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MINORS AS PARTIES IN CIVIL ACTIONS

n Janet Mason

People of any age may be parties in civil court actions and proceedings.[1] Particular rules come into play, however, when one or more of the parties are minors.[2] This bulletin will discuss the general rules that govern minor parties' participation in civil court actions, including the procedures for proper service of process on minor parties. Then it will discuss instances in which these rules are modified or superseded by procedures prescribed for specific actions.

Civil Actions and Proceedings Generally

Minors[3] may be parties to many of the same kinds of civil action to which adults are parties. A child who was injured in an automobile accident might sue the driver of a vehicle to recover monetary damages for injuries caused by that person's negligence. A minor could file an action seeking damages for harm caused by another person's intentional conduct, such as assault. A teenager might seek a protective order

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Janet Mason is a faculty member who works in the areas of juvenile law and social services law.

1. All court actions are either civil or criminal. Depending on the nature of the remedy sought, some civil actions are called special proceedings. *See* Article 1 of Chapter 1 of the North Carolina General Statutes (hereinafter G.S.). For purposes of this bulletin, unless the context clearly indicates a different intent, *action* and *proceeding* are used interchangeably.

2. Special rules also apply when unborn persons are parties to civil actions. *See* G.S. 1A-1, Rule 17(b)(4).

3. *Minor* and *child* are used interchangeably throughout this bulletin to mean unemancipated minor—someone under the age of eighteen who is not married and has not been declared emancipated by a court. *See* Article 35 ("Emancipation") of G.S. Chapter 7B. *See also* G.S. 48A-2 ("A minor is any person who has not reached the age of 18 years."). The meaning of the term *juvenile* differs from that of *unemancipated minor* only in that it does not include an unemancipated minor who is in the armed services. *See* G.S. 7B-101(14) and 7B-1501(17).

under the state's domestic violence laws[4] or a civil no-contact order against someone who has been stalking her.[5] Minors frequently are parties to proceedings involving inheritance, estate, or other property issues.

In these and other civil actions a minor may be the plaintiff or petitioner who initiates the action, but a minor also may be the defendant or respondent in a case initiated by someone else.

Participation

Minors generally are considered to be legally incompetent to transact business or to participate on their own in legal proceedings.[6] For that reason, Rule 17 of the North Carolina Rules of Civil Procedure says that a minor may initiate or defend a civil action only through (1) a general guardian, (2) a testamentary guardian, or (3) a guardian ad litem.[7] In addition to enabling litigation involving a minor to move forward despite the child's legal incapacity, this representative serves to ensure the protection of the minor's rights throughout a proceeding—a role that is shared by the court.[8]

Although Rule 17 does not mention exceptions, all of the Rules of Civil Procedure are subject to being superseded by procedures prescribed by other statutes.[9] One statute enacted more recently than the Rules of Civil Procedure provides that the guardian of a minor's estate may sue or defend on behalf of the minor ward,[10] and another says that a guardian of the child's person appointed in a juvenile proceeding may represent the ward in all legal actions.[11] In addition, statutes relating to specific types of civil actions sometimes prescribe procedures for representation of and participation by a minor party.

General guardian

A *general guardian* is an individual appointed by the court to serve as both *guardian of the person* and *guardian of the estate* of a minor.[12] Proceedings for the appointment of guardians for minors are before the clerk of superior court, who has jurisdiction to appoint a guardian of the estate for any minor who has property or assets that need to be managed.[13] The clerk also has jurisdiction to appoint a guardian of the person to be responsible for the care, custody, and control of a minor, but only when the minor does not have a *natural guardian.*[14] The law says that parents are the natural guardians of their minor children[15] and, of course, most children do have a living parent. Because there are relatively few circumstances in which the clerk has jurisdiction to appoint a guardian of the person or a general guardian for a minor, few children in North Carolina have court-appointed general guardians through whom they can participate in civil litigation.[16] Although the law does not say so explicitly, it seems clear that a parent's status as a

4. *See* G.S. Ch. 50B.

5. *See* G.S. Ch. 50C.

6. *See* G.S. 35A-1201(a)(6) ("Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled."). An emancipated minor, on the other hand, "has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if [the minor] were an adult." G.S. 7B-3507.

7. G.S. 1A-1, Rule 17(b)(1) and (2) provide that a minor plaintiff must appear and a minor defendant must defend "by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed" as provided in the rule.

8."Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not." Tart v. Register, 257 N.C. 161, 171, 125 S.E.2d 754, 761 (1962).

9. G.S. 1A-1, Rule 1, states that the rules govern procedures in all civil actions and proceedings "except when a differing procedure is prescribed by statute."

10. G.S. 35A-1252.

11. G.S. 7B-600(a) and 7B-2001(2).

12. G.S. 35A-1202(7).

13. G.S. 35A-1203(a) and -1224(a).

14. *Id*. The district court in a juvenile proceeding may appoint a guardian of the person for any child who is the subject of an abuse, neglect, or dependency petition or who is alleged to be undisciplined or delinquent. The district court does not have authority to appoint a general guardian or a guardian of the estate. G.S. 7B-600 and -2001.

15. G.S. 35A-1201(a)(6).

16. When a minor is incompetent for reasons other than age and will need a guardian as an adult, the clerk has jurisdiction during the six months before the minor reaches age eighteen to conduct an incompetence proceeding and appoint a guardian, which could be a general guardian, for the minor. *See* G.S. 35A-1101(8) (definition of *incompetent child*), G.S. 35A-1202(11) (definition of *incompetent person*), and G.S. 35A-1203 (jurisdiction of the clerk).

child's natural guardian does not render the parent the child's general guardian as that term is most often used.[17]

Testamentary guardian

The only use of the term *testamentary guardian* in the North Carolina General Statutes is in Rule 17 of the Rules of Civil Procedure, which contains the requirement that a minor participate in a civil action through a general guardian, a testamentary guardian, or a guardian ad litem. Although the term might suggest that a parent in his or her will can appoint someone to serve as guardian for a surviving child after the parent's death, a parent is limited to making a testamentary recommendation with respect to guardianship of his or her children.[18] The individual named in a parent's will does not become the child's guardian automatically if the parent dies; he or she assumes that role only if appointed by the clerk of superior court. The clerk must give the parent's recommendation substantial weight but is not bound by it.[19]

If both of a child's parents are deceased, the child might have a general guardian, as described above. If both parents are deceased and the clerk names a person recommended in the parent's will only as guardian of the child's person or guardian of the child's estate, that individual might be considered the child's testamentary guardian. Otherwise, the term really has no meaning unless it is in relation to a guardian appointed pursuant to the law of another state that gives it meaning.[20]

17. The term *guardian* is almost always used to signify someone other than a parent. See, for example, G.S. 36C-3-303, which says in relation to trust matters, "A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child has not been appointed."

18. G.S. 35A-1225.

19. G.S. 35A-1224(d).

20. *See*, *e.g.*, GA. CODE ANN., § 29-1-1(25) (definition) and § 29-2-4(b) ("Unless the minor has another living parent, upon probate of the parent's will, letters of guardianship shall be issued to the individual nominated in the will who shall serve as testamentary guardian without notice or hearing provided that the individual is willing to serve.")

Other guardians

Two statutes, which make no reference to Rule 17, give guardians other than general and testamentary guardians broad authority to bring and defend civil actions on behalf of minors.

- The North Carolina guardianship law states that either a general guardian *or* a guardian of the estate appointed by the clerk of superior court for a minor ward is authorized to "maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward."[21] This authority is couched in terms of the guardian's power to collect, preserve, manage, or administer the ward's estate. It probably does not extend to matters that cannot be tied in any way to the ward's financial or property interests.
- The Juvenile Code, on the other hand, states that a guardian of the person appointed for a minor in a juvenile proceeding may "represent the juvenile in legal actions before any court."[22] A district court judge may appoint a guardian of the person for a juvenile at any stage of a proceeding in which the juvenile has been alleged or adjudicated to be abused, neglected, dependent, undisciplined, or delinquent, after finding that the appointment would be in the juvenile's best interest. A guardian of the person appointed for a minor by the clerk of superior court is not authorized to represent the minor in legal actions.[23]

Guardian ad litem

Because few children have court-appointed guardians of any type, most minors are required to participate in civil actions or proceedings through a person the court appoints as the minor's guardian ad litem. The

21. G.S. 35A-1252.

22. G.S. 7B-600(a) and 7B-2001(2).

23. *See* G.S. 35A-1241. The clerk may appoint a guardian of the person only for a minor who has no parents. G.S. 35A-1224(a).

authority and duties of a guardian ad litem—unlike the authority and duties of other types of guardians that may be appointed for minors— are confined to the particular civil action in which he or she is appointed.[24] Rule 17 places no limitations on whom the court may appoint as guardian ad litem, except that it be "some discreet person." The court may appoint a parent, another relative, an attorney, or any other responsible adult whose interests do not conflict with those of the minor. When the minor is the defendant, the court can assess a fee for the guardian ad litem as part of the costs of the action.[25]

When the minor is the party initiating the civil action, the court may appoint a guardian ad litem for the minor before or at the time the action is filed, on written motion of a relative or friend or on the court's own motion. When the minor is a defendant or respondent, if no parent or friend of the child files a written motion for appointment of a guardian ad litem for the minor within ten days after the minor is personally served, the court may appoint a guardian ad litem on written motion by any party to the action or on the court's own motion.[26] Although a court generally would defer to a guardian with legal authority to sue or defend on a minor's behalf, the court may appoint a guardian ad litem even for a child who has a guardian.[27] The court should do so any time the interests of the minor and the guardian may be in conflict.

Rule 17 says remarkably little about the role and duties of the guardian ad litem. He or she is required to "file and serve such pleadings as may be required within the times specified by [the] rules, unless extension of time is obtained." When the minor is the defendant, the guardian ad litem is "to defend" in behalf of the minor.[28] The appellate courts have not added a great deal, but they have stated that "the guardian ad litem is considered an officer of the court" and "has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party."[29]

Addressing the role of a guardian ad litem appointed pursuant to Rule 17 for an adult party who is or may be incompetent, the court of appeals stated that "Rule 17 and the case law . . . suggest the role of the [guardian ad litem] as a guardian of procedural due process for [the party], to assist in explaining and executing her rights" and that "beyond this due process protection, there are no specifics as to the proper conduct of the [guardian ad litem]."[30]

Service of Process

Proper service of process, unless waived, is an essential precedent to a court's exercise of personal jurisdiction over a defendant or respondent in a civil action. When that party is a minor, Rule 4(j) of the North Carolina Rules of Civil Procedure requires that the minor be served with the initial pleading and summons just as an adult party would be.[31] Methods for doing that include

- personal delivery to the party by someone authorized to serve process;
- leaving copies at the party's dwelling house or usual place of abode with someone of suitable age and discretion who resides there;
- registered or certified mail, with return receipt;
- deposit with a designated delivery service, followed by a delivery receipt;
- mail by signature confirmation followed by delivery to the party to be served; and

24. *See, e.g.*, *In re* L.A.B., ___ N.C. App. ___, 631 S.E.2d 61 (2006).

25. G.S. 1A-1, Rule 17(b)(2).

26. G.S. 1A-1, Rule 17(c).

27. G.S. 1A-1, Rule 17(b)(3).

28. G.S. 1A-1, Rule 17(b) and (e). This minimal description of the responsibilities of a guardian ad litem appointed pursuant to G.S. 1A-1, Rule 17, contrasts sharply with the description in G.S. 7B-601 of the duties of a guardian ad litem appointed for a child in a juvenile abuse, neglect, or dependency proceeding. The potential for confusion resulting from the use of the term to describe both roles probably accounts for the fact that many other states assign a different title, such as *court-appointed special advocate*, to the child's court-appointed representative in a juvenile proceeding.

29. Alan D. Woodlief, Jr., SHUFORD NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 17:20 (6th ed. 2003) (citing Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905) and Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964)). Also see *In re* Shepard, 162 N.C. App. 215, 591 S.E.2d 1, *review denied*, *In re* D.S., 358 N.C. 543, 599 S.E.2d 42 (2004), in which the court said, "North Carolina case law offers little guidance as to our reading of Rule 17 and any specific duties of a [guardian ad litem]."

30. *In re* Shepard, 162 N.C. App. at 227–228, 591 S.E.2d at 9–10.

31. G.S. 1A-1, Rule 4(j)(2).

- delivery to an authorized agent.[32]

Because a minor party is under a legal disability, the rule requires, in addition, that service by one of those authorized methods be made on a parent or guardian who has custody of the minor; or, if there is no such person, on someone else who has care and control of the minor; or, if there is no such person, on a guardian ad litem appointed for the minor pursuant to Rule 17 of the Rules of Civil Procedure.[33]

Some states require only substituted service—that is, service on a parent or other specified person but not directly on the minor party.[34] Other states require service directly on a minor only if he or she is above a certain age.[35] And others, including North Carolina, require service on both the minor, regardless of his or her age, and another designated person.[36] The sheriff's delivering a summons and complaint to a four-year-old child, although it might be legally sufficient to meet the requirement that the minor be served, would be nonsensical. Delivery to a person "of suitable age and discretion" with whom the child lives, however, is almost always feasible. Often that will be the same person likely to be served to satisfy the second prong of the service requirement—a parent or other person who has custody of the child.

Insufficient process, insufficient service of process, or lack of personal jurisdiction for any other reason is waived if the minor, through an appropriate representative, appears and participates in the case without making a timely objection.[37] In addition, only the minor—the party potentially prejudiced by a defect in service of process—has standing to assert that defect as error on appeal.[38]

Summary

Minors are considered legally incompetent to represent their own interests in court. Therefore, when a minor is a party to a civil court action, special rules require that the minor participate through a guardian and that documents required to be served on the minor also be served on an appropriate adult.

- Unless some other statute changes the general rule, the Rules of Civil Procedure provide that a minor may participate as a party in a civil action only through a general guardian, testamentary guardian, or guardian ad litem.
- Other statutes, however, provide that a guardian of the minor's estate appointed by the clerk or a guardian of the minor's person appointed in a juvenile case may sue or defend on the minor's behalf.
- Because few children have guardians of any kind, almost all children who are parties to civil actions in this state must appear and participate through court-appointed guardians ad litem.
- If a minor is the defendant or respondent in a civil action, effective service of process on the minor consists of service on both the minor, regardless of the minor's age, and another specified individual pursuant to Rule 4(j) of the Rules of Civil Procedure.

32. G.S. 1A-1, Rule 4(j)(1).

33. G.S. 1A-1, Rule 4(j)(2)a.

34. *See, e.g.*, Rules of Civil Procedure for the Superior Court of the State of Delaware, Rule 4(f)(1)(II)(b) (minor party served by serving guardian, if there is one, or adult with whom the minor lives); Michigan Rules of Civil Procedure, Rule 2.105 (service of process on a minor may be made by serving summons and complaint on person having care and control of the minor and with whom the minor resides).

35. *See, e.g.*, California Code of Civil Procedure, § 416.60 (only on minor who is at least twelve); Colorado Court Rules, Rule 4(e)(1) (only on minor who is thirteen or older); Hawaii Rules of Civil Procedure, Rule 4(d)(2) (only on minor who is sixteen or older).

36. *See, e.g.*, 2006–2007 Alaska Rules of Civil Procedure, Rule 4(d)(2); GA. CODE ANN., § 9-11-4(e)(3).

37. G.S. 1A-1, Rule 12(h). *See In re* J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005). The court of appeals has held, however, that the failure to even issue a summons when one is required deprives the court of subject matter jurisdiction, at least in a juvenile court proceeding, and an absence of subject matter jurisdiction may not be waived. *In re* C.T. and R.S., ___ N.C. App. ___, 643 S.E.2d 23 (2007).

38. *See In re* J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005), in which the court of appeals rejected the parent's argument that failure to serve the child was reversible error.

Specific Actions and Proceedings: The Minor as Respondent or Defendant

The Rules of Civil Procedure—including those discussed above relating to participation of and service of process on minor parties—apply to all civil actions unless a specific statute provides a different procedure.[39] A number of statutes that refer to minor parties do provide special procedures that supersede those in the Rules of Civil Procedure. Several others are less explicit but raise questions about whether the rules apply in every respect.

Juvenile Abuse, Neglect, and Dependency Proceedings

Participation

A juvenile court proceeding involving a child who is alleged to be abused, neglected, or dependent[40] is a civil action that focuses on the protection and welfare of the child. Only a county director of social services may initiate the proceeding,[41] and the child's parents, guardians, custodians, or caretakers are respondents. The litigation between these parties is about the child. If the court finds that the child has been harmed or is at risk of harm and needs services, the court may enter orders to protect the child, including orders that change custody of the child. Unlike the child in a private custody action between parents, however, the child in a juvenile proceeding is a party to the proceeding.[42] Because the child clearly is not the petitioner, presumably he or she should be considered a respondent.

Since 1980 the Juvenile Code has required the court to appoint a guardian ad litem to represent a child who is alleged to be abused or neglected.[43] The original guardian ad litem statute required that the guardian ad litem be an attorney. Now, the guardian ad litem generally is a trained volunteer and, if the guardian ad litem is not an attorney, the court also must appoint an attorney advocate "to assure protection of the juvenile's legal rights."[44] The court also has discretion to appoint a guardian ad litem and attorney advocate for a juvenile who is alleged only to be dependent.[45]

When a parent who is a respondent in an abuse, neglect, or dependency case is a minor, a guardian ad litem must be appointed for the minor parent pursuant to Rule 17 of the Rules of Civil Procedure, just as in any other civil action in which a minor

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39. G.S. 1A-1, Rule 1. *See also, e.g., In re* L.O.K., 174 N.C. App. 426, 621 S.E.2d 236 (2005); *In re* J.N.S., 165 N.C. App. 536, 598 S.E.2d 649 (2004).

40. These terms are defined in G.S. 7B-101(1), (15), and (9), respectively. An *abused juvenile* is one whose parent or other care provider inflicts or allows someone else to inflict a serious physical injury on the juvenile; creates or allows someone else to create a substantial risk of such an injury; uses or allows cruel or grossly inappropriate devices or procedures to modify the child's behavior; commits or permits a criminal sex offense against the child; creates or allows serious emotional damage to the child; or encourages, directs, or approves the juvenile's commission of delinquent acts that involve moral turpitude. A *neglected juvenile* is one who does not receive proper care from the juvenile's parent or other care provider, has been abandoned, is not provided necessary medical or remedial care, lives in an injurious environment, or has been placed illegally for care or adoption. A child is a *dependent juvenile* if (1) the child needs assistance or placement because he or she does not have a parent or other care provider responsible for the child's care or supervision or (2) the child's parent or other care provider is incapable of providing for the child's care or supervision and does not have an appropriate alternative child care arrangement.

41. Usually the petition is signed by a social worker or social work supervisor acting as the director's authorized agent. *See* G.S. 7B-101(10), 7B-302(d), and 108A-14(b).

42. G.S. 7B-601(a). Only since 1999 has the Juvenile Code stated explicitly that the child is a party to these juvenile proceedings. S.L. 1999-432 added that provision to G.S. 7B-601(a), effective August 10, 1999. The legislation did not address the purpose or effects of stating that the child is a party, and it did not amend any other parts of the Juvenile Code to conform to or shed light on the change.

43. Chapter 815 of the 1979 Session Laws included this provision in the Juvenile Code that became effective January 1, 1980. In 1983 the General Assembly established the Office of Guardian ad Litem Services in the Administrative Office of the Courts and authorized establishment of the first eight local district programs. For a description of these early guardian ad litem services in North Carolina, see Virginia G. Weisz, *Advocating for Children: North Carolina's Guardian Ad Litem Program*, POPULAR GOV'T, Summer 1985, 16–19.

44. G.S. 7B-601.

45. *Id*.

party does not have a general or testamentary guardian.[46] The Juvenile Code says only slightly more than is said in Rule 17 about this guardian ad litem's role, but it does specifically authorize the guardian ad litem for a minor parent in a juvenile proceeding to

- help the parent enter appropriate consent orders;
- facilitate service of process on the parent;
- assure that necessary pleadings are filed; and
- assist the parent and the parent's attorney, if asked by the attorney, to "ensure that the parent's procedural due process requirements are met."[47]

The role of a guardian ad litem appointed pursuant to G.S. 7B-601 for a child who is alleged to be an abused, neglected, or dependent juvenile is somewhat different from that of a guardian ad litem appointed pursuant to Rule 17. It also is described in substantially more detail. The services of most of the guardians ad litem and attorney advocates appointed for children in juvenile cases are provided through district programs that are part of the Office of Guardian ad Litem Services in the state Administrative Office of the Courts.[48] The Juvenile Code describes the role of the child's guardian ad litem, the attorney advocate, and the guardian ad litem program as follows:

- When a petition alleges that a juvenile is abused or neglected, the court must appoint a guardian ad litem "to represent the juvenile." When a petition alleges only dependency, the court may appoint a guardian ad litem "to represent the juvenile."
- If the court appoints a guardian ad litem who is not an attorney, the court must also appoint an attorney advocate "to assure protection of the juvenile's legal rights throughout the proceeding."
- The guardian ad litem and attorney advocate "have standing to represent the juvenile" in all actions under Subchapter I of the Juvenile Code in which they are appointed.
- The duties of the guardian ad litem program are to
  - investigate to determine the facts, the juvenile's needs, and resources available in the family and community to meet those needs;
  - when appropriate, facilitate the settlement of disputed issues;
  - offer evidence and examine witnesses at the adjudicatory hearing;
  - explore options with the court at the dispositional hearing;
  - conduct follow-up investigations to ensure that the court's orders are executed properly;
  - report to the court when the juvenile's needs are not being met; and
  - protect and promote the juvenile's best interests until the court formally relieves the program of responsibility.[49]

No one is charged with these responsibilities on behalf of a child who is alleged only to be dependent if the court in its discretion does not appoint a

46. G.S. 7B-602(b).

47. G.S. 7B-602(e). Every parent in an abuse, neglect, or dependency proceeding has a right to be represented by counsel and to appointed counsel if the parent is indigent. That right is in addition to any requirement that a guardian ad litem be appointed for a parent. It is not necessary that the guardian ad litem be an attorney, but the court usually does appoint an attorney because of the lack of other obvious, available candidates. G.S. 7B-602(c), which addresses the appointment of a guardian ad litem because a parent in a juvenile proceeding is incompetent or has diminished capacity rather than because the parent is a minor, states that one individual may not serve as both attorney and guardian ad litem for the parent. Although that restriction does not appear in G.S. 7B-602(b), which addresses guardians ad litem for minor parents, it is quite possible that the legislature intended for the restriction to apply in those cases as well.

48. The present statutory basis for the program is Article 12 of G.S. Chapter 7B (G.S. 7B-1200 through 7B-1204). The guardian ad litem program does not provide these services when doing so would create a conflict of interest.

49. G.S. 7B-601. The appropriate distribution of roles and authority among the guardian ad litem, the attorney advocate, and the guardian ad litem program is not always clear, although that does not appear to generate much conflict. In 2006 the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, responding in part to similar confusion and debate in many states about the roles of children's lawyers and guardians ad litem in civil actions. The act and other information about NCCUSL can be found at http://www.nccusl.org/Update/.

guardian ad litem for the child.[50] The potential impact of a juvenile court proceeding on a dependent juvenile is virtually identical to the impact on an abused or neglected juvenile,[51] and a dependent juvenile has rights that most children are able to exercise only through an attorney or other authorized representative. For example, the juvenile has a right to demand that a hearing in juvenile court be open to the public[52] and a right to appeal any final order in the case.[53] The statute acknowledges the difficulty a child would have in exercising the right to appeal by providing that if "an appeal is made" by a juvenile for whom no guardian ad litem has been appointed, the court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, for purposes of the appeal.[54] There is no provision, though, for assistance in assessing whether the juvenile has grounds for appeal or ensuring that proper notice of appeal is given.

Guardians ad litem and attorney advocates appointed for children in abuse, neglect, and dependency proceedings represent the juvenile until they are relieved by the court, the permanent plan for the juvenile is accomplished, or the court's jurisdiction ends.[55]

Service of Process

Even though juveniles are parties in juvenile court actions, provisions in various parts of the Juvenile Code for service of process on juveniles are not consistent.

In relation to abuse, neglect, and dependency cases, the code addresses

- persons for whom copies of the petition must be prepared,
- persons to whom summonses must be issued, and
- persons on whom summonses must be served.

The petitioner—the county director of social services—must prepare enough copies of the petition so that copies are "available" to each of the child's parents if they are living separately; any guardian, custodian, or caretaker of the child; the guardian ad litem; the social worker; and anyone the court determines to be a necessary party.[56] Whenever an abuse, neglect, or dependency petition is filed, the clerk of superior court must issue a summons to, and the summons must be served on, the child's parent, guardian, custodian, or caretaker.[57] If the petition alleges abuse or neglect, as soon as it is filed the clerk must "provide a copy" of the petition and any notices of hearings to the local guardian ad litem office.[58] It appears, then, that the child and his or her guardian ad litem, when there is one, are entitled to copies of the petition, but that it is not necessary that a summons be issued to or served on them.

Summary

The Juvenile Code includes specific provisions relating to appointment of guardians ad litem and issuance and service of summonses in abuse, neglect, and dependency proceedings. To the extent that those provisions differ from the Rules of Civil Procedure, the Juvenile Code controls. The effect is that

- guardians ad litem and attorney advocates (except when the guardian ad litem is an attorney) always will be appointed for children who are alleged to be abused or neglected. Whether a guardian ad litem is appointed for a child who is alleged only to be dependent is in the court's discretion.
- if the petition alleges abuse or neglect the clerk automatically will provide a copy of the petition and any notices of hearing to the guardian ad litem program. Presumably the clerk also would do so when the court appoints a guardian ad litem and attorney advocate for a child in a dependency-only proceeding.
- apparently it is not necessary that a summons be issued to the child or the

50. *See* G.S. 7B-601(a).

51. *See* G.S. 7B-903 ("Dispositional alternatives for abused, neglected, or dependent juvenile.").

52. G.S. 7B-801(b).

53. G.S. 7B-1002. In addition, the court is precluded from entering a consent order if the juvenile is not present and represented by counsel. G.S. 7B-902.

54. G.S. 7B-1002. This provision would be unnecessary if the legislature had intended to require the appointment of a Rule 17 guardian ad litem earlier in the proceeding for a dependent juvenile for whom the court does not appoint a guardian ad litem pursuant to G.S. 7B-601.

55. The court may terminate its jurisdiction at any time by court order. The court's jurisdiction ends automatically when the child reaches age eighteen or is married or otherwise emancipated. *See* G.S. 7B-201.

56. G.S. 7B-402.

57. G.S. 7B-406(a) and G.S. 7B-407.

58. G.S. 7B-408.

child's guardian ad litem, and formal service of process on them is not required.
- only the juvenile's parent, guardian, custodian, or caretaker must be served pursuant to G.S. 1A-1, Rule 4(j), with a summons and a copy of the petition.

Termination of Parental Rights Proceedings

Participation

A proceeding in juvenile court to terminate a parent's rights involves two stages. In the first, the court determines whether one or more statutory grounds for termination exist.[59] In the second, if the court has found one or more grounds, the court determines whether termination of the parent's rights is in the child's best interest. The court is never required to terminate parental rights just because a ground exists.

Both the parent and the child have substantial rights at stake in a termination proceeding. An order terminating a parent's rights renders the parent and child legal strangers and makes the child eligible for adoption without that parent's consent. For that reason, an indigent parent has a right to appointed counsel at state expense.[60] If the parent is a minor, the court also must appoint a guardian ad litem for the minor parent pursuant to Rule 17 of the Rules of Civil Procedure.[61]

When the child in a termination of parental rights proceeding has been the subject of a juvenile abuse, neglect, or dependency proceeding, any guardian ad litem or attorney advocate appointed for the child in that proceeding who has not been relieved by the court is required to continue representing the child through the termination proceeding unless the court orders otherwise.[62] If the child does not already have a guardian ad litem, the court may appoint a guardian ad litem to represent the child's best interest in any termination proceeding. The court is required to do so, however, only if the parent contests the action.[63] Failure to appoint a guardian ad litem for the child when the statute requires one is reversible error, and a parent may raise that issue on appeal even if he or she did not object at trial.[64] If the guardian ad litem is not an attorney, the court also must appoint an attorney advocate to protect the child's legal rights.

In termination of parental rights cases, the local guardian ad litem program provides guardian ad litem and attorney advocate services for the child when the child has been the subject of an abuse, neglect, or

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59. The grounds for terminating a parent's rights are listed in G.S. 7B-1111(a). The person or agency bringing the proceeding has the burden of proving at least one ground by clear and convincing evidence. G.S. 7B-1111(b).

60. G.S. 7B-1101.1(a). The North Carolina General Assembly has provided a broader right to counsel than is constitutionally required. In *Lassiter v. Department of Social Services of Durham*, 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981), the U.S. Supreme Court held that whether due process requires the appointment of counsel for an indigent parent in a termination of parental rights proceeding must be determined on a case-by-case basis.

61. G.S. 7B-1101.1(b). The statute authorizes the guardian ad litem to help the minor parent enter consent orders when appropriate; facilitate service of process on the parent; assure that necessary pleadings are filed; and, if asked by the parent's attorney, assist the parent and the attorney to ensure that procedural due process requirements are met. Similar provisions apply with respect to a parent when the court has a reasonable basis to believe the parent is incompetent or has diminished capacity and is unable to act in his or her own interest. G.S. 7B-1101.1(c) and (e).

62. G.S. 7B-1108(d).

63. G.S. 7B-1108(b). If the child's guardian ad litem initiates the termination proceeding, the court is not required to appoint another guardian ad litem for the child even if the action is contested. Before July 1990, North Carolina courts had held on several occasions that Rule 17 of the Rules of Civil Procedure required appointment of a guardian ad litem for the child in every termination of parental rights case despite the more limited provisions in the Juvenile Code about when such appointments were required. *See In re* Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In the Matter of Baby Boy Scearce, 81 N.C. App. 531, 345 S.E.2d 404, *review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986); *In re* Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990). The legislature negated those holdings by amending former G.S. 7A-289.29 (now G.S. 7B-1108) to state explicitly that appointment of a guardian ad litem for the child is not required unless an answer is filed denying material allegations. 1989 N.C. SESS. LAWS ch. 851. (*Barnes* was decided in February 1990; the legislation amending the statute was enacted July 6, 1990, which was during the 1989 Session of the General Assembly.) That provision has not been changed.

64. *See In re* R.A.H., 171 N.C. App. 427, 614 S.E.2d 382 (2005); *In re* J.L.S., 168 N.C. App. 721, 608 S.E.2d 823 (2005); *In re* Fuller, 144 N.C. App. 620, 548 S.E.2d 569 (2001).

dependency petition. In other cases, such as those in which one parent seeks to terminate the rights of the other parent, the court may appoint a guardian ad litem trained through that program only if the local program, for good cause, consents to the appointment. Otherwise, in a contested case that was not preceded by an abuse, neglect, or dependency proceeding, the court must appoint some other individual as the child's guardian ad litem. As a practical matter, the court is likely to appoint an attorney.

A proceeding in juvenile court to terminate a parent's rights may be initiated in two ways: (1) by motion in a pending abuse, neglect, or dependency proceeding or (2) by petition.[65] Regardless of which way the proceeding is initiated, any guardian ad litem and attorney advocate appointed for the child in a pending abuse, neglect, or dependency case must continue representing the child in the termination proceeding unless he or she has been relieved or the court orders otherwise.[66] When the action is started by a motion, the same is true with respect to an attorney who was appointed to represent a parent or a guardian ad litem who was appointed for a minor or incompetent parent in the pending case.[67] When the action is initiated by petition, however, any attorney or guardian ad litem appointed previously for a minor parent continues to represent the parent only if appointed again by the court.[68]

The role of a guardian ad litem or attorney advocate appointed for a child in a termination of parental rights proceeding is governed by G.S. 7B-601, the same statute that prescribes the duties of the child's guardian ad litem, the attorney advocate, and the guardian ad litem program in an abuse, neglect, or dependency case.

Service of Process

The service of process requirements for a termination of parental rights proceeding depend on whether the action is initiated by motion or by petition. A motion must be served with a notice, and a petition, because it begins a new action, must be served with a summons. The contents of the summons and the notice are prescribed by statute and are very similar.[69]

When a petition initiates the case, a summons must be issued to and served with the petition on all the following respondents who are not the petitioner:

- The juvenile's parents
- Any court-appointed custodian or guardian of the person of the juvenile
- Any county department of social services or licensed child-placing agency to which a court has given placement responsibility for the child or to which one parent has relinquished the child for adoption
- The juvenile, regardless of the juvenile's age[70]

If a guardian ad litem has been appointed for the juvenile, service on the minor of the summons, petition, and any other document directed to the juvenile is accomplished by service on the juvenile's guardian ad litem. When no guardian ad litem has been appointed for the juvenile, the general rules for service of process on a minor party pursuant to Rule 4(j) apply. That is, there must be service on the juvenile himself or herself, although that may consist of leaving the documents at the juvenile's home with a person of suitable age and discretion who lives there. In addition, there must be service on (1) a parent or guardian who has custody of the minor; or (2) if there is no such person, on someone else who has care and control of the minor; or (3) if there is no such person, on a guardian ad litem appointed for the minor pursuant to Rule 17 of the Rules of Civil Procedure.[71] As in any case in which service pursuant to Rule 4 is required, a lack of service or a defect in service or process is waived if a party participates in the proceeding without making a timely objection.[72]

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65. G.S. 7B-1102. See also G.S. 7B-1103, which specifies who has standing to file a motion or petition for termination of parental rights.

66. G.S. 7B-1108(d).

67. *See* G.S. 7B-1106.1(b)(3).

68. G.S. 7B-1106(b)(4).

69. *See* G.S. 7B-1106(b) and 7B-1106.1(b). The summons and notice differ primarily in that a summons states that a new action has been filed and that an attorney appointed for the parent in another proceeding is not involved in the termination proceeding unless appointed again by the court, while a notice states in effect that termination of parental rights is being sought in a pending case and that any attorney appointed previously for the parent in that case continues to represent the parent unless the court orders otherwise.

70. G.S. 7B-1106(a). Before January 1, 2002, the statute required that the juvenile be named as a respondent and served with the petition and summons only if the juvenile was twelve years of age or older when the petition was filed. *See* S.L. 2001-208, sec. 28.

71. G.S. 1A-1, Rule 4(j)(2)a.

72. *See supra* note 37.

When a proceeding to terminate parental rights is initiated by motion, a notice must be issued to and served with the motion on all the same parties who must be served with a summons (except someone who is the movant). The requirements for service on the minor, however, are somewhat different. Like a petition and summons, the motion and notice must be served on the juvenile's guardian ad litem if one has been appointed in the underlying abuse, neglect, or dependency proceeding and the court has not relieved that person of responsibility. However, regardless of whether a guardian ad litem has been appointed for the juvenile, the notice and motion must be served on the juvenile if the juvenile is twelve years of age or older when the motion is filed.[73] This means that when the termination is initiated by motion,

- if the juvenile has a guardian ad litem and is twelve or older, both the guardian ad litem and the juvenile must be served.
- if the juvenile has a guardian ad litem and is younger than twelve, only the guardian ad litem must be served.
- if the juvenile does not have a guardian ad litem and is twelve or older, the juvenile must be served.
- if the juvenile does not have a guardian ad litem and is younger than twelve, no service of process with respect to the juvenile is required.

Service of the motion and notice must be pursuant to Rule 4(j), just like service of a petition and summons, any time

1. the person to be served was not served with a summons in the underlying action; or
2. the person to be served was served by publication in the underlying action, and the published notice did not state that the parent's rights could be terminated in the proceeding; or
3. the underlying abuse, neglect, or dependency proceeding was initiated more than two years ago; or
4. the court, for any reason, orders that service of the motion and notice be in accordance with Rule 4(j).[74]

If, as stated above, it is not necessary that a summons be issued to or served on the child in the underlying abuse, neglect, or dependency action, it would appear that service of a motion and notice on the child in a termination of parental rights case would almost always have to be pursuant to Rule 4. When the child has a guardian ad litem in the termination case, however, it is likely that the guardian ad litem would accept or waive service of process on the child's behalf even when service was not made pursuant to Rule 4.

These circumstances in which service pursuant to Rule 4 is required comprise exceptions to the general rule that the motion and notice may be served by the less formal methods set out in G.S. 1A-1, Rule 5. Service on a party pursuant to Rule 5 may be accomplished by serving the party, or the party's attorney of record unless the court orders that the party be served,

1. by delivering a copy of the document to be served to the party. For purposes of this provision, *delivering* means
   a. handing it to the attorney or to the party,
   b. leaving it at the attorney's office with a partner or employee, or
   c. sending it to the attorney's office by confirmed telefacsimile transmittal;
2. by mailing it to the party at the party's last known address; or
3. if no address is known, by filing it with the clerk of court.[75]

A party also may accept service or waive service. Regardless of the method used, for each person served, a return or certificate of service must be filed showing the date and method of service.

When the child in a termination proceeding is represented by a guardian ad litem appointed pursuant to G.S. 7B-601 and service under Rule 5 is permissible, the motion and notice must be served on the child's guardian ad litem by one of the methods listed above. Regardless of whether the child has a guardian ad litem, if the child is twelve or older when the motion for termination of parental rights is filed, the child himself or herself must be served with the motion and notice. When the child has an attorney or attorney advocate, service on the child may consist of delivery of the papers to that attorney. In other cases, apparently, it would consist of delivering or mailing them to the child.

73. G.S. 7B-1106.1(a).

74. G.S. 7B-1102(b).

75. Even when service pursuant to Rule 5 is permissible, a party may elect to use the more rigorous method set out in Rule 4(j).

Summary

An action to terminate a parent's rights may be a new action, initiated by the filing of a petition, or it may be a continuation of a pending abuse, neglect, or dependency case, initiated by the filing of a motion. The rules for the appointment of a guardian ad litem for the child and service of process on the child depend to some extent on which way the case begins.

- Regardless of how a proceeding to terminate parental rights is initiated, if the juvenile has a guardian ad litem in a pending abuse, neglect, or dependency case, that guardian ad litem continues to represent the juvenile in the termination case unless the court orders otherwise.
- If the juvenile does not already have a guardian ad litem, the court is required to appoint one only when a parent files an answer or response denying material allegations in the petition or motion.[76] The court always has discretion to appoint a guardian ad litem for the juvenile.
- When the action is initiated by petition, service of process on the juvenile pursuant to Rule 4(j) is mandatory, unless waived. If the juvenile has a guardian ad litem, however, service on the juvenile consists of service on the juvenile's guardian ad litem.
- When the action is brought as a motion in the cause of a pending abuse, neglect, or dependency case, (1) if the juvenile has a guardian ad litem appointed in the pending case, that person must be served; (2) regardless of whether there is service on a guardian ad litem, if the child is twelve or older, service on the juvenile is required; and (3) in some circumstances service must be in accordance with Rule 4(j), and in others service pursuant to Rule 5 is allowed.

Delinquency Proceedings

A delinquent juvenile is an unemancipated minor who, while at least six years of age and not yet sixteen years of age, commits an act that would be a crime or infraction if committed by an adult.[77] Delinquency cases are civil proceedings[78] in juvenile (district) court, although juveniles in these cases have most of the same rights that an adult criminal defendant would have.[79]

Participation

When a petition is filed alleging that a juvenile is delinquent, the juvenile respondent[80] is automatically entitled to appointed counsel at state expense unless someone has retained counsel for the juvenile.[81] Given the civil nature of delinquency proceedings and the fact that the Juvenile Code includes no provision to the contrary, Rule 17 of the Rules of Civil Procedure would appear to require the appointment of a guardian ad litem for the juvenile. The law, however, has not been interpreted or applied to require that one be appointed.

The juvenile's attorney might request appointment of a guardian ad litem if the attorney believed the juvenile had diminished capacity to the extent that the juvenile could not "make adequately

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76. G.S. 7B-1108(c).

77. G.S. 7B-1501(7).

78. *See, e.g., In re* D.S.B., ___ N.C. App. ___, 634 S.E.2d 633, 634 (2006) ("[D]elinquency proceedings under the Juvenile Code are governed by the Rules of Civil Procedure," citing *In re* Bullabough, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)); *In re* Allison, 143 N.C. App. 586, 547 S.E.2d 169 (2001).

79. *See* G.S. 7B-2405. A number of minors actually are criminal defendants, subject to the same procedures and punishments that apply to adult defendants. Unlike most states, North Carolina prosecutes young people as adults for offenses they commit after they reach age sixteen or after they marry or are otherwise emancipated. G.S. 7B-1604(a). In addition, the juvenile court can transfer to superior (adult criminal) court the case of a juvenile as young as thirteen if the court finds probable cause to believe the juvenile committed a felony. The court must transfer the case if the felony is first-degree murder. G.S. 7B-2200. Once a juvenile is convicted in superior court, he or she is prosecuted as an adult for any offense committed after that conviction. G.S. 7B-1604(b).

80. Delinquency proceedings are addressed in Subchapter II of G.S. Chapter 7B. The statutes relating to delinquency do not use the term *respondent*, but instead refer to the juvenile as *the juvenile, a juvenile in custody, a juvenile who has been adjudicated delinquent*, and similar terms.

The juvenile's parents also are parties to the delinquency proceeding, usually as respondents, although a parent could be the petitioner. *See* G.S. 7B-1501(20) and 7B-1600(c).

81. Juveniles are conclusively presumed to be indigent and may not waive the right to be represented. G.S. 7B-2000 and 7B-2405(6).

considered decisions" or "adequately act in [the juvenile's] own interest."[82] However, an attorney in that circumstance would be more likely to involve the juvenile's parent or guardian or to ask the court to determine that the juvenile client lacked the capacity to proceed in the delinquency matter.[83]

A rarely used section of the Juvenile Code authorizes the court to appoint a guardian of the person for the juvenile in a delinquency case if (1) no parent, guardian, or custodian appears in court with the juvenile or (2) the court finds that appointment of a guardian would be in the juvenile's best interest.[84] The authority and responsibilities of this type of guardian are similar to those of a parent or legal custodian, not a guardian ad litem, although a guardian appointed pursuant to this provision "may represent the juvenile in legal actions before any court."[85]

Service of Process

A delinquency petition and a summons must be served personally on the juvenile and the juvenile's parent, guardian, or custodian.[86] Thus, unlike other civil process, service on a juvenile who is alleged to be delinquent may not be effected by leaving the documents at the juvenile's home with a person of suitable age and discretion who lives there. The juvenile as well as a parent, guardian, or custodian may waive the sufficiency of service or process by participating in the proceeding without making a timely objection.[87]

For purposes of delinquency proceedings, the legislature has incorporated into the Juvenile Code some of the requirements that apply to criminal process.[88] Not all of the incorporated provisions convert well to the juvenile context, but they relate primarily to the duties of the clerk and the law enforcement officer serving process. They provide, among other things, that

1. The clerk must maintain a record of all process issued in a juvenile case.
2. A copy of the process must be delivered to the person served.
3. If the summons is not served within thirty days, the officer must note on it the reason it was not served and return it to the clerk in the county in which it was issued. However, failure to return the process to the clerk as required invalidates neither the process nor service made after the thirty-day period.
4. The clerk may reissue a summons that is returned unserved, for further attempts at service, after changing any date specified for a court appearance if appropriate.
5. The clerk may make a certified copy of any process when the original process has been lost or returned unserved, and the copy may be served as effectively as the original.
6. Upon the request of a juvenile (or the juvenile's attorney), the clerk must make and furnish to the juvenile without charge one copy of every juvenile process filed against the juvenile.

Summary

A delinquency proceeding is a civil action in district (juvenile) court. It involves conduct that would be a crime if the juvenile were an adult, and a juvenile who is adjudicated delinquent may be deprived of his or her liberty. For those reasons, these actions have some characteristics in common with criminal court proceedings and do not follow some of the rules that generally apply to minor parties in civil actions.

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82. North Carolina Revised Rules of Professional Conduct, Rule 1.14.

83. *Id.*; G.S. 7B-2401.

84. G.S. 7B-2001.

85. *Id.*

86. G.S. 7B-1806. If the parent, guardian, or custodian cannot be found, the court may authorize service on that person, but not on the juvenile, by mail or publication.

87. G.S. 1A-1, Rule 12(h). *See also In re* D.S.B., ___ N.C. App. ___, 634 S.E.2d 633, 634 (2006) ("Neither Juvenile nor his counsel contested service of process or personal jurisdiction at any of the numerous hearings they participated in, and his participation in the hearings without objection constituted a general appearance for purposes of waiving any defect in service."); *In re* Hodge, 153 N.C. App. 102, 106, 568 S.E.2d 878, 880, *disc. rev. denied*, 356 N.C. 613, 574 S.E.2d 681 (2002) ("[R]espondent's and his parents' presence in the courtroom during the hearing on the simple assault petition, respondent's denial of the allegations contained in [the] petition, and his participation in the hearing on [the] petition without objection constitute a general appearance for purposes of waiving any defect in service.").

88. G.S. 7B-1806 states that G.S. 15A-301(a), (c), (d), and (e), relating to criminal process, apply to juvenile process when a child is alleged to be delinquent or undisciplined.

- In every delinquency proceeding the juvenile who is alleged to be delinquent will be represented by counsel. Appointment of a guardian ad litem for a juvenile in a delinquency case occurs rarely if ever.
- The juvenile must be served personally with a summons and a copy of the petition. Other service methods allowed by G.S. 1A-1, Rule 4(j), are not sufficient.
- The juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.
- A juvenile or other party waives any insufficiency of service or process when the party participates in the proceeding without making a timely objection.

Undisciplined Juvenile Proceedings

An undisciplined juvenile is an unemancipated minor who, while at least six years of age and not yet eighteen years of age (1) is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; (2) is found regularly in places it is unlawful for a minor to be; (3) runs away from home for longer than twenty-four hours; or (4) is under age sixteen and is unlawfully absent from school.[89]

Participation

A juvenile who is alleged to be undisciplined has a right to be represented by counsel at the juvenile's or another person's expense but is not entitled to court-appointed counsel.[90] In 1972 the North Carolina Supreme Court held under a former version of the Juvenile Code that neither the statute nor the Due Process Clause of the Constitution mandated that counsel be appointed for a juvenile at the initial stage of a proceeding in which the juvenile was alleged to be undisciplined.[91] The court relied primarily on the fact that the proceeding was not criminal and could not result at that stage in the juvenile's commitment to an institution in which the juvenile's freedom would be curtailed. Then Chief Justice Bobbitt dissented, stating, "Here a fourteen-year-old girl was brought before the juvenile court upon the complaint of her mother. Absent counsel, she stood alone before the court. . . . [I]t is my opinion that due process required that counsel be assigned to represent her at any hearing which might result in an adjudication prejudicial to her."[92]

The appellate courts appear to have revisited the issue only once. In 2005, in an unpublished opinion, the court of appeals relied on the Supreme Court's 1972 holding and rejected an undisciplined juvenile's contention that her due process rights were violated because the trial court heard the undisciplined petition without her having counsel present.[93] The potential consequences to a juvenile of being adjudicated undisciplined are less severe under current law than they were in 1972. Under the Juvenile Code in effect at that time, an undisciplined juvenile could be placed on probation and later adjudicated delinquent and committed to an institution on the basis of a violation of probation. Now, an undisciplined juvenile may be placed on protective supervision for a maximum period of six months. A violation of the terms of protective supervision does not result in an adjudication of delinquency, but it may result in a finding of contempt and a short period of detention.[94] Although the statute does not require appointment of counsel earlier in the case, it does require that counsel be appointed for an undisciplined juvenile who is alleged to be in contempt.[95]

Given the civil nature of the proceeding and the fact that the Juvenile Code includes no provision to the contrary, one might expect that Rule 17 of the Rules of Civil Procedure would require a juvenile alleged to be undisciplined to participate in the proceeding through a court-appointed guardian ad litem. That expectation might be even higher than in a delinquency case, both because the juvenile does

89. G.S. 7B-1501(27). Proceedings relating to undisciplined juveniles are addressed in Subchapter II of G.S. Chapter 7B. As in the case of a delinquent juvenile, these statutes do not use the term *respondent*. Instead, they refer to the juvenile as *the juvenile*, *a juvenile who has been adjudicated undisciplined*, and similar terms.

90. G.S. 7B-2000.

91. *In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

92. 282 N.C. 28, 44, 191 S.E.2d 702, 712.

93. *In re* B.A.T., 174 N.C. App. 365, 620 S.E.2d 735 (2005) (Table), *cert. denied*, 360 N.C. 480, 630 S.E.2d 923 (2006).

94. The maximum period of detention for a first finding of contempt is twenty-four hours; for a second finding, three days; and for a third finding, five days—with a maximum of fourteen days for any twelve-month period. G.S. 7B-2505.

95. G.S. 7B-2000.

not have the right to appointed counsel and because the parent who ordinarily would be expected to guard the juvenile's rights often is the person who initiated the proceeding. As in delinquency cases, however, the law has not been interpreted or applied to require appointment of a guardian ad litem for a juvenile who is alleged to be undisciplined.

Most likely, because the Juvenile Code sets out other procedures for cases involving delinquent and undisciplined juveniles and addresses the appointment of guardians ad litem expressly with regard to some juvenile cases, its silence with respect to guardians ad litem for delinquent and undisciplined juveniles is assumed to supersede the requirements of Rule 17. That, however, seems to directly contradict this statement in G.S. 1A-1, Rule 1: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute."

Service of Process

The Juvenile Code provisions for service of process in delinquency cases, described above, also apply to cases in which a juvenile is alleged to be undisciplined. A minor who is alleged in a juvenile proceeding to be an undisciplined juvenile must be served personally with the petition and a summons, and the juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.[96]

Summary

A proceeding in which a juvenile is alleged to be undisciplined is a civil action in district (juvenile) court. It involves conduct that is not criminal and that is legally significant only because the juvenile is a minor. Although the consequences may be serious for the minor, he or she is guaranteed neither an attorney nor a guardian ad litem.

- A juvenile who is alleged to be undisciplined is not entitled to court-appointed counsel. Counsel must be appointed, however, for a juvenile who has been alleged or adjudicated to be undisciplined and is alleged to be in contempt.
- The Juvenile Code does not require appointment of a guardian ad litem for a juvenile alleged to be undisciplined, and although Rule 17 of the Rules of Civil Procedure appears to require appointment of a guardian ad litem, that has not been the practice in the state's juvenile courts.
- The juvenile must be served personally with a summons and copy of the petition.
- The juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.
- A juvenile or other party waives any insufficiency of service or process when the party participates in the proceeding without making a timely objection.

Parental Control Actions

Under G.S. 7B-3404 a child's parent, guardian, or custodian, or a person who has assumed the status and obligations of a parent without having legal custody of the child, may file a civil action in district court against a minor defendant to enforce that adult's parental or custodial authority over the minor.[97] If the verified complaint alleges that the juvenile has left home and refuses to return and comply with the responsible adult's direction or control, the court may issue an ex parte order directing the juvenile to appear before the court, ordering the juvenile to comply with further court orders, and authorizing the sheriff to enter a home or other

96. G.S. 7B-1806.

97. G.S. 7B-3404. The statute provides that any defendant's failure to comply with the court's order in such an action is punishable "as for contempt." In 1998 the North Carolina Court of Appeals held that the contempt remedy—committing the minor defendant to detention for willfully violating the court's order—was available only for minor defendants who were sixteen or seventeen years of age, because the Juvenile Code provided the exclusive procedures applicable to undisciplined behavior by children younger than sixteen. Taylor v. Robinson, 131 N.C. App. 337, 508 S.E.2d 289 (1998). Enactment of the current Juvenile Code, G.S. Chapter 7B, effective July 1, 1999, cast doubt on the continued validity of that holding by (1) incorporating the provisions for a civil action to enforce parental authority as part (Article 34) of the Juvenile Code and (2) expanding the definition of *undisciplined juvenile* to include sixteen- and seventeen-year-olds rather than just minors younger than sixteen.

location to look for the juvenile, serve the order, or take custody of the juvenile.

Participation

The statute is silent regarding representation of the minor or appointment of a guardian ad litem. It does state that "the juvenile, or anyone acting in the juvenile's behalf," may file an answer to the complaint.[98]

That language might suggest that the juvenile may participate in the action on his or her own. On the other hand, the statute creates a civil action and does not prescribe a procedure that explicitly contradicts or supersedes Rule 17 of the Rules of Civil Procedure. Therefore, the better assumption is that Rule 17 requires that the juvenile participate in the case through a general or testamentary guardian or a court-appointed guardian ad litem.

Service of Process

The statute's only reference to service of process is a requirement that any ex parte order the court issues when the action is filed "be served by the sheriff upon the juvenile." Because the statute does not provide different procedures, the general rules set out in the Rules of Civil Procedure should be followed with respect to process and services of process—the complaint and summons should be served on the juvenile and on a custodial parent or guardian, another person who has custody and control of the juvenile, or, if there is no such person, on a guardian ad litem appointed pursuant to Rule 17. The fact that the plaintiff usually is a custodial parent or guardian or another person entitled to exercise care and control of the juvenile reinforces the notion that a guardian ad litem should be appointed for the juvenile pursuant to G.S. 1A-1, Rule 17.

Legitimation Proceedings

Two statutes provide judicial procedures through which a putative father can seek to legitimate his child. One applies when the mother was unmarried when the child was born.[99] The other, a more recent statute, applies when someone other than the petitioner is legally presumed to be the child's father because of his marriage to the child's mother.[100] The child is a necessary party in every legitimation proceeding.

Participation

Only the newer legitimation statute, for cases in which there is a presumptive father, includes an explicit requirement that a guardian ad litem be appointed to represent the child if the child is a minor. The same requirement applies in proceedings under the older statute, at least when the child does not have a general or testamentary guardian. In a case decided in 1985, the North Carolina Supreme Court said, "We also note that G.S. 49-10 provides that the child is a necessary party to the proceeding. Rule 17 of the North Carolina Rules of Civil Procedure requires that a minor defend only by general or testamentary guardian or by guardian ad litem. Rule 17 also gives the court authority to appoint a guardian ad litem for the minor notwithstanding the existence of a general or testamentary guardian . . . ."[101]

Service of Process

Because the statute is silent about service of process on the child in a legitimation proceeding, service is pursuant to G.S. 1A-1, Rule 4(j), as in other civil actions.

Note on Paternity Actions

Only a putative father may initiate a legitimation proceeding, which is a special proceeding before the clerk of superior court. A civil district court action to establish paternity, on the other hand, may be brought by the mother, the father, the child, the personal representative of the mother or child, or, in some circumstances, the director of the county department of social services.[102] The effect of a determination of paternity in a civil action is almost indistinguishable from that of a legitimation.[103] Nevertheless, although the child may initiate a civil paternity action, the

98. G.S. 7B-3404.

99. G.S. 49-10.

100. G.S. 49-12.1. The presumed father is a necessary party to the proceeding.

101. In the Matter of the Legitimation of Locklear, 314 N.C. 412, 421, 334 S.E.2d 46, 52 (1985).

102. G.S. 49-16.

103. *See* G.S. 49-11 and 49-15. *See also* Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

child is not a necessary party when the action is initiated by someone else.[104]

Summary

In any legitimation proceeding,

- the child must be named as a respondent.
- the child must be served as required by the generally applicable provisions of G.S. 1A-1, Rule 4(j).
- if the proceeding is brought under G.S. 49-12.1, the court must appoint a guardian ad litem for the child pursuant to G.S. 1A-1, Rule 17.
- if the proceeding is brought under G.S. 49-10, the court must appoint a guardian ad litem for the child pursuant to G.S. 1A-1, Rule 17, unless the child has a general or testamentary guardian, and in that circumstance the court has the option of appointing a guardian ad litem for the child.

Specific Actions and Proceedings: The Minor as Petitioner or Plaintiff

Some statutes specifically authorize minors to initiate civil court actions. The general rules governing participation and service of process discussed above apply when the statute does not prescribe another procedure. The general rules apply, for example, in

- civil actions to establish paternity,[105]
- civil actions for child support, and [106]
- special proceedings to change the child's name.[107]

Other statutes carve substantial exceptions into the general rules governing how minor parties participate in civil litigation that they initiate.

Emancipation

A minor who is sixteen or seventeen years of age may petition the court in a juvenile proceeding for a decree of emancipation.[108] The minor is not entitled to court-appointed counsel, and the Juvenile Code is silent with respect to the need for a guardian ad litem to be appointed for the minor.

Although the legislature might have reasoned that a minor seeking emancipation should be expected to participate in the proceeding as if he or she were already emancipated, there is no indication in the statute that the provisions of G.S. 1A-1, Rule 17, do not apply. In addition, the statute provides that "as of entry of the final decree of emancipation," the minor "has the same right to . . . sue and to be sued . . . as if the petitioner were an adult."[109] Therefore, until entry of a final decree, the better assumption is that even in an emancipation proceeding the minor should participate through a general or testamentary guardian or a guardian ad litem appointed pursuant to Rule 17.

Waiver of Parental Consent to Minor's Abortion

A minor female who is pregnant may petition the court in a confidential juvenile proceeding for an order allowing her to obtain an abortion without parental consent.[110] Specific provisions in the statute clearly supersede the requirements in G.S. 1A-1, Rule 17. The minor petitioner, regardless of her age, may choose whether to participate in the proceeding by herself or through a guardian ad litem.[111] In addition, she has a right to appointed counsel without regard to her financial means, but she is not required

104. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994) ("If the legislature had intended to require the child to be joined as a necessary party in an action under G.S. § 49-14, then it would have specifically stated such, as it did in G.S. § 49-10.").

105. *See* G.S. 49-14 through 49-16. The last section also authorizes "the personal representative of the . . . child" to bring the action.

106. G.S. 50-13.4(a) states that "a minor child by his guardian may institute an action" for the child's support.

107. G.S. 101-2 describes when an application to change a child's name may be filed by the child's parent, guardian, or guardian ad litem.

108. G.S. 7B-3500 through 7B-3509.

109. G.S. 7B-3507.

110. *See* G.S. 90-21.6 through 90-21.10. The minor in effect seeks an order emancipating her for the sole purpose of consenting to an abortion.

111. G.S. 90-21.8(b). The court is required to "ensure that the minor or her guardian ad litem is given assistance in preparing and filing the petition."

to be represented by counsel.[112] No one other than the minor petitioner is a necessary party to the proceeding, and she has a right to require that her parents, guardian, or custodian not be notified of the proceeding.

Marriage

In North Carolina, the county register of deeds may issue a marriage license to an unemancipated minor who is fourteen or fifteen years of age only if the minor has obtained a court order authorizing him or her to marry.[113] The minor may obtain such an order only if the couple seeking to marry are the parents of a child, whether the child has been born or is in utero. A fourteen- or fifteen-year-old female who wants to marry the father of her child (whether born or unborn), or a fourteen- or fifteen-year-old male who wants to marry the mother of his child (whether born or unborn), may file a civil action in district court seeking judicial authorization to marry.[114] The minor plaintiff may be represented by counsel but is not entitled to court-appointed counsel.[115] The minor is responsible for paying the filing fees for a civil action and for ensuring that the complaint and summons are served on his or her parents, the person the minor wants to marry, and any other necessary parties.

In an interesting and unique mix of provisions, the statute (1) specifically authorizes the minor to participate in the court action on his or her own behalf; (2) requires the court to appoint a guardian ad litem for the minor pursuant to G.S. 1A-1, Rule 17; (3) requires that the guardian ad litem be an attorney; (4) makes clear that the guardian ad litem's role is to represent the minor's best interest, not the minor's wishes; (5) describes the guardian ad litem's authority and responsibility in terms similar to those of a guardian ad litem appointed for a child in an abuse or neglect proceeding; and (6) requires the minor petitioner to serve a copy of the complaint on the attorney the court appoints as the minor's guardian ad litem.[116]

Proceeding for Approval of a Minor's Contract

Article 2 of Chapter 48A of the General Statutes establishes a procedure for obtaining court approval of certain contracts entered into by unemancipated minors. After approval of the contract by the superior court, the minor cannot disaffirm the contract on the basis of his or her minority if the contract is valid in other respects. Any party to the contract may initiate the action in superior court. For purposes of this type of proceeding, the statute says that the minor's custodial parent or guardian "shall be considered the minor's guardian ad litem," unless the court finds that the minor's interests require that someone else be appointed as the guardian ad litem.[117]

Specific Actions and Proceedings: When the Minor is Not a Party

Sometimes, even when the child is not a party to the civil action, the child's interests in the proceeding may be represented by an attorney or guardian ad litem. Some of the proceedings for which the General Assembly has either required such representation or given courts authority to require it are described below.

1. In an adoption proceeding, the court has discretion to appoint either an attorney or a guardian ad litem to represent "the interests of the adoptee" if the adoption is contested.[118]
2. If an adoption proceeding involves a parent who has been adjudicated incompetent, the court is required to appoint a guardian ad litem for the child unless the child already has a guardian.[119] The child's guardian ad litem is responsible for evaluating the

112. G.S. 90-21.8(c).

113. G.S. 51-1 and 51-2.1. A minor who is sixteen or seventeen years of age may marry only with the consent of a parent who has full or joint legal custody of the minor or the minor's legal guardian or custodian. A minor who is younger than fourteen may not marry in North Carolina.

114. G.S. 51-2.1.

115. G.S. 51–2.1(c).

116. G.S. 51-2.1. The procedures for compensation of the guardian ad litem are determined by the rules of the Office of Indigent Defense Services. *See* G.S. 7A-451(f).

117. G.S. 48A-12(d).

118. G.S. 48-2-201.

119. G.S. 48-3-602. This requirement is in addition to the requirement that the court appoint a guardian ad litem for the incompetent parent.

incompetent parent's condition, the likelihood that the parent will be restored to competency, the relationship between the child and the parent, alternatives to adoption, and other facts and circumstances relevant to whether the adoption should proceed.[120]

3. Article 21 of G.S. Chapter 35A establishes procedures through which a parent who suffers from a progressive chronic illness or an irreversible fatal illness may designate a standby guardian to be responsible for the parent's child when the parent becomes incapacitated or debilitated or when the parent consents. In a proceeding for the appointment of a standby guardian for a child, the clerk "may appoint a volunteer guardian ad litem," if one is available, to
   - represent the child's best interests;
   - where appropriate, express the child's wishes;
   - conduct an investigation to determine the facts, the child's needs, and available resources within the family;
   - protect and promote the child's best interests until relieved of responsibility by the clerk; and
   - if directed by the clerk to do so, conduct an investigation to determine the fitness of the proposed standby guardian to perform the duties that role entails.[121]
4. When the court awards custody of a child to a party in a domestic violence action, the court may consider "ordering . . . appointment of a guardian ad litem or attorney for the minor child."[122]
5. The North Carolina Uniform Trust Code, G.S. Chapter 36C, provides for only limited application of G.S. 1A-1, Rule 17.[123] Absent a conflict of interest, the code allows a parent to represent the parent's child if the child does not have a general guardian, guardian of the estate, or guardian of the person.[124] If the court finds that a child's interest is not represented or that available representation might be inadequate, the court may appoint a guardian ad litem for the child. The guardian ad litem is authorized to give consent and otherwise act on the child's behalf in any matter under the chapter, even if no court action is pending.[125]

Conclusion

Many people go through their entire lives having no involvement with the courts. No one, however, is too young to be the defendant or respondent in a civil court action or to initiate a civil action. The Rules of Civil Procedure address the means by which an unemancipated minor must participate in a civil action and the steps another party must take to properly serve a minor party. Those rules apply in every civil action unless another statute prescribes a different procedure for a particular type of action.

These generally applicable procedures, in Rules 4(j) and 17 of the Rules of Civil Procedure, could be improved by

1. clarification of the types of guardian through which a minor may initiate or defend a civil action and consistency with other statutes in that regard;
2. more detailed articulation of the role of a guardian ad litem appointed for a minor party pursuant to Rule 17 of the Rules of Civil Procedure;
3. establishment of a minimum age at which service of process on the minor party himself or herself is required;
4. clarification of the kinds of substituted service that are appropriate for minors below the minimum age; and
5. creation of exceptions or alternative procedures for serving children when the contents of the pleadings or other materials to be served are inappropriate for viewing by the minor party.

A number of statutes refer specifically to children as parties, as potential parties, or as persons

120. G.S. 48-3-602. After a hearing, the court may order the parent's guardian ad litem to execute a consent to the adoption on behalf of the incompetent parent.

121. G.S. 35A-1379. The statute is silent with respect to who might serve as a volunteer guardian ad litem.

122. G.S. 50B-3(a1)(3)h.

123. G.S. 36C-2-205(e) ("[N]othing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305.").

124. G.S. 36C-3-303(6).

125. G.S. 36C-3-305.

whose interests in an action may need to be protected even when they are not parties. Several of these statutes give the term guardian ad litem unique meanings that differ from each other as well as from the meaning of that term in Rule 17. In a few instances, statutes are not clear with respect to whether a guardian ad litem should be appointed for a minor party. In one type of juvenile proceeding—when a child is alleged to be dependent—the law leaves the appointment of a guardian ad litem for the child in the court's discretion. And in another type of juvenile proceeding—when a child is alleged to be undisciplined—the law has never been interpreted or applied to require the appointment of a guardian ad litem or other representative for the minor party.

The variety of actions that involve minor parties or a child's interests dictates some of these differences. Others, however, have merely persisted over time without scrutiny or have been enacted in one context without regard to whether they are consistent with the ways minor parties are treated in other contexts. This mix of provisions increases the risk that a guardian ad litem for a child will not be appointed when one is required or that a minor party will not be properly served—failings that can deprive a court of jurisdiction. The rules, whatever they are, should minimize those risks and give individuals who are appointed as guardians ad litem or attorneys for minor parties in civil actions clear guidance about their roles and responsibilities.