TERMINATION OF PARENTAL RIGHTS
In North Carolina

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(G.S. Chapter 7B, Article 11)*

I. Purposes of the Law

(G.S. 7B-1100)

A. General purpose is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents, when parents demonstrate that they will not provide care that promotes the child's healthy and orderly physical and emotional well-being.

B. A further purpose is to recognize both the child's need to have a permanent plan of care at the earliest possible age and the need to protect children from the unnecessary severance of the parent-child relationship.

C. If the interests of the child and parents (or others) are in conflict, the child's interests control. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984).

D. The article should not be used to circumvent the provisions of G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act.

II. Subject Matter Jurisdiction

(G.S. 7B-1101, 7B-1104; G.S. Ch. 50A)

A. District court has exclusive jurisdiction over proceedings to terminate parental rights. (District court jurisdiction extends to adoption proceedings that are appealed from or transferred by the clerk. *See* G.S. 1-301.2; G.S. 7A-246; G.S. 48-2-303; G.S. 48-2-607.)

B. Proceedings must comply fully with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A.

1. A proceeding to terminate parental rights is a child custody proceeding for purposes of the UCCJEA. G.S. 50A-102(4). In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147 (2004).

2. Evidence in the record was sufficient, without specific findings of fact, to support trial court's conclusion of law that it had subject matter jurisdiction under the UCCJEA. In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471, *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

a. Although relevant statutes do not require findings of fact, making findings would be the better practice. T.J.D.W.

* Some of the cases cited herein were decided under former law, Article 24B of G.S. Chapter 7A, which was repealed effective July 1, 1999, when Chapter 7B of the General Statutes became effective.

b. In earlier cases holding that the trial court must make findings of fact it was not clear from the record that the trial court had subject matter jurisdiction.

(1) When another state has entered a custody order relating to the child, an order terminating parental rights constitutes a "modification" of that order, and the court must make findings sufficient to conclude that it has jurisdiction to modify the other state's order. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147 (2004).

(2) Where record was devoid of evidence from which an appellate court could ascertain whether trial court had subject matter jurisdiction, case was remanded for findings based on competent evidence to support trial court's conclusion regarding subject matter jurisdiction pursuant to UCCJEA. In re J.B., 164 N.C. App. 394, 595 S.E.2d 794 (2004).

3. Information about the child's status, required by G.S. 50A-209, must be set out in the petition or motion or attached affidavit. Failure to attach the affidavit does not divest the court of jurisdiction and can be cured by the court's requiring that the affidavit be filed within a specified time. In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (2003). [Note: A form affidavit, AOC-CV-609, can be printed from the web site of the Administrative Office of the Courts, http://www.nccourts.org/Forms/FormSearch.asp.]

4. Under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, jurisdiction of a court that has made a child custody determination consistent with the PKPA continues as long as that court has proper jurisdiction under its state's laws and that state remains the residence of the child or any party. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999) (trial court, after finding that Florida retained jurisdiction over the child, properly dismissed for lack of jurisdiction) (decided under the UCCJA, which was replaced by the UCCJEA effective October 1, 1999).

C. The child must reside or be found in the district or be in the legal or actual custody of a county department of social services (hereinafter, DSS) or licensed child-placing agency in the district when the petition or motion is filed. G.S. 7B-1101.

1. Thisrequirement does not apply, however, when the court has exclusive continuing jurisdiction under the UCCJEA. In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008).

a. The court in H.L.A.D. distinguished In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985), which held that the trial court did not have jurisdiction when the mother and child had left the state days before DSS filed a petition, because (i) the UCCJA, which was in effect at the time, did not provide for exclusive continuing jurisdiction and (ii) DSS lacked standing to file the petition because the record in Leonard did not show that DSS had custody of the child.

b. The court in H.L.A.D. also distinguished In re D.D.J., 177 N.C. App. 441, 628 S.E.2d 808 (2006) (trial court lacked subject matter jurisdiction because when DSS filed petition, child was neither in the state nor in DSS custody), because(i) DSS lacked standing to file the petition because the child was not in DSS custody and (ii) the trial court had terminated its jurisdiction in the juvenile matter.

2. When the court does not have exclusive continuing jurisdiction under the UCCJEA the requirement of G.S. 7B-1101 may be at odds with the UCCJEA provision that physical

presence of a party or a child is neither necessary nor sufficient to establish jurisdiction. G.S. 50A-201(c).

3. Where petitioner in a private termination action filed the petition in the county where respondent was incarcerated, which was not the county in which she and the child resided, the issue was one of venue, not jurisdiction. There was no error because respondent made no objection to venue. Also, the child was "present" in the county when the petition was filed. In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 359 N.C. 281, 604 S.E.2d 314 (2004).

D. Failure to initiate a termination of parental rights action properly can deprive the trial court of subject matter jurisdiction.

1. Failure to verify a petition or motion to terminate parental rights deprives the trial court of subject matter jurisdiction.In re T.R.P., 360 N.C. 588, 636 S.E.2d 787 (2006); In re C.M.H., ___ N.C. App. ___,653 S.E.2d 929 (2007); In re Triscari, 109 N.C. App. 285, 426 S.E.2d 435 (1993) (trial court lacked subject matter jurisdiction where petition was not verified; signing and notarization did not constitute verification).

2. Failure to issue a summons to the child when a petition to terminate parental rights is filed deprives the trial court of subject matter jurisdiction. In re K.A.D., ___ N.C. App. ___, 653 S.E.2d 427 (2007); In re C.T., 182 N.C. App. 472, 643 S.E.2d 23 (2007); In re I.D.G., ___ N.C. App. ___, 655 S.E.2d 858 (2008); In re A.F.H-G., ___ N.C. App. ___, 657 S.E.2d 738 (2008); In re B.L.H., ___ N.C. App. ___, 657 S.E.2d 736(2008); In re J.T. (I), ___ N.C. App. ___, 657 S.E.2d 692(2008).

3. When action discontinues due to failure to renew the summons, issuance of a second or subsequent summons begins a new action as of the date of issuance of the new summons and reinvokes the court's subject matter jurisdiction. In re D.B. ___ N.C. App. ___, 652 S.E.2d 56 (2007).

4. Trial court does not have subject matter jurisdiction when a claim for termination of parental rights is asserted as a counterclaim in a civil district court action for child custody or visitation. In re S.D.W., ___ N.C. App. ___,653 S.E.2d 429 (2007).

E. The trial court may not proceed in a termination of parental rights case when an appeal from an underlying abuse, neglect, or dependency case is pending. G.S. 7B-1003(b)(1). In re P.P., ___ N.C. App. ___, 645 S.E.2d 398 (2007).

1. This rule applies to termination of parental rights actions initiated on or after October 1, 2005, regardless of when the underlying abuse, neglect, or dependency action was filed. In re Z.J.T.B., ___ N.C. App. ___, 645 S.E.2d 206 (2007).

2. Termination proceedings initiated before October 1, 2005, were not subject to that jurisdictional limitation. *See*In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005); In re N.B., 163 N.C. App. 182, 592 S.E.2d 597 (2004), *aff'd per curium*, 359 N.C. 627, 614 S.E.2d 532 (2005).

F. The parent's age is immaterial. However, G.S. 7B-1101 requires appointment of a guardian ad litem under G.S. 1A-1, Rule 17, for a parent under the age of eighteen.

G. The court does not have subject matter jurisdiction if the petition or motion is filed by someone who does not have standing.

1. DSS does not have standing to file a petition after the court awards custody to someone else. In re Miller, 162 N.C. App. 355, 590 S.E.2d 864 (2004).

2. Trial court lacked subject matter jurisdiction when DSS did not attach to petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing. In re T.B., 177 N.C. App. 790, 629 S.E.2d 895 (2006).

3. If the trial court lacked subject matter jurisdiction in the underlying action in which custody was awarded to DSS, the order giving DSS custody is void and DSS does not have standing to file a termination action.

   a. Orders giving DSS custody were void when verifications of the underlying petitions were signed by a DSS employ who signed the director's name "per [the employee's initials or name]." In re S.E.P., ___ N.C. App. ___, 646 S.E.2d 617 (2007); In re A.J.H-R., ___ N.C. App. ___, 645 S.E.2d 791 (2007).

   b. Verification of the petition was sufficient when it was signed by an identified employee of DSS and there was no assertion that the employee was not the authorized representative of the director of social services. In re Dj.L., ___ N.C. App. ___, 646 S.E.2d 134 (2007).

   c. Trial court's jurisdiction in the underlying dependency case was not affected by fact that (i) the petition did not state specifically that social worker who signed it was the director's authorized representative or (ii) social worker signed only the verification, not the signature line for the petitioner. In re D.D.F.,___ N.C. App. ___, 654 S.E.2d 1 (2007).

H. The parties cannot consent to or waive subject matter jurisdiction. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793 (2003) (court does not have subject matter jurisdiction when the petition or motion does not include a prayer for relief or request entry of any order). *Cf.* In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, *disc. review denied,* 318 N.C. 415, 349 S.E.2d 589 (1986) (district court had jurisdiction when petition alleged that mother had placed child with DSS; that father was unknown; that North Carolina was child's home state and no other state had jurisdiction; and that child's best interest would be served by court's assuming jurisdiction).

I. The Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, *et seq*., as amended, applies to termination proceedings.

1. Parent who seeks to invoke the Indian Child Welfare Act has the burden of showing that the act applies. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002) (trial court properly denied motion to dismiss for lack of subject matter jurisdiction where respondent merely made mention of his Indian heritage and provided no supporting evidence).

2. The act applies only to federally-recognized tribes, not tribes recognized only by the state. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005).

J. The courts have rejected arguments that some errors or procedures deprive the trial court of subject matter jurisdiction.

1. Statutory timelines. Timeline for initiating a termination proceeding is not jurisdictional. In re B.M., 168 N.C. App. 350, 607 S.E.2d 698 (2005) (DSS's failure to initiate termination proceeding within 60 days after permanent plan was changed to adoption).

2. Attachment of custody order. When custody is clear from the record, failure to attach a copy of the custody order to the petition or motion to terminate parental rights does not deprive the trial court of subject matter jurisdiction. In re W.L.M., 181 N.C. App. 518, 640 S.E.2d 439 (2007) (there was no question about who had legal custody, the motion alleged specific facts about the order giving DSS custody and DSS's continued custody, and motion incorporated entire underlying file that included orders giving DSS custody); In re D.J.G., ___ N.C. App. ___, 643 S.E.2d 672 (2007) (court had admitted into evidence and record included order placing custody with DSS); In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (respondent showed no prejudice and clearly was aware of child's custody with petitioners); In re T.M., ___ N.C. App. ___, 643 S.E.2d 471, *aff'd per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007) (it was clear from record that child was in DSS custody and that respondent had attended numerous hearings at which nonsecure custody had been awarded to DSS); In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006) (respondent failed to show prejudice). *Cf.*, In re T.B., 177 N.C. App. 790, 629 S.E.2d 895 (2006) (trial court lacked subject matter jurisdiction when DSS did not attach to petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing).

3. Pending custody action. The fact that a court in another district has continuing jurisdiction in a custody action under G.S. Chapter 50 does not affect the jurisdiction of the court in the district in which the child resides to proceed in an action to terminate parental rights. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003). (For a case in which a grandmother's civil action for custody and DSS's action to terminate parental rights were consolidated, *see* Smith v. Alleghany County DSS, 114 N.C. App. 727, 443 S.E.2d 101, *disc. rev. denied*, 337 N.C. 696, 448 S.E.2d 533 (1994).)

4. GAL representation in underlying action. Trial court's jurisdiction was not affected by failure to appoint guardians ad litem for the children when initial neglect and dependency petitions were filed or to ensure consistent representation of children by guardians ad litem throughout those proceedings, when children were represented by a guardian ad litem and attorney advocate throughout the termination proceeding. In re J.E., ___ N.C. ___, 655 S.E.2d 831 (2008), *reversing per curiam*, In re J.E., ___ N.C. App. ___, 644 S.E.2d 28 (2007), for reasons stated in the dissenting opinion in the court of appeals.

5. Contents of petition. Where contents of petition complied substantially with the statute and respondent had access to all of the required information, the trial court did not lack subject matter jurisdiction T.M.H., ___ N.C. App. ___, 652 S.E.2d 1, *review denied*, 362 N.C. 87, ___ S.E.2d ___ (2007).

III. Personal Jurisdiction

[*See also* Section IX (Summons) and Section X (Notice).]

A. North Carolina appellate courts have not addressed the conflict between (i) case law that requires in some termination cases that the court have personal jurisdiction over the respondent parent and (ii) the provision in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), at G.S. 50A-201(c), stating that personal jurisdiction is neither necessary nor sufficient to make a child custody determination. The case law, described in C., below, reflects the conflict in cases in which the out-of-state respondent parent of a legitimate child does not have minimum contacts with North Carolina and does not submit to the court's jurisdiction or waive the right to object to a lack of personal jurisdiction.

B. Effective October 1, 2007, in an attempt to address that conflict, the General Assembly added to G.S. 7B-1101 a provision that the court has jurisdiction to terminate a parent's rights without regard to the parent's state of residence, if

1. the court finds that it would have non-emergency jurisdiction under the UCCJEA (G.S. 50A-201 or 50A-203) to make a child custody determination and

2. the non-resident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

C. In the early 1990s, the court of appeals held that the trial court may lack personal jurisdiction and authority to proceed in a termination case if an out-of-state respondent (even if served properly) does not have minimum contacts with North Carolina. [*See* D., below, for circumstances in which the court declined to apply the same rule.] Because the court of appeals based its holdings on the due process clause of the fourteenth amendment, the effect of the legislation described above is unclear.

1. Although termination proceedings are *in rem*, to satisfy due process a non-resident parent must have minimum contacts with the state before a court here may terminate the parent's rights. In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), *cert. denied,* 330 N.C. 612, 413 S.E.2d 800, *overruled in part on other grounds*, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

   a. The nonresident parent may raise the defense of lack of personal jurisdiction in an answer, response, or motion as provided in G.S. 1A-1, Rule 12(b)(2). Trueman.

   b. Where the nonresident parent had no contacts with North Carolina and made no appearance in the action, the termination order was void and could be set aside at any time under G.S. 1A-1, Rule 60(b)(4). Finnican.

2. Courts in some states have reached a different conclusion, holding that termination of parental rights proceedings fall within the "status" exception to the minimum contacts requirement, an exception the Supreme Court acknowledged in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569 (1977). *See, e.g.*, S.B. v. State of Alaska, 61 P.3d 6 (AK Sup. Ct., 2002); In re Thomas J.R., 262 Wis.2d 217, 663 N.W.2d 734 (WI Sup. Ct., 2003).

D. The court of appeals limited its holdings in Trueman and Finnican when it held subsequently that minimum contacts are not required in the case of a non-resident father of a child born out of wedlock if the father has failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. In re Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

E. Personal service of process while respondent is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. Burnham v. California Superior Court, 495 U.S. 604, 110 S.Ct. 2105 (1990) (due process does not bar exercise of personal jurisdiction over nonresident defendant based on personal service while temporarily in the state).

F. A parent may waive the defenses of lack of personal jurisdiction or insufficiency of service of process by making a general appearance or by filing an answer, response, or motion without raising the defense. G.S. 1A-1, Rule 12. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006); In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (2003); In re J.W.J., 165 N.C. App. 696, 599 S.E.2d 101 (2004) (respondent mailed handwritten response to clerk of court and later filed formal answers without raising defense of lack of personal jurisdiction).

IV. Procedure

(G.S. 7B-1102 through 7B–1109)

A. Juvenile Code procedures for initiating a termination of parental rights proceeding are exclusive.

1. A proceeding for termination of parental rights may be initiated only by

   a. filing of a petition and issuance of a summons, or

   b. filing of a motion in a pending abuse, neglect, or dependency proceeding.

2. Parents cannot unilaterally and extra-judicially terminate their own parental rights. In re Jurga, 123 N.C. App. 91, 472 S.E.2d 223 (1996).

3. A claim for termination of parental rights may not be asserted as a counterclaim in a civil action for custody or visitation. In re S.D.W., ___ N.C. App. ___,653 S.E.2d 429 (2007).

B. If termination of parental rights is necessary in order to accomplish the permanent plan for a child, G.S. 7B-907(e) requires DSS to file a termination petition or motion within 60 days after the permanency planning hearing unless the court makes findings about why that cannot be done.

1. The requirement is “directory,” not “mandatory,” and DSS’s failure to file within the 60-day period is not reversible error absent a showing of prejudice. In re B.M., 168 N.C. App. 350, 607 S.E.2d 698 (2005).

2. *See, e.g.*, In re B.M., 168 N.C. App. 350, 607 S.E.2d 698 (2005); In re T.M., ___ N.C. App. ___, 643 S.E.2d 471, *aff’d per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007); In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006); In re W.L.M., 181 N.C. App. 518, 640

S.E.2d 439 (2007) (court found that all of the continuances were necessary, respondent had objected to none of them, and respondent did not assert or establish any prejudice resulting from the continuances).

C. Any person or agency with standing to file a petition for termination may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion for termination of parental rights.

D. When the proceeding is initiated by petition in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same child, the court on its own motion or motion of a party may consolidate the actions pursuant to G.S. 1A-1, Rule 42.

E. Any respondent may file a written answer to a petition, or a written response to a motion,

1. within 30 days after service of the summons and petition or the notice and motion, or

2. within the time established for a defendant's reply by G.S. 1A-1, Rule 4(j1), if service is by publication.

F. If a county DSS, which is not the petitioner or movant, is served with a petition or motion seeking termination of parental rights, the DSS director

1. must file a written answer or response, and

2. is deemed a party to the proceeding.

G. It was not error for trial court to conduct consolidated adjudication and disposition hearings on both the abuse and neglect petition and a motion to terminate parental rights; however, court should enter two orders or distinguish within an order the components of a hearing when hearings are consolidated. In re R.B.B., ___ N.C. App. ___, 654 S.E.2d 514 (2007).

H. The Rules of Civil Procedure apply to termination proceedings unless the statute provides otherwise or the appellate courts have held otherwise with respect to a particular rule. "[T]he Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code." In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236 (2005).

1. A few cases hold that particular rules do not apply in termination proceedings.

a. A parent does not have a right to file a counterclaim in a termination action. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

b. Summary judgment procedures are not available in termination proceedings. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); In re J.N.S., 165 N.C. App. 536, 598 S.E.2d 649 (2004) (summary judgment as to a ground for termination is contrary to the procedural mandate of the juvenile code, which requires the court to hear evidence and make findings).

c. G.S. 1A-1, Rule 41, did not apply to bar DSS from filing another petition to terminate parental rights after voluntarily dismissing an earlier petition. In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236 (2005).

2. A number of cases acknowledge that the Rules of Civil Procedure apply in termination cases, at least to the extent the termination statute does not deal specifically with the procedure a rule addresses.

    a. The Rules of Civil Procedure, while not to be ignored, are not super-imposed on termination hearings. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982) (court found no error in trial court's entry of an order under [former] G.S. 7A-289.31, but went on to discuss and find no error under G.S. 1A-1, Rule 58).

    b. In one case the court of appeals said, "Having determined that [former] G.S. 7A-289.26 contains no provision for serving a known, but unlocatable parent, we must examine [former] G.S. 7A-289.27 and the Rules of Civil Procedure for guidance." The court held that the Rules' due diligence requirement for service by publication applies to termination cases. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985). *See also* In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986) (real party in interest under G.S. 1A-1, Rule 17(a)).

    c. The North Carolina Supreme Court, in dicta, concluded that the Rules of Civil Procedure apply to termination proceedings: "A proceeding to terminate parental rights is . . . either a civil action or a special proceeding. . . . If this is a civil action, the Rules apply, G.S. 1A-1, Rule 2; if this is a special proceeding, the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute." In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

    d. *See* concurring opinion in In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992), emphasizing the appropriateness of the court's use of the Rules of Civil Procedure in a termination of parental rights case.

    e. "Juvenile proceedings are generally governed by the Rules of Civil Procedure." In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005) (trial court had authority to limit discovery pursuant to G.S. 1A-1, Rule 26, and did not abuse its discretion by denying respondent's motion to interview the child).

3. In relation to G.S. 1A-1, Rule 17, and the appointment of guardians ad litem for minors and incompetent persons, the General Assemblyamended the termination statute in 1989, to make clear that it, and not Rule 17, is controlling with regard to guardians ad litem for children in termination proceedings. Before that, both the supreme court and the court of appeals had stated that Rule 17 controlled despite the fact that the termination statute deals specifically with the appointment of guardians ad litem. *See, e.g.,*In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, *disc. 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).

4. In a number of termination of parental rights cases the courts have applied one or more of the Rules of Civil Procedure.

    a. Entry of judgment—Rule 58. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed, sub nom*Moore v. Guilford County Department of Social Services, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983).

b. Motion for relief from a judgment or order—Rule 60(b). In re Saunders, 77 N.C. App. 462, 335 S.E.2d 58 (1985).

c. Amendment of complaint—Rule 15. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied,* 306 N.C. 385, 294 S.E.2d 212 (1982).

d. Findings of fact and signing of judgment—Rule 52 and Rule 63. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

e. Motion to intervene of right—Rule 24(a)(2). Hill v. Hill, 121 N.C. App. 510, 466 S.E.2d 322 (1996) (social services department that paid public assistance on behalf of the child and therefore had an interest in the father's continued responsibility to pay child support, was entitled to intervene by right in an action to terminate the father's rights).

f. Motion for medical examination—Rule 35. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

I. Technical errors and violations of the Juvenile Code are reversible error only when appellant shows that the errors resulted in prejudice. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

V. Appointment and Payment of Counsel and Guardian ad Litem

(G.S. 7A-450, *et seq*.; 7B-1101; 7B-1101.1; 7B-1108; 7B-1109)

A. The parent has a right to counsel, and to appointed counsel if indigent, but may waive the right.

1. If the proceeding is initiated by petition, an attorney appointed to represent the parent in a prior abuse, neglect, or dependency proceeding will not represent the parent in the termination proceeding unless so ordered by the court.

2. If the proceeding is initiated by motion in a pending abuse, neglect, or dependency proceeding, an attorney appointed to represent the parent in that proceeding will continue to represent the parent in regard to termination unless the court orders otherwise.

3. If respondent appears at the adjudication hearing and is not represented by counsel, court must inquire whether the parent wants counsel and is indigent. If the parent wants counsel and is indigent, court must appoint counsel in accordance with rules of the Office of Indigent Defense Services. The parent's failure to file an answer or response or to ask for counsel before the hearing does not constitute waiver of the right to counsel. In re Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997); In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22 (2004), *review denied*, *sub nom* In re D.M.H., 359 N.C. 632, 616 S.E.2d 230 (2005) (parent cannot waive right to counsel by inaction), *overruled on other grounds by* In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005).

4. A respondent who neither contacts the clerk to request counsel nor attends the hearing waives the right to appointed counsel. In re R.R., ___ N.C. App. ___, 638 S.E.2d 502 (2006).

5. The parent has a right to effective assistance of counsel. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996) (parent failed to show that counsel's performance deprived her of fair hearing; she was not prejudiced by attorney's failure to request pretrial hearing, failure to move to dismiss, or choice of evidence to introduce); In re L.C., 181 N.C. App. 278, 638 S.E.2d 638, *review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007) (court of appeals rejected respondent's argument that he was denied effective assistance of counsel because his lawyer had been late for a hearing and trial court had not allowed her to ask questions about matters already covered, because respondent failed to show prejudice and failed to make offer of proof to show what questions the attorney would have asked).

B. The court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent any parent who is under age eighteen.

- The issue of failure to appoint a guardian ad litem for respondent in earlier dependency proceeding when she was a minor could not be considered in the termination of parental rights proceeding. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300 (2005).

C. The court may appoint a guardian ad litem for a parent if the court determines there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot act adequately in his or her own interest.

1. The parent's attorney may not also serve as the parent's guardian ad litem.

2. There is no requirement that the guardian ad litem be an attorney.

3. Communications between the guardian ad litem and the parent or the parent's attorney are privileged and confidential.

- *See* In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006), decided under former law, but holding that a hearing under G.S. 1A-1, Rule 17, was not required because the record and transcripts did not reveal circumstances that, if brought to trial judge's attention, would have raised "a substantial question as to whether [respondent was] *non compos mentis.*"

D. **Former Law.**Most appellate court decisions addressing guardians ad litem for parents in termination of parental rights proceedings were decided under the law that applied to petitions or actions filed before October 1, 2005.Under that law, the court was required to appoint a guardian ad litem to represent any parent whose incapability to provide proper care and supervision for the child was alleged as a ground for termination under G.S. 7B-1111(6), when the parent's incapability was alleged to be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or a similar cause or condition. In some cases, appointment of a guardian ad litem was required even if that ground was not alleged, if mental health or substance abuse or similar issues were central to the case. All of the following were decided under former law.

1. Failure to appoint a guardian ad litem when the statute required one was reversible error. In re Richard v. Michna, 110 N.C. App. 817, 431 S.E.2d 485 (1993); In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003); In re S.B., 166 N.C. App. 488, 602 S.E.2d 691 (2004); In re J.D., 164 N.C. App. 176, 605 S.E.2d 643, *disc. review denied* 358 N.C. 732, 601 S.E.2d 531 (2004); In re T.B.K., 166

N.C. App. 234, 603 S.E.2d 805 (2004); In re B.M., 168 N.C. App. 350, 607 S.E.2d 698 (2005); In re K.R.S., 170 N.C. App. 643, 613 S.E.2d 318 (2005).

2. Even when the petition or motion did not specifically allege the dependency ground, G.S. 7B-1111(6), the trial court sometimes was required to appoint a guardian ad litem or to conduct a hearing pursuant to G.S. 1A-1, Rule 17, to determine whether a guardian ad litem should be appointed. *See*, *e.g.*, In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, *disc. review denied*, ___ N.C. App. ___, 633 S.E.2d 818 (2006); In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45 (2005); In re C.D.A.W., 175 N.C. App. 680, 625 S.E.2d 139 (2006), *aff'd per curiam*, 361 N.C. 232, 641 S.E.2d 301 (2007).

3. The statute did not require appointment of a guardian ad litem for a parent every time dependency or substance abuse was alleged, only when the parent's incapability *as a result of* substance abuse (or other statutory or similar cause) was alleged; and the trial court was not required to appoint a guardian ad litem for a parent in every case where substance abuse or some other cognitive limitation was alleged. *See* In re. H.W., 163 N.C. App. 438, 594 S.E.2d 211, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004); In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005); In re A.L.G., 173 N.C. App. 551, 619 S.E.2d 561 (2005); In re D.H., 177 N.C. App. 700, 629 S.E.2d 920 (2006); S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006); In re J.M.W., 179 N.C. App. 788, 635 S.E.2d 916 (2006).

4. No testimonial privilege prevented guardian ad litem from testifying. The guardian ad litem's testimony could be used to establish a ground for termination. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004).

E. The role of a guardian ad litem appointed for a parent pursuant to G.S. 1A-1, Rule 17, is not altogether clear.

1. Role of a Rule 17 guardian ad litem is as a "guardian of procedural due process for that parent, to assist in explaining and executing her rights." In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004).

2. For guardians ad litem appointed in actions filed on or after October 1, 2005, the statute specifies that the guardian ad litem is authorized to help the parent enter appropriate consent orders; facilitate service of process on the parent; assure that necessary pleadings are filed; and, at the request of the parent's attorney, assist in ensuring that procedural due process requirements are met.

3. There is no authority "suggesting that a GAL serves as a type of social worker for the parent." The role of the guardian ad litem is to protect procedural due process rights of a party who later may be adjudicated as incapable. In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61 (2006).

4. In an action to terminate parental rights the role of a parent's guardian ad litem is to provide assistance, not to substitute his or her judgment or decisions for those of the parent. In re L.B., ___ N.C. App. ___, 653 S.E.2d 240 (2007).

F. *See* VIII.A.3., below, regarding appointment of a guardian ad litem for an unknown parent.

G. Unless a guardian ad litem for the child has been appointed pursuant to G.S. 7B-601, the court must appoint a guardian ad litem for the child in any case in which an answer or

response is filed denying any material allegation of the petition or motion, and the petition or motion was filed by someone other than the child's guardian ad litem.

1. Where the court of appeals could not determine from the record when or for what purpose respondent had filed a letter he later claimed was an "answer," the court refused to assume trial court error and held that appointment of a guardian ad litem was not required. In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

2. Although respondent waited until the day of the hearing to file an answer, the court was required to appoint a guardian ad litem for the child. In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823 (2005).

3. In a private termination action, court's failure to appoint a guardian ad litem for the child, when father had filed an answer denying material allegations, required reversal despite father's failure to object or assign error to trial court's violation of the statutory requirement. In re Fuller, 144 N.C. App. 620, 548 S.E.2d 569 (2001).

4. Appointment of an attorney advocate does not obviate the requirement that a guardian ad litem be appointed for the child, because the two have different roles and statutory duties. In re R.A.H., 171 N.C. App. 427, 614 S.E.2d 382 (2005).

5. The person appointed as guardian ad litem for the child may be a guardian ad litem trained and supervised by the state guardian ad litem program only if

   a. the child is or has been the subject of an abuse, neglect, or dependency petition, or

   b. the local guardian ad litem program, for good cause, consents to the appointment.

6. In some cases appointment of a guardian ad litem for the child, even if not otherwise required, may be the best way to facilitate service of process on the child. The child is a party [*see* G.S. 7B-601(a)] and must be served regardless of age when a petition for termination is filed and if twelve or older when a motion for termination is filed.

H. In every case, the court has discretion to appoint a guardian ad litem for the child to assist the court in determining the child's best interest. Appointment may be made before or after the court adjudicates grounds for termination.

I. If a guardian ad litem has been appointed to represent the child in an earlier juvenile proceeding, that guardian ad litem will also represent the child in any termination proceeding, unless the court determines that the child's best interests require otherwise.

J. If the child's guardian ad litem is not an attorney, an "attorney advocate" must be appointed to assure protection of the child's legal rights in the proceeding.

K. Fees of appointed counsel and guardians ad litem should be paid as follows:

1. Fees of counsel or guardian ad litem appointed for an indigent parent are to be paid by the Office of Indigent Defense Services. *See* 5, below, for alternate source of fees when the parent is a minor or dependent.

2. If a parent's rights are terminated, the court may order the parent to reimburse the state for some or all of the fees for the parent's counsel, taking into account the parent's ability to pay. If the parent does not comply at disposition, the court must file a judgment against the parent for the amount ordered.

3. If the parent is not indigent and does not secure private counsel, the fee of a guardian ad litem appointed for the parent is a proper charge against the parent.

4. The child's (non-volunteer) guardian ad litem or attorney advocate

   a. most often will be paid by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.

   b. in a private termination proceeding or when the guardian ad litem program has a conflict, must be paid a reasonable fee fixed by the court.

5. Whenever an attorney or guardian ad litem is appointed for a person under age eighteen, or eighteen or over but dependent on and domiciled with a parent or guardian, the court may require the parent, guardian, or trustee to pay the fee. If a parent is ordered to pay attorney fees and does not comply at disposition, the court must file a judgment against the parent for the amount ordered.

L. Attorney fees for retained counsel are not awardable in termination of parental rights actions. Burr v. Burr, 153 N.C. App. 504, 570 S.E.2d 222 (2002).

VI. Who May File Petition or Motion

(G.S. 7B-1103)

Only the following may file a petition or motion to terminate parental rights:

A. Either parent seeking termination of the other parent's rights; except, the child's father may not file a petition if

   1. the father has been convicted of rape under G.S. 14-27.2 or G.S. 14-27.3, for a rape that occurred on or after December 1, 2004; and

   2. the child who is the subject of the termination proceeding was born as a result of the rape.

B. Any judicially appointed guardian of the person of the child.

C. Any county DSS or licensed child-placing agency to which (i) a court has given custody of the child, or (ii) a parent or guardian of the person of the child has surrendered the child for adoption pursuant to G.S. Chapter 48.

   1. Custody pursuant to a valid nonsecure custody order is sufficient to confer on DSS standing to file a petition to terminate parental rights. In re T.M., ___ N.C. App. ___, 643 S.E.2d 471, *aff'd per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007).

2. A petition brought by a county DSS director was valid because it was apparent that he brought it not in his individual capacity but on behalf of the county DSS. In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

3. Where the court had placed the child in the legal custody of an individual before DSS filed its petition, DSS did not have standing to petition for termination of parental rights. In re Miller, 162 N.C. App. 355, 590 S.E.2d 864 (2004); In re D.D.J., 177 N.C. App. 441, 628 S.E.2d 808 (2006).

4. When DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing, trial court lacked subject matter jurisdiction In re T.B., 177 N.C. App. 790, 629 S.E.2d 895 (2006).

5. DSS did not have standing to petition for termination of parental rights because orders giving DSS custody were void, when verifications of the underlying petitions were signed by a DSS employ who signed the director's name "per [the employee's initials or name]." In re S.E.P., ___ N.C. App. ___, 646 S.E.2d 617 (2007). *See also* In re A.J.H-R., ___ N.C. App. ___, 645 S.E.2d 791 (2006) (verification of a neglect petition was not sufficient when a DSS employ signed the director's name "per [the employee's initials or name.").

D. Any person with whom the child has resided for a continuous period of two years or more immediately preceding the filing of the petition or motion for termination.

E. A guardian ad litem appointed under G.S. 7B-601 to represent the child in an abuse, neglect, or dependency proceeding.

F. Any person who has filed a petition to adopt the child.

VII. Contents of Petition or Motion

(G.S. 7B-1104)

A. The petition or motion must be entitled "In re (*last name of child*), a minor child" and either include the following facts or state that the facts are unknown:

1. The child's birth certificate name, date and place of birth, and county of residence.

2. Petitioner's or movant's name and address and facts sufficient to show that the petitioner or movant has standing to file a petition or motion under VI, above.

3. Name and address of the child's parents.

   a. If a parent's name or address is unknown, the petition or motion, or attached affidavit, must describe efforts that have been made to find out the name and address.

   b. A father need not be named if the father has been convicted of first- or second-degree rape under G.S. 14-27.2 or G.S. 14-27.3 and the child who is the subject of the action was born as a result of the rape.

4. Name and address of any court-appointed guardian of the child's person and of any person or agency to which a court of any state has given custody of the child. A copy of any such order must be attached.

5. Facts sufficient to support a determination that one or more grounds for terminating parental rights exist.

    a. Although the petition did not specifically reference G.S. 7B-1111(a)(6), allegations gave respondent sufficient notice of that ground for termination. In re A.H., ___ N.C. App. ___, 644 S.E.2d 635 (2007).

    b. Although motion [which the opinion refers to as a petition] asserted only barebones legal bases alleged as grounds for terminating parental rights, it was sufficiently detailed because it incorporated by reference the entire juvenile file in the matter. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

    c. Bare allegation that parent neglected the child and willfully abandoned the child for six months did not comply with this requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

    d. Allegations need not be exhaustive or extensive, but they must put a party on notice as to acts, omissions, or conditions that are at issue and must do more than recite the statutory wording of the ground. In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79 (2002). *See also* In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003) (allegations were sufficient to put respondent on notice even though the petition did not specifically allege neglect).

6. A statement that the petition or motion has not been filed to circumvent the Uniform Child Custody Jurisdiction and Enforcement Act. *See* In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003) (while the petition should include this statement, its omission did not result in prejudice to the respondent); In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005) (omission did not deprive court of jurisdiction). *Cf.*In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298 (2005) (failure to make required allegation and attach prior custody order deprived court of jurisdiction).

B. Information about the child's status, as required by G.S. 50A-209, must be set out in the petition or motion or an attached affidavit.

1. A termination proceeding is a child-custody proceeding and must comply with the Uniform Child Custody Jurisdiction and Enforcement Act. G.S. 50A-102(4).

2. Failure to attach the affidavit does not divest the court of jurisdiction and can be cured by requiring that the affidavit be filed within a specified time. In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (2003); In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). *See also* In re B.D., 174 N.C. App. 234, 620 S.E.2d 913 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006) (failure to attach a pertinent custody order did not deprive court of jurisdiction when no prejudice was shown). *Cf.*In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298 (2005) (failure to make required allegation and attach prior custody order deprived court of jurisdiction).

3. The AOC provides a form affidavit, AOC-CV-609, that is available from the AOC web site, http://www.nccourts.org/Forms/FormSearch.asp.

C. The petition or motion must be verified. In re T.R.P., 360 N.C. 588, 636 S.E.2d 787 (2006); In re C.M.H., ___ N.C. App. ___,653 S.E.2d 929 (2007); In re Triscari, 109 N.C. App. 285, 426 S.E.2d 435 (1993) (fact that petition is signed and notarized is not sufficient to constitute verification).

D. The court may consider only those issues that are brought before it by proper pleading. A motion or petition that does not contain a prayer for relief or request the entry of any order is not a proper pleading, and the court does not have jurisdiction to proceed in the matter. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793 (2003).

VIII. Unknown Parent; Preliminary Hearing and Notice

(G.S. 7B-1105)

A. If the name or identity of a parent/respondent is unknown when a petition is filed, the court must conduct a hearing to determine the parent's name or identity.

1. The hearing must be held within 10 days after the petition is filed or at the next term of court in the county if there is no court within 10 days.

2. Notice of the preliminary hearing need be given only to the petitioner, but the court may summons others to testify.

3. The court may inquire of any known parent about the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a "diligent search" for the parent.

4. If the parent's identity is determined, the court must enter a finding and summons the parent to appear.

5. The court must make findings or issue a publication order (*see* B, below) within 30 days of the preliminary hearing unless additional time is required for investigation.

6. These special hearing provisions do not apply in the case of a known parent whose whereabouts are unknown. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985).

B. If not able to identify an unknown parent, the court must order publication of notice of the termination proceeding by means most likely to identify the child to the unknown parent.

1. The notice must be published in a newspaper qualified for legal advertising under G.S. 1-597 and 1-598 and published in counties directed by the court weekly for three successive weeks.

a. The notice must

(1) be directed to the unknown parent of (male) (female) child born at specified time and place.

(2) designate the court, docket number, and name of the case (at the direction of the court, "In re Doe" may be substituted).

(3) specify the type of proceeding.

(4) direct the respondent to answer the petition within 30 days after the specified date of first publication.[Note: For combined service on both a known and an unknown parent, the time to respond must be 40 days, as required by G.S. 1A-1, Rule 4(j1), which applies to service on a known parent.]

(5) follow the form set out in G.S. 1A-1, Rule 4.

(6) state that parental rights will be terminated if no answer is filed.

b. After service, a publisher's affidavit must be filed with the court.

2. If an unknown parent served by publication does not answer within the prescribed time, the court "shall" issue an order terminating the parent's rights.

[Note: In several cases involving known parents, the court of appeals has said that the court is never required to terminate parental rights. *See* In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976); Forsyth County Dep't of Social Services v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974).]

IX. Summons—When Proceeding Is Initiated by Petition

(G.S. 7B-1106)

A. Except as provided in the case of an unknown parent, upon filing of the petition, the following must be named as respondents and summons must be directed to them:

1. The child's parents, except any parent who has

a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or

b. consented to adoption of the child by the petitioner.

2. Any judicially appointed custodian or guardian of the person of the child.

3. Any county DSS or licensed child-placing agency to which the parent has released the child for adoption under G.S. Chapter 48.

4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.

5. The child, regardless of age.

Failure to issue a summons to the child deprives the trial court of subject matter jurisdiction. In re K.A.D., ___ N.C. App. ___, 653 S.E.2d 427 (2007); In re C.T., 182 N.C. App. 472, 643 S.E.2d 23 (2007); In re I.D.G., ___ N.C. App. ___, 655 S.E.2d 858 (2008); In re A.F.H-G., ___ N.C. App. ___, 657 S.E.2d 738(2008); In re B.L.H., ___ N.C. App. ___, 657 S.E.2d 736 (2008); In re J.T. (I), ___ N.C. App. ___, 657 S.E.2d 692(2008).

B. The summons must include the child's name and notice that

1. A written answer must be filed within 30 days or the parent's rights may be terminated.

2. The parent, if indigent, is entitled to appointed counsel and may contact the clerk immediately to request counsel.

3. It is a new case, and any attorney appointed to represent the parent in another case will not represent the parent in this case unless so ordered by the court.

4. Notification of the date, time, and place of the hearing will be mailed upon filing of an answer or 30 days from the date of service.

5. The purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated.

6. The parent may attend the termination hearing.

[Note: *See* cases holding that parent does not have an absolute right to be present at a termination hearing. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).]

C. Issuance of a second or subsequent summons, without an extension or alias and pluries summons, begins a new action as of the date of issuance of the new summons and, if the action was discontinued, reinvokes the court's subject matter jurisdiction. In re D.B. ___ N.C. App. ___, 652 S.E.2d 56 (2007).

D. Summons must be served pursuant to G.S. 1A-1, Rule 4(j), except that service on the child is made on the child's guardian ad litem if one has been appointed.

1. Child's guardian ad litem may waive proper service of process, and respondent parent is not an "aggrieved party" who can raise on appeal the issue of whether the child was served properly. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005).

2. Because the child is a party to the proceeding [*see* G.S. 7B-601(a)] and must be served with summons regardless of age, in some cases appointment of a guardian ad litem for the child may be the best way to effect proper service on the child.

3. A parent is not deemed to be under a disability even if a minor; however, G.S. 7B-1101 requires appointment of a guardian ad litem for any parent under age eighteen.

4. Petitioner must comply with Rule 4(j1) regarding service by publication and specifically with the section's due diligence requirement. In re Clark, 76 N.C. App. 83, 332 S.E.2d

196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985). *See also* later related case, In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990) (court correctly dismissed adoption proceeding when order terminating father's rights was reversed and father had filed a legitimation proceeding).

5. Service by publication is void, and an order for termination can be overturned, where petitioner did not use diligence in trying to ascertain the respondent/parent's whereabouts. Clark.

6. When respondent/parent's whereabouts are unknown, service must comply with both rule 4(j1) and with [former] G.S. 7A-289.27(b) (contents of summons; *see* VIII.B., above). In re. Joseph, 122 N.C. App. 468, 470 S.E.2d 539 (1996) (failure to comply fully with [former] G.S. 7A-289.27(b) was error, but did not prejudice respondent).

7. Trial court lacked personal and subject matter jurisdiction when respondent was served with summons that had expired, and respondent made no appearance in the proceeding. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707 (2005).

8. Court of appeals rejected respondent's argument that he had not received proper notice, as he had not challenged trial court's finding of fact that he was personally served by certified mail on a specific date. In re A.R.H.B., ___ N.C. App. ___, 651 S.E.2d 247 (2007).

9. Where the record failed to show respondent was given proper notice, her appearance in court after the hearing did not constitute a waiver of notice. Facts surrounding the case and respondent's failure to respond or appear rebutted any presumption of proper service. In re K.N., 181 N.C. App. 736, 640 S.E.2d 813 (2007).

X. Notice—When Proceeding Is Initiated by Motion in the Cause

(G.S. 7B-1106.1)

A. Upon filing a motion for termination of parental rights, the movant must prepare and serve a notice; issuance of a summons is neither necessary nor appropriate. In re D.R.S., 181 N.C. App. 136, 638 S.E.2d 626 (2007).

B. The notice must be directed to and served on each of the following that is not a movant:

1. The child's parents, except any parent who has

   a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or

   b. consented to adoption of the child by the movant.

2. Any court-appointed custodian or guardian of the person of the child.

3. Any county DSS or licensed child-placing agency to which the parent has released the child for adoption under G.S. Chapter 48.

4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.

5. The child's guardian ad litem, if one has been appointed under G.S. 7B-601 and has not been relieved of responsibility.

6. The child, if twelve or older when the motion is filed. (The reason for requiring service of a summons on the child regardless of age and limiting service of a notice to older children is not apparent.)

C. The notice must include the child's name and notice that

1. A written response must be filed within 30 days after service of the motion and notice, or the parent's rights may be terminated.

2. Any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise.

3. The parent, if indigent, is entitled to appointed counsel and, if not already represented by appointed counsel, may contact the clerk immediately to request counsel.

4. Notification of the date, time, and place of the hearing will be mailed upon filing of a response or 30 days from the date of service.

5. The purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated.

6. The parent may attend the termination hearing.

[Note: *See* cases holding that parent does not have absolute right to be present at termination hearing. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).]

D. The motion and notice must be served pursuant to G.S. 1A-1, Rule 4, if

1. the person or agency to be served

a. was not served originally with summons, or

b. was served originally by publication that did not include notice, substantially in conformity with G.S. 7B-406(b)(4)(e), that the court would have jurisdiction to terminate parental rights;

2. a period of two years has elapsed since the date of the original action; or

3. the court in its discretion orders that service be pursuant to G.S. 1A-1, Rule 4.

E. Except as provided in D., above, the motion and notice may be served pursuant to G.S. 1A-1, Rule 5(b).

1. Respondents' contention that more than two years had passed since initiation of the proceeding, thus triggering a requirement for service pursuant to G.S. 1A-1, Rule 4, was not supported by the record, so service of the motion and notice pursuant to G.S. 1A-1, Rule 5, was proper. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

2. Because Rule 5 service was permissible, service on respondent's attorney was proper.In re H.T.

F. Service pursuant to Rule 5 was proper when motion was filed within two years after filing of most recent neglect petition. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

G. A parent is not deemed to be under a disability even if the parent is a minor; however, G.S. 7B-1101 requires appointment of a guardian ad litem for any parent under age eighteen.

H. Failure to give the respondent notice that complies fully with G.S. 7B-1106.1

1. is reversible error. In re Alexander, 158 N.C. App. 522, 581 S.E.2d 466 (2003); In re D.A., 169 N.C. App. 245, 609 S.E.2d 471 (2005).

2. is not reversible error where respondent waives the defense of insufficiency of service or insufficiency of process by making a general appearance or filing an answer, response, or motion without raising the defense. In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (2003); In re B.M., 168 N.C. App. 350, 607 S.E.2d 698 (2005); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387 (2006).

XI. Answer or Response; Hearing to Determine Issues

(G.S. 7B-1107, 7B-1108)

A. If a respondent fails to file a timely answer or response, the court must order a hearing on the petition or motion and may issue an order terminating respondent's parental and custodial rights. At the hearing, the court may examine the petitioner or movant or others, on facts alleged in the petition or motion.

[Note: Before October 1, 2000, the statute said that the court "shall" (instead of "may") issue an order terminating parental rights upon a parent's failure to file an answer. *But see* In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992), where the court of appeals, in dicta, concluded that the absence of an answer denying material allegations of the petition did not authorize a "default type" order terminating parental rights, since the statute required a hearing on the petition. The court is never required to terminate parental rights. In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976); Forsyth County Dep't of Social Services v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974).]

B. Respondent's answer or response must admit or deny allegations of the petition or motion and provide the name and address of the respondent or respondent's attorney.

C. The court is required to conduct a special hearing to determine the issues raised by the petition or motion and answer(s) or response(s).

1. Petitioner or movant must give notice of not less than 10 days or more than 30 days to the answering respondent(s) and the child's guardian ad litem.

2. Notice of hearing is deemed to be given upon deposit of notice, properly addressed, in the U.S. mail, first-class postage paid.

3. The fact that this special hearing is brief and held just before trial does not conflict with statutory requirements. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); In re Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990) (delineation of issues for adjudication just before termination hearing satisfied "special hearing" requirement).

4. Failing to hold a special hearing before adjudication was not reversible error, because respondent failed to show prejudice. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

D. If a county DSS, not otherwise a party petitioner or movant, is served with a petition or motion to terminate parental rights, the DSS must file a written answer or response and is deemed a party to the proceeding.

XII. Adjudicatory Hearing on Termination

(G.S. 7B-1109)

A. A hearing on a termination petition or motion must be held within 90 days after it is filed unless the court orders that it be held at a later time.

1. For good cause, the court may continue the hearing up to 90 days from the date of the initial petition to receive additional evidence or allow parties to conduct expeditious discovery. The court may grant a continuance that extends beyond 90 days after the initial petition only in extraordinary circumstances when necessary for proper administration of justice and must issue a written order stating grounds for the continuance. Granting or denying motion for a continuance is in trial court's discretion. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675 (2004).

2. The statutory timelines are not jurisdictional. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006); In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006); In re D.J.G., ___ N.C. App. ___, 643 S.E.2d 672 (2007).

3. Delay in holding the hearing is not reversible error in the absence of a showing of prejudice.

   a. Cases in which the court did find prejudice include In re D.M.M., 179 N.C. App. 383, 633 S.E.2d 715 (2006) (hearing held more than year after petition was filed and order entered 7 months after the hearing).

   b. Cases in which the court did not find prejudice include In re J.Z.M., 362 N.C. 167, 655 S.E.2d 832 (2008), *reversing per curiam,* ___ N.C. App. ___, 646 S.E.2d 631 (2007) (hearing held more than year after petition filed); In re S.W., 175 N.C. App.

719, 625 S.E.2d. 594, *disc. review denied,* ___ N.C. ___, 635 S.E.2d 59 (2006); In re Dj.L., ___ N.C. App. ___, 646 S.E.2d 134 (2007) (hearing held 6 months after filing); In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26 (2005) (some of the delay was due to respondent's requests for continuances); In re C.T., 182 N.C. App. 472, 643 S.E.2d 23 (2007) (delay of 13 months between petition and hearing on petition); In re D.J.G., ___ N.C. App. ___, 643 S.E.2d 672 (2007) hearing more than 90 days after motion was filed); In re T.M., ___ N.C. App. ___, 643 S.E.2d 471, *aff'd per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007) (hearing more than 90 days after petition was filed); In re C.M., ___ N.C. App. ___, 644 S.E.2d 630 (2007) (delay of more than year in holding termination hearing was not prejudicial, but was to respondent's benefit because it gave her "every possible opportunity to be reunited with her children"); In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006); In re R.R., ___ N.C. App. ___, 638 S.E.2d 502 (2006) (part of delay resulted from difficulty locating and serving respondent, respondent was not in communication with petitioner during delay, and evidence supported multiple grounds for terminating parental rights).

4. The standard for measuring prejudice resulting from errors such as violation of statutory timelines is whether the error had a probable impact on the outcome of the case. In re D.B. ___ N.C. App. ___, 652 S.E.2d 56 (2007).

B. The adjudicatory hearing is before a judge, without a jury. There is no constitutional right to a jury trial in termination proceedings. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

1. Knowledge of evidentiary facts from earlier proceeding does not require a judge's disqualification. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002); In re Larue, 113 N.C. App. 807, 440 S.E.2d 301 (1994) (fact that judge conducted review, found that children should remain with DSS, and recommended that termination be pursued was not sufficient to show bias); In re M.A.I.B.K., ___ N.C. App. ___, 645 S.E.2d 881 (2007) (judge who presided over action to terminate one parent's rights was not precluded from presiding over later hearing to terminate other parent's rights).

2. Although different evidentiary standards apply at the adjudicatory and dispositional stages, it is not necessary for the two stages to be conducted at two separate hearings. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994); In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied,* 318 N.C. 283, 347 S.E.2d 470 (1986).

3. The hearing is reported as provided for civil trials.

   a. Electronic recording equipment may be used when court reporters are not available. G.S. 7A-198.

   b. When the parties stipulate to the use of recording machines in lieu of a court reporter, they are estopped from complaining on appeal about the quality of the recording equipment. If the equipment fails to function, the record must be reconstructed. To show prejudicial error, a party must show (1) that the party was prejudiced by loss of specific testimony and (2) what the content of any gaps or lost testimony was. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985); In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981). *See also* In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (2003).

c. The fact that a recording is incomplete or inadequate, by itself, is not ground for reversal. There is a presumption of regularity in a trial, and the appellant must make a specific showing of probable error. In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (2003); In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83 (2003) (respondent took no steps to reconstruct the record and alleged only general prejudice).

4. The court must inquire whether parents are present and, if so, whether they are represented by counsel or desire counsel.

   a. If a parent desires counsel and is indigent and unable to obtain counsel, counsel for the parent must be appointed according to the rules of the Office of Indigent Defense Services, and the court must grant an extension of time to permit counsel to prepare.

      (1) Even if the parent has not filed an answer [or response] or taken other action, if the parent is present at the hearing the court must inquire about counsel and counsel must be appointed for an indigent parent unless the court finds that the parent knowingly and voluntarily waives the right. In re Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997); In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22 (2004), *review denied*, *sub nom* In re D.M.H., 359 N.C. 632, 616 S.E.2d 230 (2005) (parent cannot waive the right to counsel by inaction), *overruled on other grounds by* In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005).

      (2) Caution should be exercised in appointing one attorney to represent both parents, given the potential for conflicting interests and evidence. In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985).

   b. Failure to appoint separate counsel for respondent parents was not error, where they did not object when appointment was made, record showed that evidence was sufficient to terminate both parents' rights, and there was no indication that the court treated respondents as a couple rather than as individuals. Byrd.

   c. If the parent declines counsel, the court must examine the parent and find that the waiver is knowing and voluntary. The examination must be reported as provided in G.S. 7A-198.

5. The court, upon finding reasonable cause, may order the child examined by a psychiatrist, clinical psychologist, physician, agency, or other expert, to ascertain the child's psychological or physical conditions or needs. The court may order a parent similarly examined if the parent's ability to care for the child is in issue.

C. A parent does not have an absolute right to be present at the termination hearing.

1. Respondent's due process rights were not violated, and the trial court did not abuse its discretion when it ordered respondent removed from the courtroom and did not provide him a means to testify, after respondent repeatedly cursed, disrupted the proceedings, and ignored the court's warnings. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002) (applying the *Matthews v. Eldridge* balancing test, the court examined (a) private interest affected by the proceeding; (b) risk of error caused by the procedure; and (c) countervailing governmental interest supporting the use of the challenged procedure).

2. The trial court's denial of respondent's motion to be brought to the hearing from a state correction facility did not violate respondent's state or federal constitutional rights. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992).

3. The parent's due process rights were not violated by the court's refusal to order his transportation from an out-of-state prison for the hearing or to pay for his attorney to go there to take his deposition. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992). (The court stated, though, that "when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent.")

4. Denial of motion for funds to take incarcerated parent's deposition did not violate the parent's due process rights. In re K.D.L., 176 N.C. App. 261, 627 S.E.2d 221 (2006) (applying the *Matthews v. Eldridge* balancing test).

5. Mother's failure to appear for the hearing was not excusable neglect when she had received proper notice and did not seek appointment of counsel or a continuance. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882 *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). *See also* In re. Carpenter, 127 N.C. App. 353, 489 S.E.2d 437 (1997), *aff'd*, 347 N.C. 569, 494 S.E.2d 763 (1998).

6. Whether to grant a continuance is in the trial court's discretion. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, *reversed on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002) (respondent's absence was voluntary or the result of her own negligence in failing to obtain adequate transportation); In re C.D.A.W., 175 N.C. App. 680, 625 S.E.2d 139 (2006), *aff'd per curiam*, 361 N.C. 232, 641 S.E.2d 301 (2007).

7. The trial court did not err in allowing the child to testify in closed chambers, over the respondent's objection, when all attorneys were allowed to be present and the court made findings about the child's best interest. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

8. Respondent's due process rights were not violated when court excluded her from courtroom during child's testimony, where she was in a room with her guardian ad litem, could hear the proceedings, and had a video monitor and telephone contact with her attorney. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005).

D. The rules of evidence for civil cases apply.

1. The Sixth Amendment does not apply in civil cases and does not bar evidence of out-of-court testimonial statements in termination proceedings. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300 (2005).

   [Note: The court of appeals referred to the holding in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) that out-of-court testimonial statements are barred by Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. The court in D.R. did not address whether testimony that would be barred under *Crawford* on Sixth Amendment grounds in a criminal case would be barred in a termination proceeding on due process grounds.]

2. The trial court may admit into evidence or take judicial notice of earlier proceedings in the same cause.

    a. Trial court did not err in admitting prior orders into evidence, even though they were based on lower standard of proof. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005). *See also*, In re S.W., 175 N.C. App. 719, 625 S.E.2d 594, *disc. review denied,* ___ N.C. ___, 635 S.E.2d 59(2006); In re M.N.C., 176 N.C. App. 114, 625 S.E.2d 627 (2006); In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006); In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (respondent failed to show he was prejudiced by admission of DSS file into evidence.)

    b. Trial court did not err in taking judicial notice of prior orders and reports in the case, as trial court is presumed to have disregarded any incompetent evidence. Respondent did not demonstrate that trial court relied in its findings on any incompetent evidence or that prejudice had resulted from court's taking judicial notice of file. In re W.L.M., 181 N.C. App. 518, 640 S.E.2d 439 (2007).

3. Mental health records and information.

    a. Court did not err in considering respondent's mental health records, which court had ordered disclosed at an earlier stage of the proceeding and which were in the underlying file. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005).

    b. Trial court did not err by admitting respondent's mental health records when respondent made only general objection, did not file a motion *in limine*, and did not ask for in camera review of records. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387 (2006).

    c. Social worker's testimony about what respondent's drug counselor had said was admissible because it was offered to show respondent's awareness of terms of case plan; respondent did not establish that statements were offered for their truth or that, even if testimony was impermissible hearsay, respondent was prejudiced by its admission. In re S.N., 180 N.C. App. 169, 636 S.E.2d 316 (2006).

    d. Even if children's mental health records that were admitted into evidence contained inadmissible hearsay, respondent failed to show that court had relied on inadmissible evidence in making its findings. In re L.C., 181 N.C. App. 278, 638 S.E.2d 638, *review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007).

4. Opinions and expert testimony.

    a. It was not error for court to permit a social worker to give an opinion as to parents' capacity to provide a stable home environment, even though the witness was not tendered as an expert. In re Pierce, 67 N.C. App. 257, 312 S.E.2d 900 (1984).

    b. It was not error for court to allow social worker to give an expert opinion about whether parents' actions were indicative of good parenting skills, even though there was no explicit finding that she was an expert. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

c. Trial court did not err in refusing to allow an expert witness to testify about the mother's mental health and parenting capacity, where the witness was an expert in clinical social work specifically dealing with adolescents, and there was no evidence that she was an expert in mental health issues. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

d. It was not error for court to admit expert testimony of witnesses tendered as experts in juvenile protective services, infant development, and permanency planning. In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985).

5. Guardian ad litem report. Admission into evidence of the report of the guardian ad litem was error, but the error was harmless because the report did not contain information that was not properly before the court from another witness. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

6. Child's testimony and statements.

   a. It was not error to allow a ten-year-old child to testify. Any inability she had to remember relevant events went to the weight, not admissibility or competence, of her testimony. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

   b. Trial court did not err in allowing child to testify in closed chambers, over respondent's objection, when all attorneys were allowed to be present and the court made findings about child's best interest. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

   c. Trial court did not err in requiring respondent to leave the courtroom and participate through video and audio hook-up during child's testimony. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005).

   d. Nine-year-old's statements to detective in response to questions 16 hours after child's observation were properly admitted as excited utterances. In re J.S.B., ___ N.C. App. ___, 644 S.E.2d 580, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 645 (2007).

7. In reversing a case because the trial court improperly granted partial summary judgment based on the parent's criminal conviction, the court of appeals stated, in dicta, "Properly admitted evidence of the father's conviction of first-degree sexual offense against the minor child constitutes sufficient, clear, cogent, and convincing evidence of the respondent's abuse of the child. The child's testimony will not be necessary at the adjudicatory stage." Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

8. The respondent may be called to testify as an adverse party; a subpoena is not necessary. The parent may claim his or her Fifth Amendment privilege and refuse to answer questions that might incriminate the parent. In re Davis, 116 N.C. App. 409, 448 S.E.2d 303, *review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994).

9. The husband-wife or physician-patient privilege is not grounds for excluding evidence regarding grounds for termination. G.S. 7B-1109(f).

10. The court may admit and consider evidence relating to events between the time the petition [or motion] was filed and the hearing. In re Bishop, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

11. DSS records were admissible under the business records exception to the hearsay rule; testimony of social workers who had familiarized themselves with the records was competent even though they had no contact with the case before the petition was filed. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied,* 306 N.C. 385, 294 S.E.2d 212 (1982).

12. Autopsy report and medical examiner's report were properly admitted as public records. In re J.S.B., ___ N.C. App. ___, 644 S.E.2d 580, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 645 (2007).

13. Social worker may testify to statements made by a respondent under the hearsay exception for admissions of a party opponent. In re S.W., 175 N.C. App. 719, 625 S.E.2d 594, *disc. review denied,* ___ N.C. ___, 635 S.E.2d 59 (2006).

14. After an earlier petition had been dismissed for delay in holding the hearing, res judicata did not require dismissal of a subsequent petition when evidence related only to events that occurred after the filing of the first petition. In re I.J., ___ N.C. App. ___, 650 S.E.2d 671 (2007).

E. Whether to grant an indigent respondent's motion for funds to pay for an expert or other litigation expenses is in the trial court's discretion. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005); In re D.R., 172 N.C. App. 300, 616 S.E.2d 300 (2005).

F. The court must find facts and adjudicate the existence or nonexistence of grounds set forth in G.S. 7B-1111 (*see* XIII, below) for terminating parental rights.

1. Findings must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f). In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied,* 318 N.C. 283, 347 S.E.2d 470 (1986); In re Ennix, 76 N.C. App. 512, 333 S.E.2d 540 (1985). *See* In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997) (reversing termination on neglect and abandonment grounds, on basis that there was not clear, cogent, and convincing evidence to support trial court's findings); In re C.W., 182 N.C. App. 214, 641 S.E.2d 725 (2007) (reversing termination where none of the grounds was supported by clear and convincing evidence and a number of findings were supported by no evidence; DSS had never developed a case plan with respondent, respondent took a number steps while incarcerated to maintain a relationship with children, there was not a prior adjudication or finding of neglect, and DSS had not alleged abandonment as a ground for termination).

2. The order must recite the standard of proof. In re Church, 136 N.C. App. 654, 525 S.E.2d 478 (2000); In re Lambert-Stowers, 146 N.C. App. 438, 552 S.E.2d 278 (2001); In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002); In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002). But there is no requirement as to where or how the standard is recited in the order. In re J.T.W., ___ N.C. App. ___, 632 S.E.2d 237 (2006), *reversed on other grounds*, 361 N.C. 341, 643 S.E.2d 579 (2007).

3. Termination order was deficient where it did not state the standard of proof and did not indicate which ground(s) the court was adjudicating. In re D.R.B., ___ N.C. App. ___, 643 S.E.2d 77 (2007).

4. Findings of fact must do more than merely repeat the allegations in the petition. In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002).

5. It is not proper for the court to exercise discretion in making findings at adjudication, where the issue is whether there is proof, by clear and convincing evidence, that a ground for termination exists. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

6. Where the findings did little more than restate the statutory grounds and discuss DSS's efforts to reunify, the order was not sufficient to establish a ground for termination. In re Locklear, 151 N.C. App. 573, 566 S.E.2d 165 (2002).

7. The order must include findings of fact and conclusions of law. Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another; conclusions of law are findings by a court as determined through the application of rules of law. In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219 (2002).

G. The order must be entered within 30 days following completion of the hearing. *See* Section XV.C., below.

XIII. Grounds for Termination

(G.S. 7B-1111)

A. The parent has abused or neglected the child within the meaning of G.S. 7B-101. [G.S. 7B-1111(a)(1)]

1. A prior adjudication of abuse or neglect is not a precondition to a termination proceeding based on those grounds. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002).

2. Evidence of a prior adjudication of neglect is admissible; however, the court must consider evidence of changed conditions and the probability of repetition of neglect. Determinative factors are the child's best interests and the parent's fitness to care for the child at the time of the termination proceeding. A prior adjudication of neglect, standing alone, is unlikely to be sufficient to support termination when the parents have been deprived of custody for a significant period before the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984). *See also* In re Beasley, 147 N.C. App. 399, 555 S.E.2d 643 (2001); In re Brim, 139 N.C. App. 733, 535 S.E.2d 367 (2000); In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499 (2000); Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995); In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986); In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied,* 318 N.C. 283, 347 S.E.2d 470 (1986); In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985); In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985); In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985); In re McDonald, 72 N.C. App. 234, 324 S.E.2d 847 (1984), *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985).

a. Even if there is no evidence of neglect at the time of the termination proceeding, the court may terminate parental rights if there is a prior adjudication of neglect and the court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. It was not necessary for petitioner to present evidence of neglect subsequent to the prior adjudication. In re Pope, 144 N.C. App. 32, 547 S.E.2d 153, *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001).

b. Evidence was insufficient to establish that an incarcerated parent abandoned or neglected the child, where the father wrote to and called his sons while in prison and made progress on a case plan after his release; there was no evidence of a likelihood of repetition of prior neglect, because the earlier neglect was due solely to the mother's failure to provide proper care and supervision. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403 (2003). *Cf.* In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003) (affirming termination order on basis that there was clear, cogent, and convincing evidence that incarcerated parent had neglected his child); In re D.M.W., 360 N.C. 583, 635 S.E.2d 50 (2006), *reversing per curiam, for reasons stated in dissenting opinion*, 173 N.C. App. 679, 619 S.E.2d 910 (2005) (evidence was sufficient to establish neglect by frequently incarcerated parent).

c. Court of appeals affirmed termination based on "evidence of past neglect in conjunction with the special needs of the children and the evidence that respondent-mother [had] made no advancements in confronting and eliminating her problem with alcohol." In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).

d. It was not error for the court to consider evidence of a neglect adjudication in a prior termination proceeding in which the court found that, even though the neglect ground existed, termination was not in the child's best interest; but the court also must consider evidence of changed conditions and the probability of repeated neglect. In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986).

e. Admissibility of a prior order is not conditioned on whether the parent was represented by counsel at the earlier hearing. Byrd.

f. Neglect was properly established where the order was based in part on a prior adjudication to which the parties had stipulated, but the trial judge also had reviewed the entire file, including at least twelve detailed orders regarding the parents' lack of progress between the initial juvenile petition and the termination order. In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984). *See also* In re Davis, 116 N.C. App. 409, 448 S.E.2d 303, *review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994) (failure to correct conditions that led to the earlier finding of neglect constituted a failure to provide "proper care, supervision, or discipline" and a failure to correct an environment that was "injurious" to the child's welfare).

g. It is not essential that there be evidence of culpable neglect following the initial adjudication of neglect. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985); In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

h. It was not error for the court to consider evidence of a prior neglect adjudication, even though a later order had found that the child was no longer neglected. In re Castillo, 73 N.C. App. 539, 327 S.E.2d 38 (1985).

i. The reasoning of Ballard also applies to prior abuse. In re Reber, 75 N.C. App. 467, 331 S.E.2d 256 (1985), *aff'd per curiam*, 315 N.C. 382, 337 S.E.2d 851 (1986) (court's findings about prior abuse, probability of repetition of abuse, and child's best interests were not based on clear, cogent and convincing evidence sufficient to support termination on the ground of abuse); In re Beck, 109 N.C. App. 539, 428 S.E.2d 232 (1993) (court did not err in admitting prior order finding child to be abused, since court did not rely solely on that order). *See also* In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341(2001).

j. A prior adjudication of abuse was *res judicata* on the question of whether the father had abused the children; the parties were estopped from relitigating that issue of abuse. The court did not rely solely on the prior adjudication in terminating parental rights. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

3. When child has not been in respondent's custody for long period of time, the neglect ground cannot be established without evidence of prior neglect and a likely repetition of neglect. In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450 (2006) (ground not established where DSS took custody soon after child's birth and child was adjudicated only dependent).

4. Evidence – including evidence of respondent's substance abuse, inadequate supervision, failure to follow treatment recommendations with respect to substance abuse, failure to meet child's needs during trial home placement, failure to comply with numerous DSS recommendations – was sufficient to establish that respondent had neglected the child. In re C.T., 182 N.C. App. 472, 643 S.E.2d 23 (2007). *See also* In re J.T.W., 361 N.C. 341, 643 S.E.2d 579 (2007), *reversing per curiam*, 178 N.C. App. 678, 632 S.E.2d 237 (2006) (findings were sufficient to support termination ground of neglect).

5. There is a substantive difference between the quantum of proof of neglect required for termination and that required for mere removal of the child from a parent's custody. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

   a. Parental rights may not be terminated for threatened future harm. Evans; In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984) (parent's abuse of alcohol, without proof of adverse impact on the child, was insufficient for adjudication of neglect as a ground for termination).

   b. A showing of risk of future neglect, absent proof of actual harm to the child, is insufficient to establish neglect. If the petitioner seeks termination based on the parent's failure to correct conditions that led to the child's removal from the home, it must do so within the statutory provisions that require a two-year [now, twelve-month] trial period, when there is no showing of harm to the child. Phifer.

   c. Trial court's failure to make findings about the "impairment" prong of the neglect ground was not reversible error when evidence in the record supported such a finding. In re Ore, 160 N.C. App. 586, 586 S.E.2d 486 (2003).

6. An earlier adjudication that the child was dependent was not inconsistent with a finding that the parent neglected the child for purposes of termination. It was not error for the court to consider the parent's incarceration and criminal conduct along with other factors. In re Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

7. For a finding of neglect, it is not necessary to find a failure to provide the child with physical necessities. In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985); In re Apa, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

8. Determinative factors are the child's circumstances and conditions, not the parent's fault or culpability; the fact that the parent loves or is concerned about the child will not necessarily prevent the court from making a determination that the child is neglected. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

9. Parent's nonfeasance, as well as malfeasance, can constitute neglect. In re Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984) (mother's failure to intervene or protect child from another person's physical abuse).

10. This ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed, sub nom*Moore v. Guilford County Department of Social Services, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

11. The statute does not apply only to the poor and thus violate equal protection. In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).

12. Lack of involvement with children for more than two years established a pattern of abandonment and neglect. The fact that the parent was incarcerated much of that time did not justify the parent's failure to communicate with or inquire about the children. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983). *Also see* In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 359 N.C. 281, 604 S.E.2d 314 (2004) (affirming order terminating rights of incarcerated father on basis of neglect); In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83 (2003) (although incarcerated respondent's lack of contact with child was beyond his control, other evidence and findings supported conclusion that the neglect ground existed).

13. It was error to admit evidence of father's failure to participate in the underlying neglect proceeding when there was no evidence that he was served in that action. In re Mills, 152 N.C. App. 1, 567 S.E.2d 166 (2002), *cert denied*, 356 N.C. 672, 577 S.E.2d 627 (2003).

14. Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition, as does the separate ground of abandonment. The court may examine the parent's conduct over an extended period of time. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003). *See also* In re Apa, 59 N.C. App. 322, 296 S.E.2d 811 (1982) (father's willful failure to support or visit the child for eleven-year period constituted neglect in the form of abandonment).

15. Trial court did not err in admitting evidence of mother's surrender of her rights to another child, since how another child in the same home was treated and that child's status clearly were relevant to whether children in the present action were neglected. In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219 (2002). *See also*, In re Allred, 122 N.C. App. 561, 471 S.E.2d 84 (1996).

16. Evidence of child's four years in DSS custody and mother's conduct and conditions during that time, even though the mother made some progress, was sufficient to establish that the neglect ground existed at the time of the hearing. In re Allred, 122 N.C. App. 561, 471 S.E.2d 84 (1996).

17. For a case reversing termination on the neglect ground on the basis that there was not clear, cogent, and convincing evidence to support findings that neglect or probability of its repetition existed at the time of the proceeding, *see* In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

18. Evidence was sufficient to establish abuse ground (creation of substantial risk of serious non-accidental physical injury and probability of repeated abuse if child returned home) where court found that the mother was diagnosed with Munchausen Syndrome by Proxy, had violated various court orders, and had not benefited from treatment, and the child's recurring need for medical attention ended when child was removed from the mother's custody. In re Greene, 152 N.C. App. 410, 568 S.E.2d 634 (2002).

19. Trial court's findings were supported by the evidence and supported the conclusion that the abuse ground to terminate parental rights existed. In re L.C., 181 N.C. App. 278, 638 S.E.2d 638, *review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007).

20. "The determination of neglect, requiring application of legal principles, is a conclusion of law." In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499 (2000), citing In re Everette, 133 N.C. App. 84, 514 S.E.2d 523 (1999).

21. Findings supporting the conclusion that incarcerated parent neglected the child were supported by clear, cogent, and convincing evidence. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

B. The parent has willfully left the child in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; provided, parental rights may not be terminated for the sole reason that the parents are unable to care for the child on account of their poverty. [G.S. 7B-1111(a)(2)]

1. It is not necessary that the eighteen [now, twelve] months in foster care be continuous. In re Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

2. The one year in foster care or other placement refers to period between the time the child was removed from the home pursuant to a court order and the filing of the petition or motion. In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729 (2006). *See also* In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (fact that respondent consented to petitioners' being named guardians did not preclude use of this ground based on respondent's failure to make reasonable progress before the consent order).

3. Willfulness, for purposes of this ground, is something less than willful abandonment and does not require a showing of parental fault. Evidence was sufficient even though the parent had made some effort and some progress. In re Bishop, 92 N.C. App. 662, 375 S.E.2d 676 (1989). *See also* In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992); In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995); In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (2003). *Cf.* In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498 (2002) (affirming termination of mother's rights, but not the father's, on this ground).

4. For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome factors that resulted in the child's placement. *See* In re Baker, 158 N.C. App. 491, 581 S.E.2d 144 (2003) (evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services); In re C.C., 173 N.C. App. 375, 618 S.E.2d 813 (2005) (evidence and findings were not sufficient to establish neglect or that respondent "willfully" left the children in care).

5. In the case of a minor parent, the court must make specific findings showing that the parent's age-related limitations as to willfulness have been adequately considered. In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002); In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450 (2006).

6. A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987). *See also*, In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403 (2003) (evidence insufficient to establish that incarcerated parent willfully left the child in foster care, where the father wrote to and called his sons while in prison and made progress on a case plan after his release); Whittington v. Hendren, 156 N.C. App. 364, 576 S.E.2d 372 (2003) (termination affirmed where court found that "[e]ven though the respondent was incarcerated, he could have made more of an effort to maintain contact with his child," and respondent had foregone the opportunity to attend the termination hearing).

7. The fact that a parent makes some efforts does not preclude a finding of willfulness. In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984). *See also* In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996); In re B.S.D.S., 163 N.C. App. 540, 594 S.E.2d 89 (2004) (although evidence showed some efforts and some progress by respondent, evidence was sufficient to support trial court's finding that respondent's prolonged inability to improve her situation was willful).

8. For a discussion of the elements of "willfulness" and "substantial progress" [now, "reasonable progress under the circumstances"], *see* In re Wilkerson, 57 N.C. App. 63, 291 S.E.2d 182 (1982). *See also* In re Nesbitt, 147 N.C. App. 349, 555 S.E.2d 659 (2001) (reversing termination on basis that even if the mother had failed to make reasonable progress, her failure was not willful).

9. This ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed, sub nom*Moore v. Guilford County Department of Social Services, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983).

10. Other cases involving this ground:

a. In re J.T.W., 361 N.C. 341, 643 S.E.2d 579 (2007), *reversing per curiam*, 178 N.C. App. 678, 632 S.E.2d 237 (2006) (findings sufficient to support ground).
b. In re S.N., 180 N.C. App. 169, 636 S.E.2d 316 (2006) (evidence sufficient to support ground against father, when child was removed due to mother's substance abuse and father continued to live with child's mother even though she continued to abuse drugs).
c. In re Pierce, 356 N.C. 68, 565 S.E.2d 81 (2002) (affirming court of appeals' conclusion that record did not contain clear, cogent, and convincing evidence that parent failed to make reasonable progress under the circumstances during 12-month period immediately before filing of petition, based on statute as it read before 1/1/02).
d. In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341(2001).
e. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379 (2001).
f. In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002).
g. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387 (2006) (evidence and findings were sufficient to establish the ground with regard to mother but not father).

C. The child has been placed in the custody of DSS, a licensed child-placing agency, a child-caring institution, or foster home, and the parent has willfully failed to pay a reasonable portion of the cost of the child's care for a continuous period of six months next preceding the filing of the petition or motion, although physically and financially able to do so. [G.S. 7B-1111(a)(3)]

1. A finding that the parent is able to pay support is essential to termination on this ground. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).

2. A finding as to the cost of foster care can establish the child's reasonable needs. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

3. The trial judge must make findings of fact concerning both the parent's ability to pay and the amount of the child's reasonable needs. In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984); In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002); In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, *disc.review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). In the case of a minor parent, the findings must evidence appropriate consideration of respondent's age. In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002).

4. Determination of a reasonable portion of the cost of the child's care depends on the parent's ability to pay. In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986); In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed, sub nom*Moore v. Guilford County Department of Social Services, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983); In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

5. Neither the absence of notice of the support obligation nor the father's lack of awareness that support was required of him was a defense to termination on this ground. In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).

6. Parent cannot assert lack of ability or means to contribute to support when the opportunity to do so is lost due to the parent's own misconduct. In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984); Bradley.

7. The ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed, sub nom*Moore v. Guilford County Dep't of Social Services, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Bradley.

8. Termination was upheld where neither parent paid support during the six-month period or until over a year after the termination petition was filed; neither offered any specific reason for failing to pay support; both signed a service agreement and later a voluntary support agreement committing to pay support; both were employed during at least half of the six-month period; and neither offered evidence of sickness or disability that prevented their being employed. In re Huff, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed*, *review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

9. Trial court's findings and evidence in the record were not sufficient to support a conclusion that this ground existed, where there was not specific evidence or findings as to the mother's employment, earnings, or other financial means during the relevant six-month period. In re Faircloth, 161 N.C. App. 523, 588 S.E.2d 561 (2003).

D. One parent has custody of the child pursuant to court order or agreement of the parents, and the other parent (respondent), for one year or more immediately preceding the filing of the petition or motion, has willfully failed without justification to pay for the child's care, support, and education as required by court order or custody agreement. [G.S. 7B-1111(a)(4)]

1. Trial court's findings and conclusions that this ground existed and that termination was in the child's best interest were supported by the evidence and, even though some evidence was contra, are binding on the appellate court. In re McMahon, 98 N.C. App. 92, 389 S.E.2d 632 (1990).

2. It is not necessary for petitioner to prove or for the court to find that respondent had the ability to pay support, since proof of a valid court order or support agreement is required. In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990) (father's evidence of emotional difficulties was not sufficient to rebut evidence that his failure to pay was willful); In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005).

3. Parent may present evidence sufficient to prove that he or she was unable to pay child support, to rebut a finding of willful failure to pay. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994) (evidence of financial status and alcoholism).

E. The father of a child born out of wedlock has not, before the filing of the termination petition or motion,
- established paternity judicially or by affidavit, or
- legitimated the child pursuant to G.S. 49-10 or filed a petition to do so, or
- legitimated the child by marriage to the mother, or
- provided substantial financial support or consistent care with respect to the child and mother. [G.S. 7B-1111(a)(5)]

1. The court must inquire of the Department of Health and Human Services to determine whether an affidavit has been filed and must incorporate the certified reply in the case record. G.S. 7B-1111(a)(5).

2. Even if paternity test results show a high likelihood that respondent is not the child's father, the court may consider the results only if they are properly introduced into evidence. The results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. In re L.D.B., 168 N.C. App. 206, 617 S.E.2d 288 (2005).

3. Petitioner must prove that respondent failed to take any of the four listed actions. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987) (allegation of respondent's "putative" fatherhood in a DSS affidavit for publication was not clear, cogent, and convincing evidence of a ground for termination); In re I.S., 170 N.C. App. 78, 611 S.E.2d 467 (2005); In re M.A.I.B.K., ___ N.C. App. ___, 645 S.E.2d 881 (2007) (record clearly established that respondent failed to take any of the required steps and supported court's determination that termination was in child's best interest).

4. The statute does not require a finding that respondent had the ability to support the child, but in this case the trial court made such a finding in any event. In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997) (one judge dissenting, on basis that record did not support conclusion that termination was in the child's best interest).

5. Fact that the putative father did not know of the child's existence is not a defense to termination. In re T.L.B., 167 N.C. App. 298, 605 S.E.2d 249 (2004).

6. For case in which court of appeals reversed trial court's determination that the ground had not been established, *see* A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673 (2006), in which putative father had taken extensive steps trying to determine whether the mother had given birth, the mother lied about the child's parentage, and the mother led respondent to believe that she had miscarried. (Dissenting judge would have affirmed on basis that respondent's conduct amounted to "providing consistent care.")

7. For adoption cases dealing with a similar ground for determining that a parent's consent to adoption is not required, *see* In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001); In re Adoption of Baby Girl Anderson, 360 N.C. 271, 624 S.E.2d 626 (2006). For a case decided under the same wording in former adoption statute, holding that putative father's consent to adoption was required because he had filed a petition for legitimation, *see* In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

F. The parent is incapable of providing for the proper care and supervision of the child, such that the child is a "dependent juvenile" as defined in G.S. 7B-101; there is a reasonable probability that the parent's incapability will continue for the foreseeable future; and the parent does not have an appropriate alternative child care arrangement. The parent's incapability may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. [G.S. 7B-1111(a)(6)]

1. This ground does not violate the equal protection clause or deny due process. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

2. Taken as whole, a physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's findings and termination order. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, *disc. review denied*, 325 N.C. 708, 388 S.E.2d 459 (1989). *See also*, In re Small, 138 N.C. App. 474, 530 S.E.2d 104 (2000) (trial court's findings not supported by clear and convincing evidence).

3. The court will not read into this ground a requirement that DSS make "diligent efforts" to provide services to parents before proceeding to seek termination; any such requirement must come from the legislature. In re Guynn, 113 N.C. App. 114, 437 S.E.2d 532 (1993).

4. Evidence did not support the trial court's finding that parents were mentally retarded, where evidence showed that they had IQs of 71 and 72, placing them in the borderline range of mental retardation. Since the statute does not define "mental retardation," the court looked at other definitions, including G.S. 122C-3(22), and concluded that the term does not apply to someone with an IQ of 70 or more if the person does not exhibit significant defects in adaptive behavior. In re Larue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

5. In the case of a minor parent, the court must adequately address "capacity" in light of the parent's youth.In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002).

6. This ground was not established by clear and convincing evidence where evidence was that the father was incarcerated and his release date was 17 months away; evidence did not show that he was incapable of arranging for the child's care; and father testified that he had told DSS about several close relatives whom DSS had not contacted. In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

G. The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion. [G.S. 7B-1111(a)(7)]

1. This ground was added in 1985 when provisions for the clerk of superior court to make determinations of abandonment in adoption proceedings were deleted from G.S. Chapter 48. The wording is comparable to that in the former adoption statute.

2. The state supreme court, in an adoption case, defined abandonment essentially as follows: A parent's willful or intentional conduct evincing a settled purpose to forego all parental duties and relinquish all parental claims. Willful intent, an integral part of abandonment, is a question of fact. Abandonment also has been defined as willful neglect and refusal to perform natural and legal parental obligations of care and support. If a parent withholds the parent's presence, love, care, and opportunity to display filial affection, and willfully neglects to lend support and maintenance, the parent relinquishes all parental claims and abandons the child. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

3. Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. In re McLemore, 139 N.C. App. 426, 533 S.E.2d 508 (2000).

4. Willful abandonment under this subsection connotes more than the mere neglect implied in [former] G.S. 7A-289.32(3). In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992). *See also*, In re. T.C.B., 166 N.C. App. 482, 602 S.E.2d 17 (2004) (trial court's order included findings that were contrary to conclusion of willfulness).

5. Failure to pay support, in and of itself, does not constitute abandonment. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

6. Whether a parent has the willful intent to abandon the child is an issue of fact. The fact that parent paid some support during relevant six-month period does not preclude a finding of willful abandonment. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

7. In an adoption case, the superior court erred in instructing the jury to consider the six-month period preceding the filing of the petition, since the summons was endorsed 102 days after it was issued. The action commenced as to the respondent on the day of endorsement; the six-month period preceding that date should have been used. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986). [Note: Unlike the termination ground, the applicable adoption statute referred to six consecutive months preceding institution of an abandonment proceeding. The termination statute refers to six months preceding filing of the petition.]

8. In an adoption proceeding, the court erred in finding that the mother had willfully abandoned the child, where the court made no findings in support of its conclusion that her failure to communicate with the child was willful, and where the record revealed that she had introduced substantial evidence that her actions in not communicating with the child were not willful. In re Clark v. Jones, 67 N.C. App. 516, 313 S.E.2d 284, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 128 (1984).

9. The critical period for a finding of abandonment is at least six consecutive months immediately preceding the filing of a petition to terminate parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997) (reversing a termination order on the basis that the findings did not manifest "a willful determination to forego all parental duties and relinquish all parental claims to the child").

H. The parent has
- committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; or
- aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child in the home; or
- committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or
- committed murder or voluntary manslaughter of the child's other parent; provided, the court must consider whether the murder or voluntary manslaughter was committed in self-defense or in defense of others, or whether there was substantial evidence of other justification.

[G.S. 7B-1111(a)(8)]

1. The petitioner has the burden of proving the criminal offense by either (i) proving the elements of the offense or (ii) proving that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea.

2. The ground of a parent's commission of voluntary manslaughter of another child requires proof of the elements of the offense by clear and convincing evidence, not beyond a reasonable doubt. In re J.S.B., ___ N.C. App. ___, 644 S.E.2d 580, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 645 (2007).

3. To prove that respondent committed a felony assault resulting in serious bodily injury by proving that respondent was convicted of the offense, a petitioner would have to show a

conviction under G.S. 14-32.4(a) (assault inflicting serous bodily injury) or perhaps G.S. 14-318.4(a3) (felony child abuse inflicting serious *bodily* injury). A conviction under G.S. 14-318.4(a) (felony child abuse inflicting serious *physical* injury) would not be sufficient. Serious bodily injury (i) creates a substantial risk of death; or (ii) causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ; or (iii) results in prolonged hospitalization. G.S. 14-318.4(a3). *See* State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, *review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002); State v. Downs, 179 N.C. App. 860, 635 S.E.2d 518, *review denied*, 361 N.C. 173, 640 S.E.2d 57 (2006); In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471, *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

I. A court of competent jurisdiction has terminated the rights of the parent with respect to another child of the parent and the parent lacks the ability or willingness to establish a safe home. [G.S. 7B-1111(a)(9)]

- *See* In re V.L.B., 168 N.C. App. 679, 608 S.E.2d 787, *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005); In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61 (2006) (court found evidence was sufficient to establish respondents' inability or unwillingness to provide a safe home).

J. The child has been relinquished to a county department of social services or licensed child-placing agency or placed for adoption with a prospective adoptive parent, and

1. the parent's consent to or relinquishment for adoption is irrevocable (except for fraud, duress, or other circumstances set out in G.S. 48-3-609), and

2. termination of the parent's rights is required in order for the adoption to occur in another jurisdiction where an adoption proceeding has been or will be filed, and

3. the parent does not contest the termination of parental rights.

K. The parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 [abandonment of infant within seven days after child's birth] for at least 60 consecutive days immediately preceding the filing of the petition or motion. [G.S. 7B-1111(a)(7)]

L. The parent has been convicted for a rape that occurred on or after December 1, 2004, and the child was conceived as a result of the rape. [This is not exactly a ground for termination of parental rights, as the filing of a termination of parental rights proceeding is not necessary. The loss of the parent's rights with respect to a child conceived as a result of rape is a direct result of the parent's conviction for that rape pursuant to G.S. 27.2 or G.S. 27.3.]

XIV. Disposition

(G.S. 7B-1110)

A. At disposition, the court must determine whether termination of parental rights is in the child's best interest, considering:

1. the child's age;

2. likelihood of the child's being adopted;

3. whether termination will help achieve the permanent plan for the child;

4. the bond between the child and the parent;

5. quality of the relationship between the child and the proposed adoptive parent, guardian, or custodian; and

6. any other relevant factor.

B. At disposition, petitioner [or movant] does not have the burden of proving by clear, cogent, and convincing evidence that termination is in the child's best interest. That standard applies at adjudication. At disposition, the court makes a discretionary determination as to whether to terminate parental rights. In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990). *See also*, In re Mitchell, 356 N.C. 288, 570 S.E.2d 212 (2002), *reversing per curiam* for reasons stated in the dissenting opinion in In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237 (2002).

C. Although the court must apply different evidentiary standards at each stage, there is no requirement that adjudicatory and dispositional stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied,* 318 N.C. 283, 347 S.E.2d 470 (1986).

D. For cases filed before October 1, 2005, the statute provided that if the trial court found grounds for terminating parental rights, the court was required to issue an order terminating rights, unless the court further determined that the child's best interests required that rights not be terminated. The following cases were decided under that version of the statute.

1. The child's best interests, not the rights of the parents, are paramount. It is in the court's discretion to consider such factors as family integrity in deciding whether termination is in the child's best interest. In re Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984); In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984); In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied,* 306 N.C. 385, 294 S.E.2d 212 (1982).

2. Upon finding grounds for termination, trial court is not required to terminate parental rights, but is merely given discretion to do so. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Webb, 70 N.C. App. 345, 320 S.E.2d 306 (1984), *aff'd per curiam*, 313 N.C. 322, 327 S.E.2d 879 (1985); In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341(2001); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976); Forsyth County Dep't of Social Services v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974). *But see* In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906 (2001) (trial court did not abuse its discretion in terminating mother's rights where there was "nothing upon which the trial court could reasonably base a decision to find it would *not* be in [the child's] best interests to terminate parental rights").

3. It was error (not prejudicial in this case) for the court to allow the guardian ad litem to give a lay opinion that it was in the children's best interests for parental rights to be terminated. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

4. The trial court did not commit constitutional error in permitting questions and testimony about the parents' religious beliefs and practices, where (a) the inquiry was brief; (b) the inquiry related primarily to practices that might affect the child, not to beliefs; (c) the inquiry was directed to the father, not an "expert" or minister; and (d) the court made no findings about the parties' religious practices. Even assuming that the inquiry was improper, any error was not prejudicial because there was no indication that the testimony affected the trial court's decision. In re Huff, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed*, *review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

5. Trial court did not err in concluding that termination was in child's best interest, where the record included overwhelming evidence that the parents had not accepted responsibility for ways their actions affected the family and created a significant likelihood of future neglect. (The court pointed to the parents' failures to maintain a sanitary, hygienic home; visit or otherwise contact the child for extended period; follow medical advice regarding one child's health needs; or obtain counseling. Huff. *See also*, In re Brim, 139 N.C. App. 733, 535 S.E.2d 367 (2000) (despite some evidence of improvement in mother's mental condition, trial court did not abuse its discretion in finding and concluding that terminating mother's rights was in the child's best interest);In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (2003) (fact that child had been in DSS custody over six years, strength of evidence establishing ground for termination, plan for foster parents to adopt, and other evidence did not show abuse of discretion in court's decision to terminate parent's rights).

6. The court is not required to find that the child is adoptable before terminating parental rights. In re Norris, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *disc. review denied,* 310 N.C. 744, 315 S.E.2d 703 (1984). It is not error, though, for the court to consider the child's adjustment in a foster-adopt home as one factor in determining best interest. In re V.L.B., 168 N.C. App. 679, 608 S.E.2d 787, *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005).

7. When the child's and parents' interests conflict, the child's best interests control. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984).

8. The trial court is not required to make findings regarding its refusal to exercise its discretion not to terminate parental rights. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

9. For a case in which the court of appeals held that the trial court abused its discretion in finding termination to be in child's best interest, *see* Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994). The court of appeals referred to the supreme court's holding in Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) (focusing on parents' paramount right to custody and care of their children). Since the court of appeals also held that the trial court erred in finding that grounds for termination existed, however, it appears that the court of appeals need not have reached the best interest issue. (One judge, dissenting, did not think the trial court had abused its discretion.)

E. A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379 (2001); In re J.W.J., 165 N.C. App. 696, 599 S.E.2d 101 (2004).

F. Where there was only "remote chance" that troubled teenager would be adopted and there was possibility of benefit from continued relationship with his mother and other relatives, trial court abused its discretion in terminating parental rights. In re J.A.O., 166 N.C. App. 222, 601 S.E.2d 226 (2004).

G. If the Indian Child Welfare Act applies because of the child's status as a Native American, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian Custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. sec. 1012(f). In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

H. It was reversible error for a judge other than the one who presided at the hearing to sign the order terminating parental rights. (Presiding judge had stated that a ground for termination existed and that the child's best interest would be served by termination, and asked the guardian ad litem, an attorney, to prepare an order with appropriate findings.) G.S. 1A-1, Rule 52, requires the judge in a non-jury proceeding to find facts, make conclusions of law, and enter judgment accordingly. Rule 63 would allow another judge to sign the order, but only as a ministerial act, if the presiding judge were disabled and had already made findings of fact and conclusions of law. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

I. Where evidence established neglect, the petitioner's failure to comply with the periodic review requirements of [former] G.S. 7A-657 did not bar termination. In Re Swisher, 74 N.C. App. 239, 328 S.E.2d 33 (1985).

J. Americans with Disabilities Act did not preclude termination of respondent's rights. The court reviewed other courts' treatment of the issue and adopted the rule followed by other states, *i.e.*, termination of parental rights proceedings are not services, programs, or activities within the meaning of Title II of the ADA. At the same time, the court found that the requirements for and the trial court's findings about reasonable efforts constituted compliance with the ADA. In re C.M.S., ___ N.C. App. ___, 646 S.E.2d 592, *review denied*, 361 N.C. 693, 654 S.E.2d 248 (2007).

K. If the court determines that circumstances authorizing termination do not exist, or that the child's best interests require that rights not be terminated, the court must dismiss the petition or motion after setting forth findings and conclusions.

L. The court may tax the costs to any party.

XV. Entry and Effect of Order

(G.S. 7B-1109(e); 7B-1110(a); 7B-1112)

A. Nothing prevents the trial court from directing the prevailing party to draft an order on the court's behalf. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005).*See also* In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006) (trial court did not err in directing petitioner's attorney to draft order after enumerating in court specific findings of fact to be included in the order); In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

B. An order terminating parental rights should include conclusions of law relating to the ground(s) and, for certain grounds, must include findings of willfulness. T.M.H., ___ N.C. App. ___, 652 S.E.2d 1 (2007), *review denied*, 362 N.C. 87, ___ S.E.2d ___ (2007).

C. The order (whether adjudicatory or dispositional) must be entered within 30 days following completion of the hearing. "Entered" means reduced to writing, signed by the judge, and filed with the clerk.

1. If the order is not entered within 30 days after the hearing, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the 30-day period to obtain and explain the reason for the delay and obtain any needed clarification about the contents of the order. The court must enter the order within 10 days after this hearing.

2. Delay in entry of the order is not prejudicial *per se,* but delay plus a showing of resulting prejudice is reversible error, and the longer the delay the easier it is to show prejudice. In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368 (2005).

3. Statutory timelines are not jurisdictional. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006).

4. Cases in which the court found prejudice and reversed include In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, *disc. review denied*, 359 N.C. 632, 616 S.E.2d 538 (2005) (entry of order more than six months after the hearing was prejudicial "to all parties"); In re T.L.T., 170 N.C. App. 430, 612 S.E.2d 436 (2005) (entry of order seven months after hearing); In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368 (2005); In re T.W., 173 N.C. App. 153, 617 S.E.2d 702 (2005) (one-year delay in entering order was prejudicial based on respondent's argument that she continued to pay child support and was denied opportunity to see the children during the appeal); In re O.S.W., 175 N.C. App. 414, 623 S.E.2d 349 (2006) (order entered six months after hearing); In re D.S., 177 N.C. App. 136, 628 S.E.2d 31 (2006) (order entered seven months after hearing); In re D.M.M., 179 N.C. App. 383, 633 S.E.2d 715 (2006) (holding termination hearing more than a year after petition was filed and entering order 7 months after the hearing were prejudicial and required reversal); In re C.L.K., ___ N.C. App. ___, 643 S.E.2d 458 (2007) (order entered more than five months after hearing); In re C.L.K., ___ N.C. App. ___, 643 S.E.2d 458 (2007) (order entered more than five months after hearing); In re J.N.S., ___ N.C. App. ___, 637 S.E.2d 914 (2006) (order entered almost 6 months after hearing was egregious violation of statute, and respondent was prejudiced in that (i) he was entitled to speedy resolution of petition, (ii) child was entitled to permanent plan of care at earliest possible age, (iii) respondent's right to appeal had been delayed, (iv) his relationship with child was prejudiced because delay extended time he was separated from child, and (v) petitioner barred him from communicating with child after disposition hearing and rendering of order).

5. Cases in which the court found no prejudice include In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 359 N.C. 281, 604 S.E.2d 314 (2004); In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005); In re D.R., 172 N.C. App. 300, 616 S.E.2d 300 (2005); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264 (2005); In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583 (2005); In re A.L.G., 173 N.C. App. 551, 619 S.E.2d 561 (2005); In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006); In re S.W., 175 N.C. App. 719, 625 S.E.2d 594, *disc. review denied,* ___ N.C. ___, 635

S.E.2d 59(2006); In re K.D.L., 176 N.C. App. 261, 627 S.E.2d 221 (2006); In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510 (2006) (order entered 83 days after hearing); In re A.R.H.B., ___ N.C. App. ___, 651 S.E.2d 247 (2007) (pattern of entering late orders did not prejudice respondent's efforts to complete case plan; in absence of evidence to the contrary, court presumed that trial court's oral rendition of disposition and review orders contained everything that appeared in the written orders that were entered later).

6. Counsel for the petitioner or movant must serve a copy of the termination order on the child's guardian ad litem, if any, and the child, if twelve or over.

D. An order terminating parental rights completely and permanently severs all rights and obligations of the parent to the child and the child to the parent; except, the child's right of inheritance does not terminate until a final order of adoption is issued.

1. When parental rights have been terminated, parents no longer have any constitutionally protected interest in their children. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

2. A parent whose rights have been terminated is not a party for purposes of post-termination review hearings unless

   a. an appeal of the termination order is pending, and

   b. a court has stayed the order pending the appeal.

3. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them.

4. A parent whose rights have been terminated does not have standing to seek custody of the child as an "other person" under G.S. 50-13.1(a). Krauss v. Wayne County Dep't of Social Services, 347 N.C. 371, 493 S.E.2d 428 (1997).

E. If the child had been placed in the custody of (or released for adoption by one parent to) a county DSS or licensed child-placing agency and is in the custody of that agency when the petition or motion is filed, upon entry of a termination order that agency acquires all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent released the child to the agency pursuant to G.S. Chapter 48. *See* In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1997).

F. Except as provided in D, above, upon entry of a termination order, the court may place the child in the custody of the petitioner or movant, some other suitable person, a county DSS, or a licensed child-placing agency, as the child's best interests require.

G. When DSS has custody of the child pursuant to termination of one parent's rights and the other parent's surrender and consent to adoption, grandparents do not have standing under G.S. 50-13.1 to seek custody or visitation. In re Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993). *Cf.* Smith v. Alleghany County DSS, 114 N.C. App. 727, 443 S.E.2d 101, *disc. rev. denied*, 337 N.C. 696, 448 S.E.2d 533 (1994).

H. After termination, the court must conduct review hearings under G.S. 7B-908 every six months until the child is placed for adoption and an adoption petition is filed, if

1. a DSS or licensed child-placing agency has custody of the child and

2. the petition or motion was filed by a person or agency designated in G.S. 7B-1103(2) through (5).

XVI. Appeals; Modification of Order

(G.S. 7B-1001 through 7B-1004; Rule 3A, N.C. Rules of Appellate Procedure)

A. Appeal to the court of appeals may be taken by

1. the juvenile, acting through a guardian ad litem;

2. a county social services department;

3. a parent, guardian, or custodian who is not a prevailing party; and

4. any party that sought but failed to obtain an order terminating parental rights.

B. Orders that may be appealed include any order that

1. terminates parental rights.

2. denies a petition or motion to terminate parental rights.

3. finds a lack of jurisdiction or in effect terminates the action and prevents a judgment from which appeal might be taken.

C. Notice of appeal must be given in writing within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk.

1. If the appealing party is represented by counsel, both trial counsel and the appellant must sign the notice of appeal. In re L.B., ___ N.C. App. ___, 653 S.E.2d 240 (2007) (signature of respondent's guardian ad litem on the notice of appeal was not a sufficient signature by the "appellant" as required by Rule 3A(a).

2. When a juvenile appeals, the notice of appeal must be signed by the guardian ad litem attorney advocate.

3. Notice of appeal was timely when given after the trial court's order was rendered but before it was entered. In re J.L., ___ N.C. App. ___, 646 S.E.2d 861 (2007).

4. Appeal was dismissed where record included appellate entries but did not include a notice of appeal; court of appeals did not have jurisdiction to consider the appeal, and respondent did not petition for writ of certiorari. In re Me.B., 181 N.C. App. 597, 640 S.E.2d 407 (2007).

5. Trial court erred in dismissing respondent's appeal for failure to timely give notice of appeal, when respondent filed a written notice of appeal after the court rendered its

judgment but before court entered its written judgment. Error was harmless, however, because trial court could have dismissed the appeal on ground that respondent gave no notice of appeal to the appellee. In re J.L., ___ N.C. App. ___, 646 S.E.2d 861 (2007).

6. Failure to include certificate of service with notice of appeal, when not waived by the party entitled to be served, is reversible error. In re A.C, ___ N.C. App. ___, 643 S.E.2d 470 (2007).

D. Except in sealed verbatim transcript

1. Initials instead of names must be used to refer to the juvenile and any sibling or other household member under age 18.

2. No filing, document, exhibit, or argument may contain the juvenile's address, social security number, or date of birth.

E. Expedited procedures apply in the court of appeals, and cases generally will be decided on the record and briefs without oral argument.

1. One business day after notice of appeal is filed, clerk of superior court must notify AOC court reporting coordinator, who must assign transcriptionist to the case within two business days after receiving the notification.

2. Transcriptionist must prepare and deliver transcript to court of appeals and copies to parties within 35 days after the case is assigned. Court of appeals will grant motions for extensions of time to prepare and deliver transcripts only in extraordinary circumstances.

3. Within 10 days after receipt of the transcript appellant must prepare and serve proposed record on appeal.

   a. If parties agree to a settled record within 20 days after receipt of the transcript, then within five business days after the record is settled, appellant must file three copies of the record in the court of appeals.

   b. Within 10 days after service of the proposed record, appellee may serve a notice approving the proposed record, specific objections or amendments, or proposed alternative record. If all appellees file none of those, the proposed record becomes the settled record on appeal. If an appellee does timely serve one of the above and parties cannot agree on a settled record within thirty days after receipt of the transcript, then within five business days after the last day on which the record could be settled by agreement, (1) appellant must file three copies of the proposed record on appeal and (2) appellee must file three copies of any objections, amendments, or proposed alternative record with the court of appeals.

4. Within 30 days after the record on appeal is filed appellant must file his or her brief in court of appeals and serve copies on all other parties. Within 30 days after appellant's brief is served on an appellee, the appellee must file his or her brief and serve copies on all other parties. The court will allow motions for extensions of time to file briefs only in extraordinary circumstances.

F. Appeal is a critical stage of the proceeding for purposes of an indigent respondent's right to appointed counsel pursuant to G.S. 7A-450, *et seq*. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675 (2004).

1. Motions to appeal in forma pauperis must be made within 30 days after entry of the judgment or order. G.S. 1-288.

2. It was error for the trial court to provide a transcript without cost to a respondent and to allow the respondent to appeal in forma pauperis based on a simple assertion of poverty, without inquiry as to the respondent's actual financial status. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied,* 306 N.C. 385, 294 S.E.2d 212 (1982).

G. Arguments on appeal

1. Counsel for a parent appealing from a termination order has no right to file an *Anders* brief (indicating the attorney believes the appeal is meritless and asking the appellate court to conduct its own review of the record for possible error). In re Harrison, 136 N.C. App. 831, 526 S.E.2d 502 (2000); N.B., ___ N.C. App. ___, 644 S.E.2d 22 (2007).

2. An appellant who does not assign error to any finding of fact waives any argument as to sufficiency of the evidence. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005).

3. Defenses of collateral estoppel and res judicata cannot be asserted for the first time on appeal. In re D.R.S., 181 N.C. App. 136, 638 S.E.2d 626 (2007).

4. Because respondent failed to challenge two of the grounds the trial court adjudicated, the court of appeals did not need to address his assignments of error with respect to other grounds. In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (2006).

5. Child's death did not render appeal of termination order moot. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813 (2005).

6. On appeal from an order terminating parental rights, the issue of failure to appoint a guardian ad litem for respondent in the initial abuse, neglect, or dependency proceeding is not properly before the court. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391,*disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005); In re D.H., 177 N.C. App. 700, 629 S.E.2d 920 (2006); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387 (2006); In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61 (2006).

H. Trial court's authority during and after appeal

1. Pending disposition of an appeal, trial court may enter such temporary orders affecting the child's custody or placement as court finds to be in the best interest of the child.

2. Trial court erred when it ignored the mandate of the court of appeals to hold a new termination hearing, but error was not prejudicial when the court, instead, held a new permanency planning hearing. In re R.A.H., 182 N.C. App. 52, 641 S.E.2d 404 (2007).

3. Trial court committed reversible error when it failed to carry out the mandate of the court of appeals after remand of the permanency planning order, by holding a termination of parental rights hearing instead of a permanency planning hearing. In re P.P., ___ N.C. App. ___, 645 S.E.2d 398 (2007).

4. On affirmation of an order by the appellate court, the trial court may modify its original order in the child's best interest to reflect the child's adjustment or changed

circumstances. If modification is *ex parte*, the court must notify interested parties to show cause to vacate or alter the order within 10 days).

a. The statute does not create a right to another review proceeding; it gives the district court discretion to modify or vacate the original order due to changed circumstances. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

b. The district court has discretion to hear or decline to hear evidence in support of a motion to modify or vacate an order after an appeal. Montgomery.

c. The hearing on a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing; the formal rules of evidence do not apply. Montgomery.