

Chapter 4

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4.1 Introduction

The first place to look for rules governing the procedures that apply in abuse, neglect, dependency, and termination of parental rights (TPR) actions is Subchapter I of G.S. Chapter

7B. The Juvenile Code (G.S. Chapter 7B) establishes the procedures for these cases. However, there are times when a certain rule of the North Carolina Rules of Civil Procedure applies. This Chapter highlights procedural issues in abuse, neglect, dependency, and TPR cases, with an emphasis on statutes and cases that implicate the Rules of Civil Procedure. The Chapter is not meant to address all aspects of procedure in juvenile cases. Some procedural issues have an impact on jurisdiction and are discussed in Chapter 3. Local rules may also affect procedure and should be consulted.

A. Applicability of Rules of Civil Procedure in Juvenile Proceedings

The first stated purpose of the Juvenile Code in G.S. 7B-100 is to “provide procedures for the hearing of juvenile cases. . . .” In addition, the legislative intent regarding the termination of parental rights statutes includes a general purpose “to provide judicial procedures for terminating the legal relationship between a juvenile and . . . [his or her] parents.” G.S. 7B-1100(1). When the Juvenile Code provides a procedure, that procedure prevails over the Rules of Civil Procedure. However, a specific Rule of Civil Procedure may apply when it does not conflict with the Juvenile Code and only to the extent that it advances the purposes of the Juvenile Code. *In re E.H.*, 227 N.C. App. 525 (2013); *In re L.O.K.*, 174 N.C. App. 426 (2005).

1. Rules apply when explicitly required by the Juvenile Code. The Juvenile Code specifically states that certain Rules of Civil Procedure apply in particular circumstances, in which case those rules must be followed. Rules of Civil Procedure that are referenced in the Juvenile Code include

- **Rule 4** (process),
- **Rule 5** (service and filing of pleadings and other papers); *see In re H.D.F.*, 197 N.C. App. 480, 496 (2009) (emphasis in original) (urging trial courts to check certificates of service to ensure that “*all* parties are served with *all* documents required to be served” after determining that respondent father did not receive notices and, therefore, did not have a meaningful opportunity to participate in the action when his appointed counsel withdrew),
- **Rule 17** (as it pertains to guardians ad litem),
- **Rule 42** (consolidation), and
- **Rule 58** (entry of judgment).

2. A rule or part of a rule will not apply where the Juvenile Code provides a different procedure. In juvenile cases many procedures that ordinarily would be governed by the Rules of Civil Procedure are established instead by the Juvenile Code itself. For example, provisions in G.S. 7B-800 relating to amending petitions prevail over Rule 15 of the Rules of Civil Procedure related to amendments. *In re B.L.H.*, 190 N.C. App. 142 (discussing former G.S. 7B-800 and applying it to a TPR petition), *aff’d per curiam*, 362 N.C. 674 (2008).

3. Rules or parts of rules apply when required to fill procedural gaps. Where the Juvenile Code does not identify a specific procedure to be used, the Rules of Civil Procedure may be used to fill procedural gaps. *See In re S.D.W.*, 187 N.C. App. 416 (2007) (termination of parental rights proceeding). Some appellate court decisions have held that specific rules apply

in abuse, neglect, dependency, and termination of parental rights (TPR) proceedings. In other opinions, the court has referenced or applied a Rule of Civil Procedure without discussion and with no suggestion that the rule’s applicability was in doubt. The following rules apply:

- **Rule 7(b).** *In re McKinney*, 158 N.C. App. 441 (2003) (applying Rule 7(b)(1) to determine whether a TPR motion was sufficient to confer jurisdiction).
- **Rule 8.** *In re Dj.L.*, 184 N.C. App. 76, 80 (2007) (applying the rule to construe the petition “as to do substantial justice”).
- **Rule 11(a), (b), (d).** *In re Triscari Children*, 109 N.C. App. 285 (1993) (applying Rule 11(a) and (b) when holding verification of a TPR petition is required by statute and verification by the respondent mother, who was the petitioner, was insufficient); *In re Dj.L.*, 184 N.C. App. 76 (2007) (applying Rule 11(b) to determine whether verification of abuse, neglect, or dependency petition was sufficient); *In re N.X.A.*, ___ N.C. App. ___, 803 S.E.2d 244 (2017) (applying Rule 11(d), verification by the State, when holding verification by the DSS attorney of the petition alleging neglect and dependency was sufficient as the county DSS was acting as agent of the State Department of Health and Human Services when implementing the statutory provisions of the Juvenile Code).
- **Rule 12(b), (h).** *In re J.L.K.*, 165 N.C. App. 311 (2004) (applying Rule 12(b)(3) to require respondent to timely object to venue or the right to seek a change of venue is waived); *In re Quevedo*, 106 N.C. App. 574 (1992) (applying Rule 12(b)(6) to determine if the TPR petition was sufficient to state a claim upon which relief may be granted); *In re K.J.L.*, 363 N.C. 343 (2009) (discussing Rule 12(h) and waiver of defense of personal jurisdiction when not timely raised).
- **Rule 30.** *In re K.D.L.*, 176 N.C. App. 261 (2006) (discussing incarcerated respondent father’s request for deposition and how it could have been taken by telephone). *See In re D.R.*, 172 N.C. App. 300 (2005) (holding no abuse of discretion when court denied respondent’s motion for expenses to conduct telephone deposition).
- **Rule 32(a).** *In re Quevedo*, 106 N.C. App. 574 (1992) (where the respondent father in a TPR action was imprisoned in Massachusetts, discussing the rule allowing for the use of depositions at hearing when a witness is unable to attend because of imprisonment).
- **Rule 33.** *In re J.D.*, 234 N.C. App. 342 (2014) (reviewing the factual background of the action, which included interrogatories).
- **Rule 35.** *In re Williams*, 149 N.C. App. 951 (2002) (applying the rule to determine that respondent was not entitled to a mental examination of the child).
- **Rule 41(a)(1)(i).** *In re E.H.*, 227 N.C. App. 525 (2013) (applying the rule to affirm DSS’s voluntary dismissal of its action before the adjudicatory hearing).
- **Rule 43(a).** *In re A.M.*, 192 N.C. App. 538 (2008) (applying the rule to require at least some live testimony at a TPR hearing); *see In re J.T.* ___ N.C. App. ___, 796 S.E.2d 534 (2017) (holding some oral testimony needed at permanency planning hearing).
- **Rule 45.** *In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (applying the “unreasonable or oppressive” standard set forth in subsection (c) of the rule to determine whether there was abuse of discretion in quashing a subpoena for the child to testify at hearing).
- **Rule 52(a).** *In re T.P.*, 197 N.C. App. 723 (2009) (applying the rule in a TPR action to require that the court find the facts specially and state its conclusions separately); *In re E.N.S.*, 164 N.C. App. 146 (2004) (referring to Rule 52(a)(1) when determining

sufficiency of findings of fact and conclusions of law in a neglect and dependency adjudication order).

- **Rule 60(a).** *In re C.N.C.B.*, 197 N.C. App. 553 (2009) (applying Rule 60(a) to prohibit the trial court from making substantive modifications to a judgment versus a correction of a clerical mistake); *In re J.K.P.*, 238 N.C. App. 334 (2014) (court has jurisdiction to correct a clerical mistake, which in this case was the inadvertent checking of a box on an AOC form, pursuant to Rule 60(a) so long as the correction occurs before an appeal is docketed); *In re J.K.*, ___ N.C. App. ___, 799 S.E.2d 439 (2017) (referring to Rule 60(a) and holding when a clerical error is discovered on appeal, remand to the trial court for correction is appropriate so that the record speaks the truth).
- **Rule 60(b).** *In re E.H.*, 227 N.C. App. 525 (2013) (holding that a Rule 60(b) motion was an appropriate means of addressing whether a voluntary dismissal was permissible and looking to G.S. 7B-1001(a) when determining that the order denying the Rule 60 motion was a final order subject to appeal); *In re Saunders*, 77 N.C. App. 462 (1985) (applying Rule 60(b) to reject a motion for relief from a TPR judgment where the respondent did not comply with the time requirements of the rule). Note that a Rule 60(b) motion for relief may only be made with respect to a final order and is not appropriate when an order has been rendered but not entered. *See In re A.B.*, 239 N.C. App. 157 (2015) (where a trial court had granted a Rule 60 motion, the court of appeals noted that it could not analyze the motion in the context of Rule 60 because there had not been an order entered pursuant to Rule 58; the court of appeals treated the motion as a motion to reopen the evidence).
- **Rule 61.** *In re T.M.*, 187 N.C. App. 694 (2007) (applying the rule to find harmless error and reject the argument made by respondent because no prejudice was shown).
- **Rule 63.** *In re Whisnant*, 71 N.C. App. 439 (1984) (holding although the rule allows a judge other than the one who presided at the hearing to sign an order, the circumstances under Rule 63 for a substitute judge to sign the TPR order did not apply to this case).

4. Rules may not be used to confer rights. Application of a Rule of Civil Procedure where the Juvenile Code is silent may not be appropriate where it would have the effect of conferring a new procedural right. *See In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008). Rules that have been held to be inapplicable in juvenile proceedings include the following:

- **Rule 12(c).** *In re I.D.*, 239 N.C. App. 172 (2015) (originally unpublished Feb. 3, 2015, but subsequently published) (holding that adjudication order entered solely upon allegations in a verified petition amounted to a judgment on the pleadings, which required reversal even though respondent had failed to object); *In re Shaw*, 152 N.C. App. 126 (2002) (holding that default judgment or judgment on the pleadings is inappropriate in an adjudication of neglect); *In re Thrift*, 137 N.C. App. 559 (2000) (holding that judgment on the pleadings is not available in abuse, neglect, or dependency matters because the Juvenile Code requires a hearing).
- **Rule 13.** *In re E.H.*, 227 N.C. App. 525 (2013) (recognizing DSS has burden of proof at adjudicatory hearing for abuse, neglect, or dependency, and respondent parent or child's GAL has no right to seek affirmative relief like that available in a counterclaim); *In re S.D.W.*, 187 N.C. App. 416 (2007) (holding that Rule 13 does not apply to allow a claim for TPR to be asserted as a counterclaim in a civil custody or visitation action); *In re*

Peirce, 53 N.C. App. 373 (1981) (holding that a parent does not have a right to file a counterclaim in a TPR action).

- **Rule 15.** *In re G.B.R.*, 220 N.C. App. 309 (2012) and *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008) (both holding in TPR cases that the trial court erred in applying Rule 15(b) to allow amendment of the petitions to conform to the evidence, but holding in *In re G.B.R.* that the error was harmless); *In re M.M.*, 200 N.C. App. 248 (2009) (explains an amendment to a TPR petition that names a previously unknown father is not required and is instead governed by G.S. 7B-1105 and not Rule 15). See section 4.2.C, below (discussing amendments to pleadings).
- **Rule 41(a)(1).** *In re L.O.K.*, 174 N.C. App. 426 (2005) (holding DSS's voluntary dismissal of its TPR petition after it rested its case and without first obtaining a court order is not a dismissal with prejudice that would preclude DSS from filing a second TPR petition).
- **Rule 55.** *In re I.D.*, 239 N.C. App. 172 (2015) (originally unpublished Feb. 3, 2015, but subsequently published) (reversing abuse and neglect adjudication order; default judgment is inappropriate); *In re Quevedo*, 106 N.C. App. 574 (1992) (Greene, J., concurring) (applying language of TPR statute requiring a hearing to implicitly prohibit default judgment).
- **Rule 56.** *In re J.N.S.*, 165 N.C. App. 536 (2004) (holding that summary judgment as to a ground for TPR is contrary to the procedural mandate of the Juvenile Code requiring the court to hear evidence and make findings); *Curtis v. Curtis*, 104 N.C. App. 625 (1991) (holding that summary judgment procedures are not available in TPR proceedings).

B. Rule Application Analysis

The language of the Juvenile Code and appellate court decisions that reference or consider specific Rules of Civil Procedure provide the following guidance for determining whether a rule (or part of a rule) applies in a particular circumstance.

Yes, the rule applies if

1. the Juvenile Code provides specifically that the rule applies or
2. the Juvenile Code is silent with respect to the procedure the rule covers and applying the rule fills a procedural gap in a way that is consistent with the purposes of the Juvenile Code.

No, the rule does not apply if

1. the Juvenile Code provides a different procedure or
2. the rule confers a procedural right that is not contemplated by the Juvenile Code.

But, there may still be lack of clarity in the application of some rules. When the Juvenile Code is silent about a procedure and case law provides no guidance, it simply may not be clear whether application of a Rule of Civil Procedure in a juvenile proceeding would fill a procedural gap or confer a new procedural right.

When applicability of a particular rule is unclear, the purpose statements in the Juvenile Code (G.S. 7B-100 and 7B-1100) may provide guidance, since appellate cases have stated that the Rules of Civil Procedure apply to the extent they advance the purposes of the Juvenile Code. *See, e.g., In re A.M.*, 192 N.C. App. 538 (2008) (applying Rule 43(a) to require that some testimony be taken orally in open court because the rule furthered the Juvenile Code’s purposes of assuring fairness and equity and developing a disposition that reflects consideration of the facts).

The reasoning by the court of appeals regarding the applicability of part of Rule 41(a)(1), which allows a plaintiff to voluntarily dismiss an action before resting the case, to one proceeding, and the inapplicability of another part of Rule 41(a)(1), which would bar the filing of a second TPR petition, to another proceeding further demonstrates the importance of the purposes of the Juvenile Code. In the case *In re E.H.*, 227 N.C. App. 525 (2013), the court of appeals reasoned that application of Rule 41(a)(1)(i) to allow a department of social services (DSS) to voluntarily dismiss a juvenile petition prior to the adjudicatory hearing advanced the purposes of the Juvenile Code because the legislature entrusted DSS with the duty to determine whether allegations of abuse, neglect, or dependency are credible and what action to take. The court said that requiring the child’s guardian ad litem or parent to consent to a dismissal would impermissibly shift this responsibility away from DSS. In addition, allowing DSS to dismiss its own petition after finding that evidence underlying the allegations is too weak to merit proceeding advances the Juvenile Code purpose of avoiding unnecessary periods of family separation and unnecessary burdens on the juveniles and their families, while allowing DSS to conserve its limited resources for other juveniles.

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.

Yet in the case *In re L.O.K.*, 174 N.C. App. 426 (2005), the court of appeals held Rule 41(a)(1) was not applicable to bar DSS from filing a subsequent petition to terminate parental rights (TPR) even though DSS had voluntarily dismissed an earlier TPR petition, without obtaining a court order, after presenting evidence and resting its case. The court reasoned that applying Rule 41(a)(1) to preclude a subsequent TPR petition could not be reconciled with a court’s continuing jurisdiction over a juvenile under G.S. 7B-201; would be contrary to a child’s best interests, which are of paramount consideration under G.S. 7B-100(5); and is antithetical to those best interests because it would result in children being stranded indefinitely in foster care without a permanent plan when they cannot be returned to their parents.

4.2 Procedures Regarding the Petition

Abuse, neglect, or dependency actions are initiated by the filing of a verified petition. Termination of parental rights (TPR) actions may be initiated either by verified petition or if there is a pending abuse, neglect, or dependency case, by verified motion.

A. Contents of Petition

General requirements for the contents of a petition alleging abuse, neglect, or dependency are addressed in Chapter 5.3.A. General requirements for the contents of a TPR petition or motion are addressed in Chapter 9.5. The relationship between petition requirements and jurisdiction is addressed in Chapter 3.2.

Even though the Juvenile Code specifically addresses the required contents of juvenile petitions (and TPR motions), the applicable Rules of Civil Procedure may impose additional requirements. For example, in the case of *In re McKinney*, 158 N.C. App. 441 (2003), an attempt was made to initiate a TPR proceeding by filing a motion in the cause. However, the motion did not include a statement specifically asking that the court terminate parental rights. Because the motion failed to comply with the requirement in Rule 7(b)(1) that the motion set forth the relief or order sought, the court found the motion insufficient to initiate a TPR action.

B. Signature of Attorney or Party

Rule 11(a) of the Rules of Civil Procedure requires that the petition (as well as all pleadings, motions, and other papers) be signed by (1) at least one attorney of record and state the attorney's address or (2) the party if not represented by counsel. The attorney's signature constitutes certification by the attorney that he or she has read the petition, that to the best of his or her knowledge, information, and belief it is well grounded in fact and is warranted by law or a good faith argument, and that it is not being used for an improper purpose. A petition that is not signed must be "stricken unless it is signed promptly after the omission is brought to the attention" of the attorney or party. N.C. R. Civ. P. 11(a). See *In re L.B.*, 181 N.C. App. 174 (2007) (relying on language in *In re T.R.P.*, 173 N.C. App. 541 (2005), *aff'd* 360 N.C. 588 (2006)), of the possibility that DSS could take remedial action to provide the trial court with subject matter jurisdiction it had been lacking and holding that the trial court gained subject matter jurisdiction to move forward in the action when a DSS representative signed and verified the petition two days after a nonsecure custody order was filed and one day after the summons was issued); see also *In re D.D.F.*, 187 N.C. App. 388, 395–96 (2007) (discussing in Footnote 1 that Rule 11(a) contemplates correcting an omission of a signature and noting "[t]he juvenile code would not prevent this type of minor amendment to a petition").

Practice Note: AOC forms may not include space for the attorney's signature, so when AOC forms are used, attorneys must ensure that a signature page is included.

C. Amended and Supplemental Pleadings

1. Amendments in abuse, neglect, or dependency proceedings. The Juvenile Code provides for the amendment of an abuse, neglect, or dependency petition. As a result, the applicable procedure is found at G.S. 7B-800 and not Rule 15 of the Rules of Civil Procedure. The court in its discretion may permit the amendment of a petition. G.S. 7B-800. When allowing an

amendment the court must direct the manner in which the amended petition must be served and specify the time allowed for a party to prepare after the amendment. G.S. 7B-800.

Practice Note: Prior appellate decisions prohibiting an amendment from changing the nature of the conditions alleged in the petition (e.g., abuse, neglect, or dependency) are based on the former language of G.S. 7B-800, which contained a limiting provision. That limitation was removed by S.L. 2010-90, sec. 11 and is no longer current law.

2. Amendments in termination of parental rights proceedings. The Juvenile Code is silent with respect to amendments to petitions or motions for termination of parental rights (TPR). The court of appeals has held that application of Rule 15(b) of the Rules of Civil Procedure to allow amendments to conform to the evidence is improper in a TPR case because it would superimpose a new right where none was intended by the Juvenile Code. *In re B.L.H.*, 190 N.C. App. 142 (looking to G.S. 7B-800 and applying it to a TPR petition), *aff'd per curiam*, 362 N.C. 674 (2008). This holding differs from several earlier decisions upholding the application of Rule 15(b) in TPR cases. *See, e.g., In re L.T.R.*, 181 N.C. App. 376, 390 (2007) (citing Rule 15(b) in holding that (1) respondent, by not objecting to the evidence, “impliedly consented to the adjudication” of an issue that was not raised by the pleadings, and (2) the trial court did not err in making findings of fact and conclusions of law based on that evidence); *In re Smith*, 56 N.C. App. 142, 147 (1982) (finding no error in the trial court’s application of Rule 15(b) to allow a motion to amend the TPR complaint to conform to the evidence).

What these cases have in common is a concern about notice and fairness. The court in *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674, emphasized (1) that the ground the petition was amended to allege did not exist and could not have been alleged when the petition was filed; and (2) that the original petition did not allege that ground by statutory reference or facts sufficient to put respondents on notice that the ground would be an issue. In *In re Smith*, 56 N.C. App. 142, the court of appeals noted the trial court’s finding that the allegations in the pleading had put respondent on notice that the grounds added by the amendment could provide bases for the TPR. The amendment in *In re L.T.R.*, 181 N.C. App. 376, added factual allegations to conform to the evidence, not a different ground, and probably was not even necessary. The court quoted an earlier case in which it said, “[A] party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary.” *In re L.T.R.*, 181 N.C. App. at 390 (citations omitted).

More recently, in the case *In re G.B.R.*, 220 N.C. App. 309 (2012), the court of appeals relied on *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674, in holding that the trial court erred by allowing amendment of the TPR petition to conform to the evidence. The court went on, however, to determine that the respondent had sufficient notice, the erroneous granting of the motion to amend had no effect on the court’s ultimate determination, and the error was harmless.

Appellate court decisions addressing amendments to conform to the evidence in TPR proceedings have focused on whether there was sufficient (even if not formal) notice of the allegations in the amended pleading and whether allowing the amendment resulted in prejudice.

3. Supplemental pleadings. The Juvenile Code does not address supplemental pleadings in abuse, neglect, dependency, or TPR proceedings, and appellate cases have not directly addressed the applicability in juvenile cases of Rule 15(d) of the Rules of Civil Procedure. Rule 15(d) refers to a supplemental pleading as “setting forth transactions or occurrences or events which may have happened since the date of the pleading” and gives the court discretion to allow a supplemental pleading where there is reasonable notice and on terms that are “just.”

Amendments and supplemental pleadings differ primarily with regard to the nature of the additional allegations the party seeks to assert. The facts in a supplemental pleading did not exist when the original pleading was filed. An amended pleading relates to information that existed but was not alleged in the original pleading. Both require a motion and permission of the court. In the case of *Foy v. Foy*, 57 N.C. App. 128 (1982), the court of appeals stated that a plaintiff’s motion to amend her complaint was in substance a motion to file a supplemental pleading, which was governed by Rule 15(d). The court acknowledged that whether to allow a party to file a supplemental pleading was within the trial judge’s discretion and that such pleadings should be allowed unless they would impose a substantial injustice on the opposing party.

D. Responsive Pleadings

The Juvenile Code does not address responsive pleadings in abuse, neglect, or dependency proceedings, and the filing of answers in those cases is not required and is rare.

The only provisions in the Juvenile Code for responsive pleadings are in the context of termination of parental rights (TPR) proceedings, where the summons directs the respondent to file an answer to a TPR petition and the notice that accompanies a TPR motion directs the respondent to file a response. G.S. 7B-1106; 7B-1106.1; *see* G.S. 7B-1108(a). *See* also Chapter 9.8 (discussing details relating to TPR answers and responses). The failure to file an answer or response, however, does not constitute an admission of the allegations and cannot result in a default judgment or judgment on the pleadings. *In re Tyner*, 106 N.C. App. 480 (1992). Filing a responsive pleading in a TPR action that denies any material allegation of the petition or motion does, however, require the court to appoint a guardian ad litem (GAL) for the juvenile unless one has already been appointed under G.S. 7B-601. G.S. 7B-1108.

Appellate cases have rejected attempts to utilize other responsive pleadings, such as counterclaims, in TPR cases, stating that because the Juvenile Code provides procedures that include an answer or response but do not address other types of pleadings, these are the exclusive procedures. *See In re S.D.W.*, 187 N.C. App. 416 (2007); *In re Peirce*, 53 N.C. App. 373 (1981). The court of appeals has also rejected the argument that a counterclaim or cross-claim could be filed by the parent or GAL in an abuse, neglect, or dependency case,

reasoning that all authority of the trial court arises out of the juvenile petition, which can be filed only by DSS, and that although the parents and the GAL may present evidence and argument, they have no right to seek affirmative relief. *In re E.H.*, 227 N.C. App. 525 (2013).

4.3 Summons

Problems with issuance or service of a summons implicate personal jurisdiction, not subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343 (2009). For a discussion of the relationship between the summons and subject matter jurisdiction, see Chapter 3.2.C.1.

A. Content and Issuance of Summons

The Juvenile Code sets out the required contents for the summons in abuse, neglect, or dependency proceedings in G.S. 7B-406 and for termination of parental rights (TPR) proceedings in G.S. 7B-1106. For TPR cases initiated by motion, G.S. 7B-1106.1 sets out similar requirements for contents of the required notice. For details relating to summonses in abuse, neglect, or dependency proceedings, see Chapter 5.3.B and summonses and notices for TPR proceedings, see Chapter 9.7.

AOC Forms:

- AOC-J-142, [Juvenile Summons and Notice of Hearing \(Abuse/Neglect/Dependency\)](#) (Oct. 2013).
 - AOC-J-208, [Summons in Proceeding for Termination of Parental Rights](#) (March 2012).
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1. Signature of clerk. Although the Juvenile Code is very specific with respect to the content of summonses in juvenile proceedings, Rule 4(a) and (b) of the Rules of Civil Procedure, relating to the issuance and content of a summons, has been applied to juvenile proceedings as well. In a TPR case, *In re K.J.L.*, 363 N.C. 343 (2009), the North Carolina Supreme Court stated that to be properly “issued,” the summons must contain the signature of the clerk, assistant clerk, or deputy clerk as required by Rule 4(b).

2. Timing. The Juvenile Code states that the summons must be issued by the clerk immediately after an abuse, neglect, or dependency petition is filed. G.S. 7B-406(a). This is different from the requirement in Rule 4(a) of the Rules of Civil Procedure that a summons be issued within five days of the filing of the complaint. In most situations, the petition is filed with the clerk, who issues the summons at that time. However, a juvenile petition must be accepted for filing by a magistrate in emergency situations when the clerk’s office is closed and a petition must be filed to obtain a nonsecure custody order or an order to cease obstruction of or interference with a DSS assessment. G.S. 7B-404. The magistrate’s acceptance of the petition constitutes the “filing” of the petition. G.S. 7B-405. A magistrate is not authorized to issue the summons. A petition that is filed with a magistrate must be delivered to the clerk’s office for processing as soon as the clerk’s office opens. G.S. 7B-404(b). The immediacy requirement for the issuance of a summons applies when the clerk’s office opens and processes the petition.

3. Who receives summons. When a petition alleges abuse, neglect, or dependency, the summons is issued to each party named in the petition except the juvenile. G.S. 7B-406(a). For a TPR petition, a summons is issued to the respondent parents, except a parent who has irrevocably relinquished the child for adoption or consented to adoption by the petitioner. G.S. 7B-1106(a)(1). For a TPR petition, a summons also must be issued to any court-appointed guardian of the person of the child, legal custodian, a DSS or licensed child-placing agency to whom the child has been relinquished for adoption, and/or any DSS with court-ordered placement responsibility for the child. G.S. 7B-1106(a)(2)–(4).

4. Service requirements when summons is not required. Although a summons need not be served on the juvenile or the juvenile's guardian ad litem (GAL), immediately after a petition alleging abuse or neglect is filed, the clerk is required to provide a copy of the petition and any notices of hearings to the local GAL office. G.S. 7B-408. If a child has a GAL when a TPR petition or motion is filed, or if a GAL is appointed for the child during the TPR proceeding, a copy of all pleadings and other papers required to be served (but not a summons) must be served on the GAL or attorney advocate pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a1).

In a TPR proceeding, if an attorney was appointed for a respondent parent in the underlying abuse, neglect, or dependency proceeding and the attorney has not been relieved of responsibility, a copy of all pleadings and other papers (but not a summons) must be served on the attorney pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a2).

B. Expiration of Summons

The provisions of Rule 4 of the Rules of Civil Procedure determine the life of a juvenile summons. Rule 4(c) requires that a summons be served within sixty days after the date of issuance but provides that failure to serve the summons within sixty days does not invalidate the summons. When the sixty-day time limit is not met, Rule 4(d) allows an extension of the time for service by obtaining either

- an endorsement on the original summons for an extension of time, but the endorsement must be obtained within ninety days of issuance of the summons; or
- an alias or pluries summons (a summons subsequent to the first), obtained within ninety days of the issuance of the summons.

Failure to obtain an extension may result in lack of personal jurisdiction over the party to whom the summons is directed. However, like other defects in or even the absence of a summons, the expiration of a summons can be waived if the party makes a general appearance or files a responsive pleading and does not raise the issue of personal jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009); *In re J.D.L.*, 199 N.C. App. 182 (2009).

Under Rule 4(e), failure to secure an endorsement or an alias or pluries summons within ninety days results in discontinuance of the action with respect to a party who was not served within the sixty-day period. Even after a discontinuance of the action, the petitioner may obtain an extension, an endorsement, or even a new summons, reviving the action. However,

the action will be deemed to have commenced when the endorsement, alias or pluries summons, or new summons was obtained. N.C. R. CIV. P. 4(e). At least in juvenile cases, discontinuance of an action under Rule 4(e) does not operate to deprive the court of subject matter jurisdiction, and the court may proceed to exercise personal jurisdiction in the action over a party who makes a voluntary appearance and does not object to insufficiency of service or process. *See In re N.E.L.*, 202 N.C. App. 576, 578 (2010) and *In re J.D.L.*, 199 N.C. App. 182, 187 (2009), in which the court of appeals stated that the supreme court, in *In re J.T.*, 363 N.C. 1 (2009) and *In re K.J.L.*, 363 N.C. 343 (2009), “appear[s] to have rejected the application of Rule 4(e) of the North Carolina Rules of Civil Procedure in all cases under the Juvenile Code.”

4.4 Service

A. The Impact of Service

Service of process, unless waived, is necessary for the court to obtain personal jurisdiction over a respondent. Service affects the notice to a respondent party. Notice and a meaningful opportunity to be heard are fundamental requirements for due process under the U.S. and North Carolina Constitutions. *See Armstrong v. Manzo*, 380 U.S. 545 (1965); *Harris v. Harris*, 104 N.C. App. 574 (1991) and cases cited therein. The Juvenile Code specifically directs the court to “protect the rights of the juvenile and the juvenile’s parent to assure due process of law.” G.S. 7B-802. One of the purposes of the Juvenile Code is to provide procedures that assure fairness and protect the constitutional rights of parents and juveniles. G.S. 7B-100(1).

Although the issuance and service of a summons do not affect the court’s subject matter jurisdiction because subject matter jurisdiction is established by statute, defenses implicating personal jurisdiction and challenges on due process grounds may be raised by a respondent. *See In re K.J.L.*, 363 N.C. 343 (2009). For further discussion, see Chapter 3.2 (subject matter jurisdiction) and 3.4 (personal jurisdiction). To determine whether a lack of notice unreasonably deprived a parent who was not served of due process, the court balanced the parent’s right to custody with the state’s interest in the welfare of children and the child’s right to be protected by the state from abuse or neglect. *In re Poole*, 357 N.C. 151 (2003), (affirming child’s adjudication as dependent when service had not been made on respondent father even though he was entitled to notice of the proceeding; service had been made on respondent mother), *rev’g per curiam for reasons stated in the dissent* 151 N.C. App. 472 (2002).

Appellate cases have discussed the importance of fundamentally fair service procedures when the liberty interests of parents are at stake. *In re K.N.*, 181 N.C. App. 736 (2007), was a case in which service was questionable because although there were signed receipts showing acceptance of service by someone residing at the address on the summons, there was no evidence that the address was where the respondent mother actually lived. The mother arrived in the courtroom after the TPR hearing had concluded, but the court of appeals was not swayed by an argument that her arrival proved she had notice. The court of appeals cited

Santosky v. Kramer, 455 U.S. 745 (1982), in support of its conclusion that the order should be vacated for lack of fair procedure due to issues of valid service and a twenty-minute hearing with no counsel present for the respondent. Similarly, in the case *In re H.D.F.*, 197 N.C. App. 480 (2009), failure to serve a father whose counsel had withdrawn with notices of hearings and numerous other documents filed in the neglect case was error and required reversal of an adjudication that occurred at a hearing of which the father had not been notified.

B. Summons

Proper service in a juvenile case is generally the same as proper service in any civil case. The Juvenile Code specifically applies Rule 4 of the Rules of Civil Procedure, which sets out the “[m]anner of service to exercise personal jurisdiction,” to service of the summons in abuse, neglect, dependency, and termination of parental rights (TPR) proceedings. G.S. 7B-407; 7B-1106(a).

1. Service by delivery. Service of the summons on a respondent whose whereabouts are known or can be determined is pursuant to Rule 4(j)(1), which provides for the following types of service:

(a) Personal delivery. Service can be made by an authorized person’s delivery of a copy of the summons and petition to the person or leaving copies at his or her house or usual place of abode with a person “of suitable age and discretion” who lives there. N.C. R. CIV. P. 4(j)(1)a. If DSS knows that a respondent is disabled and under a guardianship of any kind, service must be made on the respondent and guardian. N.C. R. CIV. P. 4(j)(2)b. A minor respondent parent is not considered to be under a disability requiring service also be made on the minor’s parent, guardian, person having care or control of the minor, or an appointed Rule 17 guardian ad litem. G.S. 7B-406(a); 7B-1106(a); *see* N.C. R. CIV. P. 4(j)(2)a.

(b) Delivery by mail or delivery service. Service can be made by mailing a copy of the summons and petition addressed to the party to be served via registered or certified mail, return receipt requested, or by signature confirmation via the U.S. Postal Service. N.C. R. CIV. P. 4(j)(1)c. and e. In addition to the U.S. Postal Service, mail may be via an approved delivery service (authorized by 26 U.S.C. 7502(f)(2)) with a delivery receipt. N.C. R. CIV. P. 4(j)(1)d. *See In re K.N.*, 181 N.C. App. 736 (2007) (holding that service was not proper where there was no evidence that respondent lived at the address where the summons was delivered and the return receipt was signed by someone else).

2. Service by publication. When service cannot be made by the means described above or the respondent is unknown or missing, service by publication may be permissible. Publication is to be once a week for three consecutive weeks. *See* N.C. R. CIV. P. 4(j1) (explaining details of service by publication; the discussion below does not comprehensively cover the requirements of the rule).

(a) Applicability. With respect to abuse, neglect, or dependency proceedings, the Juvenile Code states that if service by publication pursuant to Rule 4(j1) of the Rules of Civil Procedure is required, the cost may be charged as court costs. G.S. 7B-407. Note that before October 1, 2013, service by publication required prior court authorization. *See* S.L. 2013-129, sec. 12.

With respect to TPR proceedings, the Juvenile Code deals with unknown parents in G.S. 7B-1105, requiring a special hearing to attempt to ascertain the parent's identity and permitting service by publication when the parent's identity cannot be ascertained. See Chapter 9.6.A and B (discussing details related to a hearing to determine the identity of an unknown parent and special requirements for service by publication). Where the parent's identity can be ascertained but service on the parent cannot be accomplished by other means, service by publication is appropriate but must comply with both the Juvenile Code (G.S. 7B-1106; 7B-1106.1), and Rule 4(j1). *See In re C.A.C.*, 222 N.C. App. 687 (2012); *In re Joseph Children*, 122 N.C. App. 468 (1996) (decided under prior law). Effective October 1, 2017, before service by publication in a TPR proceeding may be made, the court must (1) make findings of fact that the respondent cannot otherwise be served despite diligent efforts made by the petitioner for personal service and (2) approve the form of the notice before it is published. G.S. 7B-1106(a). *See* S.L. 2017-161, sec. 11.

(b) Diligent efforts. Diligent efforts, or due diligence, to serve a party by other means is always a prerequisite for serving a party by publication under Rule 4. The rule requires an affidavit showing “the circumstances warranting the use of service by publication,” any information about the party's location, and that after due diligence the party cannot be served personally or by registered or certified mail or designated delivery service.

What constitutes “diligent efforts” is not specifically defined by statute or case law. North Carolina cases have rejected having a “checklist” for what constitutes due diligence and have said that this issue is fact-specific and must be examined on a case-by-case basis. *See Jones v. Wallis*, 211 N.C. App. 353, 358 (2011); *Emanuel v. Fellows*, 47 N.C. App. 340, 347 (1980). Some cases have stated that to exercise due diligence a party must use all “resources reasonably available” to accomplish service. *See Jones*, 211 N.C. App. at 357; *Fountain v. Patrick*, 44 N.C. App. 584, 587 (1980). Nevertheless, the court of appeals has rejected the notion that due diligence requires that a party “explore every possible means of ascertaining the location of a defendant.” *Jones*, 211 N.C. App. at 359 (holding that due diligence was exercised where service was attempted at defendant's last known address and another address, public records were searched, the internet was searched, counsel for plaintiff went personally to last known address to speak with current residents, determination was made that last known address had been foreclosed, and a copy of the complaint was sent to defendant's attorney to ask that he accept service).

In several cases, the court found the diligent efforts requirement was not met where the petitioner failed to check public records to determine the location of the person to be served. In the case of *In re Clark*, 76 N.C. App. 83 (1985) (decided under prior law), it was error for the court to conclude that the father should be served by publication in a TPR proceeding where the petitioning adoption agency did not check public records and

the facts indicated that the father would have been easy to locate had the agency made diligent efforts to find him.

Updated information regarding a party's whereabouts must also be considered when making diligent efforts. In *Dowd v. Johnson*, 235 N.C. App. 6 (2014), diligent efforts were not made when a new address for the defendant was specifically provided to the plaintiff's attorney in an email from the defendant's attorney but service was only attempted at the defendant's old address.

In a neglect case, *In re Shaw*, 152 N.C. App. 126 (2002) (decided under prior law), DSS had attempted service unsuccessfully at the father's last known address. DSS was found to have satisfied requirements for service by publication where it submitted an affidavit stating that the father's address, whereabouts, dwelling house, or usual place of abode was unknown and could not with due diligence be ascertained, and that the father was a transient person with no permanent residence.

Practice Note: When the location of a parent is unknown after a diligent search has been completed and service is made by publication, the court in an abuse, neglect, or dependency case should continue to inquire into and enter orders with findings about the efforts to locate and serve the missing parent. This inquiry occurs through the initial dispositional hearing. G.S. 7B-506(h)(1); 7B-800.1(a)(3); 7B-901(b).

- (c) Contents of published notice.** Rule 4(j1) is very specific with respect to the contents of the published notice. In addition, the contents of the notice must comply with Juvenile Code requirements related to summons content. In the case *In re C.A.C.*, 222 N.C. App. 687 (2012), the court of appeals held that service by publication in a TPR case was deficient because it did not include notice of the respondent's right to counsel, required by G.S. 7B-1106(b)(4). Respondent did not appear at the hearing and although provisional counsel did appear, the court of appeals held that provisional counsel's appearance could not be considered a "general appearance" that would waive the deficiency in service. *See also In re Joseph Children*, 122 N.C. App. 468 (1996) (finding error where service by publication did not comply with the Juvenile Code requirement that summons contain information about requesting counsel but further finding the error was not prejudicial) (decided under prior law).

When a parent is served by publication in an abuse, neglect, or dependency case and subsequently a TPR motion is filed, the TPR motion and notice may be served pursuant to Rule 5 (instead of Rule 4) of the Rules of Civil Procedure only if

- the published notice informed the parent that upon proper notice and hearing and a finding based on the criteria set out in G.S. 7B-1111, the court could terminate the respondent parent's parental rights;
- the underlying action was initiated less than two years ago; and
- the court does not order that service be pursuant to Rule 4.

G.S. 7B-1102(b); *see* G.S. 7B-406(b)(4)e.

For TPR cases in which the parent’s identity is unknown, G.S. 7B-1105(d) sets out specific requirements for the published notice and directs the court to “specifically order . . . the contents of the notice which the court concludes is most likely to identify the juvenile to such unknown parent.”

Practice Notes: Where the name of the parent being served is known, the published notice should contain any known aliases as well as the parent’s name. Whether the full name of the other parent (the one not being served by publication) should be included in the notice is not specifically addressed in the Rules of Civil Procedure or the Juvenile Code, but presumably it should be included so that the parent being served by publication can identify the child who is the subject of the action. *See* G.S. 7B-1105(d).

G.S. 7B-1105(d)(3) states that when serving a parent whose identity is unknown, the words “In re Doe” may be substituted for the title of the case. No similar provision exists for other cases in which service by publication is required. While Rule 3.1 of the Rules of Appellate Procedure protects the child’s identity in appellate documents, nothing in the statutes or in case law addresses protection of the child’s identity in a publication notice. G.S. 7B-2901(a) requires the clerk of court to withhold from public inspection records of juvenile cases that are filed in the office and allege abuse, neglect, or dependency.

The hearing on an unknown parent required by G.S. 7B-1105 will be expedited if the attorney has prepared a proposed publication notice that contains facts (such as the place of conception, range of possible dates of conception, and description or nickname of the unknown parent and the known parent) that would help the unknown parent recognize himself or herself. If the court orders service by publication at the conclusion of the hearing, the court can either approve or modify the proposed notice.

(d) Where to publish. Publication of notice must be made in a newspaper that is qualified for legal advertising and circulated in the area where the person to be served is believed to be located. If there is no reliable information as to the person’s location, publication may be made in a newspaper that is circulated where the action is pending. N.C. R. CIV. P. 4(j1).

When the parent in a TPR proceeding is unknown such that a G.S. 7B-1105 hearing is required, the court order specifies the place or places where the publication is made. G.S. 7B-1105(d).

(e) Mailing requirement. If the post office address of the person served by publication is known, or can be ascertained with reasonable diligence, a copy of the notice of service of process by publication must be mailed to the party at or immediately before the first publication. If the post office address cannot be ascertained with reasonable diligence, the mailing may be omitted. N.C. R. CIV. P. 4(j1).

(f) Affidavit related to service by publication. Rule 4(j1) requires that once service by publication is completed, an affidavit must be filed with the court showing

- that the publication and mailing (if the party's post office address is known) were done

in accordance with the requirements of G.S. 1-75.10(a)(2), which requires an affidavit of the publisher or printer specifying the date of the first and last publication, and an affidavit of the person who mailed a copy of the complaint or notice if mailing was required;

- circumstances warranting the use of service by publication and efforts that were made to serve by other means (*see In re Shaw*, 152 N.C. App. 126 (2002) (reaffirming the necessity of including this information on the affidavit and finding this requirement satisfied when the affidavit stated that the respondent's address, whereabouts, dwelling house, or usual place of abode were unknown and could not with due diligence be ascertained because the respondent was a transient person with no permanent residence)); and
- information, if any, regarding the location of the party served.

N.C. R. CIV. P. 4(j1).

3. Service in a foreign country. Service in a foreign country is governed by Rule 4(j3) of the Rules of Civil Procedure, which allows service by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention) or the Inter-American Service Convention when the particular convention applies. N.C. R. CIV. P. 4(j3)(1). Service in a foreign country is a complex issue that this Manual does not attempt to address fully.

Proper service methods vary from country to country and the appropriate method depends on whether a particular country is a party to a particular convention dealing with service. A country may be a signatory to one convention but not another. For example, El Salvador is not a signatory to the Hague Convention but is a signatory to the Inter-American Service Convention. See U.S. Department of State Bureau of Consular Affairs [website for El Salvador](#). Even when a country is a signatory to a convention, it is critical to know whether the country has filed objections or exceptions. Mexico, for example, is a signatory to the Hague Convention, but has filed an objection to alternative service methods, so that service by publication in Mexico is not an option.

Where there is no internationally agreed upon means of service, or applicable agreements allow other means of service, Rule 4(j3)(2) and (3) state that as long as service is reasonably calculated to give notice, it may be

- in the manner prescribed by the law of the foreign country;
- as directed by foreign authority in response to a letter rogatory or letter of request;
- by delivering a copy of the summons and petition to the individual personally (unless prohibited by law of the foreign country);
- through any form of mail requiring a signed receipt, addressed to the party to be served and dispatched by the clerk (unless prohibited by law of the foreign country); or
- by other means not prohibited by international agreement as may be directed by the court.

Resources:

For information related to service in a foreign country, see the online resources listed below, many of which include links to more detailed information:

- “[Service of Process Abroad](#)” on the Bureau of Consular Affairs, U.S. Department of State website (use this [map link](#) to access country-specific information).
- “[Service of Process, Foreign Civil Process](#)” on the U.S. Marshals Service, U.S. Department of Justice website.
- Hague Conference on Private International Law [website](#).

For information from the UNC School of Government on this topic, see

- W. Mark C. Weidemaier, [International Service of Process Under the Hague Convention](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2004/07 (UNC School of Government, Dec. 2004).
 - W. Mark C. Weidemaier, [Service of Process and the Military](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2004/08 (UNC School of Government, Dec. 2004).
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C. Notice and Motions

The Juvenile Code addresses the service of only some notices, motions, and orders. G.S. 7B-700(c) requires that discovery motions in juvenile proceedings be served pursuant to Rule 5 of the Rules of Civil Procedure. Rule 5(b) relates to service of “pleadings and other papers,” and has been used to fill a “procedural gap” in the Juvenile Code where the Juvenile Code is silent as to service. *See In re D.L.*, 166 N.C. App. 574 (2004). When a motion for termination of parental rights (TPR) is filed in a pending abuse, neglect, or dependency proceeding, while service of the motion and notice generally is pursuant to Rule 5(b), G.S. 7B-1102(b) specifies four circumstances in which service must be pursuant to Rule 4. See Chapter 9.7.C.4 (discussing details related to serving motions and notice to initiate TPR).

Generally, Rule 5 permits service of all pleadings subsequent to the original petition and all other papers to be made

- pursuant to Rule 4, upon either the party or the party’s attorney of record;
- by delivering a copy to the party’s attorney of record, but if there is no attorney or if the court so orders, to the party;
- by mailing it to the party’s attorney of record, but if there is no attorney or if the court so orders, to the party; or
- by filing it with the clerk of court if no address is known for the party or the party’s attorney of record.

N.C. R. CIV. P. 5(b).

Although service of the summons on the child is not required, where the child is required to receive notice, acceptance of service by an attorney advocate constitutes proper service on a guardian ad litem (GAL), which constitutes proper service on a child represented by the GAL. *See In re J.A.P.*, 189 N.C. App. 683 (2008) (decided under former law). However, the Juvenile Code requires that the juvenile who is at least 12 years old be served with certain

notices and orders, in addition to service on his or her GAL. *See* G.S. 7B-906.1(b)(ii) and (vi) (notice of review and permanency planning hearings); 7B-908(b)(1) (notice of post-TPR review hearing); 7B-1110(d) (service of TPR order); 7B-1114(d)(1) and (2), (e) (service of motion and notice of hearing to reinstate parental rights).

4.5 Continuances

A. Continuances Disfavored

The Juvenile Code includes specific timelines within which certain hearings must be held, and it speaks directly about the circumstances in which continuances should be permitted. The Juvenile Code provisions are more restrictive than those in Rule 40(b) of the Rules of Civil Procedure and, to the extent they are inconsistent with Rule 40, the Juvenile Code provisions control. Appellate cases related to juvenile proceedings have noted that continuances are generally disfavored, and the burden of demonstrating sufficient grounds for a continuance is on the party seeking the continuance. *See In re J.B.*, 172 N.C. App. 1 (2005); *In re Humphrey*, 156 N.C. App. 533 (2003). A decision to grant or deny a motion for a continuance ordinarily is in the trial court's discretion. *See In re Mitchell*, 148 N.C. App. 483, *rev'd per curiam on other grounds for reasons stated in the dissent*, 356 N.C. 288 (2002).

B. Abuse, Neglect, Dependency Proceedings

In abuse, neglect, or dependency proceedings, G.S. 7B-803 authorizes the court to continue a hearing, for good cause, for as long as reasonably necessary to

- receive additional evidence, reports, or assessments the court has requested;
- receive other information needed in the child's best interests; or
- allow for a reasonable time for the parties to conduct expeditious discovery.

Otherwise, the court may grant a continuance "only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile." G.S. 7B-803. *See In re R.L.*, 186 N.C. App. 529 (2007) (finding that neither a systemic problem of over-scheduling nor the absence of a respondent or a respondent's attorney at an earlier hearing constituted extraordinary circumstances warranting multiple continuances), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). Resolution of a pending criminal charge against a respondent arising out of the same circumstances as the juvenile petition cannot be the sole extraordinary circumstance for granting a continuance. G.S. 7B-803. *See In re Patron*, ___ N.C. App. ___, 792 S.E.2d 853 (2016) (looking to the limitation in G.S. 7B-803 against granting a continuance on the sole basis of a pending criminal charge arising from the same incident in the juvenile matter when determining there was no abuse of discretion in a denial of a motion to stay a judicial review of a placement on the Responsible Individuals List pending resolution of the related criminal charges).

While G.S. 7B-803 does not specify that it applies to dispositional as well as adjudication hearings, appellate cases have generally applied it to any type of hearing in an abuse, neglect, or dependency case. *See, e.g., In re E.K.*, 202 N.C. App. 309 (2010) (analyzing the appropriateness of continuances of a permanency planning hearing according to G.S. 7B-803); *In re C.M.*, 183 N.C. App. 207 (2007) (discussing the continuance of a dispositional hearing in the context of G.S. 7B-803).

C. Termination of Parental Rights Proceedings

G.S. 7B-1109(d) authorizes the court to continue an adjudication hearing in a termination of parental rights (TPR) proceeding for up to ninety days from the date of the initial petition to

- receive additional evidence,
- allow the parties to conduct expeditious discovery, or
- receive any other information needed in the best interests of the child.

A continuance beyond ninety days may be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court must enter a written order stating the grounds for granting the continuance. G.S. 7B-1109(d). *See In re D.J.G.*, 183 N.C. App. 137 (2007) (when circumstances warrant it, the judge presiding over the case has discretion to continue the hearing; the hearing had been continued because of the need to appoint respondent mother a new attorney, allow time for responsive pleading and discovery, and sufficient time to hear the case). The burden of showing there are sufficient grounds for a continuance rests on the party requesting the continuance. *In re C.J.H.*, 240 N.C. App. 489 (2015).

The court of appeals has looked to both G.S. 7B-803 and 7B-1109(d) when determining whether a court acted properly in continuing (or denying a motion to continue) a TPR hearing. *In re C.J.H.*, 240 N.C. App. 489 (applying G.S. 7B-803 and 7B-1109 when holding it was not error for the trial court to deny a motion to continue requested by respondent's attorney at the hearing when the respondent chose to start a new job rather than appear at a hearing that he had notice of). *See In re C.M.P.*, ___ N.C. App. ___, 803 S.E.2d 853 (2017) (applying the standard in G.S. 7B-803 to deny respondent's motion to continue a TPR hearing and holding, based on prior case law, that respondent's due process rights were not violated by termination of parental rights at a hearing at which she was not present and there was no abuse of discretion when trial court conducted a full hearing on the petition and allowed respondent's counsel to cross-examine each witness and fully participate); *In re Mitchell*, 148 N.C. App. 483 (applying G.S. 7B-803 to determine that denial of a continuance in a TPR case was proper where nothing in the record indicated that the court requested or needed additional information in the best interests of the children, that more time was needed for expeditious discovery, or that extraordinary circumstances necessitated a continuance, and where it was apparent that mother's absence was voluntary or a result of her own negligence), *rev'd per curiam on other grounds for reasons stated in the dissent*, 356 N.C. 288 (2002).

In the case *In re D.W.*, 202 N.C. App. 624 (2010), the court of appeals reversed an order terminating parental rights, holding that the trial court abused its discretion in denying the mother's motion for a continuance of the adjudication hearing. The appellate court said that "the circumstances of [the] case indicate[d] that justice was impaired by the denial of the continuance." *In re D.W.*, 202 N.C. App. at 625. The court pointed to uncertainty as to whether the mother had notice of the hearing; the mother's diminished capacity, which could have made her absence involuntary; her attendance at all prior hearings; external time constraints that negatively affected the hearing; and the trial court's failure to ascertain the nature of the proceeding before ruling on the motion for a continuance.

D. Considerations

1. Party's own actions. Appellate cases have said that lack of preparation for trial that is due to the party's own actions is not sufficient reason for a continuance. See *In re C.J.H.*, 240 N.C. App. 489 (2015) (finding denial of continuance appropriate when father chose to start new job rather than appear at hearing where his attorney requested a continuance based on father's absence); *In re J.B.*, 172 N.C. App. 1 (2005) (holding that respondent's request for third continuance in TPR case was properly denied where court found that any lack of time to prepare for the hearing related to recent incarceration and was due to respondent's own actions in being arrested for kidnapping the juvenile); *In re Bishop*, 92 N.C. App. 662 (1989) (finding denial of continuance appropriate where respondent had ample time for trial preparation but simply failed to cooperate with her counsel).

2. Absence of witness. When a motion to continue is based on the absence of a witness, the motion should be supported by an affidavit containing the facts to be proved by the witness. *In re Lail*, 55 N.C. App. 238 (1981) (decided under prior law).

3. Heavy dockets. Avoidance of continuances requires careful attention to scheduling and calendaring in juvenile cases. In a case in which seven of fourteen continuances were attributed to heavy dockets, the court of appeals said: "Given the overall scheme of the juvenile code, which consistently requires speedy resolution of juvenile cases, it is clear that the General Assembly did not contemplate a crowded docket as a circumstance sufficient to warrant delay." *In re R.L.*, 186 N.C. App. 529, 535 (2007), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008).

4. Time to prepare. Although continuances are disfavored, the court's failure to grant a continuance may be reversible error if good cause for the continuance exists and the party is prejudiced by the denial. G.S. 7B-908(b)(2), when it authorizes the court to appoint a guardian ad litem for the juvenile at an initial post-termination of parental rights hearing, says specifically that "[t]he court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case." The burden is on the party seeking a continuance to show good cause. See *In re D.Q.W.*, 167 N.C. App. 38 (2004) (holding that respondent was not prejudiced where he did not explain why his attorney had insufficient time to prepare, what his attorney hoped to accomplish during a continuance, or how preparation would have been more complete if a continuance had been granted). If a

continuance is necessary to safeguard a party's constitutional rights, it must be granted. *State v. Jones*, 342 N.C. 523 (1996).

5. Delay, prejudice, and the remedy of mandamus. The court of appeals has held that where continuances result in the court's failure to meet statutory timelines for conducting hearings, the appropriate remedy is to seek a writ of mandamus. *In re E.K.*, 202 N.C. App. 309 (2010) (acknowledging that delays in the case were "deplorable," the appellate court nevertheless refused to find reversible error and held that the proper remedy for excessive delays in holding hearings is to file a petition for a writ of mandamus during the delay, rather than raise the issue on appeal). The court relied on the supreme court's earlier holding in *In re T.H.T.*, 362 N.C. 446 (2008), that mandamus is the proper remedy for delay in entering orders in juvenile cases. See section 4.9.D.3, below (discussing the elements for seeking mandamus specified in the *In re T.H.T.* case).

Practice Note: Most of the cases decided before the holding in *In re T.H.T.*, 362 N.C. 446, that mandamus is the appropriate remedy for delay, analyzed delay issues according to whether prejudice resulted from the delay. These cases were abrogated by *In re T.H.T.*

An order denying a motion for a continuance is interlocutory and not immediately appealable. Nevertheless, a party asserting that the denial of a continuance and a delay in the right to appeal affected a substantial right might pursue an interlocutory appeal or petition for a writ of supersedeas. *See, e.g., Myers v. Barringer*, 101 N.C. App. 168 (1990) (discussing interlocutory appeals and stating that appellant could have sought a writ of supersedeas in response to trial court's order to prosecute). See Chapter 12.9.E for an explanation of a writ of supersedeas.

4.6 Discovery

A. Discovery Generally

G.S. 7B-700 addresses information sharing and discovery in abuse, neglect, dependency, and termination of parental rights proceedings and supersedes the discovery provisions in the Rules of Civil Procedure that differ. Because G.S. 7B-700 applies to all actions under Subchapter I of the Juvenile Code, it also applies when petitions are filed relating to alleged interference with or obstruction of a DSS assessment or for judicial review of a responsible individual determination (both of which are discussed in Chapter 5).

The Juvenile Code encourages a process in which parties access information by means of permissible voluntary information sharing before resorting to discovery motions to obtain information. Parties are permitted to utilize discovery motions pursuant to G.S. 7B-700.

Practice Note: The Juvenile Code addresses confidentiality and information sharing in juvenile cases in more than one place (not just in the discovery statute). *See, e.g.,* G.S. 7B-

302(a1); 7B-311; 7B-601(c); 7B-700; 7B-2901; 7B-3100. For a discussion of confidentiality and information sharing, see Chapter 14.

B. The Juvenile Code and Discovery

1. DSS sharing of information. The Juvenile Code permits DSS to share with any other party information that is relevant to a pending juvenile action, with these exceptions:

- DSS may not share information that would reveal the identity of a reporter or lead to discovery of the reporter's identity.
- DSS may not share any uniquely identifying information that would lead to the discovery of any other person's identity if DSS determines that disclosure of the information would be likely to endanger that person's life or safety.

G.S. 7B-700(a).

The provisions of G.S. 7B-700 apply to information sharing and discovery requests made by parties in the juvenile proceeding and do not apply to requests for information or discovery made on a DSS by a person or agency who is not a party to the juvenile proceeding, such as a litigant in another action or a government agency investigating a party in the juvenile proceeding. For a discussion about when DSS is authorized to share information to non-parties, see Chapter 14.1.

2. GAL sharing of information. The child's guardian ad litem (GAL) is not free to voluntarily share information with other parties but can share information pursuant to either a court order or local rules. G.S. 7B-700(f); 7B-601(c). The GAL also must share information requested by other designated agencies (including DSS) under G.S. 7B-3100 to the extent that information falls within the parameters of that statute. In addition, the GAL must share reports and records with all parties before submitting them to the court. G.S. 7B-700(f). See Chapter 14.1.D and E for further discussion.

3. Local rules. The chief district court judge may adopt local rules or enter an administrative order addressing the sharing of information among parties and the use of discovery. G.S. 7B-700(b). Local rules, however, may not contradict statutory requirements. *See In re J.S.*, 182 N.C. App. 79 (2007); *In re T.M.*, 187 N.C. App. 694 (2007). There may also be a local rule or administrative order that addresses the sharing of predisposition reports among the parties. *See* G.S. 7B-808(c).

Note that local rules or administrative orders issued pursuant to G.S. 7B-700 and 7B-808(c) apply to the parties in a juvenile proceeding and may not be directed to agencies or entities that are not parties. Information sharing among agencies is covered by G.S. 7B-3100, and rules issued by the Department of Public Safety authorize a chief district court judge to issue administrative orders designating local agencies that are required to share information pursuant to that statute. *See* 14B N.C.A.C. 11A.0301 and .0302. See Chapter 14.1.E for further discussion of information sharing.

See Appendix 2 at the end of this Manual (discussing responsibilities of chief district court judge relating to local rules, discovery, and information sharing).

4. Discovery methods. G.S. 7B-700 makes no reference to the discovery methods or procedures in the Rules of Civil Procedure. However, appellate courts have discussed the use in juvenile proceedings of certain discovery methods that are set forth in the Rules of Civil Procedure. Those methods include depositions, interrogatories, requests for production of documents, and physical/mental examinations. See section 4.1.A, above; *see also In re J.D.*, 234 N.C. App. 342 (2014) (referring to use of request for production of documents in factual summary of the case). A party may also subpoena a witness's attendance at a deposition or command the production, inspection, and copying of designated documents, including electronic records, and tangible things in the possession or control of the person specified in the subpoena. N.C. R. CIV. P. 45; *see In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (applying Rule 45 when addressing motion to quash subpoena for testimony at hearing). Additionally, a chief district court judge might reference or incorporate certain discovery rules in the judicial district's local rules or in an administrative order issued pursuant to G.S. 7B-700(b). The court of appeals has also referred to Rule 26(b)(1) of the Rules of Civil Procedure, which allows for discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action. *In re J.B.*, 172 N.C. App. 1 (2005).

5. Discovery motions. The Juvenile Code authorizes a motion for discovery and a motion for protective order. G.S. 7B-700(c), (d). As a general rule, discovery orders are reviewed for an abuse of discretion. *In re J.B.*, 172 N.C. App. 1; *Ritter v. Kimball*, 67 N.C. App. 333 (1984).

(a) Motion for discovery. Any party may file a "motion for discovery," which appears to be the Juvenile Code's version of a motion to compel. G.S. 7B-700(c). A motion for discovery must contain

- a specific description of the information sought and
- a statement that the requesting party has made reasonable efforts to obtain or cannot obtain the information by means of information sharing permitted by statute, local rules, or an administrative order.

G.S. 7B-700(c).

A motion for discovery must be served on all parties pursuant to Rule 5 of the Rules of Civil Procedure. The court must conduct a hearing and rule on the motion within ten business days of the date the motion is filed. G.S. 7B-700(c). The court is authorized to "grant, restrict, defer, or deny the relief requested" in the motion. G.S. 7B-700(c).

(b) Motion for protective order. Any party who has been served with a motion for discovery may seek a protective order to deny, restrict, or defer the discovery. G.S. 7B-700(d). *See In re J.B.*, 172 N.C. App. 1 (holding, in a case decided under prior language of discovery statute, that the trial court did not err in using its authority to "deny or restrict" discovery where it denied a request to interview the child due to the disruption it would cause to the child's therapeutic progress). A protective order should be made pursuant to the

requirements of G.S. 7B-700(d) as the Juvenile Code prescribes a procedure that differs from Rule 26(c) of the Rules of Civil Procedure. The court of appeals has consistently held the Rules of Civil Procedure only apply when they do not conflict with the Juvenile Code and the application of a rule advances the purpose of the Juvenile Code. *In re E.H.*, 227 N.C. App. 525 (2013); *In re L.O.K.*, 174 N.C. App. 426 (2005). *But see In re J.D.*, 234 N.C. App. 342 (2014) (referencing in the factual summary a motion for protective order made pursuant to Rule 26(c), without mentioning G.S. 7B-700(d)).

Pursuant to G.S. 7B-700(d), a party requesting that the discovery be denied, restricted, or deferred must submit the information the party seeks to protect for in camera review by the court. If the court denies or restricts discovery, copies of materials submitted for in camera review must be preserved for potential appellate review. G.S. 7B-700(d).

6. Continuances related to discovery. The court may grant continuances in an abuse, neglect, dependency, or termination of parental rights proceeding for a reasonable time to allow for expeditious discovery. G.S. 7B-803; 7B-1109(d). However, any order related to discovery must avoid unnecessary delay and establish expedited deadlines for completion. G.S. 7B-700(c). *See In re J.S.*, 182 N.C. App. 79 (2007) (holding, in a case decided under prior law, that the trial court did not abuse its discretion in denying a continuance where the attorneys failed to make time to examine the records within the time frame set out by the administrative order).

7. Rediscovery. Information obtained through discovery or permissible sharing of information may not be redisclosed if the redisclosure is prohibited by state or federal law. G.S. 7B-700(e). *See also* G.S. 108A-80; 7B-3100.

4.7 Intervention

A. Abuse, Neglect, Dependency Proceedings

The Juvenile Code defines precisely who the parties are in an abuse, neglect, or dependency proceeding. *See* G.S. 7B-401.1; 7B-601(a). Someone who is not a party but is providing care for the child, such as a relative or foster parent, is entitled to notice of and an opportunity to be heard at review and permanency planning hearings. G.S. 7B-906.1(b), (c). The court may also require that notice be given to others persons or agencies. G.S. 7B-906.1(b). At dispositional hearings (initial, review, and permanency planning), the court may consider information from any person or agency that the court finds is relevant, reliable, and necessary to determine the juvenile's needs and the most appropriate disposition. G.S. 7B-901(a); 7B-906.1(c). However, the right to notice and to be heard does not confer party status. G.S. 7B-906.1(b). *See* G.S. 7B-401.1(e1).

Only the following persons or agencies may intervene in an abuse, neglect, or dependency proceeding

- the juvenile's parent, guardian, or custodian;

- another DSS that has an interest in the proceeding;
- a person with standing to initiate a termination of parental rights (TPR) proceeding who seeks to intervene for the sole purpose of filing a TPR motion; or
- a foster parent only if that foster parent has authority (or standing) to file a TPR petition.

G.S. 7B-401.1(e1), (h); 7B-1103(b); *see* G.S. 7B-1103(a) (standing to file TPR).

Although not addressed in the Juvenile Code, when the Indian Child Welfare Act (ICWA) applies to the abuse, neglect, or dependency proceeding, the child's Indian tribe and (if applicable) Indian custodian have a right to intervene at any point in the action. 25 U.S.C. 1911(c); *see* 25 C.F.R. 23.111(d)(6)(ii) and (iii). For a discussion of ICWA, see Chapter 13.2.

Practice Note: The intervention statute, G.S. 7B-401.1(h), was enacted by S.L. 2013-129, sec. 9, effective for all actions filed or pending on or after October 1, 2013. Prior to that legislative change, the Juvenile Code did not specifically address intervention in abuse, neglect, or dependency proceedings other than to allow a party with standing to initiate a TPR action to intervene for the purpose of filing a TPR motion in an underlying abuse, neglect, or dependency action. G.S. 7B-1103(b). It was not unusual, however, for relatives or foster parents to make motions to intervene in abuse, neglect, or dependency cases to seek custody of or visitation with a child. The few appellate court decisions that addressed intervention applied Rule 24 of the Rules of Civil Procedure to assess the propriety of the trial court's ruling. *See, e.g., In re T.H.*, 232 N.C. App. 16 (2014). However, since those cases were decided, G.S. 7B-401.1(h) and (e1) were enacted, specifically addressing intervention in abuse, neglect, or dependency proceedings. Parties and the court should look to the Juvenile Code (G.S. 7B-401.1(h) and (e1)) and not Rule 24 when determining whether someone has a right to intervene in an abuse, neglect, or dependency proceeding. *See* S.L. 2016-94, sec. 12C.1(f) removing caretakers from G.S. 7B-401.1(h) (effective July 1, 2016) and S.L. 2015-136, sec. 2 adding G.S. 7B-401.1(e1) to allow a foster parent who has standing to initiate a TPR to intervene (effective for all actions filed or pending on or after October 1, 2015).

While opportunities for intervention in an abuse, neglect, or dependency action are limited, the Juvenile Code makes clear that the restrictions on intervention do not prohibit the court hearing the abuse, neglect, or dependency proceeding from consolidating its case with a civil action that has a claim for custody or visitation. *See* G.S. 7B-200(c)(1), (d); 7B-401.1(h). *See* also Chapter 3.6.A and D (discussing overlapping civil actions with claims for custody). The Juvenile Code does not address the procedure the courts should use to ensure that the juvenile court is aware of a civil action involving a claim for custody and how any request to consolidate the actions would be heard. The court hearing the abuse, neglect, or dependency action makes the decision on consolidation, but a party in the civil action may not be a party or satisfy the criteria to have standing to intervene in the abuse, neglect, or dependency proceeding. In that case, the person would not have standing to file in the abuse, neglect, or dependency action a motion to consolidate the two actions. Although the claim for custody or visitation in the civil action is automatically stayed, the court hearing that action may want to notify the court hearing the juvenile proceeding of the separate civil action.

B. Termination of Parental Rights Proceedings

The statutory limitations on intervention (in G.S. 7B-401.1(h) and 7B-1103(b)) apply only to intervention in abuse, neglect, or dependency proceedings. The Juvenile Code is silent with respect to intervention in termination of parental rights (TPR) proceedings. Where the Juvenile Code is silent, appellate decisions have applied Rule 24 to analyze whether intervention is permissible. *See, e.g., In re T.H.*, 232 N.C. App. 16 (2014) (holding that intervention pursuant to Rule 24 was permissible in a dependency case as the rule did not conflict with the Juvenile Code and advances its purpose (note that this case was decided before the enactment of G.S. 7B-401.1(e1) and (h), which address intervention in an abuse, neglect, or dependency action)); *In re Baby Boy Scarce*, 81 N.C. App. 531 (1986) (upholding the application of Rule 24 to allow permissive intervention by foster parents, emphasizing the child's best interest).

Assuming that Rule 24 applies in TPR actions, it is important to distinguish between the provisions for intervention of right and those for permissive intervention.

1. Intervention of right. Under Rule 24(a), in the absence of an unconditional statutory right to intervene, a person is entitled to intervene by right when

- that person claims an interest in the subject of the action;
- as a practical matter, disposition of the action may impair the person's ability to protect that interest; and
- the person's interest is not adequately represented by existing parties.

The court of appeals applied Rule 24(a) to hold that a child support enforcement agency was entitled to intervene by right in a mother's action to terminate the father's rights. *Hill v. Hill*, 121 N.C. App. 510 (1996) (reversing the trial court's denial of DSS's motion to intervene, because termination of the father's rights would also terminate DSS's ability to seek reimbursement from the father for public assistance the mother would continue to receive). Intervention of right, the court said, "is an absolute right and denial of that right is reversible error." *Hill*, 121 N.C. App. at 511.

When the Indian Child Welfare Act (ICWA) applies to the TPR proceeding, the child's Indian tribe and (if applicable) Indian custodian have a right to intervene at any point in the action. 25 U.C.S. 1911(c); *see* 25 C.F.R. 23.111(d)(6)(ii) and (iii). For a discussion of ICWA, see Chapter 13.2.

2. Permissive intervention. Under Rule 24(b) the court may grant a motion for permissive intervention by someone whose claim or defense has a question of law or fact in common with the main action. N.C. R. Civ. P. 24(b). However, because the courts have held that a respondent parent cannot file a counterclaim for custody in a TPR action (*see, e.g., In re Peirce*, 53 N.C. App. 373 (1981)), it seems unlikely that a third party could intervene in a TPR proceeding to pursue a custody claim. Either a party or a nonparty can file a civil action for custody or a motion in a pending civil custody action and seek to have that action consolidated with the TPR action. *See Smith v. Alleghany County Dep't of Soc. Servs.*, 114

N.C. App. 727 (1994) (the facts identify a consolidated TPR and G.S. Chapter 50 custody action).

Should a court find that Rule 24 does apply to allow permissive intervention, in addition to showing a common issue of law or fact, the person seeking to intervene must establish that he or she has standing to assert the claim or defense put forward. *See, e.g., Perdue v. Fuqua*, 195 N.C. App. 583 (2009) (affirming denial of grandmother's motion to intervene in a G.S. Chapter 50 custody proceeding on basis that allegations in her motions to intervene and for custody were insufficient to establish that she had standing to seek custody). In deciding whether to grant a motion for permissive intervention, the court must consider whether allowing intervention will unduly delay or prejudice the adjudication of the rights of the original parties. N.C. R. CIV. P. 24(b). The standard for reviewing an order granting or denying a motion for permissive intervention is abuse of discretion. *In re T.H.*, 232 N.C. App. 16 (2014).

3. Procedure for intervening. Intervention, whether permissive or by right, requires a timely application and service on all parties of a motion stating the grounds for intervention. The motion must be accompanied by a pleading that asserts the claim or defense for which the applicant seeks to intervene. N.C. R. CIV. P. 24(c).

Resource: For information about third party custody and visitation actions, see Cheryl Howell, [*Third Party Custody and Visitation Actions: 2010 Update to the State of the Law in North Carolina*](#), FAMILY LAW BULLETIN No. 2011/25 (UNC School of Government, Jan. 2011).

4.8 Motions in Juvenile Proceedings

Unless specified in the Juvenile Code, motions are made according to Rule 7(b) of the Rules of Civil Procedure, Rule 6 of the General Rules of Practice for the Superior and District Courts, applicable Juvenile Code provisions (e.g., G.S. 7B-1102, related to a motion to terminate parental rights), and any pertinent local rules.

Under Rule 7(b) of the Rules of Civil Procedure, a motion may be made orally if it is made during a hearing or at a session for which the case is calendared. Otherwise, motions must be in writing. The motion must state with particularity the grounds for the motion and the relief the moving party is seeking. N.C. R. CIV. P. 7(b)(1). Under Rule 6 of the General Rules of Practice for the Superior and District Courts, a motion must state the specific rule(s) under which the movant is proceeding. Motions must be signed by at least one attorney of record if the party is represented by counsel, stating the attorney's office address and telephone number. N.C. R. CIV. P. 7(b)(2) (certain rules applicable to pleadings apply to all motions provided for by the Rules of Civil Procedure); Rule 6 of the General Rules of Practice for the Superior and District Courts. *See* N.C. R. CIV. P. 11(a). The format of motions is governed by Rule 10 of the Rules of Civil Procedure. *See* N.C. R. CIV. P. 7(b)(2).

Unless the Juvenile Code states otherwise, the filing and service of motions is pursuant to Rule 5 of the Rules of Civil Procedure. The time frame for service of a motion is according to Rule 6 of the Rules of Civil Procedure, which generally requires service no later than five days prior to the hearing. When a motion is based on facts that are not in the record, the court may determine the motion based on affidavits presented by the parties, or the court may require that the matter be heard wholly or partly on oral testimony or depositions. N.C. R. CIV. P. 43(e).

4.9 Judgments and Orders

There are provisions contained throughout the Juvenile Code that specifically address orders, including

- the timing for entry of an order,
- required findings of fact and conclusions of law,
- types of available relief that may be ordered (note that the type of relief available is addressed throughout this Manual when discussing specific statutes and topics), and
- service of an order.

Some practices related to orders are addressed by the appellate courts rather than the Juvenile Code.

A. Drafting Orders

1. Who drafts the order. Judges may draft their own orders, but nothing prevents the trial judge from directing the prevailing party to draft an order on the court's behalf. *In re J.B.*, 172 N.C. App. 1 (2005); *see also In re S.N.H.*, 177 N.C. App. 82 (2006) (holding that the trial court did not err in directing the petitioner's attorney to draft an order after enumerating in court specific findings of fact to be included in the order); *In re H.T.*, 180 N.C. App. 611 (2006). Rule 52 of the Rules of Civil Procedure, addressing findings by the court, has not been interpreted to require the judge to manually draft or orally dictate a judgment. *See Johnson v. Johnson*, 67 N.C. App. 250 (1984) (finding no error where the court directed an attorney to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as its own when tendered and signed); *Walker v. Tucker*, 69 N.C. App. 607 (1984).

2. Responsibility of the court. The court of appeals has recognized that district court judges have little or no support staff to assist with preparing orders, which has resulted in judges relying on the attorneys for the parties to assist in preparing the court's order. *In re A.B.*, 239 N.C. App. 157 (2015); *In re J.W.*, 241 N.C. App. 44 (2015). Regardless of who drafts an order, the trial court is ultimately responsible for the order. *In re A.B.*, 239 N.C. App. at 167 (stating "the order is the responsibility of the trial court, no matter who physically drafts the order").

3. Circulating draft orders. While it is common practice for attorneys to draft court orders, it is important that draft orders be circulated to all parties before being submitted to the judge.

Another party may identify discrepancies between the draft order and that party's understanding of the judge's oral rendition, and a party may elect to submit his or her own proposed findings of fact or amendments to those in the draft order. *See also* [North Carolina State Bar](#), 97 Formal Ethics Opinion 5 (1998) (relating to the need to submit a proposed order to opposing counsel simultaneously with submitting it to the court). In some judicial districts local rules may address the circulation of draft orders.

4. Presiding judge must sign order. In almost all instances only the judge who presides at a hearing should sign an order resulting from the hearing. In the case of *In re Whisnant*, 71 N.C. App. 439 (1984), it was reversible error for a judge other than the one who presided at the hearing to sign the order terminating parental rights. Rule 52 of the Rules of Civil Procedure requires the judge in a non-jury proceeding to find facts, make conclusions of law, and enter judgment accordingly.

Under Rule 63 of the Rules of Civil Procedure, if after the hearing is concluded the judge who presided at a hearing is not able to sign the order – whether by reason of disability, death, resignation, retirement, or any other reason – the chief district court judge can sign the order, but only if the judge who is not available made findings of fact and conclusions of law. *See* Comment to N.C. R. CIV. P. 63; *In re Savage*, 163 N.C. App. 195 (2004) (quotations and citation omitted). If the chief judge of the district is disabled, the order can be signed by any district court judge in the judicial district designated by the director of the Administrative Office of the Courts. N.C. R. CIV. P. 63(2). If the substitute judge concludes that he or she is not able to sign the order for any reason, the judge may grant a new hearing. N.C. R. CIV. P. 63. The substitute judge's action in signing the order is a ministerial, not judicial act, and does not involve decision making. *In re Savage*, 163 N.C. App. 195.

B. Findings of Fact and Conclusions of Law¹

The Juvenile Code includes a number of specific requirements for the court's findings and conclusions in orders, and these requirements vary depending on the type and stage of the proceeding. In addition, Rule 52 of the Rules of Civil Procedure applies. Findings of fact must be based on competent evidence in the record, and conclusions of law must be based on sufficient findings of fact. *In re Patron*, ___ N.C. App. ___, 792 S.E.2d 853 (2016); *In re T.H.T.*, 185 N.C. App. 337 (2007), *aff'd as modified*, 362 N.C. 446 (2008).

1. Separation of findings of fact and conclusions of law. Rule 52(a) of the Rules of Civil Procedure governs court orders in bench trials and has been applied to juvenile proceedings. *See In re T.P.*, 197 N.C. App. 723 (2009); *In re J.L.*, 183 N.C. App. 126 (2007); *In re C.W.*, 182 N.C. App. 214 (2007). Rule 52(a)(1) specifically requires that findings of fact and conclusions of law be stated separately. Appellate courts have noted that the failure to separate findings from conclusions can hinder appellate review and in some cases may prevent the appellate court from determining whether the order is supported by clear, cogent, and convincing evidence, prompting a remand. *See In re T.M.M.*, 167 N.C. App. 801 (2005). *See also* Chapter 12.8 (explaining the standards of review for findings and conclusions). However,

¹ Some content in this section was sourced or adapted from Janet Mason, [Drafting Good Court Orders in Juvenile Cases](#), JUVENILE LAW BULLETIN No. 2013/02 (UNC School of Government, Sept. 2013).

a mislabeled finding of fact or conclusion of law may be reviewed on appeal according to what it actually is rather than what it is incorrectly labeled. *In re J.A.M.*, ___ N.C. App. ___, 795 S.E.2d 262 (2016), *temporary stay allowed*, 794 S.E.2d 804, *review allowed*, 799 S.E.2d 617 (2017) (oral argument scheduled Jan. 9, 2018); *In re M.M.*, 230 N.C. App. 225 (2013).

2. Findings of fact. Facts have been described as “things in space and time that can be objectively ascertained by one or more of the five senses . . . [which] in turn, provide the bases for conclusions.” *In re M.N.C.*, 176 N.C. App. 114, 121 (2006) (citation omitted). Certain issues related to findings of fact arise repeatedly in appellate cases:

- **Recitation of allegations.** A number of appellate decisions have held that findings of fact must consist of more than mere recitations of the allegations in the petition. *See, e.g., In re O.W.*, 164 N.C. App. 699 (2004) (remanding the case where findings were a mere recitation of the allegations and were not sufficiently specific); *In re Harton*, 156 N.C. App. 655 (2003) and *In re Anderson*, 151 N.C. App. 94 (2002) (both citing Rule 52 and discussing the disfavor of mere recitation in context of a permanency planning order).

However, in the case *In re J.W.*, 241 N.C. App. 44 (2015), the court of appeals sought to clarify such decisions and held that it is not *per se* reversible error for findings of fact to mirror the wording of a party’s pleading. Instead, the determination of whether findings of fact are sufficient depends on an examination of the record of the proceedings and whether they “demonstrate that the trial court, through process of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.” *In re J.W.*, 241 N.C. App. at 48 (citations omitted). In its reasoning, the court of appeals acknowledged that trial judges often rely on counsel to assist in drafting orders and stated the need to avoid imposing on counsel the obligation “to eliminate unoriginal prose.” *In re J.W.*, 241 N.C. App. at 45. *See also In re A.B.*, ___ N.C. App. ___, 799 S.E.2d 445 (2017) (the ultimate finding as to a parent’s reasonable progress must be the result of a process of logical reasoning based on the evidentiary facts found by the court).

Recent cases considering orders containing verbatim recitations of allegations are consistent with *In re J. W.*, 241 N.C. App. 44. *See In re L.C.*, ___ N.C. App. ___, 800 S.E.2d 82 (2017) (considering only those findings that are supported by evidence in the record regardless of whether those findings mirror the allegations in the petition); *In re L.Z.A.*, ___ N.C. App. ___, 792 S.E.2d 160 (2016) (while “several” findings were verbatim recitations of allegations, other substantive findings made after several days of witness testimony did not mirror language in the petition and supported the order’s conclusions; moreover, the trial court’s discussion of a proposed order with the parties and subsequent modification of a proposed finding demonstrated an independent decision-making process); *In re A.B.*, ___ N.C. App. ___, ___, 781 S.E.2d 685, 690 (2016) (trial court thoughtfully considered the evidence and independently determined the facts even though one of seventy findings contained “unoriginal prose”); *In re M.K.*, 241 N.C. App. 467 (2015) (trial court applied a process of logical reasoning and supported its adjudication of neglect with six substantive findings, even though twelve findings were disregarded as verbatim recitations of allegations).

In *In re A.B.*, ___ N.C. App. ___, 799 S.E.2d 445 (2017), respondent claimed that a TPR order included findings that were copied from prior orders in the case. The findings at issue were viewed as specific findings regarding respondent’s progress at each prior hearing, with the court noting that whether the findings were copied from prior orders was “irrelevant” when respondent had not claimed that the findings were not supported by the evidence.

- **Recitation of testimony and sufficient specificity.** Findings must consist of more than mere recitation of the testimony of witnesses, and they must be sufficiently specific to allow an appellate court to review the decision and test the correctness of the judgment. A finding of fact by the court reflects a determination that evidence is credible and sufficiently clear and convincing to permit the court to say that something is a fact. For example, the statement “Dr. Lee testified that the child’s injuries could not have been caused accidentally” is a recitation of testimony, whereas the statement “the child’s injuries could not have been caused accidentally” is a finding of fact based on the court’s determination that the doctor’s testimony was credible, clear, and convincing. *See, e.g., In re L.C.*, ___ N.C. App. ___, 800 S.E.2d 82 (2017) (recitation of testimony does not constitute findings by the court); *In re M.M.*, 230 N.C. App. 225 (2013) (holding that many of the trial court’s findings were actually recitations of assertions made by parties and witnesses or even arguments by attorneys); *In re H.J.A.*, 223 N.C. App. 413 (2012) (holding that the trial court’s findings of fact were insufficient, although it had recited testimony that might support the required findings).
- **Reports and documents in an order.** Juvenile proceedings typically involve multiple reports and documents. A report or other document simply attached to an order does not by itself constitute findings of fact. When reports and documents are evidence that the court considered at the hearing, they do not need to be attached to an order. When they (or portions of them) are being incorporated by reference as findings of fact, or the court is finding as a fact that the document exists, they should be attached to the order and the order should specify what the attachment is and why it is being attached. However, the court should incorporate by reference sparingly, and then only if accompanied by the court’s own specific findings related to what is incorporated. *See In re K.L.*, ___ N.C. App. ___, ___, 802 S.E.2d 588, 595 (2017) (incorporated documents “may support a finding of fact; however, merely incorporating the documents by reference is not a sufficient finding of fact”; incorporating by reference findings from previous orders in the case did not result in findings sufficient to support a permanency planning order); *In re H.J.A.*, 223 N.C. App. 413 (2012) (the trial court’s order referencing the GAL and DSS reports without making specific findings about those reports was insufficient); *In re A.S.*, 190 N.C. App. 679 (2008); *In re C.M.*, 183 N.C. App. 207 (2007) (finding no error in incorporating reports where the trial court did not simply adopt reports but made separate findings based upon them). A report should not be incorporated by reference without oral testimony from a witness at a hearing that results in the order. *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017) (vacating and remanding orders; holding findings were unsupported by competent evidence when reports were accepted into evidence and then incorporated by reference in the order at a permanency planning hearing where no oral testimony was taken).

- **Findings based on evidence.** Findings of fact must be based on evidence that is actually presented and admitted by the court. *See In re C.W.*, 182 N.C. App. 214 (2007) (finding that the trial court’s order and its findings of fact contained information that was neither introduced nor admitted at trial); *In re A.W.*, 164 N.C. App. 593 (2004) (finding error where the trial court based findings of fact for adjudication on a report that was not introduced at adjudication). The issue of what constitutes competent evidence is discussed in Chapter 11, but note that statements by counsel are not evidence and do not support findings of fact. *In re D.L.*, 166 N.C. App. 574 (2004); *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017). When a case is appealed, the issue of whether there is sufficient evidence to support the findings may be raised regardless of whether that issue was raised in the trial court.
- **Specific findings required by the Juvenile Code.** Many provisions in the Juvenile Code require the court to make very specific findings to support specific types of orders and/or to reflect appropriate consideration of statutory criteria in various stages of the proceedings. When determining what findings must be included in an order, it is important to look at the language of the statute and whether it requires written findings on all/each enumerated factor or only relevant factors. *Compare* G.S. 7B-906.1(n) (“each”) *with* G.S. 7B-906.1(d) (“those that are relevant”). In many appellate cases, failure of the trial court to make findings required by the Juvenile Code has led the appellate court to reverse, vacate, and/or remand the trial court’s order. This has been especially true when courts fail to make required findings under G.S. 7B-906.1(n) (waiving further review hearings, see Chapter 7.2.A.4 for related cases); and G.S. 7B-906.1(d) and (e) (required findings for review and permanency planning hearings, see Chapter 7.8.B and C for related cases).

Practice Notes: Older opinions will refer to G.S. 7B-906 (review hearings) and 7B-907 (permanency planning hearings), which were repealed and replaced by G.S. 7B-906.1, effective for all actions filed or pending on or after October 1, 2013. *See* S.L. 2013-129, sec. 26.

There is also a line of appellate decisions that address mandatory findings regarding the cessation of reasonable efforts for reunification pursuant to G.S. 7B-507. Effective for all actions filed or pending on or after October 1, 2015, S.L. 2015-136, sec. 7, 9, and 14 made significant amendments to G.S. 7B-507 by eliminating the language regarding reasonable efforts and adding new language regarding reasonable efforts and reunification to G.S. 7B-901(c) (initial dispositional hearings) and 7B-906.2(b) (concurrent permanency planning).

The North Carolina Supreme Court in the case *In re L.M.T.*, 367 N.C. 165 (2013), rejected the argument that findings must include the exact statutory wording, emphasizing practical application of the law so that the best interests of the child are the paramount concern. Examining a permanency planning order for compliance with statutory requirements (then, G.S. 7B-507), the supreme court held that findings of fact do not need to quote the precise language of the statute but must “address the substance of the statutory

requirements,” noting also that “use of the precise statutory language will not remedy a lack of supporting evidence for the trial court’s order.” *In re L.M.T.*, 367 N.C. at 165, 168.

3. Conclusions of law. The distinction between findings of fact and conclusions of law can be difficult to make. “As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles” is a conclusion of law, and a “determination reached through ‘logical reasoning from the evidentiary facts’ ” is a finding of fact. *In re A.B.*, 179 N.C. App. 605, 612 (2006) (quoting *In re Helms*, 127 N.C. App. 505, 510 (1997)). The determination at an adjudicatory hearing of whether the child is an abused, neglected, or dependent juvenile is a conclusion of law because it requires the exercise of judgment and application of legal principles. *See, e.g., In re A.B.*, 179 N.C. App. 605; *In re Helms*, 127 N.C. App. 505. In dispositional orders, determinations of reasonable efforts and best interests are conclusions of law because they require an exercise of judgment. *In re Helms*, 127 N.C. App. 505. However, the trial court’s failure to properly characterize a statement as a finding of fact or conclusion of law is not fatal if the necessary findings and conclusions are present in an order. *In re Helms*, 127 N.C. App. 505.

Conclusions of law must be supported by findings of fact. Where specific findings required by a particular statute are not made or are not specific or strong enough to support the conclusions, appellate courts will not affirm the trial court’s order. *See In re I.K.*, 227 N.C. App. 264 (2013) (reversing a permanency planning order where there were inconsistent findings and evidence, including findings that there was a risk of sexual abuse by the father and that the father should have unsupervised visitation); *In re H.J.A.*, 223 N.C. App. 413 (2012) (holding that the trial court erred where findings did not specify which parent particular findings referred to and specific findings required by 7B-907(b), now found in G.S. 7B-906.1, were not made); *In re I.R.C.*, 214 N.C. App. 358 (2011) (holding that trial court erred in failing to link its findings to its conclusion to cease reunification efforts and in neglecting to address G.S. 7B-507(b), now found in G.S. 7B-901(c), requirements). *See also In re O.J.R.*, 239 N.C. App. 329 (2015) (where the trial court’s TPR order was reversed and remanded in part due to its failure to make the required findings and conclusions and its lack of findings to support some conclusions).

For findings of fact to support conclusions of law, they must not be inconsistent with those conclusions. In the case *In re A.B.*, 239 N.C. App. 157 (2015), the court of appeals reversed the trial court’s order terminating a mother’s parental rights where the court’s conclusions contradicted its findings and some of its findings contradicted other findings.

Practice Note: While parties may stipulate to facts, they may not stipulate to conclusions of law. *See In re A.K.D.*, 227 N.C. App. 58 (2013). See also Chapter 6.3.C.1 related to stipulations.

Resource: Janet Mason, [Drafting Good Court Orders in Juvenile Cases](#), JUVENILE LAW BULLETIN No. 2013/02 (UNC School of Government, Sept. 2013).

C. Entry and Service of the Order

1. What constitutes entry. The Juvenile Code provides for orders to be entered and served in accordance with Rule 58 of the Rules of Civil Procedure. *See* G.S. 7B-1001(b). An order is not entered until it is reduced to writing, signed by the judge, and filed with the clerk pursuant to Rule 5. N.C. R. CIV. P. 58. *See* S.L. 2017-158 sec. 1 and 2 (amending both Rule 5 and Rule 58 regarding filing, effective July 21, 2017); *In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410 (2016) (extensively discussing pre- and post-1994 amendments to Rule 58 of the Rules of Civil Procedure, with applicable case law, and the impact of those amendments on when an order is entered versus orally rendered); *In re Pittman*, 151 N.C. App. 112 (2002). This means that when the judge makes an oral announcement (or rendition) of his or her order in open court, the order does not become enforceable until it is reduced to writing, signed by the judge, and filed with the clerk of court. *See Carland v. Branch*, 164 N.C. App. 403 (2004); *see also In re O.D.S.*, ___ N.C. App. at ___, 786 S.E.2d at 418 (stating “no order or judgment had been entered at that time, and therefore, no party was bound by the judgment”).

Because an oral rendition is not an entry of a judgment, it is subject to change, meaning the trial court is not required to adhere to the rendition when making and entering its written order. *In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410 (holding the court was not bound by the oral rendition to terminate parental rights based on neglect when it included both neglect and dependency as grounds to TPR in the written entered order; reasoning it is not bound by the holding in *In re J.C.*, 236 N.C. App. 558 (2014) to the extent *In re J.C.* conflicts with prior holdings of the court of appeals or supreme court and can be distinguished from the current case before it).

A court may also consider evidence presented after its oral rendition but before it enters a written judgment. *In re O.D.S.*, ___ N.C. App. ___, 786 S.E.2d 410, and cases cited therein. A trial court’s misapprehension of when an order terminating parental rights was entered led to a reversal in the case *In re B.S.O.*, 225 N.C. App. 541 (2013). The trial court has broad discretion to re-open a case and admit additional testimony after the conclusion of the evidence, after argument of counsel, even weeks after the original hearing, or when the “ends of justice require.” *In re B.S.O.*, 225 N.C. App. at 543. In *In re B.S.O.*, which cites cases on this principle, the trial court refused to exercise its discretion to take additional evidence because it thought a valid order terminating parental rights had been entered, when in fact the order was not final because it had not been reduced to writing.

2. Serving the order. Rule 58 of the Rules of Civil Procedure requires that the party designated by the judge or the party who prepares the judgment serve a copy of the order on all other parties within three days after the judgment is entered. Service is pursuant to Rule 5 of the Rules of Civil Procedure. Statutory provisions for termination of parental rights (TPR) actions specifically require counsel for the petitioner or movant to serve a copy of the TPR order on the guardian ad litem for the child (if there is one) and on the child if the child is 12 or older. G.S. 7B-1110(d).

Service of the order by mail adds three days to the time within which a party may

- file a motion to amend the findings or the judgment, under Rule 52(b), or
- file a motion for a new trial, under Rule 59.

In addition, the time period for filing these motions is tolled for any period of noncompliance with the service provisions, but not longer than ninety days. N.C. R. CIV. P. 58.

G.S. 7B-1001(b) requires that notice of appeal be given “within thirty days after entry and service of the order in accordance with . . . Rule 58.” Thus, the time within which notice of appeal must be given does not begin to run until both entry and service have occurred. For details related to notice of appeal, see Chapter 12.5.

D. Time Requirements for Orders

When an order is entered impacts the progression of the juvenile proceeding. There are strict time requirements for the entry of orders in the Juvenile Code, which have the purpose of expediting outcomes for children and are consistent with the purpose of the Juvenile Code to achieve safe, permanent homes for children within a reasonable period of time. *In re T.H.T.*, 362 N.C. 446 (2008); *see* G.S. 7B-100(5). Delays in entering orders are directly contrary to the best interests of the children involved. *In re T.H.T.*, 362 N.C. 446; *In re S.Z.H.*, ___ N.C. App. ___, 785 S.E.2d 341 (2016).

1. Entry of order within thirty days. Orders for all of the following hearings must be in writing, include appropriate findings of fact, and be entered (signed by judge and filed with clerk) within thirty days of completion of the hearing:

- continued nonsecure custody, G.S. 7B-506(d);
- adjudication of abuse, neglect, or dependency, G.S. 7B-807(b);
- disposition in abuse, neglect, or dependency case, G.S. 7B-905(a);
- review, G.S. 7B-906.1(h);
- permanency planning, G.S. 7B-906.1(h);
- placement on the Responsible Individuals List, G.S. 7B-323(d);
- hearing on unknown parent in a TPR action, G.S. 7B-1105(e);
- TPR adjudication and disposition, G.S. 7B-1109(e); 7B-1110(a); and
- reinstatement of parental rights, G.S. 7B-1114(l).

2. Clerk’s duty to reschedule when entry is late. For certain orders, the Juvenile Code requires that the clerk schedule a special hearing when the order is not entered within the thirty-day time requirement and requires that an order be entered with ten days after the special hearing:

- adjudication of abuse, neglect, or dependency, G.S. 7B-807(b);
- dispositional order in abuse, neglect, or dependency case, G.S. 7B-905(a);
- review, G.S. 7B-906.1(h);
- permanency planning, G.S. 7B-906.1(h);

- TPR adjudication and disposition, G.S. 7B-1109(e); 7B-1110(a); and
- reinstatement of parental rights, G.S. 7B-1114(l).

The hearings required by these statutes must be scheduled by the clerk at the first session of court scheduled for the hearing of juvenile matters after the thirty-day period expires. The purpose of the hearing is to determine and explain the reason for the delay and to obtain any needed clarification about the contents of the order. If the order is not entered within thirty days after the applicable substantive hearing and the clerk has not scheduled a subsequent hearing to address the delay, a party should file a request for such a hearing with the clerk. *See In re T.H.T.*, 362 N.C. 446 (2008).

3. Remedy for untimely orders is mandamus. The appropriate remedy for a trial court's failure to enter a timely order is not a new hearing or an appeal. It is a petition to the court of appeals for a writ of mandamus to require the trial court to proceed to judgment. *In re T.H.T.*, 362 N.C. 446 (2008); *In re S.Z.H.*, ___ N.C. App. ___, 785 S.E.2d 341 (2016) (setting out the remedy of mandamus when a termination order was entered nearly six months after the adjudicatory and dispositional hearing in violation of G.S. 7B-1109(e) and 7B-1110(a)). Application for a writ of mandamus is made pursuant to Rule 22 of the North Carolina Appellate Rules. In describing the remedy of mandamus, the North Carolina Supreme Court specified these required elements:

- the petitioner seeking relief must show a clear legal right to the act requested;
- the respondent must have a clear legal duty to perform the act;
- the duty must relate to a ministerial act, not an act requiring the exercise of discretion (mandamus may be used to compel an official to exercise his or her discretion, but not to direct what the result should be);
- the respondent must have neglected or refused to perform the act and the time to act expired; and
- there must not be an alternative, legally adequate remedy.

In re T.H.T., 362 N.C. 446.

When a court fails to enter an order within thirty days of completion of the applicable hearing, schedule a hearing to address the delay, and/or enter an order within ten days following that hearing, a party may petition the court of appeals for a writ of mandamus. *In re T.H.T.*, 362 N.C. 446.

Resource: For a further discussion see Sara DePasquale, [Tick Tock: Mandatory Time Requirements to Enter A/N/D and TPR Orders](#), UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 10, 2017).
