Chapter 7
Dispositional Phase: Initial, Review, and Permanency Planning

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7.1 Introduction and Purpose of Dispositional Phase

A. Introduction

In this Manual, the term "dispositional phase" refers collectively to initial dispositional hearings, review hearings, and permanency planning hearings that take place after a child has been adjudicated abused, neglected, or dependent. Initial dispositional hearings, review hearings, and permanency planning hearings share most of the same purposes and procedures. *In re Montgomery*, 77 N.C. App. 709 (1985) (stating that a hearing on a motion for review is in the nature of a dispositional hearing). Yet each type of hearing has distinct purposes and procedures as well.

Note, this Chapter discusses all three types of hearings, the applicable procedures, and the outcomes that are available in those different hearings. This Chapter is best understood when read in its entirety, as subsections within the Chapter are not meant to be stand-alone explanations of a topic given the regular use of cross-referencing within this Chapter. Checklists at the end of this Manual identify the required findings and outcome options for orders resulting from each of the three types of dispositional hearings: initial, review, and permanency planning.

Throughout the dispositional phase the court determines and reviews the needs of the child and the family and the best way to meet those needs. The court's guiding principle in the dispositional phase is the child's best interests, which is the paramount consideration or the "polar star" of the Juvenile Code. G.S. 7B-100(5); *In re Montgomery*, 311 N.C. 101, 109 (1984). The court exercises its discretion when determining the child's best interests. *See In re J.W.*, 241 N.C. App. 44 (2015).

At dispositional hearings of any type, the court may be considering

- whether the child can safely remain at home or be returned home;
- who should have custody of the child;
- where the child should be placed;
- what visitation is appropriate if the child is out of the home;
- whether to delegate decision-making authority for specific issues involving the child;
- what services the child should receive;
- what services the parents, guardian, custodian, or caretaker over whom the court has personal jurisdiction should receive;
- what directives should be made to the parents, guardian, custodian, or caretaker over whom the court has personal jurisdiction concerning expected changes or accomplishments that would place him or her in a better position to care for the child;
- whether efforts by DSS to reunify the family have been made and whether they should continue; and
- the date of the next hearing.

See G.S. 7B-901 through -906.2.

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.

At a permanency planning hearing, the court must also determine the best concurrent permanent plans for the child and the steps necessary to accomplish those plans so that permanence is timely achieved for the child. *See* G.S. 7B-906.2. Permanency options include

- reunification;
- adoption;
- guardianship;
- custody;
- for youth ages 16 or 17, Another Planned Permanent Living Arrangement (APPLA); and
- when there has been a termination of parental rights, reinstatement of those rights.

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

DSS is required to make reasonable efforts toward those plans. A permanent plan of reunification has priority over other permanent plans, and specific procedures and findings apply when reasonable efforts for reunification are eliminated by the court. *See* G.S. 7B-906.2(b); 7B-901(c); *see also* G.S. 7B-100(4), (5) (purposes).

The dispositional hearings may be informal, and the court considers evidence that is relevant, reliable, and necessary to determine the child's needs and most appropriate disposition. G.S. 7B-901(a); *see* G.S. 7B-906.1(c). All parties may submit evidence to the court of their perspectives on what the child's and family's needs are and how those needs can be met.

"Dispositional alternatives" or outcomes related to placement, evaluation, and treatment of the child are addressed in G.S. 7B-903. These dispositional alternatives, which can be combined, are available to the court at any hearing that takes place during the dispositional phase of the case. *See* G.S. 7B-903(a); 7B-906.1(i).

In addressing the child's placement, the priority is to help the family by providing community-level services while the child remains in the home. *See* G.S. 7B-900. However, if the court determines that the child's safety and welfare require that the child be placed outside his or her home (or remain outside the home if the child is already placed outside the home), the court will examine placement alternatives and the best strategy for making it possible for the child to return home safely. *See* G.S. 7B-903. If the court determines that the child cannot be returned home within a reasonable period of time, the court must decide what other placement will provide the child with a safe, permanent home within a reasonable period of time. *See* G.S. 7B-906.1.

Regardless of the child's placement, the court may order evaluations, treatment, or services for the child or parents (or sometimes guardians, custodians, or caretakers) to better understand or address their needs. Dispositional outcomes that require parents or others to participate in evaluations, treatment, or classes, or to take other actions to address the conditions that led to the child's adjudication or removal from home are authorized by G.S. 7B-904 and, indirectly, G.S. 7B-200(b), relating to the court's personal jurisdiction over individuals. The court's authority to enter dispositional orders is not without limits, and the court is not permitted to make dispositional orders that are beyond the scope of the dispositional statutes.

Initial dispositional hearings are addressed in G.S. 7B-901 and review and permanency planning hearings in G.S. 7B-906.1. The initial dispositional hearing is the first hearing in the dispositional phase of the case. The court may order the parties to take specific actions to address the child's adjudication and/or removal. If the child is placed in DSS custody, the court also considers whether reasonable efforts toward reunification may be eliminated based on written findings of specified statutory factors. When reunification efforts are eliminated, permanency planning is accelerated as a permanency planning hearing must be scheduled.

When reunification efforts are not eliminated, review hearings are scheduled after the initial dispositional hearing and before a permanency planning hearing (although it may be combined with a permanency planning hearing). A review hearing provides the court with an opportunity to assess what is happening in the case and to determine whether any changes should be made concerning the disposition.

A permanency planning hearing is a specific type of review hearing held for the purposes of determining whether the child's return home is likely, identifying concurrent permanent plans for the child, ordering DSS to make reasonable efforts toward each of those plans, and reviewing the progress made in finalizing a permanent plan so that a safe, permanent home for the child may be achieved within a reasonable period of time. *See* G.S. 7B-906.1(g); 7B-906.2. A permanency planning hearing must be held within twelve months of the initial order that removed custody of the child from a parent, guardian, custodian, or caretaker. Unless the

statutory criteria to waive permanency planning hearings are satisfied, subsequent permanency planning hearings must be held at least every six months to review the progress in finalizing the permanent plans or to make new permanent plans for the juvenile. *See* G.S. 7B-906.1(a), (k), (n). The achievement of certain permanency outcomes will terminate the court's jurisdiction over the action while other permanency outcomes will result in the court retaining jurisdiction without there being any regularly scheduled hearings.

Resources:
Multiple resources addressing dispositional outcomes for children and issues faced by children and families in foster care, including publications and tools related to specific topics such as physical and mental health issues, child development, child safety, visitation, education, race and ethnicity, substance abuse, older youth, permanency, incarcerated parents, fatherhood, and much more can be found on the following websites:

- The Child Welfare Information Gateway, a service of the Children's Bureau, which is part of the U.S. Department of Health and Human Services Administration for Children and Families.
- The National Council of Juvenile and Family Court Judges.
- The National Conference of State Legislatures.
- The American Bar Association Center on Children and the Law, and also within that website, *ABA Child Law Practice*.

B. Purpose of Disposition

The Juvenile Code refers specifically to dispositional purposes in both G.S. 7B-100 and 7B-900. Other provisions in the Juvenile Code expand on these purposes. Read collectively, these provisions indicate the following general purposes, which should guide the court in determining dispositional outcomes for any hearing in the dispositional phase. Ultimately, throughout the dispositional phase the court is balancing child safety with family preservation.

1. Exercise jurisdiction to address child's needs. A stated purpose of disposition is to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." G.S. 7B-900. The court must examine the specific needs and limitations of the child and craft a plan that takes into account the child's need for safety, continuity, and permanence, with a preference for the return of the child to his or her parents and home. *See* G.S. 7B-100(2), (3), (5); 7B-900. In doing so, the court should focus on the conditions that resulted in the adjudication of abuse, neglect, or dependency, with safety as the primary objective. As a corollary, the court also must determine at what point it is no longer necessary or appropriate for the court to continue exercising jurisdiction. *See, e.g.,* G.S. 7B-911.

2. Careful consideration of needs and circumstances. A disposition should take into consideration the facts, the child's needs and limitations, and the family's strengths and weaknesses. G.S. 7B-100(2). Juvenile Code procedures require the court to take into account information from multiple sources when making dispositional determinations, and the court

has wide latitude to consider relevant, reliable, and necessary evidence for dispositional purposes. G.S. 7B-901(a); 7B-906.1(c).

3. Respect for family autonomy. Dispositional plans and orders must respect family autonomy and avoid unnecessary or inappropriate separation of children from their parents. *See* G.S. 7B-100(3), (4). When possible, the initial approach should be for a child to remain at home with appropriate community-level services. G.S. 7B-900.

4. Preference for placement with relative when no reunification. When a child must be removed from the home, the court must first consider whether a relative is willing and able to provide proper care for the child in a safe home. *See* G.S. 7B-903(a1); 7B-101(19) (definition of "safe home"). In situations where a child is removed from one parent's home but living in the home of another parent is a possibility, placement with the other parent must be considered before other relatives or other placement options are considered.

5. Fair procedures and protection of rights. The procedures set forth in the Juvenile Code are meant to assure fairness and equity as well as protect the constitutional rights of juveniles and parents. *See* G.S. 7B-100(1). See Chapter 2.3 and 2.4 (discussing the rights of children and parents).

6. Child's best interests. Applying to all aspects of the Juvenile Code, including dispositions, are standards that ensure that the child's best interests are of paramount consideration for the court. *See* G.S. 7B-100(5). The Juvenile Code also refers to the consideration of the child's "health and safety." *See, e.g.*, G.S. 7B-507(a)(1) and (2); 7B-903(a2), (a3).

7. Safe, permanent home within a reasonable period of time. The goal of the dispositional phase is to return the child to his or her home or when that is not possible to a safe, permanent home within a reasonable period of time. The Juvenile Code specifically refers to the federal Adoption and Safe Families Act (ASFA), which has as one focus timeliness to permanency. G.S. 7B-100(5). See Chapter 1.3.B.6 (discussing ASFA and its impact on the Juvenile Code).

C. Significant Legislative Changes regarding Permanency Planning

In 2013 and 2015 significant changes were made to the Juvenile Code, many of which impact the dispositional phase of abuse, neglect, or dependency proceedings. Prior to legislative changes in 2013, review hearings were addressed in G.S. 7B-906 and permanency planning hearings in G.S. 7B-907. Both statutes were repealed in 2013 and replaced with G.S. 7B-906.1, which addresses both types of hearings and incorporates most of the language of the two previous statutes. Some cases cited in this Chapter were decided under the earlier statutes that contained language the same as, or similar to, the current statute. *See* S.L. 2013-129.

In 2015, with the enactment of G.S. 7B-906.2, the Juvenile Code mandates concurrent permanency planning in all abuse, neglect, or dependency actions that proceed to a permanency planning hearing. *See* S.L. 2015-136. Prior to October, 1, 2015, the Juvenile

Code permitted but did not require concurrent reasonable efforts for reunification and another permanent arrangement. *See* former G.S. 7B-507(d) (repealed by S.L. 2015-136, sec. 7). Additionally, the requirements and timing for when the court is authorized to order DSS relieved of providing reasonable efforts for reunification, often referred to as the cessation or elimination of reunification efforts, was changed substantially. Prior to the 2015 legislative changes, G.S. 7B-507 authorized the court in any order that awarded DSS custody of or placement responsibility for the child (e.g., a nonsecure custody, dispositional, review, or permanency planning order) to order that DSS was not required to provide reasonable efforts for reunification. The court was required to first make specific findings designated in former G.S. 7B-507.

Effective for all actions pending or filed on or after October 1, 2015, a court's authority to order the elimination or cessation of reasonable efforts changed and is more limited. A court may order the elimination of reasonable efforts for reunification only at initial disposition or permanency planning. The criteria a court considers and the required findings a court must make when eliminating reunification efforts differ depending on whether the hearing is the initial dispositional or permanency planning hearing. *See* G.S. 7B-901(c); 7B-906.2(b). See sections 7.8 and 7.9, below (discussing the findings at different hearings and reasonable efforts). Some of the cases cited in this Chapter were decided under the previous statute, which did not distinguish between the type of hearing the order resulted from or when certain findings could be made to support the determination to cease reunification efforts. The handful of cases that have been decided under the current statutes focus primarily on the findings and timing of the findings as it relates to the noticed hearing that resulted in the order eliminating reunification efforts. See sections 7.8.A.2, below (discussing initial dispositional hearing), 7.8.C.8, below (discussing permanency planning hearing), and 7.9, below (discussing the findings at different hearings and reasonable efforts).

7.2 Dispositional Hearings

A. Timing and When Required

There is a sequential process to an abuse, neglect, or dependency proceeding that carries over into the dispositional phase. *See In re T.R.P.*, 360 N.C. 588 (2006). There first must be an adjudication. An initial dispositional hearing follows the adjudication. A review or permanency planning hearing follows the initial dispositional hearing. When a review hearing is held that is not designated as a permanency planning hearing, a permanency planning hearing follows the review hearing. The Juvenile Code sets forth the maximum time limits that may expire before each type of hearing must be held; however, a case may proceed faster than the outer time limits designated in the Juvenile Code. The process should not be slower than the statutory maximum time limits. The appropriate remedy for a trial court's failure to conduct hearings in the dispositional phase within the statutory time frames is mandamus, not a new hearing. *See In re T.H.T.*, 362 N.C. 446 (2008); *In re E.K.*, 202 N.C. App. 309 (2010). See Chapter 4.5 (discussing continuances, delay, and remedy for delay) and 4.9.D.3 (discussing the elements for seeking mandamus).

1. Initial dispositional hearing. The initial dispositional hearing must be held immediately following adjudication and completed within thirty days after the conclusion of the adjudication hearing. G.S. 7B-901.

2. Review hearing. A review hearing must be held within ninety days from the date of the initial dispositional hearing, and within six months thereafter. Depending on when the first permanency planning hearing is scheduled, the review hearing may be replaced with the permanency planning hearing. Review hearings that are scheduled after the initial permanency planning hearing must be designated as subsequent permanency planning hearings. G.S. 7B-906.1(a).

In addition, in all cases the court is required to conduct a hearing when a party files a motion seeking review. G.S. 7B-906.1(n); *see also* G.S. 7B-1000. The motion may be made under G.S. 7B-906.1 or 7B-1000. Although the same standard, the child's best interests, applies to hearings under both statutes, different criteria apply. G.S. 7B-1000 authorizes the court to modify or vacate an order in light of changes in circumstances or the needs of the juvenile. Review hearings under G.S. 7B-906.1 are based on the child's best interests and do not require proof of changed circumstances or the needs of the juvenile before a dispositional order may be modified. *See In re J.S.*, ___ N.C. App. ___, 792 S.E.2d 861 (2016). See section 7.8.E, below (discussing G.S. 7B-1000).

Practice Notes: Whether a review hearing that results from a party's motion is held pursuant to G.S. 7B-906.1 or 7B-1000 may depend on what the motion for review asks for and what is contained in the notice to the parties. At the beginning of the hearing, the parties or the court should make clear under what statute(s) the hearing is being held. The type of hearing should also be stated in the court's order. When a motion is filed after the first permanency planning hearing has been held, the hearing on the motion should be designated as a permanency planning hearing. *See* G.S. 7B-906.1(a) (stating "[r]eview hearings after the initial permanency planning hearing shall be designated as subsequent permanency planning hearings").

In one statutorily specified circumstance when a child is placed in a parent's custody and a new report is received, DSS will be required to file a new petition in the existing court action rather than a motion for review. *See* G.S. 7B-401(b). See subsection 4(a), below (discussing application of G.S. 7B-401(b)).

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3. Permanency planning hearing. A type of review hearing called a permanency planning hearing is required within twelve months of the initial order removing custody of the child, which in many cases is a nonsecure custody order issued soon after the petition is filed. *See* G.S. 7B-906.1(a). A permanency planning hearing must be scheduled sooner when the court (1) orders at initial disposition that reasonable efforts for reunification are not required or (2) makes written findings in a review order (that is not a permanency planning order) that reasonable efforts for reunification with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time. In either case, the court must schedule a permanency planning

hearing within thirty days to address the child's permanent plans. G.S. 7B-901(d); 7B-906.1(d)(3).

Hearings after the initial permanency planning hearing are automatically designated permanency planning hearings (taking the place of regular review hearings) and must be held at least every six months unless waived or until the court no longer has subject matter jurisdiction over the action. *See* G.S. 7B-906.1(a), (k), (n); *see also* G.S. 7B-201 (jurisdiction); 7B-911 (transfer to civil custody action). See Chapter 3.1.C (discussing continuing and ending jurisdiction).

Practice Note: Permanency planning hearings are also referred to in some districts as "permanency planning review hearings."

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4. Waiver of hearings and departure from time requirements. The Juvenile Code allows the court to depart from the schedule for review and permanency planning hearings in limited circumstances.

(a) Custody to a parent. The court is not obligated to conduct review and permanency planning hearings when custody is placed with a parent. G.S. 7B-906.1(k). No particular findings are required to waive these hearings when custody has been placed with a parent. Although the court is relieved of the duty to conduct periodic review and permanency planning hearings, it has discretion to continue to conduct these hearings as long as it retains jurisdiction over the action. *In re Shue*, 311 N.C. 586 (1984); *In re H.S.F.*, 177 N.C. App. 193 (2006).

When review and permanency planning hearings have been waived because the court has placed custody with a parent, if a new report of suspected abuse, neglect, or dependency is made to DSS, specific procedures under G.S. 7B-401(b) apply. As explained by the court of appeals, there are four criteria that trigger the application of G.S. 7B-401(b):

- the court retained jurisdiction over a child whose custody was granted to a parent;
- the court is not conducting periodic judicial reviews of the child's placement;
- a new report of abuse, neglect, or dependency is received by DSS after review hearings have been discontinued by the court; and
- the DSS director determined, based on an assessment of the new report conducted under G.S. 7B-302, that court action is needed.

In re T.P., ___ N.C. App. ___, 803 S.E.2d 1 (2017).

Once periodic review and permanency planning hearings have been waived, G.S. 7B-401(b) impacts the trial court's subject matter jurisdiction to proceed in the action and limits the court's ability to simply hold a review or permanency planning hearing when the criteria of G.S. 7B-401(b) apply. When all four criteria are met, the court will only have subject matter jurisdiction to modify the dispositional order that awarded custody to the parent based on DSS filing a new petition in the existing action and not a motion for review. DSS sets out the recent allegations of abuse, neglect, or dependency in the new

petition. Rather than hold a review or permanency planning hearing on that new petition, the trial court must then conduct a new adjudicatory hearing. If, based on the new petition, the child is adjudicated abused, neglected, or dependent at this second adjudicatory hearing, the court proceeds to a dispositional hearing to modify the existing dispositional order that grants custody to the parent. *See In re T.P.*, ___ N.C. App. ____, 803 S.E.2d 1 (vacating modification of permanency planning order that removed custody of the children from respondent mother resulting from DSS motion for review when G.S. 7B-401(b) was triggered; DSS motion was based on a new report it received and assessed about conditions in the mother's home one week after the court ordered custody to the mother and waived further review hearings; holding the court lacked subject matter jurisdiction to proceed on DSS motion as the proper pleading required by G.S. 7B-401(b) is a new petition filed in the existing case, which would be followed by a subsequent adjudicatory hearing on that petition).

(b) Custody or guardianship to a non-parent. When custody or guardianship is awarded to a person who is not the child's parent, the court may waive G.S. 7B-906.1 hearings, require the custodian or guardian to submit written reports to the court in lieu of the hearings, or order hearings less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following factors:

- the child has resided in the placement for at least one year;
- the placement is stable, and continuing the placement is in the child's best interests;
- neither the child's best interests nor the rights of any party require that review hearings be held every six months;
- all parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
- the court order has designated the relative or other suitable person as the child's permanent custodian or guardian of the person.

G.S. 7B-906.1(n). See Chapter 3.1.D (discussing terminology in court orders when reviews are waived).

The court of appeals held that for purposes of the first condition stated above, a child had lived with a relative for a year even though the child had not lived with the same relative for the entire year. *In re T.P.*, 217 N.C. App. 181 (2011) (finding no error with the trial court's combining time spent with two different sets of grandparents to meet the one-year time period).

A person who was not initially named as a party in the abuse, neglect, or dependency proceeding but who is later awarded custody of, or appointed guardian for, the child automatically becomes a party to the proceeding when that arrangement is the child's permanent plan. G.S. 7B-401.1(c), (d). Custodians or guardians who are parties may file a motion for review at any time.

Review and permanency planning hearings are not automatically waived when the court appoints a guardian or places the child in the custody of someone other than DSS or a

parent. The hearings must continue until all of the conditions in G.S. 7B-906.1(n) are met, and the court makes all the required statutory findings in an order that waives further hearings. Such an order is commonly referred to as having "waived further reviews" (even when the hearing being waived is a permanency planning hearing).

Appellate courts have repeatedly found error where a trial court has waived further review hearings without making all the findings enumerated in G.S. 7B-906.1(n) by clear, cogent, and convincing evidence. *See In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017) (holding reversible error when two of the five required findings were not found); *In re E.M.*, ___ N.C. App. ___, 790 S.E.2d 863 (2016) (vacating the order waiving review hearings when neither the order nor the record showed the standard of proof the court applied and the court had made only one of the five required findings); *In re P.A.*, 241 N.C. App. 53 (2015) (holding that it was reversible error for the trial court to waive further review hearings without making findings of fact on each of the five statutory enumerated criteria).

Practice Note: When custody is ordered to a parent or non-parent and it seems appropriate for DSS and juvenile court involvement to end, transfer of the abuse, neglect, or dependency proceeding to a Chapter 50 custody action should be considered. If appropriate, the court enters a Chapter 50 custody order and terminates its jurisdiction in the juvenile proceeding pursuant to the criteria and procedures of G.S. 7B-911. See section 7.10.B.4(a) (explaining transfer to a civil custody action).

B. Notice and Calendaring

DSS is required to make a timely request to the clerk to calendar each review and permanency planning hearing at a juvenile court session. The clerk is required to give fifteen days' notice of the hearing and its purpose to

- the parents,
- the child if 12 or older,
- the guardian,
- the person providing care for the child,
- the custodian or agency with custody,
- the child's guardian ad litem, and
- any other person or agency the court may specify.

G.S. 7B-906.1(b).

For purposes of notice to a person providing care for the child, DSS must either provide the clerk with the name and address of the individual to be given notice or send the notice itself and file with the clerk written documentation that notice of the hearing was sent to the child's current care provider. G.S. 7B-906.1(b).

Unless proper notice was waived, the court cannot enter a permanency planning order at a hearing for which proper notice was not given. Proper notice includes compliance with the

fifteen-day time period as well as stating the purpose of the hearing. *See In re K.C.*, ___ N.C. App. ___, 791 S.E. 2d 284 (2016) (originally unpublished Aug. 2, 2016, but subsequently published) (vacating permanency planning review orders and remanding for proper permanency planning hearings when respondent objected after receiving eight days' notice that the hearing initially scheduled as a review hearing would be a permanency planning hearing). *See also In re S.C.R.*, 217 N.C. App. 166 (2011) (holding that trial court erred where it authorized a permanent plan at a disposition hearing without the proper notice required for a permanency planning hearing). However, appellate cases have held that respondents waive any objection to lack of such notice by failing to object at trial. *See In re T.H.*, 232 N.C. App. 16 (2014) (holding that respondent could not claim lack of notice where trial court made a "temporary permanent plan" at adjudication and respondent attended disposition hearing but did not object to a lack of notice at disposition); *In re J.P.*, 230 N.C. App. 523 (2013) (holding that because respondent and counsel attended the disposition hearing in which the trial court announced its intention to enter a permanent plan and they did not object to lack of notice, they waived their right to object).

C. Participants

At dispositional hearings, in addition to hearing from DSS as the petitioner, the court must give the child and the child's parents, guardian, custodian, or if applicable a caretaker who is a party an opportunity to present evidence and make recommendations about the disposition they believe to be in the child's best interests. *See* G.S. 7B-901(a).

At review and permanency planning hearings, the court is required to consider information from

- the parents,
- the child,
- the guardian,
- any person providing care for the child,
- the custodian or agency with custody of the child,
- the child's guardian ad litem, and
- any other person or agency that will aid in its review.

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

At any hearing in the dispositional phase, testimony or evidence from persons who are not parties may be considered when the court finds it to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. G.S. 7B-901(a); 7B-906.1(c). The Juvenile Code states specifically that its provisions should not be construed to make any person providing care to a child a party to the proceeding based solely on receiving notice and having a right to be heard. G.S. 7B-906.1(b). See Chapters 5.4 (discussing parties) and 4.7.A (discussing intervention).

Persons whose presence may not be required (unless subpoenaed by a party) but who could potentially provide useful information to the court because of their involvement with the

family or knowledge of or expertise on a particular relevant issue include

- relatives or nonrelative kin,
- counselors/therapists,
- medical or other experts,
- previous foster parents or other caregivers,
- school personnel,
- day care providers,
- law enforcement officers,
- juvenile court counselors,
- probation/parole officers, and
- other service providers.

D. Open or Closed Hearings

Hearings are presumed to be open unless the court specifically excludes the public. The child has the right to request that the hearing be open, and the court must keep the hearing open when the child (or child's GAL) requests it. G.S. 7B-801(b). Otherwise, the court has discretion to exclude the public from all or part of a hearing, but in deciding to do so must consider the circumstances of the case, including

- the nature of the allegations,
- the age and maturity of the child,
- the benefit to the child of confidentiality,
- the benefit to the child of an open hearing, and
- the extent to which an open hearing would compromise the confidentiality afforded the child's record by G.S. 7B-2901.

G.S. 7B-801(a). See Chapter 14.1 (discussing confidentiality and disclosure of juvenile records).

Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure prohibits electronic media and still photography coverage of juvenile proceedings. In some judicial districts local rules may address open hearings.

E. Evidentiary Standard and Burden of Proof

1. Rules of evidence. Hearings in the dispositional phase may be informal, and the court may consider any evidence, including hearsay evidence, it finds to be relevant, reliable, and necessary to determine the child's needs and the most appropriate disposition. *See* G.S. 7B-901(a) (initial dispositional hearing); 7B-906.1(c) (review and permanency planning hearings). Some cases state that the North Carolina Rules of Evidence do not apply to dispositional hearings. *In re J.H.*, ___ N.C. App. ___, 780 S.E.2d 228 (2015) (dispositional hearings are not governed by the rules of evidence); *In re M.J.G.*, 168 N.C. App. 638 (2005) (formal rules of evidence do not apply at dispositional hearings); *In re Montgomery*, 77 N.C.

App. 709 (1985) (unlike adjudication hearing, formal rules of evidence do not apply at dispositional hearings). See Chapter 11.1.B (discussing interpretation of this statement).

Some cases discussing the trial court's rulings on evidentiary issues at dispositional hearings include the following.

- The trial court did not abuse its discretion in refusing to admit hearsay evidence in a permanency planning hearing when there was no explanation as to why the authors of documents were not present to testify, there was no support for the contention that the documents were reliable, and DSS strenuously objected to the documents based on a lack of authenticity and reliability. *In re P.O.*, 207 N.C. App. 35 (2010).
- It was not error for the court to exclude hearsay testimony of mother's sister regarding child's statements about abuse by father because it was cumulative—there was already an abundance of testimony regarding abuse of child by father. *In re J.S.*, 182 N.C. App. 79 (2007).
- It was error for the court to decline to "hear anything else about this thing today" and cut off a party's attempt to introduce evidence regarding best interest where there was no finding that the evidence was incompetent, irrelevant, or cumulative. *In re O'Neal*, 140 N.C. App. 254, 257 (2000).
- It was error for the trial court to base findings on statements made in the dispositional hearing by parties and other individuals who had not been duly sworn; this was not competent evidence. *In re J.N.S.*, 207 N.C. App. 670 (2010).

See Chapters 6.3.B (discussing the handling of different evidentiary standards when adjudication and disposition are combined) and 11 (discussing in detail evidence issues in juvenile proceedings).

2. No burden of proof. Juvenile Code provisions related to hearings in the dispositional phase do not place a burden of proof on any party. The essential requirement is that sufficient evidence be presented so that the court can make sufficient findings and a determination regarding the child's best interests. *See In re L.M.T.*, 367 N.C. 165 (2013) (stating that neither the parent nor DSS bears the burden of proof in a permanency planning hearing); *In re Shue*, 311 N.C. 586 (1984) (earlier version of the Juvenile Code did not place any burden of proof upon the parents or DSS during dispositional or review hearings).

3. Reports. After an adjudication, the court must proceed to the initial dispositional hearing when it receives sufficient social, medical, psychiatric, psychological, and educational information. G.S. 7B-808(a). Reports containing this type of information may be presented to the court by DSS, the child's guardian ad litem (GAL), and the parent at any type of hearing in the dispositional phase of the proceeding.

(a) DSS predisposition reports. A "predisposition report" is a written report prepared by DSS that provides social, medical, psychiatric, psychological, and educational information, and sometimes recommendations, related to disposition. The court may not receive or consider the predisposition report until the adjudicatory hearing is completed. G.S. 7B-808(a). *Cf.*

Chapter 6.3.B (discussing combining of adjudication and disposition hearings while considering certain evidence for dispositional purposes only).

Unless the court makes a written finding that the report is unnecessary, DSS is required to prepare a predisposition report containing

- the results of any mental health evaluation under G.S. 7B-503(b) (ordered by the court when the alleged abuser has a history of violent behavior against people),
- a placement plan, and
- a treatment plan to meet the child's needs.

G.S. 7B-808(b).

(b) GAL or parent reports. The Juvenile Code does not require written reports from parties other than DSS. Nevertheless, the child's GAL typically submits written reports to the court as part of the GAL's duties involving the investigation of facts and the child's needs, identification of resources, exploration of dispositional options, and promotion of the child's best interests. *See* G.S. 7B-601; 7B-700(f). This report, submitted to the court in the disposition phase of the case, may address many of the issues addressed in the DSS predisposition report and include the same or different recommendations.

Parents (through their attorneys, if represented by counsel) may submit written reports to the court, describing the parents' circumstances and progress, identifying resources, discussing dispositional alternatives, and making recommendations, including the parents' opinions about the best interests of the child. These reports, like the DSS report, can be given to the court only after adjudication. *See In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (in a termination of parental rights proceeding, respondent mother did not preserve for appeal the trial court's earlier determination to exclude the parent report made at a hearing on a motion in limine when her counsel did not seek to properly introduce the parent report at the disposition hearing); *see also In re H.M.H.*, 208 N.C. App. 568 (2009) (unpublished) (refers to a parent report admitted as evidence that the court considered at a review hearing).

(c) Sharing of reports. Both judicial efficiency and the parties' ability to prepare adequately are enhanced if reports to the court are shared among parties before the day of the hearing. The Juvenile Code requires the GAL to share reports and information with all parties before submitting them to the court, but a time frame for sharing the report is not specified. G.S. 7B-700(f). The chief district court judge may adopt local rules or issue an administrative order establishing time frames and procedures for the sharing of reports, including how a party's objection to the content of another party's report should be handled. The local rules or administrative order

- may prohibit disclosure of the report to the child if the court determines that disclosure is not in the child's best interests,
- may not prohibit a party entitled by law to receive confidential information from receiving that information, and

- may not allow disclosure of any confidential source protected by statute.

G.S. 7B-808(c). *See* G.S. 7B-700(b). See also Chapter 14.1 (discussing other laws related to sharing information in juvenile cases) and Appendix 2 (discussing the chief district court judge and local rules).

(d) Court's use of reports. Although the court may consider reports as evidence, reports alone are insufficient to support a permanency planning order; there must be some testimony at the hearing. *See In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017) (vacating and remanding a permanency planning order as not supported by competent evidence when the court heard no oral testimony from any witness and only heard statements from the attorneys and accepted into evidence DSS and GAL reports); *In re D.Y.*, 202 N.C. App. 140 (2010) (holding that where trial court considered only written reports and no testimony was taken, trial court failed to hold a proper permanency planning hearing because DSS had presented no competent evidence); *In re D.L.*, 166 N.C. App. 574 (2004).

When written reports are admitted as evidence, the appellate courts have distinguished between a court's consideration of the reports and a court's incorporation of entire reports into its order as findings of fact. The appellate opinions sometimes characterize broad incorporation as error, but more often they focus on whether the trial court made sufficient independent findings of fact to show that the court did not improperly delegate its fact-finding function by over-reliance on outside reports. *See, e.g., In re H.H.*, 237 N.C. App. 431 (2014) (holding the incorporation of reports by reference is not the equivalent of a finding); *In re A.S.*, 190 N.C. App. 679 (2008) (explaining that the trial court's finding that the statements in the reports were true did not constitute independent findings and did not tell the appellate court on which statements the court relied), *aff'd per curiam*, 363 N.C. 254 (2009); *In re L.B.*, 181 N.C. App. 174 (2007) (holding that the trial court properly incorporated and made findings of fact based on DSS and guardian ad litem reports); *In re J.S.*, 165 N.C. App. 509, 511 (2004) (explaining that the trial court may consider all written reports but "may not delegate its fact finding duty," and instructing that "the trial court should not broadly incorporate these written reports from outside sources as its findings of fact").

7.3 Best Interests of the Child

The court's decisions related to disposition center on the determination of what is in the child's best interests. North Carolina appellate cases have referred to "best interests" as the "polar star" of the Juvenile Code. *See In re T.H.T.*, 362 N.C. 446, 450 (2008); *In re R.T.W.*, 359 N.C. 539, 550 (2005); *In re Montgomery*, 311 N.C. 101, 109 (1984). See also section 7.1.B, above, discussing purposes of disposition.

As applied to abuse, neglect, or dependency proceedings, there is no specific definition of "best interests" in the Juvenile Code or elsewhere. The determination of best interests is a judicial function and is in the trial court's discretion. An appellate court reviews a trial court's

best interests determination for an abuse of discretion. *See, e.g.*, *In re J.W.*, 241 N.C. App. 44 (2015) (holding no abuse of discretion when the trial court kept the children in DSS custody rather than return the children to respondent mother's custody); *In re D.S.A.*, 181 N.C. App. 715 (2007) (holding that trial court's determination that it was not in child's best interest to be placed in paternal grandparents' custody was not an abuse of discretion). A determination that a particular disposition is in a child's best interests is a conclusion of law that must be supported by findings of fact based on competent evidence in the record. *See In re L.M.*, 238 N.C. App. 345 (2014); *In re Helms*, 127 N.C. App. 505 (1997). In an appellate review, the trial court's findings are not viewed in isolation but instead are considered as part of the totality of all the court's findings. *See In re C.P.*, ___ N.C. App. ___, 801 S.E.2d 647 (2017) (affirming permanent plan of guardianship based on child's bests interests; findings of mother's progress should not viewed in isolation and did not contradict other findings that it was not in child's best interests to return home). In a G.S. Chapter 50 custody action the court of appeals said the following, which is equally applicable to best interests determinations in abuse, neglect, or dependency cases:

> [A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Carpenter v. Carpenter, 225 N.C. App. 269, 273 (2013) (citations omitted) (quoting *Dixon v. Dixon*, 67 N.C. App. 73, 76-77 (1984)).

What follows are a few of many cases discussing the court's determination of best interests. However, nearly all appellate cases discussing the sufficiency of the evidence to support a dispositional decision either discuss or mention best interests. Many of these are cited in other sections of this Chapter and elsewhere in this Manual.

- Where a sixteen-year-old child had been in and out of foster care during his life, his mother had made some progress, and the child desired to return to his mother, it was not error for the trial court to conclude that it was nevertheless in the child's best interest to appoint the foster father as the child's guardian. The trial court's findings provided sufficient evidence that the plan for guardianship was in the child's best interest and that the respondent mother could not adequately care for him. *In re L.M.*, 238 N.C. App. 345 (2014).
- There was insufficient evidence to support a conclusion that the change in custody from father to mother was in the child's best interest where the only relevant findings were that the child was not totally happy in her current residence; she missed her animals, her mother, her grandfather, and her stepfather (two of whom had neglected her); and she said she was glad that her biological father was in her life. The appellate court also found fault with an indication from the transcript that the principal basis for the change in custody was

the fact that the father was unmarried, citing *Stanley v. Illinois*, 405 U.S. 645 (1972), which explicitly rejected this line of reasoning. *In re H.S.F.*, 177 N.C. App. 193 (2006).

- Evidence of a strong emotional bond between parent and child is critically important but not determinative on the issue of best interest. *In re Shue*, 63 N.C. App. 76 (1983), *aff'd as modified on other grounds*, 311 N.C. 586 (1984).
- Respondent mother asserted that the trial court erred in failing to consider the progress she had made and in ceasing reunification efforts, but the court of appeals found that while the trial court had considered her progress, there was not enough progress for the court to be assured that the children could be safely returned to her care, and the best interests of the children, not the rights of the parents, were paramount. *In re T.K.*, 171 N.C. App. 35, *aff'd per curiam*, 360 N.C. 163 (2005).
- Findings were insufficient to support the best interest determination as to custody outside of respondent's home, where findings were that respondent made diligent efforts to comply with the DSS case plan; both DSS and the GAL noted the absence of safety concerns in the home and recommended custody with respondent; and the trial court's findings that indicated some reservations about custody with the respondent were inadequate to support the best interest determination. *In re J.B.*, 197 N.C. App. 497 (2009).
- Where the trial court had made a finding that return of the child was contrary to the best interests of the child in that conditions leading to removal had not been alleviated, the court of appeals had difficulty determining which "condition" the trial court was referring to. One of the possibilities was the trial court's finding of "sexual deviancy" and that the respondent was bisexual, where the trial court had characterized this lifestyle as "abnormal" and "not conducive to child rearing." The court of appeals rejected such a finding, stating that it is not self-evident that sexual orientation has an adverse effect on the welfare of the child. Even if the court's finding that the parent is bisexual and people who surround her "engage in a similar lifestyle" were supported by evidence, there were no findings linking these circumstances to a negative impact on the child's welfare or on her parents' abilities to care for her. The court of appeals held that these conditions could not be a basis to take custody away from the child's biological parents. *In re M.M.*, 230 N.C. App. 225, 235 (2013) (see also cases cited therein).

7.4 Dispositional Alternatives: Placement and Custody

The Juvenile Code refers to placement and custody options as "dispositional alternatives" and enumerates five such options. *See* G.S. 7B-903(a). The court may combine any of those options when it finds the disposition is in the child best interests. G.S. 7B-903(a). The various dispositional alternatives are available at any dispositional hearing. G.S. 7B-903(a); 7B-906.1(i). Over the course of the dispositional phase of the case, the child's placement is likely to change given the court's consideration of the child's best interests and need for a safe, permanent home within a reasonable period of time and the progress the parents made (or not) in correcting the conditions that led to the child's adjudication and/or removal. *See* G.S. 7B-906.1; 7B-906.2.

Resource: The National Conference of State Legislatures discusses "The Child Welfare Placement Continuum: What's Best for Children?" on its website.

A. Dismiss or Continue the Case

1. Dismiss the case. An adjudication that a child is abused, neglected, or dependent allows the court to exercise jurisdiction to decide and enter dispositional orders. If the court determines at the conclusion of a dispositional hearing that there is no purpose to be served by the continued exercise of jurisdiction by the court, the court has the option to dismiss the case. G.S. 7B-903(a)(1). Dismissal results in termination of the court's jurisdiction, and the legal status of the child and custodial rights of the parties revert to the status that existed before the filing of the petition, unless a valid order in another civil proceeding provides otherwise, a Chapter 50 custody order was entered pursuant to G.S. 7B-911, or a termination of parental rights was ordered. G.S. 7B-201(b). See Chapter 3.1.C (relating to ending jurisdiction).

Practice Note: Although dismissal at an initial dispositional hearing is uncommon, it may be appropriate when circumstances since the filing of the petition have changed to the point that there is no longer a need for court involvement (e.g., the parents completed the services agreed upon in the protective services plan such that the child is safe in the parents' care and state intervention is no longer required).

2. Continue the case. The court has the dispositional alternative of continuing the case to "allow the parent, guardian, custodian, caretaker or others to take appropriate action." G.S. 7B-903(a)(1). For example, the court may find that the family is on track for addressing the conditions that led to the adjudication and may want to give the family more time to progress before entering a dispositional order or dismissing the case. Similarly, the court might hold a dispositional hearing in which the evidence shows what the needs are, what the parents have accomplished so far, and what remains to be accomplished, then continue the case to a specific time to evaluate the parents' continued progress and determine an appropriate disposition.

Note that this dispositional outcome is different from the continuance of a dispositional hearing. *See* G.S. 7B-803. See section 7.2.A, above (discussing the statutory time requirements for dispositional hearings), and Chapter 4.5 (relating to continuances).

B. In-Home Supervision and Services

The Juvenile Code sets out a preference for the use of in-home supervision and community-level services by stating that in dispositions "the initial approach should involve working with the juvenile and juvenile's family in their own home." G.S. 7B-900. The court may require that the child be supervised in his or her own home by DSS or another individual who is available to the court, subject to any conditions the court places on the parent, guardian, custodian, or caretaker. G.S. 7B-903(a)(2). When a child remains in the home but is supervised by DSS or another individual, the court may or may not order that DSS or the other

individual have legal custody of the child while the parent, guardian, or custodian retains physical custody. If legal custody is ordered to DSS or another individual, that portion of the order would be made under a different dispositional alternative, and the dispositional order would combine the two applicable dispositional alternatives. G.S. 7B-903(a)(2) and (4). In cases where custody is placed with a parent who is subject to supervision, the court is not obligated to conduct periodic review or permanency planning hearings. *See* G.S.7B-906.1(k). However, the court may hold those hearings to receive an update on the family's progress and enter new dispositional orders that may continue or change the existing disposition. See section 7.2.A.4(a), above (discussing waiving review hearings).

Prior to October 1, 2015, this dispositional alternative was codified at G.S. 7B-903(a)(2)a. and contained introductory language about a "juvenile who needs more adequate care or supervision or who needs placement." The court of appeals interpreted that introductory language to be a required finding in the order. *See In re S.H*. 217 N.C. App. 140 (2011) (reversing and remanding dispositional order for failing to include required finding). That introductory language was removed by S.L. 2015-136, sec. 10, and presumably the finding is no longer required under an order entered pursuant to the current G.S. 7B-903(a)(2).

Practice Notes: Although permitted by the Juvenile Code, it is uncommon for the court to order someone other than DSS to provide in-home supervision. When that condition is ordered, typically the parent is residing with the person responsible for providing the supervision (e.g., the maternal grandmother, respondent mother, and child reside in the same home, and mother is ordered to be under the supervision of maternal grandmother). The child's guardian ad litem (GAL) cannot serve in an in-home supervisory role, as it is beyond the statutory scope and authority of a GAL's role. *See* G.S. 7B-601.

In-home supervision may be ordered as an initial disposition, but it also may be used later when the court orders the child's return home from foster care or other placement.

C. Out-of-Home Placement Generally

Out-of-home placement dispositional alternatives include

- DSS custody with or without placement authority;
- custody with a parent, relative, other suitable person, or private agency offering placement services; or
- appointment of a guardian.

G.S. 7B-903(a)(4)−(6).

Effective for all actions pending or filed on or after October 1, 2015, the dispositional alternatives statute, G.S. 7B-903, was amended with both language changes and a reorganization of the subsections and subdivisions. The prior version of the statute (pre-2015 changes) identified various dispositional alternatives, including the out-of-home placements discussed here, and contained introductory language about a "juvenile who needs more adequate care or supervision or who needs placement." The court of appeals interpreted that

introductory language to be a finding the trial court had to make when it ordered one of the dispositional alternatives that followed the language. *See In re S.H.*, 217 N.C. App. 140 (2011) (reversing and remanding dispositional order for failing to include required finding). That introductory language was removed by S.L. 2015-136, sec. 10, and presumably the finding is no longer required under an order entered pursuant to the current G.S. 7B-903(a)(2).

1. Placement priority: parents and relatives. Throughout the Juvenile Code it is clear that the preferred placement and permanent plan are the child's remaining in or returning to the child's own home when the child can be safe there. For example, a dispositional order that places or continues the child's out-of-home placement must include findings that the child's continuation in or return to his or her own home would be contrary to his or her health and safety. G.S. 7B-903(a2). The Juvenile Code defines "return home or reunification" as the child's placement "in the home of either parent" or "in the home of the guardian or custodian from whose home the child was removed by court order." G.S. 7B-101(18b). Given the definition of "return home or reunification," when the court makes a placement decision, it is required to consider placement with a parent. *See also* G.S. 7B-100 (in the purposes statute, referring to rights of child and parents and preventing inappropriate separation of child from parents); 7B-906.2(b) (reunification must be a permanent plan absent statutorily required written findings). The appellate courts have also identified the Juvenile Code's prioritization of the child's placement with his or her parents. *See In re T.W.*, ___ N.C. App. ___, ___, 796 S.E.2d 792, 794 (2016) and *In re J.D.C.*, 174 N.C. App. 157, 161 (2005) (both quoting *In re Shue*, 311 N.C. 586, 596 (1984) "[i]t is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)").

When placement with either parent is not possible and the court is ordering the child's out-of-home placement, the court must first consider placement with a relative. *See* G.S. 7B-903(a1). Note that the Juvenile Code does not define "parent," and some appellate opinions have referred to parents as relatives. *See In re J.D.R.*, 239 N.C. App. 63, 73 (2015) (stating the "disposition order removed custody from Mother and placed custody with a relative, Father"). As between a parent and relative, parents, not relatives, have paramount constitutional rights to care, custody and control of their children. *See Eakett v. Eakett*, 157 N.C. App. 550, 554 (2003) (stating in grandparent visitation case, "[t]he grandparent is a third party to the parent-child relationship. Accordingly, the grandparent's rights to the care, custody and control of the child are not constitutionally protected while the parent's rights are protected"). See Chapter 2.4.A (discussing constitutional rights of parents).

At the initial dispositional hearing, the court must inquire into efforts made by DSS to identify and notify parents, relatives, or other persons with legal custody of the child's siblings as potential resources for placement or support. G.S. 7B-901(b). *See also* G.S. 7B-506(h)(2) (similar inquiry at the nonsecure custody stage of the case). For a court or DSS to consider placement with the child's relative, the relative must be willing and able to provide proper care and supervision in a safe home. "Safe home" is defined as "a home in which the

juvenile is not at substantial risk of physical or emotional abuse or neglect." G.S. 7B-101(19). See section 7.4.D, below (related to custody and placement authority of DSS).

In ordering an out-of-home placement, when there is a willing and able relative with a safe home, the child must be placed with that relative unless the court finds that placement with the relative is contrary to the best interests of the child. G.S. 7B-903(a1). *See In re L.C.*, ___N.C. App. ___, 800 S.E.2d 82 (2017) (holding failure to make the finding that a relative placement is contrary to the child's best interests will result in a remand; vacating and remanding permanency planning order that did not make required findings about relative that mother identified as possible placement option when DSS was in the process of evaluating the placement). Relative priority applies to initial, review, and permanency planning hearings and placements. *In re E.R.*, ___ N.C. App. ___, 795 S.E.2d 103 (2016); *In re L.L.*, 172 N.C. App. 689 (2005) (decided under previous statute), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). Because placement with an out-of-state relative requires compliance with the Interstate Compact on the Placement of Children (ICPC), immediate placement with a relative may not be possible. *See In re L.L.*, 172 N.C. App. 689 (ICPC home study not approved until review hearing). *See* G.S. 7B-903(a1) (placement made in accordance with ICPC). See section 7.4.H, below (discussing the ICPC).

The following cases are examples of decisions that reviewed the child's out-of-home placement outside of a relative's home.

- When the Indian Child Welfare Act applies, the court is not relieved of its obligation to make the finding under the Juvenile Code that it is contrary to the child's best interests to place the child with a relative when ordering placement with a nonrelative. *In re E.R.*, ___ N.C. App. ___, 795 S.E.2d 103 (reversing and remanding permanency planning order of guardianship to children's current nonrelative placement provider without making findings of fact as to why the children's placement with their paternal grandmother was not in their best interests).
- Where the father had not submitted to a paternity test and DSS had not completed a home study of the father's parents, it was not an abuse of discretion for the court to determine that placement with the father's parents was not in the child's best interest, since the child could be subject to removal from that home. *In re D.S.A.*, 181 N.C. App. 715 (2007).
- It was error for the court to place a child with foster parents without finding that it was contrary to the child's best interests to place her with willing relatives. *In re L.L.*, 172 N.C. App. 689 (2005), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008).
- The trial court did not abuse its discretion in determining that placement with grandparents was not in the child's best interest, where the parents and grandparents were unwilling to consider or explain the source of an infant's serious injuries while in the parents' care, the grandparents were unlikely to deny their daughter access to the child, and it had been recommended that the grandfather attend intensive outpatient substance abuse treatment. *In re B.W.*, 190 N.C. App. 328 (2008).

When placement with a relative is considered, the court must also determine whether it is in the child's best interest to stay in the community where the child lives, discussed in

subsection 2, immediately below.

Practice Notes: When the court considers whether a relative is "willing and able" to care for a child, it is important for the court to make this determination in relation to the child's specific needs (e.g., special needs) and the relative's ability to meet those needs.

When a child is placed with a relative, depending on the duration of the placement, whether the placement becomes the child's permanent plan, and the location of the placement, a post-adjudication change in venue of the action may be appropriate. See Chapter 3.5.C (discussing change in venue). However, if the relative lives outside of North Carolina, the court cannot transfer the action to another state. When more than one state is involved, the Uniform Child-Custody Jurisdiction Enforcement Act (UCCJEA) applies, and the UCCJEA requires that a court action be initiated in the other state. See Chapter 3.3.C (discussing jurisdictional issues under the UCCJEA).

Resources:
For information, resources, statistics, and summaries of state laws that address kinship (relative) placements including foster care licensing and financial assistance, see the Grandfamilies.org website.

CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Placement of Children with Relatives" (2013).

For additional discussions about the involvement of relatives in an abuse, neglect, or dependency action, see Chapters 2.2.B.10 (identifying relatives), 2.3.C.3 (discussing relatives and the Foster Care Children's Bill of Rights), and 5.5.C.3 and 5.6.E (discussing similar inquiry at and placement priority at the nonsecure custody stage of the proceeding).

2. Child's own community. In determining an out-of-home placement, the court must consider whether it is in the child's best interests to stay in the child's own community rather than move elsewhere. G.S. 7B-903(a1).

In addition, federal education and child welfare laws require that DSS consider the child's educational stability and make assurances that the placement takes into account the appropriateness of the child's current educational setting and proximity of the placement to the school the child was enrolled in at the time of the each placement (school of origin). DSS must ensure that the child remains in the school of origin, unless there is a determination that it is not in the child's best interests to do so. For a discussion of the Every Student Succeeds Act and the Fostering Connections to Success and Increasing Adoptions Act as related to school stability, see Chapter 13.7.

Practice Note: The court's consideration of community ties is broad and suggests that the court might examine factors such as

- the child's school, the impact of changing schools, and the best interest determination as to whether the child will remain in his or her school of origin;

- ties with or support from siblings, relatives, or friends in the community and the impact that relocating could have on such ties or support;
- the child's current receipt of services from specific individuals or agencies in the community and the impact of disrupting, changing, or losing relationships with particular service providers;
- the child's involvement with specific activities or groups and the impact of changing or losing that involvement (e.g., music, scouts, church, sports, etc.); and
- the location of the parents and the effect of a particular placement on the child's ability to see his or her parents (note that the court is required to address visitation under G.S. 7B-905.1; see section 7.5, below, for a discussion of visitation).

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3. Required findings. Anytime a dispositional order places or continues the child in an out-of-home placement, the order must contain findings

- that the child's continuation in or return to his or her own home would be contrary to the child's health and safety (G.S. 7B-903(a2));
- whether DSS has made reasonable efforts to prevent the need for the child's placement, based on the child's health and safety as the paramount concern when determining if the efforts were reasonable (note that in cases where reasonable efforts were precluded because of an immediate threat of harm to the child, the order must have a finding that placement is necessary to protect the child) (G.S. 7B-903(a3); *see In re N.B.*, 240 N.C. App. 353 (2015) (holding findings that DSS made reasonable efforts to eliminate the need for an out-of-home placement were supported by evidence of social worker's contact with mother since previous review hearing that showed social worker was involved in scheduling and supervising visits between mother and children and social worker informed mother of children's medical issues and coordinated contact between mother and children's therapist)); and
- addressing visitation (G.S. 7B-905.1).

See sections 7.9, below (discussing reasonable efforts), and 7.5, below (discussing visitation).

4. Meaning and impact of "custody" and "placement". The term "custody" is not defined in the Juvenile Code and is used in more than one way. "Custody" may refer to a temporary legal arrangement or a more permanent arrangement. Temporary custody, nonsecure custody, and custody granted at disposition are all different. *See, e.g.*, G.S. 7B-500; 7B-505; 7B-903(a)(4). See also Chapter 5.5 (discussing temporary and nonsecure custody).

A custody order entered after adjudication (whether at an initial dispositional, review, or permanency planning hearing) is a dispositional alternative. Only an order entered at a permanency planning hearing can award custody as the permanent plan for the child. *See In re D.C.*, 183 N.C. App. 344 (2007) (decided under prior law) (holding that it was error for the trial court to order a permanent plan of custody when the parent had not received notice that the hearing was a permanency planning hearing). See also section 7.10, below, related to permanent placement options. "Custody" may refer to a civil custody order entered pursuant to G.S. 7B-911 and Chapter 50. See section 7.10.B.4(a), below, relating to civil custody orders.

Although the term "nonsecure custody" is only used in Article 5 of the Juvenile Code, which addresses the pre-adjudication phase of a case, the trial court's use of the term "non-secure custody" at disposition when ordering the dispositional alternative of custody to DSS was not error as the term " 'non-secure custody' merely distinguishes the custody from 'secure custody,' in which the juvenile is placed in a detention facility or other government-supervised confinement." *In re J.W.*, 241 N.C. App. 44, 52 (2015) (rejecting respondent's argument that the court erred in awarding DSS "non-secure custody" at the dispositional hearing; note that the distinction between "nonsecure custody" granted in the pre-adjudication phase of the case under Article 5 of the Juvenile Code and the use of the term "non-secure custody" in the dispositional phase was not addressed).

Practice Note: Assumptions tend to be made concerning the authority and duties that accompany an order giving one "custody," but because "custody" does not have one distinct meaning and is not statutorily defined, it is important for the court to make its intentions clear when ordering custody. To avoid problems surrounding the meaning of custody, the court should anticipate questions that might arise with respect to the custodian's authority or duties and specifically address them in the order. Note that "custodian" is defined as "the person or agency that has been awarded legal custody of a juvenile by a court." G.S. 7B-101(8).

Legal custody, physical custody, placement, and placement authority are not the same thing and are not automatically tied to one another. Consider the following:

- The Juvenile Code refers to "custody or placement responsibility" with DSS. *See* G.S. 7B-903.1(b)−(d); 7B-905.1(b); 7B-906.1(f), (*l*). *See also* G.S. 7B-507(a)(4) (an order placing child in nonsecure custody with DSS shall specify that placement and care are DSS's responsibility unless the court orders a specific placement). Presumably when an order grants custody to DSS without designating a specific placement, DSS has both custody and placement responsibility with the authority to make placement decisions and arrangements for the child's placement. When the order awards custody to DSS and specifies the child's placement, DSS is awarded legal custody without the authority to make decisions related to the child's placement.
- The court may not order physical custody with one person and physical placement without custody with another person. The phrase "physical custody" is used "to refer to the rights and obligations of the person *with whom the child resides*." *In re H.S.F.*, 177 N.C. App. 193, 202 (2006) (emphasis in original) (quoting 3 Suzanne Reynolds, Lee's *North Carolina Family Law* § 13.2, at 13–16 (5th ed. 2002)). An order granting physical custody to mother and physical placement with paternal grandfather without a grant of custody purported to grant physical custody to a parent who did not reside with the child and physical placement of the child with a person with no custodial rights or the legal ability to make daily decisions regarding the child's welfare. *In re H.S.F.*, 177 N.C. App. 193. However, a person with custody may choose to place the child with a selected caretaker while still retaining custody. In *In re D.L.*, 215 N.C. App. 594 (2011), the court of appeals held the trial court did not abuse its discretion when it sanctioned respondent mother's decision that the children would live with relatives while keeping custody with the respondent mother rather than ordering custody to DSS or the relative caretakers. The court of appeals distinguished *In re D.L.* from *In re H.S.F.* and emphasized that the trial

court had not ordered physical placement of the children with the relative but had approved the mother's decision about where the children should be placed.

- A court may order joint legal custody to both a parent and another person, with physical custody to the other person. See section 7.4.E.4, below (discussing joint custody).

D. DSS Custody

The court may order the child to be placed in DSS custody in the county of the child's residence. If the child's residence is in another state, the court may place the child in the physical custody of DSS in the county where the child is found so that DSS can return the child to the responsible authorities in his or her home state. G.S. 7B-903(a)(6).

Practice Notes: A court in North Carolina cannot "transfer" custody of the child to an agency in another state unless a valid order giving that agency custody is already in place. DSS should contact the appropriate child welfare agency in the other state to discuss the assumption of custody by that agency. However, neither DSS nor the court can force a person or agency in another state to initiate a court action in that state. If a custody action already exists in the child's home state, procedures in G.S. Chapter 50A, the UCCJEA, should be used. The court cannot "transfer" an entire abuse, neglect, or dependency proceeding to another state. See Chapter 3.3 (explaining the UCCJEA).

In an abuse, neglect, or dependency action, if the adjudication occurred somewhere other than the county of the child's legal residence (e.g., a DSS petitioner is the county DSS where the child was found and it filed the court action in its own county) or if the disposition involves placement in a different county, involvement of another county DSS and/or a transfer of venue may be appropriate. See Chapters 3.5.C (discussing transfer of venue) and 4.7 (discussing intervention).

Resource: For DSS policies and procedures related to child placement, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(IV) (April 2017). Note, DSS polices, currently located here, are being revised.

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1. Notice to GAL of change in placement. When DSS has custody or placement responsibility for a child, it must notify the child's guardian ad litem (GAL) of an intention to change the child's placement unless prevented from giving notice by emergency circumstances. When emergency circumstances exist, DSS must notify the GAL or the attorney advocate within seventy-two hours of a placement change unless local rules require that notification be made sooner. G.S. 7B-903.1(d).

2. Court approval for return home and unsupervised visitation. Once the court orders that DSS has custody of or placement responsibility for a child, DSS may not permit unsupervised visitation with or a return of physical custody to the parent, guardian, custodian, or caretaker from whom the child was removed without a hearing at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(d); *see* G.S. 7B-101(19) (definition of "safe home"). S*ee also In re H.S.F.*, 177 N.C. App. 193 (2006) (holding that it was error for the court to return the child home to the mother without finding that the

child would receive proper care and supervision in a safe home); *In re A.S.*, 181 N.C. App. 706 (holding that it was not error for the trial court to limit visitation or refuse to return the children home where the trial court found that the conditions that led to removal from the home were still present and that return to the home would be contrary to the welfare of the children), *aff'd per curiam*, 361 N.C. 686 (2007). See section 7.5, below (discussing visitation).

Effective June 21, 2017, DSS may not recommend the child's return of physical custody to the removal parent, guardian, custodian, or caretaker without first observing two visits between the child and the removal parent, guardian, custodian, or caretaker. Each observed visit must be at least one hour, and the observations must be at least seven days apart. DSS must provide documentation of the observed visits to the court for the court to consider when DSS is recommending the return of physical custody to the removal parent, guardian, custodian, or caretaker. G.S. 7B-903.1(c). *See* S.L. 2017-41, sec. 10. Although not in the statute, the state policy requires that the visits occur no more than thirty days before the scheduled permanency planning hearing where DSS will make the recommendation. 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(V)G.2 (Aug. 2017). Note, DSS polices, currently located here, are being revised.

3. DSS authority to consent to child's medical care. When DSS has custody of a child, unless the court orders otherwise, DSS may arrange for, provide, or consent to the child's

- routine medical or dental treatment or care, including treatment for common pediatric illnesses and injuries that require prompt attention;
- emergency medical, surgical, psychiatric, psychological, or mental health care or treatment; and
- testing and evaluation in exigent circumstances.

G.S. 7B-505.1(a); 7B-903.1(e). *See also In re Stratton*, 153 N.C. App. 428 (2002) (holding that parents whose children were adjudicated neglected and dependent and placed in foster care did not have the authority to object to DSS's decision to immunize the children; decided before the enactment of G.S. 7B-505.1, effective for all cases pending or filed on or after October 1, 2015, which requires DSS to obtain a court order or authorization from the child's parent, guardian or custodian to immunize a child when it is known that the parent has a bona fide religious objection to the standard schedule of immunizations).

For all other medical care or treatment, DSS must obtain consent from the child's parent, guardian, or custodian unless DSS obtains a court order authorizing the director to provide consent. There must be a hearing, and the court must find by clear and convincing evidence that the care, treatment, or evaluation that DSS is requesting the authority to consent to is in the child's best interests. G.S. 7B-505.1(c); 7B-903.1(e). There is a non-exhaustive list in G.S. 7B-505.1(c) of the type of treatment and care that necessitates DSS obtaining a court order authorizing it to consent to that treatment for the child.

When care or treatment is provided to a child in DSS custody, DSS must make reasonable efforts to (1) promptly notify the parent, guardian, or custodian that the care will be or has

been provided and (2) give frequent status reports on the care and treatment provided to the child. G.S. 7B-505.1(d); 7B-903.1(e). The parent, guardian, or custodian has a right to copies of any records or results of medical evaluations when the parent, guardian, or custodian requests those records from DSS; however, there is an exception for a Child Medical Evaluation or records prohibited from disclosure by G.S. 122C-53(d). G.S. 7B-505.1(d); 7B-903.1(e). In addition, the health care provider who treats the child must disclose confidential information about the child to the parent, guardian, or custodian and to DSS unless a court order or federal law prohibits such disclosure. G.S. 7B-505.1(f); 7B-903.1(e).

Note that the medical evaluations and treatment discussed in G.S. 7B-505.1 differ from the court's authority to order that the child receive an evaluation and necessary treatment pursuant to G.S. 7B-903(d). See section 7.6, below (discussing court-ordered evaluations and treatment of the child).

Resources:
For more information about the medical consent statute when children are ordered in DSS custody, G.S. 7B-505.1, see Sara DePasquale, *New Law: Consenting to Medical Treatment for a Child Placed in the Custody of County Department*, UNC SCH. OF GOV'T: COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG (Nov. 6, 2015).

For information about medical standards of care and best practices related to medical care for children in foster care, see the "Fostering Health NC" section of the North Carolina Pediatric Society website.

NC DHHS DSS Forms:
- DSS-1812, General Authorization for Treatment and Medication (Feb. 2016).
- DSS-1812ins, General Authorization for Treatment and Medication Instructions (Feb. 2016).

4. Reasonable and prudent parent standard. Effective October 1, 2015, North Carolina adopted the federal "reasonable and prudent parent standard" required by the Preventing Sex Trafficking and Strengthening Families Act. See Chapter 1.3.B.10 (discussing the federal law and its impact on North Carolina law). The "reasonable and prudent parent standard" is "characterized by careful and sensible parental decisions that are reasonably intended to maintain the health, safety, and best interests of the child while at the same time encouraging the emotional and developmental growth of a child that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities." G.S. 131D-10.2A(a); 42 U.S.C. 675(10)(A).

Unless the court orders otherwise, a placement provider for a child in DSS custody (e.g., a foster parent) must use the reasonable and prudent parent standard to provide or withhold permission related to the child's participation in normal childhood activities. The placement provider does not need prior approval from DSS or the court. *See* G.S. 7B-903.1(b); 131D-10.2A(c), (e). Normal childhood activities include overnight activities that are not in the direct supervision of the placement provider for periods up to seventy-two hours; for example, a

childhood sleepover. G.S. 131D-10.2A(e); *see* 42 U.S.C. 671(a)(24). If the court determines that it is not in the child's best interests for a placement provider to make these decisions, it shall order alternative parameters for the approval of a child's participation in normal childhood activities. G.S. 7B-903.1(b).

DSS is authorized by statute to make decisions for a child in its custody that are generally made by a child's custodian, unless federal law prohibits DSS from exercising that authority. G.S. 7B-903.1(a); *see* G.S. 131D-10.2A(c); 7B-906.1(*l*). For example, a DSS representative is prohibited from making decisions as the child's parent under the federal Individuals with Disabilities in Education Act (IDEA) regarding special education eligibility and services even though DSS may make other educational decisions, such as which school the child enrolls in. See Chapter 13.7 (discussing the Every Student Succeeds Act regarding school placement decisions) and 13.8 (discussing IDEA). The court may delegate any part of the authority granted to DSS to the child's parent, foster parent, or other individual. G.S. 7B-903.1(a).

At a permanency planning hearing for a child in DSS custody who is at least 14 years old, the court must make an inquiry and specified findings related to the reasonable and prudent parent standard and participation in age- or developmentally-appropriate activities. *See* G.S. 7B-912(a). See section 7.8.C.8, below (discussing required findings at permanency planning hearing).

As part of the recognition and acceptance of the reasonable and prudent parent standard for children in foster care, amendments were made to laws outside of the Juvenile Code to address barriers that existed for teens in foster care who sought to obtain a driver's license. *See* S.L. 2015-135; G.S. 20-11 (application for driver's license); 48A-4 (purchase of automobile insurance).

Practice Note: It may be helpful at a child and family team meeting to discuss and review "The Reasonable and Prudent Parenting Activities Guide" created by the North Carolina Department of Health and Human Services, Division of Social Services. Through this meeting, the parties may learn whether a disagreement exists warranting court intervention. The court may address the issue raised before it by delegating or limiting a placement provider's or DSS's authority over certain decisions, such as a child's participation in a contact sport, staying overnight at a particular individual's home, or attending a specific religious service. It may be also helpful for the court and others to know what activities the child was engaged in to ensure the child's participation may continue.

Resources:

For more information about the reasonable and prudent parent standard, see

- 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(V) (Aug. 2017) and accompanying "The Reasonable and Prudent Parenting Activities Guide" (Sept. 2015). Note, DSS polices, currently located here, are being revised.
- Sara DePasquale, *Children in Foster Care, "Normal Childhood Activities," and the "Reasonable and Prudent Parent" Standard*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Oct. 16, 2015).

- The "Reasonable and Prudent Parenting Legislation" on the National Conference on State Legislatures website.

E. Custody with a Person or Private Agency

1. Custody to a parent, relative, other suitable person, or private agency. The court may order that the child be placed in the custody of "a parent, relative, private agency offering placement services, or some other suitable person." G.S. 7B-903(a)(4). This gives the court broad authority to place custody with someone other than DSS.

Custody as a permanent placement must be made in the context of a permanency planning hearing. See sections 7.2.A.4, above; 7.8.C, below (discussing permanency planning); and 7.10.B.4, below (discussing custody as permanent plan). As a permanent plan, the best interests of the child standard is not applicable unless the court makes written findings that the parents are unfit, have neglected the child, or have acted inconsistently with their constitutionally protected status as parents. See section 7.10.B.5, below.

See section 7.3, above (relating to the court's focus on the child's best interests in determining out-of-home placement).

Practice Notes: DSS remains a party even without custody and is responsible for scheduling reviews pursuant to G.S. 7B-906.1(a). *See* G.S. 7B-401.1(a). The court should make clear its expectations with respect to DSS's supervising the child's placement, providing services, and preparing reports for the court.

The Juvenile Code defines a "custodian" as the person or agency who has been awarded legal custody of a child by a court. G.S. 7B-101(8). Before October 1, 2013, the definition of "custodian" also included a person other than the child's parent or legal guardian who assumed the status and obligation of a parent without being awarded legal custody by a court. This part of the definition was removed by S.L. 2013-129, sec. 1. A person who would have satisfied that criteria is now considered a "caretaker." There are some appellate opinions that were decided under the former language of the statute that refer to what is now considered a "caretaker" as a "custodian."

(a) Parent. The provision allowing custody to a parent may apply in various circumstances, including when

- a child is removed from the home of one parent (the "removal parent") and placement with the other parent (the "non-removal parent") is appropriate;
- the child has been in the custody of someone other than a parent and the court determines that custody should be returned to the parent (but see section 7.4.D.2, above (relating to requirements before DSS may recommend returning physical custody of the child to the removal parent)); or
- one parent needs a court order of custody to establish and protect his or her rights to the child in relation to the other parent.

The Juvenile Code prioritizes reunification with a parent (as discussed in section 7.4.C, above). It is error for the court to fail to consider giving custody to a parent where placement with a parent is a possibility. *See In re Eckard*, 148 N.C. App. 541 (2002) (holding that the trial court erred when it refused to consider whether the biological father of the child, who had entered the case late, was a candidate for custody of the child after it ceased reunification efforts with the mother). See section 7.10.B.5, below (discussing the inapplicability of the best interest standard between a parent and non-parent when there is a fit and able parent).

(b) Relative. When custody is not ordered to a parent, willing relatives who can provide a safe home are always the preferred out-of-home placement option unless the court finds that the placement is contrary to the child's best interest. G.S. 7B-903(a1); *In re E.R.*, ___ N.C. App. ___, 795 S.E.2d 103 (2016). See section 7.4.C, above (preference for relatives).

(c) Other person. The "catch-all" provision in G.S.7B-903(a)(4) permits the court to place custody with "some other suitable person." Nonrelative kin, a person with legal custody of the child's sibling, friends of the family, or others can be given custody of the child if deemed "suitable" by the court. *See* G.S. 7B-800.1(a)(4); 7B-901(b) (court inquiry about notification to other persons with legal custody of the child's siblings as potential resource for placement and support); *see also* G.S. 7B-101(15a) (definition of "nonrelative kin").

(d) Private agency. While custody with a "private agency offering placement services" is permissible, it would be rare for the court to order this instead of ordering custody with DSS.

2. Verification required. Before the court orders custody to an individual who is not the child's parent, the Juvenile Code requires the court to verify that the person receiving custody of the child understands the legal significance of the placement and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4); 7B-906.1(j). See section 7.4.G, below (discussing the verification requirement in greater detail).

3. Return to caregiver with violent history. When a child is removed from the home due to physical abuse, DSS must conduct a review of the background of the alleged abuser, and if there is a history of violent behavior against people, DSS must petition the court to order the alleged abuser to submit to a mental health evaluation. G.S. 7B-302(d1); 7B-503(b). When the court has determined the child suffered physical abuse by that person, before it may order the child returned to that person's custody, the court must consider the opinion of the mental health professional who performed the evaluation. G.S. 7B-903(b).

4. Joint custody is permissible. The court may order joint custody. In the case of *In re B.G.*, 197 N.C. App. 570 (2009), the trial court awarded joint legal custody of a child to her father and her maternal aunt and uncle, giving physical custody to the aunt and uncle. The court of appeals rejected the father's argument that joint legal custody was not an authorized dispositional alternative after reviewing G.S. 7B-903(a) and finding it allowed the trial court

to combine any of the applicable dispositional alternatives and did not prohibit joint legal custody. (The permanency planning order awarding joint custody was reversed, however, because the trial court's findings of fact were insufficient to support application of the best interests standard as there were no findings about whether the father acted inconsistently with his parental rights; see section 7.10.B.5, below (discussing required findings addressing parent's constitutional rights)).

5. Modification of custody order. When the court orders custody, the court may modify the order, either based on the child's best interests pursuant to G.S. 7B-906.1 or upon a motion to modify or vacate the order because of changes in circumstances or the needs of the juvenile brought pursuant to G.S. 7B-1000. *See In re J.S.*, ___ N.C. App. ___, 792 S.E.2d 861 (2016). See section 7.8.E, below (discussing G.S. 7B-1000).

6. Consideration of transfer to civil custody action. Whenever the court places custody with a parent or other appropriate person, the court is required to determine whether jurisdiction in the juvenile proceeding should be terminated and custody of the child awarded to the parent or other appropriate person under G.S. Chapter 50 civil custody provisions. G.S. 7B-911(a). Transferring the abuse, neglect, or dependency action to a civil custody case pursuant to G.S. 7B-911 is appropriate when the need for intervention through a juvenile court action has ended, but there is a need to have a custody order remain in effect. See section 7.10.B.4(a), below, for details of G.S. 7B-911.

F. Guardianship

1. Appointment. The appointment of a guardian of the person for the juvenile is a dispositional alternative. G.S. 7B-903(a)(5). The court may appoint a guardian of the person when it finds that it would be in the best interests of the child. G.S. 7B-600(a). However, guardianship as a permanent plan may be ordered only in the context of a permanency planning hearing. See sections 7.2.A.4, above; 7.8.C, below (discussing permanency planning); and 7.10.B.3, below (discussing guardianship as a permanent plan). When guardianship is a permanent plan, the best interests standard is not applicable unless the court makes written findings that the parents are unfit, have neglected the child, or have acted inconsistently with their constitutionally protected status as parents. See section 7.10.B.5, below.

See sections 7.3, above (relating to the court's focus on best interests in determining out-of-home placement), and 7.4.C.1, above (discussing placement priority and relatives).

Practice Note: Guardianship may be ordered as a temporary measure, as a disposition, or as a permanent plan. *See In re E.C.*, 174 N.C. App. 517 (2005) (a guardian may be appointed at any time in an abuse, neglect, or dependency proceeding when the court finds it is in the child's best interests). In addition to a dispositional alternative, G.S. 7B-600(a) authorizes the court to appoint a guardian of the child's person when no parent appears at a hearing with the child.

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2. Verification required. Before the court appoints as a guardian of the child's person an individual who is not the child's parent, the Juvenile Code requires the court to verify that the person who will be appointed as the child's guardian of the person understands the legal significance of the appointment and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4); 7B-600(c); 7B-906.1(j). See section 7.4.G, below (discussing the verification requirement in greater detail).

3. Role of guardian. "Guardian" is not defined by the Juvenile Code, but the governing statute, G.S. 7B-600, specifies the guardian's roles and responsibilities. A guardian of the person appointed for the child pursuant to G.S. 7B-600

- operates under the supervision of the court, with or without bond;
- files reports only when required by the court;
- has the care, custody, and control of the child;
- may arrange a suitable placement for the child;
- may represent the child in any legal action in any court; and
- may consent to certain actions on the part of the child in place of the parent, including (i) marriage; (ii) enlisting in the military; (iii) enrollment in school; and (iv) necessary remedial, psychological, medical, or surgical treatment.

G.S. 7B-600(a).

Practice Notes: In addition to its meaning under the Juvenile Code, the term "guardian" can be used in relation to a person appointed by the clerk of superior court, pursuant to G.S. Chapter 35A, as guardian of the person, guardian of the estate, general guardian, ancillary guardian, or standby guardian of a minor. A guardian appointed under G.S. 7B-600 in an abuse, neglect, or dependency action does not have all of the rights and responsibilities as a guardian appointed for the child pursuant to G.S. Chapter 35A in a proceeding before the clerk of superior court. A G.S. 7B-600 guardian is not a "guardian of the estate" with authority to manage the child's property, estate, or business affairs. *See* G.S. 35A-1202(9); *see also* G.S. 35A-1221 through -1228 (process and criteria for appointment of guardian of estate for a minor). Unlike a guardian of the person appointed by the clerk pursuant to G.S. Chapter 35A, a G.S. 7B-600 guardian does not have authority under the Juvenile Code or the adoption statutes to consent to the child's direct placement adoption or execute a relinquishment to an agency for the child's adoption. *See* G.S. 48-1-101(8) (definition of "guardian").

Additionally, a guardian appointed under G.S. 7B-600 is completely different from the child's guardian ad litem (GAL) appointed pursuant to G.S. 7B-601. See Chapter 2.3.D (discussing the child's GAL). The term "guardian", by itself, does not refer to a GAL appointed pursuant to G.S. 7B-601, G.S. 7B-602, or Rule 17 of the Rules of Civil Procedure. Appointment of a guardian pursuant to G.S. 7B-600 does not substitute for the appointment of a GAL in the abuse, neglect, dependency, or termination of parental rights action.

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4. Duration of the guardianship. The authority of the guardian continues until the guardianship is terminated by court order; the court terminates its jurisdiction in the abuse, neglect, or dependency action; or the child is emancipated or reaches the age of 18, whichever

occurs first. G.S. 7B-600(a). When guardianship is for a temporary period or is ordered as a disposition that is not the permanent plan, the court may end the guardianship based on a determination that it is no longer in the child's best interests. *See* G.S. 7B-600. *See also In re J.D.C.*, 174 N.C. App. 157 (2005) (holding the G.S. 7B-600(b) criteria to terminate a guardianship order that is the child's permanent plan is inapplicable to the termination of a dispositional order that appointed a guardian but was not the child's permanent plan); *In re E.C.*, 174 N.C. App. 517 (2005) (holding only where guardianship is the permanent plan is the court required to make a finding under G.S.7B-600(b) before terminating the guardianship). When guardianship is awarded as the permanent plan for the child, the guardian automatically becomes a party to the case and the guardianship can be terminated only when the certain circumstances specified in G.S. 7B-600(b) are satisfied. *See* G.S. 7B-600(b); 7B-401.1(c) (parties). See section 7.10.B.3, below (discussing details related to guardianship as a permanent plan).

G. Verification of Understanding and Adequate Resources

Before placing a child in the custody or guardianship of someone other than a parent, the court must verify that the person receiving custody or guardianship understands the legal significance of the placement or appointment and will have adequate resources to appropriately care for the child. G.S. 7B-903(a)(4) and (5); 7B-600(c). This same determination is required by G.S. 7B-906.1(j) when the court awards custody or appoints a guardian at a review or permanency planning hearing.

The Juvenile Code does not require the court to make specific findings in order to make the verification. *In re N.B.*, 240 N.C. App. 353 (2015) (citing *In re J.E.*, 182 N.C. App. 612 (2007)). However, appellate cases have required that there be competent evidence in the record to support the court's verification. *See In re P.A.*, 241 N.C. App. 53 (2015) (holding that this requirement was not met when there was inadequate evidence in the record as to the proposed guardian's resources; the proposed guardian's own unsworn testimony asserting that her resources were sufficient was simply her subjective opinion and was not evidence of her actual resources); *In re J.E.*, 182 N.C. App. 612 (holding in the context of a permanency planning hearing that the trial court's determination was satisfactory where it had received into evidence and considered a home study conducted by DSS indicating that grandparents had a clear understanding of the enormity of the responsibility of caring for the children, that they were committed to raising the children, and that they were financially capable of providing for the children); *see also In re N.B.*, 240 N.C. App. 353; *In re L.M.*, 238 N.C. App. 345 (2014).

The court's verification that the person receiving custody or guardianship understands the legal significance and their responsibilities applies to each person receiving custody or guardianship. In the case *In re L.M.*, 238 N.C. App. 345, the trial court properly verified this as to the foster father, but not the foster mother, although both were being awarded guardianship. The order of guardianship for the foster father was affirmed, but the order of guardianship for the foster mother was vacated and remanded.

The trial court must make an independent determination based on the evidence that is presented that the resources available to the potential guardian or custodian will be adequate. *In re P.A.*, 241 N.C. App. 53. There is no standard for determining whether the proposed guardian or custodian has adequate resources. The court of appeals has recognized that the case law examining a trial court's determination of adequate resources has "addresse[d] this situation from numerous angles, none of them precisely on point." *In re N.H.*, ___ N.C. App. ___, ___, 804 S.E.2d 841, 843 (2017). In some cases, the court of appeals has looked to whether there was evidence of monthly income and expenses and whether the income was sufficient to meet the expenses. *See In re K.B.*, ___ N.C. App. ___, 791 S.E.2d 669 (2016) (holding insufficient evidence to make verification); *In re N.H.*, ___ N.C. App. ___, 804 S.E.2d 841 (although a close call, affirming verification of adequate resources); *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (reversing order; resources were inadequate). When determining whether the income is adequate, applying for assistance programs does not preclude a verification of adequate resources. *See In re C.P.*, ___ N.C. App. ___, 801 S.E.2d 647 (2017) (noting proposed guardian's seeking TANF benefits demonstrated his preparation for the financial burden of caring for the child). In other cases, the court has looked to whether the evidence shows that the proposed guardian or custodian will have adequate resources moving forward, rather than allowing the trial court to rely on the past care provided to the child. *See In re N.H.*, ___ N.C. App. ___, 804 S.E.2d 841 (Dillon, J., concurring).

Practice Note: The court should consider both income and services available to the child and caregiver. Some caregivers may not be willing to apply for available monetary benefits, such as TANF (Temporary Assistance for Needy Families), because doing so will create a reimbursement obligation for the child's parents and a duty on the part of the caregiver to cooperate with efforts to obtain support from the child's parents. (Note, however, that a caregiver may be excused from the duty to cooperate if he or she can provide evidence to support a claim that doing so would not be in the child's best interest.) Some services and benefits, such as scheduling of mental health or therapy appointments or help with the school IEP (Individual Education Plan) process, may not continue when DSS is no longer the child's custodian. The caregiver may need to apply for other services, such as transportation or day care, which had been provided without cost when the child was in DSS custody and now may become an expense for the caregiver.

H. Interstate Compact on the Placement of Children

1. Introduction and purpose. The Interstate Compact on the Placement of Children (ICPC) governs the placement of children in foster care, adoptive homes, and institutions across state lines. The ICPC is a binding statutory agreement that has been adopted in all fifty states, the District of Columbia, and the U.S. Virgin Islands. It consists of ten different articles, and in North Carolina, it is codified at Article 38 of the Juvenile Code, G.S. 7B-3800 *et seq.* The district court has exclusive original jurisdiction over ICPC proceedings. G.S.7B-200(a)(1).

The ICPC establishes uniform legal and administrative procedures the states follow when placing children in out-of-state foster care and preadoptive placements. Its purpose is to protect children by having the two involved states (the sending state and the receiving state) work together to ensure appropriate foster care and adoption placements of children across

state lines. The ICPC provides a framework for exchanging information, evaluating potential placements and the child's circumstances, and ensuring that the child receives adequate care and protection in the receiving state while the sending state retains jurisdiction over the child. *See* G.S. 7B-3800, Art. 1, Art. V.

This section provides only an overview of the ICPC and is not intended to be a comprehensive guide.

2. State and agency structure. Each state has a Compact Administrator. A national association of Compact Administrators referred to as the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) promulgates regulations that are key to interpreting and applying the ICPC. G.S. 7B-3800, Art. VII. North Carolina's Compact Administrator and staff are located in the Division of Social Services within the state's Department of Health and Human Services (DHHS). The Compact Administrator and staff handle all incoming and outgoing referrals for interstate placements. They oversee the investigation of proposed placements in North Carolina to determine whether the placement is consistent with or contrary to the child's best interests.

3. Source of requirements and procedures. Requirements and procedures related to the ICPC are determined by the ten ICPC statutory articles. The North Carolina Administrative Code also includes provisions addressing interstate placement of children under the ICPC. *See* 10A N.C.A.C. Subchapter 70C; 10A N.C.A.C 70H.0301 and .0407(e). In addition, there are the AAICPC regulations, some of which have undergone recent amendments to clarify certain issues. In some instances the amended regulations conflict with earlier North Carolina appellate court decisions interpreting the ICPC statute. Finally, the North Carolina DHHS Division of Social Services policies and procedures provide a framework for compliance with the ICPC.

Resources:
For North Carolina's policies, procedures, and explanations related to interstate placement, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL CH. XI (Nov. 2012; Feb. 2013). Note, DSS polices, currently located here, are being revised.

Additional information about the ICPC in North Carolina, including Compact Administrator contact information, can be found on the "North Carolina" page on the ICPC State Pages website. Information for other states can also be found on the ICPC State Pages website by viewing the map and clicking on a particular state.

Information about the ICPC and the AAICPC regulations can be found on the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC), an affiliate of the American Public Human Services Association, website.

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4. Applicability of ICPC. The ICPC applies to the interstate placement of a child made by a "sending agency"

- in foster care (which may be a child-caring institution) or
- as a preliminary placement to a possible adoption.

G.S. 7B-3800, Art. III(a); *see* G.S. 7B-3800, Art. II(d) (definition of "placement").

A "sending agency" includes DSS, the court, a child-placing agency, or a person (which may be a parent or guardian). G.S. 7B-3800, Art. II(b).

However, the ICPC does not apply to the sending or bringing of a child into a receiving state by the child's

- parent,
- stepparent,
- grandparent,
- adult sibling,
- adult uncle or aunt, or
- nonagency guardian

when the child is left with any of these relatives or a nonagency guardian in the receiving state. G.S. 7B-3800, Art. VIII. The exclusion from application of the ICPC occurs only when both the person making the placement and the placement recipient belong to the above classes of individuals.

The ICPC also does not apply to

- a juvenile who is adjudicated delinquent but is not being ordered to an out-of-state institution (e.g., the juvenile is placed on probation);
- any child placed in a facility for the sole purpose of education;
- any child placed in a medical facility for the sole purpose of medical care;
- any child placed pursuant to any other interstate compact (e.g., Interstate Compact on Juveniles, Interstate Compact on Mental Health); or
- child placements handled in court cases of paternity, divorce, custody, and probate.

See G.S. 7B-3800, Art. II(d) (definition of "placement"), Art. VI.

5. The ICPC and placement with a non-removal parent or relative. In 2004 the North Carolina Court of Appeals held that the provisions of the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother. *In re Rholetter*, 162 N.C. App. 653 (2004). In that case the children had been removed from the custody of the father and stepmother in North Carolina, based on adjudications of abuse and neglect, and placed in DSS custody. The court eventually gave custody to the mother who lived in South Carolina, even though two home studies by South Carolina declined to approve the placement. The court of appeals held that the award of full custody to a non-removal parent was not a "placement" under the ICPC. The court found that the language of the ICPC statute was "clear and unambiguous" and that, because the trial court had not

placed the children "in foster care or as a preliminary [placement] to adoption," the ICPC did not apply. *In re Rholetter*, 162 N.C. App at 664.

However, in 2011 and 2012, the AAICPC substantially rewrote some of the ICPC regulations, including Regulation 3, which covers definitions, placement categories, applicability, and exemptions. Under Regulation 3, placement categories that require compliance with the ICPC include placements with parents and relatives when the other parent or relative is not making the placement. The definition of "foster care" was also amended to include 24-hour-a-day care provided by the child's parent by reason of a court-ordered placement (and not by virtue of the parent-child relationship). However, the amended regulations exempt the ICPC from a placement with a parent if all of the following apply:

- the parent is not the parent from whom the child was removed;
- the court has no evidence that the parent is unfit;
- the court does not seek any evidence from the receiving state regarding the parent's fitness; and
- the court relinquishes jurisdiction over the child immediately upon placement with the parent.

The language of the AAICPC regulations that include parents in the definition of "foster care" has been rejected by some state courts as contravening the plain meaning of the statutory terms of "foster care" and "adoption" and exceeding the scope of the ICPC statute. Applying the same reasoning as the North Carolina Court of Appeals in *In re Rholetter*, 162 N.C. App. 653, the Connecticut Supreme Court concluded that the ICPC's language, "placement in foster care or as a preliminary to a possible adoption," does not include placement with a noncustodial parent. The court went on to say that "it is reasonable to conclude that the drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests." *In re Emoni W.*, 305 Conn. 723, 736 (2012). The court went on to state in a footnote that even if the ICPC regulations have the force of law, they are invalid under state law to the extent they impermissibly expand the scope of the Compact itself. Similarly, the Texas Court of Appeals held the ICPC does not apply to interstate placements of children with their parents. In *In re C.R.-A.A.*, 521 S.W.3d 893 (Tex. App. 2017), the Texas court looked to the Texas version of the ICPC, which specifically refers to out-of-state placements of children into foster care or preliminary to adoptions, and held the unambiguous meaning of the words made the ICPC inapplicable to interstate placements with parents. The Texas court further noted that its conclusion was supported by the state's statutory definitions of "foster care", foster home", and "adoption". The Texas court also stated the regulation contravened the statutory language. Other states have examined the amended regulations and have held the ICPC does not apply to placements with out-of-state parents. *See, e.g., In re S.R.C.-Q.*, 52 Kan. App. 2d 454 (2016); *In re Welfare of Ca.R.*, 191 Wash. App. 601 (2015); *In re D.B.*, 43 N.E.3d 599 (Ind. Ct. App. 2015); *In re Patrick S. III*, 218 Cal. App. 4th 1254 (2013).

There is a split in the state appellate decisions on this issue as other states have reached the opposite conclusion and apply the ICPC to placements with out-of-state parents that do not meet the exception set forth in the AAICPC regulations. The Arizona Court of Appeals found the trial court was a "sending agency" and held that compliance with the ICPC regulations was required for placements with parents and relatives if none of the enumerated exceptions applied. *Arizona Dep't of Econ. Sec. v. Stanford*, 234 Ariz. 477 (Ct. App. 2014). The court reasoned that the ICPC should be "interpreted liberally because the primary purpose of the ICPC is to protect children by making certain they are placed in a safe environment." *Arizona Dep't of Econ. Sec*., 234 Ariz. at 481−482. The Montana Supreme Court also applied the ICPC to placements with out-of-state parents after noting that "Montana has joined [the ICPC] by statute and for which the Department has adopted by rule the regulations of the Association of the ICPC" when applying AAICPC Regulation 3 to the out-of-state father. *In re J.H*., 382 Mont. 214, 219 (2016). Other states have held the ICPC applies to out-of-state parents. *See, e.g., Dep't of Children and Families v. C.T*., 144 So.3d 684 (Fla. Dist. App. 2014); *Dawn N. v. Schenectady County Dep't of Social Services*, 58 N.Y.S.3d 701 (2017).

To date, North Carolina's appellate courts have not addressed the application of the amended AAICPC regulations to an out-of-state parent. However, *In re Rholetter*, 162 N.C. App. 653 (2004), was decided on the language of the statute and did not discuss the AAICPC regulations in effect at the time. If Regulation 3 applies, the holding in *In re Rholetter* would be contrary to the language of the regulation.

Practice Note: When the ICPC does not apply, AAICPC Regulation 3 allows a state to request a "courtesy check" of a non-removal parent's home by the receiving state, without invoking the full ICPC home study process. Whether to conduct a courtesy check is in the discretion of the receiving state. When placement with a non-removal parent is made without ICPC compliance or with only a courtesy check, the receiving state has no responsibility for supervising or monitoring the placement.

Resource: Sara DePasquale, *A/N/D, ICPC, and Out-of-State Parents: Say What?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 25, 2015).

The Juvenile Code states that when the court places the child in out-of-home care with a relative outside of North Carolina, that dispositional placement "must be in accordance with the Interstate Compact on the Placement of Children." G.S. 7B-903(a1). AAICPC Regulation 3 makes it clear that the ICPC applies to out-of-state placements with relatives. The North Carolina Court of Appeals has addressed the application of the ICPC to relative placement. Although compliance with the ICPC takes time, it is not mutually exclusive of the preference in the Juvenile Code for relative placement. *In re L.L*., 172 N.C. App. 689 (2005) (holding the trial court must give out-of-state relatives priority consideration for placement unless it finds such placement is contrary to the child's best interests). See section 7.4.C.1, above (discussing placement priority).

When determining whether the ICPC applies, the court of appeals has looked to whether the dispositional order involves a "placement." In *In re V.A*., 221 N.C. App. 637 (2012), the court of appeals reversed the dispositional order that awarded legal custody to DSS and

placed the child with her maternal great-grandmother in South Carolina when the concurrent permanent plan was reunification and adoption. The court of appeals held the placement fell under the category of both foster care and a placement preliminary to a possible adoption, and in a footnote referred to Regulation 3 regarding foster care. As a result, the placement required strict compliance with the ICPC, which had not happened as the placement had not been approved by South Carolina. In contrast, in *In re J.E.*, 182 N.C. App. 612 (2007), the permanency planning order awarded guardianship, pursuant to G.S. 7B-600, to an out-of-state relative. The court of appeals held the ICPC did not apply because guardianship was not a placement in foster care or preliminary to adoption. The court of appeals also noted that neither G.S. 7B-600 nor the former permanency planning statute (G.S. 7B-907, now G.S. 7B-906.1) refer to the ICPC.

6. The ICPC and visitation. The ICPC applies only to interstate placements of children, not visits. AAICPC Regulation 9 defines a visit according to the purpose, duration, and intention behind a child's stay. The purpose of a visit is to provide the child with a social or cultural experience of a short duration, such as a camp stay or visit with a friend or relative. A stay for such a purpose that is less than thirty days is presumed to be a visit. A stay of more than thirty days is presumed to be a placement. If, however, for a school-aged child, a stay is more than thirty days but less than the duration of a school vacation period (e.g., forty-five days during a summer break), it can be considered a visit and does not require ICPC approval. A stay that does not have a terminal date will be considered a proposed placement and should not occur without ICPC approval. AAICPC Regulation 9.

If, however, the sending state has requested a home study or supervision and sends the child to stay with the proposed caregiver in the receiving state, there is a rebuttable presumption that it is a placement and not a visit.

Note that if a court in North Carolina does not follow the ICPC requirements, another state can decline to monitor the placement or provide services.

7. Summary requirements of the ICPC and Regulations. The sending agency is required to "comply with each and every requirement" set forth in G.S. 7B-3800, Art. III.

(a) Notice and best interest. When the ICPC applies, prior to sending or bringing a child from one state to another, the sending agency (which includes the court) must furnish the receiving state with written notice of its intention to send, bring, or place the child in the receiving state. G.S. 7B-3800, Art. III(b) (see the Article for the content of the notice). The receiving state may then request any supporting or additional information it deems necessary. G.S. 7B-3800, Art. III(c). The sending agency may not send or bring the child into the receiving state until the receiving state notifies the sending agency in writing that the proposed placement does not appear to be contrary to the interests of the child. G.S. 7B-3800, Art. III(d).

NC DHHS DSS Form:
DSS-1837, Interstate Compact on the Placement of Children Request (ICPC 100A) (Aug. 2001) with Instructions.

(b) Social history, case plan, and review. The sending agency (e.g., a DSS caseworker) must prepare a packet containing items such as the child's social, medical, and educational history; the current status of any court case involving the child; and information about the person being considered for placement in the receiving state. The packet will first be sent to the central ICPC office (in North Carolina, the Division of Social Services at DHHS) in the sending state where it will be examined and, if approved, sent to the receiving state. Once it arrives in the receiving state's central ICPC office, the packet will be examined, and if everything is in order it will be sent to the child welfare agency (in North Carolina, the county DSS) office in the community where the prospective placement is located. *See* "ICPC FAQ" on the Association of Administrators of the Interstate Compact on the Placement of Children website. *See also* AAICPC Regulation 1 for specific requirements.

(c) Reports, recommendations, approval or denial. The local agency receiving the packet will evaluate the prospective home for placement, and a completed home study report will be sent to the central ICPC office in the receiving state. The home study must be completed by the receiving state within sixty days. *See* 42 C.F.R. 671(a)(26)(A); AAICPC Regulation 2(7). The central ICPC office reviews the report, determines whether ICPC requirements have been met, and either approves or denies the recommendation of the report. If the placement is approved, once all plans and agreements have been completed the child is moved to the receiving state. The placement may not be approved if the local agency recommends against the placement or the Compact Administrator determines that a lawful placement cannot be completed, unless the problems can be remedied. The decision to approve or deny the placement should be made as soon as practicable but no later than 180 days from the receipt of the initial request for a home study. AAICPC Regulation 2(8). If a placement is denied, a request for reconsideration may be made by the sending state within ninety days from the date the receiving state signs the denial of the placement. The receiving state has sixty days to complete its reconsideration. AAICPC Regulation 2(9). Whether the placement is approved or denied, there are requirements related to copies of specific documents and reports that must be sent to the sending or receiving state's central office. *See* "ICPC FAQ"; *see also* ICPC Regulation 1.

(d) Jurisdiction and responsibility for child under the ICPC. The sending agency retains jurisdiction over the child to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child until the child is adopted, reaches the age of majority, becomes self-supporting, or is discharged with the concurrence of the receiving state. This jurisdiction includes the power to return the child to the sending state or transfer the child to another location. The sending agency also continues to have financial responsibility for the support and maintenance of the child during the period of placement. However, a public agency may enter into an agreement with an agency in a receiving state to provide services as an agent for the sending agency. G.S. 7B-3800, Art. V. Financial responsibility and agreements between agencies are also addressed in G.S. 7B-3801, 7B-3802, and 7B-3803.

NC DHHS DSS Form:
DSS-1838, Interstate Compact Report on Child's Placement Status (Aug. 2001).

(e) Expedited placement procedures. An issue with the ICPC is the length of time it can take for states to process cases and approve interstate placements. AAICPC Regulation 7 was adopted to allow for expedited ICPC procedures when a judge finds a child meets the criteria for priority ICPC status.

Criteria for an expedited placement decision are

- the child is under the jurisdiction of the court as a result of a DSS action and has been removed from a parent, and
- the out-of-state placement being considered is with the non-removal parent, a stepparent, grandparent, adult aunt or uncle, adult sibling, or guardian, and
    - the child sought to be placed is four years of age or younger (and includes older siblings sought to be placed in the same proposed placement);
    - the child currently is placed in an emergency placement;
    - the child is unexpectedly dependent due to sudden or recent incarceration, incapacitation, or death of a parent or guardian; or
    - the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource.

AAICPC Regulation 7(5). See subsection 5, above (discussing whether the ICPC applies to a non-removal parent).

Regulation 7 outlines the manner in which the process is expedited, and includes specific time frames for completing different steps.

NC DHHS DSS Form:
DSS-1839, Regulation 7 Form Order For Expedited Placement Decision Pursuant to the ICPC (Feb. 2012).

8. Illegal placements. G.S. 7B-3800, Art. IV addresses placements made in violation of the ICPC. Violations are punishable according to the laws of each state involved. In addition, violations constitute grounds for the suspension or revocation of any license, permit, or other authorization under which the sending agency operates.

7.5 Visitation

A. Order Must Address Visitation When Out-of-Home Placement

Anytime custody is removed from a parent, guardian, or custodian, or placement outside the home is continued, the order must address appropriate visitation that is in the child's best interest and consistent with the child's health and safety. G.S. 7B-905.1(a). It is reversible error to fail to address visitation in a disposition order. *See, e.g.*, *In re S.C.R.*, 217 N.C. App. 166 (2011); *In re C.M.*, 198 N.C. App. 53 (2009); *In re C.P.*, 181 N.C. App. 698 (2007). An appellate court reviews a visitation order for an abuse of discretion. *In re C.S.L.B.*, ___ N.C.

App. ___, 803 S.E.2d 429 (2017) (originally unpublished July 18, 2017, but subsequently published).

The current visitation statute, G.S. 7B-905.1, was enacted by S.L. 2013-129, sec. 24 and applies to all actions pending or filed on or after October 1, 2013. Prior to 2013, visitation was addressed in G.S. 7B-905(c). Some of the cases discussed in this section are based on the prior statute. Note that effective October 1, 2017, G.S. 7B-506(g1) was enacted and makes clear that G.S. 7B-905.1 provisions regarding visitation apply to orders for continued nonsecure custody. *See* S.L. 2017-161, sec. 7. See also Chapter 5.5.C and 5.6 (discussing nonsecure custody and continued nonsecure custody).

1. Minimum outline of visits required. Visitation orders must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b), (c). All three criteria must be ordered. *See In re J.H.*, ___ N.C. App. ___, 780 S.E.2d 228 (2015) (remanding visitation order to comply with G.S. 7B-905.1(c) after the order appealed from failed to establish the duration of the monthly supervised visits between the child and respondent mother). Even before this requirement was codified in 2013, decisions in several appellate cases found error when orders related to visitation were not specific enough. *See In re T.H.*, 232 N.C. App. 16 (2014) (remanding for failure to include minimum outline of time, place, and conditions of visitation; decided under former statute); *In re J.P.*, 230 N.C. App. 523 (2013) (reversing and remanding visitation portion of disposition order for failure to contain a minimum outline). See subsection 4, below, discussing order of no visitation.

The statutory requirement that visitation orders indicate the minimum frequency and length of visits has been interpreted by the court of appeals to mean that the trial court must provide a framework for the visits (e.g., time, day) but that the order itself does not have to include the particular time and place for visits. *In re N.B.*, 240 N.C. App. 353 (2015) (holding the order complied with G.S. 7B-905.1 when it provided for visits at a minimum of one hour once per month, to be supervised by the family therapist, the date and time of which was to be coordinated with the family therapist).

The minimum outline required by G.S. 7B-905.1 is satisfied when two orders addressing visitation provisions are read together. *See In re L.Z.A.*, ___N. C. App. ___, 792 S.E.2d 160 (2016) (affirming order of supervised visitation in accordance with the current plan when the current visitation plan was memorialized in the court's previous order that identified the frequency of two days a week, the duration of two hours per visit, and that supervision was required); *In re J.W.*, 241 N.C. App. 44 (2015) (affirming dispositional order that provided for weekly, supervised visits with the child and stated that all prior orders remain in full force and effect; prior order provided for weekly two-hour supervised visits with one child and weekly one-hour supervised visits with the other child; read together, the orders, complied with G.S. 7B-905.1).

The court may not delegate its judicial function of establishing the minimum outline by giving discretion to an individual to reduce or change the terms of the visitation. *See In re C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429 (2017) (originally unpublished July 18, 2017, but subsequently published) (holding visitation order complied with minimum outline but

improperly delegated the court's judicial function to the court-appointed guardians who were authorized to unilaterally modify the visitation based on their "concerns" about mother's substance use or discord with the children's father during the visits); *In re J.D.R.*, 239 N.C. App. 63 (2015) (holding despite a minimum outline for some of mother's visits, the order impermissibly delegated substantial discretion over other kinds of visitation based on her complying with certain conditions).

2. Cost of supervision. Although G.S. 7B-905.1 does not address payment for the cost of supervised visitation, the appellate courts have held that before the court orders a parent to pay for supervised visitation, the trial court must make findings of the cost of visitation and the parent's ability to pay. *See In re J.C.*, 368 N.C. 89 (2015) (vacating and remanding order that made no findings about respondent mother's ability to pay for supervised visitation; without such findings appellate court was unable to review for an abuse of discretion); *In re E.M.*, ___ N.C. App. ___, 790 S.E.2d 863 (2016) (vacating portion of the order requiring respondent to pay for cost of visitation and remanded for findings of fact regarding cost and respondent's ability to pay).

3. Electronic communication. In the case *In re T.R.T*, 225 N.C. App. 567 (2013), the court of appeals held that communication via Skype is a form of electronic communication that cannot take the place of face-to-face visitation required by the Juvenile Code (decided under former statute). In so ruling, the court looked to G.S. 50-13.2(e), after finding the Juvenile Code was silent as to electronic communication. Under G.S.50-13.2(e), electronic communication may supplement visitation and is not a replacement or substitution for custody or visitation. As a result, electronic communication alone is a denial of visitation that requires specific findings. See subsection 4, immediately below (discussing findings when visitation is denied). Additionally, the court of appeals emphasized that electronic communications supplementing visitation between a parent and juvenile must comply with G.S. 50-13.2(e), which provides specific guidelines relating to best interest, availability of equipment, and other factors.

Practice Note: In relying on G.S. 50-13.2(e), the court reasoned that while G.S. 50-13.2(a) explicitly limits its application to custody orders entered under G.S. 50-13.2, nothing in subsection (e), dealing with electronic communications, limits its application in that way. Therefore, the court said G.S. 50-13.2(e) is a generic provision that applies to all custody actions. This reasoning raises a question as to whether other subsections of G.S. 50-13.2 could apply to orders under the Juvenile Code when they deal with matters not addressed by the Juvenile Code.

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4. Visitation consistent with health, safety, and best interest. The Juvenile Code requires that visitation orders be consistent with the health and safety of the child and in the child's best interest. G.S. 7B-905.1(a). While the court must address visitation, it may order no visitation after finding the parent has forfeited his or her right to visitation or that it is in the child's best interests to deny visits. *See In re T.R.T.*, 225 N.C. App. 567 (2013). *See also In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (holding no abuse of discretion and affirming order that respondent mother have no visitation with the child based on findings that visitation was undesirable, respondent mother was awaiting criminal trial for alleged sexual abuse of child, and she was not compliant with her treatment); *In re J.S.*, 182 N.C. App. 79

(2007) (holding that evidence was sufficient to support the trial court's order for no visitation with the father where evidence showed that the father beat the child two to three times a day causing injuries, thus no amount of contact could be said to be in the best interest of the child or consistent with the health and safety of the child); *In re K.C.*, 199 N.C. App. 557 (2009) (holding that while the court may have failed to make an express finding that visitation with respondent mother would be harmful to the children or that she forfeited her right to visits, any error was invited by respondent mother such that she is not entitled to appeal as she invited the outcome by effectively asking the trial court to not order visitation; noting that the order alluded to numerous findings that related to visitation including her own stated wishes not to see the children, her cancellation of visitation, her refusal to work with DSS toward reunification, and her unwillingness to follow through with agreed-upon recommendations).

5. DSS responsibility; court approval. If DSS has custody or placement responsibility for the child, the court may order DSS to arrange, facilitate, and supervise a court-approved visitation plan consistent with the best interests of the child. Although the plan must indicate the minimum frequency and length of visits and whether the visits must be supervised, unless the court orders otherwise, DSS has the discretion to do the following:

- determine who will supervise visits when supervision is required;
- determine the location of visits; and
- change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances.

G.S. 7B-905.1(b).

Limited and temporary changes must be communicated promptly to the affected party, and ongoing changes must be communicated in writing to the party, stating the reason for the change. G.S. 7B-905.1(b).

If a child is in the custody or placement responsibility of DSS, the director may not allow unsupervised visitation with the parent, guardian, custodian, or caretaker from whom the child was removed without a hearing at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(c); 7B-101(19) (definition of "safe home").

6. Guardians and custodians. If the child is placed or remains in the custody or guardianship of a relative or other suitable person, any visitation order must specify the minimum frequency and length of the visits and whether the visits must be supervised. The court may authorize additional visitation agreed upon by the respondent and custodian or guardian. G.S. 7B-905.1(c). Determination of visitation rights is a judicial function that cannot be delegated to the child's custodians, guardians, or others. *See In re C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429 (2017) (originally unpublished July 18, 2017, but subsequently published) (vacating and remanding visitation order as unilateral right of the guardians to suspend visits based on "concerns" about mother's substance abuse or discord with the children's father during visitation was improper delegation of judicial function); *In re J.D.R.*, 239 N.C. App. 63 (2015) (remanding order related to visitation; although the father did not have complete authority to determine visitation, the degree of delegation given to father by the court to

determine visitation by mother went too far); *In re M.M.*, 230 N.C. App. 225 (2013); *In re L.B.*, 181 N.C. App. 174 (2007).

7. Suspension of visitation. The court's order concerning visitation may specify conditions under which visitation may be suspended. G.S. 7B-905.1(a). When DSS has custody or placement responsibility, DSS may temporarily suspend all or part of the visitation plan if DSS makes a good faith determination that the plan is not consistent with the child's health and safety. If DSS suspends the plan, it must expeditiously file a motion for review and will not be subject to a motion to show cause for the suspension. G.S. 7B-905.1(b).

B. Review of Visitation Plan and Mediation

All parties must be informed of the right to file a motion for review of any visitation plan. Prior to or at a hearing to review visitation, the court may order DSS or the GAL to investigate and make written recommendations and provide testimony as to appropriate visitation. After a proper motion, notice, and a hearing to review visitation, the court may establish, modify, or enforce a visitation plan that is in the child's best interest. G.S. 7B-905.1(d).

To resolve visitation issues, the court may order the parents, guardian, or custodian to participate in custody mediation where such programs have been established (pursuant to G.S. 7A-494). When the court refers a case to custody mediation, it must specify the issues for mediation, including but not limited to whether visitation must be supervised and whether overnight visitation may occur. Participants in custody mediation may not consent to a change in custody. A copy of any mediation agreement must be provided to the parties and counsel and must be approved by the court. G.S. 7B-905.1(d). Mediation of visitation issues is subject to the provisions of G.S. 50-13.1(d) through (f), which address

- circumstances for dismissal of mediation and having the action heard in court;
- privacy and confidentiality of mediation proceedings as well as inadmissibility in court;
- mediator's authority to interview the child and others; and
- applicability or inapplicability of privilege, immunity, etc.

7.6 Evaluation and Treatment of Child

A. Court's Authority to Order Evaluation and Treatment

Regardless of the child's placement and other dispositional plans, the Juvenile Code authorizes the court to order that the child be examined by a physician, psychiatrist, psychologist, or other qualified expert to determine the child's needs. Once the examination is completed, the court must conduct a hearing to determine whether the child needs treatment and, if so, who should arrange and pay for the treatment. G.S. 7B-903(d).

See section 7.4.D.3, above (discussing medical consent for evaluation and treatment of a child placed in DSS custody).

B. Hearing to Determine Treatment Needs and Payment

After completion of a court-ordered evaluation, the court must have a hearing to determine the child's treatment needs. G.S. 7B-903(d). This hearing may be a stand-alone hearing that only addresses the child's treatment needs or may be combined with an initial dispositional, review, or permanency planning hearing.

1. County involvement. Since treatment may involve county services and county finances, the county manager (or other person designated by the chair of the board of county commissioners) of the county of the child's residence must be notified of the hearing and given an opportunity to be heard. G.S. 7B-903(d).

2. Treatment arrangements. Subject to G.S. 7B-903.1, if the court finds that the child needs medical, surgical, psychiatric, psychological, or other treatment, the court must permit the parent or other responsible person to arrange for the treatment. However, if the parent declines or is unable to make the necessary arrangements, the court may order the needed treatment and direct the county to arrange for it. The statute requires DSS to recommend a facility that will provide treatment for the juvenile. G.S. 7B-903(d). If the child needs psychological or psychiatric treatment, DSS ordinarily would coordinate with the area authority or managed care organization in planning for the child's treatment, discussed in subsection 4, below.

3. Treatment costs. Whether or not the parent arranges for treatment, the court may order the parent or other responsible parties to pay the cost of the child's treatment or care. G.S. 7B-903(d); 7B-904(a). If the court finds that the parent is unable to pay the cost, the court must order the county to arrange and pay for the treatment. G.S. 7B-903(d).

4. Mental illness or developmental disability.

(a) Mental health services. The Juvenile Code states that if the court determines the child may be mentally ill or developmentally disabled, the court may order DSS to coordinate with the appropriate representative of the area mental health, developmental disabilities, and substance abuse services authority or other managed care organization responsible for managing public funds for mental health and developmental disabilities to develop a treatment plan for the child. G.S. 7B-903(e).

Practice Notes: Because the area authority or other managed care organization is not a party to the abuse, neglect, or dependency action, the court should refrain from ordering the area authority or managed care organization to provide services.

Every county falls within the service catchment area of an area authority. The area authority is responsible for providing mental health, developmental disabilities, and substance abuse services that are paid for with Medicaid or State funds. For a child to receive services paid for with these public funds, the child must meet the eligibility requirements for the Medicaid or State benefits program, and the service itself has to be authorized by the area authority following a comprehensive clinical assessment performed by one of the area authority's contracted service providers. Only then will an area authority

and its contracted service provider develop a treatment plan. If the child is eligible for publicly-funded services, a representative of DSS may coordinate with the area authority for a clinical assessment to be performed by an area authority contractor and submitted to the area authority with a request for service authorization. If the requested service is denied, both the Medicaid and State-funded programs provide a procedure for appealing the denial of service. (An area authority is often referred to by its employees and contractors, as well as statutory law, as a local management (LME), managed care organization (MCO), and LME/MCO.)

As of the date of this Manual, all Medicaid and state-funded mental health and developmental disabilities services have to be accessed through an area authority and one or more of its contracted service providers. However, the North Carolina General Assembly appears to be moving toward a system where all or some Medicaid services for mental illness and developmental disabilities will be provided through private insurance companies that contract with the state to be an MCO for Medicaid funds. In the event that this policy comes to fruition, the language in G.S. 7B-903(e) will apply to these private MCOs because they will be "a managed care organization responsible for managing public funds for mental health and developmental disabilities."

(b) Commitment. The court has no authority to commit a child directly to a state hospital or developmental center for persons with intellectual and developmental disabilities, and any such order is void. If the court determines that the best service for the child is institutionalization, admission should be pursuant to the voluntary consent of the child's parent, guardian, or custodian. However, if the parent, guardian, or custodian refuses to consent to the child's admission, the court's signature may be substituted for the purpose of consent. G.S. 7B-903(e).

If the treatment institution refuses admission to a child referred by the court, or discharges the child prior to the completion of treatment, the institution must submit to the court a written report stating

- the reasons for denying admission or for early discharge,
- the child's diagnosis,
- indications of mental illness or intellectual and developmental disabilities and the need for treatment, and
- the location of any facility known to have an appropriate treatment program for the child.

G.S. 7B-903(e).

Resource: Sara DePasquale, *Children in DSS Custody Who Need Treatment in a PRTF: There's a Disconnect*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 1, 2016).

7.7 Court's Authority over Parents and Others

The court has jurisdiction over the parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent, if that person has been properly served, has waived service, or has automatically become a party pursuant to G.S. 7B-401.1(c) and (d) by being awarded custody or guardianship as a permanent plan. G.S. 7B-200(b); *see* G.S. 7B-904(d1). See Chapter 3.4 (related to personal jurisdiction).

The court is specifically authorized to direct certain orders to parents, guardians, custodians, and caretakers, but the court's authority is limited by the Juvenile Code. *See* G.S. 7B-904. *See In re W.V.*, 204 N.C. App. 290, 297 (2010) (quoting *In re Codgill*, 137 N.C. App. 504, 508 (2000)) ("A 'trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen. Stat. § 7B-904.]' "). The court's dispositional authority to impose conditions on the respondents requires "a nexus between the step ordered by the court and a condition [of abuse, neglect, or dependency] that is found or alleged to have led to or contributed to the adjudication" or court order removing custody of the juvenile from the respondent. *In re T.N.G.*, ___ N.C. App. ___, ___, 781 S.E.2d 93, 101 (2015).

In the dispositional phase, the court has authority to order a respondent to undergo treatment to remedy the conditions that led to the child's adjudication or removal from the parent's custody. The court should not order the respondent to undergo treatment or take additional actions in an adjudication order. *See In re A.G.M.*, 214 N.C. App. 426 (2017) (noting that it is unclear pursuant to what authority the court, in an adjudication order, required respondent mother to participate in therapy). But note that S.L. 2015-136, sec. 7 amended G.S. 7B-507, effective October 1, 2015, authorizing the court at nonsecure custody to "order services or other efforts aimed at returning the juvenile to a safe home."

A. Treatment and Counseling

1. Participation in child's treatment. If the court finds that it is in the child's best interests, the court may order a parent, guardian, custodian, stepparent, adult member of the child's household, or an adult relative entrusted with the child's care to participate in the child's medical, psychiatric, psychological, or other treatment. G.S. 7B-904(b).

2. Evaluations and treatment of parents and others. When in the child's best interests, the court may order a parent, guardian, custodian, stepparent, adult member of the child's household, or an adult relative entrusted with the child's care to undergo treatment or counseling directed toward remediating or remedying behaviors or conditions that led or contributed to the child's adjudication or to the court's decision to remove the child from that person's custody. G.S. 7B-904(c). *See In re A.R.* 227 N.C. App. 518 (2013) (holding that it was within the trial court's authority to order the parents to comply with mental health assessments and recommendations, substance abuse evaluations, and random drug screens, which were reasonably related to aiding the parents in correcting the conditions that led to the children's removal; the children's removal was related to domestic violence and the court-ordered conditions were to assist respondents in understanding and resolving the possible underlying causes of the domestic violence); *In re A.S.*, 181 N.C. App. 706 (holding that the

trial court did not abuse its discretion in ordering the father to undergo a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes, where DSS and the GAL recommended evaluations and classes and the trial court found them to be in the best interests of the children), *aff'd per curiam*, 361 N.C. 686 (2007). Additionally, the court may order that the parent or other person comply with a plan of treatment approved by the court in order to maintain or regain custody of the child. G.S. 7B-904(c).

B. Parenting Classes, Transportation, Remedial Steps, and Other Orders

The court may order a parent, guardian, custodian, or caretaker who has been served with a summons (or has otherwise submitted to the court's jurisdiction) to

- attend and participate in parenting classes, if classes are available in the judicial district where he or she resides;
- provide transportation for the child to keep appointments for any treatment ordered by the court (if the child is in that person's home and to the extent the person is able to provide transportation); or
- take appropriate steps to remedy conditions in the home that led or contributed to the child's adjudication or to the court's removal of custody of the child from that person.

G.S. 7B-904(d1). *See In re D.L.W*, 368 N.C. 835 (2016) (discussing G.S. 7B-904(d1)(3) in a termination of parental rights case; noting the order requiring respondent to create a budgeting plan was appropriate when findings in adjudication order indicated domestic violence, a lack of consistent and adequate housing, and the parents' inability to meet the children's basic needs as reasons for children's removal and adjudication); *In re T.N.G.*, ___ N.C. App. ___, 781 S.E.2d 93 (2015) (holding court did not exceed its dispositional authority in an order directing respondent father to maintain stable employment and obtain a domestic violence offender assessment and follow recommendations when the record established a nexus between the child's court-ordered removal from respondent's custody and the circumstances that led to removal, as set out in an addendum to the petition that alleged respondent was unemployed and unable to care for the child and DSS had concerns about respondent's admitted domestic violence history); *In re W.V.*, 204 N.C. App. 290 (2010) (holding that the trial court did not have authority to order a parent to obtain and maintain stable employment, when the parent's employment status was not relevant to the adjudication that the child was neglected).

Practice Note: The allegations in a petition and the findings of fact in an adjudication order impact the court's authority at disposition to order parents and other respondents to take certain actions. Those allegations and findings may form the basis for the court's removal of the child's custody from a respondent or the child's adjudication so that a nexus can be made to support the conditions a court orders a respondent to comply with in a dispositional order. *See In re H.H.*, 237 N.C. App. 431 (vacating order requiring mother to maintain stable housing and employment as petition did not allege and court did not find these issues as the basis for the child's removal or adjudication, which related to mother's inability to provide proper care and discipline to the children; noting respondent's inability to properly care for her child may be due to employment, financial and/or housing concerns given evidence that

suggested frequent moves, unstable housing situations, financial dependence on a person with whom there was domestic violence; taking the opportunity to urge district court judges to make detailed findings as to all competent evidence that is relevant to the child's adjudication).

C. Cost Responsibilities

For a discussion of orders that required a respondent parent to pay the cost of supervised visitation, see section 7.5.A.2, above.

1. Child support. If the child is in the legal custody of someone other than a parent, the court may order the parent to pay a reasonable sum to cover (in whole or in part) the support of the child if the court finds that the parent is able to do so. The amount of child support is determined according to G.S. 50-13.4(c) and the Child Support Guidelines. G.S. 7B-904(d). The court must find the parent has an ability to pay support and determine a reasonable sum. *In re A.M.*, ___ N.C. App. ___, 786 S.E.2d 772 (2016) (remanding child support portion of dispositional order for further findings; noting the order contained no findings about the mother's income, ability to work, or ability to pay; the reasonable needs of the children; or an appropriate amount of support). If the child is in the custody of DSS and the court finds that the parent is unable to pay the cost of the child's care, the cost must be paid by the county DSS (unless the child is receiving care in a state or federal institution). G.S. 7B-904(d). The court does not have the authority to order a parent to contact a child support enforcement agency to arrange to pay child support. *In re A.S.*, 181 N.C. App. 706, *aff'd per curiam*, 361 N.C. 686 (2007). However, when a child is placed in foster care, DSS has an obligation to seek support from the child's parents. If support is not addressed in a court order entered in the abuse, neglect, or dependency action, DSS can pursue support through the IV-D child support enforcement program.

Practice Note: Child support orders usually are not entered in juvenile court, and child support generally is best dealt with through the IV-D Child Support Enforcement office. The court may order DSS to pursue the establishment, modification, or enforcement of a support obligation through the IV-D office. A parent may volunteer to go to the child support enforcement office. The parent generally is legally responsible for the financial support of a minor child whether or not he or she has a formal support obligation through agreement or court order.

2. Treatment of child or participating adult. Regardless of whether the parent arranges for treatment for the child, the court may order the parent "or other responsible parties" to pay for the cost of treatment or care ordered by the court, including treatment in which the parent or others are ordered to participate. G.S. 7B-903(d); 7B-904(a), (b). If the court finds that the parent is unable to pay the cost of the child's treatment, the court must order the county to pay for treatment. G.S. 7B-903(d). See section 7.6, above (evaluation and treatment of child).

3. Treatment of parent or others. If the court orders treatment for the parent (or other respondents), the court may order that person to pay the cost of his or her own treatment. If

the court finds that the parent or other person is unable to pay, the court may

- order the person to receive treatment currently available from the area mental health program (local management entity) or
- if the court has conditioned the child's legal custody or placement with that person on that person's compliance with treatment, charge the cost of treatment to the child's county of residence.

G.S. 7B-904(c).

D. Failure to Comply with Court Orders

On motion of a party or on the court's own motion, the court may issue an order for a parent, guardian, custodian, or caretaker who has been served with a summons in an abuse, neglect or dependency proceeding to show cause why he or she should not be found in contempt (civil or criminal) for willfully failing to comply with a court order. G.S. 7B-904(e). Contempt proceedings are governed by Chapter 5A of the General Statutes.

AOC Form:
AOC-J-155, Motion and Order to Show Cause (Parent, Guardian, Custodian or Caretaker in Abuse/Neglect/Dependency Case) (Nov. 2000).

Practice Note: Although G.S. 7B-904(e) refers to a parent, guardian, custodian, or caretaker who is served with a copy of the summons, no such limitation appears in G.S. Chapter 5A. The juvenile court may have personal jurisdiction over a respondent who has not been properly served with a summons in the abuse, neglect, or dependency proceeding (e.g., when proper service is waived or a guardian or custodian automatically becomes a party pursuant to G.S. 7B-401.1(c) and (d)). *See* G.S. 7B-200(b). See also Chapter 3.4 (discussing personal jurisdiction).

E. Court's Authority over DSS

The court's authority over DSS is clear in some circumstances and less clear in others. Throughout the Juvenile Code, the court is authorized to order DSS to take certain actions. For example, when a child is placed outside the home, the court "may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court." G.S. 7B-905.1(b). At the nonsecure custody stage, the court may order services or other efforts aimed at returning the child to a safe home, and when the court orders that the child's placement and care are DSS's responsibility, the order states DSS is to provide or arrange for the child's placement. G.S. 7B-507(a)(4) and (5). The court may also grant DSS the authority to make medical decisions for the child for treatment or care that is neither routine nor emergency care pursuant to G.S. 7B-505.1. The court may order DSS to make diligent efforts to notify relatives and other persons with legal custody of the child's siblings of the child's placement in nonsecure custody. G.S. 7B-505(b). At initial disposition and permanency planning, the court may determine whether DSS should continue to make reasonable efforts for

reunification. G.S. 7B-901(c); 7B-906.2(b). At permanency planning, the court must order DSS to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable. G.S. 7B-906.2(b). See sections 7.9, below (relating to reasonable efforts), and 7.10, below (discussing concurrent permanent plans). Although there are numerous provisions throughout the Juvenile Code that authorize the court to direct DSS to conduct certain actions, the Juvenile Code is not entirely clear about the court's authority to order DSS to take actions beyond those specifically required or authorized.

F. Court's Authority over Child's GAL

The Juvenile Code does not specifically address the court's authority over the child's guardian ad litem (GAL). However, the court presumably has the authority to order a GAL to fulfill his or her statutory responsibilities but not to do things beyond the scope of those responsibilities, such as provide transportation or supervise visits. See Chapter 2.3.D (relating to the GAL role and responsibilities).

G. Limitations on Court's Dispositional Authority

The court's authority in juvenile dispositions is limited to statutory options and existing programs or programs for which the funding and machinery for implementation are in place. In the absence of a statute providing otherwise, the court generally has no authority over agencies or individuals who are not parties to the case. Absent a general appearance, due process requires that a person (or organization) who will be subject to a court's order be given reasonable notice and opportunity to be heard before any proceeding that results in entry of an order against that person or a deprivation of that person's rights. *See Helbein v. Southern Metals Co.*, 119 N.C. App. 431 (1995).

- The court could not require DSS to implement the creation of a special type of foster home. *In re Wharton*, 305 N.C. 565 (1982).
- Where there was no alternative education program for an expelled/suspended student, the court could not send the student back to public school absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow for a return to school. *In re Jackson*, 84 N.C. App. 167 (1987).
- In a delinquency case, the court had no authority to order the state to develop and implement specific treatment programs and facilities. *In re Swindell*, 326 N.C. 473 (1990).
- There was no statutory authorization for the court to grant legal and physical custody of a child to the Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services. *In re Autry*, 115 N.C. App. 263 (1994), *aff'd per curiam*, 340 N.C. 95 (1995).
- Although the Juvenile Code allows the court to order a parent to "pay a reasonable sum that will cover in whole or in part the support of the juvenile," the statute does not give the trial court authority to order a parent to contact a child support enforcement agency. *In re A.S.*, 181 N.C. App. 706, *aff'd per curiam*, 361 N.C. 686 (2007); *In re Cogdill*, 137 N.C. App. 504 (2000) (decided under former law).

7.8 Dispositional Considerations and Findings

As discussed throughout this Chapter, the court must consider a variety of factors and decide numerous issues during the dispositional stage of an abuse, neglect, or dependency proceeding, with the child's best interests as the paramount consideration. In addition to custody; placement; visitation; decision-making; evaluation and treatment services for the child; payment for services and/or child support; and services for and/or conditions placed on the parent, guardian, custodian, or caretaker, the Juvenile Code places specific requirements on the court regarding inquiries, findings, and possible outcomes at the different dispositional hearings. Different requirements apply to the initial, review, and permanency planning hearings.

Note that significant changes related to the timing and findings of orders eliminating reasonable efforts for reunification resulted from S.L. 2015-136, effective for actions pending or filed on or after October 1, 2015. Before that date, the court had the authority to order the cessation of reasonable efforts based on any statutorily enumerated finding in any order placing or continuing the placement of a child in DSS custody. *See* G.S. 7B-507 prior to S.L. 2015-136. Now, a court may only order the elimination of reasonable efforts at an initial dispositional hearing or a permanency planning hearing, and the criteria upon which the court may base its order differs in each type of hearing. *See* G.S. 7B-901(c); 7B-906.2(b).

A. Initial Dispositional Hearing

1. Inquiry as to missing parent, paternity, and relatives required. At the initial dispositional hearing, the court is required to

- inquire about the identity and location of any missing parent and whether paternity is an issue;
- make findings about efforts to locate and serve a missing parent and to establish paternity if paternity is an issue; and
- inquire about efforts made to identify and notify parents, relatives, or other persons with legal custody of the child's sibling as potential resources for placement or support.

G.S. 7B-901(b).

The court may order specific efforts be made to identify and locate a missing parent or to establish paternity. G.S. 7B-901(b).

See Chapter 5.4.B.5−7 (discussing missing or unknown parents and paternity).

Practice Note: While the Juvenile Code does not specifically address the issues of missing parents, paternity, or locating relatives in the context of review and permanency planning hearings, the court should address these issues at any hearing where they may have ongoing relevance. *See In re A.E.C.*, 239 N.C. App. 36 (2015) (vacating and remanding TPR order and order eliminating reunification efforts for father who made a late appearance in the case; the facts showed that at a permanency planning hearing, the child's GAL reported mother's

husband was not the child's father based on paternity tests conducted in another court; no findings were made at the permanency planning hearing that he was not the father and no inquiries were made into paternity; putative father eventually contacted court and DSS after being notified by mother that he was possible father; his paternity was established; court was required to address reunification efforts).

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2. Consideration of G.S. 7B-901(c) factors and reasonable efforts. At the initial dispositional hearing, when the court is placing the child in DSS custody, it may order that reasonable efforts for reunification are not required. The court must make written findings of a specific factor identified in G.S. 7B-901(c) before making such an order, and those findings are that a court of competent jurisdiction

- has determined that the parent has committed, encouraged the commission of, or allowed to be committed against the juvenile any of the following aggravated circumstances: sexual abuse, chronic physical or emotional abuse, torture, abandonment, chronic or toxic exposure to alcohol or controlled substances that caused an impairment or addiction in the juvenile, or any other conduct that increased the enormity or added to the injurious consequences of the abuse or neglect (G.S. 7B-901(c)(1));
- has terminated involuntarily the parent's rights to another child (G.S. 7B-901(c)(2)); or
- has determined that a parent committed, or aided, attempted, conspired, or solicited to commit, murder or involuntary manslaughter of the parent's child; committed sexual abuse or felony assault causing serious bodily injury to the parent's child; or has been required to register as a sex offender (G.S. 7B-901(c)(3)).

When the court makes one of those written findings, it must order that reasonable efforts are not required. However, effective July 1, 2016, the court may conclude that compelling evidence warrants continued reunification efforts. G.S. 7B-901(c). *See* S.L. 2016-94, sec. 12C.1.(g). When the court determines that reunification efforts are not required, a permanency planning hearing must be scheduled within thirty days. G.S. 7B-901(d). See section 7.2.B, above (discussing timing of dispositional hearings).

In *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d 274 (2016), *aff'd per curiam*, ___ N.C. ___, 808 S.E.2d 142 (2017), the court of appeals interpreted the language of G.S. 7B-901(c) by looking to the verb tenses used in the statute: "makes" written findings, which is present tense, and "has determined," which is present perfect tense. In a divided opinion, the court of appeals held that the plain language of the statute and use of the term "has determined" means that the determination must have already been made by a trial court in a prior order either at a previously held hearing in the same abuse, neglect, or dependency case (e.g., an adjudicatory hearing) or in a collateral proceeding. At initial disposition, the court is making a finding that there is a previous determination by a court of competent jurisdiction of a factor identified in G.S. 7B-901(c)(1) through (3). The court does not have the authority to determine, based on evidence presented at that initial dispositional hearing, that an aggravating circumstance exists. *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d 274, *aff'd per curiam*, ___ N.C. ___, 808 S.E.2d 142 (reversing portion of initial dispositional order that eliminated reunification efforts based upon written finding that aggravating circumstance involving chronic or toxic exposure to controlled substances that caused impairment or

addiction in the child exists at the dispositional hearing when the prior adjudication order did not contain that finding). *See In re L.C.*, ___ N.C. App. ___, 800 S.E.2d 82 (2017) (vacating and remanding portion of dispositional order that ceased reunification efforts based on finding for the first time of aggravating circumstances set forth at G.S. 7B-901(c)(1)b., c., and f.).

The court's authority to order the cessation (or elimination) of reasonable efforts for reunification based upon a G.S. 7B-901(c) factor is limited to the initial dispositional hearing and does not continue to the permanency planning hearing. *See In re T.W.*, ___ N.C. App. ___, 796 S.E. 2d 792 (2016) (reversing order ceasing reunification efforts after making a finding of a G.S. 7B-901(c) factor at the permanency planning hearing). Similarly, the more "lenient" requirements of different G.S. 7B-906.2(b) findings, which authorize the court to eliminate reunification efforts, are limited to a permanency planning hearing. The G.S. 7B-906.2(b) findings cannot be applied at the initial dispositional hearing and order. *See In re J.M.*, ___ N.C. App. ___, 804 S.E.2d 830 (vacating portion of combined initial dispositional and permanency planning order that released DSS from providing reasonable efforts upon finding that those efforts would clearly be unsuccessful or inconsistent with the child's health and safety), *review allowed*, ___ N.C. ___, 807 S.E.2d 146, *and* ___ N.C. App. ___, 807 S.E.2d 564 (2017). An order that follows an initial dispositional hearing implicates the statute governing initial dispositional hearings, G.S. 7B-901(c), and requires the trial court to make a finding of one of the G.S. 7B-901(c) factors before it orders reunification efforts are not required. The requirement that a court find one of the G.S. 7B-901(c) factors cannot be eluded by combining an initial dispositional and a permanency planning hearing in a single order. *In re J.M.*, ___ N.C. App. ___, 804 S.E.2d 830, *review allowed*, ___ N.C. ___, 807 S.E.2d 146, *and* ___ N.C. App. ___, 807 S.E.2d 564. *See* G.S. 7B-906.2(b). See also section 7.8.C, below (discussing permanency planning hearings and reunification efforts).

The court is not required to make findings specified in G.S. 7B-906.1 at an initial dispositional hearing; findings required by that statute apply to review and permanency planning hearings and should be made at the subsequently scheduled hearing. *See In re L.Z.A.*, ___ N.C. App. ___, 792 S.E. 2d 160 (2016).

B. Required Criteria for Review and Permanency Planning Hearings

The court is required to consider the following criteria at review and permanency planning hearings and to make written findings concerning any that are relevant.

1. Reunification efforts. The court must consider services offered to reunite the child with either parent (whether or not the child resided with the parent at the time of removal) or with the guardian or custodian from whom the child was removed. G.S. 7B-906.1(d)(1). The court must also consider whether efforts to reunite the child with either parent clearly would be unsuccessful or inconsistent with the child's health or safety and need for a safe, permanent home within a reasonable period of time (regardless of whether the child lived with the parent, guardian, or custodian at the time of removal). G.S. 7B-906.1(d)(3). If the finding that efforts would be unsuccessful or inconsistent with the child's health or safety is made, the court is not authorized by G.S. 7B-906.1(d)(3) to order the cessation of reunification efforts. The finding

is the trigger for the court to start the permanency planning process. *See In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016). When the court makes the finding, it must schedule a permanency planning hearing within thirty days to address permanent plans for the child. G.S. 7B-906.1(d)(3); *see* S.L. 2017-161, sec. 8 (effective October 1, 2017). See sections 7.9, below (relating to ceasing reunification efforts, including case law on evidence and findings to ceasing reunification efforts), and 7.10, below (discussing concurrent permanent plans).

2. Visitation. The court must consider reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan according to G.S. 7B-905.1. G.S. 7B-906.1(d)(2). See section 7.5, above (related to visitation).

3. Placement. The court must consider reports on the placements the child has had, goals of a foster care placement, and the appropriateness of the foster care plan, as well as the role the current foster parent will play in planning for the child. G.S. 7B-906.1(d)(4). *See also In re L.L.*, 172 N.C. App. 689 (2005) (holding that trial court erred in failing to address the goals for foster care and the role of the foster parents).

4. Independent living. If the child is 16 or 17 years old, the court must consider a report on an independent living assessment of the child and, if appropriate, an independent living plan. G.S. 7B-906.1(d)(5). See Chapters 8.3 (discussing Foster Care 18−21) and 1.3.B.7 (discussing the Foster Care Independence Act).

5. Termination of parental rights. The court must consider whether and when a termination of parental rights (TPR) should be considered. G.S. 7B-906.1(d)(6). See section 7.8.G, below (explaining when DSS may be required to initiate TPR). See also Chapter 9 (discussing TPR).

6. Any other criteria. The court may consider any other criteria it deems necessary. G.S. 7B-906.1(d)(7).

C. Permanency Planning Additional Requirements

Permanency planning hearings are a type of review hearing with the same requirements as other review hearings, explained in section 7.8.B, immediately above. At permanency planning, the court must adopt concurrent permanent plans and identify a primary and secondary plan. G.S. 7B-906.2(b). See section 7.10.A, below.

The court must consider additional criteria, which are set forth in various statutes, at permanency planning hearings. As the court of appeals noted, the Juvenile Code requires multiple layers of inquiry and resulting findings and conclusions of law. *See In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017). While there is a need to address specifically the relevant criteria, appellate courts have not had the expectation that the findings include a formal listing of the factors in the Juvenile Code or that they be expressly denominated as such, where it can be concluded from the findings that the relevant criteria were considered. *See In re T.R.M.*, 188 N.C. App. 773 (2008).

The following statutory criteria must be considered, with findings made of either those that are relevant or every factor listed. The specific statute itself indicates whether findings of all or only relevant enumerated factors must be made. Failure to comply with the applicable statute will result in a remand. *See In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (reviewing whether court made findings required by G.S. 7B-906.1(d), (e), (i), (n) and 7B-906.2(b), (c), (d); reversing and remanding for additional necessary findings). The exact statutory language is not necessarily required. The North Carolina Supreme Court held that the use of the actual statutory language in making findings is best practice, but the statute does not demand that the trial court's order contain a verbatim recitation of its language. *In re L.M.T.*, 367 N.C. 165 (2013) (reversing the court of appeals, which had reversed the trial court, because the order embraced the substance of the statutory provisions; decided under former statute).

1. Returning home. The court must consider whether it is possible for the child to be placed with a parent immediately or within the next six months, and if not, why placement with a parent is not in the child's best interest. G.S. 7B-906.1(e)(1). *See also In re I.K.*, 227 N.C. App. 264 (2013); *In re J.V.*, 198 N.C. App. 108 (2009); *In re J.S.*, 165 N.C. App. 509 (2004); *In re Ledbetter*, 158 N.C. App. 281 (2003) (all cases in which the trial court erred by failing to make adequate findings as to why it was not in the child's best interest to return home). However, the child cannot be returned home unless the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903.1(c); *see* G.S. 7B-906.1(*l*). See section 7.4.D.2, above (relating to court requirements for returning a child home).

Appellate cases have stated that in determining whether it is possible for the child to return home within six months of the permanency planning hearing, the court must look at the progress the parents have made in eliminating the conditions that led to the removal of the child. *In re J.V.*, 198 N.C. App. 108 (2009); *In re T.K.*, 171 N.C. App. 35, *aff'd per curiam,* 360 N.C. 163 (2005). The fact that parents have made some progress does not ensure that the child will be returned home. *See In re T.K.*, 171 N.C. App. 35 (upholding the trial court's determination that while the mother had made progress, the progress was insufficient for the court to be assured that the children could be safely returned to her care and that the best interests of the children, not the rights of the parents, were paramount), *aff'd per curiam,* 360 N.C. 163. Some other issues related to this permanency planning requirement that have been addressed in appellate cases include the following:

- A trial court's finding that the juvenile's return to the home was "improbable," rather than not possible (using a term other than the one in the statute) did not require a remand. Although it is the better practice for the court to use the words of the statute in its findings, the court sufficiently addressed the issue of whether it was possible for the juvenile to be returned home immediately or within the next six months and why it was not in the juvenile's best interests to return home. *In re T.R.M.*, 188 N.C. App. 773 (2008).
- The fact that the court has made guardianship the permanent plan for a child does not eliminate the requirement that the court address whether it is possible for the child to return home. *In re J.V.*, 198 N.C. App. 108 (2009).
- The court reversed and remanded where the trial court's order failed to clarify which findings related to which parent and included insufficient findings to support the ultimate

finding (or conclusion) that it was contrary to the child's best interest to be returned to respondent. *In re H.J.A.*, 223 N.C. App. 413 (2012).

2. Guardianship or custody. Where the child's placement with a parent is unlikely within six months, the court must consider whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents. G.S. 7B-906.1(e)(2). See sections 7.4.C.1, above (placement priority); 7.4.E and F, above (custody and appointment of guardian). The trial court is not required to make findings about whether the respondent parent retains each right or responsibility he or she had before the order granting guardianship or custody. With the exception of visitation, the parent's rights and responsibilities are lost when the court does not provide otherwise in the order that places the child in the custody or guardianship of someone other than a parent. *In re M.B.*, ___ N.C. App. ___, 800 S.E.2d 757 (2017). Before ordering custody or guardianship to a person other than a parent, the court must verify that the potential guardian or custodian understands the legal significance of the placement or appointment and will have adequate resources to appropriately care for the child. G.S. 7B-906.1(j). See section 7.4.G, above (discussing verification requirement).

- A permanent plan placing a child in guardianship with a half-sibling's grandparents was upheld where the child was bonded with the grandparents and lacked interest in visiting the mother, and the mother failed to undergo ordered psychological evaluation, conquer anger problems, and comply with orders to eliminate contact between her child and her sex offender boyfriend. *In re L.B.*, 181 N.C. App. 174 (2007).
- The trial court erred in failing to consider the biological father as a potential candidate for custody because of his late appearance in the case. *In re Eckard*, 148 N.C. App. 541 (2002) (citing G.S. 7B-907(b)(2), now 906.1(e)(2), for the requirement that the father be considered).
- Where the court ordered in a permanency planning hearing that legal guardianship be placed with relatives, even though the court did not explicitly use the term "permanent" in its order or refer to G.S. 7B-600 related to guardianship, it was reasonable to infer from the findings and other provisions of the order that the court intended to establish guardianship as a permanent plan. *In re P.O.*, 207 N.C. App. 35 (2010).

3. Adoption. Where the child's placement with a parent is unlikely within six months, the court must consider whether adoption should be pursued and, if so, any barriers to adoption. G.S. 7B-906.1(e)(3). *See In re Z.J.T.B*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to make no finding as to whether adoption should be pursued).

Practice Note: When the child to be adopted is age 12 or older, the child's consent to his or her own adoption is required unless the court in the adoption proceeding waives the requirement after finding it is not in the child's best interest to require his or her consent. G.S. 48-3-601(1); 48-3-603(b)(2). The child's desire to be adopted, especially when the child is age 12 or older, may be relevant when considering this factor.

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4. Change in current placement. Where the child's placement with a parent is unlikely within six months, the court must consider whether the child should remain in the current placement

or be placed in another permanent living arrangement and why. G.S. 7B-906.1(e)(4). *See In re Z.J.T.B*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to fail to examine whether the children's placement should change and why); *In re Ledbetter*, 158 N.C. App. 281 (2003) (holding that it was error for the trial court to change a child's custody without adequately explaining in its findings why the change was being made).

5. Reasonable efforts to implement permanent plan. At hearings after the initial permanency planning hearing, the court must address whether DSS has made reasonable efforts to implement the permanent plan for the child. G.S. 7B-906.1(e)(5). See section 7.9, below (discussing reasonable efforts).

6. Other criteria. The court may consider any other criteria it deems necessary. G.S. 7B-906.1(e)(6). *See In re J.M.D.*, 210 N.C. App. 420 (2011) (holding that even if none of the other statutory criteria were relevant the trial court should have made findings as to "other criteria" relevant to the purpose of the permanency planning hearing).

7. Permanent plan. At the conclusion of each permanency planning hearing, the court must make specific findings as to the best permanent plans to achieve a safe, permanent home for the child within a reasonable period of time. G.S. 7B-906.1(g). *See* G.S. 7B-906.2. *See also In re T.W.*, ___ N.C. App. ___, ___, 796 S.E.2d 792, 795 (2016) (stating "[o]bviously, a court presiding at a permanency planning hearing will always consider a permanent plan of care for the juvenile and, indeed, must 'adopt concurrent permanent plans and … identify the primary plan and secondary plan.' "); *In re J.B.*, 197 N.C. App. 497 (2009) (holding that the trial court erred in failing to specify a permanent plan). See section 7.10, below, for further explanation of concurrent permanency planning and the options for a permanent plan.

The judge must also inform the parent, guardian, or custodian that his or her failure or refusal to cooperate with the plan may result in a subsequent permanency planning order that ceases reunification efforts with that parent, guardian, or custodian. G.S. 7B-906.1(g).

Practice Note: In giving the warning of the potential consequence of a parent's, guardian's, or custodian's failure to cooperate with a plan, the court may decide to include that warning in the court's notice of hearing as well as its resulting order, especially if the parent, guardian, or custodian fails to appear the permanency planning hearing.

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8. Reasonable efforts findings. At the first permanency planning hearing held under G.S. 7B-906.1, unless reasonable efforts to reunify were ceased at initial disposition or at the first permanency planning hearing pursuant to G.S. 7B-906.2(b), the court must make a finding about whether DSS's efforts to reunify were reasonable. See section 7.8.A.2, above (related to ceasing reasonable efforts at initial disposition). In every subsequent permanency planning hearing, the court must make written findings about the efforts DSS has made toward the primary and secondary permanency plans that were in effect before the hearing and determine whether those efforts were reasonable to timely achieve permanency for the child. G.S. 7B-906.2(c); *see In re K.L.*, ___ N.C. App. ___, ___, 802 S.E.2d 588, 596−97 (2017) (reversing and remanding order that made no findings of whether DSS made reasonable efforts to reunify

with respondent mother; noting the record shows "DSS completely disregarded its statutory duty to 'finalize the primary and secondary' plans until relieved by the trial court.").

The court must also make written findings of each of the following four factors regarding the parent and whether he or she is

- making adequate progress within a reasonable period of time under the plan;
- actively participating or cooperating with the plan, DSS, and the child's guardian ad litem (GAL);
- remaining available to the court, DSS, and the child's GAL; and
- acting in a manner that is consistent with the child's health or safety.

G.S. 7B-906.2(d). *See In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (reversing and remanding order for additional findings when order did not address mother's progress, shortcomings, or failure to accomplish permanent plan or mother's cooperation or lack thereof with DSS; noting evidence showed DSS offered no assistance to mother). See section 7.9, below (discussing reasonable efforts).

The court's findings of these four factors do not address the ultimate finding of fact to support an order eliminating reunification as a permanent plan under G.S. 7B-906.2(b), which is that reunification efforts clearly would be unsuccessful or inconsistent with the child's health or safety. A reviewing court will not make ultimate findings on behalf of the trial court or draw inferences. *See In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (vacating permanency planning order eliminating reunification efforts for failure to make findings under G.S. 7B-906.2(b); remanding for further proceedings). Additional findings are required by G.S. 7B-906.2(b) related to reasonable efforts clearly being unsuccessful or inconsistent with a child's health and safety before the court may eliminate reunification as a concurrent permanent plan at a permanency planning hearing. See sections 7.9 and 7.10.A, below, for a discussion of reasonable efforts, those necessary findings, and concurrent permanency planning.

9. Youth in DSS custody at age 14 and older. At every permanency planning hearing where the juvenile is 14 years old or older and in DSS custody, the court must inquire and make findings of each of the following:

- the services provided to assist the juvenile in making a transition to adulthood,
- the steps a DSS is taking to ensure the placement provider for the juvenile follows the reasonable and prudent parent standard, and
- whether the juvenile has regular opportunities to engage in age- or developmentally-appropriate activities.

G.S. 7B-912. *See* G.S. 7B-906.2(e). See section 7.4.D.4, above (discussing reasonable and prudent parent standard and normal childhood activities).

When a juvenile is going to age out of foster care, at least ninety days before his or her 18th birthday, the court, at a permanency planning hearing, must inquire as to whether the juvenile has important documentation that will help his or her transition to adulthood and determine

the person or entity that will assist the juvenile in obtaining the documents before the juvenile turns 18. The documents include the juvenile's

- birth certificate,
- social security card,
- health insurance information,
- driver's license or other identification card, and
- educational or medical records that are requested by the juvenile.

G.S. 7B-912(b). See also Chapters 1.3.B.10 (discussing the Preventing Sex Trafficking and Strengthening Families Act) and 8.3 (explaining Foster Care 18−21).

Resources:
For information and resource links applying to older youth in foster care, see the "Supporting Older Youth in Foster Care" section of the National Conference of State Legislatures website.

For materials, training, and tools related to older children in foster care and aging out of foster care, see the "Youth Engagement Project" page of the ABA Center on Children and the Law website.

D. Initiation of Termination of Parental Rights Proceeding under Certain Circumstances

The court is also required to consider whether a proceeding to terminate parental rights should be initiated so that the child may find permanency outside of his or her parent's home. The Juvenile Code specifies three circumstances in which DSS is required to initiate a termination of parental rights (TPR) proceeding. The circumstances are

- the child is in the custody or placement responsibility of DSS and has been placed outside the home for twelve of the most recent twenty-two months;
- a court has determined that the parent has abandoned the child; or
- a court has determined that the parent has committed murder or voluntary manslaughter of another child of the parent or has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent.

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

When one of these circumstances exists, DSS must initiate TPR proceedings unless

- the court finds that guardianship or custody with a relative or other suitable person is the permanent plan for the child;
- the court makes specific findings as to why initiation of TPR proceedings is not in the child's best interest; or
- the court finds that reasonable efforts to reunify the family are still required and that DSS has not provided the family with the services DSS deems necessary for reunification.

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

When a TPR is determined to be necessary to perfect the permanent plan for the child, DSS must file a TPR petition or motion within sixty days of the date the permanency planning order is entered unless the court makes written findings as to why this sixty-day time frame cannot be met. When the court finds the sixty-day time period cannot be met, it must specify the time within which the TPR petition or motion must be filed. G.S. 7B-906.1(m). Note that the sixty-day time requirement is directory, and failure by DSS to file a TPR petition or motion within the sixty days will not deprive the court of subject matter jurisdiction. *See In re T.M.*, 182 N.C. App. 566 (holding that the trial court was not deprived of subject matter jurisdiction when filing occurred after the sixty-day period and that there was no error where no prejudice was shown from the delay), *aff'd per curiam*, 361 N.C. 683 (2007).

Practice Note: Although the Juvenile Code directs that DSS initiate the TPR action, the child's GAL, a court-appointed guardian of the child's person, or the person with whom the child has resided with for a continuous period of two years or more, has standing to and may initiate a TPR action. *See* G.S. 7B-1103(a)(2), (5), and (6). The timeliness of filing the TPR petition or motion will become increasingly important as of January 1, 2019 due to legislative changes regarding appeals. If an appeal of an order eliminating reunification is pending, the trial court continues to exercise jurisdiction in the abuse, neglect, or dependency action (unless otherwise directed by the appellate court) but may not proceed with a TPR action. G.S. 7B-1003. If a child's permanent plan is adoption and a TPR is required, the achievement of that plan will be delayed if there is a pending appeal of an order eliminating reunification as a permanent plan since the TPR action cannot proceed until the appeal is resolved.

Legislative Note: Effective for appeals filed on or after January 1, 2019, a parent may appeal an order entered under G.S. 7B-906.2(b) that eliminates reunification as a permanent plan if after sixty-five days from the entry and service of that order, a TPR petition or motion has not been filed during that sixty-five day period. The change in the law reduces the time period during which a parent must wait before appealing the G.S. 7B-906.2(b) order from 180 days to sixty-five days. G.S. 7B-1001(a)(5) sets forth specific requirements to preserve the right to appeal and to subsequently appeal the G.S. 7B-906.2(b) order. *See* S.L. 2017-41, sec. 8.(a) as amended by S.L. 2017-102, sec. 40.(f). See Chapter 12.5.A.2 (discussing appeal of an order eliminating reunification as a permanent plan).

E. Hearing to Modify or Vacate a Dispositional Order

The Juvenile Code allows a party to file a motion (or petition) to modify or vacate an order entered in the abuse, neglect, or dependency action. *See* G.S. 7B-1000. Upon such motion (or petition), the court may conduct a review hearing, after providing notice to the parties, to determine whether the order is in the child's best interests. G.S. 7B-1000(a). The applicable standard in the review hearing is either a change in circumstances or the needs of the juvenile. G.S. 7B-1000(a). *See In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728 (2016).

In *In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728, the court of appeals addressed the criteria of G.S. 7B-1000. Distinguishing the standard of G.S. 7B-1000 from a motion to modify a G.S. Chapter 50 civil custody order, the court of appeals held the statute allows for a modification based on a change in the needs of the juvenile or a change in circumstances and

that the burden is on the moving party to prove the changes that support the modification being sought. The changes must have either occurred or been discovered since the time of the order, but the court may consider historical facts of the case to determine whether a change has occurred. When a change has occurred, the court applies the best interests of the child standard in making any modifications to the order. In *In re A.C.*, the movant alleged a change in circumstances (not the needs of the juvenile), and the trial court properly determined that a substantial change in circumstances existed and a modification of the order was in the child's best interests.

There are exceptions to the application of G.S. 7B-1000(a). When the change being sought is the removal of a guardianship that is the child's permanent plan, the provisions of G.S. 7B-600(b) apply. When custody has been placed with a parent, the court has retained jurisdiction but periodic review and permanency planning hearings have been waived, and DSS receives a new report of abuse, neglect or dependency that warrants court action, DSS must file a new petition in the existing action and not a motion to modify or vacate the order. *See* G.S. 7B-401(b). Under these circumstances, the trial court will not have subject matter jurisdiction to proceed on a motion to modify. *In re T.P.*, ___ N.C. App. ___, 803 S.E.2d 1 (2017) (vacating order modifying permanency planning order based on a DSS motion for review when G.S. 7B-401(b) applied; holding trial court lacked subject matter jurisdiction as proper pleading was not filed and procedure for adjudicatory hearing was not followed). See section 7.2.A.4(a), above (discussing G.S. 7B-401(b)).

7.9 Reasonable Efforts

A. Introduction

In abuse, neglect, or dependency proceedings "reasonable efforts" is a term of art that originated with the federal Adoption Assistance and Child Welfare Act of 1980. Reasonable efforts requirements have been part of the North Carolina Juvenile Code since 1988. *See* S.L. 1987-1090. The Adoption and Safe Families Act (ASFA) was enacted in response to a recognition that the child welfare system was overburdened and moved slowly, that some children were spending what many professionals thought to be an unreasonable portion of their childhoods in foster care, and that efforts to assist parents in correcting conditions that led to a child's removal often were insufficient. The changes also reflected an increased awareness that children's perception of time is different from that of adults. A period of three days, three months, or three years as experienced by judges, attorneys, social workers, and parents is not comparable to that same period in the life of a child. ASFA focused on the child's safety, explicitly addressed permanency for children, included timelines to move a case forward, and made changes to reasonable efforts provisions initially enacted by the Adoption Assistance and Child Welfare Act. See Chapter 1.3.B.3 and 6 (providing more information on the Adoption Assistance and Child Welfare Act and ASFA).

The following excerpt from the North Carolina Department of Health and Human Services (DHHS) Division of Social Services, *Family Services Manual* illustrates the increased focus on the concepts of permanence and timeliness in the child welfare system:

> Foster care placement is temporary substitute care provided to a child who must be separated from his or her own parents or caretakers when the parents or caretakers are unable or unwilling to provide adequate protection and care …. When removal is necessary to preserve a child's safety and care, it is the responsibility of the child welfare agency to ensure that the child is in foster care placement for the shortest time possible…. Permanency planning begins before a child enters foster care…. Concurrent permanency planning ensures that alternative plans are developed in the event that placement prevention efforts are unsuccessful. In cases of removal, alternative permanency options are developed while reunification efforts are being made. If reunification is unsuccessful, an alternative permanency plan has been developed and can be implemented swiftly. It is not inconsistent to work toward reunification while building a case which will support alternative planning and alternative resolutions. Permanence is defined as a life-long family relationship with at least one adult that promotes a sense of mutual belonging and is legally secure.

1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(I)B (April 2017). Note, DSS polices, currently located here, are being revised.

Resources:

CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, "Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children" (2016).

JUDGE LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE (2014), available on the National Council of Juvenile and Family Court Judges website.

For a comprehensive discussion on the reasonable efforts requirements, see the white paper from the YOUTH LAW CENTER, "Making Reasonable Efforts: A Permanent Home for Every Child" (2000). For guidance on what constitutes reasonable efforts, see the material starting on page 66 of this resource.

B. Statutory Definitions: Reasonable Efforts, Return Home, Reunification

The Juvenile Code defines "reasonable efforts" as DSS's diligent use of

- preventive or reunification services "when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time" or
- permanency planning services, to develop and implement a permanent plan for the juvenile, if the court has determined that the juvenile is not to be returned home.

G.S. 7B-101(18).

The Juvenile Code defines "return home or reunification" as "placement of the juvenile in the home of either parent or placement of the juvenile in the home of a guardian or custodian from whose home the child was removed by court order." G.S. 7B-101(18b). This definition was added to the Juvenile Code in 2013 and supersedes the holding of the court of appeals in *In re J.M.D.*, 210 N.C. App. 420 (2011), that a child is returned home only when placed back in the home from which the child was removed.

Practice Notes: The Juvenile Code appears to use the term "reunification efforts" interchangeably with "reasonable efforts." There is no definition of "reunification efforts."

Because reunification refers to the child's placement with either parent or with a guardian or custodian from whose home the child was removed, reasonable efforts and reasonable efforts findings must be made with respect to both parents and, if the child was removed by court order from the home of a custodian or guardian, that person as well. *See In re A.E.C.*, 239 N.C. App. 36 (2015).

C. Required Findings

In any case in which the child is placed in the custody or placement responsibility of DSS, the Juvenile Code requires the court to make findings at each placement stage of the proceeding about whether DSS has made reasonable efforts to prevent the child's need for placement. *See* G.S. 7B-507(a)(2) (nonsecure custody phase); 7B-903(a3) (dispositional phase). A finding that reasonable efforts to prevent the child's placement were precluded by an immediate threat of harm to the child or a finding that reasonable efforts were not made by DSS does not prevent the court from ordering the child's out-of-home placement when the court finds that the child's placement is necessary for his or her protection. G.S. 7B-903(a3); *see* G.S. 7B-507(a)(2). The court must make a finding that the child's continuation in or return to his or her own home would be contrary to the child's health and safety. G.S. 7B-903(a2). Additionally, different findings regarding reasonable efforts are required at different stages in an abuse, neglect, or dependency action as discussed in earlier sections of this Chapter.

Although the child's best interests is the primary standard used throughout the Juvenile Code, some of the statutes related to reasonable efforts refer to the child's health and/or safety as the paramount concern when addressing reasonable efforts. *See* G.S. 7B-507(a)(2); 7B-903(a3); 7B-906.1(d)(3); 7B-906.2(b).

Practice Note: The statute and appellate cases refer to reasonable efforts findings, but the determination as to reasonable efforts is a conclusion of law. *See, e.g., In re E.G.M.*, 230 N.C. App. 196, 211 (2016) (stating "[d]espite its statutory designation as a finding or 'ultimate finding'… the determination that grounds exist to cease reunification efforts under [statutory language that such efforts would clearly be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time] is in the nature of a conclusion of law that must be supported by adequate findings of fact."); *In re Helms*, 127 N.C. App. 505, 510−11 (1997) (stating that "reasonable efforts and best interest determinations are conclusions of law because they require the exercise of judgment.").

Beyond the possibility of being reversed on appeal and delaying permanency for a child, the Juvenile Code does not specify consequences for a court's failure to make findings about reasonable efforts or for the failure of a DSS to actually make reasonable efforts. The findings and the efforts themselves are conditions of the state's receipt of federal child welfare funding. Consequences to the state for failing to adhere to reasonable efforts requirements, if they occur, would come from the federal government, which can withhold or recoup funding the state receives under Title IV-E of the Social Security Act if these and other conditions are not met. See Chapter 1.2.C and 1.3.B (providing more information on Title IV-E and other federal programs, as well as state compliance with federal laws).

D. Eliminating or Ceasing Reasonable Efforts

The court of appeals has noted that the essential aim of dispositional and review hearings is to reunite a child who has been removed from his or her parent's care, and as a result of that purpose, the Juvenile Code limits when a court may order that reasonable efforts to reunify a parent with his or her child are not required. *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016). As of October 1, 2015, the court's authority is limited to the initial dispositional and permanency planning hearings. *See* G.S. 7B-901(c); 7B-906.2(b). Recent appellate opinions involving challenges to orders eliminating reunification efforts have focused on the procedural requirements related to the timing and findings that are required to enter such an order. See sections 7.8.A.2, above (discussing initial dispositional hearing), and 7.8.C.8, above (discussing permanency planning hearing).

Other appellate cases involving challenges to orders ceasing reunification efforts have focused on determining whether the trial court made appropriate findings that address the specific requirements of the applicable statute, whether the findings were based on credible evidence in the record, whether the findings supported the court's conclusion of law, and whether the trial court abused its discretion. *See In re P.T.W.*, ___ N.C. App. ___, 794 S.E.2d 843 (2016); *In re N.G.*, 186 N.C. App. 1 (2007), *aff'd per curiam*, 362 N.C. 229 (2008). The facts and conclusions must be based on evidence *presented at the hearing* that results in an order ceasing reunification efforts. *In re P.T.W.*, ___ N.C. App. ___, 794 S.E.2d 843 (emphasis in original). Note that as of October 1, 2015, the applicable statutes are G.S. 7B-901(c) and 7B-906.2(b); prior to that date, the applicable statute was G.S. 7B-507.

Where court orders have failed to address the specific requirements of the applicable statutes, appellate cases have found reversible error. *See, e.g., See In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017) (reversing and remanding order for additional findings required by G.S. 7B-906.1 and 7B-906.2); *In re A.E.C.*, 239 N.C. App. 36 (2015) (vacating and remanding the court's order to cease reunification efforts where that order and the order terminating parental rights failed to determine whether DSS had made reasonable efforts to reunify, whether reunification would be futile, or why placement with the father was not in the child's best interest).

However, the exact statutory language is not necessarily required. The supreme court held that the use of the actual statutory language in making findings is best practice, but the statute does not demand that the trial court's order contain a verbatim recitation of its language. *In re*

L.M.T., 367 N.C. 165 (2013) (reversing the court of appeals, which had reversed the trial court, because the order that ceased reunification efforts embraced the substance of the statutory provisions; decided under former statute); *In re H.D.* 239 N.C. App. 318 (2015).

In some circumstances, deficiencies with findings of fact that exist in an order eliminating reunification efforts may be cured in a subsequent order terminating parental rights. This may happen when a termination of parental rights (TPR) action is filed within the statutory time period affecting an appeal of an order eliminating reunification such that the appeals of the two orders are heard together. *See In re L.M.T.*, 367 N.C. 165 (reviewing G.S. 7B-1001(a)(5); holding legislature unambiguously instructed the appellate courts to review the appeal of an order ceasing reunification together with an appeal of a TPR order, allowing incomplete findings of fact in the cease reunification order to be cured by findings of fact in the TPR order); *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017) (vacating order ceasing reunification efforts and TPR order; neither order contained sufficient findings to eliminate reunification efforts); *In re D.C.*, 236 N.C. App. 287 (2014) (deficiency in permanency planning order was cured by TPR order). See Chapter 12.4.A.5 (discussing in detail the requirements for an appeal of an order eliminating reunification).

The requirements of the statute authorizing the cessation of reunification efforts based on whether those efforts clearly would be unsuccessful or inconsistent with the child's health, safety, and need for a safe, permanent home have been found to be satisfied where the trial court relates its findings to one of those prongs (sometimes referred to by the court of appeals as "ultimate findings" and other times as a conclusion of law). The court of appeals cannot "simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home." *In re I.R.C.*, 214 N.C. App. 358, 363 (2011) and cases cited therein at 364 (decided under former G.S. 7B-507). *See In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (quoting *In re I.R.C.*, 214 N.C. App. at 363−64); *see also In re J.P.*, 230 N.C. App. 523 (2013) (holding that the trial court did relate its findings to a conclusion of law setting forth the basis for ceasing reunification efforts; decided under former statute). Note that the former statute authorizing the cessation of reasonable efforts, G.S. 7B-507, was based on a finding that efforts clearly would be "futile" (now replaced with "unsuccessful") or inconsistent with the child's health, safety, "and need for a safe, permanent home within a reasonable period of time" (now referring solely to the child's "health and safety"; however a reasonable period of time is referred to throughout the Juvenile Code).

The following cases address the sufficiency of the evidence and findings to support an order ceasing reunification efforts and have found them sufficient.

- The findings and evidence showing respondent mother's failure to comply with her case plan, demonstrate sustained parental improvements, and maintain stable housing; substantiation by DSS for sexual abuse of another one of her children who was not the subject of the court action; and lack of awareness of her history of domestic violence with the children's father supported an order ceasing reunification efforts after concluding those efforts would be inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable time. Although one finding of fact regarding

mother's failure to reengage in therapy was not supported by competent evidence, the remaining findings of fact support the court's ultimate decision to cease reunification efforts. *In re P.T.W.*, ___ N.C. App. ___, 794 S.E.2d 843 (2016).

- The findings supported the conclusion of law that a reunification plan with respondent mother would be futile or inconsistent with the child's need for a safe, permanent home within a reasonable period of time where they showed the parent educator who was working with mother was concerned about mother's ability to protect her child and that mother was aware of one of the children's father's sexual abuse of another one of her children, was not prepared for visits and did not interact with and comfort her child at visits, and moved in with a man upon whom she was dependent despite knowing recommendations for reunification would not be made if there were concerns about her living, parenting, and financial situation. *In re E.M.*, ___ N.C. App. ___, 790 S.E.2d 863 (2016).
- Findings in the reunification order that the mother had failed to attend visits or complete her case plan, had pending criminal charges, had not participated in drug screens, and that the children could not go home for at least six months were sufficient to suggest that reunification efforts would be futile. *In re H.D.*, 239 N.C. App. 318 (2015).
- Reviewing the permanency planning order together with the TPR order, the court of appeals found that the detailed findings in the TPR order relating to the respondent mother's drug abuse, failures of treatment, and relapses up until the time of the TPR hearing were sufficient to support cessation of reunification efforts. *In re D.C.*, 236 N.C. App. 287 (2014).
- The supreme court found the findings were sufficient to support the trial court's order ceasing reunification efforts where respondent mother's drug abuse and domestic violence problems were worsening, and she was covering these problems up and refusing to acknowledge them. *In re L.M.T.*, 367 N.C. 165 (2013).
- In the case *In re A.Y.*, 225 N.C. App. 29 (2013), the court of appeals agreed with respondent mother that some findings of fact in an order ceasing reunification efforts were unsupported, but the court determined that they were not material to the trial court's decision, and other findings were sufficient to support ceasing reunification efforts. Supported findings established continuing verbal aggression and significant conflict between the parents, that the parents had not successfully engaged in couples therapy, that the mother had made only limited progress on treatment goals and had a pattern of poor parenting, and that the child had been detrimentally affected.
- An order to cease reunification efforts was upheld where findings were that mother failed to comply with the terms of a case plan regarding the child's sibling, that the father failed to seek necessary medical care despite being prompted, and that both parents had intellectual disabilities. Also, the mother did not understand the reason for DSS involvement, and she shared characteristics with parents who have been known to abuse their children. Despite intensive case management offered to respondents, there were missed appointments and an inability to contact or locate the child and mother. Both the mother and father would need ongoing support to effectively parent, and there did not appear to be a person available to supervise the parents if child was placed in their home or the home of a relative. *In re C.M.*, 183 N.C. App. 207 (2007).
- In determining whether to continue reunification efforts or change the permanent plan, it was permissible for the court to consider the cost of providing services deemed necessary

for reunification. Here, the court concluded that because the mother would need help twenty-four hours a day to cope with and care for her children, "reunification is possible but not financially practical." *In re J.J.*, 180 N.C. App. 344, 350–51 (2006).

The following cases have found the evidence and findings insufficient to support an order eliminating reunification efforts.

- The court of appeals vacated a permanency planning order that ceased reunification efforts with respondent father and as a result vacated the TPR order that was heard together on appeal with the permanency planning order. At the permanency planning hearings, the trial court heard no oral testimony and instead heard statements from the attorneys, which are not evidence, and accepted court reports submitted by DSS and the child's guardian ad litem (GAL). Relying on previous opinions, the court of appeals stated, "reports incorporated by reference in the absence of testimony are insufficient to constitute competent evidence to support the trial court's findings of fact" and determined the findings in the permanency planning order were unsupported by competent evidence and its conclusions of law were in error. In looking to the TPR order, the court of appeals found the TPR order did not cure the deficiencies in the permanency planning order. *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017).
- The court's findings under G.S. 7B-906.2(d) of mother's refusal to engage in treatment, pending criminal charges, failure to attend the permanency planning hearing due to oversleeping, her aggressive behavior toward the proposed guardians at a child and family team meeting, and her acting inconsistently with her parental rights do not address the ultimate finding of fact required by G.S. 7B-906.2(b) to support the elimination of reunification efforts – whether efforts would clearly be unsuccessful or inconsistent with the child's health or safety. An appellate court will not make that inference. *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) (vacating permanency planning order and remanding for further proceedings).
- The court of appeals reversed and remanded a permanency planning order that ceased reunification efforts with respondent father, holding that the evidence did not support the trial court's findings related to reunification efforts, and the findings did not support the conclusion that reunification efforts should cease. The findings failed in several respects to meet the requirements of [former statutes] G.S. 7B-907(b) and 7B-507. There was insufficient evidence of risk of abuse by the father; some findings were mere recitations of evidence; some findings were contrary to evidence that the father was not likely to abuse the child; and findings did not explain why the child could not be returned home or why not returning home was in her best interest. *In re I.K.*, 227 N.C. App. 264 (2013).
- Evidence was insufficient to support an order ceasing reunification efforts with respondent mother where DSS recommended reunification; injuries to the child occurred while in the care of someone the mother was no longer seeing; the mother had a low I.Q. but no severe mental health issues that would interfere with her ability to parent; mother understood her poor choices leading to abuse and had grown and matured to a level as to not be a danger to the child; and the mother continued to pay child support, visit the child regularly, stay employed, and comply with her case plan. Also, the trial court had failed to consider changed conditions, which in this case were highly relevant. *In re Eckard*, 148 N.C. App. 541 (2002).

7.10 Concurrent Permanency Planning and Outcomes

At the conclusion of the permanency planning hearing, the court must make specific findings required by the various applicable statutes, discussed throughout this Chapter. The court also must make determinations related to the best plans of care to achieve a safe, permanent home for the child within a reasonable period of time. The court has the same dispositional alternatives and authority over parents and others that it has at the initial dispositional and review hearings.

A. Concurrent Permanency Planning

The Juvenile Code mandates concurrent permanency planning in all actions filed or pending on or after October 1, 2015. *See* S.L. 2015-136, sec. 14. There are six types of permanent plans:

- reunification,
- adoption,
- guardianship with relatives or others,
- custody to a relative or other suitable person,
- Another Planned Permanent Living Arrangement (APPLA) for youth who are 16 or 17 years old, and
- reinstatement of parental rights (when parental rights have been terminated).

G.S. 7B-906.2(a). *See* G.S. 7B-101(18a) (definition of "reunification"); 7B-600 (appointment of guardian); 7B-903(a) (dispositional alternatives); 7B-911 (transfer to a G.S. Chapter 50 custody action); 7B-912(c), (d) (APPLA); 7B-1114 (reinstatement of parental rights); G.S. Chapter 48 (adoption).

At any permanency planning hearing, the court must adopt concurrent permanent plans that the court finds are in the child's best interests. In its permanency planning order, the court must identify the primary and secondary plans and order DSS to make efforts toward finalizing each plan. In its order, the court may also specify the efforts that are reasonable to timely achieve permanency for the child. G.S. 7B-906.2(a), (b). Concurrent permanency planning must continue until a permanent plan is achieved. G.S. 7B-906.2(a1); *see* S.L. 2016-94, sec. 12C.1.(h) (effective July 1, 2016).

Reunification must be a primary or secondary plan unless

- the court ceased reunification efforts in an initial dispositional order that made a G.S. 7B-901(c) finding or
- at the permanency planning hearing, the court makes written findings under G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or would be inconsistent with the child's health or safety.

G.S. 7B-906.2(b). See sections 7.8.A.2; 7.8.C.8; and 7.9, above (discussing reasonable efforts

and findings to eliminate those efforts at initial dispositional and permanency planning hearings).

An order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) may be appealed. The statute governing appeals of G.S. 7B-906.2(b) orders eliminating reunification as a permanent plan, G.S. 7B-1001(a)(5), has complex requirements related to the timing and manner of the appeal that depend on whether the appealing party is a parent, custodian, or guardian, and on whether a TPR petition is filed within 180 days (or effective January 1, 2019, within sixty-five days). These requirements are explained in Chapter 12.4.A.5.

In *In re C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429 (2017) (originally unpublished July 18, 2017, but subsequently published), the court of appeals stated that the respondent mother conflated removing reunification as a permanent plan with ceasing reunification efforts. Respondent mother appealed a permanency planning order that awarded the primary permanent plan of guardianship with a relative and retained a secondary plan of reunification. Respondent mother appealed because the order did not contain the findings required by G.S. 7B-906.2(b) to eliminate reunification as a permanent plan. The court of appeals held reunification had not been eliminated as a permanent plan as the order specifically included a secondary permanent plan of reunification. However, the court of appeals agreed with respondent mother that the trial court should not have waived further review hearings as all of the required G.S. 7B-906.1(n) findings were not made. See section 7.2.A.4, above (discussing waiving review hearings). The court of appeals continued its analysis and looked to G.S. 7B-906.2(b) and 7B-906.1(d) and (e) and held the trial court erred in relieving DSS and the child's guardian ad litem (GAL), stating "[m]oreover, by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have [DSS] provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts." *In re C.S.L.B.*, ___ N.C. App. at ___, 803 S.E.2d at ___ (not paginated on Westlaw) (vacating portion of order). *See also In re E.C.*, 174 N.C. App. 517 (2005) (an award of guardianship at an initial dispositional hearing does not cease DSS's duty to provide reunification efforts).

Note that in *In re C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429, the trial court apparently did not apply, at a permanency planning hearing in August 2016, G.S. 7B-906.2(a1), effective July 1, 2016. That statute states "concurrent planning shall continue until a permanent plan has been achieved" and authorized (but did not require) the trial court to enter a guardianship order as the achieved permanent plan with no secondary permanent plan ordered. Additionally, the court of appeals did not address the language of G.S. 7B-601(a), which states the child's GAL appointment "shall terminate when the permanent plan has been achieved for the juvenile and approved by the court."

The court of appeals has not addressed the issue of whether an order entered under G.S. 7B-906.2(a1) that achieves a permanent of plan for the child that is not reunification requires the findings of G.S. 7B-906.2(b) regarding the elimination of reunification as a permanent plan. Under the former statutory scheme when concurrent planning was not mandated, the court of appeals held that a permanency planning order that eliminates reunification and awards guardianship to a person effectively ceases reunification efforts. *See In re N.B.*, 240 N.C. App.

353 (2015) (holding the findings supported the effective cessation of reasonable efforts as the finding addressed the statute's concerns that efforts would be futile or inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable period of time).

Resources:
For the state policy regarding permanency planning, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(VI) (Dec. 2016). Note, DSS polices, currently located here, are being revised.

DSS has a category of services designed for family reunification. For an explanation, policies, and procedures regarding these services, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL CH. II (July 2013). Note, DSS polices, currently located here, are being revised.

See the following publications by CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVICES,

- "Concurrent Planning for Permanency for Children" (2017).
- "Concurrent Planning: What the Evidence Shows" (2012).
- "Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children" (2016).
- "Supporting Successful Reunifications" (2017).

In addition to the publications, multiple resources related to permanency plans are accessible through the Child Welfare Information Gateway, U.S. Department of Health and Human Services website. See "Concurrent Planning," "Achieving & Maintaining Permanency," "Legal Issues Related to Permanency," "Reunifying Families," and "Concept and History of Permanency in U.S. Child Welfare."

B. Achieving a Permanent Plan

Permanent placements can be ordered only in the context of permanency planning hearings that are properly noticed as such (unless the party has waived notice). *See* G.S. 7B-906.1(b); *see In re K.C.*, ___ N.C. App. ___, 791 S.E.2d 284 (2016) (originally unpublished Aug. 2, 2016, but subsequently published) (vacating and remanding permanency planning review orders granting custody to paternal grandparents when parent objected at permanency planning hearing to deficient notice but court proceeded with permanency planning hearing). See section 7.2.B, above (discussing notice).

1. Reunification. Reunification is achieved when the child is placed in the home of either parent (regardless of whether the child was removed from that parent's home) or the guardian or custodian from whose home the child was removed by order of the court. G.S. 7B-101(18b). The permanent plan of reunification may be achieved in a variety of ways. If the court dismisses the case (either as the result of the child not being adjudicated abused, neglected, or dependent or as a dispositional alternative), the legal status of the child and the custodial rights of the parties revert to what they were before the court action was commenced

(unless there has been a termination of parental rights, a Chapter 50 custody order was entered pursuant to G.S. 7B-911, or an order in another civil action provides otherwise). *See* G.S. 7B-201(b); 7B-807(a); 7B-903(a)(1). If the court does not dismiss the action, achievement of reunification as a permanent plan occurs through a custody order, which is a permissible dispositional alternative. G.S. 7B-903(a)(4). When a custody is awarded to a parent (or custodian or guardian from whom the child was removed), the court must consider whether its jurisdiction should be terminated pursuant to G.S. 7B-911 and a custody order entered pursuant to G.S. Chapter 50. See subsection 4, below (discussing G.S. 7B-911 and transfer to a G.S. Chapter 50 custody action).

2. Adoption. For children who cannot return home, placement options have varying degrees of finality or "permanence." An adoption is the permanency option with the greatest degree of legal finality. An adoption is a separate proceeding, initiated by the adoption petitioner. *See* G.S. 48-2-301(a). It is a special proceeding that is heard before the clerk of superior court, unless the action is transferred to district court as a result of a question of fact, request for equitable relief, or equitable defense. G.S. 48-2-100(a); 48-2-601(a1). In some cases, a termination of parental rights (TPR) of one or both parents will be required, and in other cases, relinquishments will be obtained from the necessary persons whose consents are required, allowing the adoption to proceed without a TPR action. *See* G.S. 48-2-603(a)(4). The final decree of adoption results in a complete substitution of the family and establishes a parent-child relationship between the child and adoption petitioner(s). G.S. 48-1-106(a), (b). *But see* G.S. 48-1-106(d) (exception for stepparent adoption). With the final decree of adoption, the child has achieved permanency, and the district court's jurisdiction in the juvenile proceeding terminates with the entry of the final decree. *See* G.S. 48-2-102(b); *In re W.R.A.*, 200 N.C. App. 789 (2009). For a further discussion of adoptions, see Chapter 10.3.

3. Guardianship. The court may award guardianship of the person to a non-parent as the child's permanent plan. G.S. 7B-903(a)(5); 7B-906.2(a)(3); 7B-600(b). When the court orders guardianship as a permanent plan for the child and appoints a guardian under G.S. 7B-600, the guardian automatically becomes a party to the proceeding. G.S. 7B-401.1(c). The duties and responsibilities of the child's guardian are discussed in section 7.4.F, above. The guardianship may not be terminated unless the court finds that

- the relationship between the guardian and the juvenile is no longer in the juvenile's best interest;
- the guardian is unfit;
- the guardian has neglected his or her duties; or
- the guardian is unwilling or unable to continue to perform those duties.

G.S. 7B-600(b).

The court must make certain findings before ordering guardianship, as discussed in sections 7.4.F and G, above. Before the court can award guardianship as the permanent plan, it must also make findings about the parent's constitutional rights since guardianship awards care, custody, and control of the child to a non-parent. See subsection 5, below (discussing required findings regarding parent's constitutional rights).

For a guardianship order to remain in effect and be enforced or modified, the court must retain jurisdiction over the abuse, neglect, or dependency action. *See* G.S. 7B-201(b). However, the court may order that periodic judicial reviews of the permanent guardianship order be waived, held less often than every six months, or be substituted by written reports submitted by the guardian to the court in an order that makes all the required G.S. 7B-906.1(n) findings by clear and convincing evidence. See section 7.2.A.4, above (discussing waiving review hearings).

When hearings are waived, a party has a right to file a motion for review. G.S. 7B-906.1(n). If a party files a motion for review under G.S. 7B-906.1 or G.S. 7B-1000 when a permanent plan of guardianship is in place, before conducting a review hearing the court may do one or more of the following:

- order DSS to conduct an investigation and file a written report and give testimony regarding the performance of the guardian,
- utilize the community resources in behavioral sciences and other professions in the investigation and study of the guardian,
- ensure that a guardian ad litem (GAL) for the child has been appointed pursuant to G.S. 7B-601 and has been notified of the pending motion, and
- take any other action necessary to make a determination.

G.S. 7B-600(b).

Practice Note: When state intervention through a juvenile court proceeding is no longer necessary, the court should consider entering a custody order (where the court's jurisdiction in the abuse, neglect, or dependency action may terminate upon the entry of a G.S. 7B-911 order that transfers the action to a G.S. Chapter 50 civil custody action, discussed in subsection 4(a), immediately below) rather than a guardianship order, which requires that the court retain jurisdiction in the abuse, neglect, or dependency proceeding.

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4. Custody. A permanent plan of custody involves an award of custody of the child to someone who is not the child's parent because an order of custody to a parent constitutes the permanent plan of reunification. Because the permanent plan of custody is to a non-parent, the court must make findings regarding the parents' constitutional rights, discussed in subsection 5, below. Additional considerations and criteria the court must consider and satisfy are discussed in sections 7.4.E and G, above.

(a) Transfer to G.S. Chapter 50 custody action. When the court places custody with a parent or other appropriate person, the court must determine whether jurisdiction in the abuse, neglect, or dependency proceeding should be terminated and custody awarded pursuant to G.S. Chapter 50. G.S. 7B-911(a). Through G.S. 7B-911, the court is transferring the juvenile proceeding to a G.S. Chapter 50 custody proceeding. Any subsequent action, such as a modification or enforcement action, would occur in the G.S. Chapter 50 proceeding. Note that prior to 2013, the court had the option of transferring the case to a G.S. Chapter 50 custody action when G.S. 7B-911 factors were satisfied but was not required to consider that option.

The transfer of an abuse, neglect, or dependency proceeding to a G.S. Chapter 50 custody action should occur only when (1) there is a need for a custody order to remain in effect and be enforceable and modifiable and (2) continued state intervention through a juvenile court proceeding is no longer necessary or appropriate. *See* G.S. 7B-911. Terminating jurisdiction in the abuse, neglect, or dependency action, by itself, nullifies any custody order entered in that case, and the legal status of the child and custodial rights of the parties revert to the status that existed before the filing of the abuse, neglect, or dependency petition (unless another valid order has been entered or a parent's rights have been terminated). *See* G.S. 7B-201(b). The G.S. Chapter 50 civil custody order will remain in effect and be subject to modification upon a showing of a substantial change in circumstances and enforcement by the district court in the G.S. Chapter 50 action until the child reaches age 18 or is otherwise emancipated.

Under G.S. 7B-911, the juvenile court may enter a new or modify an existing civil custody order and terminate jurisdiction in the abuse, neglect, or dependency case only if the court finds that

- there is not a need for continued state intervention through a juvenile court proceeding and
- placement with the person being awarded custody has been the permanent plan for the child for at least six months, unless that person is a parent or the person with whom the child was living when the petition was filed.

G.S. 7B-911(c)(2). *See In re J.K.*, ___ N.C. App. ___, 799 S.E.2d 439 (2017); *In re J.M.D.*, 210 N.C. App. 420 (2011); *Sherrick v. Sherrick,* 209 N.C. App. 166 (2011).

The court must make the necessary findings under G.S. 7B-911. *See In re J.D.R.*, 239 N.C. App. 63 (2015) (order terminating jurisdiction was reversed and remanded because the trial court failed to make finding required by G.S. 7B-911(c)(2)a. as to continued state intervention).

The court must also follow the procedures set forth in G.S. 7B-911. *See In re J.K.*, ___ N.C. App. ___, 799 S.E.2d 439 (holding compliance with procedures of G.S. 7B-911 is jurisdictional; remanding order for inclusion of provisions required by G.S. 7B-911 when transferring an abuse, neglect, or dependency proceeding to a G.S. Chapter 50 civil action, creating a new G.S. Chapter 50 action); *see Sherrick v. Sherrick,* 209 N.C. App. 166 (holding procedures of G.S. 7B-911 affect subject matter jurisdiction, which cannot be conferred by consent; holding failure to terminate jurisdiction in juvenile proceeding prevents case from being transferred to a civil custody action such that district court has no jurisdiction to act under G.S. Chapter 50).

If there is no existing civil custody action, the court must instruct the clerk to treat the custody order entered pursuant to G.S. 7B-911 as initiating a civil custody action. The court must designate the parties to the action and determine the most appropriate caption for the action. The filing fees are waived unless the court orders one or more of the parties to pay the filing fee. The order constitutes a custody determination and any motion to

enforce or modify the custody order must be filed in the newly created G.S. Chapter 50 action pursuant to the requirements of G.S. Chapter 50. G.S. 7B-911(b).

If the custody order is entered in an existing civil action and the person who is being awarded custody is not a party to that action, the court must order that the person be joined as a party and that the caption be modified accordingly. An order that is filed in an existing action resolves any pending claim for custody and modifies any custody order previously entered in that action. G.S. 7B-911(b).

Any order entered pursuant to 7B-911 must satisfy all the requirements for a civil custody order and should not simply refer to or incorporate a juvenile court order. A modification order must satisfy all requirements for modifying a civil custody order. These requirements include proper findings and conclusions that support the creation or modification of a G.S. Chapter 50 custody order. G.S. 7B-911(c)(1). *See also* G.S. 50-13.2; 50-13.5; 50-13.7; *In re J.B.*, 197 N.C. App. 497 (2009) (holding that the necessary findings were lacking).

Note, a thorough description of all of the required contents or characteristics of a valid civil custody order or an order modifying a civil custody order is beyond the scope of this Manual. *See, generally,* G.S. 50-13.1, 50-13.2, 50-13.7, and cases decided thereunder.

Although there are two different actions – the abuse, neglect, dependency proceeding and the G.S. Chapter 50 case – the court may enter one order for placement in both court files. However, the order must be sufficient to support both the necessary findings terminating jurisdiction in the juvenile proceeding and the initial or modified civil custody order. *See Sherrick v. Sherrick*, 209 N.C. App. 166 (2011); *In re A.S.*, 182 N.C. App. 139 (2007) (holding there is no requirement that there be two separate orders).

(b) Jurisdiction retained in the abuse, neglect, dependency action. When the trial court orders custody as a permanent plan pursuant to G.S. 7B-903(a)(4) and determines the criteria of G.S. 7B-911 are not satisfied, it retains jurisdiction over the abuse, neglect, or dependency proceeding. The custody order is effective and can be enforced and modified by the juvenile court while the court continues to exercise jurisdiction in the juvenile action. G.S. 7B-201(b). Review of the custody order will take place periodically pursuant to G.S. 7B-906.1, unless the requirements for waiving reviews in G.S. 7B-906.1(n) are met or the court terminates its jurisdiction. See section 7.2.A.4, above (discussing waiver of reviews). If the criteria for waiving review hearings are met, a custody order in an abuse, neglect, or dependency action can remain in place with little court oversight. Even when reviews are not required, any party may file a motion for review under G.S. 7B-906.1. A custody order may also be modified pursuant to a G.S. 7B-1000 motion to review or vacate as discussed in section 7.8.E, above.

See also Chapter 3.1.C (discussing continuing or ending jurisdiction) and 3.1.D (discussing terminology related to continuing and ending jurisdiction).

5. Parent's constitutional rights findings before custody or guardianship to non-parent. Parents have paramount constitutional rights to care, custody, and control of their children. See Chapter 2.4.A for a discussion of parents' rights to raise their children and when the state may interfere with those rights.

In the permanency planning stage of an abuse, neglect, or dependency action, before the court may order custody or guardianship with a non-parent, the court must find the parent is unfit, has neglected the child's welfare, or has acted inconsistently with his or her constitutional rights. *See Price v. Howard,* 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994); *In re B.G.*, 197 N.C. App. 570 (2009) (permanent custody order); *In re D.M.*, 211 N.C. App. 382 (2011) (permanent custody order); *In re R.P.*, ___ N.C. App. ___, 798 S.E.2d 428 (2017) (permanent guardianship order). A determination that a parent is unfit, has neglected the child's welfare, or has acted inconsistently with his or her constitutionally protected status must be supported by clear and convincing evidence. *Price*, 346 N.C. 68; *Petersen*, 337 N.C. 397; *Owenby v. Young*, 357 N.C. 142 (2003); *In re E.M.*, ___ N.C. App. ___, 790 S.E.2d 863 (2016). That standard requires evidence that fully convinces and is more than preponderance of the evidence but less than beyond a reasonable doubt. *See In re K.L.* ___ N.C. App. ___, 802 S.E.2d 588 (2017) (reversing permanent custody order; holding court's conclusion of parent's unfitness or acting inconsistently with parental rights was unsupported by findings of fact). The finding is required even when the child has been previously adjudicated as neglected and dependent. *See In re R.P.*, ___ N.C. App. ___, 798 S.E.2d 428 (2017) (reversing permanent guardianship order that made no reference to father's constitutionally protected status; rejecting GAL argument that parental conduct leads to an adjudication and constitutes some showing of unfitness); *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011) (holding in a custody case between the child's mother and grandparents that a finding that the children had been adjudicated dependent in an earlier proceeding was not, by itself, sufficient to support a conclusion that the mother had acted in a manner inconsistent with her parental status).

There is no bright-line test when determining if a parent has acted inconsistently with his or her parental rights. *See In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728 (2016) (examining the mother's conduct and intentions and holding that she acted inconsistently with her parental rights). The determination is not based on whether the conduct consisted of good or bad acts but rather the court considers the voluntariness of the parent's actions and the relinquishment of exclusive parental authority to a third person. *Mason v. Dwinnell*, 190 N.C. App. 209 (2008). As part of its analysis, the court looks at the parent's intentions. *Mason*, 190 N.C. App. 209; *In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728. When determining whether a parent is unfit or acted inconsistently with his or her parental rights, "evidence of a parent's conduct should be viewed cumulatively." *Owenby*, 357 N.C. at 147. The court's conclusion as to whether a parent acted inconsistently with his or her parental rights is a question of law that is reviewable de novo. *See Boseman v. Jarrell*, 364 N.C. 537 (2010); *In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728.

The best interests of the child standard is not applicable to an order granting permanent custody or guardianship to a non-parent until after the court has found that the parent was unfit or has acted inconsistently with his or her parental rights. *See In re C.P.*, ___ N.C. App.

___, 801 S.E.2d 647 (2017); *In re A.C.*, ___ N.C. App. ___, 786 S.E.2d 728. Note that the best interests of the child standard does apply when the court is deciding custody between two parents, which may be an issue in an abuse, neglect, or dependency proceeding when reunification with either parent is an option and the parents do not reside together.

A parent may waive his or her right to the court finding regarding the constitutionally protected status prior to the court looking to best interests when the parent does not raise the issue before the trial court. *See In re R.P.*, ___ N.C. App. ___, 798 S.E.2d 428 (2017) (holding father did not waive his right to the findings as there was not a proper hearing on the issue for the father to raise an objection on constitutional grounds); *In re C.P.*, ___ N.C. App. ___, 801 S.E.2d 647 (mother failed to preserve the issue when she failed to raise it at permanency planning hearing resulting in guardianship order). Constitutional issues not raised at trial cannot be considered for the first time on appeal. *See In re T.P.*, 217 N.C. App. 181 (2011). See Chapter 12.3 (discussing preservation of issues for appeal).

Practice Note: North Carolina appellate opinions addressing the issue of parent's constitutional rights before the application of the best interests of the child standard in abuse, neglect, or dependency cases have been applied to appeals of permanency planning orders awarding custody or guardianship to non-parents.

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6. APPLA. APPLA stands for "Another Planned Permanent Living Arrangement." It is a term that arose from the federal Adoption and Safe Families Act (ASFA). The term is not defined in the Juvenile Code.

APPLA is the least preferred permanent plan as it is only available for children who do not have the option of reunification, adoption, custody, or guardianship. *See* G.S. 7B-912(c). In response to a recognition that APPLA was being used routinely and with young children, restrictions on its use were included in the federal Preventing Sex Trafficking and Strengthening Families Act. See Chapter 1.3.B.10 (discussing that federal law). As a result of that federal law, the Juvenile Code was amended effective for all actions filed or pending on or after October 1, 2015 and for the first time specifically addressed APPLA.

The Juvenile Code identifies APPLA as one of the possible permanent plans for a juvenile in foster care. *See* G.S. 7B-906.2(a)(5). APPLA may be the juvenile's primary permanent plan only when all of the following conditions apply:

- the juvenile is 16 or 17 years old;
- DSS has made diligent efforts to permanently place the juvenile with a parent or relative or in a guardianship or adoptive placement;
- there are compelling reasons that it is not in the juvenile's best interests to be permanently placed with a parent or relative or in a guardianship or adoptive placement; and
- APPLA is the best permanent plan for the juvenile.

G.S. 7B-912(c).

The court must approve APPLA before it becomes a primary permanent plan, and the court must first question the juvenile and make written findings addressing the juvenile's desired permanency outcome. G.S. 7B-912(c), (d). The Juvenile Code does not address when APPLA may become a secondary permanent plan.

A juvenile with a permanent plan of APPLA remains in DSS custody and will age out of foster care. Planning for a successful transition to adulthood and preparing the youth is especially important. The court has authority to specify efforts DSS must make to achieve this permanent plan, and the findings the court makes under G.S. 7B-912 for juveniles who are 14 years old and older may help the court determine what efforts are reasonable and required. *See* G.S. 7B-906.2(b). When the juvenile ages out of foster care, he or she will be eligible for Foster Care 18−21 if he or she meets the educational, employment, or medical condition/disability criteria of that program. See Chapter 8.3 (discussing Foster Care 18−21).

Resources:
For the state policy on APPLA, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(VI) (Dec. 2016). Note, DSS polices, currently located here, are being revised.

For more information about APPLA, see "OPPLA/APPLA" on the Child Welfare Information Gateway, U.S. Department of Health and Human Services website.

7. Reinstatement of parental rights. North Carolina is in the minority of states that authorize the reinstatement of parental rights after those rights have been terminated by a court. The Juvenile Code identifies reinstatement of parental rights as a permanent plan for the child. *See* G.S. 7B-906.2(a)(6). Reinstatement is an option in very limited circumstances. Absent a finding of extraordinary circumstances, the reinstatement of parental rights is available for a child who is at least 12 years of age. The child must be without a legal parent, not in an adoptive placement, and unlikely to be adopted within a reasonable period of time. The TPR order must have been entered at least three years before the motion to reinstate parental rights is filed. G.S. 7B-1114(a). The child must be in the custody of DSS. G.S. 7B-1114. The criteria, process, and possible outcomes are governed by G.S. 7B-1114. A reinstatement of parental rights "restores all rights, powers, privileges, immunities, duties, and obligations of the parent as to the juvenile, including those relating to custody, control and support…." G.S. 7B-1114(k). See Chapter 10.4 (discussing reinstatement of parental rights circumstances, procedures, and orders).

Resources:
For the state policy on reinstatement of parental rights, see 1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL 1201(VI) (Dec. 2016). Note, DSS polices, currently located here, are being revised.

See the "Reinstatement of Parental Rights State Statute Summary" on the National Conference of State Legislatures website.

For articles and other resources with hyperlinks provided, see "Reinstatement of Parental Rights" on the Child Welfare Information Gateway, U.S. Department of Health and Human Services website.

7.11 Dispositional Orders

A. Timing

Orders from initial disposition, review, or permanency planning hearings must be reduced to writing, signed, and filed with the clerk within thirty days of the completion of the hearing. G.S. 7B-905(a); 7B-906.1(h). If the order is not entered within thirty days, the juvenile clerk must schedule a hearing at the next juvenile session of court for a determination and explanation of the reason for the delay and for any needed clarification as to the contents of the order. The order must then be entered within ten days of this follow-up hearing. G.S. 7B-905(a); 7B-906.1(h). The appropriate remedy for a trial court's failure to enter a timely order is a petition to the court of appeals for a writ of mandamus to require the trial court proceed to judgment. *In re T.H.T.*, 362 N.C. 446 (2008). See Chapter 4.9.C (discussing what constitutes entry of the order) and 4.9.D (discussing the effect of and the remedy for delay).

B. General Requirements

AOC Form:
AOC-J-154, Juvenile Disposition Order (Abuse, Neglect, Dependency) (Oct. 2015).

This section discusses the specific requirements that apply to any dispositional order. For more information about orders, see Chapter 4.9. In addition to the general requirements, the Juvenile Code has specific requirements that apply to different orders, depending on whether the order is an initial, review, permanency planning, or transfer to G.S. Chapter 50 order and what is actually being ordered (e.g., out-of-home placement). Those specific requirements are discussed in the applicable sections throughout this Chapter. See Checklists at the end of this Manual, which summarize the requirements for initial dispositional, review, and permanency planning orders, respectively.

Generally, the Juvenile Code requires the following for any dispositional order.

1. Findings and conclusions. The order must contain appropriate findings of fact and conclusions of law. G.S. 7B-905(a). See Chapters 4.9.B and 12.8.B (relating to defining and separating findings and conclusions as well as the standard of review for findings of fact and conclusions of law).

(a) Findings of fact. The Juvenile Code specifies certain required findings in dispositional orders, depending on the outcomes ordered and the type of dispositional hearing. Failure to include required findings in an order has been found by appellate courts to be reversible error. *See, e.g.*, *In re K.L.*, ___ N.C. App. ___, 802 S.E.2d 588 (2017); *In re M.M.*, 230

N.C. App. 225 (2013); *In re H.J.A.*, 223 N.C. App. 413 (2012). However, the North Carolina Supreme Court has held that while the better practice is to include statutory language, an order need not recite the exact language of a statute but must address the substance of the concerns contained in the statute. *In re L.M.T.*, 367 N.C.165 (2013) (affirming an order ceasing reunification efforts under G.S. 7B-507; decided under former statute). Requirements for findings related to specific dispositional outcomes are discussed throughout this Chapter.

(b) Conclusions of law. Determinations of reasonable efforts, best interests, and whether a parent has acted inconsistently with his or her parental rights are conclusions of law because they require an exercise of judgment. *See In re Helms*, 127 N.C. App. 505 (1997). The determinations must be supported by specific findings.

(c) Incorporation of reports. There must be some oral testimony at a hearing where reports are submitted for those reports to constitute competent evidence that supports a court's findings of fact. *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017). The court cannot simply adopt DSS, GAL, or other reports as its only findings or substitute reports for the court's independent determination. *See In re M.M.*, 230 N.C. App. 225 (2013); *In re Harton*, 156 N.C. App. 655 (2003). Written reports may be incorporated and findings may be based on those reports so long as the court does its own independent review. *See In re C.M.*, 183 N.C. App. 207 (2007) (holding that psychological evaluations and a GAL report were properly incorporated because the court made extensive findings showing that the court made its own determinations with respect to the facts); *In re J.S.*, 165 N.C. App. 509 (2004) (holding that the trial court erred by entering a two-page order that broadly incorporated written reports from DSS and a mental health expert as its findings of fact). *See also In re H.J.A.*, 223 N.C. App. 413 (2012) (noting that recitation of testimony and incorporation of reports without specific findings were insufficient). It is error for the court to generally find statements in reports to be true without specifying the statements in the reports upon which the court is relying. *In re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009); *see also In re S.J.M.*, 184 N.C. App. 42 (2007), *aff'd per curiam*, 362 N.C. 230 (2008); *In re Ivey*, 156 N.C. App. 398 (2003). See section 7.2.E.3, above (discussing the court's use of reports). See Chapter 4.9.B.2 (discussing reports and documents in an order).

(d) Recitation of testimony. Recitations of the testimony of witnesses do not constitute findings of fact. *In re L.B.*, 184 N.C. App. 442 (2007) (finding no prejudice, however, when the trial court's conclusions were supported by other proper findings). *See also In re M.M.*, 230 N.C. App. 2250 (2013). See Chapter 4.9.B.2 (discussing recitation of allegations or testimony).

(e) Arguments of counsel not evidence. Arguments of counsel may not be considered as evidence. *In re J.T.*, ___ N.C. App. ___, 796 S.E.2d 534 (2017); *In re K.S.*, 183 N.C. App. 315 (2007); *In re D.L.*, 166 N.C. App. 574 (2004).

2. Precise terms. The court must state with particularity, both orally and in the written order, the precise terms of the disposition. It must include the type of disposition, the duration, and

the person responsible for carrying out whatever the disposition requires, as well as the person or agency in whom custody is vested. G.S. 7B-905(a).

3. Set next hearing. When custody is removed from a parent, guardian, custodian, or caretaker (and a review hearing as opposed to a permanency planning hearing) is required, the order must direct that a review hearing be scheduled within ninety days from the date of that dispositional hearing and set the date of the review hearing if practicable. G.S. 7B-905(b). *See* G.S. 7B-901(d); 7B-906.1(d)(3).

If the court (1) orders the elimination of reunification efforts at an initial dispositional hearing or (2) finds, at a review hearing that is not a permanency planning hearing, that reunification efforts clearly would be unsuccessful or inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable period of time, the court must schedule a permanency planning hearing within thirty days. If practicable, the order should set the date for the hearing. *See* G.S. 7B-901(d); 7B-906.1(d)(3).

Legislative Note: Effective October 1, 2017, S.L. 2017-161 amended G.S. 7B-906.1(a) to delete the condition that custody be removed from a parent, guardian, or custodian for the requirement that the court conduct a review hearing within 90 days of the dispositional hearing and within six month thereafter to apply. A corresponding amendment to remove the same language from G.S. 7B-905(b) was not made, so it continues to require that a dispositional order with the condition that custody is removed from a parent, guardian, or custodian direct that a review hearing be scheduled. Practically, it makes sense to include the mandate of G.S. 7B-905(b) when a review hearing is required under G.S. 7B-906.1 rather than limit its inclusion to when custody is removed from a parent, guardian, or custodian.

Also included in S.L. 2017-161 is an amendment to G.S. 7B-906.1(d)(3), which requires that a permanency planning hearing be scheduled within thirty days of the court making the finding in G.S. 7B-906.1(d)(3) when the review hearing was not designated as a permanency planning hearing.

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4. Compliance with UCCJEA, ICPC, MEPA, and ICWA. All dispositional orders must comply with the

- UCCJEA (Uniform Child-Custody Jurisdiction and Enforcement Act), ensuring that the court has subject matter jurisdiction (see Chapter 3.3);
- ICPC (Interstate Compact on the Placement of Children), which ensures an appropriate process of placing children across state lines (see section 7.4.H, above);
- MEPA (Multiethnic Placement Act), which prohibits the use of a child's or prospective foster or adoptive parent's race, color, or origin to delay or deny placement (see Chapter 13.3); and
- ICWA (Indian Child Welfare Act), ensuring that when an "Indian child" is the subject of the action, placement preferences are followed, active efforts are provided, the burdens of proof required by ICWA are applied, and a qualified expert witness testifies about whether the child's continued custody with a parent or Indian custodian is likely to result in serious emotional or physical damage to the child (see Chapter 13.2).

C. Consent Orders

Consent orders are permitted only when

- all parties are present or represented by counsel who is present and authorized to consent;
- the child is represented by counsel; and
- the court makes sufficient findings of fact.

G.S. 7B-801(b1). See Chapter 6.5 (providing more detail on consent orders).

D. Status of Jurisdiction

The Juvenile Code states that one purpose of disposition is to "achieve the objectives of the State in exercising jurisdiction." G.S. 7B-900. The Juvenile Code provides that once jurisdiction is obtained in an abuse, neglect, or dependency proceeding, it continues until terminated by the court or until the juvenile reaches age 18 or is otherwise emancipated, whichever occurs first. G.S. 7B-201(a). For a full discussion of continuing or ending jurisdiction, including the effect of terminating jurisdiction and why the term "closing" a case is problematic, see Chapter 3.1.C and D.

The court has jurisdiction to modify any disposition made in the abuse, neglect, or dependency proceeding until jurisdiction is terminated. G.S. 7B-906.1; 7B-1000(b). *See also In re H.S.F.*, 177 N.C. App. 193 (2006); *In re J.S.*, 165 N.C. App. 509 (2004).

During an appeal of a dispositional order, the court continues to have jurisdiction to conduct review and permanency planning hearings, unless directed otherwise by an appellate court. G.S. 7B-1003(b). But see Chapter 12.4 and 12.10 (providing details and limitations on what disposition orders may be appealed and how disposition orders and the court's jurisdiction are affected by appeals).