Chapter 9
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[1] Portions of this Chapter are adapted from JANET MASON, TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA (UNC School of Government, 2012).

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9.1 Purpose and Overview of Termination of Parental Rights

A. Overview of Termination of Parental Rights

Termination of parental rights (TPR) is the state's ultimate interference with the constitutionally protected parent-child relationship, severing all legal ties between the parent and the child. A TPR may occur only when the district court determines that at least one statutory ground for TPR has been proved by clear, cogent, and convincing evidence and the TPR is in the child's best interests.

All TPR proceedings are in juvenile court, before a district court judge without a jury. Informally they are characterized as "private" actions (when initiated by one parent against the other, for example) or as "agency" actions (when the child is in the custody of a department of social services (DSS) or a licensed child-placing agency that initiates the action). If an abuse, neglect, or dependency case is pending and the primary permanent plan for the child is adoption, DSS may be required to initiate a TPR proceeding when a TPR is necessary for the child to be adopted. See Chapter 7.8.D (discussing initiation of TPR under certain circumstances) and 7.10 (discussing various permanent plans).

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.

Additional Note, this Manual focuses on abuse, neglect, or dependency cases, some of which require a TPR for the child to achieve a permanent plan of adoption. The various laws and procedures that apply to TPR proceedings related to an abuse, neglect, or dependency action are discussed throughout this Manual. This Chapter is not meant to be a stand-alone explanation of the TPR process in North Carolina and regularly cross-references other Chapters where TPR is discussed. Although a TPR may be initiated and obtained without there ever being DSS involvement with a family, those private TPRs are not the focus of this Chapter.

A TPR proceeding is divided into two stages: adjudication and disposition. At adjudication, the party initiating the proceeding (petitioner or movant) has the burden of proving by clear, cogent, and convincing evidence that one or more of the alleged statutory grounds for termination of parental rights found at G.S. 7B-1111 exist.

If the court adjudicates one or more grounds, the court moves on to disposition where it determines whether TPR is in the child's best interests. At the disposition stage, which is governed by G.S. 7B-1110, there is no burden of proof. After considering additional relevant evidence, the court makes findings of fact and, based on those findings, makes a discretionary determination as to whether the TPR is in the child's best interests.

If the court does not find that grounds for TPR exist or, after adjudicating a ground, determines that TPR is not in the child's best interests, the court must dismiss the action. If the court adjudicates at least one alleged ground and determines TPR is in the child's best interests, the court orders the termination of the respondent parent's rights to the child who is the subject of the action.

If the court terminates parental rights and the child is in the custody of DSS or a licensed child-placing agency, post-termination review hearings must be held at least every six months to examine progress toward achieving the permanent plans for the child. See Chapter 10, discussing post-TPR review hearings and issues related to the child's adoption, including the selection of prospective adoptive parents.

B. Purpose of the Juvenile Code's Termination of Parental Rights Provisions

Article 11 of the Juvenile Code (G.S. Chapter 7B) governs termination of parental rights (TPR) and reflects the following policies and purposes, as set out in G.S. 7B-1100.

1. Procedures. Article 11 provides judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents when the parents have demonstrated that they will not provide the degree of care that promotes the child's healthy and orderly physical and emotional well-being. G.S. 7B-1100(1). *See also In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008).

2. Balancing needs. TPR provisions are meant to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while also recognizing the need to protect children from the unnecessary severance of the parent-child relationship. G.S. 7B-1100(2). *See also In re L.O.K.*, 174 N.C. App. 426 (2005).

3. Child's best interests. If the interests of the child and parents (or others) are in conflict, the child's best interests control. G.S. 7B-1100(3). *See In re Montgomery*, 311 N.C. 101 (1984).

4. No circumvention of UCCJEA. TPR provisions in the Juvenile Code may not be used to circumvent the provisions of G.S. Chapter 50A, the Uniform Child-Custody Jurisdiction and Enforcement Act. G.S. 7B-1100(4).

9.2 Jurisdiction and Procedure

A termination of parental rights (TPR) occurs exclusively through judicial procedures that are established in the General Statutes. *See In re C.K.C.*, 822 S.E.2d 741 (N.C. Ct. App.

2018) (reversing TPR; holding consent order in Chapter 50 civil custody action between father and grandparents that included a provision that grandmother would file a petition to terminate father's rights that no other party, including father, would oppose is void as against public policy and is neither a properly executed consent or relinquishment under the adoption statutes); *In re Jurga*, 123 N.C. App. 91 (1996) (holding written statement that voluntarily terminated the parents' rights was ineffective and contrary to the statutorily required judicial procedures); *In re J.N.S.*, 165 N.C. App. 536 (2004) and *Curtis v. Curtis*, 104 N.C. App. 625 (1991) (both holding summary judgment not permitted by Juvenile Code). The judicial procedures are set forth in Article 11 of the Juvenile Code. Additionally, under the adoption statutes, a final decree of adoption severs a parent's legal rights to and relationship with their child. G.S. 48-1-106(c); 48-3-607(c); 48-3-705(d).

A. Subject Matter Jurisdiction

See Chapter 3.1 through 3.3 for a detailed discussion and case law related to subject matter jurisdiction.

The district court has exclusive, original jurisdiction over termination of parental rights (TPR) actions. G.S. 7B-200(a)(4); 7B-1101. In addition to the general jurisdiction statute, G.S. 7B-200, that establishes the district court's jurisdiction over various types of juvenile proceedings, the Juvenile Code has a specific "jurisdiction" statute that applies to TPR proceedings: G.S. 7B-1101. The jurisdictional conditions imposed by G.S. 7B-1101 include

- the child resides in, is found in, or is in the legal or actual custody of a DSS or licensed child-placing agency in the judicial district at the time the TPR petition or motion is filed in district court;
- the court has jurisdiction under the Uniform Child-Custody Jurisdiction Enforcement Act (UCCJEA), specifically G.S. 50A-201, 50A-203, or 50A-204;
- for a nonresident respondent parent, the court has initial custody or modification jurisdiction under the UCCJEA and the court finds process was served pursuant to G.S. 7B-1106 on the nonresident parent.

Failure to comply with the provisions of G.S. 7B-1101 will result in a lack of subject matter jurisdiction. *See, e.g.*, *In re J.M.*, 797 S.E.2d 305 (N.C. Ct. App. 2016) (vacating TPR order for lack of subject matter jurisdiction as child did not reside in, was not found in, and was not in the legal custody of a DSS in the judicial district at the time the action was filed); *In re D.A.Y.*, 831 S.E.2d 854 (N.C. Ct. App. 2019) (vacating TPR order for lack of subject matter jurisdiction under UCCJEA to modify California custody order when mother was presently residing in California after relocating out of state and there was no finding (order) by the California court that it no longer had exclusive continuing jurisdiction); *In re P.D.*, 803 S.E.2d 667 (N.C. Ct. App. 2017) (unpublished) (vacating TPR order for not meeting jurisdictional requirements of G.S. 7B-1101; order did not include finding that nonresident parent was served with process pursuant to G.S. 7B-1106; record shows the service was deficient as summons failed to list respondent-father as the father). *See also* N.C. R. CIV. P. 12(h)(3).

Resource: For a further discussion on G.S. 7B-1101, see Sara DePasquale, *It's Complicated: Venue vs Jurisdiction in A/N/D and TPR Actions*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Feb. 22, 2017).

Key factors in determining subject matter jurisdiction in TPR cases include the following, all of which are discussed in detail as referenced below:

- proper petitioner (standing), see section 9.3.B, below, and Chapter 3.2.B.1;
- proper initiation of proceedings, see Chapter 3.2.B.2;
- verification of petition or motion, see Chapter 3.2.B.3;
- compliance with the UCCJEA, see Chapter 3.3;
- location of child, see Chapter 3.2.B.7; and
- compliance with the Indian Child Welfare Act (ICWA), see Chapter 3.2.B.4 and Chapter 13.2 (detailing ICWA application and requirements).

Appellate courts have determined that several specific issues do *not* affect subject matter jurisdiction in TPR cases. These are discussed in detail as referenced below:

- defects in or lack of summons (but note G.S. 7B-1101 requirement for nonresident parent and proper service), see Chapter 3.2.C.1;
- failure to include certain information in petition, see Chapter 3.2.C.2; and
- failure to comply with statutory timelines, see Chapter 3.2.C.3.

Subject matter jurisdiction in a TPR also is not affected by an earlier deficiency in the appointment of a guardian ad litem (GAL) for the child in an underlying abuse, neglect, or dependency proceeding when the child is represented by a GAL in the TPR proceeding. *In re J.E.*, 362 N.C. 168 (2008) (noting the prior orders in the neglect action in which the children were purportedly unrepresented at the hearings are not on appeal), *rev'g per curiam for the reasons stated in the dissent* 183 N.C. App. 217 (2007).

Any order entered by a court that lacks subject matter jurisdiction is void. *See In re T.R.P.*, 360 N.C. 588 (2006) (concluding that because trial court lacked subject matter jurisdiction, review hearing order was void ab initio).

B. Personal Jurisdiction

Generally, proper service of a summons under G.S. 7B-1106 for termination of parental rights (TPR) confers personal jurisdiction when a TPR proceeding is initiated by petition. (A TPR may also be initiated as a motion in an existing abuse, neglect, or dependency proceeding pursuant to G.S. 7B-1102.) A parent may waive the defenses of lack of personal jurisdiction or insufficiency of process or service of process by making a general appearance or by filing an answer, response, or motion without raising the defense. *See* N.C. R. CIV. P. 12(b), (h). However, some TPR cases involving out-of-state parents present unique issues related to personal jurisdiction.

See Chapter 3.4 for a detailed discussion and case law relating to personal jurisdiction (and for TPRs involving out-of-state parents specifically, see section E).

C. Applicability of the Rules of Civil Procedure

Where the Juvenile Code provides a procedure, that procedure prevails over the Rules of Civil Procedure. *In re L.O.K.*, 174 N.C. App. 426 (2005). Where the Juvenile Code does not identify a specific procedure to be used in termination of parental rights cases (TPR), the Rules of Civil Procedure may be used to fill procedural gaps. *See In re S.D.W.,* 187 N.C. App. 416 (2007). For example, the TPR statutes do not address venue but the court of appeals has recognized a respondent parent's right to seek a change in venue. *See In re J.L.K.*, 165 N.C. App. 311 (2004) (holding respondent waived his right to seek a change of venue when he failed to either move for a change in venue or object to venue in his answer pursuant to Rule 12(b) of the Rules of Civil Procedure).

Appellate cases that have analyzed the application of specific rules or discussed the Rules of Civil Procedure generally in the TPR context are discussed in detail in Chapter 4.1, and some are referenced in relevant sections of this Chapter.

9.3 Initiation of Proceedings and Standing

A. Initiation of TPR

1. Only by petition or by motion in pending abuse, neglect, or dependency proceeding. A proceeding for termination of parental rights (TPR) may be initiated only by (1) filing a petition or (2) filing a motion in a pending abuse, neglect, or dependency proceeding.

(a) Termination of one's own parental rights not permitted. Parents cannot unilaterally and extra-judicially terminate their own parental rights. *In re Jurga*, 123 N.C. App. 91 (1996) (affirming dismissal of guardianship of minor action under G.S. Chapter 35A for lack of subject matter jurisdiction when child had natural parents; holding that a written declaration of voluntary termination of parental rights contravened statutory procedures and was ineffective); *see also In re C.K.C.*, 822 S.E.2d 741 (N.C. Ct. App. 2018) (reversing TPR; holding consent order in Chapter 50 civil custody action between father and grandparents that included a provision that grandmother would file a petition to terminate father's rights that no other party, including father, would oppose is void as against public policy and is neither a properly executed consent or relinquishment under the adoption statutes). Note that a parent's consent or relinquishment for adoption results in termination of the parent's rights when the child's adoption is final. *See* G.S. 48-3-607(c); 48-3-705(d).

(b) TPR cannot be initiated by counterclaim. A parent cannot initiate a TPR action by filing a counterclaim to terminate parental rights in the other parent's civil action for visitation. *In re S.D.W.*, 187 N.C. App. 416 (2007).

(c) Initiation of TPR via intervention. Any person or agency with standing to initiate a TPR may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a TPR motion. G.S. 7B-1103(b).

2. DSS required to initiate TPR in certain circumstances. If a termination of parental rights (TPR) is necessary to perfect the primary permanent plan for a child, G.S. 7B-906.1(m) requires that DSS file a TPR petition or motion within sixty days from entry of the permanency planning order unless the court makes findings as to why this sixty-day time frame cannot be met. *See In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019) (facts show that in January 2018, after a permanency planning order was entered that identified adoption as the primary plan and reunification as the secondary plan, DSS filed petition to terminate both parents' rights). If the court finds that the sixty-day time period cannot be met, the court shall specify the time in which any needed TPR petition or motion must be filed. G.S. 7B-906.1(m).

In cases examining DSS's late filing of a TPR action, the court of appeals has held that this statutory sixty-day requirement is "directory" rather than "mandatory" and, therefore, is not jurisdictional. The court of appeals noted that the purpose of the specified time period is to provide for a speedy resolution of a case involving custody of a child and reversing or vacating an order because the action was filed outside the time limit would only cause further delay as a new petition and hearing would be required. The court also looked to whether the failure to timely file a TPR action caused prejudice to the respondent when determining if there was reversible error. *See In re B.M.,* 168 N.C. App. 350 (2005) (decided under former statute; respondents were not prejudiced by late filing); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007). *See also In re T.H.T.,* 362 N.C. 446 (2008) (holding a writ of mandamus, and not a new hearing, is appropriate remedy to enforce statutory time limits in an appeal involving delay in entry of an order; stating delay is directly contrary to the child's best interests, which is the polar star of the Juvenile Code).

In other circumstances specified in G.S. 7B-906.1(f), DSS is required to initiate TPR proceedings unless the court makes certain findings. These are discussed in Chapter 7.8.D.

Practice Notes: Although the Juvenile Code directs that DSS initiate the TPR action, the child's GAL, the child's court-appointed guardian of the person, or the person with whom the child has resided with for a continuous period of two or more years has standing to and may initiate a TPR action. *See* G.S. 7B-1103(a)(2), (5), and (6).

Additionally, the Juvenile Code does not prohibit the commencement of a TPR when the achievement of a secondary permanent plan requires a TPR. Under G.S. 7B-906.2(b), the court must order DSS to make efforts toward finalizing the primary and secondary permanent plans.

B. Standing to File Petition or Motion

1. Introduction. Standing is a jurisdictional issue. *In re J.A.U.*, 242 N.C. App. 603 (2015). The court does not have subject matter jurisdiction if the petition or motion to terminate parental rights (TPR) is filed by someone who does not have standing. *In re Miller*, 162 N.C.

App. 355 (2004). Standing to file a TPR petition or motion is conferred by G.S. 7B-1103, which limits the parties to seven categories of persons or agencies having an interest in the child. *In re N.G.H.*, 237 N.C. App. 236 (2014); *In re E.T.S.*, 175 N.C. App. 32 (2005). The petition, motion, or record must include any document or order pursuant to which the petitioner claims standing. *See In re N.G.H.*, 237 N.C. App. 236, 237 (G.S. 7B-1104(2) requires petitioner to state "the facts sufficient to identify the petitioner or movant as authorized by [G.S.] 7B-1103 to file a petition or motion"); *In re T.B.*, 177 N.C. App. 790, 793 (2006) (the requirement in G.S. 7B-1104(5) that a copy of the order giving petitioner custody be attached to the petition or motion "implicitly recognizes" that a trial court has subject matter jurisdiction only if the record includes the required document).

Only the following persons or agencies have standing to file a TPR petition or motion:

- a parent,
- a child's guardian of the person,
- a DSS or child-placing agency with custody of the child,
- a DSS or child-placing agency to whom the child was surrendered (relinquished) for adoption,
- a person with whom the child has continuously resided for two or more years preceding the filing of the TPR petition or motion,
- a child's guardian ad litem (GAL) appointed in an abuse, neglect or dependency action,
- a person who has filed a petition to adopt the child.

G.S. 7B-1103(a).

2. Either parent. Either parent has standing to initiate an action seeking termination of the other parent's rights, except a parent convicted under

- G.S. 14-27.21 or 14-27.22 of first- or second-degree forcible rape occurring on or after December 1, 2004 (formerly codified at G.S. 14-27.2 and 14-27.3),
- G.S. 14-27.23 of statutory rape of a child by an adult occurring on or after December 1, 2008 (formerly codified at G.S. 14-27.2A), or
- G.S. 14-27.24 of first-degree statutory rape (previously G.S. 14-27.2(a)(1)) occurring on or after December 1, 2015 (or December 1, 2004 under previous statute)

when the rape resulted in the conception of the child who is the subject of the TPR proceeding. G.S. 7B-1103(a)(1).

3. Guardian. Any judicially appointed guardian of the person of the child has standing to initiate a TPR proceeding. G.S. 7B-1103(a)(2). *See also In re D.C.*, 225 N.C. App. 327 (2013) (affirming the guardians' authority to file for TPR and noting that the statute places no preliminary requirements on guardians before filing); *In re J.A.U.*, 242 N.C. App. 603 (2015) (maternal grandmother with physical and legal custody of child pursuant to a G.S. Chapter 50 custody order was a custodian and lacked standing as a guardian to file a petition to terminate respondent father's parental rights; grandmother also did not meet any other category enumerated in G.S. 7B-1103); *In re B.O.*, 199 N.C. App. 600 (2009) (explaining that the

Juvenile Code does not equate custody and guardianship, and it gives guardians, but not legal custodians, standing to petition for TPR; decided under former definition of "custodian" that also included a person who assumes the status of parent without being awarded legal custody (*see* S.L. 2013-129, sec. 1 amending G.S. 7B-101(8))).

4. DSS or child-placing agency with custody order. A TPR proceeding may be initiated by any county DSS or licensed child-placing agency to whom a court has given custody of the child. G.S. 7B-1103(a)(3).

(a) Must establish custody order. Unless the child has been relinquished to DSS for adoption, if DSS does not have court-ordered custody of the child or fails to establish that there is a court order giving DSS custody, DSS will not have standing to initiate a TPR proceeding and the court will not have subject matter jurisdiction. *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re Miller*, 162 N.C. App. 355 (2004).

- When DSS did not attach to the petition or remedy the omission by amending the petition or by otherwise including in the record a copy of the order giving DSS custody that was in effect at the time the TPR petition was filed, DSS failed to establish that it had standing. The trial court lacked subject matter jurisdiction. *In re T.B.*, 177 N.C. App. 790 (2006).
- Custody pursuant to a valid nonsecure custody order is sufficient to confer on DSS standing to file a TPR petition pursuant to G.S. 7B-1103(a)(3). *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007).
- Where the court had placed the child in the legal custody of relatives before DSS filed its petition, DSS did not have standing to file a TPR petition because it no longer had custody. *In re D.D.J.*, 177 N.C. App. 441 (2006).

Cases that have considered the failure to attach a custody order, if one exists, to a TPR petition or motion as required by G.S. 7B-1104(5) have found that the failure to attach the order does not deprive the court of subject matter jurisdiction where the court can get the necessary information concerning custody from the petition itself or from the record, and no party is prejudiced by the omission. *See, e.g.*, *In re H.L.A.D.*, 184 N.C. App, 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re T.M.H.*, 186 N.C. App. 451 (2007); *In re B.D.*, 174 N.C. App. 234 (2005); and others discussed in Chapter 3.2.C.2.

(b) Custody order must be valid. If the order giving DSS custody is invalid, DSS will not have standing to initiate a TPR proceeding. For example, when the petition in the underlying abuse, neglect, or dependency action was not properly signed and verified, the district court did not have subject matter jurisdiction. The orders entered in that action, including the orders giving DSS custody, were void such that DSS did not have standing to initiate the TPR proceeding. *In re S.E.P.*, 184 N.C. App. 481 (2007). *See also In re A.J.H-R.*, 184 N.C. App. 177 (2007) (holding custody order void for lack of proper verification of petition). See Chapters 3.2.B.3 (discussing verification) and 4.2.B (discussing proper signatures). See also Chapter 3.3 (discussing subject matter jurisdiction under UCCJEA).

(c) DSS must have court-ordered custody when the petition is filed. Where the court had placed the child in the legal custody of a couple before DSS filed its petition, DSS did not have standing to petition for termination of parental rights. *In re D.D.J.*, 177 N.C. App. 441 (2006); *In re Miller*, 162 N.C. App. 355 (2004).

5. DSS or child-placing agency to whom the child has been surrendered for adoption. A county DSS or a licensed child-placing agency has standing to initiate a TPR proceeding involving a child who has been surrendered to the agency for adoption pursuant to G.S. 48-3-701 by a parent or guardian of the child's person. G.S. 7B-1103(a)(4); *In re E.B.*, 834 S.E.2d 169 (N.C. Ct. App. 2019) and *In re A.L.*, 245 N.C. App. 55 (2016) (in both cases, DSS had standing to file a petition to terminate father's rights pursuant to G.S. 7B-1103(a)(4) based on mother's relinquishment of her parental rights and surrender of the child for adoption pursuant to G.S 48-3-701). *See* G.S. 48-1-101(8) (definition of "guardian" for purposes of adoption limited to appointment under G.S. Chapter 35A).

6. Person child has lived with for two years. Any person with whom the child has resided for a continuous period of two years or more immediately preceding the filing of the TPR petition or motion has standing to initiate the TPR proceeding. G.S. 7B-1103(a)(5). The determining factor is the length of time the child has resided with the person and not the relationship between petitioner and the child. *See In re J.A.U.*, 242 N.C. App. 603 (2015) (vacating TPR; holding the court lacked subject matter jurisdiction as petitioner (maternal grandmother) did not have standing when evidence established child had lived with petitioner pursuant to a G.S. Chapter 50 custody order continuously for less than one year at the time the petition was filed); *In re B.O.*, 199 N.C. App. 600 (2009) (holding that the petitioners did not have standing because, when petition was filed, the child had not resided with them for two years and they did not satisfy any other criteria in G.S. 7B-1103 for standing).

Appellate cases have interpreted "residing with" to mean the same as "living with," looking at the number of nights a child spends with a person per year without regard to whether the person has primary, shared, or joint legal custody of the child. *See In re A.D.N.*, 231 N.C. App. 54 (2013) (although the trial court did not make detailed findings as to standing, it did make the ultimate finding that the child had resided with the TPR petitioner for a continuous period of two years before the petition was filed; evidence in the record showed that the child spent an average of eighty-five percent (85%) of his nights with petitioner). The language "continuous period of two years" does not require that the child spend every single night with the person for that period, and a period of temporary absence will not necessarily prevent a determination that the child's stay was "continuous." *In re A.D.N.*, 231 N.C. App. 54 (using the child support guidelines and UCCJEA for guidance and holding that "continuous" allows for a limited number of nights away from the person's home).

7. Guardian ad litem for child. A guardian ad litem (GAL) appointed under G.S. 7B-601 to represent the child in an abuse, neglect, or dependency proceeding, who has not been relieved of that responsibility, has standing to initiate a TPR proceeding. G.S. 7B-1103(a)(6). The GAL appointed under G.S. 7B-601 is a team that typically consists of a GAL volunteer, local GAL program staff, and an attorney advocate. The court of appeals has examined the issue of standing in the context of GAL team representation. Relying on the North Carolina Supreme

Court case *In re J.H.K.*, 365 N.C. 171 (2011), the court of appeals held that a TPR petition signed by the GAL program specialist "by and through the undersigned Attorney Advocate" and not by the volunteer GAL directly involved in the action was not improper. *In re S.T.B.*, 235 N.C. App. 290, 293 (2014).

See Chapter 2.3.D (discussing child's GAL).

8. Adoption petitioner. Any person who has filed a petition to adopt the child has standing to initiate a TPR proceeding. G.S. 7B-1103(a)(7). *See also* G.S. 48-2-302(c) (providing that a petition for adoption may be filed concurrently with a petition to terminate parental rights). See Chapter 10.3 (discussing selected adoption provisions). Petitioners in a private TPR action failed to establish standing pursuant to G.S. 7B-1103(a)(7) when they did not attach to the TPR petition a copy of the petition for adoption, the TPR petition did not incorporate by reference any adoption petition, and testimony at the TPR hearing did not establish that an adoption petition had been filed. *In re N.G.H.*, 237 N.C. App. 236 (2014).

9.4 Counsel and Guardians ad Litem for Parent and Child

A. Counsel for Parent

The respondent parent has a right to be represented by counsel, and to appointed counsel if indigent, but may knowingly and voluntarily waive the right. G.S. 7B-1101.1(a), (b). For a discussion of the appointment of counsel, see Chapter 2.4.D.

The procedure for appointment of counsel is different for termination of parental rights (TPR) proceedings initiated by petition and TPR proceedings initiated by motion. *See* G.S. 7B-1106(b)(4) (petition); 7B-1106.1(b)(4) (motion). When a respondent parent is represented by appointed counsel in an underlying abuse, neglect, or dependency action that attorney continues to represent the parent in the TPR proceeding unless otherwise ordered by the court. *See* G.S. 7B-1106(a2), (b)(3); 7B-1106.1(b)(3); *In re D.E.G.*, 228 N.C. App. 381 (2013) (attorney representing parent in underlying abuse, neglect, or dependency proceeding was not provisional counsel in TPR proceeding).

When provisional counsel is appointed, the court acts on the status of that provisional appointment at the first hearing in the TPR proceeding after the respondent is served. If provisional counsel is released, the court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding. G.S. 7B-1101.1(a). Additionally, if a parent appears at the adjudication hearing and is not represented by counsel, the court must conduct an inquiry into whether the parent desires counsel but is indigent and cannot retain counsel. If the court determines that the parent is indigent and desires counsel, the court must appoint counsel and grant the parent an extension of time to permit counsel to prepare. G.S. 7B-1109(b).

All appointments are pursuant to the policies of the Office of Indigent Defense Services (IDS).

AOC Forms:

- AOC-J-144, Order of Assignment or Denial of Counsel (Abuse, Neglect, Dependency; Termination of Parental Rights; Post-DSS-Placement Review and Permanency Planning Hearing (Delinquent/Undisciplined)) (Oct. 2019).
- AOC-J-143, Waiver of Parent's Right to Counsel (Oct. 2019).

Practice Notes: Appointment of provisional counsel probably is not required for an unknown respondent parent who is not "named in the petition." *See* G.S. 7B-1101.1(a); *see also* G.S. 7B-1105(d) (contents of publication notice do not refer to provisional counsel).

In the process of informing a respondent parent of the right to appointed counsel, the court should explain that even though an attorney is appointed, the respondent may be responsible for some costs. G.S. 7B-603(b1).

Caution should be exercised in appointing one attorney to represent both parents, given the potential for conflicting interests and evidence. *But cf. In re Byrd*, 72 N.C. App. 277 (1985) (holding that the failure to appoint separate counsel for respondent parents was not error, where they did not object when the appointment was made, the record showed that evidence was sufficient to terminate both parents' rights, and there was no indication that the court treated respondents as a couple rather than as individuals).

Resource: The Office of the Parent Defender within the North Carolina Office of Indigent Defense Services (IDS) coordinates, assists, and trains parents' attorneys. Information about the office as well as resources for parents' attorneys can be found on the IDS website.

B. Guardian ad Litem for Parent

In some circumstances the court will either be required or have discretion to appoint a guardian ad litem (GAL) for a respondent parent in a termination of parental rights (TPR) proceeding pursuant to Rule 17 of the Rules of Civil Procedure.

See Chapter 2.4.F (discussing GAL for respondent parent in detail).

1. GAL for minor parent. A minor parent's rights may be terminated. *See* G.S. 7B-1101. The minor parent is not deemed to be under a disability. G.S. 7B-1102(b)(2); 7B-1106(a). However, the court must appoint a GAL pursuant to Rule 17 of the Rules of Civil Procedure to represent any parent who is an unemancipated minor. G.S. 7B-1101.1(b).

Appellate courts have not specifically addressed the failure to appoint a GAL for a minor parent in a TPR proceeding, but they have held that failure to appoint a GAL for the child or an adult parent, when the statute required one, was reversible error. *See, e.g., In re R.A.H.*, 171 N.C. App. 427 (2005) (failure to appoint a GAL for a child); *In re B.M.*, 168 N.C. App. 350 (2005) (failure to appoint GAL for parent when former law required appointment). However, when the respondent mother was an adult at the time the TPR was filed, the failure to appoint a GAL to her as a minor parent in an earlier dependency proceeding as required by the applicable statute could not be considered in the TPR proceeding. *In re E.T.S.*, 175 N.C.

App. 32 (2005).

2. GAL for parent who is incompetent. On motion of any party or on the court's own motion, the court may appoint a GAL pursuant to Rule 17 of the Rules of Civil Procedure for a parent who is incompetent. G.S. 7B-1101.1(c). Note that legislation in 2013 substantially changed GAL representation for parents and eliminated the role of GALs of assistance based on diminished capacity, now only authorizing GALs of substitution based on incompetency. *See* S.L. 2013-129, sec. 17 and 32.

The court has discretion to determine if there is a substantial question as to whether a respondent is incompetent requiring a hearing to determine the need for a GAL. *In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019); *In re T.L.H.*, 368 N.C. 101 (2015). When there is a substantial question as to incompetence, the court should address that question as soon as possible. See Chapter 2.4.F.3 and 5 (discussing determination of incompetence for GAL appointment).

3. GAL appointment and role. The Juvenile Code prohibits appointing the parent's counsel as GAL for the parent but does not say anything else regarding who should be appointed. *See* G.S. 7B-1101.1(d). In practice, attorneys are often appointed to act as parents' GALs, although there is no requirement that the GAL be an attorney. Rule 17(b)(2) of the Rules of Civil Procedure refers to the appointment of "some discreet person." The role of the parent's GAL is not well defined by either the Juvenile Code or Rule 17. The GAL is required to actively participate in the proceedings for which the GAL is appointed, and when a GAL is appointed in the underlying abuse, neglect, or dependency case, that GAL's responsibilities continue throughout the TPR proceeding as long as the reasons for the appointment still exist. *In re A.S.Y.*, 208 N.C. App. 530 (2010) (holding in a TPR case initiated by motion that it was reversible error for the trial court to excuse the parent's GAL and not appoint another GAL when the parent did not appear for the TPR hearing). See Chapter 2.4.F.6 (discussing role of parent's GAL).

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

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

C. Guardian ad Litem for Child

The child is a party to the termination of parental rights (TPR) action. G.S. 7B-1104; *see* G.S. 7B-601(a) ("the juvenile is a party in all actions under this Subchapter"). The child's best interests are represented by a guardian ad litem (GAL). See Chapter 2.3.C (discussing the rights of the child including participation in the proceeding).

When there is an underlying abuse, neglect, or dependency proceeding, the GAL representing the child in that proceeding will continue to represent the child in a TPR proceeding, regardless of how it is initiated (petition or motion), unless the court orders otherwise. G.S. 7B-1106(a1); 7B-1106.1(a)(5); 7B-1108(d). The court must appoint a GAL for a child who does not already have one in any TPR case in which an answer or response is filed denying any material allegation of the petition or motion. G.S. 7B-1108(b). Even when not required to do so, the court has discretion to appoint a GAL for the child at any stage of the TPR proceeding to assist the court in determining the child's best interests. G.S. 7B-1108(c). At a pretrial hearing, the court must address whether a GAL should be appointed for the child, if a GAL was not previously appointed. G.S. 7B-1108.1(a)(2). *See In re P.T.W.*, 250 N.C. App. 589 (2016) (footnote 11 discussing G.S. 7B-1108.1).

If the child does not already have a GAL, the court makes a new appointment pursuant to G.S. 7B-601. However, GALs trained and supervised by the GAL Program may be appointed only in cases in which the child is or has been the subject of an abuse, neglect, or dependency petition (i.e., not private TPR cases), unless for good cause the GAL Program consents to the appointment. G.S. 7B-1108(b). See Chapter 2.3.D for an explanation of the GAL Program and GAL team representation. When the GAL Program is not appointed and the GAL who is appointed for the child is not an attorney, an attorney is also appointed. G.S. 7B-1108(b). The supreme court has held that "if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate," which involve both in-court and out-of-court responsibilities. *In re J.H.K.*, 365 N.C. 171, 175 (2011). *Cf. In re J.L.H.*, 217 N.C. App. 192 (2011) (originally unpublished Nov. 15, 2011, but subsequently published) (citing *In re R.A.H.*, 171 N.C. App. 427 (2005) rather than the more recent supreme court case *In re J.H.K.*, 365 N.C. 171) (finding reversible error where the trial court in a private TPR action appointed an attorney advocate but not a GAL for the child as the functions of the two roles are not sufficiently similar).

Practice Note: A court order that appoints an attorney to serve in both roles should specifically state that the attorney is to serve in both the attorney advocate and GAL roles.

Timing of the answer does not impact the requirement that a GAL be appointed. *See In re J.L.S.*, 168 N.C. App. 721 (2005) (holding that although the respondent waited until the day of the hearing to file an answer, the court was required to appoint a GAL for the child). Something less than a formal answer is not likely to trigger the requirement for a GAL. *See In re Tyner*, 106 N.C. App. 480 (1992) (holding that appointment of a GAL for the child was not required, where the court of appeals could not determine from the record when or for what purpose the respondent had filed a letter he later claimed was an "answer").

In the case *In re A.D.N.*, 231 N.C. App. 54 (2013), the court of appeals held that the issue of failure to appoint a GAL for the child when an answer denying a material allegation was filed must be preserved for appeal, and it refused to rule on the failure of the trial court to appoint a GAL because the failure was not objected to at trial. However, in two earlier cases the court of appeals invoked Rule 2 of the Rules of Appellate Procedure to reach the issue, which was not objected to at trial, and in both cases found prejudicial error in the trial court's failure to appoint a GAL for the child when the respondents filed an answer denying a material

allegation, triggering the statutory mandate that a GAL be appointed for the child. *See In re Fuller*, 144 N.C. App. 620 (2001); *In re Barnes*, 97 N.C. App. 325 (1990). See Chapter 12.3.C (discussing Appellate Rule 2).

In the case *In re P.T.W.*, 250 N.C. App. 589 (2016), respondent mother did not file an answer denying a material allegation that would have required the trial court to appoint a GAL for the child and also did not preserve for appeal her argument that the trial court abused its discretion by failing to appoint a GAL. However, the appellate court considered the issue and found that the trial court acted within its discretion when it did not appoint a GAL to represent the child's best interests in the TPR proceeding. The trial court heard testimony from petitioner, respondent, and a member of respondent's family and carefully weighed the child's best interests against the evidence presented. The trial court's determination to forego GAL assistance in determining child's best interests was not unreasonable.

The GAL appointment, duties, and payment in a TPR proceeding are the same as for a GAL appointed in an abuse, neglect, or dependency action unless the court determines the child's best interests require otherwise. G.S. 7B-1108(d); *see* G.S. 7B-601.

See Chapter 2.3.D for a full explanation of the child's GAL appointment, role, and duties.

9.5 Contents of Petition or Motion

For a discussion of amendments to TPR petitions, see Chapter 4.2.C.2.

A. Identifying Information

1. Title. The petition or motion must be entitled "In Re (*last name of child*), a minor juvenile." G.S. 7B-1104.

Note that in the juvenile record maintained by the clerk, all materials relating to a termination of parental rights proceeding (TPR) are located in a "T" (or "JT") subfolder of the juvenile file, regardless of whether the TPR is initiated by petition or motion and whether it is a private or agency action. Rule 12.1.1, Chapter XII, Rules of Recordkeeping Procedures for the Office of the Clerk of Superior Court (in Appendix 4).

2. Child. The petition or motion must include the child's name as it appears on the birth certificate, the date and place of the child's birth, and county of the child's residence or it must state that the information is unknown. G.S. 7B-1104(1).

3. Petitioner or movant. The petition or motion must include the petitioner's or movant's name and address and facts sufficient to show that the petitioner or movant has standing to initiate the action. G.S. 7B-1104(2). See section 9.3.B, above (discussing standing).

4. Parents. The petition or motion must include the names and addresses of the child's parents. If a parent's name or address is unknown, the petition or motion or an attached

affidavit must describe efforts that have been made to determine the name and address. (See section 9.6, below, related to a hearing on an unknown parent.) A parent need not be named in the petition if he or she has been convicted of first- or second-degree forcible rape under G.S. 14-27.21 or 14-27.22, statutory rape of a child by an adult under 14-27.23, or first-degree statutory rape under 14-27.24, and the child who is the subject of the action was conceived as a result of the rape. G.S. 7B-1104(3).

Practice Note: The Juvenile Code does not specifically address naming and serving a respondent parent in the TPR action when that respondent parent has been convicted of one of those four enumerated rape offenses and the rape resulted in the child's conception. However, that criminal conviction is one of the grounds to terminate the parent's rights. *See* G.S. 7B-1111(a)(11), discussed in section 9.11.K, below. The parent whose rights are sought to be terminated is a necessary party to the TPR action. In addition, due process requires that the respondent parent have notice and an opportunity to be heard. Presumably, the exclusion of a parent's name and address from the TPR petition (or motion) under G.S. 7B-1104(3) relates to a petition or motion that is not naming that parent as the respondent but is instead seeking to terminate the other parent's rights.

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5. Guardian of the person or custodian. The petition or motion must include the name and address of any court-appointed guardian of the child's person and of any person or agency to whom a court of any state has given custody of the child. A copy of any related court order must be attached. G.S. 7B-1104(4), (5). See section 9.3.B.4, above (discussing standing and need to attach custody order showing custody in effect at time TPR petition or motion is filed).

In a private TPR action, the petitioner's failure to include a prior custody or "guardianship" order with the petition and failure to include the name and address of any appointed guardian, or a statement declaring the petitioner had no such knowledge, rendered the petition facially defective as there was no information about the guardianship order that was raised by the respondent. *In re Z.T.B.*, 170 N.C. App. 564 (2005).

B. Addressing the UCCJEA

See Chapter 3.3 (discussing UCCJEA).

1. No circumvention of UCCJEA. The petition or motion must include a statement that it has not been filed to circumvent the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). G.S. 7B-1104(7); *see* G.S. Chapter 50A (UCCJEA). Omission of the statement will not deprive the court of jurisdiction or require dismissal where there is no showing of prejudice. *See In re J.D.S.*, 170 N.C. App. 244 (2005); *In re B.D.*, 174 N.C. App. 234 (2005).

2. Child status information required by UCCJEA. Information about the child's status, as required by the UCCJEA in G.S. 50A-209(a), must be set out in the petition or motion or an attached affidavit. Failure to attach the affidavit does not divest the court of subject matter jurisdiction and can be cured by filing the affidavit within a time specified by the court. *In re J.D.S.*, 170 N.C. App. 244 (2005). See Chapter 3.2.C.2(c).

AOC Form:
AOC-CV-609, Affidavit as to Status of Minor Child (March 2019).

C. Facts to Support Grounds for Termination

The petition or motion must include facts sufficient to support a determination that one or more grounds for terminating parental rights exist. G.S. 7B-1104(6). The court cannot adjudicate a ground that is not alleged in the petition. *In re S.R.G.*, 195 N.C. App. 79 (2009). *Cf. In re T.J.F.*, 230 N.C. App. 531 (2013) and *In re A.H.*, 183 N.C. App. 609 (2007), set out below in this section.

G.S. 7B-1104 does not distinguish between the facts that must be alleged in a petition or in a motion to terminate parental rights. Either pleading must comply with the requirement for factual allegations in G.S. 7B-1104(6). *In re J.S.K.*, 807 S.E.2d 188 (N.C. Ct. App. 2017).

Practice Note*:* The petition or motion should allege specific facts supporting one or more grounds for termination of parental rights that are sufficient to put a respondent parent on notice. While using attachments to petitions may be helpful, it is generally not helpful for them to be used as a substitute for alleging specific facts in the petition or to be voluminous.

Appellate cases discussing this requirement have focused on whether the facts alleged are sufficient to put a party on notice of a ground rather than whether a particular statute number is alleged. Allegations need not be exhaustive or extensive, but they must put a party on notice as to acts, omissions, or conditions that are at issue and must do more than recite the statutory wording of the ground. *In re B.S.O.*, 234 N.C. App. 706 (2014); *In re T.J.F.*, 230 N.C. App. 531 (2013); *In re Hardesty*, 150 N.C. App. 380 (2002). Although appellate cases have focused on the facts alleged rather than the stated grounds, they have also noted that the better practice is to specifically plead a particular ground for termination pursuant to a specific statutory section. *In re B.S.O.*, 234 N.C. App. 706; *In re T.J.F.*, 230 N.C. App. 531.

Cases finding that the pleading provided sufficient notice of a ground for termination.

- The petition did not allege willful abandonment under G.S. 7B-1111(a)(7) but did refer to respondent father's "abandonment" of his children in the context of alleging neglect. This, coupled with allegations that his whereabouts were unknown since his incarceration and deportation approximately eight months prior to the filing of the petitions, was sufficient to put the father on notice of a potential adjudication on the ground of abandonment. *In re B.S.O.*, 234 N.C. App. 706.
- Where the petition alleged only the neglect ground under G.S. 7B-1111(a)(1) but the court adjudicated the abandonment ground under G.S. 7B-1111(a)(7), the court of appeals held that the petition put the father on notice as to abandonment. The petition's language alleged the father's "lack of involvement with or regard for the minor child constitute[d] neglect," and contained several allegations suggesting that the father had foregone his parental responsibilities and withheld his presence, care, and parental affection from the child despite consistently available opportunities for involvement; failure to contact the child in the six months preceding the TPR petition; and failure to provide a reasonable

amount for the cost and care of the child. *In re T.J.F.*, 230 N.C. App. 531, 533.

- Although the petition did not specifically reference G.S. 7B-1111(a)(6), the allegations gave the respondent sufficient notice that termination of parental rights would be sought on the basis of the parent's inability to provide proper care for the child. *In re A.H.*, 183 N.C. App. 609 (2007). *See also In re Humphrey*, 156 N.C. App. 533 (2003).
- Although the pleading asserted only the barebones legal grounds for terminating parental rights, it was sufficiently detailed because it incorporated by reference the entire juvenile file in the matter, which included all the court orders with facts as to mother's drug use, failure to comply with the orders, and criminal convictions. *In re H.T.*, 180 N.C. App. 611 (2006).
- Bare allegations that the parent neglected the child and willfully abandoned the child for six months did not comply with this requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. *In re Quevedo*, 106 N.C. App. 574 (1992).

Cases finding that the pleading did not provide sufficient notice of a ground for termination.

- Motion filed by DSS to terminate parental rights that "merely recited the statutory grounds" in G.S. 7B-1111(a)(1)–(3) and (a)(6) was insufficient to put respondent mother on notice of the acts, conditions, or omissions at issue. Unlike *In re Quevedo*, 106 N.C. App. 574, above, the TPR motion in this case did not incorporate any prior orders and the custody order attached to the TPR motion did not contain any additional facts that would warrant a determination that a TPR ground existed. *In re J.S.K.*, 807 S.E.2d 188 (N.C. Ct. App. 2017) (trial court erred in denying mother's G.S. 1A-1, Rule 12(b)(6) motion to dismiss).
- When neither the petition nor the affidavit of the DSS social worker that was incorporated by reference mentioned the respondent father's progress or lack thereof in correcting the conditions that led to the child's removal from her mother's home, the TPR was reversed for not providing prior notice that G.S. 7B-1111(a)(2) was a potential ground and an issue in the TPR hearing. *In re L.S.*, 822 S.E.2d 506 (N.C. Ct. App. 2018).
- When the TPR petition did not refer to the ground under G.S. 7B-1111(a)(4) and did not allege respondent's willful failure to pay child support as required by a court order or custody agreement, a TPR order was reversed in part for not providing sufficient notice to respondent father of this ground. *In re I.R.L.*, 823 S.E.2d 902, 906 (N.C. Ct. App. 2019) (petition alleged only that father "[h]as failed to provide substantial financial support or consistent care for the minor child", which the court of appeals noted "may be an assertion under the ground of abandonment").

D. Verification

G.S. 7B-1104 requires that the petition or motion be verified by the petitioner or movant, and the failure to verify deprives the court of subject matter jurisdiction. *In re T.R.P.*, 360 N.C. 588 (2006) (petition in neglect proceeding); *In re E.B.*, 249 N.C. App. 614 (2016) (motion to terminate parental rights verified by child's guardian ad litem invoked the trial court's jurisdiction); *In re C.M.H.*, 187 N.C. App. 807 (2007); *In re Triscari Children*, 109 N.C. App. 285 (1993) (explaining that a petition that is signed and notarized as subscribed and

sworn before me is insufficient to constitute verification).

See Chapter 3.2.B.3 (discussing proper verification).

E. Request for Relief

A motion or petition that neither contains a prayer for relief nor requests the entry of any order is not a proper pleading, and the court does not have jurisdiction to proceed. *In re McKinney*, 158 N.C. App. 441 (2003). *Cf. In re Baby Boy Scearce*, 81 N.C. App. 531 (1986) (holding that district court had jurisdiction when petition alleged that mother had placed child with DSS, father was unknown, North Carolina was child's home state and no other state had jurisdiction, and child's best interest would be served by court's assuming jurisdiction).

9.6 Hearing for Unknown Parent

A. Preliminary Hearing to Determine Identity of Unknown Parent

1. When required. If the name or identity of a parent whose rights are sought to be terminated is unknown, the court must conduct a preliminary hearing to determine that parent's name or identity. G.S. 7B-1105(a). *See also In re M.M.*, 200 N.C. App. 248 (2009). This preliminary hearing on an unknown parent is not required when a parent's identity is known but his or her whereabouts are not. *In re Clark*, 76 N.C. App. 83 (1985). Naming "John Doe" in the alternative does not trigger the need to hold a preliminary hearing on an unknown parent so long as one person is identified as a parent and named as a respondent. *See In re A.N.S.*, 239 N.C. App. 46 (2015) (in a private TPR case, a putative father was named by the petitioner and "John Doe" was named in the alternative; naming "John Doe" in the alternative did not negate the fact that the identity of the father was known and a preliminary hearing was, therefore, not required).

2. Timing. The preliminary hearing on an unknown parent must be held within ten days after the petition is filed or if there is no court in the county during that ten-day period, at the next term of court in the county where the petition is filed. G.S. 7B-1105(a). The court must make findings and enter its order within thirty days of the preliminary hearing, unless the court finds that additional time is required for investigation. G.S. 7B-1105(e).

3. Notice. Notice of the preliminary hearing need be given only to the petitioner, but the court may direct that a summons be issued directing any other person to appear and testify. G.S. 7B-1105(c).

4. Inquiry by court. The court may inquire of any known parent about the identity of the unknown parent and may order the petitioner to conduct a "diligent search" for the parent. G.S. 7B-1105(b).

5. Order. If the court determines the parent's identity, the court must enter that finding and direct that the parent be summoned to appear. G.S. 7B-1105(b).

If the parent is not identified, the court must order that the unknown parent be served by publication (see section 9.6.B, below). The court in its order must specify

- the place(s) of publication and
- the contents of the notice the court concludes is most likely to identify the juvenile to the unknown parent.

G.S. 7B-1105(d).

6. Amendment of petition to allege identity not required. When the unknown respondent is identified as a result of the preliminary hearing, an amended TPR petition adding him or her as a respondent is not necessary for the court to obtain personal jurisdiction over him or her. Instead, the procedure set forth in G.S. 7B-1105 requires that the court make a finding as to the parent's identity and that the parent be served with a summons as provided for in G.S. 7B-1106. *In re M.M.*, 200 N.C. App. 248, 255 (2009) (determining DSS was not required to amend petition when the parent was identified as a result of the hearing required by G.S. 7B-1105; holding the amended petition, which the appellate court referred to as "no more than a supplemental pleading" clarifying that respondent was the biological father, did not constitute the filing of a new action; rejecting respondent's argument that the judicial determination of his paternity between the filing of the original and amended petitions precluded termination of his parental rights under G.S. 7B-1111(a)(5) for failure to establish paternity).

Practice Note: Although rare, it is possible that respondent mother's identity will be unknown. For example, a mother may safely surrender her infant without disclosing her identity. *See* G.S. 7B-500 (further discussed in Chapter 5.5.B.3).

B. Service on Unknown Parent

1. No summons required. No summons shall be required for a parent whose name or identity is unknown and who is served by publication as provided in this section. G.S. 7B-1105(g); *see* S.L. 2018-68 (effective October 1, 2018).

2. Publication. When the court orders that an unknown parent be served by publication, notice must be published in a newspaper qualified for legal advertising under G.S. 1-597 and 1-598 and published weekly, for three successive weeks, in locations specified by the court. After service, a publisher's affidavit must be filed with the court. G.S. 7B-1105(d).

The published notice must

- be directed to the mother, father, mother and father of (male) (female) child born at a specified time and place;
- designate the court, docket number, and name of the case (at the direction of the court, "In re Doe" may be substituted);
- state that a petition seeking to terminate the parental rights of the respondent has been filed;
- direct the respondent to answer the petition within thirty days after the specified date of

first publication; (Note that this time period differs from N.C. R. CIV. P. 4(j1), which provides for forty days from the date of first publication of the notice for the defendant to respond.)
- follow the form set out in Rule 4(j1) of the Rules of Civil Procedure; and
- state that parental rights will be terminated if no answer is filed within the time period.

G.S. 7B-1105(d).

Practice Note: In cases involving service by publication on known parents, the court of appeals has said that a notice of publication not only must comply with Rule 4(j1) but also must comply with the requirements for a summons under G.S. 7B-1106. *In re C.A.C.*, 222 N.C. App. 687 (2012); *In re Joseph Children*, 122 N.C. App. 468 (1996) (decided under prior law) (stating that notice of publication must include information related to the respondent's right to counsel since this is required in the summons). It is unclear if these holdings apply to service by publication on an unknown parent. Neither opinion addressed the specific publication notice requirements for an unknown parent set forth in G.S. 7B-1105. Additionally, both these opinions were decided before G.S. 7B-1105(g) was enacted, stating no summons is required for an unknown parent who is served by publication.

For more detail on service by publication, see Chapter 4.4.B.2.

3. Failure of unknown parent to answer. If an unknown parent served by publication does not answer within the prescribed time, the court must issue an order terminating the parent's rights. G.S. 7B-1105(f). However, the court of appeals has said that the trial court is never required to terminate parental rights and that default proceedings are not permitted. *See Bost v. Van Nortwick*, 117 N.C. App. 1 (1994); *In re Tyner*, 106 N.C. App. 480 (1992); *see also* G.S. 7B-1110(b) (stating that even if grounds exist, the court may determine that the best interests of the child require that rights not be terminated). See also sections 9.8, below (answers and responses), and 9.12 (best interests).

9.7 Summons and Notice

A. Introduction

Because a TPR may be initiated by a petition or by a motion in an existing abuse, neglect, or dependency proceeding, the Juvenile Code has two different provisions addressing the manner in which a respondent parent is informed of the TPR action. In proceedings initiated by petition, a summons to the parent is required. In proceedings initiated by motion, a specific form of notice is required. The requirements for the summons and the notice are similar but not identical.

AOC Forms:
- AOC-J-208, Summons in Proceeding for Termination of Parental Rights (March 2012).
- AOC-J-210, Notice of Motion Seeking Termination of Parental Rights (Sept. 2009).

B. Summons for Proceeding Initiated by Petition

1. Those entitled to summons. When a petition is filed, a summons must be issued and directed to the following persons or agencies who must be named as respondents (note exceptions for the petitioner and as provided for in the case of an unknown parent):

(a) Parents. A summons must be directed to the child's parents, except any parent who has irrevocably relinquished the child to a county DSS or licensed child-placing agency for adoption or consented to adoption of the child by the petitioner. G.S. 7B-1106(a)(1).

A copy of all pleadings and other papers that are required to be served on the parent must also be served on a parent's attorney appointed in an underlying abuse, neglect, or dependency action when that attorney has not been relieved of responsibilities. Service on the attorney is pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a2).

(b) Custodian or guardian. A summons must be directed to any judicially-appointed custodian or guardian of the person of the child. G.S. 7B-1106(a)(2) and (3).

(c) DSS or child-placing agency. A summons must be directed to any county DSS or licensed child-placing agency to whom a parent has relinquished the child for adoption under G.S. Chapter 48 and to any county DSS to whom a court of competent jurisdiction has given placement responsibility for the child. G.S. 7B-1106(a)(4).

2. Child and GAL. No summons is directed to the child or the child's guardian ad litem (GAL). However, if the child has a GAL appointed under G.S. 7B-601 or the court appoints a GAL after the TPR petition is filed, a copy of all pleadings and other papers required to be served must be served on the GAL or the attorney advocate pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a1).

3. Contents of summons. The summons must include the following:

(a) Child's name. The child's name must be on the summons. G.S. 7B-1106(b)(1).

(b) Notice. The summons must give notice

- that a written answer must be filed within thirty days after service of the summons and petition or the parent's rights may be terminated;
- that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise;
- that if the parent is indigent and not already represented by appointed counsel, the parent is entitled to appointed counsel, that provisional counsel has been appointed

(and is identified on the summons or an attachment), and the court will review the appointment of provisional counsel at the first hearing after the parent is served;
- that after an answer is filed, or thirty days from the date of service if no answer is filed, the petitioner will mail a notice of the date, time, and place of any pretrial hearing and the hearing on the petition;
- that the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated; and
- that the parent may attend the termination hearing (see Chapter 2.4.B.2 (discussing cases holding that parent does not have an absolute right to be present at a termination hearing)).

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

4. Service of summons. The summons must be served pursuant to Rule 4 of the Rules of Civil Procedure. However, when service by publication is made, G.S. 7B-1106(a) requires an additional step to Rule 4(j1) that involves court action. Before service by publication, the court must make findings of fact that a respondent cannot otherwise be served despite diligent efforts made by petitioner for personal service, and the court must approve the form of the notice before it is published. G.S. 7B-1106(a); *see* S.L. 2017-161, sec. 11 (effective October 1, 2017).

A minor parent is not deemed to be under a disability regarding service. G.S. 7B-1106(a); *see* G.S. 7B-1102(a). However, G.S. 7B-1101.1(b) requires the appointment of a Rule 17 guardian ad litem for any respondent parent under age eighteen who is not married or otherwise emancipated (as discussed in section 9.4.B.1, above). The GAL appointment for the respondent parent is in addition to the appointment of an attorney. G.S. 7B-1101.1(b), (d).

See Chapter 4.4.B for detailed discussion of service of a summons.

5. Problems with summons. Failure to issue a summons, or defects or irregularities in the summons or in service of process, relate to personal, not subject matter, jurisdiction and can be waived. *In re K.J.L.*, 363 N.C. 343 (2009). *Cf. In re P.D.*, 803 S.E.2d 667 (N.C. Ct. App. 2017) (unpublished) (applying to out-of-state respondent parent and application of G.S. 7B-1101, discussed in section 9.2.A, above). If not waived, however, these may be grounds for dismissal if the issue raised is a fatal jurisdictional defect as opposed to an irregularity that may be corrected or is not fatally defective. *See, e.g., Hazelwood v. Bailey*, 339 N.C. 578 (1995) (holding defect in summons of listing incorrect county was voidable rather than void and was a nonjurisdictional correctable defect; discussing other cases on the issue).

See Chapters 3.4 (discussing personal jurisdiction, including the manner in which it may be waived); 4.3.B (relating to expiration of the summons and subsequent summonses); and 4.4 (relating to service).

C. Notice for Proceeding Initiated by Motion in the Cause

1. Notice required. Upon filing a motion for termination of parental rights (TPR), the movant

must prepare and serve a notice along with the motion. G.S. 7B-1106.1(a). This is not a mere notice of hearing but is a statutorily prescribed notice that resembles a summons. Issuance of a summons is neither necessary nor appropriate when the TPR is initiated by motion. *In re D.R.S.*, 181 N.C. App. 136 (2007).

2. Those entitled to notice. The notice must be directed to and served on each of the following who is not a movant:

(a) Parents. The child's parents must be given notice unless the parent has irrevocably relinquished the child to a county DSS or licensed child-placing agency for adoption or consented to adoption of the child by the movant. G.S. 7B-1106.1(a)(1).

A copy of all pleadings and other papers that are required to be served on the parent must also be served on a parent's attorney appointed in an underlying abuse, neglect, or dependency action when that attorney has not been relieved of responsibilities. Service on the attorney is pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1102(b), (b1); *see* G.S. 7B-1106(a2).

(b) Custodian or guardian. Any judicially-appointed custodian or guardian of the person of the child must be given notice. G.S. 7B-1106.1(a)(2) and (3).

(c) DSS or child-placing agency. Any county DSS or licensed child-placing agency to whom the parent has relinquished the child for adoption under G.S. Chapter 48 and to any county DSS to whom a court of competent jurisdiction has given placement responsibility for the child must be given notice. G.S. 7B-1106.1(a)(4).

(d) GAL or attorney advocate. The child's GAL or attorney advocate, who has been appointed under G.S. 7B-601 and not relieved of responsibility, must be given notice. G.S. 7B-1106.1(a)(5).

3. Contents of notice. The notice must include the child's name and notice of the following:

- that a written response must be filed within thirty days after service of the motion and notice or the parent's rights may be terminated;
- that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise;
- that the parent, if indigent, is entitled to appointed counsel and, if not already represented by appointed counsel, may contact the clerk immediately to request counsel;
- that when a response is filed, or thirty days from the date of service if no response is filed, the moving party will mail notice of the date, time, and place of any pretrial hearing and the hearing on the motion;
- that the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated; and

- that the parent may attend the termination hearing (see Chapter 2.4.B.2 (discussing cases holding that parent does not have an absolute right to be present at a termination hearing)).

G.S. 7B-1106.1(b).

4. Service of motion and notice. When a motion for termination of parental rights (TPR) is filed in a pending abuse, neglect, or dependency proceeding, service of the motion and notice generally is pursuant to Rule 5(b); however, G.S. 7B-1102(b) specifies four circumstances in which service must be pursuant to Rule 4.

(a) When Rule 4 service is required. The motion and notice must be served pursuant to Rule 4 of the Rules of Civil Procedure if

- the person or agency to be served was not served originally with a summons;
- the person to be served was served originally by publication that did not include notice substantially in conformity with G.S. 7B-406(b)(4)e. (that after proper notice and a hearing an order in the case may terminate respondent's parental rights);
- a period of two years has elapsed since the date of the original action; or
- the court orders that service be made pursuant to Rule 4.

G.S. 7B-1102(b); 7B-1106.1(a).

Practice Note*:* These factors do not affect whether a TPR can be initiated by motion. They relate only to the method by which a motion and notice must be served.

(b) When Rule 5(b) service is appropriate. The motion and notice may be served pursuant to Rule 5(b) of the Rules of Civil Procedure, except in the circumstances explained above where service pursuant to Rule 4 is required. G.S. 7B-1106.1(a) (service of the motion and notice shall be as provided in G.S. 7B-1102(b)); 7B-1102(b). Rule 5 requires that service be made on a party's attorney of record if there is one. Service directly on the party is required only if ordered by the court or if the party has no attorney of record. When a party has an attorney of record, service only on the party is not sufficient; the party's attorney must be served. N.C. R. CIV. P. 5(b). See Chapter 4.4.C for additional information related to service of motions and notice under Rule 5 of the Rules of Civil Procedure.

- Respondents' contention that more than two years had passed since initiation of the proceeding, thus triggering a requirement for service pursuant to Rule 4, was not supported by the record. Service of the motion and notice pursuant to Rule 5 was proper. *In re H.T.*, 180 N.C. App. 611 (2006).
- Because Rule 5 service was permissible, service on respondent's attorney was proper. *In re H.T.*, 180 N.C. App. 611 (decided under an earlier version of Rule 5 that allowed service on either the party or the attorney).
- Service pursuant to Rule 5 was proper when the motion was filed within two years after filing of the most recent neglect petition. *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff'd per curiam*, 360 N.C. 360 (2006).

(c) Minor parent not under disability. A minor parent is not deemed to be under a disability regarding service. G.S. 7B-1102(a); 7B-1106(a). However, G.S. 7B-1101.1(b) requires the appointment of a Rule 17 guardian ad litem for any respondent parent under age eighteen who is not married or otherwise emancipated in addition to the appointment of an attorney. *See* G.S. 7B-1106(a2) (Rule 5 service on attorney appointed to respondent parent in an underlying abuse, neglect, or dependency proceeding who has not been relieved).

5. Problems with notice. Problems with notice do not affect subject matter jurisdiction. *See In re C.S.B.*, 194 N.C. App. 195 (2008). Failure to comply with the notice requirement may constitute reversible error, however. *See In re D.A.*, 169 N.C. App. 245 (2005) (holding that where respondent objected to some aspects of the notice, the issue was preserved for appeal and failure to give proper notice was prejudicial error); *In re Alexander*, 158 N.C. App. 522 (2003) (holding that failure to give the respondent notice that complied with G.S. 7B-1106.1 was prejudicial error). The respondent waives any defect in the notice or service of the notice by failing to make a timely objection. *See In re C.S.B*, 194 N.C. App. 195; *In re J.S.L.*, 177 N.C. App. 151 (2006); *In re Howell*, 161 N.C. App. 650 (2003).

9.8 Answer or Response

Any respondent may file an answer to a termination of parental rights (TPR) petition or written response to a motion. G.S. 7B-1108(a). The answer or response must be filed within thirty days after service of the summons and petition or motion (or within the time determined by Rule 4(j1) if service is by publication). *See* G.S. 7B-1106(b)(2); 7B-1106.1(b)(2); 7B-1107. Only a district court judge may grant an extension of time in which to file an answer or response. G.S. 7B-1108(a).

If a county DSS that is not the petitioner or movant is served with a TPR petition or motion, DSS must file a written answer or response and is deemed a party to the proceeding. G.S. 7B-1106(c); 7B-1106.1(c).

A respondent's answer to a petition or response to a motion must admit or deny the allegations and provide the name and address of the respondent or respondent's attorney. G.S. 7B-1108(a). Denial of any material allegation triggers the requirement that a guardian ad litem (GAL) be appointed for the child if one is not already in place. G.S. 7B-1108(b). See section 9.4.C, above (discussing appointment of a GAL in TPR proceedings), and Chapter 2.3.D (discussing the child's GAL).

Regardless of whether the respondent files an answer or response, and regardless of whether the respondent admits or denies allegations in the petition or motion, the court must hold a TPR hearing. When the respondent does not file an answer or response, the court at the hearing may examine the petitioner or movant or others on facts alleged in the petition or motion and may issue an order terminating the respondent's parental rights. *See* G.S. 7B-1107. Absence of an answer denying material allegations of the petition does not authorize a "default type" order terminating parental rights, since the statute requires a hearing on the petition. *In re Tyner*, 106 N.C. App. 480 (1992).

The parent's failure to file an answer or response or to ask for counsel before the hearing does not constitute waiver of the right to counsel (*Little v. Little*, 127 N.C. App. 191 (1997)), nor does it remove the court's responsibility under G.S. 7B-1109(b) to inquire at the adjudicatory hearing about and potentially appoint counsel for the parent. See section 9.4.A, above.

9.9 Pretrial and Adjudication Hearing Requirements

A. Pretrial Hearing

1. Timing. Unless all respondents have filed answers or responses, the pretrial hearing should be held only after the time for filing an answer or response has run.

2. May be combined with adjudication hearing. The court must conduct a pretrial hearing in every termination of parental rights case but may combine the pretrial and adjudicatory hearings. If the pretrial and adjudicatory hearings are combined, no separate order is required for the pretrial hearing. G.S. 7B-1108.1(a).

3. Notice. Written notice of the pretrial hearing is required. The notice must include the date, time, and place of the hearing and be mailed by the petitioner or movant to the respondent after an answer or written response has been filed or if there is no answer or response, thirty days after service of the summons or notice. *See* G.S. 7B-1106(c); 7B-1106.1(c); 7B-1108.1(b).

4. Required considerations. At a pretrial hearing the court must consider the following:

- retention or release of provisional counsel;
- whether a guardian ad litem for the juvenile should be appointed if not already appointed;
- sufficiency of the summons, service, and notice;
- any pretrial motions;
- issues, including any affirmative defense, raised by an answer or response;
- any other issue that can be addressed properly as a preliminary matter.

G.S. 7B-1108.1(a).

B. Adjudication Hearing

1. Timing. A hearing on a termination of parental rights (TPR) petition or motion must be held within ninety days after the petition or motion is filed unless the court orders that it be held at a later time. G.S. 7B-1109(a).

(a) Continuance. For good cause, the court may continue an adjudication hearing up to ninety days from the date of the initial petition (or motion) to receive additional evidence, allow parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the child. The court may grant a continuance that extends beyond that ninety-day period only in extraordinary circumstances, when necessary for

the proper administration of justice, and must issue a written order stating grounds for the continuance. G.S. 7B-1109(d). Granting or denying a motion for a continuance is in the trial court's discretion and is reviewed for an abuse of discretion. However, motions to continue based on a constitutional right present a question of law and are fully reviewable on appeal. *In re C.M.P.*, 254 N.C. App. 647 (2017).

Continuances are generally disfavored, and the burden is on the party seeking the continuance to show the statutory criteria for the continuance is satisfied. *In re C.D.A.W.*, 175 N.C. App. 680 (2006). See subsection 5(b), below, and Chapter 4.5.C (discussing continuances in TPR proceedings in greater detail).

(b) Delay and prejudice. After the supreme court's holding that mandamus is the appropriate means to address a trial court's failure to enter an order within the statutory thirty-day time period (*see In re T.H.T.*, 362 N.C. 446 (2008)), the court of appeals reached the same conclusion with respect to delay in holding a hearing. *In re E.K.*, 202 N.C. App. 309 (2010) (refusing to find reversible error but acknowledging that delays in the case were "deplorable"). Note that prior to *In re T.H.T.*, numerous appellate cases had held that failure to comply with the statutory time requirements could be reversible error, but only if an appellant showed prejudice resulting from the delay. See Chapter 12.10.D for required elements for seeking mandamus.

2. General procedures. The Juvenile Code sets out most procedural aspects of the adjudicatory hearing, but where it does not, case law and the Rules of Civil Procedure provide additional requirements and/or guidance.

(a) Bench trial. The adjudicatory hearing is before a judge, without a jury. G.S. 7B-1109(a). There is no constitutional right to a jury trial in termination of parental rights (TPR) proceedings. *In re Clark*, 303 N.C. 592 (1981); *In re Ferguson*, 50 N.C. App. 681 (1981).

The fact that a judge acquires knowledge of evidentiary facts from an earlier proceeding does not require the judge to be disqualified from presiding over a TPR hearing. *In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019) (judge's statement at an earlier proceeding did not disqualify the judge from hearing a later TPR proceeding; the statement, when viewed in the context of the child's permanent plan having been changed to adoption and DSS having been ordered to file a TPR petition at the earlier hearing, was an explanation of the steps previously taken after determining those actions were in the child's best interest at the time); *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the judge who presided over action to terminate one parent's rights was not precluded from presiding over later hearing to terminate other parent's rights); *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994) (holding that the fact that judge conducted review, found that children should remain with DSS, and recommended that TPR be pursued was not sufficient to show bias). See Chapter 2.1.B.1 (discussing recusal).

(b) Consolidation with underlying case. When a TPR proceeding is initiated by petition in the same judicial district in which there is pending an abuse, neglect, or dependency proceeding involving the same child, the court on its own motion or motion of a party may

consolidate the actions pursuant to Rule 42 of the Rules of Civil Procedure. G.S. 7B-1102(c). Court orders resulting from consolidated hearings should sufficiently separate the matters considered in the different proceedings. *See In re R.B.B.*, 187 N.C. App. 639 (2007).

(c) Combined adjudication and disposition. The TPR proceeding has two phases: the adjudication phase and the disposition phase. *In re D.L.W.*, 368 N.C. 835 (2016). Although different evidentiary standards apply at the adjudicatory phase, which determines whether a statutory ground for termination of parental rights exists and is governed by G.S. 7B-1109, and the dispositional phase, which determines whether termination of the parent's rights is in the child's best interest and is governed by G.S. 7B-1110, it is not necessary for the two phases to be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re Carr*, 116 N.C. App. 403 (1994). However, to ensure that a parent's constitutional rights to his or her child are not violated by an order to terminate parental rights based solely on the child's best interest, the court must conduct two separate inquiries, even though the two inquiries may be conducted in the same hearing. *In re S.Z.H.*, 247 N.C. App. 254 (2016).

(d) Reporting. The hearing is reported as provided for in civil trials. G.S. 7B-1109(a); 7A-198. Current practice statewide is to use electronic recording.

If equipment fails to function, the record must be reconstructed. To show prejudicial error from an equipment failure, a party must show (1) prejudice from the loss of specific testimony and (2) what the content of any gaps or lost testimony was. *In re Caldwell*, 75 N.C. App. 299 (1985). *See also In re Clark*, 159 N.C. App. 75 (2003). The fact that a recording is incomplete or unintelligible, by itself, is not a ground for reversal. There is a presumption of regularity in a trial, and the appellant must make a specific showing of probable error during the faulty or missing part of the recording. *In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003) (noting that the respondent took no steps to reconstruct the record and alleged only general prejudice).

3. Counsel for parents. The court must inquire whether parents are present and, if so, whether they are represented by counsel or desire counsel. If a parent appears, is not represented, has not waived counsel, desires counsel, and is indigent, the court must appoint counsel for the parent, according to the rules of the Office of Indigent Defense Services, and grant an extension of time to permit counsel to prepare. *See* G.S. 7B-1109(b); 7B-1101.1(a), (a1). See section 9.4.A, above, and Chapter 2.4.D (providing additional details and cases related to appointment of counsel).

4. Examination of child or parent. The court, upon finding reasonable cause, may order that the child be examined by a psychiatrist, a licensed clinical psychologist, physician, a public or private agency, or other expert, to ascertain the child's psychological or physical condition or needs. The court may order a parent similarly examined if the parent's ability to care for the child is an issue. G.S. 7B-1109(c).

5. Presence of parent. A parent has a right to attend all hearings in a proceeding to terminate that parent's rights. The court of appeals has held that this right is not absolute; however, "the magnitude of 'the private interests affected by the [termination] proceeding, clearly weighs in favor of a parent's presence at the hearing.'" *In re S.G.V.S.*, 811 S.E.2d 718, 721 (N.C. Ct. App. 2018) (reversing and remanding for new hearing; holding denial of mother's continuance request and motion to reopen the evidence when mother was previously scheduled to appear in a criminal action in another county at the same time as the later scheduled TPR hearing involved a misapprehension of law and substantial miscarriage of justice).

In very limited circumstances the court can proceed in the absence of a parent who wants to be present. The most common circumstance involves parents who are incarcerated. The court must take steps to ensure that the absent respondent's due process rights are protected. *See In re Murphy*, 105 N.C. App. 651 (denial of respondent's motion to be brought to the hearing from a state correctional facility did not violate respondent's state statutory rights or his state or federal due process rights), *aff'd per curiam*, 332 N.C. 663 (1992).

For more detailed information on this topic, see Chapter 2.4.B, discussing the parent's right to notice and opportunity to be heard, including the right to participate and limitations on that right.

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

(a) Modified setting for testimony by child. The trial court can modify the setting in which the child testifies. The court may allow the child to testify outside the presence of the parent, but the court must make appropriate findings as to the need for doing so and must utilize appropriate procedures. *See In re J.B.*, 172 N.C. App. 1 (2005) (holding that respondent's due process rights were not violated when the court excluded her from the courtroom during the child's testimony, where respondent was in a room with her guardian ad litem, could hear the proceedings, and had a video monitor and telephone contact with her attorney); *In re Williams*, 149 N.C. App. 951 (2002) (holding that the trial court did not err in allowing the child to testify in closed chambers without the father present because all attorneys were allowed to be present and the court made findings about this type of setting being in the child's best interest). For a more detailed discussion of modified settings for testimony, see Chapter 11.2.B.1.

(b) Continuance and failure of parent to appear. Note that the court of appeals has looked to both G.S. 7B-803 and 7B-1109(d) when determining whether a court acted properly in continuing (or denying a motion to continue) a termination of parental rights (TPR) hearing.

Appellate cases have acknowledged the trial court's discretion to determine whether to hold a TPR hearing when the parent is not present or continue the hearing to secure the parent's presence. The court has discretion to proceed with the hearing, however, only if

the respondent has been properly notified. *See In re K.N.*, 181 N.C. App. 736 (2007) (reversing a TPR order where the respondent entered courtroom shortly after the hearing and rebutted the presumption of proper service).

Whether to grant a continuance is in the trial court's discretion. When deciding a motion to continue, the court's main consideration is whether substantial justice will be furthered by granting or denying the motion. *In re C.D.A.W.*, 175 N.C. App. 680 (2006) (denying the motion for a continuance was not error where the respondent chose to attend a drug treatment program rather than attend the hearing after repeatedly rejecting earlier opportunities to undergo drug rehabilitation), *aff'd per curiam*, 361 N.C. 232 (2007).

A case-by-case analysis has been found more appropriate than the application of rigid rules. *In re D.W.*, 202 N.C. App. 624 (2002) (denial of absent mother's motion to continue was an abuse of discretion).

- When absent respondent's motion to continue was not based on a constitutional right and where the trial court conducted a full hearing on the petition, heard testimony, and allowed respondent's counsel to cross-examine each witness and to otherwise fully participate in the hearing, respondent was not prejudiced by denial of a motion to continue. *In re C.M.P.*, 254 N.C. App. 647 (2017) (respondent had notice of the hearing and indicated to counsel that she would attend, failed to give counsel or the court notice of or a reason for her absence, and counsel did not argue that more time was needed to prepare).
- In a private TPR case in which the respondent father knew about the hearing but failed to appear, the trial court did not abuse its discretion in denying an oral motion to continue that was made by the father's attorney at the start of the hearing. Also, after learning in the middle of the hearing that the father could be present the next day, it was not an abuse of discretion for the trial court to allow direct examination of the petitioner's witness with the father's counsel present but continue the hearing until the next afternoon so that the respondent father could be present for cross examination of that witness and the remainder of the hearing. *In re C.J.H.*, 240 N.C. App 489 (2015).

The court of appeals has addressed a respondent parent's failure to appear for a TPR hearing in the context of a Rule 60(b) motion based on "excusable neglect." Excusable neglect is a question of law that is fully reviewable on appeal and depends on what may be reasonably expected of a party in paying proper attention to his or her case given all the surrounding circumstances. *Mitchell County Dep't of Soc. Servs. v. Carpenter,* 127 N.C. App. 353 (1997), *aff'd per curiam*, 347 N.C. 569 (1998). In two cases, the court of appeals held the respondents' failure to appear for the TPR hearing was not excusable neglect given the receipt of proper notice of the hearing and the failure to act prudently. *See In re Hall*, 89 N.C. App. 685 (1988) (holding no excusable neglect when respondent, after being served with the summons, failed to give her defense the attention a person of ordinary prudence would give important business; noting her poor financial situation does not account for her failure to call or write court authorities (including legal counsel) or DSS for assistance or to appear for the hearing because she was worrying about finding work; ignorance of the judicial process is not excusable neglect); *Mitchell County Dep't of*

Soc. Servs. v. Carpenter, 127 N.C. App. 353 (holding trial court did not abuse its discretion in denying Rule 60(b) motion as respondent paying proper attention to her case would have made transportation arrangements sooner or would have contacted her attorney when she discovered her transportation was not available; noting the record did not show her husband assured her he would transport her, lulling her into missing her court date when he refused to transport her), *aff'd per curiam*, 347 N.C. 569.

9.10 Evidence and Proof

Evidentiary issues are discussed in greater detail in Chapter 11.

A. Evidentiary Requirements and Standards

At the adjudicatory hearing, the court must take evidence, find the facts, and adjudicate the existence or nonexistence of any alleged ground(s) for termination of parental rights (TPR). G.S. 7B-1109(e). The rules of evidence in civil cases apply. G.S. 7B-1109(f). The standard of proof is clear, cogent, and convincing evidence, and the burden of proof is on the petitioner or movant. G.S. 7B-1109(f); 7B-1111(b). *See In re N.D.A.*, 833 S.E.2d 768 (N.C. S.Ct. 2019); *In re Pierce*, 356 N.C. 68 (2002); *In re Young*, 346 N.C. 244 (1997). There is no distinction between "clear, cogent and convincing" and "clear and convincing" evidence. *In re Belk*, 364 N.C. 114, 122 (2010); *In re Montgomery*, 311 N.C. 101, 109 (1984) ("clear and convincing" and "clear, cogent and convincing" describe the same evidentiary standard). Clear and convincing evidence is "stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt and requires evidence which should fully convince." *In re H.N.D.*, 827 S.E.2d 329, 332 (N.C. Ct. App. 2019) (quoting *In re Mills*, 152 N.C. App. 1, 13 (2002)).

At disposition, on the other hand, there is no burden of proof on any party, and the court exercises its discretion, based on findings supported by the evidence, to determine whether TPR is in the child's best interest. *See* G.S. 7B-1110(a); *In re C.W.*, 182 N.C. App. 214 (2007). See also section 9.12.B, below (discussing the evidentiary standard at disposition).

A court's TPR order cannot be based solely on documentary evidence. In the case of *In re A.M.*, 192 N.C. App. 538 (2008), the court of appeals looked to G.S. 7B-1109(e), requiring the trial court to "take evidence" in conjunction with the purpose of the Juvenile Code (G.S. 7B-100(1), (2)), to determine that Rule 43(a) of the Rules of Civil Procedure was applicable to TPR proceedings. Rule 43(a) requires that "[i]n all trials the testimony of witnesses shall be taken orally in open court." Therefore, the petitioner was required to present some live testimony (even if minimal), and the court could not terminate parental rights based solely on documentary evidence (prior court orders and DSS and GAL reports). *See also In re N.B.*, 195 N.C. App. 113 (2009) (holding that DSS's case in chief consisting solely of the DSS social worker's report and statements by counsel and the testimony by only the respondent mother, which refuted DSS's allegations, was insufficient since DSS, as petitioner, carried the burden to prove the grounds of neglect or dependency; there was no testimony to support its assertion that parental rights should be terminated). The court of appeals has also held that summary judgment is not available in a TPR because of the requirement of G.S. 7B-1109(e)

that the court "take evidence." *In re J.N.S.*, 165 N.C. App. 536 (2004).

While a party may stipulate to facts from which the court can make conclusions, parties may not stipulate to a conclusion of law such as the conclusion that grounds for termination exist. *See In re A.K.D.*, 227 N.C. App. 58 (2013) (holding in a private TPR case that the father's stipulation to the abandonment ground was invalid). See Chapters 6.3.C.1 (relating to stipulations for an adjudication in abuse, neglect, or dependency proceeding) and 11.7.D.5 (relating to stipulations made in prior proceedings).

The court may not rely on a consent order (or agreement between the parties) that a TPR will not be opposed as proof of an adjudicatory ground and the child's best interests determination. Such an agreement is both void as against public policy and avoids the judicial process that requires a determination of whether a ground to TPR exists and whether the TPR is in the child's best interests. *In re C.K.C.*, 822 S.E.2d 741, 745 (N.C. Ct. App. 2018) (reversing TPR; holding consent order in Chapter 50 civil custody action between father and grandparents that included a provision that grandmother would file a petition to terminate father's rights, which no other party, including father, would oppose is void as against public policy and is neither a properly executed consent or relinquishment under the adoption statutes (quoting *Foy v. Foy*, 57 N.C. App. 128, 131 (1982) ("In essence, the parental rights of a parent in his child are not to be bartered away at the parent's whim.")).

B. Events between Filing of Petition or Motion and Hearing

An evidentiary issue that arises in termination of parental rights (TPR) proceedings is the significance of events that occur between the time the TPR petition or motion is filed and the time of the TPR hearing. Several TPR grounds refer to a specified period of time immediately preceding the filing of the TPR petition or motion, and when adjudicating those grounds, the court is limited to considering that specific time period. *See* G.S. 7B-1111(a)(3), (4), (5), (7). Note, however, that relevant evidence of events occurring after the filing of the petition or motion is admissible at the disposition stage when determining whether TPR is in the child's best interests. *In re Pierce*, 356 N.C. 68 (2002); *In re J.A.O.*, 166 N.C. App. 222 (2004).

In cases involving the abuse and neglect ground in G.S. 7B-1111(a)(1), the appellate courts have regularly referred to the determination of "whether [abuse or] neglect authorizing the termination of parental rights existed at the time of the hearing." *In re J.W.*, 173 N.C. App. 450, 455 (2005), *aff'd per curiam*, 360 N.C. 361 (2006). *See also In re D.L.W.*, 368 N.C. 835, 843 (2016) (termination of rights on this ground "requires a showing of neglect at the time of termination hearing"); *In re M.P.M.*, 243 N.C. App. 41, 48 (2015) (finding of neglect for purpose of terminating parental rights "must be based on evidence showing neglect at the time of the termination proceeding"), *aff'd per curiam,* 368 N.C. 704 (2016); See also section 9.11.A, below (discussing abuse and neglect grounds for TPR). When current neglect or abuse cannot be shown because the parent and child have been separated for a long period of time, the court must determine whether there is past neglect or abuse and a probability of a repetition of abuse or neglect in light of the fitness of the parent to care for the child at the time of the TPR proceeding. *See In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019) and *In re*

Ballard, 311 N.C. 708 (1984) (both relating to neglect); *Alleghany County Dep't of Soc. Servs. v. Reber*, 75 N.C. App. 467 (1985) (relating to abuse), *aff'd per curiam*, 315 N.C. 382 (1986). See section 9.11.A.4 and 5, below (discussing time periods).

When TPR is sought on the basis of willfully leaving the child in foster care or placement outside the home for more than twelve months without making reasonable progress to correct conditions that led to the child's removal pursuant to G.S. 7B-1111(a)(2), the court may consider evidence relating to the *parent's progress* up to the time of the hearing. *In re A.B.*, 253 N.C. App. 29 (2017) (holding the period for evaluating the nature and extent of a parent's reasonable progress extends up to the TPR hearing). *See In re Pierce*, 356 N.C. 68, 75 n.1 (2002) (decided on an earlier wording of the statute that included a second twelve-month period where the parent must make progress, but noting that under a 2001 amendment that removed that second twelve-month time period, "there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof"); *In re C.L.C.*, 171 N.C. App. 438, 447 (2005) (noting that after deletion of the second-twelve month period in G.S. 7B-1111(a)(2) "[t]he focus is no longer solely on the progress made in the 12 months prior to the petition"), *aff'd per curiam*, 360 N.C. 475 (2006). However, the evidence must show that the *child's placement* for more than twelve months resulted from a court order and the twelve months expired before the filing of the TPR petition or motion. *In re A.C.F.*, 176 N.C. App. 520 (2006) (reversing TPR order when the requisite time period had not expired before TPR motion was filed; holding removal began with the first nonsecure custody court order and not the voluntary placement agreement entered into by the parent months earlier). See section 9.11.B.2 and 4, below (discussing time periods).

C. Events after a TPR Is Denied or Reversed

As explained throughout this Manual, there are multiple court proceedings and hearings that may arise from a family's involvement with DSS. Some cases will involve a termination of parental rights (TPR) action naming one or more respondent parents. The district court must deny a TPR motion or dismiss a TPR petition if it determines that none of the alleged grounds were proved or that the TPR is not in the child's best interests. G.S. 7B-1110(b), (c). In those cases where the TPR is granted, the parent has a right to appeal. G.S. 7B-1001(a1); 7B-1002(4). One possible result of an appeal is a reversal of the TPR decision. A denial of a TPR motion, dismissal of a TPR petition, or reversal on appeal of a TPR order does not automatically preclude the filing of a second TPR action based on the same or other ground.

The law of the case doctrine applies when "a question before an appellate court has previously been answered in an earlier appeal in the same case[.]" *In re S.R.G.*, 200 N.C. App. 594, 597 (2009). The appellate court's answer to the question on appeal becomes the law of the case in subsequent proceedings in the trial court and in a subsequent appeal. *In re S.R.G.*, 200 N.C. App. 594. However, "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *In re K.C.*, 812 S.E.2d 873, 874 (N.C. Ct. App. 2018) (citations omitted) (affirming second TPR based on abandonment, after reversal of first TPR based on abandonment by neglect; the operative facts supporting the ground in the second TPR were based on new

events – the six-month period immediately preceding the filing of the second TPR). In *In re K.C.*, the court of appeals recognized that time does not stand still and stated, "the prior opinion of this Court does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority. . . ." *In re K.C.*, 812 S.E.2d at 874.

The court of appeals also discussed the law of the case as well as res judicata in *In re S.R.G.*, 200 N.C. App. 594 (2009). The court of appeals reversed a second TPR order based on neglect that was entered by the trial court after the first TPR based on abandonment was reversed. The second TPR was entered on remand and was based on the same (first) petition. The court of appeals held that the re-litigation of a ground alleged but not previously determined in the first proceeding was barred and stated, "[a] new [TPR] petition, based on circumstances arising subsequent to the original termination hearing, would have constituted a new action, and would not have been barred by the doctrine of res judicata." *In re S.R.G.*, 200 N.C. App. at 599. *See also In re F.S.*, 835 S.E.2d 465, 471 (N.C. Ct. App. 2019) (stating in a neglect, not a TPR action that "[t]he doctrine of collateral estoppel does not preclude the trial court's adjudication of facts from new allegations and events which transpired after the [previous] adjudication" of neglect that was reversed).

D. Specific Types of Evidentiary Issues

Chapter 11 discusses in detail the following types of evidentiary issues commonly arising in TPR proceedings:

- judicial notice of earlier proceedings, see Chapter 11.7;
- collateral estoppel and res judicata, see Chapter 11.7.D.2;
- medical, mental health, substance abuse, and other records, see Chapter 11.6.E and F (see also Chapter 14.2−4);
- opinions and expert testimony, see Chapter 11.9−10;
- testimony by children, see Chapter 11.2;
- character and prior acts, see Chapter 11.8;
- privileges, see Chapter 11.11;
- hearsay and hearsay exceptions, including out-of-court statements by children, see Chapter 11.5−6.

9.11 Adjudication: Grounds for Termination of Parental Rights

A termination of parental rights (TPR) proceeding consists of two phases: the adjudication phase and the disposition phase. At the first phase – adjudication – the court determines, based on clear, cogent, and convincing evidence, whether a statutory ground to terminate a parent's rights exists. *See In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019); *In re D.L.W.*, 368 N.C. 835 (2016). Clear and convincing evidence is "stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt and requires evidence which should fully convince." *In re H.N.D.*, 827 S.E.2d 329, 332 (N.C. Ct. App. 2019) (quoting *In re Mills*, 152 N.C. App. 1, 13 (2002)).

The Juvenile Code, at G.S. 7B-1111(a), sets out eleven statutory grounds for terminating parental rights. A finding of any one of the eleven grounds is sufficient to support a TPR order. *In re B.O.A.*, 831 S.E.2d 305 (N.C. S.Ct. 2019); *In re T.N.H.*, 831 S.E.2d 54 (N.C. S.Ct. 2019); *In re E.H.P.*, 831 S.E.2d 49 (N.C. S.Ct. 2019). The grounds for TPR require the court to focus on the parent's individual conduct and make a determination, based on the evidence presented, about the parent's actions as those actions relate to the alleged statutory ground(s) to terminate that parent's rights. *See In re D.T.N.A.*, 250 N.C. App. 582 (2016). The focus on the parent's culpability at the TPR adjudication differs from the focus on the child's status, rather than the parent's culpability, at the abuse, neglect, or dependency adjudication.

A. Abuse or Neglect

A parent's abuse or neglect of a child within the meaning of G.S. 7B-101 is grounds for termination of that parent's parental rights. G.S. 7B-1111(a)(1).

1. Definition of abuse or neglect. Abuse or neglect of the child that is the subject of a TPR proceeding must meet the same statutory definition that would apply in an underlying abuse or neglect proceeding. *See* G.S. 7B-101(1) (definition of "abused juvenile"); 7B-101(15) (definition of "neglected juvenile"). See Chapter 2.3.B.1 and 2 for details on the definitions of abuse and neglect.

The North Carolina Supreme Court has interpreted the ground that a parent has abused or neglected the child to require "a showing of neglect at the time of the termination hearing, or if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15 (1984)).

The court of appeals has recognized that there is a substantive difference between the quantum of proof of neglect required for a TPR and that required for a child's adjudication as neglected and removal of the child from a parent's custody. *In re Evans*, 81 N.C. App. 449 (1986). Parental rights may not be terminated for a risk of neglect based on the risk of future harm to the child. *In re Evans*, 81 N.C. App. 449 (distinguishing required proof for TPR from a child's adjudication as a neglected juvenile in an appeal of an adjudication of a juvenile as neglected); *In re Phifer*, 67 N.C. App. 16 (1984) (holding that the parent's behaviors including abuse of alcohol, without proof of those behaviors having an adverse impact on the child, was insufficient for adjudication of the neglect ground for TPR; discussing threat of harm that might happen at some time in the future is insufficient to support TPR on neglect ground).

2. Constitutional challenge. This ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (decided under an earlier version of the Juvenile Code). The statute does not apply only to the poor and thus violate equal protection. *In re Wright*, 64 N.C. App. 135 (1983) (decided under an earlier version of the Juvenile Code).

3. Parental culpability. In an underlying abuse or neglect proceeding the issue is whether the child is an abused or neglected juvenile, and the court is not adjudicating parental culpability. In a TPR proceeding, however, the issue is whether a particular parent abused or neglected the

child. A parent's culpability may be found even when the court cannot determine which parent was the perpetrator of the child's abuse or neglect when the court finds that both parents were jointly and individually responsible as the child's sole care providers. *See In re Y.Y.E.T.*, 205 N.C. App. 210 (2010) (affirming TPR on ground of abuse and neglect, based on finding that both parents were responsible for their 4-month-old infant's non-accidental serious injury as one or both parents inflicted the injury and protected each other by refusing to identify the perpetrator, or one caused the injury and the other failed to prevent it; rejecting respondents' argument that an individual must be identified as the perpetrator as against public policy as it would encourage individuals to deny responsibility for and knowledge of harm to a child and interfere with the court's ability to serve the child's best interests).

4. Past neglect and likelihood of repetition of neglect. When a child has been separated from his or her parent for a long period of time such that it cannot be shown that a parent is neglecting the child at the time of the termination hearing, the petitioner (or movant) must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent. *In re M.A.W.*, 370 N.C. 149 (2017).

(a) Past neglect: prior adjudication admissible but not required. A prior adjudication of abuse or neglect is not a precondition to a TPR proceeding based on those grounds. *See, e.g.*, *In re R.B.B.*, 187 N.C. App. 639 (2007) (a court may find that the parent abused or neglected the child in the TPR adjudicatory hearing without the child having been previously adjudicated abused or neglected); *In re Williamson*, 91 N.C. App. 668 (1988) (holding that an earlier adjudication of dependency was not inconsistent with a finding that the parent neglected the child for purposes of TPR); *In re Z.D.*, 812 S.E.2d 668 (N.C. Ct. App. 2018) (there was no prior adjudication of neglect but the court's finding that respondent mother left son with a woman she had just met earlier that day and did not return to the woman's home to get him supported the trial court's ultimate finding that respondent had previously neglected her son; note the TPR was reversed for insufficient findings to support grounds).

When there is a prior adjudication, evidence of that prior adjudication of abuse or neglect is admissible in a TPR proceeding, but that order alone is unlikely to be sufficient to support a TPR when the parents have been deprived of custody for a significant period of time before the TPR proceeding. *See In re M.A.W.*, 370 N.C. 149 (2017); *In re Ballard*, 311 N.C. 708 (1984). The North Carolina Supreme Court has recognized that a TPR for neglect cannot be based solely on past conditions that no longer exist but also cannot be based on evidence of current neglect when, after a child's adjudication as neglected, the child has been removed from that parent's custody. Instead, the trial court must consider (1) evidence of neglect prior to removal, including a prior adjudication of neglect, (2) evidence of changed circumstances since the prior adjudication, and (3) whether there is a likelihood of future neglect if the child is returned to the parent. *In re M.A.W.*, 370 N.C. 149; *In re D.L.W.*, 368 N.C. 835 (2016); *In re Ballard*, 311 N.C. 708. The trial court considers the parent's circumstances and fitness to care for the child at the time of the termination hearing. *In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019); *In re Ballard*, 311 N.C. 708.

The supreme court's reasoning also applies to prior abuse. *See Alleghany County Dep't of Soc. Servs. v. Reber*, 75 N.C. App. 467 (1985) (applying reasoning in *In re Ballard* to prior abuse), *aff'd per curiam*, 315 N.C. 382 (1986); *In re Beck*, 109 N.C. App. 539 (1993) (holding that the court did not err in admitting the prior order finding the child to be abused, since the court did not rely solely on that order in finding the child neglected for TPR purposes); *see also In re McMillon*, 143 N.C. App. 402 (2001); *In re Wheeler*, 87 N.C. App. 189 (1987) (holding that a prior adjudication of abuse was collateral estoppel on the question of whether the father had abused the children, the parties were estopped from relitigating that issue, and the court did not rely solely on the prior adjudication in terminating parental rights).

(b) Likelihood of repetition of neglect. To predict the probability of a repetition of neglect, the court looks to the historical facts of the case to assess whether there is a substantial risk of future abuse or neglect. *In re M.P.M.*, 243 N.C. App. 41 (2015), *aff'd per curiam,* 368 N.C. 704 (2016). The court must also look to evidence of changed conditions and "the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.V.A.*, 835 S.E.2d 425, 430 (N.C. S.Ct. 2019) (emphasis in original); *In re Z.D.*, 812 S.E.2d 668, 675 (N.C. Ct. App. 2018) (petitioners' evidence in a private TPR as to mother's conduct primarily occurring at least six months prior to the termination hearing lacked "temporal proximity" and did not support a finding that mother was incapable of providing proper care at the time of the termination hearing and that there was a likelihood of repetition of neglect).

The order must set out the process by which the court reasoned and adjudicated the facts in support of the conclusion that the respondent was likely to neglect the child upon return to respondent's custody. *In re L.L.O.*, 252 N.C. App. 447 (2017). Failure to include the required finding of fact about the probability of the repetition of neglect is not harmless error. *See In re L.L.O.*, 252 N.C. App. 447 (vacating and remanding portion of an order without the required finding when evidence in the record supported, but did not compel, a finding of neglect); *In re E.L.E.*, 243 N.C. App. 301 (2015) (reversal was required when necessary finding as to probability of repetition of neglect was not made even though there was evidence in the record to support a finding).

When there is an underlying abuse, neglect, or dependency case, a parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *In re M.J.S.M.*, 810 S.E.2d 370 (N.C. Ct. App. 2018) (although mother made some progress on her case plan, it was sporadic and inadequate; her lack of significant progress supported court's determination of likelihood of future neglect); *In re C.M.P.*, 254 N.C. App. 647 (2017) (children were removed because of domestic violence (DV), unstable housing and employment, and inappropriate supervision, all of which were addressed in respondent mother's case plan; the finding of a high probability of the repetition of neglect was supported by evidence that during the three years the children had been removed, mother had not completed a DV assessment and had been arrested on assault charges related to another DV incident, mother's employment remained unstable based on a history of losing jobs, and mother had not obtained independent housing; mother's failure to make progress on the case plan was indicative of a likelihood of future neglect).

A parent's substantial compliance with a case plan may constitute evidence of changed conditions at the time of the TPR hearing that could support a determination of a low probability of future neglect. *See In re J.K.C.*, 218 N.C. App. 22 (affirming denial of TPR on ground of neglect; holding that in spite of a prior adjudication of neglect and the father's incarceration, there was not a substantial probability of a repetition of neglect and he had not willfully left the children in foster care without making progress, given his substantial compliance with the DSS case plan, keeping in contact with DSS, completing courses available to him in prison, and sending gifts to the children through his mother); *In re Shermer*, 156 N.C. App. 281 (2003) (holding that the evidence was insufficient to establish that an incarcerated parent abandoned or neglected the children, where the father wrote to and called his sons while in prison and made progress on a case plan after his release; there was no evidence of a likelihood of repetition of prior neglect because the earlier neglect was due solely to the mother's failure to provide proper care and supervision).

However, completion of a case plan does not preclude a court's conclusion that the ground of neglect exists. *See In re M.P.M.*, 243 N.C. App. 41 (2015) (affirming TPR based on neglect; despite complying with his case plan by attending ten therapy sessions and interacting appropriately during supervised visits with his daughter, father had not demonstrated at the time of the TPR hearing that he had learned how to keep daughter safe in the future; conclusion of a likelihood of repetition of neglect was supported by findings about the severity of respondent's and mother's abuse of the child's siblings, respondent's dishonesty about his role in the abuse, and respondent's dishonesty as to his continued contact with child's abusive mother and his continued belief that mother did not pose to a risk to daughter), *aff'd per curiam*, 368 N.C. 704 (2016).

Cases involving prior neglect adjudications in which parental rights were terminated include

- *In re Z.V.A.*, 835 S.E.2d 425 (N.C. S.Ct. 2019) (clear, cogent, and convincing evidence supported the district court's findings that father was willing to leave the child alone with mother who was unfit to parent the child by herself, that respondents displayed constant marital discord during supervised visits with the child, and respondents intended to remain together; these findings supported the conclusion that father's rights were subject to termination under G.S. 7B-1111(a)(1)).
- *In re M.A.W.*, 370 N.C. 149 (2017) (respondent father's incarceration during the prior neglect adjudication is neither a sword nor a shield in the TPR action; prior neglect supported by findings of respondent's long history of substance abuse and criminal activity and awareness of mother's substance abuse issues that he knew would result in DSS involvement; likelihood of repetition of neglect supported by respondent's inconsistent visitation with and failure to provide any care, discipline, or supervision to child, denial of social worker's access to his home, and failure to complete clinical assessment after his release from prison despite his successfully participating in substance abuse treatment and parenting courses while incarcerated). *See also In re C.L.S.*, 245 N.C. App. 75, 78, *aff'd per curiam*, 369 N.C. 58 (2016) (citations omitted) (stating that "[i]ncarceration alone ... does not negate a father's neglect of his

child").

- *In re D.L.W.*, 368 N.C. 835 (2016) (likelihood of neglect existed based on injurious environment where in underlying abuse and neglect case, mother was ordered to participate in domestic violence counseling based on findings that parental domestic violence placed the children at risk and that one child had intervened when the parents were arguing, and findings in the order terminating mother's parental rights included findings from the underlying neglect adjudication order and new findings of domestic violence incidents between the parents after the children's removal and mother not articulating an understanding of what she learned in domestic violence counseling).
- *In re A.A.S.*, 812 S.E.2d 875 (N.C. Ct. App. 2018) (earlier neglect adjudication established a history of past neglect; competent evidence supported findings as to future neglect, specifically, that mother needed an additional support person to assist her in safely parenting but was unable to identify any such support person, she repeatedly failed drug screens, DSS had to intervene during supervised visitations because of her inappropriate behavior, and she had not complied with her case plan).
- *In re B.S.O.*, 234 N.C. App. 706 (2014) (affirming the trial court's order finding that there was a high probability of a repetition of neglect where the mother had failed to address the issues that had led to the children's removal and to the original neglect adjudication: improper supervision, domestic violence, unhealthy relationships, mental health issues, and unstable living arrangements).

Cases involving prior neglect adjudications in which parental rights were not terminated include

- *In re C.N.*, 831 S.E.2d 878 (N.C. Ct. App. 2019) (reversing a conclusion of neglect when mother had made some progress on her case plan by completing parenting classes, the assessments, re-engaging in services, recently submitting to drug testing, being employed, and obtaining stable housing and transportation; opinion also noted that there was no evidence or findings to indicate that the reason for child's removal, which was the child spilling Mr. Clean on herself causing chemical burns, were likely to be repeated).
- *In re G.B.R.*, 220 N.C. App. 309 (2012) (reversing termination of father's rights where petition alleged neglect as grounds; father had been incarcerated and evidence at the hearing focused primarily on his incarceration but failed to address circumstances since his release or show a likelihood of a repetition of neglect, showing instead that while incarcerated father wrote many letters to the children and took a number of courses, including a "father accountability" class; since release, he had employment, his own apartment and insurance, and did not drink alcohol or use any medication).
- *In re J.G.B.*, 177 N.C. App. 375 (2006) (holding that the neglect ground was not established where DSS took custody soon after the child's birth and the child was adjudicated only dependent; there must be evidence of prior neglect while in respondent's custody and a likelihood of repetition of neglect).

Other cases addressing the neglect ground to TPR when there was not a prior adjudication of neglect include

- *In re Z.D.*, 812 S.E.2d 668, 675 (N.C. Ct. App. 2018) (reversing TPR; evidence in a private TPR did not support ultimate finding that there was a reasonable probability that child would be neglected if returned to respondent's care when (i) "ambiguous" findings did not address respondent's mental health at the time of the termination hearing or the impact her mental health issues had on the child and (ii) a finding used the subjective terms "concerning" and "disturbing" to describe mother's behavior during visitation, without further explanation of the behavior and how it impacted mother's ability to care for her son at the time of the termination hearing).
- *In re C.G.R.*, 216 N.C. App. 351 (2011) (affirming TPR; holding that evidence of neglect of child who was removed at birth while mother was incarcerated was sufficient: prior to the child's birth the mother had been living in a home used for drug dealing with her other child who was adjudicated neglected; since release from prison the mother chose to live with co-defendants in the drug raid that was the source of her arrest; she had numerous short-term jobs and residences resulting in an unstable living and employment situation, all of which resulted in a substantial risk of impairment to the child).
- *In re C.W.*, 182 N.C. App. 214 (2007) (reversing TPR; holding that there was not sufficient evidence of neglect at the time of the hearing where the incarcerated father sent cards, letters, and money to the children and tried to stay in contact with them during incarceration, and DSS had never developed a case plan with the father).
- *In re Young*, 346 N.C. 244 (1997) (reversing and remanding TPR; child had been in custody of others for over a year at time of termination proceeding but there was no prior adjudication of neglect; evidence of mother's prior neglect was not sufficient evidence of neglect at the time of the termination proceeding as the probability of repetition of neglect was not shown from evidence that mother made considerable positive changes to her lifestyle).

5. Current neglect. The ground of neglect may also be proved by showing the parent has neglected the child at the time of the filing of the TPR petition or motion. When determining whether neglect exists, the court "may consider . . . a parent's complete failure to provide the personal contact, love, and affection that [exists] in the parental relationship." *In re A.J.M.P.*, 205 N.C. App. 144, 149 (2010) (quoting *In re Apa*, 59 N.C. App. 322, 324 (1982)). Note that a number of reported cases addressing current neglect involve incarcerated parents.

- *In re N.D.A.*, 833 S.E.2d 768, 775 (N.C. S.Ct. 2019) (noting that the absence of findings that applied the two-prong test of past neglect and likelihood of future neglect in the TPR order suggests the trial court considered whether respondent father was currently neglecting the child for purposes of the TPR).
- *In re R.B.B.*, 187 N.C. App. 639 (2007) (affirming TPR on ground of abuse and neglect; TPR hearing was consolidated with adjudicatory hearing on an abuse and neglect petition).
- *In re Bradshaw*, 160 N.C. App. 677 (2003) (affirming private TPR; holding that, although the incarcerated parent's lack of contact with the child was beyond his control, other

evidence and findings of respondent father's infrequent correspondence with mother (petitioner) regarding child and failure to pay any support despite having small income supported the conclusion that the neglect ground existed).

- *In re A.J.M.P.*, 205 N.C. App. 144 (upholding adjudication of the neglect ground where incarcerated parent had never written to child, sent child anything, paid support despite have some ability to do so, or challenged a court order that ceased his visitation rights; court of appeals reiterated that incarceration alone is not sufficient to establish a ground for TPR).
- *In re C.L.S.*, 245 N.C. App. 75 (child was adjudicated neglected and dependent based on mother's stipulations to allegations in DSS petition and while father's identity was still unknown; father's paternity was later established, father was incarcerated, and father's rights were terminated; TPR of father upheld based on evidence at the time of the TPR hearing that father had neglected the child by failing to provide love, support, affection, and personal contact to the child between the time paternity was established and the TPR hearing; evidence that before incarceration father did not want to pursue reunification and missed appointments with the social worker and post-incarceration that father would not sign a case plan, meet the child, or provide financial support was sufficient to support termination), *aff'd per curiam,* 369 N.C. 58 (2016).

6. Factors related to abuse and neglect. The following appellate cases have discussed factors that relate to neglect or abuse in the context of termination of parental rights. See also Chapters 6.3.D and E (discussing evidence for neglect and abuse, outside the context of TPR) and 2.3.B.1 and 2 (discussing the definitions of abuse and neglect).

(a) Not limited to physical necessities. For a finding of neglect, it is not necessary to find a failure to provide the child with physical necessities. *In re Black*, 76 N.C. App. 106 (1985); *In re Apa*, 59 N.C. App. 322 (1982).

(b) Parent's love and concern not determinative. Determinative factors are the child's circumstances and conditions; the fact that the parent loves or is concerned about the child will not necessarily preclude adjudication of the neglect ground. *In re Montgomery*, 311 N.C. 101 (1984). *See also In re T.J.C.*, 225 N.C. App. 556 (2013) (holding that despite findings that the parents loved their children and the children loved their parents, the parents' ongoing domestic violence was sufficient to support a finding of neglect).

(c) Nonfeasance as neglect. Parent's nonfeasance, as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984) (holding that mother's failure to intervene or protect child from another person's physical abuse was neglect). *See also In re D.A.H.–C.*, 227 N.C. App. 489 (2013) (finding sufficient evidence of neglect where despite mother's participation in classes, she continued to cohabit and associate with people violent toward her and her children, failing to protect them from abuse and neglect and creating a substantial risk of future neglect).

(d) Participation in previous action. It was error to admit evidence of father's failure to participate in the underlying neglect proceeding when there was no evidence that he was served in that action. *In re Mills*, 152 N.C. App. 1 (2002).

(e) Relinquishment of another child. The trial court did not err in admitting evidence of mother's surrender of her rights to another child, since the way another child in the same home was treated and that child's status clearly were relevant to whether there could be an adjudication of the neglect ground. *In re Johnston*, 151 N.C. App. 728 (2002); *see also In re Allred*, 122 N.C. App. 561 (1996).

7. Neglect includes abandonment. The definition of "neglected juvenile" includes a juvenile "who has been abandoned." G.S. 7B-101(15). The ground of abandonment as neglect under G.S. 7B-1111(a)(1) is separate from the ground of abandonment set forth at G.S. 7B-1111(a)(7) (discussed in section 9.11.G, below). Although "abandonment" has the same meaning under both statutory grounds, the determinative time period the trial court examines when adjudicating the existence or nonexistence of each ground differs.

Termination of parental rights for neglect based on abandonment requires a determination that the conduct of the parent "demonstrates a 'willful neglect and refusal to perform the natural and legal obligations of parental care and support.' " *In re N.D.A.*, 833 S.E.2d 768, 775 (N.C. S.Ct. 2019) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). The North Carolina Supreme Court recognizes that "willful" does not appear in G.S. 7B-101(15), but abandonment based on neglect "is inherently a willful act." *In re N.D.A.*, 833 S.E.2d at 776, n.2. Willfulness is a question of fact. *See In re N.D.A.*, 833 S.E.2d 768.

To terminate a parent's rights pursuant to G.S. 7B-1111(a)(1) for neglect based on abandonment, the trial court must find that a parent has engaged in conduct "which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing." *In re N.D.A.*, 833 S.E.2d 768 (agreeing with the application by the court of appeals in *In re C.K.C.*, 822 S.E.2d 741 (N.C. Ct. App. 2018) of this standard to neglect by abandonment). When the trial court's order does not include findings addressing the willfulness of the parental conduct, the order will be vacated. *See In re N.D.A.*, 833 S.E.2d 768 (findings did not address whether father, who was incarcerated when DSS first became involved up to the adjudication hearing, had the ability to contact petitioner or the child, to exercise visitation, or pay child support).

The determinative time period is not specified by G.S. 7B-1111(a)(1); however, the appellate courts have held that there must be evidence of neglect at the time of the TPR hearing. *In re C.K.C.*, 822 S.E.2d 741 (quoting *In re Young*, 346 N.C. 244 (1997)). When considering neglect by abandonment, the court may examine the parent's conduct over an extended period of time. *In re N.D.A.*, 833 S.E.2d 768, 776 (considering whether father had the ability to contact the petitioner in a private TPR during a period from 2014 through December 2016, during most of which father was incarcerated). Unlike the ground of abandonment under G.S. 7B-1111(a)(7), neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition. In some cases, however, these time periods may overlap. For example, the determination that respondent father had not willfully abandoned his children pursuant to G.S 7B-1111(a)(7) because he sought sole custody of the children during the determinative six-month period under that ground was relevant to the determination in the same TPR proceeding that considered whether he neglected the children by abandonment. *In re C.K.C.*, 822 S.E.2d 741 (N.C. Ct. App. 2018)

(reversing TPR; father's attempt to regain custody of his children precluded a determination that father neglected the children by abandonment pursuant to G.S. 7B-1111(a)(1) as his attempt to obtain custody of the children did not show he intended to forego all parental duties and relinquish all parental claims to his children).

B. Willfully Leaving Child in Foster Care for More than Twelve Months without Reasonable Progress

Willfully leaving the child in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal is grounds for termination of parental rights (TPR). Parental rights may not be terminated for the sole reason that a parent is unable to care for his or her child because of poverty. G.S. 7B-1111(a)(2).

This statutory ground, G.S. 7B-1111(a)(2), requires a two-part analysis: (1) that the child has willfully been left by the parent in foster care or placement outside the home for over twelve months and (2) that as of the time of the TPR hearing, the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. *In re Z.D.*, 812 S.E.2d 668 (N.C. Ct. App. 2018); *In re L.L.O.*, 252 N.C. App. 447 (2017).

1. Constitutional challenge. This ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (decided under an earlier version of the Juvenile Code).

2. Time period in foster care or placement outside the home. G.S. 7B-1111(a)(2) requires that a parent has willfully left the child in foster care or placement outside the home for more than twelve months. The language "for more than twelve months" has been interpreted to require that the twelve-month period expire by the date a motion or petition to terminate parental rights is filed. *In re A.C.F.,* 176 N.C. App. 520 (2006); *In re J.G.B.,* 177 N.C. App. 375 (2006) (twelve-month period is calculated from the date the child is left in foster care or placement outside the home until the date that a TPR motion or petition is filed). This interpretation provides parents "with at least twelve months' notice" to correct the conditions that led to their child(ren)'s removal before having to respond to a pleading seeking to terminate their parental rights. *In re A.C.F.*, 176 N.C. App. at 527.

The period of one year in foster care or other placement must be pursuant to a *court order*. *In re A.C.F.*, 176 N.C. App. 520 (emphasis in original). A child has not been "removed" when a parent can withdraw his or her consent at any time, such that time a child spent in a placement pursuant only to a voluntary protection plan (e.g., a temporary safety placement) cannot be counted as part of the twelve-month period. *In re A.C.F.,* 176 N.C. App. 520 (reversing TPR; child was not left in foster care for more than twelve months when removal occurred by nonsecure custody order and TPR motion was filed ten months later, even though separation between child and parent occurred with a voluntary protection plan months before entry of the nonsecure custody order). However, time spent outside the home pursuant to a civil custody order can be counted, as can time spent with guardians appointed pursuant to G.S. 7B-600. *See In re L.C.R.*, 226 N.C. App. 249 (2013) (where a neglect matter had been transferred to a

G.S. Chapter 50 civil custody action pursuant to G.S. 7B-911); *In re D.H.H.*, 208 N.C. App. 549 (2010) (rejecting the father's argument to count only the time prior to guardianship, stating that this ground and G.S. 7B-600 are independent and noting the ground does not require the child be in DSS custody).

The court order requiring that a child be removed from the home and which starts the clock on the twelve-month period can be a nonsecure custody order as in *In re J.A.K.*, 812 S.E.2d 716 (N.C. Ct. App. 2018). The twelve-month time period in foster care placement applies when the respondent in the TPR was the "non-removal parent" and did not appear in the underlying abuse, neglect, or dependency action until after the child's adjudication and almost one year after the nonsecure custody order was issued. *In re J.A.K.*, 812 S.E.2d 716 (rejecting argument of respondent father that the statutory period began when father first appeared at a hearing with counsel).

It is not necessary that the period of time in foster care be continuous. *In re Taylor*, 97 N.C. App. 57 (1990) (holding that trial period during which children were placed with parents did not defeat this ground).

3. Willfulness. Appellate cases have emphasized and shaped the meaning of the term "willful" in this ground.

(a) Fault not required. Willfulness, for purposes of this ground, is something less than willful abandonment and does not require a showing of parental fault. *In re J.A.K.*, 812 S.E.2d 716 (N.C. Ct. App. 2018) (willfulness exists when the respondent has an ability to show reasonable progress but is unwilling to make the effort; it does not require a showing of fault); *In re C.R.B.*, 245 N.C. App. 65 (2016); *In re A.W.*, 237 N.C. App. 209 (2014); *In re N.A.L.*, 193 N.C. App. 114 (2008); *In re Bishop*, 92 N.C. App. 662 (1989) (holding that the evidence was sufficient to support a finding of willfulness even though the parent had made some effort and some progress). *Cf. In re Fletcher*, 148 N.C. App. 228 (2002) (affirming termination of mother's rights, but not the father's, on this ground). It is not a prerequisite for a TPR that the parent whose rights are at issue caused the conditions that resulted in the child's placement. *In re A.W.*, 237 N.C. App. 209 (affirming termination of father's rights pursuant to G.S. 7B-1111(a)(2) where the child was placed in DSS custody and removed from his mother's care before paternity was established, but father made almost no efforts to obtain custody despite the repeated attempts by DSS to help him do so).

(b) Parent's ability. For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome the factors that resulted in the child's placement and that the parent was unwilling to make the effort. *In re L.L.O.*, 252 N.C. App. 447 (2017); *In re H.D.*, 129 N.C. App. 318 (2015). *See In re C.C.*, 173 N.C. App. 375 (2005) (holding that the evidence and findings were not sufficient to establish that respondent "willfully" left the children in care); *In re Baker*, 158 N.C. App. 491 (2003) (affirming TPR where the evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services).

(c) Minor parent. In the case of a minor parent, the court must make specific findings showing that the parent's age-related limitations have been adequately considered in relation to willfulness. *In re J.G.B.*, 177 N.C. App. 375 (2006); *In re Matherly*, 149 N.C. App. 452 (2002).

(d) Incarcerated parent. A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. *In re Harris*, 87 N.C. App. 179 (1987); *see also In re Shermer*, 156 N.C. App. 281 (2003) (holding that evidence was insufficient to find willfulness where the incarcerated father wrote to his sons while in prison and informed DSS that he did not want his rights terminated); *Whittington v. Hendren*, 156 N.C. App. 364, 369–70 (2003) (affirming TPR where the court found that "[e]ven though the respondent was incarcerated, he could have made more of an effort to maintain contact with his child," and respondent had foregone the opportunity to attend the TPR hearing).

(e) Some effort does not preclude a finding of willfulness. The fact that a parent makes some efforts does not preclude a finding of willfulness. *See, e.g.*, *In re A.B.*, 253 N.C. App. 29 (2017) (a trial court may find willfulness when a parent has made some attempt to regain custody but has failed to make reasonable progress or exhibit a positive response to the efforts of DSS); *In re A.W.*, 237 N.C. App. 209 (2014) (upholding TPR on this ground where although the father did visit the child seven times in six months, the father made almost no efforts to get the child placed in his custody despite repeated efforts from DSS to engage and assist him in doing so); *In re D.C.*, 225 N.C. App. 327 (2013) (upholding TPR where a three-year-old child had been removed from the home due to serious injuries sustained by a dog attack in the home, the dog was immediately destroyed, and the mother's home had no dogs and was deemed "clean and tidy," but the mother still did not understand the nature of the child's injuries or the trauma he experienced; she failed to set up appointments with the child's therapist; and she waited three and a half years before filing a motion for review to seek help with visitation); *In re J.L.H.*, 224 N.C. App. 52 (2012) (upholding TPR on this ground where respondent mother had participated in some services but failed to participate with her own mental health treatment and was inconsistent in participating with her daughter's therapy); *In re D.H.H.*, 208 N.C. App. 549 (2010); *In re B.S.D.S.*, 163 N.C. App. 540 (2004); *In re Tate*, 67 N.C. App. 89 (1984); *but see In re Nesbitt*, 147 N.C. App. 349 (2001) (reversing TPR because there was insufficient evidence that mother failed to make reasonable progress; noting that even if she had, there was no evidence any failure was willful).

4. Reasonable progress to correct conditions that led to child's removal.

(a) Conditions that led to the child's removal. In *In re B.O.A.*, 831 S.E.2d 305 (N.C. S.Ct. 2019), the North Carolina Supreme Court interpreted the phrase "those conditions that led to the removal of the juvenile" appearing in G.S. 7B-1111(a)(2). As part of its analysis, the supreme court looked to other relevant statutory provisions, including the trial court's authority over parents at disposition in an abuse, neglect, or dependency action under G.S. 7B-904(d1)(3). At disposition, the trial court may order a parent to take appropriate steps

to remedy the conditions that led to the child's adjudication or removal from the parent's custody. A parent's compliance with a judicially adopted case plan is relevant when determining if grounds to terminate that parent's rights exist pursuant to G.S.7B–1111(a)(2). See Chapter 7.7.A and B (discussing the court's authority over parents and others at disposition).

In looking at the language of "conditions of removal," the supreme court held that an expansive reading is appropriate and reversed the court of appeals, which limited its interpretation of conditions of removal to that which was alleged in the abuse, neglect, or dependency petition. The supreme court reasoned that a child's removal "is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation," and a trial court gains a better understanding of the family dynamic as the case progresses. *In re B.O.A.*, 831 S.E.2d at 314. The supreme court held that "conditions of removal" encompasses all factors directly or indirectly contributing to the child's removal, which allows the courts to recognize the complexity of issues that must resolved in abuse, neglect, or dependency cases. In applying the more expansive interpretation of conditions of removal, the supreme court affirmed the TPR after determining there was a nexus between the court-ordered case plan and the complex series of interrelated factors causing the child's removal and that respondent mother failed to make reasonable progress on her case plan. The supreme court noted that its holding did not mean a trial judge has unlimited authority or that "conditions of removal" has no meaning.

(b) What constitutes reasonable progress by a parent. Extremely limited progress is not reasonable, but perfection is not required for a parent to reach the reasonable progress standard. *In re C.N.*, 831 S.E.2d 878 (N.C. Ct. App. 2019); *In re S.D.*, 243 N.C. App. 65 (2015); *see In re A.B.*, 253 N.C. App. 29, 33 (2017) (quoting *In re J.S.L.*, 177 N.C. App. 151, 163 (2006)) ("a parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of 'reasonable progress'."). The supreme court has observed that "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination." *In re B.O.A.*, 831 S.E.2d at 314 (affirming TPR). The supreme court also has found that a parent's limited progress in correcting conditions that led to removal will support a termination of rights under G.S. 7B-1111(a)(2) when findings showed, among other things, "that mother waited too long to begin working on her case plan." *See In re I.G.C.*, 835 S.E.2d 432, 435 (N.C. S.Ct. 2019) (affirming TPR), discussed in subsection (d), below.

Whether a parent is in a position to actually regain custody of the child at the time of the TPR hearing is not relevant in determining whether the parent has made reasonable progress to correct the conditions that led to removal. *In re L.C.R.*, 226 N.C. App. 249 (2013) (transfer of neglect order to a civil custody order was immaterial to showing of reasonable progress; holding respondent is not required to regain custody to defeat TPR on this ground, and conditions resulting in removal do not need to be completely corrected;

trial court looks to whether reasonable progress under the circumstances was made).

(c) Time period for a parent's reasonable progress. The period for evaluating the nature and extent of a parent's reasonable progress extends up to the hearing on the TPR motion or petition. *See In re I.G.C.*, 835 S.E.2d 432 (N.C. S.Ct. 2019) (affirming TPR; considering respondent mother's progress up to time of termination hearing); *In re D.L.W.*, 368 N.C. 835 (2016) (affirming TPR; one finding addressed mother's lack of housing at the time of the termination hearing); *In re A.B.*, 253 N.C. App. 29 (2017) (vacating and remanding TPR order that contained no findings as to mother's conduct or circumstances after the last review hearing up to the TPR hearing; respondent mother and social worker presented testimony upon which findings up to the time of the hearing could be based); *see also In re Pierce*, 356 N.C. 68, 75 n.1 (2002) (decided on an earlier wording of the statute that included a second twelve-month period where the parent must make progress, but noting that under a 2001 amendment that removed that second twelve-month time period, "there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof"); *In re C.L.C.*, 171 N.C. App. 438, 447 (2005) (noting that after deletion of the second-twelve month period in G.S. 7B-1111(a)(2) "[t]he focus is no longer solely on the progress made in the 12 months prior to the petition"), *aff'd per curiam*, 360 N.C. 475 (2006).

(d) Findings must support court's conclusion as to a parent's reasonable progress. The ultimate finding as to a parent's reasonable progress must be the result of a process of logical reasoning based on the evidentiary facts found by the court. *In re A.B.*, 253 N.C. App. 29 (2017).

A conclusion that a parent has not made reasonable progress to correct conditions is not supported by findings when the order contains inconsistent findings and conflicting evidence that were not resolved by the trial court. *See In re L.L.O.*, 252 N.C. App. 447 (2017) (vacating and remanding a TPR order based on G.S. 7B-1111(a)(2) that did not resolve conflicting evidence); *In re A.B.*, 253 N.C. App. 29 (vacating and remanding a TPR order based on G.S. 7B-1111(a)(2) when respondent mother and DSS social worker presented conflicting material evidence on willfulness and reasonable progress that was not resolved in the court's order).

Cases where the findings support the conclusion that parent failed to make reasonable progress to correct conditions that led to child's removal.

- Findings that respondent mother lacked an understanding of, or did not accept responsibility for, the circumstances leading to children's removal was supported by evidence that mother continued to live with father during the juvenile proceeding and placed more importance on their relationship than the safety of the children. Father did not comply with his case plan and denied responsibility for domestic violence and other conditions that led to children's removal. Mother blamed the children and others for the father's return to the home, and she continued to defend father. While mother made some progress on her case plan, she did not comply with the

requirement that she provide a safe and stable home environment for the children. *In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019).

- Respondent mother's limited achievements in correcting conditions were "well-documented" by findings that "showed that mother had waited too long to begin working on her case plan." *In re I.G.C.*, 835 S.E.2d 432, 435 (N.C. S.Ct. 2019). Findings that related to mother's conduct after she agreed to the case plan included that mother did not complete the recommended substance abuse or domestic violence programs and that she missed multiple drug screens, tested positive on two occasions, and committed two DWI offenses. Findings relating to mother's conduct after reunification efforts ceased up to the date of the TPR hearing included that mother did not maintain stable employment or stable housing for six months and moved frequently, signaling instability. Mother's progress at the TPR hearing "was not the level of progress required by her class plan." *In re I.G.C.*, 835 S.E.2d at 435.
- Respondent father's case had two main components: attend parenting classes and stabilize housing and income. Findings showed limited progress in that father completed parenting classes but failed to obtain independent and appropriate housing. Completion of one component did not rebut failure on the other component. *In re J.A.K.*, 812 S.E.2d 716 (N.C. Ct. App. 2018).

Case where findings did not address, or did not sufficiently address, the parent's progress or lack of progress in correcting conditions that led to child's removal.

- Primary condition that led to child's removal was respondent mother's mental health, but other conditions were mother's drug use and DSS's concern for the child's care and well-being. The trial court made no findings at the time of the termination hearing as to mother's progress or lack of progress in correcting her drug use or the conditions of her home. The following findings were insufficient to support the ultimate finding of lack of reasonable progress: findings as to mother's mental health lacked detail in describing what a mental illness "episode" was, how frequently mother had such episodes, and how the episodes "left her incapable of properly caring for [her son]"; and findings describing mother's behavior during visits with her child as "consistently concerning" and "disturbing" lacked any particularity in what behavior it was referring to and how that behavior impacted mother's ability to care for her son. Moreover, testimony of mother's psychiatrist tended to show that mother had made significant progress in addressing her mental health issues, and other evidence showed she had stable housing and income and was not using drugs. *In re Z.D.*, 812 S.E.2d 668, 673 (N.C. Ct. App. 2018).

5. Poverty cannot be basis for TPR. The Juvenile Code explicitly prohibits the termination of a parent's rights for the sole reason that he or she is unable to care for his or her child because of poverty. G.S. 7B-1111(a)(2). North Carolina appellate courts have examined this issue in a limited number of cases.

- Findings in the underlying neglect adjudication order indicated that a lack of consistent and adequate housing and an inability to meet the children's minimal needs led in part to their removal. Findings in the TPR order that mother refused to comply with a case plan

requirement that she create a budgeting plan, her inability to account for where her earnings went, multiple evictions for nonpayment of rent despite being employed, her loss of employment after being incarcerated because of a domestic violence incident, and her driving without a valid driver's license resulting in charges, demonstrated mother's failure to correct the conditions that led to the children's removal and that her failure "was not simply the result of poverty." *In re D.L.W.*, 368 N.C. 835, 846 (2016).

- Father's argument that his inability to obtain housing due to poverty was directly rebutted by the court's finding that his actions were not solely the result of poverty. *In re J.A.K.*, 812 S.E.2d 716 (N.C. Ct. App. 2018)
- The trial court found that mother met five of the requirements for reunification but concluded that she had failed to make reasonable progress when she had not complied with three other requirements: resolve pending criminal charges, obtain a psychological evaluation and follow recommendations, and maintain employment sufficient to meet both her and her child's needs. The order terminating mother's rights was reversed when evidence as to those three requirements indicated that (1) at the time of the hearing mother's criminal charges could have been resolved in a week's time by plea for time served, (2) mother had submitted to a psychological evaluation and attended therapy as recommended by her therapist, which was for "individual counseling services" and not "intensive individual counseling" as found by the trial court, and (3) while mother's monthly income from a part-time job was insufficient to meet her and her child's needs, G.S. 7B-1111(a)(2) does not allow parental rights to be terminated on the sole basis of poverty. *In re S.D.*, 243 N.C. App. 65 (2015).
- When reviewing a TPR based on failure to make reasonable progress under G.S. 7B-1111(a)(2), the court of appeals examined whether the father's rights were terminated solely because of poverty even though the father did not present this issue on appeal. The court of appeals affirmed the TPR noting the father's failure to obtain custody of his daughter has nothing to do with poverty but was instead due to his own inaction. *In re A.W.*, 237 N.C. App. 209 (2014).

C. Failure to Pay a Reasonable Portion of the Child's Cost of Care

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

1. Constitutional challenge. The ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (decided under an earlier version of the Juvenile Code); *In re Clark*, 303 N.C. 592 (1981) (decided under an earlier version of the Juvenile Code).

2. Ability to pay. A finding that the parent is able to pay a reasonable portion of the cost of the child's care or support is essential to termination on this ground. *In re Ballard*, 311 N.C. 708 (1984) (deeming it essential that the court find that a parent has the ability to pay support before terminating for nonsupport on this ground); *In re Clark*, 303 N.C. 592 (1981) (a parent's ability to pay is the controlling characteristic in determining what constitutes a

reasonable portion of the cost of the child's care).

The court must make specific findings that the parent was able to pay some amount greater than what he or she paid (including more than zero if nothing was paid) during the relevant time period but is not required to find a specific amount of support that would have constituted a reasonable portion under the circumstances. *In re N.X.A.*, 254 N.C. App. 670 (2017) (holding no error in ordering TPR; mother paid no support, had annual income of $10,000 to $13,000, claimed her children as dependents for tax purposes resulting in a significant tax refund, and had the ability to pay some amount greater than zero).

An order terminating a parent's rights on this ground will be reversed if the required finding as to the parent's ability to pay is not included. *In re Clark*, 151 N.C. App. 286 (2002) (incarcerated father paid no child support and was not ordered to do so; when there was no finding that father had the ability to pay an amount greater than zero, conclusion that respondent father failed to pay a reasonable portion of his child's care was error).

When a court orders child support, it has determined the reasonable portion of the cost of the child's care based on the parent's ability to pay and the child's needs. When a TPR is based on a parent's willful failure to pay a reasonable portion of the cost of the child's care, and there is an order for child support, the TPR petitioner (or movant) is not required to independently prove the respondent parent's ability to pay. *In re S.T.B.*, 235 N.C. App. 290 (2014) (holding that the trial court's findings that (1) the father failed to pay any amount of his $50/month child support obligation and (2) the court was unaware of any disability that would prevent the father from paying some amount of support were sufficient to establish the father's ability to pay some amount greater than zero); *In re A.L.*, 245 N.C. App. 55 (2016) (affirming TPR of father who only made two child support payments and who was subject to a child support order; father's ability to pay was established by (1) child support enforcement orders, (2) findings that father had signed a memorandum of understanding on two occasions acknowledging that he had the ability to pay the support ordered, and (3) evidence that father was employed as a mechanic and a truck driver with at least $600/month in disposable income).

A parent cannot assert lack of ability or means to contribute to support when the opportunity to do so is lost due to the parent's own misconduct. *In re Tate*, 67 N.C. App. 89 (1984) (parent was not excused from contributing support after she voluntarily quit her various jobs and made no payments, explaining to social worker that she did not feel she had to pay the ordered amount of $10/month because another mother with a child in foster care was not paying support); *In re Bradley*, 57 N.C. App. 475 (1982) (father was removed from prison work-release program after violating program rules by returning from the program intoxicated).

3. Willfulness. As used in G.S. 7B-1111(a)(3), the term " 'willfully'. . . imports knowledge and a stubborn resistance . . . one does not willfully fail to do something which is not in his power to do." *In re Matherly*, 149 N.C. App. 452, 455 (2002) (quoting *In re Moore*, 306 N.C. 394, 411 (2002)). *See In re J.K.C.*, 218 N.C. App. 22 (2012) (finding that the father could not be found to have willfully failed to pay child support because he had attempted to do so but was told by child support enforcement agency that it could not be arranged because he did

not make enough income). In the case of a minor parent, the findings must show adequate consideration of respondent's age-related limitations. *In re Matherly*, 149 N.C. App. 452.

4. Reasonable portion of cost of care. A finding as to the cost of foster care can establish the child's reasonable needs. *In re Montgomery*, 311 N.C. 101 (1984). Determination of a reasonable portion of the cost of the child's care depends on the parent's ability to pay. *In re A.L.*, 245 N.C. App. 55 (2016); *In re Manus*, 82 N.C. App. 340 (1986). Appellate cases have held that this ground can be adjudicated only if there is clear and convincing evidence that respondent is able to pay some amount greater than zero. *See In re J.E.M.*, 221 N.C. App. 361 (2012) (finding that zero support was not a reasonable portion of the cost of care when respondent father was gainfully employed from time to time and was physically and financially able to make some payments); *see also In re T.D.P.*, 164 N.C. App. 287 (2004), and cases cited therein (finding this ground was met even though respondent's prison wages ranged from forty cents to one dollar per day), *aff'd per curiam*, 359 N.C. 405 (2005).

Where a mother was earning approximately $300 per weekend, occasional small sums she gave to the foster parents and children (such as $1, $10, or $20) could not be deemed to be active financial support. Total expenditures by social services in caring for the mother's five children exceeded $315,000. *In re B.S.O.*, 234 N.C. App. 706 (2014).

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

6. Child's placement. Parental rights may be terminated pursuant to G.S. 7B-1111(a)(3) only if the child has been placed in the custody of a DSS, a licensed-child placing agency, a child-caring institution, or a foster home.

In the case *In re E.L.E.*, 243 N.C. App. 301 (2015), the court of appeals examined what qualifies as a "foster home" for purposes of this TPR ground. It looked to the definition of "foster home" in G.S. 131D-10.2(8), which requires that a child be placed in the home by a child-placing agency or that foster care is being provided full-time for two or more children who are unrelated to the adult members of the household by blood, marriage, guardianship, or adoption. In this case, the child was placed with her great aunt and uncle, who were the TPR petitioners. Although initially placed with petitioners by DSS in a neglect action, the trial court ultimately awarded custody of the child to petitioners and transferred the juvenile action to a civil custody action. Because petitioners had custody pursuant to a civil custody order and were related to the child, neither criteria of "foster home" was met, thus, mother's rights could not be terminated pursuant to G.S. 7B-1111(a)(3).

A child may be placed in the custody of a DSS by court order or by operation of law through the execution of a relinquishment pursuant to G.S. Chapter 48. *See In re A.L.*, 245 N.C. App. 55 (2016) (holding child was in custody of county DSS when mother relinquished her parental rights and surrendered the child to DSS for adoption as authorized by G.S. 48-3-701 and 48-3-703); *see also* G.S. 48-3-705(b), (c) (consequences of relinquishment related to custody of child).

D. Failure to Pay Child Support to Other Parent

Where one parent has custody of the child pursuant to a court order or custody agreement of the parents, and the other parent (respondent), for one year or more immediately preceding the filing of the petition or motion, has willfully failed without justification to pay for the child's care, support, and education as required by the court order or custody agreement, failure to pay support is grounds for termination of parental rights (TPR). G.S. 7B-1111(a)(4). The petition or motion to terminate for failure to pay child support must put respondent on notice of this ground by referring to G.S. 7B-1111(a)(4) and/or alleging a willful failure to pay support as required by a court order or other agreement. *See In re I.R.L.*, 823 S.E.2d 902, 906 (N.C. Ct. App. 2019) (when TPR petition did not include any of the foregoing, an order was reversed for not providing sufficient notice in a private TPR proceeding to respondent father of the ground in G.S. 7B-1111(a)(4); petition alleged only that father "[h]as failed to provide substantial financial support or consistent care for the minor child").

1. Agreement or order and failure to pay must be proven. The existence of a child support agreement or order as well as the parent's failure to pay the amount must be established by clear, cogent, and convincing evidence. *See In re I.R.L.*, 823 S.E.2d 902, 905 (N.C. Ct. App. 2019) (although both parents testified in a private TPR proceeding about a support order entered the year the child was born for $50/month, findings were insufficient to support termination for failure to pay child support when the termination order contained no findings indicating that a child support order existed or that respondent father had failed to pay support "as required by" a child support order); *In re J.M.K.*, 820 S.E.2d 106 (N.C. Ct. App. 2018) (in a private TPR proceeding, conclusion that ground in G.S. 7B-1111(a)(4) existed was reversed when there was no evidence of a child support order); *In re D.T.L.*, 219 N.C. App. 219 (2012) (holding that this ground could not be proven where the petition did not allege that there was a decree or custody agreement requiring respondent to pay and no such evidence was introduced at trial); *In re Roberson*, 97 N.C. App. 277, 281 (1990) (stating "[i]n a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed").

2. Agreement or order establishes ability to pay. The order or support agreement may be used to establish what the parent should have reasonably paid. However, there is no requirement that petitioner independently prove or that the court find as a fact respondent's ability to pay support during the relevant time period since the existence of the agreement or order must be established, and it is based on the parent's ability to pay. *See In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Roberson*, 97 N.C. App. 277 (1990).

3. Willfulness: parent may rebut ability to pay. Even though the existence of an agreement or order creates a presumption that the parent has the ability to pay support, the parent may present evidence to prove he or she was unable to pay child support to rebut a finding of willful failure to pay. *See Bost v. Van Nortwick*, 117 N.C. App. 1 (1994) (reversing TPR; overwhelming evidence showed inability to pay due to alcoholism and financial status); *In re Roberson*, 97 N.C. App. 277 (1990) (affirming TPR; father's evidence of emotional

difficulties was insufficient to rebut evidence that his failure to pay was willful); *see also In re J.D.S.*, 170 N.C. App. 244 (2005) (affirming TPR; findings support conclusion that respondent willfully failed to pay support as required by an order entered by a Nevada court in that he only made one partial payment and had significant arrears at time of the TPR hearing).

E. Father's Actions regarding Child Born Out of Wedlock

Grounds for termination of parental rights (TPR) exist where the father of a child born out of wedlock has not, before the filing of the TPR petition or motion,

- filed an affidavit of paternity in a central registry maintained by the North Carolina Department of Health and Human Services (DHHS),
- legitimated the child pursuant to G.S. 49-10 or 49-12.1 (special proceedings before the clerk of superior court) or filed a petition to do so,
- legitimated the child by marriage to the mother,
- provided substantial financial support or consistent care with respect to the child and mother, or
- established paternity through G.S. 49-14 (civil action to establish paternity), G.S. 110-132 (affidavits of parentage executed by putative father and mother for purposes of child support), G.S. 130A-101 (affidavits of parentage for purposes of registration of child's birth signed by the mother and putative father or by the mother, her husband, and the putative father when there is genetic marker testing of paternity), G.S. 130A-118 (amendment of child's birth certificate based on parents' marriage after the child's birth or a court order relating to parentage), or other judicial proceeding.

G.S. 7B-1111(a)(5).

1. All prongs of ground required. Petitioner must prove that respondent failed to take any of the listed actions. *See, e.g., In re S.C.R.,* 198 N.C. App. 525 (2009); *In re M.A.I.B.K.,* 184 N.C. App. 218 (2007) (both decided under prior law). The court must make findings of fact based on clear, cogent, and convincing evidence addressing each of the statutorily required elements in G.S. 7B-1111(a)(5)a.–e. G.S. 7B-1109(f); *In re L.S.*, 822 S.E.2d 506 (N.C. Ct. App. 2018) (DSS offered no evidence that the children were born out of wedlock or that respondent father had failed, before the filing of the TPR petition, to act as required by G.S. 7B-1111(a)(5)a., b., c., or e.; a minimal proffer of evidence as to G.S. 7B-1111(a)(5)d. had been made at trial but was not sufficient to support an adjudication); *In re J.M.K.*, 820 S.E.2d 106 (N.C. Ct. App. 2018) (reversing TPR when only three of the five subsections were addressed in the order).

2. Affidavit of paternity filed with DHHS. The petitioner or movant must inquire of DHHS to determine whether an affidavit of paternity has been filed. DHHS's certified reply must be presented to and considered by the court. G.S. 7B-1111(a)(5)a. The inquiry is made to

Division of Social Services
Adoption Review Team
820 S. Boylan Ave.
2411 Mail Service Center
Raleigh, NC 27699-2411
Telephone: 919-527-6370.

3. Substantial financial support or consistent care. The Juvenile Code does not define "substantial financial support" or "consistent care"; however, these terms have been discussed by the North Carolina Court of Appeals. Looking to the dictionary definition of "consistent", the court of appeals stated " 'consistent' means with 'regularity, or steady continuity throughout: showing no significant change, unevenness, or contradiction.' " *In re A.C.V.*, 203 N.C. App. 473, 478 (2010) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 484 (1976)). In applying the definition, the court of appeals determined the father failed to provide consistent care to the mother, when during her pregnancy, he only made a few phone calls and attended some parenting classes and an ultrasound. *In re A.C.V.*, 203 N.C. App. 473.

Regarding "substantial support", the court of appeals held that in a TPR action, the father must have provided the support directly to the mother and child, and at a minimum he should have provided support that was requested of him: gas money, medical co-pays, and general financial support during the pregnancy. *See In re A.C.V.*, 203 N.C. App. 473 (distinguishing the TPR statute from a similar consent to adoption statute (G.S. 48-3-601(2)b.4.II) that uses the word "for" rather than "to"). The court of appeals has also held that a finding regarding the respondent father's ability to pay is not required. *See In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Hunt*, 127 N.C. App. 370 (1997). Cases have not addressed whether the respondent could defeat that prong of the ground by proving that he lacked the ability to provide substantial support or consistent care.

4. Knowledge of child's existence. The fact that the father of a child born out of wedlock does not know of the child's existence is not an automatic defense to a TPR under this ground. North Carolina appellate courts have analyzed this issue in the contexts of this TPR ground and a similarly worded adoption statute, G.S. 48-3-601 (persons whose consent is required for adoption). Interpreting these statutes, the appellate courts have held that a father's lack of knowledge that he has a child is not a bar to termination of his rights and does not prevent an adoption from proceeding without his consent. *See A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006) (affirming TPR where mother deceived father, claiming that she had miscarried, and father knew of child's existence only when served with TPR petition); *In re T.L.B.*, 167 N.C. App. 298 (2004) (affirming TPR where father claimed not to have known of child's existence).

The issue of whether and how a father's lack of knowledge of the child's existence impacts his parental rights has also been analyzed in the constitutional context. The North Carolina Supreme Court analyzed the particular facts surrounding a putative father's attempt to protect his parental rights when he learned of his child's existence, of which the mother intentionally had not informed him, six months after the child's birth. The court concluded that the father's

constitutional rights would not be violated by allowing a pending adoption to proceed without his consent. *In re Adoption of S.D.W.*, 367 N.C. 386 (2014). In doing so, the supreme court did not address the analysis undertaken by the court of appeals, which had reversed the trial court and remanded out of concern that the statute regarding who must consent to adoption may be unconstitutional. The supreme court also did not examine prior North Carolina cases addressing the issue (such as *In re Baby Girl Dockery*, discussed below).

Instead, the court focused on "the extent to which a natural father's biological relationship with his child received protection under the Due Process Clause," the question articulated by the U.S. Supreme Court in *Lehr v. Robertson*, 463 U.S. 248, 258 (1983). *In re Adoption of S.D.W.*, 367 N.C. at 391. Using *Lehr* as the "backdrop" for analysis, the supreme court stated that North Carolina's statutory framework recognized that a concern for a biological father's interest exists only in those men who have "grasp[ed] the opportunity [to develop a relationship with their offspring] and accept[ed] some measure of responsibility for the child's future." *In re Adoption of S.D.W.*, 367 N.C. at 394 (quoting *Lehr*, 463 U.S. at 262). According to *Lehr*, however, statutes designating the class of biological fathers entitled to notice may be unconstitutional (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are beyond the control of an interested putative father. Pursuant to this second prong, the North Carolina Supreme Court then examined whether obtaining notice of the child's birth was beyond the putative father's control, concluding that it was not, and emphasizing the facts in the case:

> [The biological father] . . . demonstrated only incuriosity and disinterest. He knew that [the mother] was fertile because she already had a child when they met. He knew that, despite [the mother's] purported use of birth control, he had impregnated her once, leading to an abortion. He assumed that her subsequent birth control methods would be effective without making detailed inquiry. He and [the mother] continued an active sex life, even after they broke up. From [the father's] perspective, the sex was unprotected and contraception was wholly [the mother's] responsibility. The burden on him to find out whether he had sired a child was minimal, for he knew how to contact [the mother]. All the while, [the child] continued to live and bond with his adoptive parents.

In re Adoption of S.D.W., 367 N.C. at 395.

The supreme court held that the father was not deprived of due process: the father "had the opportunity to be on notice of the pregnancy and . . . he failed to grasp that opportunity by taking any of the steps that would establish him as a responsible father," therefore falling outside "the class of protected fathers who may claim a liberty interest in developing a relationship with a child." *In re Adoption of S.D.W.*, 367 N.C. at 396.

In a subsequent adoption case, *In re Adoption of B.J.R.*, 238 N.C. App. 308 (2014), the court of appeals examined this same adoption statute, G.S. 48-3-601, in the context of a father's claim that his consent should have been required for his child's adoption and that his due process rights were violated by the determination under the adoption statutes that his consent

was not required. Although in this case the father knew of the child's existence and filed a G.S. Chapter 50 custody action with a request for genetic testing prior to the filing of the adoption petition, the court of appeals cited both *Lehr* and *In re Adoption of S.D.W.* in reasoning that the 17-year-old father's actions, many of which were consistent with his desire to develop a relationship with the child, were not sufficient to meet the statutory criteria in G.S. 48-3-601, nor sufficient to demonstrate that he had "grasped the opportunity" to develop a relationship with his child such that he had a constitutionally protected right of parentage.

It is worth noting that in both the *In re Adoption of S.D.W.* and *In re Adoption of B.J.R.* opinions, the appellate courts' holdings were very fact-specific. It is likely that the outcome of future cases addressing similar issues will likewise depend to a great extent on the facts surrounding a putative father's circumstances. For example, the court of appeals in *In re R.D.H.*, III, 828 S.E.2d 170, 174 (N.C. Ct. App. 2017), a TPR based on neglect, stated, "[w]hile there may be certain situations where a man should 'know' he is likely the father of a child, this is not one of them." The evidence in this case showed the mother and respondent did not have a relationship but instead had meetings that were sexual in nature, and the child was named after a different man that the mother identified as the potential father.

In an earlier case, *In re Baby Girl Dockery*, 128 N.C. App. 631 (1998), the court of appeals rejected a putative father's constitutional challenge to an order refusing to allow him to intervene in an adoption proceeding, even though his failure to act sooner was due in part to his lack of knowledge of the child's existence. The court held that the statutory scheme making his consent unnecessary violated neither due process nor equal protection and was "a reasonable means of addressing the legitimate state concern that only those persons who have, in addition to a biological link, a parental relationship of care and provision for a minor child be afforded the right to the requirement of consent before his or her parental rights are severed by such child's adoption." *In re Baby Girl Dockery*, 128 N.C. App. at 635.
Other cases addressing the constitutionality of this ground but unrelated to the issue of knowledge of the child's existence, are discussed in subsection 7, below.

5. Judicial paternity determinations and name on birth certificate. For purposes of the ground to terminate parental rights under G.S. 7B-1111(a)(5), the petitioner must prove the respondent father has not "established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding." This means the father has not

- judicially established his paternity in a civil action to establish paternity (G.S. 49-10), a declaratory judgment (G.S. 1-253), or other civil or criminal action where paternity is an element of the claim (e.g., criminal nonsupport (G.S. 49-2; 14-322) or custody (G.S. 50-13.1));
- executed an affidavit of parentage along with the child's mother within ten days of the child's birth (G.S. 130A-101) or as part of a child support case (G.S. 110-132); or
- sought an amendment of the child's birth certificate as provided for in G.S. 130A-118.

This prong of the TPR ground, G.S. 7B-1111(a)(5)e., was enacted by S.L. 2013-129, sec. 35, effective for all actions pending or filed on or after October 1, 2013. Prior to its enactment, the court of appeals held in a TPR action based on G.S. 7B-1111(a)(5) that there is a rebuttable

presumption that respondent father took the required legal steps necessary to establish paternity if he is named on the child's amended birth certificate. *In re J.K.C.*, 218 N.C. App. 22 (2012). *Cf. Gunter v. Gunter*, 228 N.C. App. 138 (2013) (unpublished) (mother could not rely on holding in *In re J.K.C.* to support her argument that husband's name on child's birth certificate judicially established his paternity of the child).

See Chapter 5.4.B.7 for further discussion of paternity, putative fathers, and birth certificates.

Practice Note: Although the statutory language in G.S. 7B-1111(a)(5)e. refers to the establishment of paternity, some of the identified statutes have the legal effect of acknowledging paternity but do not establish paternity. For example, G.S. 130A-101 provides for the execution of an affidavit of parentage for the purposes of registering the child's birth, to be executed within ten days of the child's birth. As a result of a properly executed affidavit, the father's name will be listed on the child's birth certificate. However, G.S. 130A-101(f) does not include a presumption or adjudication of paternity but instead provides that "a certified copy of the affidavit shall be admissible in any action to establish paternity."

Resources:
Issues related to paternity are complicated. For a detailed discussion of relevant topics, see SARA DEPASQUALE, FATHERS AND PATERNITY: APPLYING THE LAW IN NORTH CAROLINA CHILD WELFARE CASES (UNC School of Government, 2016).

For a shorter discussion, see
- Sara DePasquale, *New Book! Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 17, 2016).
- Sara DePasquale, *Legitimation versus Paternity: What's the Difference?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (March 23, 2016).

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6. Admissibility of paternity test. A TPR action is a civil action where the issue of paternity may be raised as an element of the claim or defense. When paternity is at issue and paternity testing is sought, the court must order paternity testing. *See* G.S. 8-50.1(b1); *In re J.S.L.*, 218 N.C. App. 610 (2012) (private TPR action holding G.S. 8-50.1(b1), the evidence statute requiring paternity testing when requested at "the trial of any civil action in which the question of parentage arises" applies; reversing the trial court's adjudication of this ground, where the father had denied paternity and requested testing, and the trial court denied his request).

Even if paternity test results show a high likelihood that the respondent is not the child's father, the court may consider those results only if they are properly introduced into evidence. The results of testing ordered under G.S. 8-50.1(b1) create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. *In re L.D.B.*, 168 N.C. App. 206 (2005) (reversing order regarding paternity and TPR when court excluded named respondent from TPR action based on test results, which were not admitted into evidence, that showed a zero probability of parentage; concluding the respondent's right to offer evidence regarding the allegations in the TPR petition, including whether he is actually the child's parent, is inherent in due process protections that require an adequate opportunity to be heard).

7. Constitutionality. The court of appeals, in *In re A.C.V.*, 203 N.C. App. 473 (2010), affirmed an order terminating a teenage father's rights to his newborn child based on G.S. 7B-1111(a)(5). The court expressed concerns about the constitutionality of applying this ground to the facts of the case. Noting that none of the trial court's 123 findings indicated that the father was unfit to parent the child or that his home was unsuitable, the court said, "It is difficult, under the circumstances of this case, to conclude that [the father's] constitutional rights were assured through the application of section 7B-1111(a)(5)." *In re A.C.V.*, 203 N.C. App. at 482. The court affirmed the TPR order on the basis that it was bound by cases such as *Owenby v. Young*, 357 N.C. 142 (2003) (stating that a finding of any ground for termination under G.S. 7B-1111 will result in forfeiture of a parent's constitutionally protected status) and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006). See also the discussion of constitutional issues related to this ground in subsection 4, above.

F. Dependency

Where the parent is incapable of providing for the proper care and supervision of the child, such that the child is dependent as defined by G.S. 7B-101(9), there is a reasonable probability that the parent's incapability will continue for the foreseeable future, and the parent lacks an appropriate alternative child care arrangement, a ground for termination of parental rights (TPR) exists. The parent's incapability may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. G.S. 7B-1111(a)(6).

To adjudicate the ground in G.S. 7B-1111(a)(6), the court must find that the parent (1) does not have an ability to provide care or supervision to the child and (2) lacks an available alternative child care arrangement for the child. *In re Z.D.*, 812 S.E.2d 668 (N.C. Ct. App. 2018); *In re D.T.N.A.*, 250 N.C. App. 582 (2016).

1. Constitutional challenge. This ground does not violate the equal protection clause or deny due process. *In re Montgomery*, 311 N.C. 101 (1984) (decided under an earlier version of the Juvenile Code).

2. Lack of alternative child care required. This ground cannot be established without findings supporting a conclusion that the parent lacks an appropriate alternative child care arrangement. *In re N.B.*, 200 N.C. App. 773 (2009); *see also In re C.N.C.B.*, 197 N.C. App. 553 (2009). For a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives; it is not enough that the parent merely goes along with a plan created by DSS. *In re L.H.*, 210 N.C. App. 355 (2011). *See also In re K.O.*, 223 N.C. App. 420 (2012) (holding that respondent mother could not claim she had an alternative child care arrangement with an unrelated acquaintance where this acquaintance had been awarded permanent custody of the child by the court, the acquaintance did not have custody at the mother's request, and the mother had no ability to decide custody).

Alternative child care arrangements suggested by the parent are not "appropriate" if they cannot be approved by DSS. In the case of *In re N.T.U.*, 234 N.C. App. 722 (2014), three

alternative placements were provided to DSS by an incarcerated respondent mother, but none could be approved by DSS: one was incarcerated, one physically disciplined another child in front of DSS, and another demonstrated a lack of interest in the child. *See also In re L.R.S.*, 237 N.C. App. 16 (2014) (child care arrangement suggested by mother was not shown to be viable).

A finding that respondent father had never offered another child care placement was contradicted by evidence in the case file. The father had recommended a cousin for placement in the underlying dependency case, and that cousin was approved by the court but not utilized by DSS because respondent believed the child remaining in his foster care placement was better for the child. *In re D.T.N.A.*, 250 N.C. App. 582 (2016) (order terminating father's parental rights pursuant to G.S. 7B-1111(a)(6) reversed).

3. Evidence of incapability to provide proper care or supervision of the child. This ground cannot be established without findings supporting a conclusion that the parent does not have the ability to provide care or supervision to the child. The parent's incapability must be proved by clear and convincing evidence. G.S. 7B-1111(b) (petitioner or movant has the burden to prove the facts justifying termination by clear and convincing evidence). *See, e.g.*, *In re Scott*, 95 N.C. App. 760 (1989) (holding that the physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's findings and termination order); *see also In re Small*, 138 N.C. App. 474 (2000) (holding that the finding that the respondent was incapable of providing proper care to her children was not supported by clear and convincing evidence); *In re D.T.N.A.*, 250 N.C. App. 582 (2016) (holding evidence did not support the court's findings that respondent father was incapable of providing proper and supervision because he had failed to comply with his case plan, engaged in poor decision making, was unable to provide for the child's daily needs, and used drugs; court's finding that assumed the respondent's refusal to take drug tests would have resulted in positive results is not supported by the record, which included judicial notice of the court file that contained permanency planning orders where the court found the respondent had negative drug screens as part of his criminal probation and a court report that stated respondent had tested negative for illegal substances; further holding even if drug use was proven, the petitioner has the burden of showing that abuse prevents the parent from providing proper care and supervision for the child, and there was no such evidence).

The cause of the parent's incapability to provide proper care and supervision may be based on any cause or condition and is not limited to certain types of conditions. *See In re L.R.S.*, 237 N.C. App. 16 (2014) (affirming TPR where respondent's incapability was based on her incarceration; explaining 2003 amendment to G.S. 7B-1111(a)(6) that removed limiting conditions for basis of parent's incapability). Note that before statutory amendments in 2003, this ground required that the parent's incapacity be due to substance abuse, "mental retardation" (now diagnosed as "intellectual disability"), mental illness, organic brain syndrome, or any other similar cause or condition. In 2012, the court of appeals relied on an older case that examined the former language of the statute and held that this ground was not established where there was no evidence that the father, who was incarcerated, was incapable of providing care and supervision due to a condition specified in the statute or any other similar cause or condition. *In re J.K.C.* 218 N.C. App. 22 (2012) (looking to *In re Clark*, 151

N.C. App. 286 (2002)). To the extent the court of appeals relied on *In re Clark*, that reliance was misplaced. *See In re L.R.S.*, 237 N.C. App. 16 (2014) (discussing significance of the change in the statutory language related to the *In re Clark* and *In re J.K.C.* opinions).

Termination under this ground does not require that the parent's incapability be permanent or that its precise duration be known, only that there is a reasonable probability that such incapability will continue for the foreseeable future. *In re H.N.D.*, 827 S.E.2d 329, 335 (N.C. Ct. App. 2019) (affirming TPR; determination of a reasonable probability that mother's incapability to provide proper care and supervision would continue for the foreseeable future was based on mother's stated intent to keep father in her and the children's lives "in spite of the enduring pattern of violence [m]other has suffered" during their troubled history together); *In re N.T.U.*, 234 N.C. App. 722 (2014) (affirming TPR order where the respondent mother had been incarcerated for three years on charges relating to homicide and bank robbery and had not received a trial date, the child had been in DSS custody for two-thirds of his life, and none of the alternative child care arrangements suggested by respondent could be approved for placement); *see also In re L.R.S.*, 237 N.C. App. 16 (2014) (where child had been in DSS custody since the age of two months due to mother's pretrial incarceration and subsequent conviction on federal charges resulting in a sentence of 38 months, the trial court properly found there was a reasonable probability that the incapability would continue for the foreseeable future; statute no longer requires incapability continue throughout child's minority).

A mental health evaluation conducted a year before a termination hearing can support a termination of parental rights based on dependency when "the persistence of [the] personality problems" is characterized as "not easily amendable to change" and there is a lack of mental health treatment. *In re A.L.L.*, 254 N.C. App. 252, 267 (2017) (citations omitted) (affirming TPR based on two prior mental health assessments that showed mother's longstanding mental health conditions and her repeated failures to follow treatment recommendations necessary to care for her children). *Cf. In re Z.D.*, 812 S.E.2d 668 (N.C. Ct. App. 2018) (reversing TPR; evidentiary findings in a private TPR proceeding were insufficient to support the ultimate finding that respondent mother had a current incapability that would continue for the foreseeable future; findings as to mother's mental health and parenting ability related to mother's history rather than her progress (or lack of progress) over the fifteen months prior to the termination hearing and included no specific findings regarding her condition, mental health, and alleged incapability at the time of the hearing; mother's psychiatrist testified that mother was participating and committed to her treatment and had been symptom free for over a year).

In the case of a minor parent, the court must adequately address the parent's capacity (or lack thereof) and whether his or her transition to adulthood would cure the basis of the incapacity. *In re Matherly*, 149 N.C. App. 452 (2002) (reversing and remanding TPR; noting respondent was 15 years old when her child was first placed in DSS custody, 17 years old when the TPR petition was filed, and as an unemancipated minor was legally unable to establish her own residence as required by the case plan).

4. Diligent efforts not a prerequisite. The court will not read into G.S. 7B-1111(a)(6) a requirement that DSS make "diligent efforts" to provide services to parents before proceeding to seek termination of parental rights; any such requirement must come from the legislature. *In re Guynn*, 113 N.C. App. 114 (1993).

5. GAL for respondent not required. Before a 2005 amendment, the trial court was required to appoint a guardian ad litem (GAL) for the parent when the ground for termination in G.S. 7B-1111(a)(6) was alleged, and a number of cases were reversed because the court failed to appoint a GAL. Under current law, appointment of a GAL for the parent is discretionary and based upon a determination that the parent is incompetent. Note that appointment of GAL for a minor respondent parent is mandatory. G.S. 7B-1101.1(b)−(f). See section 9.4.B, above, and Chapter 2.4.F (relating to GAL appointments for parents).

G. Abandonment

Where the parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion, a ground for termination of parental rights (TPR) exists. G.S. 7B-1111(a)(7). Additionally, a parent's rights may be terminated on this ground where the parent voluntarily abandoned an infant under North Carolina's "safe surrender" law and at least sixty consecutive days have passed immediately preceding the filing of a TPR petition or motion. *See* G.S. 7B-500, discussed in Chapter 5.5.B.3.

Abandonment is also included in the definition of "neglected juvenile" and may also be the basis to TPR on the ground of neglect pursuant to G.S. 7B-1111(a)(1). *See* G.S. 7B-101(15) (definition of "neglected juvenile"); *In re T.J.F.*, 230 N.C. App. 531 (2013). See also section 9.11.A, above, and specifically subsection 7.

1. Six-month time period. The critical period for a finding of abandonment of a juvenile (unrelated to the safe surrender of an infant) is at least six consecutive months immediately preceding the filing of a TPR petition or motion. G.S. 7B-1111(a)(7). *See In re Young*, 346 N.C. 244, 252 (1997) (reversing TPR order on the basis that the mother's conduct during the relevant six-month period did not manifest "a willful determination to forego all parental duties and relinquish all parental claims to the child"); *In re S.Z.H.*, 247 N.C. App. 254 (2016) (reversing TPR order when both petitioner and respondent in private TPR proceeding testified that respondent called child during approximately half of the relevant six-month period and asked to attend child's birthday party which was to occur during that time). However, the trial court may consider the respondent's conduct outside this six-month window for the purpose of evaluating the respondent's credibility and intentions. *See In re D.E.M.*, 254 N.C. App. 401 (2017) (looking back to months before relevant six-month period for TPR ground when determining that mother's actions of failing to visit, contact, or provide for the child were willful), *aff'd per curiam*, 370 N.C. 463 (2018); *In re C.J.H.*, 240 N.C. App. 489 (2015) (it was appropriate for the trial court to examine the respondent's history of sporadic contact with the child outside the six-month period to evaluate whether his requests for visitation within the six-month period were made in good faith). While a trial court may consider a parent's conduct outside the six-month period to evaluate the parent's credibility and intentions,

actions of the parent outside the six-month period will not preclude the trial court from finding willful abandonment pursuant to G.S. 7B-1111(a)(7) if the parent "did nothing to maintain or establish a relationship with [the child] during the determinative six-month period." *In re C.B.C.*, 832 S.E.2d 692, 697 (N.C. S.Ct. 2019).

2. Defining abandonment. The supreme court has defined abandonment as a parent's willful or intentional conduct evincing a settled purpose to forego all parental duties and relinquish all parental claims. *Pratt v. Bishop*, 257 N.C. 486 (1962) (adoption case); *In re Young*, 346 N.C. 244 (1997) (in private TPR case, abandonment may be implied from parental conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims). *See also In re C.B.C.*, 832 S.E.2d 692 (N.C. S.Ct. 2019) and *In re E.H.P.*, 831 S.E.2d 49 (N.C. S.Ct. 2019) (both private TPR cases adopting definition set out in *In re Young*). Abandonment also has been defined as willful neglect and refusal to perform natural and legal parental obligations of care and support. If a parent withholds the parent's presence, love, care, and opportunity to display filial affection, and willfully neglects to lend support and maintenance, the parent relinquishes all parental claims and abandons the child. *Pratt*, 257 N.C. 486; *In re N.D.A.*, 833 S.E.2d 768, 773 (N.C. S.Ct. 2019) and *In re E.H.P.*, 831 S.E.2d 49, 52 (N.C. S.Ct. 2019) (both quoting *Pratt*).

An integral part of abandonment is willful intent, which is a question of fact. *In re N.D.A.*, 833 S.E.2d 768 (N.C. S.Ct. 2019); *Pratt*, 257 N.C. 486; *In re C.B.C.*, 832 S.E.2d 692, 695 (quoting *Pratt*). For purposes of abandonment, willfulness requires "more than an intention to do a thing, there must also be purpose and deliberation." *In re E.B.*, 834 S.E.2d 169, 174 (N.C. Ct. App. 2019) and *In re D.M.O.*, 250 N.C. App. 570, 572–73 (2016) (both quoting *In re S.R.G.*, 195 N.C. App. 79, 84 (2009)). Willful intent for abandonment under G.S. 7B-1111(a)(7) is "something greater" than the willful intent necessary for leaving a child in foster care without making reasonable progress under G.S. 7B-1111(a)(2). *In re D.M.O.*, 250 N.C. App. at 576.

Because willful intent is integral to a determination of abandonment and is a question of fact, there must be evidentiary findings to support an ultimate finding of willful intent. *In re D.M.O.*, 250 N.C. App. at 573; *In re I.R.L.*, 823 S.E.2d 902, 905 (N.C. Ct. App. 2019) (quoting *In re D.M.O.*). In *In re I.R.L.*, a private TPR proceeding, the finding of willfulness was "especially important" because during the relevant six-month period, respondent father was subject to a domestic violence protection order that prohibited contact with mother, who had custody of the 3-year-old child. When the termination order did not address the willfulness of father's conduct, the findings did not support termination for abandonment, even though the order included findings that during the relevant six-month period, father knew the child's location but had not seen, visited, or inquired about the child, or provided any substantial financial support for the child. *In re I.R.L.*, 823 S.E.2d at 905 (noting that, given the child's age, "any communication with, gifts to, or requests to visit" the child would necessarily have been directed to mother, which would have violated the no-contact provision of the DVPO).

That a prior petition to terminate a parent's rights on the ground of willful abandonment was denied does not preclude a trial court in a second termination proceeding on the same ground

from finding that the same parent has willfully withheld love, care and affection from the child during the relevant six-month period. *In re C.B.C.*, 832 S.E.2d 692 (N.C. S.Ct. 2019) (2016 TPR petition on ground of willful abandonment denied; 2018 petition on same ground allowed).

3. Evidence of abandonment. Evidence of abandonment was sufficient in the following cases:

- Findings demonstrated that during the determinative six-month period (the last three months of which father was incarcerated), respondent father did not pursue a relationship with the child as he sent no cards or letters other than a birthday card sent from prison after service of the petition to terminate his rights, did not contact the child's custodians to inquire about the child's well-being despite having their contact information and not being prohibited from doing so by the custody order, did not seek to modify the custody order, and had not paid support from pre-incarceration earnings. The supreme court went on to note that other findings demonstrated that father had had no contact with the child or her custodians for nearly a year before the filing of the petition despite having "the ability to make at least some contact," all of which supported the conclusion of willful abandonment. *In re C.B.C.*, 832 S.E.2d 692, 696 (N.C. S.Ct. 2019).
- In a private TPR proceeding, respondent father's argument that he was forbidden by a temporary custody judgment from contacting his children was rejected as there was sufficient evidence that supported the trial court's determination of abandonment. Father admitted having had no contact with his children during the determinative six-month period and for several years after entry of the temporary custody judgment. Although father was incarcerated for most of the determinative six-month period, he filed a motion to suspend his obligation to pay child support during his incarceration but made no effort to modify the custody judgment to allow contact with his children. *In re E.H.P.*, 831 S.E.2d 49 (N.C. S.Ct. 2019).
- Unchallenged findings supported the trial court's conclusion of abandonment. Before the relevant six-month period, father stated that he was "just going to allow [his] sister to handle" the child's care and placement. During the relevant-six month period, father moved to California without telling DSS, failed to attend permanency planning hearings and a child support hearing, did not request a single visit despite weekly visits being authorized, and did not make any Skype calls to the child before the TPR petition was filed, despite having an opportunity to do so. *In re E.B.*, 834 S.E.2d 169, 174–75 (N.C. Ct. App. 2019).
- The trial court's order terminating parental rights for willful abandonment was affirmed where during the six months in question, the respondent did not provide timely and consistent financial support for the child; before the six-month period in question, the respondent did not pay sufficient support until ordered to do so and then did not pay consistently; and the respondent failed to make a good faith effort to visit the child or to maintain or reestablish a relationship with the child. The respondent's last-minute efforts at financial support and visitation did not undermine the trial court's conclusion of abandonment. *In re C.J.H.*, 240 N.C. App. 489 (2015).
- The trial court's conclusion of willful abandonment was supported by its findings showing that during the six-month determinative period the father made no effort to

remain in contact with his children or their caretakers and neither provided nor offered anything toward their support. The father's single phone call during the six-month period could not be deemed material enough to potentially change the outcome. Although the father had been jailed and then deported during that time, the court of appeals analyzed deportation similarly to incarceration, stating that like incarceration, deportation should serve as "neither a sword nor a shield in a termination of parental rights decision." *In re B.S.O.*, 234 N.C. App. 706, 711 (2014) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10 (2005)). In comparing deportation and incarceration, the court of appeals in *In re B.S.O.*, stated that a deported parent has more opportunities than an incarcerated parent to support a child. A deported parent can communicate with a child, earn money that is sent to support a child, and even pursue legal action to attempt to have the child returned to his or her custody. In *In re D.M.O.*, 250 N.C. App. 570 (2016), the court of appeals notes that an incarcerated parent has fewer opportunities to show affection and have contact with a child than a deported parent.

Evidence of abandonment was not sufficient in the following cases:

- In a private TPR case, father's unchallenged testimony showed that he unsuccessfully attempted to make arrangements to visit the child. The trial court made no determination regarding father's credibility or findings about whether father, who was incarcerated, had the ability to contact the child or petitioner, or pay financial support during the relevant period. The lack of findings addressing father's ability, which went to father's intent/willfulness, did not support a determination of willful abandonment under G.S. 7B-1111(a)(7). *In re N.D.A.*, 833 S.E.2d 768, 776 (N.C. S.Ct. 2019).
- During the relevant six-month period, father filed a motion to modify a G.S. Chapter 50 custody order and requested sole custody of his children who were in the custody of their maternal grandmother. Father's act in seeking sole custody demonstrated that he did not intend to forego all parental duties and relinquish all parental rights to the children. The trial court erred in concluding that father's rights should be terminated pursuant to G.S. 7B-1111(a)(7). Additionally, the trial court's reliance on a consent order entered in a Chapter 50 custody action between father and grandparents that included a provision that grandmother would file a petition to terminate father's rights that no other party, including father, would oppose was error because that order is void as against public policy and is neither a properly executed consent or relinquishment under the adoption statutes. *In re C.K.C.*, 822 S.E.2d 741, 745 (N.C. Ct. App. 2018).
- In a private TPR case, findings that mother failed to visit child, attend his sports games, or contact petitioner father during the relevant six-month period were not sufficient to establish mother's actions were willful when mother was incarcerated all but 33 of the 180 relevant days and struggled with addiction issues for which she received treatment during the same relevant period. No findings addressed how mother's incarceration, addiction issues, or participation in a drug treatment program while in custody might have affected her opportunities to exercise visitation, communicate with her child, or attend games, or whether mother had made the effort or had the ability to exercise any of those rights but failed to do so during the relevant period. *In re D.M.O.*, 250 N.C. App. 570 (2016) (additionally, on remand, the trial court was instructed to resolve material conflicts in the evidence presented by mother and father as to her efforts to communicate

with father and contact the child during the relevant period).

- Finding that father had failed to provide a plan for the child and failed to comply with his own case plan was unsupported by evidence and other findings that father substantially complied with his case plan. Additional findings that respondent worked part-time and supplemented that income by playing music, was current in his monthly child support obligation, made his home appropriate for a child by cleaning it and relinquishing his pit bulls, attended the majority of visits with the child, and successfully completed a parenting program did not show an intent to willfully forego parental duties and did not support conclusion that father willfully abandoned his child. *In re D.T.N.A.*, 250 N.C. App. 582 (2016).
- In a private TPR case, the trial court's finding of willful abandonment during the six months immediately preceding the filing of the TPR petition was not supported by the evidence because the respondent was under a court order not to have contact with the children during the six-month period, and he filed a civil action seeking visitation, which showed he did not intend to forego his role as a parent. *In re D.T.L.*, 219 N.C. App. 219 (2012).
- Evidence was not sufficient to establish the abandonment ground where the court's findings did not "clearly show that the parent's actions [were] wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. 79, 87 (2009) (finding that the mother had visited eleven times during the relevant six-month period); *see also In re S.Z.H.*, 247 N.C. App. 254 (2016) (evidence showed respondent contacted child the first half of the relevant six-month period and attempted to communicate with child after that but was stopped by petitioner from doing so).
- Although the father had not visited or asked for visits during the relevant six months and had not regularly sent cards or gifts, the appellate court held that findings did not support willful abandonment because the father had been instructed by his attorney in the criminal case not to contact the child or mother, the DSS protection plan provided for no contact, and he had been making support payments during the relevant six-month period. *In re T.C.B.*, 166 N.C. App. 482 (2004).

Evidence of the following circumstances is insufficient, standing alone, to determine abandonment:

- Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. *In re McLemore*, 139 N.C. App. 426 (2000); *In re C.B.C.*, 832 S.E.2d 692 (N.C. S.Ct. 2019) (speaking to incarceration); *In re D.M.O.*, 250 N.C. App. 570, 575 (2016) (quoting *McLemore*, 139 N.C. App. at 431) ("[I]ncarceration, standing alone, neither precludes nor requires a finding of willfulness" in the context of abandonment).
- Failure to pay support, in itself, does not constitute abandonment. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). However, the fact that a parent paid some support during the relevant six-month period may not preclude a finding of willful abandonment. *In re Adoption of Searle*, 82 N.C. App. 273 (1986).

H. Murder, Voluntary Manslaughter, and Felony Assault of Child or Parent

Grounds for termination of parental rights exist where the parent has

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

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

1. Manner of proof. Petitioner has the burden of proving the criminal offense by either (1) proving the elements of the offense or (2) proving that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea. G.S. 7B-1111(a)(8).

2. Standard of proof. The ground of a parent's commission of voluntary manslaughter of another child requires proof of the elements of the offense by clear and convincing evidence, not beyond a reasonable doubt. *In re J.S.B.*, 183 N.C. App. 192 (2007).

3. Serious bodily injury. To prove that respondent committed a felony assault resulting in serious bodily injury by proving that respondent was convicted of the offense, a petitioner would have to show a conviction under G.S. 14-32.4(a) (assault inflicting serious bodily injury) or perhaps G.S. 14-318.4(a3) (felony child abuse inflicting serious *bodily* injury). A conviction under G.S. 14-318.4(a) (felony child abuse inflicting serious *physical* injury) would not be sufficient. As defined in G.S. 14-318.4(d)(1), "serious bodily injury" (1) creates a substantial risk of death; (2) causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ; or (3) results in prolonged hospitalization. *See In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007); *State v. Downs*, 179 N.C. App. 860 (2006); *State v. Hannah*, 149 N.C. App. 713 (2002).

To prove felony child abuse inflicting serious bodily injury under G.S. 14-318.4(a3), the state must show that defendant is the parent of the child, the child was not yet sixteen years old, and defendant intentionally and without justification or excuse inflicted serious bodily injury. *State v. Bohannon*, 247 N.C. App. 756 (2016). In *Bohannon,* all elements were undisputed except whether the child's injury, a subarachnoid hemorrhage, constituted a serious bodily injury as defined in G.S. 14-318.4(d)(1). Based on the definition set out above, the trial court properly denied defendant's motion to dismiss based on testimony of three experts who treated the child as to the impact of bleeding on an infant's developing brain, which could be life-threatening and would require further monitoring.

I. TPR to Another Child and Lack of Safe Home

Grounds for termination of parental rights (TPR) exist where a court of competent jurisdiction has terminated the parent's rights with respect to another child of the parent and the parent lacks the ability or willingness to establish a safe home. G.S. 7B-1111(a)(9). *In re J.D.A.D.*, 253 N.C. App. 53 (2017) (interpreting G.S. 7B-1111(a)(9) to require a two-part analysis before terminating parental rights: (1) that there was an involuntary termination of parental rights to another child of the respondent parent and (2) that the respondent parent has an inability or unwillingness to establish a safe home). A "safe home" is defined in G.S. 7B-101(19) as "a home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." *See In re T.N.H.*, 831 S.E.2d 54 (N.C. S.Ct. 2019).

Whether parental rights to another child have been terminated by a court is often undisputed, leaving the appellate court to determine whether the evidence established that respondent lacked the ability or willingness to establish a safe home.

The following cases found sufficient evidence to support termination for lack of a safe home:

- *In re T.N.H.*, 831 S.E.2d 54 (N.C. S.Ct. 2019) (the record in the case supported findings that respondent's parental rights to another child were terminated by court order, that respondent was incarcerated at the time of the termination hearing with an unknown release date, respondent had a history of unstable housing and had failed to complete her case plan, that child was sexually abused while in respondent's care, respondent did not believe child was sexually abused and failed to report the abuse, and respondent did not understand the resulting trauma suffered by the child or his mental health needs).
- *In re D.J.E.L.*, 208 N.C. App. 154 (2010) (evidence of respondent mother's history with domestic violence with multiple individuals was sufficient to establish that she lacked the ability or willingness to establish a safe home).
- *In re L.A.B.*, 178 N.C. App. 295 (2006) (evidence that, among other things, mother's housing at all times since child's birth was transient was sufficient).
- *In re V.L.B.*, 168 N.C. App. 679 (2005) (evidence of mother's chronic mental health problems, her failure to pursue treatment, and her intention to personally care for respondent father whose mental and physical problems required round-the-clock care demonstrated that respondents could not provide a safe home).

Respondent father's incarceration, while relevant, was not sufficient by itself to support a conclusion to terminate parental rights based on his inability to establish a safe home. *In re J.D.A.D.*, 253 N.C. App. 53 (father's incarceration was the only rationale in the adjudicatory findings supporting termination; evidence was presented that father had not been approved for visitation, provided minimal financial support, continued to abuse illegal substances, and failed to obtain treatment, but there were no adjudicatory findings as to those issues, warranting reversal of the TPR order).

J. Relinquishment for Adoption

One ground for termination of parental rights addresses situations in which a child is being

adopted in another state, the relinquishment or consent to adoption occurred in North Carolina, and the consent or relinquishment is not sufficient under the law of the state in which the adoption is taking place. This ground exists when the child has been relinquished to DSS or licensed child-placing agency or placed for adoption with a prospective adoptive parent, and

- the parent's consent to or relinquishment for adoption is irrevocable (except for fraud, duress, or other circumstances set out in G.S. 48-3-609 and 48-3-707);
- termination of the parent's rights is required for the adoption to occur in another jurisdiction where an adoption proceeding has been or will be filed; and
- the parent does not contest the termination of parental rights.

G.S. 7B-1111(a)(10).

K. Conception Resulting from Sexually Related Criminal Offense

A ground for termination exists when the parent has been convicted of a sexually related offense under G.S. Chapter 14 that resulted in the conception of the child. G.S. 7B-1111(a)(11). This ground became effective October 1, 2012. *See* S.L. 2012-40. The effective date did not specify the offenses to which the law applies, but it would appear at a minimum to cover offenses committed on or after that date.

The law does not define "sexually related offense." Given the context, it most clearly covers offenses where vaginal intercourse is an element of the crime, such as rape or incest. Most of North Carolina's rape statutes explicitly state that a person convicted of the crime has no rights to custody of or inheritance from or any rights related to the child under G.S. Chapter 48 (adoptions) and Chapter 7B (juvenile proceedings). G.S. 14-27.21(c) (first-degree forcible rape); 14-27.22(c) (second-degree forcible rape); 14-27.23(d) (statutory rape of a child by an adult); 14-27.24(c) (first-degree statutory rape). *But see* G.S. 14-27.25 (statutory rape of a person who is 15 years of age or younger, which does not include such a provision). *See also* G.S. 7B-401.1(b); 7B-1103(c); 7B-1104(3). See section 9.4.A.4, above, discussing naming parents in TPR petition or motion.

Less clear is whether the law also covers crimes that may be committed through either vaginal intercourse or some other sexual act, such as sexual activity by a substitute parent or custodian under G.S. 14-27.31, or even those that never include vaginal intercourse as an element, such as indecent liberties with a child under G.S. 14-202.1. To determine whether those offenses resulted in the conception of a child would require a factual determination going beyond the elements of the conviction offense—a practice deemed proper in some related contexts, but improper in others. *Compare State v. Arrington*, 226 N.C. App. 311 (2013) (trial court not limited to the elements of the offense when determining whether kidnapping involved a minor victim and thus required sex offender registration), *with State v. Davidson*, 201 N.C. App. 354 (2009) (trial court limited to the elements of the crime of conviction when determining whether the crime meets the definition of an aggravated offense for satellite-based monitoring purposes). The appellate courts have yet to consider the question as applied to G.S. 7B-1111(a)(11).

9.12 Disposition and Best Interest Determination

A. Overview

Termination of parental rights (TPR) proceedings involve two stages: the adjudication stage and dispositional stage. *In re D.L.W.*, 368 N.C. 835 (2016). The dispositional stage only occurs if the court concludes a TPR ground has been proved by clear, cogent, and convincing evidence; otherwise, the court dismisses the petition or denies the motion after making appropriate findings of fact and conclusions of law. *See* G.S. 7B-1110(c); 7B-1111(b).

After an adjudication that one or more TPR grounds exist, the court is never required to order the termination parental rights. Rather, the court must determine whether TPR is in the child's best interest. G.S. 7B-1110(a). If the court concludes that TPR is not in the child's best interests, the court must dismiss the petition or deny the motion after making findings of fact and conclusions of law supporting its determination. G.S. 7B-1110(b). The TPR petition or motion will be granted when the court determines both a ground has been proved and TPR is in the child's best interests.

B. Evidentiary Standard

1. No burden or standard of proof; court's discretion. At disposition, no party has a burden of proof. All parties may present evidence, and the court makes findings of fact and a discretionary determination as to whether it is in the child's best interest to terminate parental rights. *See In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019) (at the dispositional stage, the court must consider whether termination of parental rights is in the child's best interests); *In re E.H.P.*, 831 S.E.2d 49, 54 (N.C. S.Ct. 2019) (trial court's findings, demonstrating that it duly considered the G.S. 7B-1110(a) factors, were a "valid exercise of its discretion" to determine that TPR of father was in children's best interest); *In re H.N.D.*, 827 S.E.2d 329, 332 (N.C. Ct. App. 2019) (upon determining that termination is in the child's best interest, the trial court "may terminate the parent's rights in its discretion"). While G.S. 7B-1109(f) requires that findings in an adjudication order be based on clear, cogent, and convincing evidence, there is no like requirement for findings in dispositional orders. *See In re Z.L.W.*, 831 S.E.2d 62 (N.C. S.Ct. 2019).

Although appellate courts refer to the trial court's discretionary decision as to best interest, they also say that a best interest determination is a conclusion of law. *See, e.g., In re J.R.S.*, 813 S.E.2d 283 (N.C. Ct. App. 2018) (in dispositional orders, determinations of best interests are conclusions of law because they require an exercise of judgment); *In re M.N.C.*, 176 N.C. App. 114 (2006). Unlike a conclusion of law regarding an adjudicatory ground that is reviewed de novo, the court's best interest determination at the dispositional stage of a TPR proceeding is reviewed by appellate courts only for an abuse of discretion. *See In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019); *In re A.U.D.*, 832 S.E.2d 698 (N.C. S.Ct. 2019); *In re L.M.T.*, 367 N.C. 165 (2013). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 832 S.E.2d 698, 700–01 (N.C. S.Ct. 2019) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

2. Separate hearings not required. Although the court applies different evidentiary standards at the adjudicatory stage, which determines whether a statutory ground for termination exists, and the dispositional stage, which determines whether termination of the parent's rights is in the child's best interest, there is no requirement that the two stages be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re White*, 81 N.C. App. 82 (1986). However, to ensure that a parent's constitutional rights to his or her child are not violated by an order to terminate parental rights based solely on the child's best interest, the court must conduct two separate inquiries, even though the two inquiries may be conducted in the same hearing. *In re S.Z.H.,* 247 N.C. App. 254 (2016).

3. Rules of evidence. At disposition, the court may consider any evidence, including hearsay evidence, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. G.S. 7B-1110(a). As the trier of fact, the court determines the weight and credibility to give to evidence. *In re K.G.W.*, 250 N.C. App. 62 (2016) (affirming trial court's decision that respondent's expert witness not testify, after an offer of proof resulted in court determining witness did not have any evidence to offer it, as trier of fact, that would be credible and persuasive).

C. Considerations for Best Interest Determination

1. Required criteria. In making a determination regarding the child's best interest, the court is required to consider the following criteria and make written findings regarding those that are relevant:

- the child's age;
- the likelihood that the child will be adopted;
- whether termination will help achieve the permanent plan for the child;
- the bond between the child and the parent;
- the quality of the relationship between the child and the proposed adoptive parent, guardian, custodian, or other permanent placement;
- any other relevant consideration.

G.S. 7B-1110(a); *In re A.U.D.*, 832 S.E.2d 698, 702 (N.C. S.Ct. 2019) (emphasis in original) (stating that "[i]t is clear that a trial court must *consider* all of the factors in section 7B-1110(a)"); *In re A.R.A.*, 835 S.E.2d 417, 424 (N.C. S.Ct. 2019) (quoting *In re A.U.D*).

The trial court must consider and make findings about any of the factors that are relevant and is not required to make written findings on all six factors. *See In re A.R.A.*, 835 S.E.2d 417; *In re A.U.D.*, 832 S.E.2d 698. The North Carolina Supreme Court has recently stated that "a factor is 'relevant' if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [district] court[.]' " *In re A.R.A.*, 835 S.E.2d at 424 (agreeing with court of appeals and quoting *In re H.D*, 239 N.C. App. 318, 327 (2015)). The court of appeals has also stated that a relevant factor is one that has "an impact on the trial court's decision[.]" *In re S.Z.H.*, 247 N.C. App. 254, 265 (2016) (citations omitted). When there is no conflicting evidence as to a factor, the trial court's failure to make a written finding was not reversible error "under the unique circumstances" in

In re A.U.D., 832 S.E.2d at 703 (when there was no conflict in the evidence as to the likelihood of adoption, that no bond existed between respondent and the children, and that there was no permanent plan in the private termination proceeding, to remand for findings on uncontested issues would elevate form over substance and delay permanence for the children).

Practice Note: The North Carolina Supreme Court considers it the better practice to make written findings as to statutory factors identified by a petitioner and encourages trial courts to make written findings as to all G.S. 7B-1110(a) factors in the dispositional portion of a TPR order to preclude an argument that a written finding was not made on a relevant factor. *In re A.U.D.*, 832 S.E.2d 698 (footnote 4 encouraging written findings).

Cases considering whether the factors considered by the court were relevant include

- *In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019) (there was no conflicting evidence regarding the likelihood of the child's adoption; with no potential adoptive parent at the time of the TPR hearing, the district court was not required to make a finding about the quality of the relationship between child and proposed adoptive parent).
- *In re T.H.*, 832 S.E.2d 162 (N.C. Ct. App. 2019) (without conflicting evidence concerning efforts by DSS to contact respondent mother during her incarceration about DSS's reunification efforts, no findings were required under G.S. 7B-1110(a)(6)).
- *In re D.H.*, 232 N.C. App. 217 (2014) (emphasis in original) (rejecting the mother's argument that the court erred in making no findings regarding four of the factors, holding that two of the factors were not relevant—age because it was not raised as relevant *in this case*, and quality of a relationship with proposed placement because there was no proposed placement—and that the court did in fact make findings on the other two factors).
- *In re H.D.*, 239 N.C. App. 318 (2015) (quoting *In re D.H.*, 232 N.C. App. 217, and stating that one of the statutorily enumerated factors is relevant if there is conflicting evidence concerning that factor).

Practice Note: Some appellate cases addressing whether the trial court handled these criteria appropriately were decided under a previous version of the statute that required the court to consider the criteria but did not require written findings. In *In re J.L.H.*, 224 N.C. App. 52, the court of appeals specifically stated that such cases (*e.g.*, *In re S.R.*, 207 N.C. App. 102 (2010); *In re S.C.H.*, 199 N.C. App. 658 (2009)) are superseded by the new version of the statute requiring written findings.

Although written findings on the relevant statutory criteria are required, recitation of the statutory language is not required where findings indicate the criteria were considered. In the case *In re D.C.*, 236 N.C. App. 287 (2014), the respondent mother challenged the court's finding of best interest, arguing that factors 3, 4, and 5 of G.S. 7B-1110(a) were not properly considered by the court. The court of appeals rejected this argument, in part noting that although the trial court did not use the word "bond" that is contained in factor 4, it did find that the child was over five years old and had been in foster care for over two years, which indicated that he did not have a strong bond with his mother since he would barely, if at all, have remembered her. Best interest was also supported by the findings related to the child's

positive relationship with his prospective adoptive family and their desire to adopt him. *See also In re L.M.T.*, 367 N.C. 165 (2013) (findings need not recite the exact statutory language but must address the substance of the statutory requirements).

2. Purpose of Juvenile Code. The child's best interests, not the rights of the parents, are paramount. When the child's and parents' interests conflict, the child's best interests control. G.S. 7B-1100(3). *See also In re Montgomery*, 311 N.C. 101 (1984); *In re C.A.D.*, 247 N.C. App. 552 (2016).

A purpose of the Juvenile Code is to provide standards to ensure that the best interests of a child are of paramount consideration and when it is not in the child's best interest to be returned home, that the child will be placed in a safe, permanent home within a reasonable time. G.S. 7B-100(5). Another purpose is to provide standards for the removal and return of a child in a manner that prevents the unnecessary or inappropriate separation of children from their parents. G.S. 7B-100(4). Recent cases have considered these purposes when making a best interest determination.

- After considering the purposes in G.S. 7B-100, an order determining that termination of respondent father's rights was not in the child's best interest was affirmed. The supreme court reviewed the fundamental principles that the child's best interest is the polar star and of paramount consideration and the process of the trial court, which included weighing the competing purposes, considering the dispositional factors in G.S. 7B-1110(a)(1)–(5), and other relevant circumstances as allowed by G.S. 7B-1110(a)(6). Even though evidence would have supported a contrary decision, the trial court's decision was not arbitrary nor manifestly unsupported by reason. *In re A.U.D.*, 832 S.E.2d 698 (N.C. S.Ct. 2019).
- The trial court's conclusion that termination of respondent father's rights was in the children's best interest was affirmed, even though the trial court had found a strong bond between respondent and the children. The supreme court considered the stated policies in G.S. 7B-100(4) and (5) when rejecting father's argument that the trial court should have considered other dispositional alternatives that would have allowed a relationship with father. *In re Z.L.W.*, 831 S.E.2d 62 (N.C. S.Ct. 2019).

3. Likelihood that the child will be adopted. While G.S. 7B-1110(a)(2) requires the court to consider the child's adoptability, the court is not required to find that the child is adoptable before terminating parental rights. *See In re Norris*, 65 N.C. App. 269 (1983) (decided under an earlier version of the Juvenile Code). Lack of an adoptive placement for the child does not bar termination of the parent's rights. *In re A.H.*, 250 N.C. App. 546 (2016) (likelihood of adoption of child with autism was good even though foster parents did not wish to adopt him because they did not want to adopt any child; evidence showed child was high functioning, had transitioned to mainstream classes, all but one of which he had recently passed, was doing well with his foster parents, and was very likeable); *see In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019) (TPR affirmed; addressing best interests factors where at the time of TPR hearing there was no potential adoptive parent identified for the child).

Child's likelihood of adoption was not affected by the prospective adoptive parents' failure to meet a procedural requirement in the adoption statute regarding standing when the

procedural requirement could be waived by the court hearing the adoption proceeding. *In re D.E.M.*, 254 N.C. App. 401 (2017), *aff'd per curiam*, 370 N.C. 463 (2018). In that case, the TPR petitioners had custody of their grandchild pursuant to a civil custody order. Before filing a petition to adopt, G.S. 48-2-301(a) requires that a child be "placed" with the prospective adoptive parent by direct placement or by placement by an agency. Respondent argued that petitioners did not have the ability to adopt because the child had not been placed with them in accordance with G.S. 48-2-301(a). This argument was rejected as G.S. 48-2-301(a) expressly authorizes waiver of the placement requirement for cause. Moreover, petitioners had raised the child since he was eighteen months old, he was thriving in their home, and the GAL supported the adoption, making adoption likely.

Consideration of the child's adjustment in a foster or preadoptive home is appropriate. *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re V.L.B.*, 168 N.C. App. 679 (2005); *see also In re H.D.*, 239 N.C. App. 318 (2015) (finding that the trial court had properly considered the factor of adoptability in concluding that TPR was in the child's best interest).

In the case *In re A.B.*, 239 N.C. App. 157, 169–70 (2015), the court of appeals interpreted the trial court's order in part as having improperly "tipped the 'best interest' scales" in favor of TPR instead of guardianship or custody based on the availability of financial benefits conferred on the potential adoptive parents. The court of appeals noted that while the financial circumstances of potential adoptive parents could be relevant in determining the likelihood of adoption, therefore making it a relevant factor in analyzing best interest, in this particular case the factor of financial assistance to the potential adoptive parents was used to outweigh the close emotional bonds between the children and their mother and her efforts to regain custody, raising questions about the internal consistencies of the order.

If adoption is a remote possibility, termination of the parent's rights may be an abuse of discretion. *In re J.A.O.*, 166 N.C. App. 222 (2004) (holding that termination was an abuse of discretion where the chance of a troubled teen being adopted was small and there was possible benefit to the child from a continued relationship with his mother and relatives). *Cf. In re A.L.L.*, 254 N.C. App. 252 (2017) (appellate court rejected mother's contention that as in *In re J.A.O.*, the likelihood of her two children's adoption was low so her rights should not have been terminated; distinguishing *In re J.A.O.* based on documentary evidence presented by the children's GAL that with therapy the children in *In re A.L.L.* would be adoptable).

When a child who is 12 or older is being adopted, his or her consent to the adoption is required unless the court hearing the adoption waives that requirement after finding it is not the child's best interest. G.S. 48-3-601(1); 48-3-603(b)(2). The child's desire to be adopted, especially when the child is 12 or older, may be relevant to whether the child is likely to be adopted.

See Chapter 10.3 (discussing selected adoption provisions).

4. Whether the TPR will aid in the accomplishment of the permanent plan for the child. A finding that termination of both respondents' parental rights was necessary to accomplish the

best permanent plan for the juveniles, which was adoption, satisfied the best interest criteria in G.S. 7B-1110(a)(3). *In re T.H.*, 832 S.E.2d 162 (N.C. Ct. App. 2019).

The North Carolina Supreme Court determined this factor is not relevant in a private TPR because there is no permanent plan within the meaning of G.S. 7B-1110(a)(3). *In re A.U.D.*, 832 S.E.2d 698 (N.C. S.Ct. 2019).

5. Bond between child and parent. The bond between parent and child set out in G.S. 7B-1110(a)(4) is just one factor to be considered under G.S. 7B-1110(a) and a trial court may give greater weight to other G.S. 1110(a) factors. *In re Z.L.W.*, 831 S.E.2d 62 (N.C. S.Ct. 2019).

6. Other relevant considerations.

(a) Court's obligation as to findings. A trial court is not required to make findings of fact on all the evidence that is presented or to state every option that it considered when determining a disposition under G.S. 7B-1110. *In re A.L.L.*, 254 N.C. App. 252 (2017) (reviewing mother's argument about a lack of detailed findings of "any relevant consideration" under G.S. 7B-1111(a)(6)).

(b) Availability of relatives. The court may, but is not required to, consider the availability of placement with a relative. *In re C.A.D.*, 247 N.C. App. 552 (2016); *In re M.M.*, 200 N.C. App. 248 (2009).

(c) GAL information and opinion. A primary function of the child's guardian ad litem (GAL) is to provide the court with information relevant to the child's best interest. In carrying out his or her duties under G.S. 7B-601, the GAL may offer evidence and/or a report at the disposition stage of a TPR proceeding. The GAL's opinion about the child's best interest, however, may not be a proper consideration for the court. In the case of *In re Wheeler*, 87 N.C. App. 189 (1987), respondent asserted as error the admission of a GAL's lay opinion that termination was in the children's best interest. The appellate court stated that the proper analysis of the admissibility of an opinion by a lay or expert witness is whether it is helpful to the trier of fact and found that the helpfulness of the GAL's lay opinion was questionable. Although the court found error in the admission, in view of the abundance of other evidence supporting the trial court's decision and remarks of the judge indicating that he did not rely on this testimony, the admission was not prejudicial.

The trial court is not bound by a GAL's recommendation. *In re A.U.D.*, 832 S.E.2d 698 (N.C. S.Ct. 2019) (rejecting petitioner's argument that the trial court erred by not giving proper consideration to a report and recommendation of the child's GAL that respondent's parental rights be terminated; the trial court considered the GAL's report and recommendation but elected not to follow the recommendation).

(d) Parents' religion. Questions and testimony about the parents' religious beliefs and practices are not necessarily constitutional error. *In re Huff*, 140 N.C. App. 288 (2000) (finding no error where the inquiry was brief, related primarily to practices that might affect the child and not to the parents' beliefs, was directed to the father rather than to an

expert or minister, and did not result in any findings by the court).

(e) Efforts of DSS. A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. *In re J.W.J.*, 165 N.C. App. 696 (2004); *In re Frasher*, 147 N.C. App. 513 (2001). Findings under G.S. 7B-906.2(b), which address reasonable efforts, apply to permanency planning hearings and are not required at a TPR hearing. *In re T.H.*, 832 S.E.2d 162 (N.C. Ct. App. 2019).

(f) Compliance with case plan not relevant. The court of appeals has stated that "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (2010).

7. Weighing the factors. The appellate courts have stated that the trial court may give greater weight to some factors over others. *In re Z.L.W.*, 831 S.E.2d 62 (N.C. S.Ct. 2019) (affirming TPR; trial court's determination that other factors outweighed children's bond with respondent was not an abuse of discretion); *In re T.H.*, 832 S.E.2d 162, 166 (N.C. Ct. App. 2019) (stating that the "court is entitled to give greater weight to certain factors over others in making its determination concerning the best interests of the child").

8. Examples of best interest evidence and findings where TPR affirmed.

- The conclusion that termination of respondent mother's rights was in the child's best interest was not arbitrary or unsupported by reason based on findings that the child was nine years old and termination would aid in achieving the permanent plan of adoption, that adoption would be more likely once child became available for adoption, that the child's need for permanence outweighed any bond between the child and mother, that child was doing well in his therapeutic placement, having formed a strong bond, and mother no longer participated in child's therapy and had not called to ask about child's welfare. *In re A.R.A.*, 835 S.E.2d 417 (N.C. S.Ct. 2019).
- Reviewing an order in which the trial court set out five of the six G.S. 7B-1110(a) factors, the supreme court affirmed the best interest determination based on unchallenged trial court findings of a high probability of adoption, that termination of father's rights would help achieve the primary plan of adoption, that while children had a bond with father, that bond had diminished during the lengthy period the children were in foster care, during which a reciprocal bond between the children and the prospective adoptive parents formed, as well as other factors which included the court's deep concern about father's lack of progress toward mental health and substance abuse treatment, and domestic violence counseling. *In re Z.L.W.*, 831 S.E.2d 62 (N.C. S.Ct. 2019).
- Trial court made detailed findings of the dispositional criteria in G.S. 7B-1110(a), which included a strong likelihood that the children would be adopted by their stepfather, with whom the children were extremely bonded, and the lack of a bond with respondent father. Also supporting the best interest determination were findings that father's home was extremely unstable and that his conduct demonstrated that he would not promote the physical and emotional well-being of the children. *In re E.H.P.*, 831 S.E.2d 49 (N.C. S.Ct. 2019).

- It was not abuse of discretion for the trial court to conclude that TPR was in the children's best interest where there was extensive evidence regarding domestic violence, lack of necessary medical care for the children, drug abuse, and criminal activity by respondent; neglect of the children during visits with respondent involving lack of feeding and bathing; respondent's failure to obtain a job and pay child support; and respondent's struggle with mental illness. The trial court also found that the respondent had made little progress toward correcting conditions leading to removal, which would subject the children to irreparable harm if returned to respondents. The trial court additionally found that there was a minimal bond between the children and respondent, that the children were of tender age, and that the children were likely to be adopted and had begun to adjust to their potential adoptive home. *In re L.M.T.*, 367 N.C. 165 (2013).
- It was not an abuse of discretion for the court to determine that TPR was in older child's best interest when there were no present viable candidates for guardianship or custody; adoption was more likely than guardianship or custody to achieve true permanence; mother's interactions with past foster placements made the possibility of another stable placement unlikely; TPR of mother would result in more available placement options; and evidence supported finding that the likelihood of adoption was good when child was autistic but high functioning and had made recent progress in school. That current caretakers did not want to adopt did not impact child's adoptability when their decision was not specific to older child but was because they did not want to adopt any child. *In re A.H.*, 250 N.C. App. 546 (2016).
- Although the mother had made progress in doing what the trial court ordered and emphasized her bond with the children, she stated repeatedly that she could not handle the responsibility of parenting the children. *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).
- Although there was some improvement in the mental condition of a mother diagnosed with borderline personality disorder, after almost two years of DSS efforts, she could not demonstrate that she was capable of providing adequately for the child's needs. One expert testified about the negative effect of further delay in obtaining a permanent placement for the child given his age and close bond with the foster family. *In re Brim*, 139 N.C. App. 733 (2000).

9. Examples of best interest evidence and findings where TPR was not affirmed.

- In private TPR proceeding involving twins, the first five factors in G.S. 7B-1110(a) were either not applicable or did not favor respondent father. Findings established that the children were approximately six months old when placed with prospective adoptive parents (PAPs); remained in their care throughout the proceedings; were strongly bonded; and the likelihood of adoption by the PAPs was high. There was no bond between father and the children as father had been incarcerated since their birth and being a private termination, there was no permanent plan. The determination that it was not in the children's best interest for father's rights to be terminated was affirmed based on other relevant considerations, specifically, that mother solely relinquished the children to the adoption agency; father was not afforded an opportunity to care for the children before the relinquishment; he proactively attempted to establish paternity; he sought to have the aunt, who has previously appropriately cared for the children, obtain custody until his

release from prison; and he engaged in services while incarcerated that resulted in self-improvement. *In re A.U.D.,* 832 S.E.2d 698 (N.C. S.Ct. 2019).

- The child was 14 years old and had mental and physical health problems and violent tendencies that made adoption very unlikely; the mother had made reasonable attempts to correct conditions that led to filing of a petition; and the reasons she stopped visitation were the child's transfer to a distant hospital, the mother's lack of transportation, and DSS's request to suspend visitation due to an increase in the child's violent behavior. *In re J.A.O.,* 166 N.C. App. 222 (2004).
- The father, a recovering alcoholic, had stopped drinking, attended Alcoholics Anonymous, and was employed; the children were settled in a new family unit with the custodial parent and her financially stable husband; and both the GAL and a court-appointed psychologist expressed the opinion that the father's rights should not be terminated. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994).

9.13 Highlighted Federal Laws: ICWA and the ADA

A. Compliance with ICWA

The Indian Child Welfare Act (ICWA) is a federal law the sets forth minimum federal standards that must be complied with for certain child custody proceedings and is governed by 25 U.S.C. 1901 *et seq.* and new federal binding regulations, effective December 12, 2016, codified at 25 C.F.R. Part 23. A termination of parental rights (TPR) is considered a child custody proceeding for purposes of ICWA. 25 U.S.C. 1903(1). Under ICWA, the court must make an inquiry of all participants at the commencement of every TPR action (including private TPRs) as to whether any participant knows or has reason to know the child is an "Indian child" as defined by ICWA. 25 C.F.R. 23.107(a); *see* 25 U.S.C. 1903(4) (definition of "Indian child"). When there is reason to know but insufficient evidence for the court to determine that the child is an Indian child, the court must treat the child as an Indian child and comply with ICWA requirements until and unless it is determined on the record that the child does not meet the definition of "Indian child". 25 C.F.R. 23.107(b)(2). The court must also confirm on the record through a report, declaration, or testimony that DSS or another party in the proceeding has used due diligence to identify, work with, and obtain verification from the tribes of which there is reason to know the child (1) may be (or is) a member or (2) is eligible for membership and a biological parent is a member. 25 C.F.R. 23.107(b)(1). *See In re L.W.S.*, 255 N.C. App. 296, 298 n.4 (2017) (in appeal of TPR order entered before application of federal regulation, noting under new federal regulations "it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child, and, if so, the state court must confirm that the agency used due diligence to identify and work with the Tribe and treat the child as an Indian child unless and until it is determined otherwise").

When ICWA provisions apply, the following issues are implicated: the court's subject matter jurisdiction if the child resides or is domiciled within an Indian reservation or is a ward of tribal court; a proper ICWA notice to the parent, Indian custodian (if applicable), child's Indian tribe, and regional office of the Bureau of Indian Affairs; the right to intervene; the

provision of "active efforts"; required findings based on a beyond a reasonable doubt standard and qualified expert testimony; and placement preferences.

See Chapter 13.2 (discussing ICWA and its requirements in detail).

B. ADA Not a Defense to TPR

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of a physical or mental disability. In a case of first impression, the North Carolina Court of Appeals held in *In re C.M.S.*, 184 N.C. App. 488 (2007), that the ADA did not preclude termination of the respondent's (who had an intellectual disability) rights. The court of appeals reviewed other state courts' treatment of the issue and adopted the rule followed by other states that termination of parental rights (TPR) proceedings are not services, programs, or activities within the meaning of Title II of the ADA, and the ADA is not a defense to a TPR. At the same time, the court of appeals found that the requirements for and the trial court's findings about reasonable efforts constituted compliance with the ADA.

See Chapter 13.5 (discussing the ADA).

9.14 Orders in Termination of Parental Rights Cases

See also Chapter 4.9 (discussing orders in juvenile cases).

A. Requirements for Order

1. Address grounds. The court must find facts and adjudicate the existence or nonexistence of the grounds alleged in the petition or motion. G.S. 7B-1109(e); 7B-1110(c). *In re O.D.S.*, 247 N.C. App. 711 (2016) (G.S. 7B-1109(e) requires that a trial court address every ground brought forth in a TPR petition or motion and make a determination in its order for every ground alleged, whether petitioner proved that ground or failed to prove it). The trial court's failure to address an alleged ground at all constitutes a conclusion that it does not exist. *In re S.R.G.*, 200 N.C. App. 594 (2009).

2. Standard of proof. With respect to the adjudication, the order must recite the clear, cogent, and convincing evidence standard of proof. G.S. 7B-1109(f) (all findings of fact shall be based on "clear, cogent, and convincing" evidence); 7B-1111(b) (petitioner or movant has the burden to prove the facts justifying termination by "clear and convincing" evidence). The two standards in G.S. 7B-1109(f) and 7B-1111(b) are used interchangeably and are synonymous. *In re Faircloth*, 153 N.C. App. 565 (2002) (comparing the two statutes); *see In re Belk*, 364 N.C. 114, (2010); *In re Montgomery*, 311 N.C. 101, (1984) ("clear and convincing" and "clear, cogent and convincing" describe the same evidentiary standard). Clear and convincing evidence is "stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt and requires evidence which should fully convince." *In re H.N.D.*, 827 S.E.2d 329, 332 (N.C. Ct. App. 2019) (quoting *In re Mills*, 152 N.C. App. 1, 13 (2002)).

Adjudicatory orders that failed to include the standard of proof set out in either G.S. 7B-1109(f) or 7B-1111(b) have been reversed. *See In re Matherly*, 149 N.C. App. 452, 454 (2002) (the burden in G.S. 7B-1111(b) to prove by clear and convincing evidence the facts establishing a ground for termination applies "throughout the adjudicatory process"; TPR order which failed to state that findings as to termination grounds were made by clear, cogent and convincing evidence was reversed); *In re Church*, 136 N.C. App. 654 (2000) (failure to state that the proper standard of proof was applied was not harmless error). *See also In re D.R.B.*, 182 N.C. App. 733 (2007) (holding that the TPR order was deficient where it did not state the standard of proof pursuant to which the court made adjudicatory findings as required by G.S. 7B-1109(f) and did not indicate which ground(s) the court was adjudicating).

However, there is no requirement as to where or how the standard is recited in the order. *In re J.T.W.*, 178 N.C. App. 678 (2006), *rev'd per curiam on other grounds*, 361 N.C. 341 (2007); *see In re A.B.*, 245 N.C. App. 35 (2016) (emphasis in original) (order that did not state that *all* findings were based on clear, cogent, and convincing evidence as required by G.S. 7B-1109(f) was affirmed; trial court used the correct standard when it orally indicated the standard it was applying, one of the seventy findings stated the appropriate standard, and there was no other contradictory standard in the order).

3. Findings and conclusions. The order must include findings of fact and conclusions of law. *See* G.S. 7B-1109(e); 7B-1110(b), (c). Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another. Conclusions of law are findings by a court as determined through the application of rules of law. *In re Johnston*, 151 N.C. App. 728 (2002).

Rule 52 of the Rules of Civil Procedure also requires the court, in any action tried without a jury, to "find the facts specially and state separately its conclusions of law thereon." *See In re Anderson*, 151 N.C. App. 94 (2002) (discussing application of Rule 52 to adjudicatory facts; note this case has been distinguished by *In re J.W.*, 241 N.C. App. 44 (2015) regarding facts that recite the allegations in petition). "[W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions, and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *In re T.N.H.*, 831 S.E.2d 54, 59 (N.C. S.Ct. 2019) (quoting *Quick v. Quick*, 305 N.C. 446, 451–52 (1982)).

See Chapters 4.9.B (discussing findings of fact and conclusions of law) and 12.8.B (discussing the difference between findings and conclusions, including the different standard of review on appeal).

(a) Findings based on clear, cogent, and convincing evidence. Findings in the adjudication order must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f); *see* G.S. 7B-1111(b) (burden of proof). *See also In re Young*, 346 N.C. 244 (1997) (reversing TPR based on neglect and abandonment grounds on the basis that there was not clear, cogent, and convincing evidence to support trial court's findings); *In re Montgomery*, 311 N.C. 101 (1984); *In re C.W.*, 182 N.C. App. 214 (2007) (reversing TPR where none of the

grounds was supported by clear and convincing evidence and a number of findings were supported by no evidence). *See also In re O.J.R.*, 239 N.C. App. 329 (2015) (one factor leading to reversal of TPR was the lack of competent evidence to support some findings).

(b) Sufficiently specific findings. Findings must be sufficiently specific. *See In re T.P.*, 197 N.C. App. 723 (2009) (holding that insufficient findings of fact required reversal where the findings mainly quoted statutory language and were not adequate for meaningful appellate review); *In re Locklear*, 151 N.C. App. 573 (2002) (holding that where findings did little more than restate the statutory grounds and discuss DSS's efforts to reunify, the order was not sufficient to establish a ground for termination). It is not necessarily reversible error for a trial court's finding of fact to mirror the language of the petition. *In re A.B.*, 245 N.C. App. 35 (2016) (affirming TPR that found DSS substantially proved facts alleged in paragraphs a-k of the TPR petition and an additional finding mirrored language in the petition when other findings of fact demonstrated the trial court made an independent determination of the facts, rather than merely reciting allegations in the petition).

(c) Conclusions. The court's adjudication of the existence or nonexistence of grounds alleged in the petition or motion is a conclusion of law and must be based on the findings of fact. *See, e.g., In re S.R.G.*, 200 N.C. App. 594 (2009) (holding that failure to address an alleged ground constitutes a conclusion that it does not exist); *In re L.C.*, 181 N.C. App. 278 (2007); *In re T.M.H.*, 186 N.C. App. 451 (2007); *see also In re D.L.W.*, 368 N.C. 835 (2016) (upholding the trial court's TPR order as to mother on the basis of neglect because the findings in the order supported the conclusion that there would be a repetition of neglect based on the juveniles living in an environment injurious to their welfare); *In re O.J.R.*, 239 N.C. App. 329 (2015) (TPR order in private case was reversed and remanded in part due to lack of adequate conclusions and findings).

With respect to best interest, the court is required to consider specific criteria pursuant to G.S. 7B-1110(a) and make specific findings regarding those criteria that are relevant. See section 9.12.C, above. The court's determination that terminating the parent's rights is or is not in the child's best interest is a conclusion of law that must be supported by the findings. *See In re M.N.C.*, 176 N.C. App. 114 (2006).

4. Timing. The order must be entered within thirty days following completion of the hearing. If the order is not entered within thirty days, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the thirty-day period, for an explanation of the reason for the delay and to obtain any needed clarification about the contents of the order. The court must enter the order within ten days after this hearing. G.S. 7B-1109(e). Where the court fails to enter a timely order, the appropriate remedy is a petition to the court of appeals for a writ of mandamus to require the trial court to proceed to judgment, not a new hearing. *In re T.H.T.*, 362 N.C. 446 (2008); *In re S.Z.H.*, 247 N.C. App. 254 (2016) (setting out the remedy of mandamus when a TPR order was entered nearly six months after the adjudicatory and dispositional hearing in violation of G.S. 7B-1109(e) and 7B-1110(a)); see also Chapter 4.9.D.3 (discussing mandamus as the remedy). Failure to comply with statutory timelines does not deprive the trial court of jurisdiction. *See In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).

5. Service of order on juvenile who is 12 or older. The juvenile is a party to the TPR proceeding. G.S. 7B-1104; 7B-601(a). Although the juvenile may be represented by a guardian ad litem (GAL), the juvenile, if 12 or older, must be served with a copy of the TPR order. G.S. 7B-1110(d); *see* G.S. 7B-1108 (GAL appointment). Service on the juvenile is in addition to service on the juvenile's GAL when a GAL is appointed. The juvenile has a right to appeal any order that grants or denies the TPR. G.S. 7B-1001(a)(6) (appealable orders); 7B-1002(1), (2) (standing to appeal). See Chapter 12 (discussing appeals).

B. Entry of Order

An order is entered when it is reduced to writing, signed by the judge, and filed with the clerk pursuant to Rule 5. N.C. R. CIV. P. 58. An order that fails to indicate it was filed with the clerk (e.g., a file-stamp or other mark to indicate a filing date) is not entered. *McKinney v. Duncan*, 808 S.E.2d 509 (N.C. Ct. App. 2017) (dismissing appeal for lack of subject matter jurisdiction in the appellate court when the underlying orders were never entered as they were devoid of any proof of filing with the clerk). *Cf.* N.C. R. CIV. P. 5(e)(3) (addressing failure to affix a date or file stamp on an order by authorizing the clerk to enter the order or judgment nunc pro tunc to the date of filing). *See* S.L. 2017-158 sec. 1 and 2 (amending both Rule 5 and Rule 58 regarding filing, effective July 21, 2017).

Specific provisions of the Juvenile Code require that orders in TPR proceedings be reduced to writing, signed by the judge, and entered, and G.S. 7B-1001(b) explicitly refers to Rule 58 of the Rules of Civil Procedure for entry and service of orders. *See* G.S. 7B-1109(e); 7B-1110(a). The judge who presides over the TPR hearing is the judge who must sign the order; otherwise, the order does not comply with Rule 58 and is not entered. *In re C.M.C.*, 832 S.E.2d 681 (N.C. S.Ct. 2019) (holding TPR order signed by a judge who did not preside over the TPR hearing was a nullity).

There is no requirement in G.S. 7B-1109 that the trial court render a decision in open court. *In re O.D.S.*, 247 N.C. App. 711 (2016). But, when the judge makes an oral announcement (or rendition) of his or her order in open court, the order does not become enforceable until it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5. *See McKinney v. Duncan*, 808 S.E.2d 509 (N.C. Ct. App. 2017); *Carland v. Branch*, 164 N.C. App. 403 (2004); *see also In re O.D.S.*, 247 N.C. App. 711, 722 (stating "[n]o order or judgment had been entered at that time, and therefore, no party was bound by the judgment").

Because an oral rendition is not an entry of a judgment, it is subject to change, meaning the trial court is not required to adhere to the rendition when making and entering its written order. *In re A.U.D.*, 832 S.E.2d 698 (N.C. S.Ct. 2019) (oral findings made by a trial court are subject to change prior to the entry of the final written order); *In re O.D.S.*, 247 N.C. App. 711 (holding the court was not bound by the oral rendition to TPR based on neglect and could include both neglect and dependency as grounds to TPR in the written entered order; reasoning it is not bound by the holding in *In re J.C.*, 236 N.C. App. 558 (2014), to the extent *In re J.C* conflicts with prior holdings of the court of appeals or supreme court and can be distinguished from the current case before it).

A court may also consider evidence presented after its oral rendition but before it enters a written judgment. *In re O.D.S.*, 247 N.C. App. 711, and cases cited therein. A trial court's misapprehension of when an order terminating parental rights was entered led to a reversal in the case *In re B.S.O.*, 225 N.C. App. 541 (2013). The trial court has broad discretion to re-open a case and admit additional testimony after the conclusion of the evidence, after argument of counsel, even weeks after the original hearing, or when the "ends of justice require." In *In re B.S.O.*, which cites cases on this principle, the trial court refused to exercise its discretion as to whether to take additional evidence, because it thought a valid order terminating parental rights had been entered, when in fact the order was not final because it had not been reduced to writing.

See Chapter 4.9.A and C, discussing the following:

- what constitutes entry of order;
- requirement that the presiding judge sign the order;
- judge's authority to direct a party to draft the order, and fact that draft orders should be circulated and are the court's responsibility even if drafted by a party; and
- service of signed orders on parties.

For a discussion of appeals of TPR orders, see Chapter 12.4.A.

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

9.15 Effect of Order and Placement after Termination of Parental Rights

A. Severance of Rights and Obligations

An order terminating parental rights (TPR) completely and permanently severs all rights and obligations of the parent to the child and the child to the parent. G.S. 7B-1112. However, the child's right of inheritance does not terminate until a final order of adoption is entered. G.S. 7B-1112. In addition, any child support arrears remain after termination of parental rights, even though the parent is no longer liable for ongoing support obligations. *See* G.S. 48-1-107; 7B-1112; *see also Michigan v. Pruitt*, 94 N.C. App. 713 (1989) (holding that even though support obligation ceased when adoption became final, support arrears owed prior to adoption were still owed).

When parental rights have been terminated, parents no longer have any constitutionally protected interest in their children. *In re Montgomery*, 77 N.C. App. 709 (1985). After a TPR, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them. G.S. 7B-1112; *see* G.S. 48-2-401. A parent whose rights have been terminated does not have standing to seek custody of the child as an "other person" under G.S. 50-13.1(a) when DSS has custody of the child both before and after the TPR petition was filed. *Krauss v. Wayne County Dep't of Soc. Servs.*, 347 N.C. 371 (1997) (examining language of former TPR statute and holding it is a narrow statute that provides an exception to the broad language

regarding standing of G.S. 50-13.1(a); note that the language of the former statute is substantially the same as the current G.S. 7B-1112(1)).

A termination of parental rights does not necessarily terminate a grandparent's rights to visitation. While mother had no constitutionally protected interest in the child after termination of her rights in a private TPR proceeding, termination of mother's rights did not extinguish a grandmother's court-ordered visitation rights. Grandmother was a party after intervening in an earlier custody proceeding between the child's parents and was awarded visitation rights. Grandmother/intervenor's visitation rights existed independently of mother's parental and custodial rights such that grandmother/intervenor could seek to enforce those rights through contempt proceedings after mother's rights were terminated. *Adams v. Langdon*, 826 S.E.2d 236 (N.C. Ct. App. 2019).

Resource: See Cheryl Howell, *Grandparent visitation: termination of parent's rights does not terminate grandparent's court ordered visitation*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Apr. 10, 2019).

In very limited circumstances, a parent's rights may be reinstated. See Chapter 10.4 (discussing the criteria and procedure for reinstatement of parental rights).

B. Collateral Legal Consequences

A TPR order may have an effect on an individual's parental rights in the future as to any other children the individual has or may have. For example, if the parent has another child that has been adjudicated abused, neglected, or dependent and is in DSS custody, the order terminating the parent's rights to a different child may be a basis for relieving DSS from making reasonable efforts to reunify the parent with the child who is the subject of the abuse, neglect, or dependency action at initial disposition. *See* G.S. 7B-901(c)(2). See also Chapter 7.8.A.2 (discussing G.S. 7B-901(c) factors and reasonable efforts) and 7.9 (discussing reasonable efforts). A TPR order is also one part of a two-prong ground to terminate parental rights to another child of the parent. *See* G.S. 7B-1111(a)(9), discussed in section 9.11.I, above.

These collateral legal consequences have been held to satisfy the exception to the mootness doctrine in an appeal. *In re Baby Boy*, 238 N.C. App. 316 (2014) (because of the potential collateral consequences, appeal of an order terminating respondent mother's rights was not moot even though the child's adoption had been finalized by the time the appellate court considered mother's appeal of the TPR order).

For more on collateral consequences arising from a TPR order, see Chapter 12.4.B.2.

C. Placement and Post-TPR Review Hearings

1. When child is in DSS/agency custody. If the child had been placed in the custody of (or relinquished for adoption by one parent to) a county DSS or licensed child-placing agency and

is in the custody of that agency (which includes a DSS) when the TPR petition or motion is filed, upon entry of a TPR order that agency acquires all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent relinquished the child to the agency pursuant to G.S. Chapter 48, except as otherwise provided in G.S. 7B-908(d). G.S. 7B-1112(1). *See also In re I.T.P-L.,* 194 N.C. App. 453 (2008) (holding that the trial court did not have subject matter jurisdiction to order the child placed with a relative following termination because the statute gives DSS exclusive placement authority when the child was in DSS custody when TPR petition or motion was filed); *In re Asbury*, 125 N.C. App. 143 (1997). Statutory changes made after these cases were decided create narrow exceptions. Until the child is placed with prospective adoptive parents as selected in G.S. 7B-1112.1, the court at a post-TPR review hearing may order a placement different from the one proposed as long as the court considers DSS's recommendations and finds that the placement is in the juvenile's best interest. G.S. 7B-908(d1). See Chapter 10.3.B (discussing selection of prospective adoptive parents).

2. When child is not in DSS/agency custody. When the child is not in DSS or another agency's custody when the TPR petition or motion is filed, the court may place the child in the custody of the petitioner or movant, some other suitable person, a county DSS, or a licensed child-placing agency, as may appear to be in the child's best interests . G.S. 7B-1112(2).

3. Post-TPR review hearings. After termination of parental rights, the court must conduct review hearings under G.S. 7B-908(b) at least every six months until the child is the subject of a final order of adoption, if

- the child is in the custody of DSS or another licensed child-placing agency and parental rights have been terminated pursuant to a petition or motion by one of the persons or agencies with proper standing under G.S. 7B-1103(a)(2) through (6); or
- one parent's parental rights have been terminated by court order and the other parent's parental rights have been relinquished under G.S. Chapter 48.

A parent whose rights have been terminated continues to be a party for purposes of post-TPR review hearings only if

- an appeal of the TPR order is pending and
- a court has stayed the TPR order pending the appeal.

G.S. 7B-908(b)(1).

See Chapter 10.1 (discussing post-TPR review hearings).