Chapter 2
The Court, Key People, and the Rights of Children and Parents

2.1 The Juvenile Court and Officials

A. The Court

Abuse, neglect, dependency, and termination of parental rights cases are heard in district court by a judge and not a jury. In practice, the sessions of district court that hear juvenile matters (which include abuse, neglect, dependency, termination of parental rights, delinquency, undisciplined, and emancipation proceedings) are usually referred to as "juvenile court." There is not a separate juvenile court system in North Carolina.

Note, as used in this Manual, the term "juvenile court" refers to a district court that hears juvenile proceedings. Juvenile proceedings include those proceedings that are governed by the Juvenile Code (G.S. Chapter 7B). As used in this Manual, the term "juvenile proceeding" typically refers to an abuse, neglect, dependency or termination of parental rights proceeding; however, in some circumstances, the context may require the inclusion of delinquency, undisciplined, and emancipation actions.

1. District court is juvenile court. For purposes of abuse, neglect, dependency, and termination of parental rights actions, G.S. 7B-101(6) defines "court" as "the district court division of the General Court of Jurisdiction." There is no definition of "juvenile court" in Subchapter I of G.S. Chapter 7B; however, it is defined in Subchapter II, applying to undisciplined and delinquent juveniles, as "any district court exercising jurisdiction under this Chapter." G.S. 7B-1501(18). The terms "juvenile court" and "district court" are used interchangeably in the Juvenile Code. *See, e.g.*, G.S. 7B-323; 7B-324.

(a) Juvenile court may be part of a family court district. In 1998, the legislature authorized the establishment of family courts on a pilot basis, with funding appropriated for three family courts. As of October 1, 2019, there are fifteen family court districts that serve twenty-seven counties. Forty-five percent of the state's population live in a county that is served by a family court district.[1] In these districts, family court case coordinators assist with the assignment and management of cases so that, to the extent possible, all of one family's legal matters are scheduled and heard before the same judge or team of judges who typically receive specialized training to handle complex family matters. Depending on the judicial district, family court matters include abuse, neglect, or dependency; termination of parental rights; domestic violence; child custody and visitation; child support; divorce, alimony, and equitable distribution; and juvenile delinquency and undisciplined proceedings. Some judicial districts that are not designated family court districts model selected family court practices, such as "one family-one judge" or child planning conferences.

(b) Family Dependency/Drug Treatment Court. Eight judicial districts have a Family Dependency/Drug Treatment Court (FDTC), which works with parents and guardians who are in danger of losing or have lost custody of their children due to abuse or neglect and

[1] N.C. ADMIN. OFFICE OF THE COURTS, CT. PROGRAMS & MGMT. SERVS. DIV., "2016 Annual Report on North Carolina's Unified Family Court Programs" (March 2016).

who have substance abuse issues. Participants receive support in their efforts to overcome substance abuse and to make other changes that will facilitate reunification with their children. FDTCs are grant funded and utilize existing community resources. *See* G.S. 7A-790 *et seq*.

Resource: For more information, see "Family Court" and "Family Dependency/Drug Treatment Courts" on the North Carolina Administrative Office of the Courts website. Use the search box for the term "Family Court."

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2. Juvenile court sessions. All juvenile proceedings are civil actions in district court, although they are scheduled and heard separately from other civil cases. The court may have special juvenile sessions for cases that are expected to involve lengthy hearings or for other reasons.

3. JWise System. JWise is the official court index of juvenile cases. It is an automated computer information system operated by the North Carolina Administrative Office of the Courts (AOC). JWise is used by multiple juvenile court officials and employees to record and access juvenile court information, manage cases, and link case outcomes from different courts. For more detailed information about JWise and other aspects of court administration, see Appendix 3 at the end of this Manual.

4. Juvenile Rules of Recordkeeping. The AOC issues rules that govern recordkeeping in the offices of the clerks of superior court. Chapter XII of the Rules of Recordkeeping Procedures for the Office of the Clerk of Superior Court addresses the filing system, access to and expungement of records, and related topics in juvenile proceedings. See Appendix 4 at the end of this Manual.

B. Judicial Officials and Staff

District court judges and clerks of superior court, often through assistant and deputy clerks, are key participants in every abuse, neglect, dependency, and termination of parental rights (TPR) proceeding.

1. Juvenile court judge. A district court judge presides over every juvenile court proceeding, without a jury. Any district court judge may preside over abuse, neglect, dependency, and TPR actions. Assignments of judges to juvenile court are made by the chief district court judge. G.S. 7A-146(1), (7); *see* N.C. R. CIV. P. 40. In judicial districts designated as family court districts, the assignment of one judge to one family is encouraged. Other judicial districts allow for different judges to hear different types of cases for a family or different hearings that are conducted in the same action (e.g., an initial disposition hearing and a permanency planning hearing). Local rules may require or encourage the assignment of one judge to one family, regardless of whether the judicial district is a family court district.

(a) Specialized training. Although special training is not a prerequisite for holding juvenile court, the Administrative Office of the Courts (AOC) encourages appropriate training and provides certification to judges who complete an approved series of courses related to juvenile proceedings, satisfy experience requirements set by the AOC, and maintain a

certain number of continuing judicial education hours designated as qualified courses for continued juvenile certification. *See* G.S. 7A-147.

Resources:
The website for the National Council of Juvenile and Family Court Judges is a valuable resource for publications, training opportunities, and technical assistance for juvenile court judges.

For more information about juvenile court certification, see "Juvenile Certification" on the "NC District Court Judges" microsite on the UNC School of Government website.

(b) Recusal. Recusal of a judge is not addressed in the Juvenile Code, but it is an issue that arises occasionally in abuse, neglect, dependency, and TPR proceedings. Even though the one judge-one family approach to judicial assignments for juvenile court has become more common, the issue of recusal is most likely to come up when a judge hears different proceedings involving the same family. The North Carolina Code of Judicial Conduct addresses recusal (disqualification) in Canon 3. When a party requests recusal by the trial judge, the party must demonstrate that grounds for disqualification exist. *See In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994). Canon 3 of the Code of Judicial Conduct states in part that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including a proceeding in which the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings. *See* N.C. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(a).

In applying this standard from Canon 3, appellate cases have not found that a judge should be recused simply because he or she presided over another case involving the same children. *See In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019) (reasoning a statement at the TPR hearing made by the district court judge at the last permanency planning hearing that he was willing to send the child to an out-of-state relative because he did not think the child could be with her parents was merely an explanation of the court's decision about the child's best interests at the time that decision was made, and was not a reflection that the court had reached a conclusion to terminate the parents' rights prior to the TPR hearing; a determination of judicial bias based on this statement would have the illogical consequence of a district court judge never being able to preside over a TPR after ordering a permanent plan that is compatible with the need for a TPR); *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the trial judge who presided over the mother's TPR proceeding was not barred from presiding over the father's TPR proceeding without any showing by the father of "extraordinary circumstances," which, according to local rules, would have been the only basis for recusal of the judge); *In re Faircloth*, 153 N.C. App. 565 (2002) (holding that recusal from a TPR proceeding was not necessary for the sole reason that the judge presided over an abuse, neglect, or dependency proceeding involving the same children); *In re LaRue*, 113 N.C. App. 807 (1994) (holding that the judge did not have to recuse himself from a TPR action because he presided over an earlier review hearing).

When the issue of recusal is not raised at trial, it is not preserved for appellate review. *See In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019) (although not preserved for appellate review, supreme court exercised discretion under Appellate Rule of Procedure 2 to address respondents arguments raising judicial bias and recusal); *In re D.R.F.*, 204 N.C. App. 138 (2010) (holding that trial judge did not err in failing to recuse himself where the judge had no duty to recuse himself sua sponte; there was no indication of the reason for the judge's earlier recusal in another hearing; and the issue was not preserved for appeal because no motion for recusal was made in the trial court).

Resource: For more information about recusal, see Michael Crowell, *Recusal*, ADMINISTRATION OF JUSTICE BULLETIN No. 2015/05 (UNC School of Government, Nov. 2015).

2. Chief district court judge. The chief district court judge has the authority to issue various administrative orders related to juvenile court. For example, the judge may issue an administrative order authorizing someone other than a district court judge to issue nonsecure custody orders or designating a local agency as an agency that is authorized to share confidential information relating to juveniles under G.S. 7B-3100. See Chapters 5.5.C.2 (relating to issuing nonsecure custody orders) and 14.1.E (relating to agency sharing of information). The chief district court judge may also adopt local rules addressing discovery and other procedures in juvenile proceedings. See Appendix 2 (identifying responsibilities of the chief district court judge).

3. Juvenile court clerk. The clerk of superior court is responsible for maintaining the official court record and generally designates one or more assistant or deputy clerks to act as juvenile court clerks. Juvenile records include paper filings, audio recordings of hearings, and an automated index of juvenile proceedings (JWise, explained further in Appendix 3). The clerk has specific statutory responsibilities related to juvenile proceedings. For example, the clerk must issue summonses, appoint provisional counsel, notify the local guardian ad litem office of a petition alleging a child's abuse or neglect, and give written notice of hearings. *See, e.g.*, G.S. 7B-406(a); 7B-408; 7B-602(a); 7B-906.1(b), (h). The clerk generally distributes the hearing calendar but does not manage it. The clerk also operates electronic recording systems for juvenile hearings and, when a case is appealed, creates duplicate recordings and delivers them to a transcriptionist.

Note that the clerk of superior court acts as the judicial official presiding over adoptions. G.S. 48-2-100; *see* G.S. 48-2-607(b). See also Chapter 10.3 (discussing adoptions).

4. Juvenile court case manager or coordinators. Some judicial districts have court staff whose role is to provide case management for abuse, neglect, dependency, and TPR cases. See Appendix 5, "Case Management for Abuse, Neglect, Dependency, and Termination of Parental Rights Cases in NC Juvenile Courts."

2.2 Key People: Who's Who in the System

A. Introduction

Many people may become involved in an abuse, neglect, or dependency and, if applicable, termination of parental rights (TPR) proceeding, some playing a role inside the courtroom and others functioning in supporting and service roles outside the courtroom. Understanding the roles of these various people in the system is critical and can affect both the proceedings and the quality of advocacy or decision-making in a case.

The tables in a courtroom where the parties sit can get crowded, as three or more sets of people may be participating. These can include a county department of social services (DSS) attorney with the DSS caseworker(s); one or more parents, guardians, custodians, or caretakers and their attorneys; the child's guardian ad litem (GAL) team and perhaps the child himself or herself; and when applicable, a private individual or representatives of a child-placing agency seeking a TPR.

Note, for purposes of this Manual, "department of social services" or "DSS" refers to a department as defined by G.S. 7B-101(8a) regardless of how it is titled or structured.

Others who may play a role in the case include relatives, other caretakers or foster parents, professional service providers (related to mental and medical health, education, etc.), and law enforcement officials.

B. The People: Explanation of Roles

1. Social services director. The DSS director has several duties and responsibilities that are established by statute. *See* G.S. 108A-14. Some of those responsibilities relate specifically to child welfare services, such as assessing reports of child abuse and neglect and taking steps to protect such children, supervising children's placements in foster homes, and investigating and supervising adoptive placements. G.S. 108A-14(a)(6), (11) and (12). Laws and regulations related to DSS responsibilities usually reference "the director" as the one carrying out those responsibilities.

Director is defined by the Juvenile Code as the director of the county department of social services in the county where the child resides or is found, or the director's authorized representative. G.S. 7B-101(10); *see In re A.P.*, 371 N.C. 14 (2018). The director's duties and authority to delegate responsibilities to staff are set out in G.S. 108A-14. It is understood that most responsibilities belonging to the director are carried out through an authorized representative of the director. *See In re D.D.F.*, 187 N.C. App. 388 (2007).

2. Social services caseworkers. DSS caseworkers screen the report and assess the case and, with others in the department, determine whether to file a petition and/or provide services to the family. Caseworkers carry out many of the statutory responsibilities of the DSS director. Caseworkers are involved in coordinating services for the family, gathering information to present in court, testifying in and making recommendations to the court, and working with and

monitoring the family situation until DSS services are no longer needed.

3. Social services attorney. The DSS attorney works with the DSS caseworker(s) assigned to a particular case. Because DSS is the petitioner in every abuse, neglect, or dependency case and in some termination of parental rights (TPR) cases, the DSS attorney is responsible for the initial presentation of evidence at many hearings. *See* G.S. 7B-401.1(a). In addition to advising and representing DSS in individual cases, the DSS attorney may provide counsel, advice, and training about court procedures, relevant changes in the law, liability, and other matters. DSS attorneys across the state are a mix of in-house agency attorneys, county or assistant county attorneys, and private attorneys under contract to represent DSS. The source of direction and supervision a DSS attorney receives may vary depending on which arrangement is in place. Because DSS is not a legal entity separate from the county, however, the DSS attorney's ultimate client is the county.

4. The child or juvenile. In this Manual the terms "child" and "juvenile" are used interchangeably. The child is the subject of a report of suspected abuse, neglect, or dependency and any resulting petition filed in juvenile court. The child is also the subject of any action seeking to terminate the rights of one or both parents. In both an abuse, neglect, or dependency and TPR court action, the child is a party. G.S. 7B-401.1(f); 7B-601(a); 7B-1104. As defined by the Juvenile Code, a juvenile is anyone under the age of 18 who is not married, emancipated, or in the Armed Forces. G.S. 7B-101(14). In North Carolina, a minor—someone under the age of 18—may become emancipated in one of two ways: marriage or a court order entered in an emancipation proceeding. G.S. 7B-3500 through -3509.

The child may or may not be a source of information relating to the allegations in the petition, and may or may not be called to testify in the adjudication or disposition phases of the case. The child's age and situation, as well as local practice and the court's and parties' preferences, will influence the nature of the child's participation in the case. The Juvenile Code, however, mandates the child's involvement in certain proceedings, starting at age 12. The child's involvement may be as simple as sending notice directly to the child or as complicated as having the court question the juvenile. *See, e.g.*, 7B-906.1(b)(ii); 7B-912(d); 7B-1110(d).

In all abuse and neglect cases and in most dependency and TPR cases the child is appointed a guardian ad litem (GAL), who advocates for the child's best interests and protects the child's legal rights. G.S. 7B-601(a); 7B-1108.

See sections 2.3.C and D, below (explaining the child's rights and GAL representation).

5. The child's guardian ad litem (GAL). When a petition alleges that a child is abused or neglected, the court must appoint a GAL for the child; when a petition alleges only that the child is dependent, the court may appoint a GAL. A GAL is also required to represent a child who is the subject of a TPR proceeding in certain circumstances. G.S. 7B-601(a); 7B-1108.

Any time the court appoints a GAL who is not an attorney, the court also must appoint an attorney advocate to protect the child's legal interests. The child's GAL representation is by a

team that consists of a GAL volunteer, local GAL program staff, and attorney advocate. The team represents the best interests of the child and protects the child's legal rights. G.S. 7B-601; 7B-1108. See section 2.3.D, below (discussing details related to the N.C. Guardian ad Litem Program and the appointment, role, and responsibilities of GALs). See Chapter 9.4.C (discussing appointment of a GAL in a TPR proceeding).

6. Parent. The child's parents are parties to the abuse, neglect, or dependency proceeding involving the child unless a parent's rights have been terminated or the parent has been convicted of first- or second-degree forcible rape, statutory rape of a child by an adult, or first-degree statutory rape that resulted in the child's conception. A parent who has relinquished the child for adoption ordinarily is not a party, but the court may order that he or she be made a party. G.S. 7B-401.1(b). Because abuse, neglect, and dependency cases are about the child, not "against" a parent, and because both parents' rights may be affected by the court's intervention, every effort should be made to serve both parents and involve both parents in the proceeding. A parent who had no involvement in the circumstances leading up to the petition alleging abuse, neglect, or dependency has the same rights in the action as a parent alleged in a petition to have created the child's circumstances.

A parent whose rights are sought to be terminated is named as the respondent in a TPR action.

The term "parent" is not defined in the Juvenile Code but generally is considered to be a child's legal, biological, or adoptive parent. If paternity of a child has not been established legally or if a child has both a legal and a putative father, a determination of paternity in the juvenile proceeding may be necessary. *See* G.S. 7B-506(h)(1); 7B-800.1; 7B-901(b) (requiring the court to inquire about efforts to identify and locate missing parents and to establish paternity if paternity is an issue and authorizing the court to order that specific efforts be made). See Chapter 5.4.B.7 (discussing paternity).

See section 2.4, below (related to parent's rights).

7. Parent's attorney. In juvenile proceedings each parent has a statutory right to counsel and to court-appointed counsel if indigent, unless the parent knowingly and voluntarily waives that right. G.S. 7B-602; 7B-1101.1. *See also Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (holding that the Due Process Clause of the U.S. Constitution does not require appointment of counsel for indigent parents in every TPR case and discussing the analysis for determining on a case-by-case basis whether appointment of counsel is constitutionally required). The parent's attorney represents the expressed interests of the parent.

See section 2.4.D, below (discussing court-appointed counsel for respondent parents).

8. Parent's guardian ad litem. The Juvenile Code requires the appointment of a guardian ad litem (GAL) pursuant to Rule 17 of the Rules of Civil Procedure for a parent who is an unemancipated minor. The court has discretion to appoint a Rule 17 GAL for an adult parent who is incompetent. A Rule 17 GAL is not the same as the child's GAL appointed under G.S. 7B-601 and has no affiliation with the N.C. Guardian ad Litem Program.

See section 2.4.F, below (discussing GALs for respondent parents in abuse, neglect, or dependency cases), and Chapter 9.4.B (discussing GALs for respondent parents in TPR actions).

9. Custodians, guardians, and caretakers. Often people other than a child's parents are responsible for or involved with caring for the child. The Juvenile Code classifies these persons for purposes of determining their legal role and significance in an abuse, neglect, or dependency proceeding as "custodians", "guardians", or "caretakers". It is important to understand the definition of each term to determine which applies in a particular circumstance. *See In re M.S.*, 247 N.C. App. 89 (2016) (holding that stepparent who did not adopt the child or have an order awarding him custody of the child was a caretaker, not a parent or custodian, and thus was not entitled to appeal under G.S. 7B-1002). A custodian, guardian, or caretaker who is a party to the case has many but not all of the same rights as a parent. For example, only parents have a statutory right to appointed counsel if indigent. However, the Office of Indigent Defense Services has a policy addressing the payment of counsel for non-parents when a court appoints an attorney after finding constitutional due process requires such appointment.

Resource: N.C. OFFICE OF INDIGENT DEFENSE SERVICES, "Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings" (July 2, 2008).

For more information on the role and status of persons who become custodians and guardians as a result of dispositional hearings, see Chapter 7.4.E and 7.10.B.4 (custodians) and 7.4.F and 7.10.B.3 (guardians).

(a) Custodian. The Juvenile Code defines custodian as a person or agency that has been awarded legal custody of the child by a court. G.S. 7B-101(8). The custodian of a child at the time a petition is filed is a party to the abuse, neglect, or dependency action; however, the court may remove a custodian as a party when the court finds both that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(d), (g). The failure to make both findings before removing a custodian who was a party from the proceeding is reversible error. *In re J.R.S.*, 813 S.E.2d 283 (N.C. Ct. App. 2018) (reversing and remanding the order removing grandparents who were custodians through a Chapter 50 order when the neglect and dependency action was initiated; noting that due to the Chapter 50 custody order awarding legal and physical to grandparents, the district court hearing the juvenile proceeding in its discretion may be prevented from making the first finding required by G.S. 7B-401.1(g)).

A person who was not a party to the case initially but who becomes the child's custodian through an order that awards custody of the child to that person and finds it is the permanent plan automatically becomes a party to the proceeding. G.S. 7B-401.1(d). See Chapter 7.10.B.4 (discussing custody as permanent plan).

(b) Guardian. Guardian is not defined in the Juvenile Code. Instead, the statute that addresses the appointment of a guardian specifies the guardian's rights and responsibilities. *See* G.S.

7B-600. In an abuse, neglect, or dependency proceeding, the court may appoint a guardian of the person for the juvenile when no parent appears in a hearing with the juvenile or any time the court finds it would be in the best interests of the juvenile. The guardian operates under the supervision of the court and has the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile. The guardian also has the authority to consent to certain types of actions for the juvenile that are specified in G.S. 7B-600(a). See Chapter 7.4.F (detailing the appointment and duties of a guardian).

A guardian also includes a guardian of the person or general guardian appointed to the juvenile pursuant to G.S. Chapter 35A by the clerk of superior court. The clerk's authority to appoint a guardian of the person or a general guardian for a minor is limited to when the minor has no natural guardian or pursuant to a standby guardianship. G.S. 35A-1221; 35A-1224(a); 35A-1370 through -1382.

A person who is the child's court-appointed guardian of the person or general guardian at the time the petition is filed is a party to the abuse, neglect, or dependency action. G.S. 7B-401.1(c). The court may remove a guardian as a party when the court finds both that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(g). The failure to make both findings before removing a guardian(s) who was a party from the proceeding is reversible error. *See In re J.R.S.*, 813 S.E.2d 283 (N.C. Ct. App. 2018) (reversing and remanding the order removing grandparents who were custodians through a Chapter 50 order when the neglect and dependency action was initiated; noting that due to the Chapter 50 order awarded legal and physical custody to the grandparents, the district court hearing the juvenile proceeding in its discretion may be prevented from making the first finding required by G.S. 7B-401.1(g)).

A person who was not a party to the case initially but who is appointed as the child's guardian pursuant to G.S. 7B-600 automatically becomes a party if the court finds the guardianship is the permanent plan for the child. G.S. 7B-401.1(c). See Chapter 7.10.B.3 (discussing guardianship as permanent plan).

(c) Caretaker. A caretaker is any person, other than a parent, guardian, or custodian, who has responsibility for the health and welfare of a juvenile in a residential setting. This may be

- a stepparent,
- a foster parent,
- an adult member of the juvenile's household,
- an adult entrusted with the juvenile's care,
- a potential adoptive parent during a visit or trial placement for a juvenile who is in DSS custody,
- a house parent or cottage parent in a residential child care or educational facility, or
- any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

G.S. 7B-101(3).

The definition of caretaker involving an adult member of the juvenile's household was amended by S.L. 2019-245, effective December 1, 2019. Prior to this effective date, a caretaker included an "adult relative entrusted with the juvenile's care," but the relative relationship has now been removed. Regarding the adult relative, the North Carolina Supreme Court addressed how to determine whether an adult relative is "entrusted with the juvenile's care" such that caretaker status attaches warranting government interference with the parent-child relationship in *In re R.R.N.*, 368 N.C. 167 (2015). The supreme court examined the purposes of the Juvenile Code and the definition of caretaker and described the categories of persons identified in the caretaker statute as those with "significant, parental-type responsibility for the daily care of the child." *In re R.R.N.*, 368 N.C. at 170. The trial court (and although not addressed by the supreme court, DSS) must consider the totality of the circumstances and whether the relative has significant parent-type responsibility for the child when determining whether the person alleged to have created the child's circumstances as abused or neglected is a caretaker. Factors to be considered include the duration, frequency, and location of the care provided as well as the level of decision-making authority given to the adult relative by the parent. In applying the totality of the circumstances test to the adult relative, who was the juvenile's stepfather's cousin, the supreme court held that he was not entrusted with the juvenile's care while supervising a one-night sleepover in his home. Although the relative was responsible for ensuring the juvenile's short-term safety, he was not given significant parent-like responsibility of the juvenile and was not a caretaker within the meaning of the statute. *In re R.R.N.*, 368 N.C. 167. To comply with the purposes of the Juvenile Code that same analysis would apply to an adult entrusted with the juvenile's care.

A caretaker is a party to the abuse, neglect, or dependency action only if the petition includes allegations relating to the caretaker, the caretaker has assumed the status and obligation of a parent, or the court orders that the caretaker be made a party. G.S. 7B-401.1(e). A caretaker may be removed as a party when the court finds the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(g). A caretaker does not have all the same rights in the proceeding as a parent, guardian, or custodian. For example, a caretaker does not have standing to appeal any order entered in the abuse, neglect, or dependency action. G.S. 7B-1002(4) (authorizing appeals by a nonprevailing party who is a parent, guardian, or custodian but not a caretaker); *In re M.S.*, 247 N.C. App. 89 (2016) (dismissing appeal brought by stepparent who was a caretaker for lack of standing).

Practice Note: Caretakers generally do not have a right to intervene in an abuse, neglect, or dependency action. G.S. 7B-401.1(h); *but see* G.S. 7B-401.1(e1) (addressing foster parents). It is unclear whether the language of G.S. 7B-401.1(e)(iii), which allows for a caretaker to be made a party when ordered by the court, results from a non-party caretaker seeking that status or only from the district court acting sua sponte or in response to a motion made by an existing party in the action.

Prior to January 1, 2016, a "caretaker" also included any person responsible for caring for a child in a child care facility as defined in G.S. 110-86. Now, such person is a "caregiver" who is subject to reports of suspected "child maltreatment" occurring in a child care

facility that are made to and investigated by the N.C. Department of Health and Human Services Division of Early Education and Child Development. *See* S.L. 2015-123.

Resources:
For more information about determining caretaker status, see Sara DePasquale, *Who Is a "Caretaker" in Child Abuse and Neglect Cases?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 2, 2015).

For more information about child maltreatment occurring in a child care facility, see

- Sara DePasquale, *The New Law Addressing Child Maltreatment in Child Care Facilities: It's the State's Responsibility*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 6, 2016).
- SARA DEPASQUALE, *Suspected Child Maltreatment Occurring in a Child Care Facility* (UNC School of Government, 2016), CH. 13A *in* JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA (UNC School of Government, 3d ed. 2013).

10. Relatives. Both maternal and paternal relatives may play an important role in the child's life as a resource for support and/or placement. DSS is required to make diligent efforts to notify relatives that the child is placed out of the home and determine whether a relative is willing and able to be an appropriate placement or resource support (e.g., supervise visitation). The court must order placement with a relative who is willing and able to provide proper care and supervision to the child in a safe home unless the court finds it would be contrary to the child's best interests. *See* G.S. 7B-505(b); 7B-506(h)(2); 7B-800.1(a)(4); 7B-901(b); 7B-903(a)(4), (a1). *See also* G.S. 7B-101(19) (definition of "safe home"). If a child is placed with a relative, that relative who is providing care to the child must receive notice of and may be heard in review and permanency planning hearings. G.S.7B-906.1(b)(iv), (c).

Relative is not defined by the Juvenile Code. For guidance, the N.C. Department of Health and Human Services Division of Social Services Child Welfare Manual refers to federal law, which identifies adult grandparents, all parents with legal custody of a sibling of a child, and other adult relatives including those suggested by the parents. Additionally, for relative notification, the Permanency Planning section of the Child Welfare Manual identifies adult relatives and kin suggested by the parents; adult maternal and paternal grandparents, aunts, uncles, siblings, great grandparents, nieces and nephews; and a custodial parent of a sibling. The Cross-Function section of the Child Welfare Manual, for purposes of a conflict of interest, further identifies relatives as birth and adoptive parents, blood and half-blood siblings, grandparents (including great and great-great), aunt and uncle (including great and great-great), nephew, niece, first cousin, stepparent, stepsibling, and the spouse of each of these relatives. *See* DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL, available here.

11. Nonrelative kin. The Juvenile Code defines nonrelative kin as (1) an individual having a substantial relationship with the juvenile or (2) for a juvenile who is a member of a State-recognized Indian tribe, an individual who is a member of any State-recognized or federally recognized Indian tribe regardless of whether there is a substantial relationship with the

juvenile. G.S. 7B-101(15a). Nonrelative kin may also be referred to as "fictive kin."

The court may consider placing a juvenile with nonrelative kin. G.S. 7B-505(c); 7B-506(h)(2a); *see* G.S. 7B-903(a)(4) (referring to "suitable person"). If a child is placed with nonrelative kin, that nonrelative kin who is providing care to the child must receive notice of and may be heard in review and permanency planning hearings. G.S.7B-906.1(b)(iv), (c).

12. Foster parents. Foster parents play a crucial role in an abuse, neglect, or dependency case. They provide substitute care to a child who has been separated from his or her family due to abuse, neglect, or dependency and placed with the foster parents by DSS or the court. The Juvenile Code does not define foster parent; however, the laws governing foster care licensing define a "foster parent" as any individual who is 21 years of age or older and licensed by the State to provide foster care. G.S. 131D-10.2(9a). "Foster care", "family foster care", and "therapeutic foster care" are defined at G.S. 131D-10.2(9), (8), and (14) respectively.

A foster parent is not a party to the abuse, neglect, or dependency proceeding. However, a foster parent may be allowed to intervene when he or she has the authority (or standing) to file a TPR petition (or motion). G.S.7B-401.1(e1). Although not a party, foster parents who are providing care to the child must receive notice of and may be heard in review and permanency planning hearings. G.S. 7B-906.1(b)(iv), (c); *In re J.L.*, 826 S.E.2d 258 (N.C. Ct. App. 2019) (discussing foster parents' participation in the hearing with attorney representation; holding no abuse of discretion). When a child's permanent plan is adoption, if a foster parent who wishes to adopt the child is not selected by DSS, the foster parent has a right to notice of the selected prospective adoptive parent and the right to seek a judicial review of that selection. G.S. 7B-1112.1. See Chapter 10.3.B (relating to selection of prospective adoptive parent).

Resource: For more information about the rights and role of a foster parent in the court proceeding, see Sara DePasquale, *What Is the Role of a Foster Parent in the A/N/D Court Action?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 30, 2015).

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13. Law enforcement. It is not uncommon for law enforcement to be the source of reports to DSS of a child's suspected abuse, neglect, or dependency. *See* G.S. 7B-301; 14-204(c); 14-318.6(g) (S.L. 2019-245, effective December 1, 2019). A DSS assessment may reveal facts that DSS is required to report to law enforcement, which then has a duty to initiate a criminal investigation. *See* G.S. 7B-307. See also Chapter 5.1.F (discussing law enforcement involvement in the pre-adjudication stage of a case). At the request of DSS, law enforcement officers are required to assist DSS in the assessment and evaluation of the seriousness of a report. G.S. 7B-302(a), (e). Sometimes law enforcement and DSS coordinate interviews and other aspects of the criminal investigation and social services assessment, and in some counties the agencies have developed protocols to facilitate this type of coordination.

14. District attorney or prosecutor. In some circumstances, DSS must notify the prosecutor regarding information it obtains. *See* G.S. 7B-307. Whether criminal charges will be filed is always up to the prosecutor. In addition, the prosecutor may be contacted by the person making the report of a child's suspected abuse, neglect, or dependency to request review of a DSS decision not to file a petition. G.S. 7B-302(g); 7B-305; 7B-306. See Chapter 5.1.E

(discussing review by a prosecutor of a DSS decision not to file a petition).

15. Other professionals and their agencies. Often various professionals and agencies are involved in evaluating or treating children or parents. Agencies and individuals also may be involved in caring for a child or assisting the parent in addressing issues related to employment, housing, education, etc. Professionals and individuals who speak on behalf of agencies are not parties to the proceedings and generally are not subject to orders of the court absent specific statutory authority. They may be subpoenaed as witnesses or called on to provide affidavits, written reports, or other information. See Chapter 14 (relating to laws governing confidentiality and disclosure of information in abuse, neglect, or dependency cases). If qualified as experts, professionals may also be called on to provide expert opinion testimony. See Chapter 11.10 (relating to expert testimony).

16. Persons involved in other court proceedings affecting the family. Parents and children involved in an abuse, neglect, or dependency case may also be involved in juvenile delinquency or undisciplined proceedings, adult criminal court proceedings, domestic violence actions, child support proceedings, or other court actions. In those situations, there may be juvenile court counselors, probation officers, domestic violence counselors, and others with an interest in the abuse, neglect, or dependency case that have information that might assist the juvenile court. See Chapter 3.6 (discussing overlapping proceedings).

2.3 The Child

A. Introduction

An abuse, neglect, or dependency case centers around the child, starting with cause to suspect that the child is abused, neglected, or dependent. For reports that are screened in, DSS completes an assessment that results in its determination as to whether the child is abused, neglected, and/or dependent and if so, whether services and/or court action is needed to protect the child. When court action is taken, in every abuse, neglect, or dependency proceeding, the child is a party and has rights designated in the Juvenile Code. Additionally, the child has constitutional rights, which are recognized by the Juvenile Code but are not specified. In some cases, termination of parental rights (TPR) is necessary. The child is the subject of the TPR proceeding, is a party, and has rights that are impacted in that proceeding as well.

B. Definitions of Abused, Neglected, or Dependent Juveniles

Children who are the subject of abuse, neglect, or dependency cases must meet the statutory definitions of abused, neglected, or dependent juveniles. Children who do not meet those definitions will not be the subject of a DSS assessment or resulting abuse, neglect, or dependency petition in district court. When a court action is filed, if the court is unable to conclude by clear and convincing evidence that the child is abused, neglected, or dependent, it must dismiss the petition with prejudice, thereby ending both court and DSS involvement. When a court adjudicates a child abused, neglected, or dependent, the action proceeds to

disposition, where the child's best interests are the paramount consideration for the court.

See Chapters 5.1 (discussing mandated reporting and the DSS assessment of a report); 5.3.A (discussing the initiation of court action); 6.3 (discussing evidence and proof at an adjudication hearing); and 7 (discussing the various dispositional hearings and options).

The first question for DSS is whether the child meets the statutory criteria of an abused, neglected, or dependent juvenile. One important component of each definition is the role of the adult who creates the child's condition. That role is limited to a parent, guardian, custodian, or caretaker (discussed in sections 2.2.B.6 and 9, above). For both abuse and neglect, there is one exception to the relationship requirement – any minor victim of human trafficking falls under the definition of abuse and neglect. In other words, a minor victim of human trafficking meets the statutory criteria for both abuse and neglect without regard to who created that child's victimization.

1. Abused juvenile. An abused juvenile is defined as any juvenile less than 18 years of age who

- is found to be a minor victim of human trafficking or
- whose parent, guardian, custodian, or caretaker engages in certain conduct resulting in harm or risk of harm to the child.

G.S. 7B-101(1).

(a) Minor victim of human trafficking. The laws defining human trafficking are codified in North Carolina's criminal statutes – specifically, G.S. 14-43.10 through -43.20. Human trafficking includes both sexual servitude and involuntary servitude; however, there are three separate crimes – human trafficking (G.S. 14-43.11), involuntary servitude (G.S. 14-43.12; *see* G.S. 14-43.10(a)(3) for definition), and sexual servitude (G.S. 14-43.13; *see* G.S. 14-43.10(a)(5) for definition). A "minor" is defined as a person who is younger than 18 years old. G.S. 14-43.10(a)(4). A "victim" is a person who is subjected to human trafficking, involuntary servitude, or sexual servitude. G.S. 14-43.10(a)(6).

Effective October 1, 2018, a minor victim of human trafficking must be alleged to be abused and neglected. G.S. 14-43.15. Any juvenile who is found to be a minor victim of human trafficking is an abused juvenile. G.S. 7B-101(1)(i). There is no required relationship between the juvenile and person who created (or allowed for the creation of) the juvenile's circumstance as a victim of human trafficking, involuntary servitude, or sexual servitude. The role of the parent, guardian, custodian, or caretaker is not considered. This expanded definition of abused juvenile was added to the Juvenile Code as required by the federal Justice for Victims of Trafficking Act (discussed in Chapter 1.3.B.11).

The definition of abused juvenile also includes a juvenile whose parent, guardian, custodian, or caretaker commits or allowed to be committed against the child an offense of human trafficking, involuntary servitude, or sexual servitude. G.S. 7B-101(1)(ii)g.

Under this particular subsection of abused juvenile, the role of the parent, guardian, custodian, or caretaker is relevant. This definition was enacted in 2013 (prior to the federal Justice for Victims Trafficking Act) and was not repealed with the 2018 amendment. Although this more restrictive definition still applies, a juvenile may be alleged to be abused under the more expansive definition of abused juvenile set forth at G.S. 7B-101(1)(i).

Resource: For more information about minors and human trafficking, see Margaret Henderson, Sara DePasquale, Nancy Hagan, Christy Croft, *Human Trafficking of Minors and Young Adults: What Local Governments Need to Know*, PUBLIC MANAGEMENT BULLETIN No. 2019/18 (UNC School of Government, Dec. 2019).

(b) Conduct by parent, guardian, custodian, or caretaker. Other than minor victims of human trafficking, conduct that results in a child's status as an abused juvenile as defined by the Juvenile Code includes the action or inaction of a parent, guardian, custodian, or caretaker. The same conduct by someone else may well be deemed abusive in other legal contexts (such as criminal court), but the fact that the harm or risk of harm is caused by the conduct of a parent, guardian, custodian, or caretaker is what makes the child's condition subject to the provisions of the Juvenile Code. While abuse (other than human trafficking) always involves a parent, guardian, custodian, or caretaker, it may involve other people as well. For example, abuse may arise when a parent allows someone else to inflict a non-accidental injury on a child or when a parent creates a substantial risk of serious injury by leaving the child with someone the parent knows to be violent. *See, e.g.*, *In re L.C.*, 253 N.C. App. 67 (2017) (facts involved mother whose infant was severely injured after mother allowed the infant to be in the care of an adult that mother previously agreed the infant would not have contact with due to previous non-accidental injuries to the child while in the presence of this other adult).

(c) Serious physical injury. Abuse includes inflicting or allowing to be inflicted on the juvenile a serious physical injury by other than accidental means or creating or allowing to be created a substantial risk of serious physical injury to the juvenile by other than accidental means. G.S. 7B-101(1)(ii)a. and b. The Juvenile Code does not define "serious physical injury." In the criminal context, it is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." G.S. 14-318.4(d)(2). Whether the injury is "serious" must be determined on the facts of each case. *See, e.g., In re A.N.L.*, 213 N.C. App. 266 (2011) (holding that respondent mother's decision to enter into a physical altercation with her boyfriend while holding infant created a substantial risk of serious physical injury to the child); *In re C.M.*, 198 N.C. App. 53 (2009) (affirming adjudication of abuse based on head trauma caused by a blow to the head). The Juvenile Code does not require the cause of the serious injuries to be explained. *See In re L.Z.A.*, 249 N.C. App. 628 (2016) (affirming abuse adjudication where the findings of fact established the pre-mobile infant sustained multiple fractures and a subdural hematoma when she was in her parents' sole custody and an expert witness testified were likely the result of non-accidental trauma).

(d) Cruelty. Abuse includes using or allowing to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify the child's behavior. G.S. 7B-101(1)(ii)c. This part of the abuse definition has not been relied on often, perhaps because it overlaps with the part of the neglect definition that refers to improper discipline or the part of the abuse definition that refers to serious physical injury or emotional abuse. However, it has been used more recently. In the case *In re H.H.*, 237 N.C. App. 431 (2014), the court of appeals examined this definition of abuse and affirmed the trial court's abuse adjudication after determining that sufficient findings were made that the mother struck her 8-year-old child five times with a belt, leaving multiple bruises on the inside and outside of his legs that were still visible the next day, and the child described "a beating." The statutory criteria looks to the devices or procedures used and not the child's behavior that is sought to be corrected. *See In re F.C.D.*, 244 N.C. App. 243 (2015) (affirming abuse adjudication).

(e) Sexual abuse and other crimes against the child. Abuse includes committing, permitting, or encouraging the commission of a violation of any of the following laws related to sexual abuse *by, with, or upon* the juvenile:

- first- or second-degree forcible rape (G.S. 14-27.21; 14-27.22);
- statutory rape of a child by an adult (G.S. 14-27.23);
- first-degree statutory rape (G.S. 14-27.24);
- first- or second-degree forcible sexual offense (G.S. 14-27.26; 14-27.27);
- statutory sexual offense with a child by an adult (G.S. 14-27.28);
- first-degree statutory sexual offense (G.S. 14-27.29);
- sexual activity by a substitute parent or custodian (G.S. 14-27.31);
- sexual activity with a student (G.S. 14-27.32);
- crime against nature (G.S. 14-177);
- incest (G.S. 14-178) (familial relationships include grandparent, grandchild, parent, child, stepchild, legally adopted child, brother, sister, half-brother, half-sister, uncle, aunt, niece, or nephew);
- preparation of obscene photographs, slides, or motion pictures of the juvenile (G.S. 14-190.5);
- employing or permitting the juvenile to assist in a violation of the obscenity laws (G.S. 14-190.6);
- dissemination of obscene material to the juvenile (G.S. 14-190.7; 14-190.8);
- displaying or disseminating material harmful to the juvenile (G.S. 14-190.14; 14-190.15);
- first or second degree sexual exploitation of the juvenile (G.S. 14-190.16; 14-190.17);
- promoting the prostitution of the juvenile (G.S. 14-205.3(b); note that the juvenile is a minor victim of human trafficking; *see* G.S. 14-43.10(a)(4)–(6); 14-43.15);
- taking indecent liberties with the juvenile (G.S. 14-202.1); or
- unlawful sale, surrender, or purchase of a minor (G.S. 14-43.14).

G.S. 7B-101(1)(ii)d.

A juvenile who commits a violation of one of the designated crimes is an abused juvenile when a parent, guardian, custodian, or caretaker permits the juvenile's commission of a designated crime. *In re M.A.E.*, 242 N.C. App. 312 (2015) (originally unpublished July 21, 2015, but subsequently published) (affirming abuse adjudication of older brother (and younger sister) based on findings that older brother sexually abused his sister after respondents learned of the abuse and failed to take appropriate measures to protect the sister).

Harmful conduct that does not fall under one of these laws may constitute abuse under another part of the abuse definition or may be considered neglect.

Resource: For information on crimes listed above, see JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (UNC School of Government, 7th ed. 2012) and 2018 CUMULATIVE SUPPLEMENT TO NORTH CAROLINA CRIMES (UNC School of Government, 2019).

(f) Emotional abuse. Abuse includes creating or allowing to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others. G.S. 7B-101(1)(ii)e. Few cases go into court solely on the basis of emotional abuse. This may be because it is difficult to determine the precise cause of a child's behavior and emotional state. The statutory criteria does not require that the juvenile have a formal psychiatric diagnosis of any of the psychological conditions set out in the statute. *In re A.M.*, 247 N.C. App. 672 (2016) (affirming abuse adjudication where findings showed the 16-year-old child had anxiety, felt hopeless, and her coping mechanism was to emotionally withdraw as a result of her mother's behavior toward her).

(g) Encouraging or approving delinquent acts. Abuse includes encouraging, directing, or approving of delinquent acts involving moral turpitude committed by the juvenile. G.S. 7B-101(1)(ii)f. "Moral turpitude" is not defined in the Juvenile Code; however, illegality is not equated with moral turpitude. *In re M.G.*, 187 N.C. App. 536, 551 (2007) (rejecting the argument that illegal substance abuse is an act of moral turpitude), *rev'd in part on other grounds*, 363 N.C. 570 (2009). Acts involving moral turpitude include "act[s] of baseness, vileness, or depravity in the private and social duties that a man owes to his fellowman or to society in general." *In re M.G.*, 187 N.C. App. at 551 (quoting *Dew v. State ex rel. N.C. Dep't of Motor Vehicles*, 127 N.C. App. 309, 311 (1997)). Moral turpitude is also considered "[c]onduct that is contrary to justice, honesty, or morality." *In re M.G.*, 187 N.C. App. at 551 (citing BLACK'S LAW DICTIONARY 1030 (8th ed. 2004)). A "delinquent act" is not defined by the Juvenile Code but a "delinquent juvenile" is defined at G.S. 7B-1501(7); *see also* G.S. 143B-805(6) (definition of "delinquent juvenile").

Legislative Note: The Juvenile Justice Reinvestment Act (S.L. 2017-57, sec. 16.D.4, amended by S.L. 2019-186) raises the age of criminal responsibility from 16 to 18 years of age for offenses committed on or after December 1, 2019. Juvenile court jurisdiction will apply to juveniles who are younger than 16 years of age when committing a crime or an infraction and to juveniles who are 16 or 17 years of age when committing a crime or an

infraction other than a violation of the motor vehicle laws. The definition of "delinquent juvenile" reflects that change, effective December 1, 2019. The legislation is commonly referred to as "raise the age."

Resources:
For more information about the new legislation, see
- Jacquelyn Greene, *Raise the Age FAQs*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 22, 2019).
- JACQUELYN GREENE, JUVENILE JUSTICE REINVESTMENT ACT IMPLEMENTATION GUIDE (UNC School of Government, 2019).

(h) Failure to prevent harm. The language "allows to be" in the definition of abuse in various subsections of G.S. 7B-101(1)(ii) means that inaction can constitute abuse. Failure to prevent harm or allowing situations to occur that create a serious risk of harm may be abuse. *See, e.g.*, *In re M.A.E.*, 242 N.C. App. 312 (2015) (originally unpublished July 21, 2015, but subsequently published) (affirming abuse adjudication where respondents permitted older sibling to sexually abuse younger sibling); *In re Adcock*, 69 N.C. App. 222 (1984) (affirming TPR where evidence showed that mother failed to intervene in another adult's abusive conduct toward the child).

For a discussion of case law related to evidence to show abuse, see Chapter 6.3.D.

2. Neglected juvenile. A neglected juvenile is one who

- is found to be a minor victim of human trafficking;
- does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker;
- has been abandoned;
- is not provided necessary medical or remedial care;
- lives in an environment injurious to his or her welfare;
- custody of whom has been unlawfully transferred (*see* G.S. 14-321.2, effective for offenses committed on or after December 1, 2016); or
- has been placed for care or adoption in violation of the law.

G.S. 7B-101(15).

In determining whether a child is neglected, it is relevant whether that child lives in a home where another child has died as a result of suspected abuse or neglect or where another child has been subjected to abuse or neglect by an adult who regularly lives in the home. G.S. 7B-101(15). A prior neglect (or abuse) adjudication alone is not determinative or sufficient; instead, the trial court has discretion to determine how much weight to give to evidence of a prior adjudication. *In re J.A.M.*, 822 S.E.2d 693 (N.C. S.Ct. 2019); *In re S.G.*, 835 S.E.2d. 479 (N.C. Ct. App. 2019).

Although not in the statute, case law requires that the child experience some physical, mental, or emotional impairment or substantial risk of such impairment as a result of the

neglect. *In re J.A.M.*, 822 S.E.2d 693; *In re Stumbo*, 357 N.C. 279 (2003). *See also In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App. 2019); *In re J.R.*, 243 N.C. App. 309 (2015); *In re J.W.* , 241 N.C. App. 44 (2015); *In re A.B.*, 179 N.C. App. 605 (2006); *In re McLean*, 135 N.C. App. 387 (1999) (all emphasizing the need to find some physical, mental, or emotional impairment of the child or a substantial risk of such impairment).

In determining whether the juvenile is neglected, DSS and the court should consider the totality of the evidence. *In re L.T.R.*, 181 N.C. App. 376 (2007).

For additional case law related to evidence to show neglect, see Chapter 6.3.E.

(a) Lack of care, supervision, or discipline. A juvenile is neglected if he or she does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker. G.S. 7B-101(15). The effect the conduct has or could have on the child is key to a determination of neglect. *See In re K.J.D.*, 203 N.C. App. 653 (2010) (affirming neglect adjudication of child who was receiving proper care in a kinship placement because the child would be at substantial risk of harm if either parent removed the child from the placement); *In re Everette*, 133 N.C. App. 84 (1999) (vacating an adjudication of neglect because the court failed to make findings that the child was impaired or at substantial risk of impairment due to lack of care, supervision, or discipline). *See also In re J.A.M.*, 822 S.E.2d 693 (N.C. S.Ct. 2019); *In re J.R.*, 243 N.C. App. 309 (2015); *In re J.W.* , 241 N.C. App. 44 (2015); *In re A.B.*, 179 N.C. App. 605 (2006); *In re McLean*, 135 N.C. App. 387 (1999) (all emphasizing the need to find some physical, mental, or emotional impairment of the child or a substantial risk of such impairment). An explicit finding about the detrimental effect of improper care is not required, however, if the evidence supports such a finding. *See In re C.C.*, 817 S.E.2d 894 (N.C. Ct. App. 2018); *In re H.N.D.*, 364 N.C. 597, *rev'g per curiam for reasons stated in the dissent* 205 N.C. App. 702 (2010).

Lack of proper discipline may include improper (i.e., inappropriate) discipline that does not rise to the level of causing serious physical injury or involve the use of cruel or grossly inappropriate procedures or devices (in which case it would be abuse). However, defining what is improper care or discipline is difficult since beliefs about proper care and discipline can vary widely. For a discussion of case law addressing evidence to establish improper care, supervision, or discipline, see Chapter 6.3.E.2.

(b) Abandonment. A juvenile who has been abandoned is considered neglected. G.S. 7B-101(15). Abandonment may be the culmination of a parent's long-term failure to perform his or her parental responsibilities. It has been described as "willful or intentional conduct" that "evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). A parent abandons a child and relinquishes all parental claims when the parent withholds their love, care, and presence; foregoes the opportunity to display filial affection; and does not provide support and maintenance. *In re C.B.C.*, 832 S.E.2d 692 (N.C. S.Ct. 2019); *In re E.H.P.*, 831 S.E.2d 49 (N.C. S.Ct. 2019); *Pratt v. Bishop*, 257 N.C. 486; *see also In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986).

Abandonment also may be a one-time act, such as leaving an infant at a hospital or fire station under North Carolina's infant safe surrender law. *See* G.S. 7B-500 (temporary custody of infant less than 7 days of age). See Chapters 5.5.B.3 (discussing infant "safe surrender" in North Carolina) and 9.11.G (discussing abandonment as a ground for termination of parental rights).

(c) Lack of medical or remedial care. A juvenile is considered neglected if he or she is not provided necessary medical or remedial care. G.S. 7B-101(15). The Juvenile Code provides no guidance on the meaning of necessary medical or remedial care, nor does it make reference to parents' religious beliefs as a basis for withholding treatment. Although limited and fact-specific, some case law addresses what does or does not constitute necessary remedial or medical care. See Chapter 6.3.E.2(e) (relating to evidence of lack of remedial or medical care).

(d) Injurious environment. A juvenile is neglected if he or she lives in an environment that is injurious to the juvenile's welfare. G.S. 7B-101(15). This may be an environment that puts the child at substantial risk of harm as well as one in which the child actually has been harmed. *See In re Safriet*, 112 N.C. App. 747 (1993). See Chapter 6.3.E.2 (relating to evidence for finding neglect, including cases discussing injurious environment).

(e) Minor victim of human trafficking. The laws defining human trafficking are codified in North Carolina's criminal statutes – specifically, G.S. 14-43.10 through -43.20. Human trafficking includes both sexual servitude and involuntary servitude; however, there are three separate crimes – human trafficking (G.S. 14-43.11), involuntary servitude (G.S. 14-43.12; *see* G.S. 14-43.10(a)(3) for definition), and sexual servitude (G.S. 14-43.13; *see* G.S. 14-43.10(a)(5) for definition). A "minor" is defined as a person who is younger than 18 years old. G.S. 14-43.10(a)(4). A "victim" is a person who is subjected to human trafficking, involuntary servitude, or sexual servitude. G.S. 14-43.10(a)(6).

Effective October 1, 2018, a minor victim of human trafficking must be alleged to be abused and neglected. G.S. 14-43.15. Any juvenile who is found to be a minor victim of human trafficking is a neglected juvenile. G.S. 7B-101(15)(i). There is no required relationship between the juvenile and person who created (or allowed for the creation of) the juvenile's circumstance as a victim of human trafficking, involuntary servitude, or sexual servitude. The role of the parent, guardian, custodian, or caretaker is not considered. This definition of neglected juvenile was added to the Juvenile Code as required by the federal Justice for Victims of Trafficking Act (discussed in Chapter 1.3.B.11).

Resource: For more information about minors and human trafficking, see Margaret Henderson, Sara DePasquale, Nancy Hagan, Christy Croft, *Human Trafficking of Minors and Young Adults: What Local Governments Need to Know*, PUBLIC MANAGEMENT BULLETIN No. 2019/18 (UNC School of Government, Dec. 2019).

(f) Unlawfully placed or transferred. A juvenile is neglected if he or she (1) has been placed for care or adoption in violation of law or (2) has had his or her custody unlawfully transferred pursuant to G.S. 14-321.2 (effective for offenses committed on after December 1, 2016). G.S. 7B-101(15). No appellate court decisions address these bases for an adjudication of neglect. Possible unlawful adoptive placements include those that violate statutes relating to

- unlicensed group homes (*see* G.S. 131D-10.1 *et seq*.),
- unlawful payments related to adoption (*see* G.S. 48-10-102),
- prohibited activities relating to placement for adoption (*see* G.S. 48-10-101), and
- violation of the Interstate Compact on the Placement of Children (*see* G.S. 7B-3800 *et seq*.).

(g) Other children. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. G.S. 7B-101(15). A child need not be physically in the home for the abuse or neglect of another child in the home to be relevant to a neglect determination. *See In re A.B.*, 179 N.C. App. 605 (2006) (holding that a newborn still physically in the hospital may properly be determined to "live" in the home of his or her parents for the purposes of considering whether the abuse or neglect of another child in that home is relevant to the determination of whether the newborn is neglected).

The weight to be given to evidence of neglect of another juvenile in the home is in the trial court's discretion. *In re J.A.M.*, 822 S.E.2d 693 (N.C. S.Ct. 2019); *In re P.M.*, 169 N.C. App. 423 (2005). The fact of prior abuse or neglect of another child, standing alone, may not be sufficient to support an adjudication of neglect; there must be evidence showing a likelihood that the abuse or neglect will be repeated. *See In re J.C.B.*, 233 N.C. App. 641 (2014); *In re S.H.*, 217 N.C. App. 140 (2011). See Chapter 6.3.E.2(b) (addressing evidence involving other children).

3. Dependent juvenile. A dependent juvenile is one who is in need of assistance or placement because

- the juvenile has no parent, guardian, or custodian responsible for his or her care or supervision or
- the juvenile's parent, guardian, or custodian is (1) unable to provide for the child's care or supervision and (2) lacks an appropriate alternative child care arrangement.

G.S. 7B-101(9).

Caretaker is not included in this definition and does not factor into a determination as to whether a child is dependent. The definition of dependency includes no reference to the cause of the parent's inability to care for the child or to the temporary or permanent nature of the inability. *Compare* G.S. 7B-101(9) *with* G.S. 7B-1111(a)(6) (TPR ground based on the

parent's inability to provide proper care and the child's resulting dependency that addresses causes of the parent's inability and requires a reasonable probability that the parent's incapability will continue for the foreseeable future).

Although the statutory definition uses the singular word parent, the court of appeals has held that a child is not dependent if the child has one parent who can provide proper care or supervision. *In re V.B.*, 239 N.C. App. 340 (2015); *see* G.S. 7B-101 ("the singular includes the plural"). The status of both parents must be taken into account in determining whether a child is dependent. *In re H.H.*, 237 N.C. App. 431 (2014) (where mother left children with their father and placement with father was suitable, it was error for the court to adjudicate the children dependent). Both prongs of the definition must be met for both parents: the parent is unable to provide proper care and supervision and lacks an appropriate alternative child care arrangement. *See In re V.B.*, 239 N.C. App. 340. When an appropriate alternative child care arrangement exists (e.g., an appropriate relative is willing and able to assume responsibility for a child), the child is not dependent, despite the parent's inability to provide proper care. *See, e.g.*, *In re C.P.*, 812 S.E.2d 188 (N.C. Ct. App. 2018); *In re J.D.R.*, 239 N.C. App. 63 (2015); *In re B.M.*, 183 N.C. App. 84 (2007); *In re P.M.*, 169 N.C. App. 423 (2005). The parent must have taken some action to identify the alternative child care arrangement and not merely have gone along with the DSS plan. *In re B.P.*, 809 S.E.2d 914 (N.C. Ct. App. 2018).

When a petition is filed before paternity has been determined, evidence that paternity has been established after the petition was filed may be considered by the court at the adjudicatory hearing when determining whether a child is dependent. If paternity is established, without allegations in the petition or when there are allegations, without evidence at the adjudicatory hearing of the father's inability or unwillingness to care for or make alternative child care arrangements for his child, the child cannot be adjudicated dependent. *In re V.B.*, 239 N.C. App. 340.

For case law related to evidence to show dependency, see Chapter 6.3.F.2.

Resource: For more information about the Juvenile Code's definition of abuse, neglect, and dependency, see JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA (UNC School of Government, 3d ed. 2013) with 2016 supplemental chapter.

C. Rights of the Child

Although children's rights in the juvenile justice (delinquency) system have long been recognized by courts and legislatures, children's rights in the context of custody and child protection proceedings are not as clear-cut. The U.S. Supreme Court has recognized that children have constitutional rights but has not defined the nature of a child's liberty interests in preserving family or family-like bonds. *See Troxel v. Granville*, 530 U.S. 57 (2000) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), as reserving the question) and cases cited in footnote 8. Without defining the nature of those rights, federal courts have recognized that a child has a liberty interest in "his family's integrity and in the nurture and companionship of his parents" although those rights are "attenuated by the fact that, unlike adults, children are always in the custody of either their parents or the state as parens patriae." *Jordan by Jordan*

v. Jackson, 15 F.3d 333, 346, 351 (4th Cir. 1994). *See D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (stating"[j]ust as parents possess a fundamental right with respect to their children, children also enjoy a 'familial right to be raised and nurtured by their parents.' ") (quoting *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002)).

Children are the intended beneficiaries of a child welfare system that aims to keep them safe, protect family autonomy, provide fair procedures that protect their own and their parents' constitutional rights, prevent their unnecessary or inappropriate separation from their parents, and ensure that they have safe permanent homes within a reasonable period of time. G.S. 7B-100. Abuse, neglect, and dependency cases involve the government's interference with constitutionally protected rights that impact families. *See In re T.R.P.*, 360 N.C. 588 (2006) (discussing the gravity of the decision to proceed with a DSS assessment and the potential consequences of filing a petition). Although the intended beneficiaries of DSS action, children have rights in that process.

In North Carolina, children who are the subject of abuse, neglect, dependency, and termination of parental rights (TPR) court actions are parties to the proceedings with both constitutional rights and rights established by the Juvenile Code. *See* G.S. 7B-401.1(f); 7B-601(a); 7B-1104. Some of those rights are explicitly stated legal rights (e.g., the right to a guardian ad litem; the right to access DSS and court records; and the right to keep an abuse, neglect, or dependency hearing open to the public). *See, e.g.*, G.S. 7B-601; 7B-302(a1)(2); 7B-2901(b)(1); 7B-801(b). Other rights, although not strictly speaking "legal rights," are implied and relate to case plans, visitation, placement, and permanency planning. *See Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that the "reasonable efforts" provisions in the federal Adoption Assistance and Child Welfare Act did not create an implied private cause of action on behalf of children).

1. Right to participate and be heard. As a party in a juvenile case, the child has a right to participate, but the child's participation differs from that of the respondents. Unlike a respondent parent, guardian, custodian, or caretaker, the child is not issued and served with a summons that directs him or her to appear for a hearing and notifies him or her of possible outcomes or consequences that may be ordered in the action. *See* G.S. 7B-406; 7B-407; 7B-1106. Instead, a copy of the petition and notice of hearing is sent to the local judicial district's guardian ad litem (GAL) office when the petition alleges abuse or neglect. G.S. 7B-408. In a TPR proceeding, if the child is represented by a GAL, the GAL is served with the pleadings and other papers that need to be served. G.S. 7B-1106(a1); *see* G.S. 7B-1106.1(a)(5).

When a GAL is appointed for the juvenile, the child's participation in the proceeding is usually through that GAL. See section 2.3.D, below (discussing the child's GAL). But, a child is not precluded from appearing in court simply because a GAL has been appointed to represent him or her. In some situations, the child must appear at the hearing. For example, the child's testimony may be necessary because he or she is the only witness to an event that must be proved, or if the court is approving a primary permanent plan of Another Planned Permanent Living Arrangement for a 16- or 17-year-old juvenile, the court must first question the juvenile. G.S. 7B-912(c), (d).

At the initial dispositional hearing, the Juvenile Code explicitly gives the child (not the GAL) the right to present evidence and advise the court of what he or she believes is in his or her best interests. G.S. 7B-901(a). At review and permanency planning hearings, the court is required to "consider information from" both the juvenile and the GAL. G.S. 7B-906.1(c). The child's GAL has the right to notice and an opportunity to participate fully in the case. A juvenile who is 12 or older also has a right to individual notice of review and permanency planning hearings and post-TPR placement review hearings. G.S. 7B-906.1(b); 7B-908(b)(1). The court may consider evidence from the juvenile and the juvenile's GAL at post-TPR placement review hearings. G.S. 7B-908(a), (b)(1). A juvenile who is 12 or older must be served with a copy of a TPR order. G.S. 7B-1110(d). When adoption is the child's primary plan, if the child is 12 or older, their consent to the adoption is necessary unless it is waived by the court hearing the adoption proceeding. G.S. 48-3-601(1); 48-3-603(b)(2).

Every juvenile has a right to appeal a final order designated in G.S. 7B-1001. The appeal is taken by the GAL, or if a GAL is not appointed, the juvenile who appeals is then appointed a Rule 17 GAL for the purposes of the appeal. G.S. 7B-1002(1), (2). *See* N.C. R. CIV. P. 17.

Practice Notes: With the exception of an appeal, the Juvenile Code is silent as to how a child participates in the proceeding when a GAL is not appointed in those cases where the child is alleged only to be dependent. That child has the same rights to present evidence and be heard that the Juvenile Code establishes for any juvenile who is the subject of the action. As a party, the child also has constitutional due process rights, which require notice and a meaningful opportunity to be heard. *See In re Adoption of K.L.J.*, 831 S.E.2d 114 (N.C. Ct. App. 2019) (in an adoption of minors case, tribal court order not required to be given full faith and credit as the adoption petitioners and children were not afforded due process in the tribal court). If a child appeals an order but is not represented by a G.S. 7B-601 GAL, a Rule 17 GAL is appointed to represent the child in the appeal. When a court is exercising its discretion in deciding whether to appoint a GAL under G.S. 7B-601 for a child alleged to be dependent only, it may want to consider the child's constitutional due process and statutory rights and how those rights will be protected without the GAL appointment. The court may look to the stated purposes of the Juvenile Code, one of which is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and protect the constitutional rights of juveniles…" when making that decision. G.S. 7B-100(1). A similar analysis may be made in a TPR proceeding where the GAL appointment for the child is discretionary under G.S. 7B-1108(c). *See* G.S. 7B-1108.1(a)(2); *In re P.T.W.*, 250 N.C. App. 589 (2016) (noting in footnote 11 that G.S. 7B-1108.1(a)(2) requires the court to affirmatively consider at a pretrial hearing whether a GAL should be appointed to the juvenile).

When a GAL is appointed, the GAL volunteer and attorney advocate use their discretion to determine how involved a child should be in the proceeding, including the circumstances under which it makes sense for a child to attend court hearings or testify. The child, especially an older child, may also be consulted when making that decision. If the child is subpoenaed by another party, the child must appear, but the child's GAL (or another party) may file a motion to quash the subpoena if the circumstances warrant such a motion. See Chapter 11.2 (discussing child witnesses including quashing of a subpoena).

Resource: To hear from representatives of the N.C. Guardian Ad Litem Program, a local GAL program, and district court judges discussing how the child's perspective is represented in abuse, neglect, or dependency proceedings, listen to *Beyond the Bench: The Child's Voice in Court*, UNC SCHOOL OF GOVERNMENT, NORTH CAROLINA JUDICIAL COLLEGE (Jan. 12, 2017) (also available through iTunes and Stitcher).

2. Best interests and legal rights representation. One of the stated purposes of the Juvenile Code is "[t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court." G.S. 7B-100(5). North Carolina appellate cases have referred to "best interests" as the "polar star" of the Juvenile Code. *See In re A.P.*, 371 N.C. 14, 21 (2018); *In re T.H.T.*, 362 N.C. 446, 450 (2008); *In re R.T.W.*, 359 N.C. 539, 550 (2005); *In re Montgomery*, 311 N.C. 101, 109 (1984).

For purposes of an abuse, neglect, or dependency case, best interests are not defined. In termination of parental rights (TPR) proceedings, G.S. 7B-1110 identifies six factors a court must consider when determining a child's best interests: the child's age; the likelihood of adoption; whether the TPR will aid in accomplishing the child's permanent plan; the bond between the child and respondent parent; the quality of the relationship between the child and proposed adoptive parent, guardian, custodian, or other permanent placement; and a catch-all "any other relevant consideration."

For a discussion of best interests in the context of the court's dispositional decisions in an abuse, neglect, or dependency case, see Chapter 7.3 and in a TPR proceeding, see Chapter 9.12.

In abuse and neglect and most TPR cases, children have the right to have their best interests represented by a guardian ad litem (GAL) and their legal rights protected by an attorney advocate throughout the course of the case. *See* G.S. 7B-601; 7B-1108. See section 2.3.D, below (discussing GAL appointment and role). The child does not have a right to court-appointed counsel to advocate for his or her expressed interest. However, GALs are trained to consider the child's wishes in determining best interests and to convey the child's wishes to the court even if they contradict the GAL's recommendations.

When a child's express interest is made known to the court either through the child's testimony or the GAL, it is not determinative on the court. The court exercises its discretion when making a best interests of the child determination. *See In re L.M.*, 238 N.C. App. 345 (2014) (holding no abuse of discretion when the court determined it was in the child's best interests to order guardianship rather than reunification, even though the 16-year-old child expressed his desire to be returned home to his mother).

Resource: For information on the child's best interests, see CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Determining the Bests Interests of the Child" (2016).

3. Foster Care Children's Bill of Rights. In 2013, the North Carolina legislature enacted a "Foster Care Children's Bill of Rights," which sets out promoted practices while children are

in foster care. The law states that a violation of the bill of rights may not be construed as creating a cause of action against DSS or a person or entity providing foster care. The statute sets out eleven enumerated foster care provisions that the General Assembly promotes:

(1) A safe foster home free of violence, abuse, neglect, and danger.
(2) First priority regarding placement in a home with siblings.
(3) The ability to communicate with the assigned social worker or case worker overseeing the child's case and have calls made to the social worker or case worker returned within a reasonable period of time.
(4) Allowing the child to remain enrolled in the school the child attended before being placed in foster care, if at all possible.
(5) Having a social worker, when a child is removed from the home, to immediately begin conducting an investigation to identify and locate all grandparents, adult siblings, and other adult relatives of the child to provide those persons with specific information and explanation of various options to participate in placement of a child.
(6) Participation in school extracurricular activities, community events, and religious practices.
(7) Communication with the biological parents if the child placed in foster care receives any immunizations and whether any additional immunizations are needed if the child will be transitioning back into a home with his or her biological parents.
(8) Establishing and having access to a bank or savings account in accordance with State laws and federal regulations.
(9) Obtaining identification and permanent documents, including a birth certificate, social security card, and health records by the age of 16, to the extent allowed by federal and State law.
(10) The use of appropriate communication measures to maintain contact with siblings if the child placed in foster care is separated from his or her siblings.
(11) Meaningful participation in a transition plan for those phasing out of foster care, including participation in family team, treatment team, court, and school meetings.

G.S. 131D-10.1.

Most of the provisions of the Foster Care Children's Bill of Rights are mandated by federal law or the Juvenile Code. For example, federal law specifically addresses sibling placement and visitation. DSS must make reasonable efforts to place siblings who have been removed from their home in the same placement unless DSS documents that a joint placement would be contrary to the safety or well-being of any of the siblings. When a joint placement is not made, DSS must provide reasonable efforts for frequent visitation or other ongoing interaction between the siblings absent documentation that such contact would be contrary to the safety or well-being of any of the siblings. 42 U.S.C. 671(a)(31).

Both federal law and the Juvenile Code require that DSS make diligent efforts to notify adult relatives of the child's removal and explore the relatives' willingness and ability to be a placement resource for the child. Federal law imposes a time period for notification of within thirty days of the child's removal. See 42 U.S.C. 671(a)(29); 7B-505(b); 7B-506(h)(2); 7B-901(b).

A child's school stability is addressed by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 and the Every Student Succeeds Act. See Chapter 13.7 for a discussion of those laws related to a child's educational stability.

The federal Preventing Sex Trafficking and Strengthening Families Act required states to adopt a reasonable and prudent parent standard that allows children in DSS custody to engage in normal childhood activities, including extracurricular and community events. The law also requires children who are 14 and older to participate in the development of their case plan. Additionally, a child who will age out of foster care must be provided with copies of his or her social security card, birth certificate, health insurance and medical information, and driver's license or state identification card. The Juvenile Code incorporates these federal mandates in G.S. 7B-903.1(a) and (b) and 7B-912(a) and (b). *See* G.S. 131D-10.2A (definition of "reasonable and prudent parent standard").

D. The Child's Guardian ad Litem[2]

1. Introduction. The foundation of widespread guardian ad litem (GAL) representation for children in abuse and neglect proceedings is the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA), as amended. CAPTA requires states receiving federal funds for the prevention of child abuse and neglect to provide an appropriately trained GAL for each child involved in an abuse or neglect judicial proceeding. Federal law gives states leeway in exactly how to do this but requires that GAL responsibilities include (1) obtaining first-hand a clear understanding of the child's situation and needs, and (2) making recommendations to the court regarding the child's best interests. 42 U.S.C. 5106a(b)(2)(B)(xiii). See Chapter 1.3.B.1 (discussing CAPTA and its influence on the Juvenile Code).

In some states, GALs are attorneys, and in some they are trained volunteers (often called Court Appointed Special Advocates or "CASA"). Other states, like North Carolina, provide a combination of attorneys and volunteers (supported by GAL program staff) to represent children. GAL representation differs from state to state not only in the structure of the GAL programs, but also in the type of representation provided to children. In some states, representation is focused on the best interests of the child, and in others representation is focused on the child's wishes (or expressed interests). In North Carolina, the GAL represents the best interests of the child but also considers the child's wishes and conveys them to the court.

[2] The source for parts of this section is KELLA HATCHER, N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL (2007).

Resources:
The National Association of Counsel for Children (NACC) addresses the legal protection and representation of children by training and educating child advocates and by affecting policy and legal systems change. The NACC offers training opportunities, memberships, and certifications and produces publications focused on the representation of children.

The National Court Appointed Special Advocate/Guardians ad Litem Association (National CASA/GAL Association) works with state organizations throughout the country that support volunteer GALs advocating for abused and neglected children in court. National CASA provides training and training curricula for programs and advocates; technical assistance to programs; national volunteer recruitment programs; and grant funding to local and state programs.

2. North Carolina GAL Program establishment and structure. The North Carolina GAL Program was established by statute in 1983. Current provisions for the implementation and administration of the GAL Program are found in G.S. 7B-1200 through -1204. The GAL Program exists within the state's Administrative Office of the Courts (AOC). The GAL state administrative office oversees local GAL programs that are located in the judicial districts throughout the state; promulgates policy; and provides supervision, training, support, and consultation to local GAL programs.

Every judicial district in the state has at least one local GAL office, and some multi-county districts have more than one office. Each local GAL program has a district administrator responsible for overseeing the program, and each office typically has one or more GAL supervisors. Most local GAL programs have administrative support positions. Local GAL programs handle the recruiting and training of GAL volunteers (using a statewide curriculum), manage the assignment of GAL volunteers to cases, and provide ongoing supervision and support to GAL volunteers. GAL volunteers are screened, must meet specified qualifications, and receive at least thirty hours of pre-service training from GAL staff. After GAL volunteers successfully complete the required pre-service training and background screening, they are sworn in by the court.

Local GAL programs are also responsible for engaging the services of local attorneys, referred to as "attorney advocates," who are appointed by the court and paid from the GAL Program funds. *See* G.S. 7B-601(a); 7B-603(a). Most attorney advocates are independent contractors, but in some judicial districts with large caseloads, the local GAL programs have staff attorneys who are state employees.

Resources:
For more information about the North Carolina GAL Program, see the North Carolina Guardian Ad Litem program website, here.

For a more detailed explanation of the GAL Program role, responsibilities, and ethical considerations, see Chapters 8 and 12 *in* KELLA W. HATCHER, N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL (2007).

3. GAL team representation: volunteer, attorney advocate, and staff. In North Carolina, volunteers usually serve in the role of guardian ad litem (GAL), and if the volunteer is not an attorney, an attorney advocate must be appointed as well. G.S. 7B-601(a). An attorney advocate works as a partner with a GAL volunteer, and both are supported by the local GAL program staff. The attorney advocate, GAL volunteer, and staff act as a team to represent and promote the best interests of the child in abuse and neglect cases and in some dependency and termination of parental rights (TPR) cases.

The North Carolina Supreme Court addressed the concept of GAL team representation when it examined statutes pertaining to GAL representation and stated,

> When read in *pari materia*, these statutes manifest the legislative intent that representation of a minor child in proceedings under sections 7B-601 and 7B-1108 is to be, as DSS argues, by the GAL program established in Article 12 of the Juvenile Code. Under Article 12 volunteer GALs, the program attorney, the program coordinator, and clerical staff constitute the GAL program.

In re J.H.K., 365 N.C. 171, 175 (2011).

Note, in this Manual, use of the term "GAL" when referring to the child's GAL (as opposed to a respondent parent's GAL) typically refers to the team appointed pursuant to G.S. 7B-601.

4. Role and responsibilities of the GAL.

See Chapter 9.4.C for an additional discussion of the child's GAL in a TPR proceeding.

(a) Appointment and standing. The court is required to appoint a GAL for the child in all cases in which a juvenile petition alleges that a child is an abused or neglected juvenile. The court has the discretion to appoint a GAL in cases in which a petition alleges only that a juvenile is dependent. G.S. 7B-601(a). The statute provides no criteria for determining whether a GAL should be appointed in a dependency case; however, any party can bring to the court's attention the potential need for a child to have a GAL. See section 2.3.C.1, above (discussing the child's legal rights including the right to participate in the proceeding).

If the child is represented by a GAL in an abuse, neglect, or dependency case when a TPR petition or motion is filed, that GAL also represents the child in the TPR action unless the court orders otherwise. *See* G.S. 7B-1106(a1); 7B-1106.1(a)(5); 7B-1108(a), (d). In all other TPR cases, the court is required to appoint a GAL for the child only if the respondent parent files an answer or response that denies any material allegation of the TPR petition or motion. G.S. 7B-1108(b). However, in every TPR action, the court has discretion to appoint a GAL for the child at any stage of the proceeding after affirmatively considering at a pretrial hearing whether a GAL should be appointed. G.S. 7B-1108(c); 7B-1108.1(a)(2); *see In re P.T.W.*, 250 N.C. App. 589 (2016).

When the local GAL program receives a copy of a petition alleging abuse or neglect and any notices of hearing, that local program assigns a GAL volunteer, attorney advocate, and staff to the case. *See* G.S. 7B-408; 7B-601(a). Appellate cases have been less concerned with the specifics of how the GAL appointment order reads (i.e., whether it names the program, a volunteer, or a GAL program staff member) than with whether someone was performing the duties of the GAL volunteer and attorney advocate from the time of the required GAL appointment and throughout the case. *See In re A.S.*, 190 N.C. App. 679 (2008) (finding no error where a GAL appointment order did not name a particular person or staff member, but, in fact, a person was performing GAL duties), *aff'd per curiam*, 363 N.C. 254 (2009). Even the lack of an appointment order in the appellate record has been found not to be error as long as the record showed that the GAL carried out his or her duties. *See In re D.W.C.*, 205 N.C. App. 266 (2010); *In re A.D.L.*, 169 N.C. App. 701 (2005).

If a conflict of interest prevents a local GAL program from representing a child, G.S. 7B-1202 authorizes the court to appoint a conflict attorney to represent the child. That attorney may be any member of the district bar. The State and local GAL programs maintain lists of "conflict attorneys" who can represent children in conflict situations.

The GAL volunteer, staff, and attorney advocate have standing to represent the juvenile in all actions related to abuse, neglect, dependency, and termination of parental rights when the team has been appointed. G.S. 7B-601(a). The court of appeals has examined the issue of standing in the context of GAL team representation. Relying on the North Carolina Supreme Court case *In re J.H.K.*, 365 N.C. 171 (2011), the court of appeals held that a TPR petition signed by the GAL program specialist "by and through the undersigned Attorney Advocate" and not by the volunteer GAL directly involved in the action was not improper. *In re S.T.B.*, 235 N.C. App. 290, 293 (2014).

The GAL appointment terminates when the permanent plan has been achieved for the juvenile and is approved by the court, but the court may reappoint the GAL in its discretion or in response to a motion of any party showing good cause for reappointment. G.S. 7B-601(a).

AOC Form:
AOC-J-207, Order to Appoint or Release Guardian Ad Litem and Attorney Advocate (June 2014).

Practice Notes: The AOC form order used for GAL appointments contains space to name a GAL volunteer, attorney advocate, and a GAL staff person. This team appointment ensures that a GAL staff person performs the duties of the GAL any time there is a gap between one GAL volunteer leaving and a new GAL volunteer being appointed.

Individuals working as GAL volunteers or attorney advocates may be appointed only as authorized by statute in abuse, neglect, dependency, and TPR cases. *See* G.S. 7B-601; 7B-1108. There is no statutory authority for GAL volunteers or attorney advocates working under the supervision of the GAL Program to be appointed in delinquency or

undisciplined cases or cases in which a GAL is appointed pursuant to Rule 17 of the Rules of Civil Procedure. The GAL Program cannot "consent" to represent a child when the representation is not authorized by statute. In TPR proceedings, the Juvenile Code authorizes the appointment of GALs who are trained and supervised by the GAL Program only when the child is or has been the subject of an abuse, neglect, or dependency petition, but makes an exception if the local GAL program consents to the appointment for good cause. G.S. 7B-1108. Otherwise, a GAL appointed for a child in a TPR case that was not preceded by an abuse, neglect, or dependency case typically is an attorney not connected with the GAL Program.

(b) Representation. The GAL volunteer and attorney advocate are responsible for protecting and promoting the best interests of the child, and the attorney advocate is responsible for protecting the child's legal rights as well. G.S. 7B-601(a). This type of representation differs from traditional legal representation in which the focus is on a client's wishes or expressed interests. GALs determine and consider the child's wishes and report those to the court. However, where the GAL's determination of best interests differs from the child's expressed wishes, the GAL advocates his or her perspective but also communicates the child's wishes to the court.

The North Carolina Supreme Court emphasized the concept of GAL team representation in assessing fulfillment of the statutory duties of GAL representation in a case in which the attorney advocate, but not the GAL volunteer, was present at the TPR hearing. In reversing and remanding the decision of the court of appeals that conducting the hearing without the GAL volunteer was error, the supreme court found that the duties of the GAL specified in the statute were in fact fulfilled by the GAL program staff, the attorney advocate, and the volunteer as a team, and that the court of appeals had failed to recognize the concept of GAL team representation. The supreme court held that the GAL volunteer's presence at the hearing was required only if the attorney advocate or the trial court deemed the GAL volunteer's presence necessary to protect the child's best interest. *In re J.H.K.*, 365 N.C. 171 (2011). *See also In re A.N.L.*, 213 N.C. App. 266 (2011) (confirming appropriateness of GAL staff member's appointment as GAL and holding that GAL representation was adequate where attorney advocate but not appointed GAL was present in court for the hearing). The supreme court in *In re J.H.K.*, 365 N.C. 171, distinguished an earlier case, *In re R.A.H.*, 171 N.C. App. 427 (2005), in which the court of appeals found error. In that case, there was an attorney advocate at the TPR hearing but a GAL volunteer was not appointed until after three and a half days of testimony had taken place. The court of appeals held that no one was fulfilling the statutory duty of investigating and determining the best interests of the child and that the GAL volunteer and attorney advocate may not "pinch hit" for one another. The *In re J.H.K.* decision by the supreme court expressly interpreted the Juvenile Code to permit a GAL who is an attorney to perform the duties of both the GAL and the attorney advocate.

Practice Note: For clarity, when an attorney is serving in both the role of the GAL volunteer and the attorney advocate, that dual appointment should be clear in the order of appointment.

Appellate courts have rejected the notion of reversing a case for failure to appoint a GAL in a prior proceeding that is not on direct appeal. *See In re J.E.*, 362 N.C. 168 (2008), *rev'g per curiam for reasons stated in the dissent* 183 N.C. App. 217 (2007); *In re O.C.*, 171 N.C. App. 457 (2005).

(c) Attorneys talking to child. Just as an attorney should not communicate with a party who is represented by counsel without that counsel's consent, authorization of the child's attorney advocate is required for another attorney to talk to the child. This applies to parents' attorneys, DSS attorneys, prosecutors and law enforcement officers who are acting as agents of prosecutors, and criminal defense attorneys. *See* North Carolina State Bar, RPC 249 (1997) and RPC 61 (1990); 2009 Formal Ethics Opinion 7 (Jan. 27, 2012).

(d) Duties and responsibilities. The Juvenile Code sets out specific duties of the GAL, including to

- make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs;
- facilitate, when appropriate, the settlement of disputed issues;
- offer evidence and examine witnesses at adjudication;
- explore options with the court at the dispositional hearing;
- conduct follow-up investigations to ensure that the orders of the court are being properly executed;
- report to the court when the needs of the juvenile are not being met; and
- protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

G.S. 7B-601. Note that these same duties apply in TPR cases pursuant to G.S. 7B-1108.

In addition, if the child is called to testify in a criminal action relating to abuse, the court may authorize the GAL to accompany the child to court. G.S. 7B-601(b).

Typically, the GAL volunteer has the primary role of communicating with the child, interviewing family and others, collecting and reviewing records, and determining recommendations for the court as to needed services and placement for the child. The attorney advocate receives information from the GAL volunteer and staff and handles the legal aspects of the case, including presenting the GAL volunteer's recommendations in court and advocating the GAL volunteer's position related to the child's best interests. *See In re R.A.H.*, 171 N.C. App. 427 (2005). However, the North Carolina Supreme Court has emphasized the concept of GAL team representation, taking the focus off of which GAL duty is performed by which team member and instead focusing on whether all the duties are in fact performed. *In re J.H.K.*, 365 N.C. 171 (2011).

See Chapter 14.1.D related to the GAL's access to confidential information.

Resource: Information regarding the complexities of representing children in child protective proceedings is available at "Representing Children" on the Child Welfare Information

Gateway, U.S. Department of Health and Human Services website.

5. Fees for child's GAL attorney advocate and experts. GAL volunteers work under the supervision of the GAL Program without compensation. GAL volunteers are paired with attorney advocates who are compensated. In some cases, an attorney is appointed to act as both GAL volunteer and attorney advocate. The child's attorney advocate, regardless of whether he or she is also serving in the role of GAL volunteer, is paid as follows:

- Most often, the attorney advocate is paid by the GAL Program in the Administrative Office of the Courts (AOC), which either contracts with or employs GAL attorneys.
- When the local GAL program has a conflict that precludes representation, a GAL conflict attorney is appointed to represent the juvenile and is paid by the AOC through the GAL Program.

See G.S. 7B-603(a); 7B-1202.

Whenever an attorney or GAL is appointed for a juvenile pursuant to G.S. 7B-601, the court may require the juvenile's parent, guardian, or a trustee (if applicable) to pay the fee, but only if a juvenile is adjudicated abused, neglected, or dependent or parental rights are terminated. G.S. 7B-603(a1); 7A-450.1.

While not addressed in the statutes, the way the AOC handles payment for experts for the GAL is similar to the way experts are paid for indigent parents. See section 2.4.E., below. For the GAL Program to use state funds to pay for an expert requested by the attorney advocate, a motion for funds must be made and granted by the court.

AOC Forms:

- AOC-J-485, Application for Expert Witness Fee in Juvenile Cases At The Trial Level (Dec. 2017).
- AOC-J-486, Order for Expert Witness Fee in Juvenile Cases At The Trial Level (Dec. 2017).
- AOC-G-200, Civil Case Trial Level Fee Application Order For Payment Judgment Against Parent/Guardian (Aug. 2019).

2.4 Rights of the Parent

A. Protection of Parent-Child Relationship

1. Generally. The first stated purpose of the Juvenile Code is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." G.S. 7B-100(1). Unless a parent's rights have been terminated; the parent has relinquished the child for adoption; or the parent has been convicted of a first- or second-degree forcible rape, statutory rape of a child by an adult, or first-degree statutory rape, and any of those criminal acts resulted in the conception of the child that is the

subject of the proceeding, both parents should be named as parties to any abuse, neglect, or dependency proceeding concerning their child. G.S. 7B-401.1(b). That applies to a parent whose identity or whereabouts is unknown and regardless of whether the parent is alleged to have contributed to the child's condition of abuse, neglect, or dependency. An abuse, neglect, or dependency proceeding involves government intervention by a county DSS into constitutionally protected parent-child relationships. A termination of parental rights (TPR) action represents the most severe form of state intervention—asking a court to completely sever the legal relationship between a child and parent.

2. U.S. Supreme Court. It is well-settled law that parents have the right to rear their children without the interference of the state. The U.S. Supreme Court has long recognized that parents have a liberty interest in the companionship, custody, care, and control of their children. *See Troxel v. Granville*, 530 U.S. 57 (2000) (declaring a non-parent visitation statute unconstitutional as applied where grandparents were awarded visitation rights based solely on the court's determination of the children's best interest, without a finding of parental unfitness or any special weight given to the parent's determination of the children's best interests). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). This liberty interest, rooted in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, continues throughout an abuse, neglect, dependency, and TPR proceeding. *See Santosky v. Kramer*, 455 U.S. 745, 753 (holding procedural due process applies to TPR hearings and stating that the parents' fundamental liberty interest "in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state").

The Supreme Court also has recognized (in the cases cited above) that the rights of the parent are not absolute. There is a presumption that parents act in their child's best interests, but when a parent is unfit, the state may intervene. *See Troxel*, 530 U.S. 57; *Parham v. J.R.*, 442 U.S. 584 (1979).

Regarding putative fathers, the Supreme Court has held that a biological link between a child and putative father does not establish the constitutional protections of the parent-child relationship. That biological link provides the putative father with the opportunity to develop a relationship with his child and accept responsibility for establishing the parent-child relationship. The putative father must grasp that opportunity before the paramount constitutional rights of parents regarding their children apply to the putative father. *Lehr v. Robertson*, 463 U.S. 248 (1983).

3. North Carolina appellate courts. North Carolina case law affirms parents' constitutional liberty interest in the care and companionship of their children and recognizes that the state or other parties who are not parents may interfere with the parent-child relationship only when the parent has acted inconsistently with the parent's superior right as a parent. The general rule in a custody dispute between a parent and a non-parent is that the parent is entitled to custody unless there is proof that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's protected status as a parent. *See Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994). Only upon finding one of those circumstances by clear and convincing evidence may the court apply a "best interest" test,

which applies in custody cases between parents, to determine a child's custody when the contest is between a parent and anyone who is not a parent. *Price*, 346 N.C. 68; *Petersen*, 337 N.C. 397; *Owenby v. Young*, 357 N.C. 142 (2003); *Moriggia v. Castelo*, 805 S.E.2d 378 (N.C. Ct. App. 2017).

The fact that the custody issue arises in an abuse, neglect, or dependency proceeding does not change the rule. *See In re D.A.*, 811 S.E.2d 729 (N.C. Ct. App. 2018) (vacating and remanding for new hearing portion of permanency planning order that awarded *de facto* permanent custody to foster parents because of insufficient findings to support conclusion that father was either unfit or acted inconsistently with his parental rights); *In re E.M.*, 249 N.C. App. 44 (2016) (error to award custody to a non-parent in a permanency planning review order which did not state that the trial court applied the clear and convincing standard when determining whether the parent's conduct had been inconsistent with her constitutionally protected status); *In re D.M.*, 211 N.C. App. 382 (2011) (holding in a dependency case that where neither parent had been found to be unfit and there was no finding that the father acted inconsistently with his constitutional rights as a parent, the trial court erred in awarding permanent custody of the child to the grandmother). *See also In re B.G.*, 197 N.C. App. 570 (2009) (reversing permanency planning order giving custody to relatives where court applied best interest standard without a showing that father was unfit, had neglected the child, or had acted inconsistently with his constitutionally protected status as a parent); *cf*. *In re T.P*., 217 N.C. App. 181 (2011) (refusing to consider respondent's argument that trial court erred in applying the best interest standard, because respondent did not raise this objection at trial and constitutional issues not raised and addressed at trial will not be considered for the first time on appeal). Note that majority of the opinions addressing the application of the finding regarding a parent acting inconsistently with his or her parental rights in abuse, neglect, or dependency cases (including the ones cited above) examined permanency planning orders. *Cf. In re S.J.T.H.*, 811 S.E.2d 723 (N.C. Ct. App. 2018) (relying on holding in opinion addressing a permanency planning order; reversing in part the initial dispositional order that did not award custody to the non-removal parent and remanding for new order to address that parent's rights and grant that parent custody unless clear and convincing evidence supports a different dispositional alternative).

Abuse, neglect, and abandonment by a parent constitute conduct inconsistent with the parent's protected status; other conduct must be evaluated on a case-by-case basis as to whether it is inconsistent with a parent's constitutionally protected rights. *Price*, 346 N.C. 68. There is no bright-line test when determining if a parent has acted inconsistently with his or her parental rights. *See In re A.C.*, 247 N.C. App. 528 (2016) (examining the mother's conduct and intentions and holding that she acted inconsistently with her parental rights). The determination is not based on whether the conduct consisted of good or bad acts but rather the court considers the voluntariness of the parent's actions and the relinquishment of exclusive parental authority to a third person. *Mason v. Dwinnell*, 190 N.C. App. 209 (2008). As part of its analysis, the court looks at the parent's intentions. *Mason*, 190 N.C. App. 209; *In re A.C.*, 247 N.C. App. 528. When determining whether a parent is unfit or acted inconsistently with his or her parental rights, "evidence of a parent's conduct should be viewed cumulatively." *Owenby*, 357 N.C. at 147 (2003).

Regarding putative fathers, the court may examine his conduct to determine whether he acted inconsistently with his parental rights by failing to grasp the opportunity to establish a relationship with the child. *Adams v. Tessener*, 354 N.C. 57 (2001) (holding father acted inconsistently with his parental rights when after being informed about the pregnancy and likelihood that he was the father, he did nothing about the pregnancy and impending birth and after the birth, did not inquire about the child or mother). In an adoption proceeding, the North Carolina Supreme Court expanded the putative father's need to grasp the opportunity to acts that would put him on notice of the pregnancy when the opportunity to be on such notice existed. *In re S.D.W.*, 367 N.C. 386 (2014) (holding the putative father did not fall in the class of fathers who may claim a liberty interest in developing a relationship with a child; concluding that even though the mother hid the child's birth from him, he was passive in discovering whether she may have become pregnant with his child despite ample evidence that it was possible).

See Chapter 7.3 and 7.10.B.5 (discussing court opinions addressing the child's best interests standard and need for findings regarding the parent's conduct when ordering custody or guardianship to a non-parent).

B. Notice and Opportunity to Be Heard

1. Entitled to due process. As a party to the juvenile proceeding, a parent is entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds); *see also In re H.D.F.* 197 N.C. App. 480 (2009) (reversing a neglect adjudication when the required notice of key events in the proceeding was not given to the *pro se* respondent parent). "Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual." *In re S.G.V.S.*, 811 S.E.2d 718, 721 (N.C. Ct. App. 2018) (quoting case not cited here).

When one parent is served in an abuse, neglect, or dependency case, the other parent's due process rights are not necessarily violated if he or she is not served before the adjudication and disposition hearings. *In re Poole*, 151 N.C. App. 472 (2002) (in case where mother was served with summons, discussing due process rights of father who was not served and to whom no summons was issued and deciding his rights were adequately protected in light of state's interest in the welfare of children, the child's right to be protected, the father's ability to seek review of the court's order, and the potential for the child's return to his care), *rev'd per curiam for reasons stated in the dissent*, 357 N.C. 151 (2003).

2. Participation in hearings. Parents have a right to participate in proceedings in a meaningful way. The summons in an abuse, neglect, or dependency case requires the parent to appear for a hearing at a specified time and place. G.S. 7B-406(a). In a termination of parental rights (TPR) case, the summons or notice includes notice that the parents may attend the hearing. G.S. 7B-1106(b)(6); 7B-1106.1(b)(6). The court of appeals has held that a parent does not have an absolute right to be present at a hearing but "the magnitude of 'the private interests

affected by the [termination] proceeding, clearly weighs in favor of a parent's presence at the hearing.' " *In re S.G.V.S.*, 811 S.E.2d at 721 (N.C. Ct. App. 2018) (reversing and remanding for new hearing; holding the magnitude of the interests at stake in a TPR hearing and the trial court's denial of mother's continuance request because mother was previously scheduled to appear in a criminal action in another county at the same time as later scheduled TPR hearing involved a misapprehension of law and substantial miscarriage of justice).

(a) Incarcerated parent. When a parent is incarcerated, the parent's attendance may be impossible or require special steps. On application of a party or the attorney for a party who wants the parent to attend or testify, the court may issue a writ to have the parent brought before the court. The closest statutory authority for such a writ, G.S. 17-41, provides for a writ of habeas corpus ad testificandum. Although an application for the writ must state that the person's testimony is believed to be "material and necessary," the same procedure is used when a parent wants to attend but does not plan to testify or has already testified. The court may issue the writ only for someone who is in a facility in North Carolina. If the parent is in a federal facility in this state, the person seeking the parent's attendance should contact that facility directly to determine whether the parent can be brought to court if a writ is issued. A North Carolina court has no authority to effect the attendance of someone who is incarcerated in another state, but parties may explore with an out-of-state facility the possibility of having the incarcerated party participate remotely.

The court's consideration of whether to issue a writ of habeas corpus ad testificandum or take other steps to facilitate a parent's participation in a hearing requires application of the balancing test articulated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In determining whether due process requires a particular procedure, the court must weigh three factors: (1) the private interests at stake, (2) the risk of deprivation posed by the use (or absence) of the procedure, and (3) the state's interest in providing (or not providing) the procedure. *Mathews,* 424 U.S. at 335. North Carolina courts have applied the test in several juvenile cases. *See*, *e.g.*, *In re K.D.L.*, 176 N.C. App. 261 (2006) (upholding trial court's denial of incarcerated father's motion to have his deposition taken); *In re Quevedo*, 106 N.C. App. 574 (1992) (holding that father's due process rights were not violated when court denied his motion for transportation to hearing and allowed hearing to proceed in his absence); *In re Murphy*, 105 N.C. App. 651 (holding that the court did not violate the parent's statutory or due process rights by denying a motion for transportation from a correctional facility to the termination hearing), *aff'd per curiam*, 332 N.C. 663 (1992).

Even when the parent does not attend the hearing, other steps to ensure protection of the parent's rights may be appropriate. In *In re Quevedo*, the court said:

> We note that the use of depositions is allowed in civil cases where a witness is unable to attend because of age, illness, infirmity or imprisonment. N.C. Gen. Stat. § 1A-1, Rule 32(a)(4). Therefore, 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.

> The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process.

106 N.C. App. at 582.

AOC Form:
AOC-G-112, Application and Writ of Habeas Corpus ad Testificandum (June 2012).

Resources:
See the Office of Indigent Defense Services (IDS), Office of Parent Defender, chart, "Participation in Abuse, Neglect, Dependency, and Termination of Parental Rights Proceeding by Incarcerated Parents."

For the North Carolina Department of Public Safety Policy and Procedures related to inmate access to the courts and to their attorneys, see Chapter G, Section .0200 "Court Related Procedures" (Jan. 16, 2018).

(b) Exclusion from courtroom. Use of the *Mathews v. Eldridge* due process test is not limited to applications for writs to be brought to a hearing. It is also used when parents have been excluded from the proceeding. *See, e.g.*, *In re J.B.*, 172 N.C. App. 1 (2005) (holding that mother could be excluded from the courtroom during the child's testimony); *In re Faircloth*, 153 N.C. App. 565 (2002) (upholding removal of disruptive parent from termination hearing, without providing means for him to testify, based on strong governmental interest and low risk of error).

(c) Testimony of parties or witnesses in other states. All abuse, neglect, dependency, and TPR proceedings are subject to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A. G.S. 50A-511 addresses taking the testimony of parties or witnesses in another state and provides:

> (a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.
>
> (b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.
>
> (c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing

may not be excluded from evidence on an objection based on the means of transmission.

C. DSS Perspective

Recognition of and respect for parents' rights are essential elements of good social work practice. The North Carolina Department of Health and Human Services Division of Social Services' Child Welfare Manual states that parents and other care providers involved in juvenile cases are entitled to

- Be treated in a courteous and respectful manner;
- Know DSS's legal authority and right to intervene in cases of child abuse, neglect, or dependency;
- Know the allegations of abuse, neglect, or dependency reported at the first contact with DSS;
- Know any possible action that DSS may take, including petitioning the court to remove the child in order to ensure safety and protection;
- Know DSS's expectations of the parent/caregiver;
- Know what services they can expect from DSS and other community agencies; and
- Have a family services case plan that is clearly stated, measurable, and specific, that includes time-limited goals, and that is mutually developed by the DSS and the parent/caretaker.

DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE MANUAL "Purpose, Philosophy, Legal Basis and Staffing" p. 9, available here.

D. Representation

1. Right to counsel. Parents have a statutory right to counsel, and to court-appointed counsel if indigent, in all abuse, neglect, dependency, and termination of parental rights (TPR) proceedings. G.S. 7B-602; 7B-1101.1. A parent's eligibility and desire for appointed counsel may be reviewed at any stage of the abuse, neglect, dependency, or TPR proceeding. A parent's right to counsel includes the right to the effective assistance of counsel. *In re C.D.H.*, 829 S.E.2d 690 (N.C. Ct. App. 2019); *In re Oghenekevebe*, 123 N.C. App. 434 (1996) (holding that the right to counsel provided by then G.S. 7A-289.23 included the right to effective assistance of counsel). See subsection 5, below.

2. Appointment of counsel. When an abuse, neglect, or dependency petition is filed, the clerk must appoint provisional counsel for the parent and indicate that appointment on the summons issued to the parent or a separate notice. G.S. 7B-602(a); *see* G.S. 7B-406(b)(2). When a TPR *petition* is filed, the clerk must appoint provisional counsel unless the parent is already represented by appointed counsel, in which case that appointment continues. G.S. 7B-1101.1(a); *see* G.S. 7B-1106(b)(3).

When a TPR *motion* is filed, an attorney appointed to represent the parent in the underlying abuse, neglect, or dependency proceeding will continue to represent the parent in the TPR

matter unless the court orders otherwise. *See* G.S. 7B-1106.1(b)(3). The notice to the parent must state that the parent is entitled to appointed counsel if indigent and, if not already represented by an attorney, may contact the clerk to request counsel. G.S. 7B-1106.1(b)(4). Provisional counsel is not appointed; instead, an unrepresented indigent parent must either contact the clerk or request counsel when he or she appears in court. *See* G.S. 7B-1108.1 (providing for pretrial hearing); 7B-1109(b) (requiring the court at adjudication to inquire whether a parent who is present and unrepresented is indigent and wants counsel).

Appointments of counsel are made in accordance with the rules adopted by the North Carolina Office of Indigent Defense Services. G.S. 7B-602(a); 7B-1101.1(a).

When provisional counsel is appointed, the court must confirm the appointment at the first hearing in an abuse, neglect, or dependency proceeding, and at the first hearing after service on the parent in a TPR proceeding, unless the parent

- does not appear at the hearing,
- has retained counsel,
- waives the right to counsel, or
- is not indigent.

G.S. 7B-602(a); 7B-1101.1(a). *See* G.S. 7B-1108.1(a)(1) (retention or release of provisional counsel may be addressed at a pretrial hearing).

In the case *In re D.E.G.*, 228 N.C. App. 381 (2013), the court noted that while G.S. 7B-1101.1(a) requires the court to dismiss provisional counsel when the parent does not appear at the first hearing, counsel who was already representing the parent in the underlying abuse, neglect, or dependency proceeding was not provisional counsel. The provisional counsel statute was inapplicable. The appointed attorney was required to seek leave from the court to withdraw. The court has discretion when deciding whether to allow the attorney's motion to withdraw; however, when an attorney has not provided his or her client prior notice of the intent to withdraw, the court does not have discretion. Instead, the court must either grant a continuance so that the notice may be provided to the client or deny the attorney's request to withdraw. *See also In re M.G.*, 239 N.C. App. 77 (2015) (attorney who represented respondent mother in the underlying proceeding in which the child was adjudicated neglected was not provisionally appointed in the TPR proceeding; trial court erred in allowing respondent's counsel to withdraw without first confirming that respondent had been notified of counsel's intention to do so).

AOC Form:
AOC-J-144, Order of Assignment or Denial of Counsel (Abuse, Neglect, Dependency, Termination of Parental Rights; Post-DSS-Placement Review and Permanency Planning Hearings (Delinquent/Undisciplined)) (Oct. 2019).

3. Waiver of counsel. Both G.S. 7B-601 (for abuse, neglect, and dependency cases) and 7B-1101.1 (for TPR cases) provide that when a parent qualifies for appointed counsel, the court may allow the parent to proceed without counsel only after examining the parent on the record

and making findings of fact sufficient to show that the waiver is knowing and voluntary. Before these provisions became effective on October 1, 2013, the North Carolina Supreme Court held that a parent's waiver of counsel in a juvenile case was not governed by G.S. 15A-1242, which applies only in criminal cases. *In re P.D.R.*, 365 N.C. 533 (2012). Subsequently, the court of appeals held that the trial court must make an inquiry sufficient to determine whether a parent's waiver was knowing and voluntary, the standard now stated in the Juvenile Code. *See In re J.K.P.*, 238 N.C. App. 334 (2014) and *In re A.Y.*, 225 N.C. App. 29 (2013) (both holding that trial court's inquiry relating to the respondent's waiver was adequate to determine that the waiver was knowing and voluntary).

Since amendments made to the Juvenile Code in 1998, a parent does not have a statutory right to self-representation in an abuse, neglect, or dependency proceeding. A parent also does not have a constitutional right to represent him or herself in a juvenile proceeding. The court exercises discretion in deciding whether to allow a parent to waive counsel and represent himself or herself. *See In re J.R.*, 250 N.C. App. 195 (2016) (holding no abuse of discretion when the court denied mother's request to proceed pro se given possibility of criminal charges arising from the same incident and finding that her waiver was not knowing and voluntary because she was influenced and possibly coerced by her abusive boyfriend to waive counsel).

When a respondent parent has a Rule 17 GAL appointed because of his or her incompetency, that GAL's consent to the parent's waiver of appointed counsel should be obtained. *See In re P.D.R.*, 224 N.C. App. 460, 470 (2012) (decided prior to amendment in GAL statute for respondent parent that removed a GAL of assistance based on diminished capacity, holding if respondent had diminished capacity and a GAL of assistance, "then she was free to make her own decision whether to proceed pro se," but if she had a GAL of substitution based on incompetency, "the GAL would act on behalf of respondent mother, making the decision necessary to seek a result favorable to the mother"); *In re A.Y.*, 225 N.C. App. at 38 (decided prior to amendment in GAL statute removing a GAL of assistance based on a parent's diminished capacity, and stating "[b]ecause the GAL was acting only in an assistive capacity, respondent mother had the ability to waive counsel, so long as that waiver was knowing and voluntary"). See section 2.4.F, below (discussing GAL appointment for respondent parent and earlier statutes establishing GAL role as either substitution or assistance).

AOC Form:
AOC-J-143, Waiver of Parent's Right to Counsel (Oct. 2019).

4. Withdrawal of counsel. Appellate courts have held that an attorney's withdrawal from a case requires: (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. *In re D.E.G.*, 228 N.C. App. 381 (2013) (citing *Smith v. Bryant*, 264 N.C. 208 (1965)). Whether to permit an attorney to cease representation of a client is within the discretion of the trial court. However, where the client has no notice of the attorney's intent to withdraw, the trial court has no discretion and must either grant a reasonable continuance or deny the motion to withdraw. *In re D.E.G.*, 228 N.C. App. 381. To determine whether circumstances would permit withdrawal when the parent is absent from the hearing, the court must inquire into the efforts made by counsel to contact the parent. *In re D.E.G.*, 228 N.C. App. 381; *see In re M.G.* 239 N.C. App. 77 (2015) (vacating a TPR order and remanding the

case because the trial court erred in allowing respondent's counsel to withdraw without first confirming that respondent had been notified of counsel's intention to do so).

Practice Note: If an attorney is unable to locate his or her client, the attorney must make reasonable efforts to notify the client of his or her intent to withdraw. This can be done by calling collateral contacts (i.e., family members, employer, landlord), by electronic communication, and by complying with the service requirements of Rule 5(b)(2)(b) of the Rules of Civil Procedure.

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5. Ineffective assistance of counsel. A parent asserting a claim of ineffective assistance of counsel must show that the attorney's performance (1) was deficient (or fell below an objective standard of reasonableness) and (2) was so deficient that the parent was denied a fair hearing. *In re C.B.*, 245 N.C. App. 197 (2016) (holding assuming arguendo that counsel's performance was deficient, mother was not deprived of a fair hearing); *In re S.N.W.*, 204 N.C. App. 556 (2010); *In re S.C.R.*, 198 N.C. App. 525 (2009). The parent alleging ineffective assistance of counsel has the burden of proving the attorney's performance was below the required standard, and that burden "is a heavy one for [the client] to bear." *In re C.B.*, 245 N.C. App. at 214. An attorney's failure to advocate or remaining silent during the proceeding, is not necessarily ineffective assistance of counsel. *In re C.D.H.*, 829 S.E.2d 690 (N.C. Ct. App. 2019); *In re T.D.*, 248 N.C. App. 366 (2016) (originally unpublished July 19, 2016, but subsequently published).

Several opinions address a respondent parent's ineffective assistance of counsel claim where in the TPR hearing, the respondent did not appear and the respondent's attorney did not participate in the hearing. For such a determination, when the record is insufficient, the court of appeals has held the appropriate remedy is to remand the case back to the trial court to make further inquiries about the reasons for the respondent's absence from the hearing, the attorney's efforts to contact the respondent, and the reasons for the attorney's actions. *In re C.D.H.*, 829 S.E.2d 690 (remanded due to insufficient record for trial court to determine if respondent waived her right to counsel based on her own actions or whether the attorney's performance was deficient); *In re A.R.C.*, 830 S.E.2d 1 (N.C. Ct. App. 2019) (remanded due to insufficient record for trial court to make a determination about the adequacy of the attorney representation, including efforts by attorney to contact mother and adequately represent her at the hearing); *In re S.N.W.*, 204 N.C. App. 556 (2010) (remanded for trial court to determine what efforts counsel made to contact and adequately represent respondent).

If, on remand, the trial court determines the attorney's actions were deficient, the court should then determine whether the deficiencies deprived the parent of a fair hearing. *In re C.D.H.*, 829 S.E.2d 690; *In re A.R.C.*, 830 S.E.2d 1. On remand, the trial court should make the necessary findings in response to the inquiry and determine whether the parent is entitled to a new hearing with the appointment of new counsel. *In re C.D.H.*, 829 S.E.2d 690; *In re S.N.W.*, 204 N.C. App. 556.

As part of the ineffective assistance of counsel cases, the court of appeals has addressed issues related to communication between the attorney and client. In a private TPR action, *In*

re B.L.H., 239 N.C. App. 52 (2015), in which the respondent father asserted ineffective assistance of counsel, the court of appeals concluded that trial counsel did not make sufficient efforts to communicate with the respondent in order to provide him with effective representation and vacated the TPR order, remanding the case for a new hearing. The only action taken by counsel related to communicating with the respondent was to contact the federal prison to learn about its email system. Counsel did not write any letters or send any emails to the respondent and did not engage in any phone conversations with the respondent; he did not present evidence on the respondent's behalf at the hearing and failed to make a cogent argument at the adjudication phase. The court of appeals pointed out that it was not a case where the respondent had failed to cooperate; to the contrary, the respondent acted promptly upon receiving the TPR summons with a response directed to his appointed counsel and timely returned an affidavit of indigency.

In another TPR case, *In re M.T.-L.Y.*, 829 S.E.2d 496 (N.C. Ct. App. 2019), the court of appeals determined that the respondent mother was not denied effective assistance of counsel when the trial court denied her attorney's motion to continue the hearing. A component of effective assistance of counsel involves adequate time for the attorney and client to prepare a defense. Although prejudice is presumed when the court denies a continuance to allow for adequate time to prepare for trial, when the lack of trial preparation is a result of the party's own actions, the trial court does not err when denying a motion to continue. In *In re M.T.-L.Y.*, the court of appeals was not persuaded by the mother's argument that in-person (or face-to-face), rather than phone, text, or email, communication was essential to prepare.

The reviewing court will not second guess an attorney's strategy and trial tactics when determining whether the respondent was denied effective assistance of counsel. There is a "presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *In re M.Z.M.*, 251 N.C. App. 120, 127 (2016). The court examines the attorney's conduct and determines whether there was prejudice to the client or whether the conduct undermined the fundamental fairness of the proceeding. *See In re M.Z.M.*, 251 N.C. App. 120 (holding mother was not denied effective assistance of counsel when her attorney's strategy was to concede the grounds to TPR; attorney did not cross-examine witnesses or present evidence during the adjudication phase but presented evidence and made arguments in the disposition phase).

6. Payment of counsel and reimbursement of fees. Counsel appointed for an indigent parent is to be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services. G.S. 7B-603(b); 7B-1101.1(a). The court may require reimbursement of fees from a parent, but only if (1) the parent is 18 or older and (2) the juvenile is adjudicated abused, neglected, or dependent, or the parent's rights are terminated. The court determines whether the parent should reimburse fees at a dispositional or other appropriate hearing, and the court must take into consideration the parent's ability to pay. If the parent does not comply with the court's order to pay, the court must file a judgment against the parent for the amount ordered. G.S. 7B-603(b1).

AOC Form:
AOC-G-200, Civil Case Trial Level Fee Application Order For Payment Judgment Against Payment/Guardian (Aug. 2019).

Resources:
The Office of Parent Defender, in the Office of Indigent Defense Services (IDS), assists court-appointed parents' attorneys at both the trial and appellate levels. Information about the office as well as resources for parents' attorneys can be found on the IDS website.

For performance guidelines for representing parents created by the IDS, see N.C. COMM'N ON INDIGENT DEFENSE SERVICES, "Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level" (2007).

For standards of practice in representing parents adopted by the American Bar Association (ABA), see AMERICAN BAR ASS'N, "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases" (2006).

For materials, training, and opportunities to connect with other attorneys, see the ABA Center for Children and the Law website.

Access to resources and organizations focused specifically on parent representation or related topics (for example, fatherhood), can be found by searching those specific terms on the website for the Child Welfare Information Gateway.

E. Funds for Experts and Other Expenses[3]

1. Expenses of representation. Indigent persons entitled to appointed counsel are also entitled to have the state provide them with "necessary expenses of representation." G.S. 7A-450(a), (b). An indigent respondent parent has the right to the services of counsel pursuant to G.S. 7A-451, 7B-602, and 7B-1101.1. Upon a proper showing, the parent also is entitled to funds for the services of expert witnesses or other expenses of representation. Payment for these services is in accordance with Rules of the Office of Indigent Defense Services (IDS). G.S. 7A-454. Under current IDS rules, an indigent parent must apply to the court in which the case is pending for funding (see discussion in subsection 3, below, related to parent's ex parte motion). The parent's attorney must locate an expert and then file a motion using the form AOC-G-309 requesting court approval for expert fees. Fees for types of experts are set out in the form itself.

AOC Form:
AOC-G-309, Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level (Feb. 2015).

[3] Some content for this section is based on Parent Representation Coordinator, N.C. Office of Indigent Defense Services, "Memo on Ex Parte Motions for Experts in AND Cases."

Resource: The Office of Indigent Defense Services maintains a website discussing Forensic Resources, here, which includes a. database of experts in all areas.

It is in the trial court's discretion whether to grant motions to obtain funds for experts and other representation expenses. *See In re D.R.*, 172 N.C. App. 300 (2005) (quoting language from other cases). However, if the indigent person makes the required showing of need, he or she is entitled to funds for expert assistance. *See State v. Parks*, 331 N.C. 649 (1992) (stating the standard). Questions relating to expert assistance arise more often in criminal cases than in abuse, neglect, dependency, and termination of parental rights (TPR) cases. However, all of these cases are decided under the same provisions in Article 36 of G.S. Chapter 7A.

2. Standard for obtaining expenses. Case law has established standards for determining whether the fee of an expert or other resource, such as an investigator, is a "necessary expense of representation." Criminal cases establish that the indigent parent must meet a "threshold showing of specific necessity"—that is, a preliminary, but particularized, showing of need. *See State v. Parks*, 331 N.C. 649, 656 (1992) (quoting *State v. Penley*, 318 N.C. 30, 51 (1986)). Juvenile cases have followed that standard. To establish a preliminary, particularized need for funding, a party must show that (1) the person requesting the expert will be deprived of a fair trial without the expert or (2) there is a reasonable likelihood that the expert will materially assist the party in the preparation of his or her case. *See In re J.B.*, 172 N.C. App. 1 (2005) (upholding trial court's denial of parent's motion for expenses for expert in TPR case where parent was unable to show deprivation of a fair trial without the requested expert assistance or material assistance with the requested expert). Particularized need is a "flexible concept" that must be determined on a case-by-case basis. "Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided[.]" *In re J.B.*, 172 N.C. App. 1, 12 (2005) (quoting *State v. Page*, 346 N.C. 689, 696–97 (1997)).

The court of appeals seemed to apply the standard for obtaining funds for an expert to a motion for funds to conduct a telephone deposition of the child's foster parents. *In re D.R.*, 172 N.C. App. 300 (2005) (holding that trial court did not abuse its discretion in denying motion for funds). Assuming the test for obtaining funding for experts applies to more routine expense requests, as a practical matter the courts may scrutinize these requests less closely. *See In re J.B.*, 172 N.C. App. 1 (affirming trial court's order that denied motion for funds for expert but allowed parent to submit bill for deposition of respondent's therapist and for costs of obtaining therapist's records).

3. Parent's ex parte motion. No appellate court decisions address the question of whether, in a juvenile case, a respondent parent's motion for funds for an expert may be made and heard ex parte. It is well established that in criminal cases ex parte hearings on motions for experts are permissible, and even required if requested, on the basis that an open hearing could jeopardize a defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to effective assistance of counsel, or right to privileged communications with his or her attorney. *See State v. Ballard*, 333 N.C. 515 (1993). Although a respondent parent in a juvenile case does not have a Sixth Amendment right to counsel like a defendant in a criminal case, the parent does have due process rights and a statutory right to counsel and to effective assistance of counsel.

Practice Note: One possible procedure, given the legal uncertainty regarding ex parte requests, is for respondent's counsel to move to be heard ex parte, giving notice to the other parties of that motion but not of the underlying motion for funds. If the court grants the request to be heard ex parte, counsel would then present the motion for funds ex parte to the court.

F. Guardian ad Litem for Parent[4]

1. Circumstances for appointment and legislative history. The Juvenile Code, in G.S. 7B-602 and 7B-1101.1, either requires or authorizes the court to appoint a guardian ad litem (GAL) for the respondent parent pursuant to Rule 17 of the Rules of Civil Procedure in two circumstances. When the parent is an unemancipated minor, the court *must* appoint a GAL. When the parent is incompetent, the court *may* appoint a GAL. GAL representation for parents has a complex legislative history that is relevant to the interpretation of any case law based on earlier versions of the statute.

Legislation in 2013 substantially changed GAL representation for parents. Before October 1, 2013, the court had the discretion to appoint a GAL for a parent based on incompetence or diminished capacity, and case law established that the GAL's role was one of either substitution or assistance, depending on the basis for the appointment. Those distinctions no longer exist. A GAL for a parent who is not a minor may be appointed only for a parent who is incompetent. *See* G.S. 7B-602(c); *In re T.L.H.*, 368 N.C. 101(2015) (applying G.S. 7B-1101.1). Designated duties of a GAL appointed under G.S. 7B-602 and 7B-1101.1 were also repealed in 2013. *See* S.L. 2013-129, sec. 17 and 32.

Resource: For a thorough discussion of the issue of GAL representation of parents, including legislative and case history, see Janet Mason, *Guardians ad Litem for Respondent Parents in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2014/01 (UNC School of Government, Jan. 2014).

(a) GAL for minor parent. If the parent is under the age of 18 and not married or otherwise emancipated, the court must appoint a GAL for the parent pursuant to Rule 17 of the Rules of Civil Procedure. G.S. 7B-602(b); 7B-1101.1(b); *see* G.S. 1A-1, Rule 17. If the minor parent reaches age 18 or gets married or becomes emancipated during the course of the proceeding, the GAL should be released unless the court determines that the parent is incompetent.

A minor parent may be "the juvenile" in a separate case involving the minor parent's own status as an abused, neglected, or dependent juvenile. In that proceeding he or she would (or might, if only dependency was alleged) have a GAL appointed pursuant to G.S. 7B-601 like any other juvenile who is the subject of a petition alleging abuse, neglect, or dependency. That G.S. 7B-601 GAL appointment is separate from the Rule 17 GAL appointment for a respondent minor parent.

[4] Portions of this section are based on Janet Mason, *Guardians ad Litem for Respondent Parents in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2014/01 (UNC School of Government, Jan. 2014).

(b) GAL for parent who is incompetent. On motion of any party or on the court's own motion, the court *may* appoint a GAL for a parent who is incompetent pursuant to Rule 17 of the Rules of Civil Procedure. G.S. 7B-602(c); 7B-1101.1(c). The court determines whether the parent is incompetent. See subsection 5, below.

AOC Form:
AOC-J-206, Order to Appoint, Deny, or Release Guardian Ad Litem (For Respondent) (Oct. 2013).

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2. Privileged communications. Communications between the GAL and the parent and between the GAL and the parent's counsel are privileged and confidential. G.S. 7B-602(d); 7B-1101.1(d).

3. Timing and source of GAL appointment. Any party or the court itself may move for the appointment of a GAL for a respondent parent. If the petitioner (or movant in a termination of parental rights (TPR) case) knows that the parent is incompetent, the petitioner should "make written application" for the appointment of a GAL before or at the time the action is filed. *See* N.C. R. CIV. P. 17(c). There is no statutory limitation on when during a proceeding the motion can or should be made. However, the appellate courts have held that when there is a substantial question as to whether a party in a civil action is competent, the court should address that question "as soon as possible in order to avoid prejudicing the party's rights." *In re J.A.A.*, 175 N.C. App. 66, 72 (2005). *See also In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that appointment of a GAL for a respondent was timely when made on motion of the petitioner seventeen days after a TPR petition was filed and three months before the first hearing). The court is not required to conduct an inquiry or a hearing if it determines there is no substantial question about the parent's competency. *See In re T.L.H.*, 368 N.C. 101 (2015), discussed in subsection 5 below.

4. Who may serve as GAL. The Juvenile Code does not specify whom the court may appoint as GAL for a parent. Rule 17 of the Rules of Civil Procedure, which is referenced in G.S. 7B-602 and G.S. 7B-1101.1, directs the court to appoint "some discreet person" to serve as GAL when one is required. The only other guidance given by the Juvenile Code as to who may serve as GAL is the following:

- A parent's attorney may not also serve as the parent's GAL. G.S. 7B-602(d); 7B-1101.1(d).
- GALs trained and supervised by the N.C. Guardian ad Litem Program do not serve as Rule 17 GALs. The GAL Program is limited to representing children who are the subject of a petition for abuse, neglect, dependency, or TPR. *See* G.S. 7B-601; 7B-1108(b), (d); 7B-1200.

Neither Rule 17 nor the Juvenile Code requires that the Rule 17 GAL be an attorney, and while courts often appoint attorneys as GALs for parents, the GAL's role in the case is not that of a second or back-up attorney for the parent.

5. Determination of incompetence. No specific procedures are articulated in the Juvenile Code or Rule 17 for determining whether to appoint a Rule 17 GAL for the parent. However, it is clear that an actual adjudication of incompetence pursuant to G.S. Chapter 35A is not required. *See* G.S. 35A-1102 (stating that even though Chapter 35A is the exclusive procedure for adjudicating a person incompetent, that does not interfere with the judge's authority to appoint a GAL under Rule 17).

If a court determines there is a substantial question as to a respondent's competence, the court in the juvenile action must conduct a hearing or inquiry on the issue of competence. *See In re D.L.P.*, 242 N.C. App. 597 (2015) (judge has a duty to inquire when made aware of a substantial question as to a litigant's competency); *In re P.D.R.*, 224 N.C. App. 460 (2012); *In re M.H.B.*, 192 N.C. App. 258 (2008); *In re N.A.L.*, 193 N.C. App. 114 (2008) (all decided under prior law). Deciding (1) whether there is a substantial question as to a parent's competence warranting a hearing on the issue and (2) whether the parent is incompetent are both discretionary determinations made by the trial court. *In re T.L.H.*, 368 N.C. 101 (2015); *In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019). The standard of review for whether an inquiry into the parent's competency should be conducted and for the appointment of the GAL is an abuse of discretion, which results in a ruling that "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107 (quoted in *In re Z.V.A.*, 835 S.E.2d. at 428).

A determination of whether there is a substantial question of a parent's incompetency does not require that the parent have a mental health diagnosis. Similarly, if a parent has a mental health diagnosis, that diagnosis is not determinative of incompetency. The trial court's determination of incompetency includes observations of the respondent's behavior in the courtroom, ability to express herself, her understanding of the situation, her ability to assist her counsel, and numerous other factors. *In re T.L.H.*, 368 N.C. 101.

A trial court is given substantial deference when determining whether there is a substantial question as to a parent's competency warranting a hearing or an inquiry on the issue because the court has interacted with the respondent parent. *In re Z.V.A.*, 835 S.E.2d 425; *In re T.L.H.*, 368 N.C. 101. Absent "the most extreme instances," a trial court should not be held to have abused its discretion by not making the inquiry when there is an appreciable amount of evidence that tends to show the respondent is not incompetent. *In re T.L.H.*, 368 N.C. at 108–09 (quoted and applied in *In re Z.V.A.*, 835 S.E.2d. at 429). How a parent appears to be functioning in the case impacts a court's determination of whether there is a substantial question. In *In re T.L.H.*, 368 N.C. 101, the supreme court found there was no abuse of discretion when the trial court did not hold a hearing on the mother's incompetency in a TPR proceeding as the evidence showed the mother appeared to understand the nature of the proceedings and that she understood that she had to manage her own affairs and that there were steps she needed to take to avoid losing her parental rights. In *In re Z.V.A.*, 835 S.E.2d 425, the supreme court held there was no abuse of discretion when the trial court did not conduct an inquiry into the mother's competency despite an indication that she had a mental disability based on an IQ of 64 as mother was able to work, attend school, and complete domestic violence classes that were part of her case plan. In *In re J.R.W.*, 237 N.C. App. 229 (2014), the court of appeals held the trial court was not required to conduct an inquiry as to

the mother's competency based on her history of mental health issues because the record established that her mental health issues did not rise to the level of incompetency. For example, the mother had successfully transitioned from shelter to apartment living, had enrolled in a GED program, had appropriate visits with her child, completed a parenting program, and attended all but one hearing where the court had an opportunity to observe her. In its reasoning, the court of appeals pointed out that the statute did not require an inquiry related to competence merely because a parent had a mental health history.

When there is a substantial question of a parent's competency, the court conducts an inquiry or hearing on the issue and the need for a GAL appointment under Rule 17. The parent and his or her attorney must be given notice of the hearing or inquiry. *See Hagins v. Redev. Comm'n of Greensboro*, 275 N.C. 90 (1969). No formal procedure for a hearing to determine incompetence is prescribed, but the court of appeals has offered this guidance:

- when practical, the respondent whose competency is questioned should be present;
- when possible, a voir dire examination of the respondent should take place;
- if the court hears conflicting evidence, the judge should make findings of fact to support its determination.

Rutledge v. Rutledge, 10 N.C. App. 427 (1971).

The court's statutory authority to order a pre-adjudication examination of the parent is clear in a TPR proceeding (s*ee* G.S. 7B-1109(c)), but less clear in the pre-adjudication stage of an abuse, neglect, or dependency case. Although Rule of Evidence 706 and Rule 35 of the Rules of Civil Procedure might provide authority for ordering such an examination, appellate cases have not directly addressed this issue.

In discussing the term "incompetent" in connection with the appointment of Rule 17 GALs for respondent parents, the courts have adopted the definition of "incompetent adult" found in G.S. 35A-1101(7). *See, e.g., In re D.L.P.,* 242 N.C. App. 597 (2015) (decided under current law); *In re A.R.,* 238 N.C. App. 302 (2014); *In re P.D.R.*, 224 N.C. App.460 (2012); *In re A.R.D.*, 204 N.C. App. 500 (2010); and *In re M.H.B.*, 192 N.C. App. 258 (2008) (all decided under prior law). That definition reads as follows:

> Incompetent adult. -- An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

G.S. 35A-1101(7).

This definition requires more than a mental health diagnosis. Evidence of mental health problems or alleging the ground of incapability based on mental illness for a TPR is not per se evidence of a parent's incompetence to participate in the proceeding. *See In re T.L.H.*, 368 N.C. 101; *In re J.R.W.*, 237 N.C. App. 229.

6. Role of the parent's GAL. Appointment of a GAL based on incompetence "will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination." *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted) (decided under prior law). An appointment of a GAL in the juvenile proceeding does not affect the parent's control over any other aspect of his or her life or property. Neither the Juvenile Code nor Rule 17 provides specific guidance as to the role of the parent's GAL. Broadly speaking, the duty of a GAL is "to protect the interest" of the party in the litigation in which he or she is appointed. *Narron v. Musgrave*, 236 N.C. 388, 394 (1952) (quoting *Spence v. Goodwin*, 128 N.C. 273, 274 (1901)). The court of appeals has stated that "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed." *In re D.L.P.*, 242 N.C. App. 597, 601 (2015) and *In re P.D.R.*, 224 N.C. App. 460, 469 (2012) (both quoting *In re A.S.Y.*, 208 N.C. App. 530, 538 (2010)). The court of appeals has also said that a GAL's role under Rule 17 is to act "as a guardian of procedural due process for the parent, to assist in explaining and executing her rights . . . to represent the party . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." *In re A.S.Y.*, 208 N.C. App. 530, 540 (2010) (citations omitted) (internal quotation marks omitted) (decided under prior law but addressing parent's incompetency and Rule 17). Once a trial court determines that a Rule 17 GAL is required and appoints a GAL to represent a respondent parent in an abuse, neglect, or dependency proceeding, the trial court may not conduct a hearing without the respondent's GAL. *In re D.L.P.*, 242 N.C. App. 597 (vacating adjudication and disposition orders entered after hearings at which respondent's GAL was not present).

The precise nature of a GAL's role will depend on a variety of factors, such as the party's age and maturity, the cause and extent of the party's incompetence, and the nature of the litigation. While a GAL's role may be viewed as one of "substitution," that should not mean depriving the party of the right to participate in and make decisions about the case to the extent he or she is able to do so. The GAL's role should include assisting the parent in understanding the case and in participating to the extent he or she is able, while exercising judgment about and making decisions the parent is unable to make, to protect that parent's interests. The incompetency and guardianship statutes in G.S. Chapter 35A state that "[t]he essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions." G.S. 35A-1201(a)(3). The role of a parent's GAL in a juvenile case can be viewed the same way in the context of the juvenile case.

The following statements referring to guardianship following an adjudication of incompetence seem equally relevant for a parent's GAL:

> Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.
>
> Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is

> allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

G.S. 35A-1201(a)(4) and (5).

A court may address the role of a GAL for the parent in its appointment order, and the GAL, along with the parent's attorney, may seek guidance from the court if they are unsure about the role the GAL should play.

7. Payment of parent's GAL. G.S. 7B-603(b) specifies that GALs for parents shall be paid a reasonable fee in accordance with the rules adopted by the Office of Indigent Defense Services. *See* G.S. 7B-1101.1(f). The Juvenile Code does not address fees for a GAL for a parent who is not indigent in an abuse, neglect, or dependency proceeding; however, Rule 17(b)(2) of the Rules of Civil Procedure (under which an appointment of a parent's GAL would be made) states that the court may "fix and tax" the GAL's fee as part of the costs. Regarding a termination of parental rights (TPR) proceeding, G.S. 7B-1101.1(f) states if the parent is not indigent and does not secure private counsel, the fee of a GAL appointed for the parent is a proper charge against the parent. *See also* G.S. 7B-1110(e), which authorizes the court to tax the cost of a TPR proceeding to any party.