establishing a parent's paramount constitutional right to care, custody, and control of his or her child.³¹⁹ Appointing DSS as guardian of a juvenile pursuant to G.S. 7B-2001 may violate a parent's constitutional due process rights absent a finding by clear and convincing evidence that the parent is unfit or has acted inconsistently with his or her parental rights.

Parents are entitled to notice of any scheduled hearings in delinquency proceedings and, therefore, should be provided with notice prior to the court's appointment of a guardian for the juvenile.³²⁰ However, the Juvenile Code does not require that the notice sent to parents (1) specifically inform them that the appointment of a guardian is the subject of the upcoming hearing or (2) set out the basis of the appointment. Without sufficient notice of what is at issue, a parent will not have the opportunity to prepare a defense. Additionally, parents do not have a right to court-appointed counsel in the delinquency proceeding.³²¹

Given the issues raised here, a court may want to prioritize the placement of a juvenile in DSS custody through a nonsecure custody order or dispositional alternative if the appropriate criteria are met over the appointment of DSS as the juvenile's guardian pursuant to G.S. 7B-2001. If, however, the court determines that DSS should be appointed guardian of the juvenile, it may limit DSS's authority as guardian by specifying what DSS may and may not do. For example, the court may appoint a limited guardianship authorizing DSS to appear with the juvenile at hearings and to ensure that the juvenile has transportation to those hearings. A limited order like this would not impact parents' constitutional rights. Without such limitations, DSS would have the full range of authority listed in G.S. 7B-2001.

How and When the Delinquency Guardianship Order Terminates

A guardianship order entered in a delinquency action remains in effect until (1) terminated by court order, (2) the juvenile is emancipated, or (3) the juvenile reaches the age of majority.³²² The Supreme Court of North Carolina has ruled that 18 is the age of majority.³²³

Depending upon when a guardianship is ordered, it may remain in place for a long period of time. For example, if guardianship is ordered for a 14-year-old and the court retains jurisdiction over the matter, without an order terminating the guardianship, the guardianship remains in place until the juvenile turns 18. This is when the juvenile reaches the age of majority and when

318. For a discussion of parents' constitutional rights, see Part Two of this bulletin.

319. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000); *Owenby v. Young*, 357 N.C. 142 (2003); see also the discussion of parents' constitutional rights in Part Two of this bulletin.

320. G.S. 7B-1807.

321. See text at note 36, *supra*, discussing proposed House Bill 301.

322. G.S. 7B-2001.

323. *Shoaf v. Shoaf*, 282 N.C. 287, 291 (1972); see text in note 304, *supra*.

the court's jurisdiction terminates. Once the JJRA goes into effect, in cases involving youth who are adjudicated for offenses committed at age 16 or 17, the juvenile court can retain jurisdiction until the juveniles reach age 19 (offense committed at age 16) or 20 (offense committed at 17).³²⁴ However, any guardianship order would automatically terminate when the juvenile turns 18, even though the court's jurisdiction continues.

Part Six: Federal Foster Care Financing

According to the North Carolina Department of Health and Human Services, foster care assistance funding is available to all youth in care “regardless of how the child comes into the agency’s placement responsibility. It does not matter, therefore, whether the child came into care as a result of a Voluntary Placement Agreement, nonsecure custody order, adjudication of abuse, neglect, dependency, undisciplined, or delinquency, or through relinquishment of parental rights.”³²⁵ A foster care eligibility determination is therefore required for all youth coming into DSS custody through a nonsecure custody, disposition, or guardianship order that includes placement responsibility in a delinquency case. The largest source of federal financing to states³²⁶ to support the costs of foster care placements is known as Title IV-E funding. To become eligible to receive Title IV-E funding, a state agency must satisfy a fairly long list of requirements. However, a failure to satisfy these funding requirements does not prevent the court from placing a juvenile in DSS custody. The consequence of not satisfying the criteria is purely financial, placing a larger burden on state and county resources to support the cost of foster care.

Some of the many eligibility criteria necessary for obtaining this federal financial participation in the cost of foster care are tied to the court order that places a juvenile into DSS custody and the court processes and findings that continue to be required while the juvenile remains in foster care.³²⁷ The very first court order that removes a child from his or her home must contain language to the effect that continuation in the home is either contrary to the welfare of the child or not in the child’s best interest.³²⁸ The order must also clearly indicate the specific home from which the child is being removed.³²⁹ The specifics of the child’s situation must be detailed in the order, and the order must state that DSS has both legal custody and responsibility for placement of the juvenile.³³⁰ This legal custody requirement may conflict with the need to address the constitutional rights of parents, as discussed in Parts Two through Five of this bulletin. If a juvenile is placed in nonsecure or secure custody and subsequently placed with DSS as a disposition or

324. S.L. 2017-57, § 16D.4.(b).

325. CHILD WELFARE FUNDING MANUAL § 150.II.B.

326. U.S. territories and tribes may also apply for IV-E funding.

327. There are many other requirements for IV-E funding, such as financial eligibility, that are not connected to the court process. These requirements are beyond the scope of this bulletin.

328. CHILD WELFARE FUNDING MANUAL § 1500.II.B.2. (*Authors’ Note:* It appears that this manual contains two sections that use this citation. To access the information intended to be sourced here, locate the bullet point “Delinquent/undisciplined” under the unnumbered heading “Other IV-E Requirements” in the subdivision labeled “2. Related Issues,” found on the 26th page of the following PDF file: <https://www2.ncdhhs.gov/info/olm/manuals/dss/csm-78/man/Section%201500.pdf>.)

329. *Id.* § 1500.II.B.2.D.1.A.

330. *Id.*

through a guardianship order, the initial nonsecure or secure custody order must contain the “contrary to the welfare” or “best interest” language.³³¹

For a state agency to be eligible to receive IV-E funding to help cover the cost of providing foster care for a juvenile, there must also be a judicial determination that reasonable efforts were made to prevent removal of the juvenile from his or her home.³³² The reasonable efforts finding must be stated in a valid court order issued within sixty days of the child’s entry into foster care in order to qualify for IV-E funding.³³³ Both a description of the efforts made to prevent removal and the judge’s determination that those efforts were reasonable or sufficient to prevent removal must be included in the court’s order.³³⁴ Reasonable efforts are not required upon a finding, included in the order, stating that (1) efforts to prevent the juvenile’s removal were precluded by an immediate threat of harm to the juvenile and (2) placement in the absence of such efforts was reasonable.³³⁵

Finally, DSS must have responsibility for the placement and care of the juvenile to access IV-E funding.³³⁶ While the failure to satisfy this requirement does not preclude the court from ordering a specific placement for the juvenile, DSS will not be able to access IV-E funding to support that placement unless DSS was permitted to offer evidence regarding the juvenile’s placement prior to the court order.³³⁷ Any order placing the juvenile in DSS custody that is entered without notice to and input from DSS will, therefore, result in a foster care placement that is not IV-E eligible.

IV-E eligibility must be re-determined annually if a juvenile remains in foster care that long.³³⁸ As part of that process, the court must make a finding that reasonable efforts to make and finalize a permanent plan for the juvenile were made within twelve months of the date the juvenile entered care and every twelve months thereafter if the juvenile remained in care.³³⁹ A specific schedule of court review hearings for the juvenile, with specific findings that must be made at these reviews, is also required for a state agency to remain eligible to receive IV-E funding for the juvenile’s foster care.³⁴⁰ In North Carolina, these requirements are codified in G.S. 7B-906.1, the review and permanency planning hearings statute that applies to abuse, neglect, or dependency actions.

Although these findings are necessary for a county to obtain federal financial assistance for foster care, failure to include such findings is not a barrier to the entry of an order that places a juvenile in DSS custody. However, federal funds will not be available to support any part of the cost of that placement.

331. *Id.* § 1500.II.B.2. (information on accessing this source is found in the Authors’ Note contained within note 328, *supra*).

332. *Id.* § 1500.II.B.2.D.1.C.

333. *Id.*

334. *Id.*

335. See N.C. Administrative Office of the Courts, Order for Nonsecure Custody (Undisciplined/Delinquent), AOC-J-441, https://www.nccourts.gov/assets/documents/forms/j441-en.pdf?ZMMIs0qF9x3G7oOMbdcm9V_aSsKb6cDN.

336. CHILD WELFARE FUNDING MANUAL, § 1500.II.B.2.D.1.D.

337. *Id.*

338. *Id.* § 1500.II.B.2.D.1.C.

339. *Id.*

340. 45 C.F.R. § 1356.21(b)(2).

Conclusion

The legal implications of placing a juvenile into foster care in the context of a delinquency matter are complex. There is a robust body of law governing the use of DSS custody in the context of abuse, neglect, or dependency cases. For juveniles coming into foster care solely as a result of a delinquency case, there is no accompanying abuse, neglect, or dependency case. The delinquency case provides the basis for the placement and drives process issues such as legal representation and jurisdiction. At the same time, because these juveniles who were adjudicated delinquent are in foster care, federal and state laws that are tied to foster care financing and court reviews are also relevant. In practice, the intersection of these two systems and their respective bodies of law raise numerous questions. Ultimately, the issues discussed in this bulletin may only be resolved through appellate decisions that address these issues of first impression or through legislative change.